

# CONTENTS

Preface	xi
Table of Frequently Cited Materials	xv
Table of Abbreviations	xvii
Table of Cases	xx
Table of Legislation	xxviii
Introduction	xxxv
<b>1. THE SUCCESSIVE REGULATORY MODELS</b>	
I. THE STARTING MODEL (UNTIL 1990)	1
II. THE REGULATORY MODEL OF THE 1987 GREEN PAPER (1990–1996)	3
1. History and legislative instruments	3
2. Key concepts and distinctions	7
a. <i>Regulatory and operational functions</i>	7
b. <i>Services and infrastructure</i>	7
c. <i>Reserved and non-reserved services</i>	9
d. <i>Access and interconnection</i>	14
3. Modifications between 1990 and 1996	17
III. THE TRANSITIONAL MODEL OF THE 1992 REVIEW AND THE 1994 GREEN PAPER (1996–1997)	19
1. History	19
2. Alternative infrastructure	20
3. Legislative instruments	21
IV. THE FULLY LIBERALIZED MODEL (1998–)	22
1. History and legislative instruments	22
2. The model of Directive 96/19	24
3. The model of the new ONP framework	26
4. Main substantive elements	30
a. Universal service	31
b. Interconnection	33
c. Licensing	34
V. CONCLUSION	35

<b>2. THE “HARD CORE” OF REGULATION AND ARTICLE 86 EC</b>	
I. THE INTEGRATION OF ARTICLES 86 AND 95 EC IN THE RUN-UP TO LIBERALIZATION	37
A. THE STARTING POSITIONS	37
1. The position of the Commission	39
2. The position of the Council	42
3. The position of the European Parliament	43
B. THE COMPROMISE OF DECEMBER 1989	43
C. THE LEGAL ASSESSMENT OF THE ECJ	48
D. THE USE OF ARTICLE 86(3) EC AS A LEGAL BASIS AFTER 1990	53
E. THE INTEGRATION OF ARTICLES 86(3) AND 95 EC IN AN ORIGINAL LEGISLATIVE PROCEDURE	60
1. “Liberalization” and “harmonization” directives	61
a. <i>The first phase</i>	61
b. <i>The second phase</i>	62
2. Article 86 EC directives as the hard core of EC telecommunications law	63
3. Resulting procedure	69
F. CONCRETE EXAMPLES	70
1. Universal service	71
2. Interconnection	76
a. <i>A priori categorizations in Directive 97/33</i>	77
b. <i>Implementation in France</i>	80
c. <i>Implementation in Germany</i>	82
3. Individual licenses	86
4. Conclusion	89
II. THE USE OF ARTICLE 86(3) EC IN A LIBERALIZED ENVIRONMENT	91
A. ARTICLE 86(1) EC	91
1. Public undertakings	91
2. Special and exclusive rights	95
3. The need for “mischief” ( <i>Zweckmäßigkeit</i> ) analysis	100
B. ARTICLE 86(2) EC	105
III. CONCLUSION	108
<b>3. THE NEW COMPETITION LAW AS APPLIED IN THE TELECOMMUNICATIONS SECTOR</b>	
I. SOURCES AND EPISTEMOLOGY	112
A. SOURCES OF EC COMPETITION LAW	112
B. A MODEL FOR THE LEGITIMACY OF EC COMPETITION LAW	115
C. THE 1991 GUIDELINES AND 1998 ACCESS NOTICE	127

II. RELEVANT MARKET DEFINITION	129
A. SUBSTITUTABILITY PATTERNS	132
B. RELEVANT MARKETS IN A NETWORK-BASED INDUSTRY	134
1. The case-law on the relevant product market in the air transport sector	135
2. The implications for the telecommunications sector	136
C. RESULTING APPROACH AND ASSESSMENT OF THE DECISION PRACTICE OF THE COMMISSION	140
1. An original approach to market definition in telecommunications	140
2. The decision practice of the Commission	143
a. <i>General principles set out under the MCR</i>	143
b. <i>Market definition in the alliance cases</i>	145
i. <i>Concert (BT/MCI, first phase)</i>	148
ii. <i>Atlas/GlobalOne</i>	153
iii. <i>Unisource/Uniworld</i>	159
iv. <i>BT/MCI II</i>	160
c. <i>Conclusion</i>	163
III. SUBSTANTIVE PRINCIPLES	165
A. REFUSAL TO DEAL AND THE “ESSENTIAL FACILITIES” DOCTRINE	165
1. ECJ case-law on refusal to deal	167
2. The essential facilities doctrine in United States law	171
3. The introduction of the essential facilities doctrine in EC competition law by the Commission	179
4. The reaction of the ECJ and CFI to the essential facilities doctrine	188
5. A cost-benefit analysis of refusal to deal and essential facility cases	196
6. From classical to bottleneck cases	203
7. Conclusion	211
B. DISCRIMINATION	218
1. The rise of a new discrimination pattern	218
2. Discrimination between customers	221
3. Discrimination between a third-party customer and a subsidiary	225
4. Conclusion	230
C. PRICING, CROSS-SUBSIDIZATION AND ACCOUNTING	231
1. Excessive and predatory pricing	231
2. Cross-subsidization	235
3. Costing and accounting in a multi-service sector such as telecommunications	239
a. <i>Terms of the economic debate surrounding costing and pricing</i>	240
b. <i>Pricing and costing under the ONP framework</i>	246

c. <i>Pricing and costing in competition law</i>	251
4. The 1998 Access Notice: towards a general principle of cost-oriented pricing for dominant firms under competition law?	255
5. Conclusion	258
D. UNBUNDLING	259
IV. COMPETITIVE ASSESSMENT	268
1. General principles concerning multi-market cases	268
2. The competitive assessment in <i>Atlas</i>	275
a. <i>The markets for cross-border and Europe-wide services</i>	276
b. <i>The French and German markets for packet-switched data services</i>	277
c. <i>Overarching concerns</i>	278
3. The competitive assessment in <i>BT/MCI II</i>	280
V. PROCEDURAL AND INSTITUTIONAL FRAMEWORK	283
A. STANDARD ELEMENTS OF THE PROCEDURAL AND INSTITUTIONAL FRAMEWORK	284
1. Procedural and institutional framework by source	284
a. <i>National sector-specific regulation</i>	284
b. <i>National competition law</i>	286
c. <i>EC competition law</i>	287
2. Relationship between those frameworks	288
a. <i>National competition law and EC competition law</i>	288
b. <i>National competition law and national regulation</i>	292
c. <i>EC competition law and national regulation</i>	292
B. MODIFICATIONS RESULTING FROM COMPETITION LAW AS APPLIED IN THE TELECOMMUNICATIONS SECTOR	295
1. Integration of EC competition law and national sector-specific regulation	295
a. <i>The creation of an area of overlap between EC competition law and national sector-specific regulation</i>	295
b. <i>The relationship between the Commission and the NRAs</i>	298
2. Use of EC competition law to compensate for gaps in sector-specific regulation	302
a. <i>The regime of conditions and obligations under EC competition law</i>	303
b. <i>The distinction between conditions and obligations</i>	308
C. RESULTING PROCEDURAL AND INSTITUTIONAL FRAMEWORK	316
VI. CONCLUSION	316

<b>4. RETHINKING SECTOR-SPECIFIC REGULATION</b>	
I. THE LIMITS OF COMPETITION LAW	322
A. THE GAPS OF COMPETITION LAW	323
1. Competition in subscriber networks	323
2. The distribution of intelligence in networks	329
B. THE CHALLENGES FOR COMPETITION LAW	331
1. Change in the market structure	331
2. Convergence	334
3. Globalization	339
C. THE DOWNSIDES OF COMPETITION LAW	343
1. Uniformization	343
2. Lack of flexibility	347
3. Opaqueness	349
D. THE LEGITIMACY OF USING COMPETITION LAW AS THE CORE OF EC TELECOMMUNICATIONS POLICY	353
1. Instrumentalization of competition law	353
2. Beyond liberalization	356
II. THE CASE FOR SECTOR-SPECIFIC ECONOMIC REGULATION	359
A. THE TERMS OF THE CASE	359
B. THE DUAL ROLE OF TELECOMMUNICATIONS	362
C. THE CORE REGULATORY MANDATE	368
1. Supplier access	369
2. Customer access	374
3. Transactional access	378
a. <i>Definition</i>	378
b. <i>The scope for regulatory intervention</i>	382
i. <i>Interplay of the preferences of firms</i>	383
ii. <i>Network effects in a multi-layered industry structure</i>	388
c. <i>The parameters of regulatory intervention</i>	393
d. <i>Conclusion</i>	397
D. THE BALANCE WITH COMPETITION LAW	398
III. SECTOR-SPECIFIC REGULATION AT THE EC LEVEL	403
1. The need for EC sector-specific regulation	403
2. Current status	405
3. Legal basis	407
4. Institutional implications	413
a. <i>At the legislative level</i>	413
b. <i>At the level of individual decisions</i>	414
c. <i>At the policy-making and policy coordination level</i>	418
d. <i>Coordination with EC competition law</i>	423
IV. CONCLUSION	425

Conclusion	429
Postscript: The 1999 Review	441
Bibliography	447
Index	459