

**European Communications Law
and Technological Convergence**
Deregulation, Re-regulation and
Regulatory Convergence in Television
and Telecommunications

Pablo Ibáñez Colomo

78

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European Communications Law and Technological Convergence

EUROPEAN MONOGRAPHS

Editor-in-chief Professor David O'Keeffe

In this series *European Monographs* this book. *European Communications Law and Technological Convergence: Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications* is the seventy-eighth title. The titles published in this series are listed at the end of this volume.

List of Abbreviations

3G	Third Generation Mobile Telephony
ARCEP	Autorité de Régulation des Communications Electroniques et des Postes
AVMS Directive	Audio Visual Media Services Directive
CAS	Conditional Access System
CSA	Conseil Supérieur de l'Audiovisuel
DoJ	US Department of Justice
DSL	Digital Subscriber Line
DTT	Digital Terrestrial Television
EBU	European Broadcasting Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union [formerly Court of Justice of the European Communities]
EPG	Electronic Programme Guide
EU	European Union
FCC	Federal Communications Commission
TFEU	Treaty on the Functioning of the European Union
FRAND	Fair, Reasonable and Non-discriminatory
FTC	Federal Trade Commission
IP	Internet Protocol
NCA	National Competition Authority
NRA	National Regulatory Authority
NVoD	Near-Video-on-Demand
Ofcom	Office of Communications
OFT	Office of Fair Trading

List of Abbreviations

PPV	Pay-per-view
SMP	Significant Market Power
TEU	Treaty Establishing the European Union
TVWF Directive	Television without Frontiers Directive
VoD	Video-on-Demand
VoIP	Voice over Internet Protocol

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Foreword

The European Commission increasingly needs to take regulatory action in industries subject to fast technological change. In the media, telecommunications and information technology industries, technological convergence is posing serious challenges. The relatively high degree of enforcement activity observed in the past decade in this area can be explained partly by the consequences of legacy regulation and partly by the underlying economic features of some markets. The liberalization of activities that were previously State monopolies enjoying exclusive rights required close monitoring to consolidate the fruits of liberalization and avoid the stifling of emerging competition by strong incumbents. In addition, high fixed costs and network effects were conducive to dominant or quasi-monopoly positions that have even become a norm in many markets, including nascent ones.

The enforcement of competition rules in these converging industries is a distinctly complex task. Where a market has a tendency towards monopoly, it may be difficult in practice to draw a meaningful line between pro- and anti-competitive behaviour. In some cases, remedial intervention may require the setting of access prices or other types of recurrent intervention, tasks for which competition authorities are not always ideally equipped. The fact that the rate of innovation has been phenomenal in communications-related markets only makes matters more complicated as it is necessary to ensure that intervention does not negatively impact the development of new products and services.

This timely book by Pablo Ibáñez Colomo, originally defended as a dissertation at the European University Institute, examines the various legal responses to technological convergence in the information, media and telecommunications sector. The author, now a Lecturer in law at the London School of Economics and Political Science, emphasizes two main ideas. First, he reminds policy makers that the broader regulatory picture in which competition rules apply must always be taken into consideration. In the pages that follow this foreword, the analysis moves

beyond the application of competition rules and examines how the available remedies in that field differ, in their logic and objectives, from those that result from sectoral regulation and notably from the enforcement of the Audiovisual Media Services Directive, the Regulatory Framework for electronic communications and various national regimes.

Second, the author insists on the importance of a clear understanding of the economic features of the markets in which authorities intervene. After showing that there are some instances in which firms compete ‘for’ the market (and not ‘within’ the market, if one uses the author’s own expression), he emphasizes that the design and the application of remedies should not merely be transposed from other areas, but rather be adapted to the nature of the activity in which they apply. Failing to do so, he explains, may render intervention ineffective and even counterproductive.

In several chapters, the author does not hesitate to explore tentative adjustments to ensure that legal instruments will continue to be responsive in an ever-changing landscape. These proposals will, I am convinced, contribute to a necessary debate, not only in their specific area of application but, more generally, in the field of competition law at large. The International League of Competition Law has already recognized the quality of this work in awarding the author the 2011 Jacques Lassier Prize. I can only welcome that it will be widely accessible after its publication.

Joaquín Almunia
Vice-President of the European Commission
Commissioner Responsible for Competition

Acknowledgements

This book is the result of several years of research undertaken at the College of Europe in Bruges and the European University Institute in Florence. I feel lucky to have matured as a scholar while a member of these two institutions. There is probably no other place in where I would have been able to engage in legal research somewhat as an *enfant sauvage*. While exposed to (and stimulated by) a multiplicity of traditions and disciplines, I have been able to experiment and explore my own way unconstrained by these. With all of its flaws and biases, the result of my efforts is therefore, I believe, in line with the comparative and contextual (which is to say cosmopolitan, if not *sauvage*) approach traditionally favoured at the Law Department of the European University Institute.

I owe an immense intellectual debt to my Ph.D. supervisor in Florence, Heike Schweitzer. Her input and unfailing trust have been decisive throughout the research process. More generally, she is a rare and valuable model of intelligence, rigour and hard work. I would also like to thank specially Denis Waelbroeck. I constantly realize how much I am influenced by his ideas and his genuine commitment to truth and integrity.

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