

Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps

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This paper analyses if and how competition law can be reconciled with considerations of pluralism in media markets ¹. Community competition law has always been used in a functional and multi-purpose manner. Competition authorities have pursued objectives that were not directly related to competition, the most notorious example being market integration. Agreements have been allowed on the grounds of social, environmental and industrial policy, and, albeit to a lesser extent, cultural policy.

Two trends have recently emerged in European Competition Law:

- a stronger focus on 'core competition objectives',
- a related increase in the use of economic-based tools in competition law assessment.

Both result in other policy considerations being cast aside. Yet, I believe that in communications markets, the goal of competition law is not only to safeguard a *competitive* market process (i.e., the efficient production of commoditised media), but also to ensure a *democratic* communications order.

The first part of this paper looks at how approaches towards pluralism and competition law are undergoing adjustment under a digital communications paradigm. It also reflects on the extent to which competition and pluralism are in contradiction.

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¹ Following the Council of Europe, I adopt a broad definition of media pluralism as the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media.

The second part of the paper studies how European Community (EC) competition law applies to audiovisual markets. Theory and practice diverge and, more often than not, competition authorities have gone beyond their remit, effectively regulating markets. I argue that the principal reason of this overreach is the existence of a 'European regulatory gap' in the media field.

The final part of the paper suggests modifying current approaches to public intervention in media markets in two complementary ways. Firstly, it is submitted that a media oriented approach to competition policy is necessary. However, the paper also argues that, even if competition law analysis were to embrace non-economic media specific considerations, it would still be insufficient to guarantee pluralism and diversity of content. There are theoretical and practical limits to how far competition law authorities can go that inevitably call for regulation. Therefore, and secondly, complementary regulatory interventions should take place at European-wide scale. This requires a re-assessment of the current allocation of competences in the media field.

■ Pluralism and competition in a digital communications environment

The multi-channel paradox

Recent trends in communications markets are well known. Concepts like convergence, globalisation, and concentration are familiar in the jargon of media policy makers. Data digitalisation techniques have allowed the same content to be carried over various networks and vice versa, resulting in the gradual fusion of the different media (newspapers, radio, television, telephone and internet services)². In order to 'survive' in the convergence jungle, media companies were told that they had no choice but to merge, seek allies among software and telecommunications companies and buy as many rights to content as they could possibly afford, or even not afford (for, what is the price of survival?). Media companies frenetically merged with

² However, after the delusive hype of the late nineties, nobody now proclaims absolute convergence, with all services being provided through all networks and received in all devices. In fact, convergence is now conceived as complementary, rather than as full substitutability.

one another, as well as with other players along the value chain³. Such powerful trends towards media conglomeration were enhanced by (or resulted in?) reductions in legal ownership restrictions in various countries⁴. Today, technology continues to thrill communications markets and the picture is that of an extremely concentrated and fiercely competitive media environment, where success stories one day are followed by failure the next day⁵. Public authorities cannot be blamed for finding it hard to keep pace with the market, not to mention correctly anticipating the kind of regulatory environment that will cater best for future developments.

What is the impact of digitalisation and consolidation trends on traditional approaches to the defence of pluralism and diversity? Has the viewer's dependency on broadcasters' discretion to access information and entertainment services disappeared? Does it make sense to continue to view the television as particularly influential and pervasive? The multi-channel paradox is the following. First privatisation and now digitalisation have multiplied the number of channels available, and therefore, the number of potential voices. As services are personalised, the power of influence and the ability to control mass viewing habits would appear to be reduced⁶. On this basis, some argue that strict regulations governing the protection of pluralism are no longer necessary.

Now, this technological optimism is not free from criticism (NÄRÄRANEN, 2002; GIBBONS, 2000). The quantity of channels and interactivity available in the delivery networks does not itself guarantee free consumer choice. Firstly, more channels do not necessarily result in an increased variety of content, but rather in more of the same⁷. Secondly, the crucial factor is not a potential lesser impact, but the *actual* impact of the media on citizens. This is measured by audience reach, rather than by number of channels. In fact, viewing patterns do not seem to have radically changed in recent years, and

³ In the USA it was mainly giant production companies (*Walt Disney, Viacom, Warner, News Corporation*) that bought channels (*ABC, CBS, CNN, Fox*) in order to distribute their contents, whilst in Europe the opposite occurred: *Bertelsmann, Vivendi, Kirch, Admira* and *Mediaset* bought the rights to the most popular fiction or sporting products.

⁴ Examples of these are recently relaxed ownership restrictions in the UK, Spain, Italy and, although momentarily on stand-by, in the USA.

⁵ Examples of companies in trouble include *AOL/Time Warner, Vivendi, Walt Disney, the Kirch Group, Telewest*, and the bankruptcy of the DTT consortia in Spain and the UK.

⁶ SUNSTEIN (2001) fears the effects that trends towards individualisation might have on democracy, as they insulate the citizen from broader exposure to influences and ideas.

⁷ Neither does a multiplication of channels imply a reduction in the levels of concentration (MOTTA & POLO, 1997).

certainly not enough to suggest that viewers are now completely emancipated from media manipulation. Finally, some warn of the apparently inexorable tendency towards globalisation and the loosening of ownership restrictions to open up markets to foreign investment (MARS DEN, 2000). As a society we might prefer less concentrated and less competitive media, if only because of the social and political power that a big media group could enjoy.

The primacy of EC competition law

The debates about the most appropriate approach to public intervention in digital communications markets seem everlasting. At the extreme, free-enterprise radicals say that markets suffice and even oligopolistic media giants can respond to audiences' desires better than smaller media firms. For them, governmental intervention is nothing more than elite paternalism that disregards personal choices and unduly distorts markets. They favour a minimally regulated media environment where consumers signal their preferences directly to service providers. De-regulation thus 'frees the viewer' and delivers genuine consumer sovereignty. This view, while admittedly providing coherent objections to the public service paradigm, largely ignores the perversity of basic media economics. Stories are selected for profitability rather than relevance. As COOPER (2003:36) argues: "advertising as a determinant of demand introduces substantial disconnection between what consumers want and what the market produces". In fact, the interests of the media consumers are satisfied only insofar as these coincide with the interests of advertisers. What is more, the media not only satisfies consumer preferences, but also shapes them⁸.

Choices have to be made, not only regarding the *degree* of intervention, but also which *tools* (mainly, sector specific regulation and competition law) and what *level* of intervention (local, national or regional) are most appropriate. At a national level, public authorities have traditionally relied on a relatively balanced combination of sector specific regulation and competition law. The picture at the EU level looks somewhat different and the impact of supranational regulation has been limited, mostly due to the basic Treaty principles governing subsidiarity. Despite numerous calls from the European Parliament to readdress the repeated failure of the directive on media concentration, the EC preferred – or had no choice but – to leave

⁸ BAKER (1997) offers a very thorough analysis of the disconnection between audiences and media providers E.

decisions concerning concentration to its Competition Directorate (WHEELER, 2003), which today is probably the most active and effective player in the European broadcasting arena.

For some years now there seems to be a general preference in communications markets for competition law, applied by competition authorities with increasingly specialised sector-specific expertise⁹. The objective is to progressively abandon regulation and move towards a competition-law based model that will ultimately prevail. Even if exclusive reliance on competition law is not an option in media markets, here too it is likely to become the primary instrument of public intervention in communications industries. This is partly because new media cases tend to escape traditional national legislation designed to control the media and assure pluralism, thus giving Community competition policy, as an inherently European-wide mechanism, a central role (UNGERER, 1995). This shift in approaches to public intervention is important because, while it does not change the underlying general policy objectives of protecting competition and enhancing the public interest, it does change *who* is the primary responsible institution for that and, consequently, *what* the applicable instruments and methodology will be. In a context of the primacy of competition law a first policy issue is to what extent competition law can, as it is now, adequately address media policy concerns. Or, in other words, where are the limits?

Competition and pluralism: a contradiction?

Efficiency and pluralism are not irreconcilable concepts. In fact, in most situations, what is good for competition would also be good for pluralism as, generally, a plurality of competitors (voices) will allow for a variety of products (discourses). Yet, nobody would seriously argue that one automatically guarantees the other. A non-exhaustive list of reasons why contradictions might arise includes:

- *Different approaches to the notion of 'public interest'*. Both the safeguard of competition and of pluralism are said to be in the public interest, but they are understood differently. For the purposes of competition,

⁹ The *European Framework for Electronic Communications and Services*, reflects this approach. See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 24.4.2002, L 108/33 (*Framework Directive*).

the public interest primarily equals the 'satisfaction of consumer preferences'. By contrast, under the pluralism paradigm, the public interest is seen as the collective benefit resulting from an informed public debate on civic issues. Thus, reference is made to something that goes beyond what 'interests the public' to include another two fundamental functions of the media: that of informing and that of acting as a 'watchdog' of government.

- *Different perceptions of acceptable levels of industry concentration.* Usually, concentration is considered as both a competition and a pluralism concern. However, because competition law is mostly corrective and deals with abuses of dominance, certain high levels of concentration might be allowed as long as market power is not abused. It may be the case that a single or few firms operating in the market prove to be more efficient than a multiplicity of inefficient firms. Such a situation would not trigger competition concerns. However, from a pluralism perspective dominance (as opinion power) would be alarming in itself ¹⁰.

- *The specific economics of media markets* also generate contradictions between competition and pluralism ¹¹. Generally, competition is expected to deliver choice as a plurality of sources would eventually lead to diversity of content for the audience. In theory, firms will offer a variety of products to cater for the tastes of as many consumers as possible. Yet, media markets show a natural tendency towards product homogeneity. This is partially the result of an unusual feature of media products: the broadcasters' capacity to have two unconnected customers for each media sale (viewers and advertisers). In a way, competition in the media suffers from a 'tyranny of the majority' and this perversely results in a tendency to under serve minorities. Therefore, there are often situations where, despite the co-existence of a large number of competitors (or precisely because of it) they all end up selling essentially the same kind of product (or saying the same thing).

■ EC competition law and audiovisual policy

The fact that competition and pluralism are at times in contradiction with each other does not necessarily imply that competition law cannot accommodate (and therefore should be blind) to pluralism concerns. In

¹⁰ One could argue that dominance will be scrutinised through merger control. Note, however, that this would not address situations of internal growth.

¹¹ For a detailed analysis of the economic specificities of media markets see DOYLE (2002).

several instances, the Treaty of Rome requires that certain objectives be considered when implementing Community policies¹². This mandate has been endorsed by the European Courts and extends to competition authorities, allowing for a fairly extensive interpretation of competition law¹³. Accordingly, a number of other goals have been, directly or indirectly, considered when implementing competition rules (MONTI, 2002). Examples of this include regional development, the promotion of regional champions, industrial policy, social progress, the protection of employment and of the environment, and, above all, market integration. In the media sector, commercial concentrations have been approved to foster pan-European broadcasting activities¹⁴, to guarantee the development of technical innovations¹⁵ or to support the entry of European companies into the world market. Finally, the Commission has recognized that cultural policy concerns might also affect the decision of whether or not to grant an exemption under article 81.3¹⁶.

Lately, traditionally expansive interpretations seem to be out of fashion and everyone agrees that competition law is primarily an instrument to pursue economic welfare. Simultaneously, and largely related to this, there has been a willingness to incorporate economic insights to the interpretation and application of competition rules¹⁷. Unfortunately, it has resulted in a progressive neglect of non-economic considerations in competition law assessment. If competition law is to be a major instrument of public intervention in communications markets, then the general limitations in the efforts to make economic theory an operational tool to resolve major competition issues need to be acknowledged, and coupled with the peculiarities of communications markets. Over-reliance on economic efficiency as the driving force behind the Commission's analysis runs the risk of ignoring other considerations that are equally important. It is also naïve. Competition law is not entirely immune from non-economic media-specific

¹² See article 6 (environmental protection), article 127 (employment), article 151.4 (culture), article 152.1 (health), article 153.2 (consumer protection); article 159 (economic and social cohesion).

¹³ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875 (*Metro I*).

¹⁴ Commission decision *Bertelsmann/CTL* [1996] OJ C 364/3.

¹⁵ Commission decision *BSkyB/Kirch*, [2000] OJ C 110/45.

¹⁶ Commission decision *VBBB-Vereniging Bevordering Belangen Boekhandels/ VBVB-Vereniging Bevordering Vlaamsche Boekwezen* [1981] OJ L 054/36.

¹⁷ This approach has considerably influenced the recent debate on modernisation.

concerns. PITOFISKY (2003:1) asserts this clearly in the context of American antitrust laws:

"Even a strictly economic antitrust policy, at least at the margin, tends to serve certain non-economic goals as well: reasonable dispersion and distribution of wealth, broadening of economic opportunity and enhancement of individual and business freedom."

This part of the paper explores whether and if so, how do *media policy objectives* (mainly the safeguarding of pluralism) fall under the scope of application of EC competition law rules. There is not much margin for a full consideration of media policy concerns in Community competition law, the principal reason being that, unlike environment, this *is not yet a Community policy*. However, the practice of the EC Competition Directorate seems to tell a different story. The paper explains the overreach in EC competition law practice in the media field by reference to the EU 'regulatory gap' that exists in connection with media policy.

EC competition law and audiovisual policy: the theory

The scope of EU intervention in the media

To the extent that it has a commercial function, broadcasting qualifies 'by its nature' as a service and triggers the application of internal market and competition rules¹⁸. Remember that competition rules need to be interpreted in the wider context of the Treaty. For this purposes article 151.4 [ex article 128.4] of the Treaty is most relevant. It obliges the Community to take cultural aspects into account in its action under other provisions of the Treaty. Accordingly, to the extent that audiovisual goods and services have an intrinsically cultural value, article 151.4 should play a role both in internal market and in competition law assessments of audiovisual markets¹⁹. However, is the requirement that competition law 'takes into account' as strong in the cultural realm as it is in the field of environmental or social policy? This cannot be the case from the moment that cultural policy is

¹⁸ Case 155/73, *Italy v Sacchi* [1974] ECR 409. See also, Case 52/79, *Procureur du Roi v Debauve*, [1980] ECR 833.

¹⁹ This has been sanctioned by the Court of Justice. For instance, in a reference for preliminary ruling in *Familiapress*, the ECJ accepted restrictions to the free movement of goods to guarantee the pluralism in the press. Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, [1997] ECR I-03689.

regarded as a matter left to member states (principle of cultural autonomy). Article 151 is therefore a different type of 'policy linking' clause in that audiovisual policy is not a Community policy.

To begin with, there is no specific allocation of EU competence in the audiovisual field. Nor is there any reference to audiovisual *policy*. A few provisions that generally refer to 'culture' in its widest sense come closest to this. Article 151 has been interpreted more as a reminder to the Community of member state sovereignty than as supporting Community action (BARENDT & HITCHENS, 2000:167). Indeed, it seems more of a response to the fear of expansion of Community powers in the audiovisual field²⁰. As a result, the scope for Community action on the basis of the current legal framework appears to be considerably more restricted in the field of culture than in other fields of policy. Tensions arise between the interest of national media companies to compete on a global scale and the reluctance of member state governments to hand control over audiovisual policy over to Brussels.

Despite the relatively limited scope for supra national action in the audiovisual sector, regional institutions have effectively played a significant role in developing a 'European media policy' (CRAUFURD-SMITH, 1997). Various Treaty objectives have indirectly served as a primary motor for regulatory change (these include the establishment and functioning of a common market for goods and services²¹, external trade policy and industrial policy²²). Competition policy and state aid policy have proved no exception to this rule. In today's digital and convergent media environment the number of EU regulations that directly or indirectly affect broadcasting has increased substantially. COLLINS & MURRONI (1996:188) refer to this phenomenon as the 'erosion of national communications sovereignty through technological change'. Two factors can be cited to explain this trend:

- EU competence in related areas has been used to leverage power into broadcasting. By means of telecommunications liberalisation, broadcasting networks have been regulated, along with the associated

²⁰ Article 151 limits these powers to 'supporting and supplementing' excluding 'any harmonisation of the laws and regulations of the MS'.

²¹ Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in MS concerning the pursuit of television broadcasting activities [1989] OJ L 298/23, as amended by Directive 97/36/EC [1997] L 202/60, *Television Without Frontiers Directive (TVWF)*.

²² E.g. The 'MEDIA Programmes' and the Eurimages Fund provide practical support to the industry.

technical facilities upon which the provision of audiovisual services depends. This has become more apparent under the new regulatory framework for electronic communications. In the area of intellectual property rights, there has also been extensive harmonisation, which has affected the broadcasting sector²³. Content remains relatively untouched, but competition law has also justified intervention in that area. All these initiatives limit the capacity of member states to regulate on broadcasting issues.

- The second factor is related to the diminished capability of national authorities to deal with cross-national and cross-sectoral developments. Cross-media empires developed by companies like News Corporation, Vivendi, Time Warner, Bertelsmann and Telefónica pose a threat to pluralism and potentially to competition as well, but this threat cannot be fully addressed on a sector-specific basis or within individual legal jurisdictions.

While the distribution of competences over broadcasting still remains unclear and highly controversial, the leading role of the Community not only in shaping national audiovisual policies, but also in developing a 'European' media policy must be accredited.

The distinctive allocation of competences for broadcasting narrows the margin of the discretion exercised by EU competition authorities in their assessment of non-economic considerations in media cases. The challenge is striking a balance between competition and media specific concerns. Difficulties emerge in cases which do not involve choosing one or the other, but rather the extent to which one can be sacrificed at the expense of the other (situations where efficiency is enhanced at the expense of pluralism, or where competition is restricted to the benefit of pluralism). In such situations, competition authorities face a trade-off between, for instance, achieving a first best solution from a competition view point, or a second best solution that protects or enhances pluralism. Although such ambiguous cases are the exception rather than the rule, it is precisely in these situations where democratic concerns arise.

²³ For example, Directive 93/83/EC aims to coordinate certain rules concerning copyright in satellite broadcasting and cable retransmission.

EC competition law and audiovisual policy in practice and beyond

There has been little discussion of whether specific media objectives *should* be considered under competition law. Instead, attention has been paid to how the Commission has *de facto* had a considerable impact on national media landscapes. This section provides an overview of the Commission's practice. It demonstrates how the Commission has at times gone beyond the realm of competition law, effectively regulating European media markets. The Commission, however, has never openly embraced pluralism concerns.

Non-economic considerations under article 81

Media policy concerns are not totally absent from the Commission's competition practice. For instance, the Commission exempted the *Eurovision* system on the basis that *EBU* members provide a broader range of sports programmes, "including minority sports and sports programmes with educational, cultural or humanitarian content"²⁴, that could not be shown on their national generalist channels. Considerations of industrial policy can also be traced back to the fact that the Commission considered the interests of small members and organizers of minority sports. Therefore, in its decision the Commission did accord significant weight to non-economic concerns and was particularly attentive to the public mission that characterises most *EBU* members²⁵.

The *UIP (United International Pictures)* case²⁶ is another example of how cultural concerns influenced the Commission decision to grant an exemption. Among other concerns, the agreement risked hindering the European film industry and the Commission used conditions to palliate that risk²⁷. In this case a prohibition based solely on cultural concerns would not have been acceptable under competition law. The problem was solved by

²⁴ Commission decision *EBU/Eurovision System*, OJ 1993 L179/23, at par.62.

²⁵ This decision was annulled by the Court of First Instance for whom non-economic considerations *alone* were not enough to exempt the agreement. Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision SA and RTI v. Commission* ('*European Broadcasting Union*') [1996] ECR II-649.

²⁶ Commission decision, *United International Pictures (UIP)* [1989] OJ L 226/25. For an analysis see GYRORY (1996).

²⁷ For instance, *UIP* promised to plough some of the profits from promoting European-made films back into the industry.

the Commission through the imposition of remedies to protect the European film production industry ²⁸.

There are very few (and relatively old) decisions where the Commission has prohibited media agreements under article 81 ²⁹. Especially interesting is the *BBB/VBVB* case that dealt with book trade restrictions ³⁰. The Commission approved an agreement that established a system of collective resale price maintenance for book prices operating across national borders to be a violation of Article 81.1. Although an exemption was declined on the basis that the parties could use less restrictive means to improve the publication and distribution of books, the Commission recognised that cultural policy concerns could affect a decision whether or not to exempt an agreement under article 81.3.

In *Eurovision*, *UIP* and *VBBB/VBVB* an explicit reference was made to non-economic considerations. This should be taken as rather exceptional. In most of its decisions concerning the audiovisual sector, the Commission is silent in this respect or refers to the question indirectly. For instance, in *Screensport/EBU* the Commission accepts that the consumer is better served by being able to make an 'informed choice' ³¹. In all events, even when the Commission refers to 'cultural' or 'public policy' concerns, it does so incidentally, and at best uses it as an added justification to grant an exemption, but never to prohibit. Therefore, the occasional reference to culture is ornamental rather than decisive ³².

²⁸ The exemption was renewed on September 9th 1999, by means of an administrative comfort letter (See IP/99/681).

²⁹ For the period 1972-2002 I have counted only 5 decisions: Commission decision *WEA-Filipacchi Music SA* [1972] OJ L 303/52; Commission decision *Miller International Schallplatten GmbH* [1976] OJ L 357/40; Commission decision *VBBB-Vereniging Bevordering Belangen Boekhandels/ VBVB-Vereniging Bevordering Vlaamsche Boekwezen* [1981] OJ L 054/36; Commission decision *Screensport/EBU members* [1991] OJ L 063/32 on the purchase of sports broadcasting rights; Commission decision *Auditel* [1993] OJ L 306/50.

³⁰ Commission decision *VBBB-Vereniging Bevordering Belangen Boekhandels/ VBVB-Vereniging Bevordering Vlaamsche Boekwezen* [1981] OJ L 054/36.

³¹ European Commission decision [1991] OJ L 63/32 at par. 73.

³² The Commission has shown particular lenience when the purpose of the agreement was to create a new platform or introduce a new service. This was the case in *BDB* (See *BDB* (On digital), Commission Notice, [1997] OJ C 291/11), in *TPS* (See Commission decision *TPS – Television Par Satellite* [1999] OJ L 90/6) and *BiB* (See Commission decision *British Interactive Broadcasting/Open* [1999] OJ 312/1).

The Commission's practice under the Merger Regulation

The Commission's most conspicuous interventions within the audiovisual sector have arisen when it has been called upon to assess ventures and alliances under its merger control rules (HUMPHREYS, 1996:212). Since the Merger Regulation (MR) was approved, out of 2,350 concentration cases only 18 have been prohibited in their integrity and 169 have been approved with commitments³³. Five of the prohibited operations concerned the media sector. The ratio 'operations prohibited/operations examined' is therefore much higher in the media (about 9%) than in other sectors (about 1%). Has the Commission perhaps treated dominance in mergers and joint ventures in the media differently than dominance in other sectors? The Commission appears to be especially vigilant when it comes to media mergers and that, at the margin, they are more likely to be challenged. A few cases can be used to illustrate the Commission's desire to strictly monitor the application competition rules to the media sector³⁴.

During the nineties the Commission's position on alliances in digital broadcasting markets was fairly restrictive. The Commission appeared reluctant to 'compromise the prospect of competition, however remote, for the possibility of a rapid launch of new digital pay TV services' (VELJANOVSKI, 1999: 61). Thus, in *NSD*³⁵, *HMG*³⁶, *MSG/Media Service*³⁷ and its sister case *Premiere*³⁸, the Commission found the parties to be dominant at various levels of the supply chain and feared market foreclosure. As a result, despite the various undertakings proposed by the parties, it prohibited all three mergers. Note that all arrangements prohibited by the Commission had vertical aspects. They concerned transactions involving either integration between a broadcaster and a content provider or between a broadcaster and an infrastructure provider, or all of the above. Issues of access to content rights, access to proprietary technology and use of networks were prominent in all of the decisions.

³³ Figures refer to cases notified between September 21st 1990 to December 31st 2003. Source: European Merger Control - Council Regulation 4064/89 – Statistics.

³⁴ For a comprehensive overview of the Commission practice in the media sector see GARZANITI (2004); NITSCHKE (2001).

³⁵ Commission decision Nordic Satellite Distribution [1995] OJ L 053/20.

³⁶ Commission decision RTL/Veronica/Endemol [1996] OJ L 124/32.

³⁷ Commission decision MSG/Media Service [1994] OJ L 364/1.

³⁸ Commission decision Bertelsmann/Kirch/Premiere [1999] OJ L 053/1.

By contrast the Commission has favoured horizontal pan-European transactions like *BSkyB/Kirch Pay-TV*³⁹ or *CLT-UFA*⁴⁰. Similarly, no objections were raised when *Richemont* and *Kirch* jointly took control over the Italian pay-TV market through the acquisition of *Telepiu*⁴¹. *News International* was permitted to acquire an interest in the German free-to-air channel, *Vox*, because it would not thereby acquire a dominant position in the relevant market, its primary interests being in English language pay-TV and newspapers⁴². What all of these decisions have in common is that the activities of the merging companies took place in different national markets. This avoided any risk of overlap or coordination in broadcasting activities that are normally national or regional in scope, whilst fostering industrial policy goals.

Lately, the tide seems to be turning and the Commission appears to have significantly departed from established policy. It is now more willing to accept vertical mega mergers (such as the merger between *AOL* and *Time Warner*⁴³, the take over of *Universal* by *Vivendi*⁴⁴, or the merger between *Telefónica* and *Endemol*⁴⁵) and to make extensive use of conditions and undertakings. More recently it has even sanctioned the creation of *de facto* monopolies in certain national digital markets. This has been the case in the Italian digital pay-TV market, where after several frustrated attempts to join forces, *News Corporation* and *Vivendi*, finally reached an agreement in October 2002, whereby the Australian media group acquired sole control over *Telepiú* (controlled by *Vivendi Universal*) and *Stream* (jointly controlled by *Newscorp* and *Telecom Italia* on a fifty-fifty basis). The purpose of horizontal concentration was to create a single unified satellite platform (re-branded *Sky Italia*) by combining the business activities of *Telepiú* and *Stream*. *Telecom Italia* would continue to be present via a minority shareholding in *Telepiú*. The Commission's clearance effectively creates a quasi monopoly in the pay-TV market in Italy. The very delicate financial situation faced by both companies seems to have influenced the final decision. CAFFARRA & COSCELLI (2003: 626) explain that the dilemma for the competition authority was 'whether to accept a further "regulated"

³⁹ Commission decision *BSkyB/Kirch Pay TV* [2000] OJ C 110/45.

⁴⁰ Commission decision *Bertelsmann/CLT* [1996] OJ C 364/3.

⁴¹ Commission decision *Kirch-Richemont- Telepiu* [1994] OJ C 225/3.

⁴² Commission decision *Bertelsmann-News International-Vox* [1994] OJ C 274/9.

⁴³ Commission decision *AOL/Time Warner* [2001] OJ L 268/28.

⁴⁴ Commission decision *Vivendi/Canal+/Seagram* [2000] OJ C 311/3.

⁴⁵ Commission decision *Telefonica/Endemol* [2000] OJ C 235/6.

consolidation through mergers, or to prohibit these mergers and then allow further "unregulated" consolidation as financial losses prompt market exit'.

This operation mirrored one that had taken place in Spain only a few months earlier and that also featured the only two satellite pay-TV platforms and the incumbent telecommunications operator⁴⁶. In May 2002 *Canal Satélite Digital* and *Vía Digital* (indirectly controlled by *Telefónica*) decided, for the third time, to initiate merger proceedings with the view to create a single platform for the provision of satellite digital pay-TV services in Spain⁴⁷. The Spanish competition authority delivered a favourable opinion and imposed 10 conditions. The Council of Ministers gave the green light to the operation and imposed 24 additional conditions⁴⁸, all of them behavioural. This once again resulted in a quasi monopoly in the Spanish digital pay-TV market⁴⁹.

These are examples of how the Commission has presently given up its determination to promote inter-platform competition, in favour of 'regulated' de facto monopolies within a single platform (intra-platform competition). The Spanish and Italian concentrations may merely constitute the beginning of a wider consolidation trend across Europe (ARIÑO, 2004).

Assessing the impact of the Commission's practice on media pluralism

The recognition of the largely national nature of European TV markets has not been an impediment to intervention. In particular, the influence over the development of digital audiovisual markets is noteworthy. In all these cases, where do concerns over pluralism come into play? Although the various operations outlined above took place in rather different product and geographical markets, it is still possible to draw some conclusions.

⁴⁶ For a detailed analysis of this case see.

⁴⁷ This case had a Community dimension, but was referred to the Spanish authorities in a substantiated decision where the Commission hinted at what direction to take. Case n° COMP/M.2845 – *Sogecable/Canalsatélite Digital/Vía Digital*.

⁴⁸ Agreement of the Council of Ministers on November 29th 2002.

⁴⁹ After the merger the new entity enjoys 80% of the total pay-TV subscribers, facing competition from cable platforms, some minor competition from digital terrestrial operators and, potentially, from telecommunications operators (that provide audiovisual services through the use of broadband technologies).

Firstly, in the broadcasting sector, non-economic constraints have not been openly incorporated into the competition law framework⁵⁰. Even in rather exceptional and consistently controversial cases such as *Eurovision* or *UIP*, where such concerns are explicitly mentioned, we have seen that the practical effects of such exercises were limited. Secondly, the Commission seems especially concerned when the operation is vertical and takes place *within* one national market, but rather indulgent in cases where the merger is trans-national. This may seem surprising, but it is simply the result of the relevant product and geographic market definition. Under current approaches, threats to pluralism that arise as a result of large media companies extending their business and political presence into other member states would not pose competition concerns because, being in different geographical markets, they would not be considered to have a dominant position. Yet, as NITSCHKE (2001:128) rightly points out:

"It might be desirable, in order to ensure pluralism, to also monitor concentrations whereby a media undertaking extends its business to another geographical market where it had previously not been active."

Pluralism may, in fact, be affected even if, as a result of lack of overlap on the activities, there is no dominance from a competition law perspective.

It is hard to believe that any competition authority can carry out a merger analysis in the media sector without being aware of pluralism-related issues. This is so at the national level and I see no reason why it should not be the same when it comes to the European Commission. In cases such as *HMG* or *Premiere* the influence of media pluralism concerns in the final decision seems inevitable. It consequently seems rather awkward that the words 'pluralism', 'plurality', 'public service' or 'diversity' are hardly ever mentioned in any of the Commission decisions, if not totally absent.

Even if competition law did prevent big media groups from consolidating and potentially hindering pluralism and diversity, it is worth noting that this was only an indirect effect. All operations risked harming 'consumers', but a reduction in the levels of pluralism and diversity was not taken as evidence of harm. Should it have been? Could competition law embrace the argument that consumers would actually be happier in the long run if a news channel remained a news channel and was not turned into another sports or action channel? It does not seem reasonable. The fact that courts and enforcement agencies can and do try to be forward looking in applying antitrust principles

⁵⁰ The same is not true with respect to the telecommunications sector (LAROUCHE, 1998).

does not, however, mean they can depart altogether from questions of efficiency or evidence of expected prices and flow of goods in a relevant market (SHELANSKI, 2003:19). In the words of MONTI (2002:1070): "It would be unlawful for the Commission to exempt an agreement that fostered a particular Community policy, but failed to achieve the core aims of EC competition policy" (which he identifies as economic freedom, market integration and efficiency). Therefore, given that the extent to which competition law can take into account non-economic considerations is so limited, there will be situations in which competition law will not suffice to protect pluralism (IOSIFIDIS, 1996; WOODS & SCHOLLES, 1997).

The European regulatory gap: regulation through competition

Recognition of this insufficiency of competition law has always been one of the principal justifications for regulatory intervention, which was mainly national in scope. There were attempts to come up with a European-wide approach to pluralism challenges but, for the moment, all regulatory initiatives have been unsuccessful. The story is well known. In 1992, the Commission published a *Green Paper on Pluralism and Media Concentration in the Internal Market*⁵¹ and reluctantly put forward the possibility of passing specific legislation on the concentration of communications media in Europe. In 1996, and then again in 1997, it came up with draft proposals. Both of these drafts were fiercely opposed, particularly on account of the Commission's controversial regulatory powers (HARCOURT, 1998; DOYLE, 1998).

As a result, there is no binding European law on media concentration and the Commission has no specific instruments with which to combat the threat to pluralism posed by the development of dominant sources of opinion. It should therefore come as no surprise that competition rules have been used indirectly as a tool to address an existing regulatory need. Competition outcomes have frequently resembled more 'regulatory measures' than competition law decisions. The regulatory character of many Commission decisions is most apparent in the overtly used figure of remedies⁵².

⁵¹ Commission's *Green Paper on Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community action* COM(92)480.

⁵² Some argue that, in practice, action by DG competition prevented threats to pluralism that would have never been detected by any of the proposals of a European ownership directive (LEVY, 1999: 98).

Competition law not only acted as a *substitute* to market regulation, it also *triggered* regulatory developments. An interesting interaction between competition law and sector specific regulation has emerged, whereby principles are abstracted from specific competition cases and later translated into generally applicable rules. This reflects a kind of trial-and-error approach to law making processes. Solutions are initially devised for specific cases and later imported into general law. Such practices have been recurrent in the telecommunications sector (LAROUCHE, 2000; GARZANITI, 2004) and, albeit to a lesser extent, are also present in broadcasting.

For example, in the *Eurovision* case a mutual concern of the Commission and national governments was that climbing prices for sports broadcasting rights could result in public service broadcasters losing bids to the benefit of commercial and pay-TV broadcasters. Neither of the latter would ensure total coverage of the population. The Commission's decision can be read as a partial attempt to ensure the continued viability of universal free access to major sport events. However, not only was it invalidated by the CFI, but even if this had not been the case, the decision would have failed to provide a response to the problem (as *EBU* members could still be outbid by competitors). From the moment that sports are viewed as performing an 'integrating and cultural function'⁵³ they become a public interest issue. If, in addition, they are an electoral 'hot potato', the issue takes priority in the political agenda. The review of the *TVWF* Directive offered a good opportunity to address the issue via regulation. The Directive was modified to allow member states to draw a list of events considered to be of 'major importance to society,' which should be broadcast to a substantial part of the population⁵⁴.

Other examples of competition law influencing the substance of regulatory developments can be found in the area of access regulation. The *MSG* and *NSD* decisions inspired the treatment of issues of standard setting and access to bottleneck facilities in the *Advanced Television Standards Directive*⁵⁵. It is also interesting how, a few weeks before the *BiB* decision, the Commission adopted the *Access Notice*⁵⁶ which extended ONP⁵⁷

⁵³ See Declaration on specific character of sport adopted at the European Council in Nice.

⁵⁴ Article 3 a.

⁵⁵ Directive 95/47/EC of the European Parliament and of the Council on the use of standards for the transmission of television signals, OJ L 281/51.

⁵⁶ Commission Notice of March 31st 1998 on the application of competition rules to access agreements in the telecommunications sector, O.J. [1998] C 265/2 (Access Notice).

principles of open and efficient access to and use of public telecommunications networks, to access issues in digital communications sectors generally (BAR & GALPERIN, 2002: 82). Similar principles have been established in the *Access Directive*⁵⁸, which also mirrors many of the conditions imposed on *Kirch* and *BSkyB* a few years earlier⁵⁹. Through *BDB*, the Commission effectively influenced regulatory developments in the UK pay-TV market by establishing the principle that a national regulatory authority should not grant a licence to a dominant operator if dominance could be extended or strengthened by doing so (TEMPLE LANG, 1998).

Competition law has also been used, in a rather unorthodox manner, for standardisation purposes. In the *BSkyB/Kirch* case, the Commission went beyond behavioural requirements and asked *Kirch* to implement a DVB standardised API (in this case MHP⁶⁰) within a year. Similarly, in the *BiB* or *Premiere* cases, the Commission went far beyond any action that would have been allowed under the *Advanced TV Standards Directive*. In all these cases, the conditions went 'further than anything prescribed by the national or EU regulations in force'(LEVY, 1997:97). The *NewsCorp/Telepiú* case is yet another revealing example of how regulatory frameworks are enforced by the use of competition law⁶¹.

These dynamics between competition law and regulation are extremely interesting and have proved successful in addressing fast evolving or incipient markets such as digital interactive television. A dialogue between both disciplines has been created and has resulted in the partial convergence of tools and methodologies. At the European level, however, the potential effectiveness of these dynamics to solve conflicts in communications markets is limited. As far as the new framework for electronic communications is concerned, for instance, the Commission has acknowledged the need for regulatory measures with respect to content that should complement the regulation of broadcasting networks and associated

⁵⁷ Open Network Provision.

⁵⁸ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and services (Access Directive), O.J. [2002] L 108/7.

⁵⁹ For instance, access on fair, reasonable and non discriminatory terms, account separation, and CAS information disclosure.

⁶⁰ Multimedia Home Platform.

⁶¹ Note also that, in most cases, the implementation of the remedies imposed by the competition authority at the EU level is monitored by the national regulatory authority.

services⁶². The Commission subsequently recognised, somehow helplessly, that the only instruments it can work with are competition rules. The long awaited revision of the *TVWF* directive, initially due in 2002 but repeatedly postponed, is expected to tackle some of the content-related issues, thus becoming a parallel and complementary instrument to the new framework. Yet, the revision is proving difficult and there are fears that it will leave many questions unanswered.

To sum up, the European authorities' response to the challenges of consolidation in digital markets has been the implementation of detailed regulation through competition law. However, this regulatory strategy leaves public interest concerns unattended. The gap is there and, as cross-country and cross-ownership consolidations continue, it will dangerously grow. One can expect that problems of legitimacy, transparency and legal certainty remain as long as there is no clarity about the objectives of competition law and about the criteria and principles that should decide potential trade offs. But these are not the only existing problems. In addition to rethinking certain competition law approaches to media markets, complementary regulatory measures will be required. The final part of this paper deals with both issues.

■ Covering gaps in EU media markets

A media specific competition law?

This paper has so far argued that pluralism is not an objective of competition law and that this is partially the reason for the existence of 'gaps' in certain cases. I have nevertheless also supported the view that pluralism and other audiovisual policy goals should be taken into consideration when applying competition law to the media sector and that this is consistent with the current Community legal framework. We have also seen that there are limits to the extent to which those extra-competition concerns can be considered. Furthermore, were pluralism to be in clear contradiction with competition goals, it would be highly unlikely (as the theory stands today) for

⁶² See remarks by Commissioner M. Monti at the European Regulators Group Hearing on Remedies Public hearing on remedies under the new regulatory framework for electronic communications networks and services, Centre Albert Borschette Rue Froissart, January 26th 2004.

the protection of the former to take preference over the defence of the latter. Even if there is a shadow of doubt as to whether the conditions imposed on parties were less directed at the protection of competition and more concerned with pluralism in some merger decisions, it is fair to recognise that this applies to a minority of cases. In the majority of cases, competition enforcement not only furthered economic efficiency, but also indirectly ensured the protection of pluralism. In short, pluralism is not a goal of competition, but simply a consequence of it.

But should pluralism affect underlying competition analysis? Or in other words, should competition law in the media sector (and particularly in merger cases), be extended so as to include an analysis of the impact on the '*marketplace of ideas*'? This suggests the implementation of a 'media specific' competition law. The assumption would be that the uniqueness of media markets (with respect to the underlying economic models and democratic values) calls for a unique approach to competition law.

The idea has hardly been explored so far. One of the few attempts to do so is found in U.S. literature. STUCKE & ALLEN (2002), two DOJ attorneys, have pondered the pros and cons of incorporating the concept of 'marketplace of ideas' into antitrust analysis. They consider that the significant analytical complexities that such an approach would entail (for instance in terms of market definition, substitutability, assessment of monopoly power or potential risks of government intrusion), do not outweigh the democratic concerns that would arise if it is, instead, rejected. They suggest (a) that competition authorities need to pay special attention to the non-price dimensions of economic competition, such as quality and choice; (b) that they should balance efficiencies against the backdrop of the marketplace of ideas; and (c) that they should give greater attention to direct evidence of anticompetitive effects, especially in cases where market definition and market share measurement are problematic. Although against current mainstream approaches to U.S. antitrust, the concerns of Stucken and Allen are shared by others (PITOFSKY, 1979; LEARY, 2000)⁶³. Their proposals are valuable as they emphasize fundamental democratic aspects of media markets that are often overlooked by competition authorities.

Such an approach could have a substantial impact on competition law outcomes. For instance, if pluralism and diversity are used as criteria in

⁶³ Pitofsky has long argued that non-economic political values such as the First Amendment can be relevant and may justify a higher degree of scrutiny in certain cases.

merger assessment one might weigh competitive efficiencies differently. The trade-off might be between a first best competition solution with no inefficiencies, or a second or third best solution, with some inefficiencies. The problem is how to measure and compare one against the other, as the impact on diversity or the loss of competition in the marketplace of ideas are hard to quantify. Yet, when in doubt, why not go for the solution that best protects media pluralism, as long as some degree of competition remains? This is arguably not the most economically efficient option, but it would not damage competition to the point of elimination, whilst still preserving democratic standards that may be perceived by society as having more than just economic value. It might involve the occasional sacrifice of economic efficiency to the benefit of other objectives. Yet remember: (a) these cases would still be the exception rather than the rule, (b) a degree of competition will be preserved and (c) "the wastes of democracy are among the greatest obvious wastes, but there are compensations in democracy which far outweigh that waste and make it more efficient than absolutism" (Justice BRANDEIS, 1934). I believe that society gains from having a plural, albeit less efficient media, and that these gains, when balanced against a hypothetical perfectly efficient media monopolist, outweigh potential losses. Ultimately, it is a constitutional choice. It is a choice reflecting the kind of society we want to live in.

On the limits of competition law

I am well aware that to suggest considering the impact on pluralism of media competition law cases would inevitably involve considerable methodological complexities in terms of competition analysis, some of which are considered in the next section of this paper ⁶⁴.

First comes the issue of how to *define a market for pluralism*. The traditional exercise of defining a market turns into a formidable task when applied to the media ⁶⁵. The particular economics of the media industry complicate price data assessments. Similarly, what might be substitutable for the consumer (getting his/her news via the internet or a newspaper)

⁶⁴ A detailed analysis of the limits in competition law concepts in addressing current concentration challenges in European media industries can be found TABERNERO & CARVAJAL (2002), chapter 1.

⁶⁵ See relatively recent studies for the European Commission: Market Definition in the Media Sector- Comparative Legal Analysis -, Report by Bird & Bird and Market Definition in the Media Sector - Economic Issues, Report by Europe Economics.

probably does not apply to advertisers. The very concept of 'consumer' changes depending on the economics of the media in question.

There are also numerous flaws in the idea of *media substitutability* itself, since what is valued in the media is diversity, both of content and of sources. Thus, two economically non equivalent products (radio and newspapers, broadcasting and publishing) would still be part of the same wider marketplace of ideas. Furthermore, the reasons why substitutability happens or not can have nothing to do with price, but with format, time scheduling or content quality. It can be fairly argued that there is no such thing as 'substitutability' of media services. Sports are an extreme example of how little substitution takes place in media content. A viewer wanting a particular tennis match is unlikely to be satisfied with a golf competition or even with another tennis match not featuring his/her favourite player. Immediacy and low substitution result in a relatively inelastic demand curve for certain events that become very valuable for broadcasters. Furthermore, even if we are talking about exactly the same content (news, for example) and exactly the same source (for example, a newspaper), there are still differences in the way the news are selected, presented and interpreted⁶⁶. Finally, it is more dangerous to lose a non-substitutable product than for two close substitutes to merge.

For the above reasons, traditional market definition exercises normally result in relevant market definitions that are generally much narrower than those of a market defined on pluralist grounds. Clearly, the fact that there would be potentially different market definitions causes trouble. Although this is a valid argument, it should be noted that market definition is only *instrumental* in providing circumstantial evidence of market power. If it is possible to ascertain dominance directly, then there is no imperative to delimit relevant markets (KÜHN, 2002:5-6). The joint determination of market definition and market power, instead of insisting on a mechanical two-step exercise of market definition and market share assessment, could be explored in connection with media markets.

This brings me to the question of what *market power* in the media is and how can it be measured. Traditional approaches to market power fail to address problems of dominance and influence over opinion forming. As Hardy has commented:

⁶⁶ Most people would not find two newspapers with different editorial voices (i.e., The Times and The Guardian) substitutable, even if the news reported is essentially the same.

"In assessing market power through economic considerations, competition law is unable to grasp more complex operations of cultural or symbolic power, which the regulation of media (and now multi-media) pluralism has traditionally sought to address." (HARDY, 2001: 15).

We have to ask a fundamentally dogmatic question: should we accept traditional definitions of dominance or is there any distinct separate and reliable media specific measure? Could we for instance consider the idea of 'opinion power' enjoyed by the firm in the 'marketplace of ideas'?

Depending on our approach to market power in the media, the competitive outcomes may again differ. For instance, we could have a situation whereby a company does not enjoy market power in the market for digital television, for example, but is part of a wider conglomerate with a strong presence in other media such as radio and newspapers, thereby potentially having the capacity to silence certain speakers and/or to influence the public discourse. In such cases, cross-ownership then becomes a major issue. As GIBBONS (1999:169) points out:

"[...] accumulations of power in many markets give strategic advantages and increase the possibility that audiences will be subject to similar content in different markets. For an audience generally, there appears to be a choice but, if it takes a selection of materials whose content originates from the same source, the choice is illusory, being one of medium and presentation only [...]. The presence in many markets creates what is a leverage of credibility [...]"

The problem with the inclusion of these 'related-markets' in a competition evaluation is that the determination of 'opinion power' would remain vague, broad and probably prophetic, and hence may be unjustified. Another problem is that competition policy only concentrates on the 'abuse' of power. How can a consensus be reached on what constitutes an abuse of 'opinion power'? How can a competition authority decide whether a restriction in output is censorship or fair exercise of editorial independency, without risking infringing the right of freedom of expression? Ultimately, this type of exercise inevitably requires a considerable degree of subjectivity.

Re-thinking the limits of competition law?

In the light of the above methodological difficulties with respect to market definition and market power, it is difficult to see pluralism becoming an objective of competition law. However, I would not infer from this that competition should be free from pluralism concerns. In the same way that

industrial policy or environmental policy concerns are balanced, the impact on media policy needs to be considered. Dissent with current mainstream approaches is based on a concern for wider issues than economic welfare. Although I support the idea that the use of an indirect policy instrument (for instance, competition law) to achieve a given end (income redistribution, targets of industrial policy) is both inefficient and socially costly when an effective and direct instrument is available, I would still like to make two points.

First, that Community competition law is sufficiently dynamic and flexible to embrace more than just economic considerations. The application of competition principles is not an end in itself, but a tool which can be used to help achieve the fundamental aims of the Community. I firmly believe that media pluralism is a fundamental aim of the Community. Besides, competition policy does not operate in a vacuum and has to take into account its repercussions in other areas of Commission policy, including media policy. European competition law is set in a particular economic, social and political context. It is naïve to pretend that any competition authority would ignore this and carry out a purely economic analysis. Such an approach is also unfortunate as it ignores much of the history, development and potential of Community competition law.

The second point is that support of other 'more direct' instruments is, as a matter of fact, dependent upon the actual *feasibility* of those other instruments. At the European level, unfortunately, the lack of competence to regulate for broadcasting considerably restricts the margin for manoeuvre of European institutions to come up with complementary regulations to fill gaps and achieve those goals that will inevitably escape competition law enforcement. The Council of Europe has recommended that "the general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector"⁶⁷. This recommendation is valid for European competition authorities too.

Without advocating a multi-purpose use of competition law as the optimal vehicle to advance all public interest in terms of media objectives, I still take the view that it is possible, desirable and legitimate for competition law to openly take media pluralism into consideration. This could be achieved by

⁶⁷ See Recommendation no. R. (99) 1 of the Committee of Ministers to MS on Measures to Promote Media Pluralism, 19 January 1999.

putting a stronger emphasis on issues other than price, for instance on analysis of its impact on quality and choice. If the concern is the power to negatively affect consumer choices, then market power in the media should combine both *power over content* and power over price⁶⁸. This is precisely the concern of the free speech philosopher C.E. BAKER (2002), who has explored the potential of an antitrust law informed by non-economic, media-specific considerations. He fears that concentrated power over content choices made available to audiences might escape the antitrust paradigm entirely if there is no power over price. He nevertheless concludes that even a broad interpretation of antitrust law is unlikely to embody democratic concerns of assuring maximum participation in the 'marketplace of ideas'.

Given that the difficulties of using pluralism as a measure are certainly not negligible, there will always be limits to the discretion of a competition authority. Certain media public policy objectives cannot necessarily, or most efficiently, be achieved through competition law, but rather through the use of other regulatory instruments. That is why the need for sector-specific regulatory measures will remain. In some countries, where competition law and policy include one or more public interest objectives, these measures take the form of a 'general public interest test' in the authorisation procedure for anticompetitive mergers⁶⁹, or of a 'public interest' ministerial over-ride⁷⁰, sometimes limited to mergers⁷¹ (or, in the case of Ireland, just media mergers⁷²). As has been pointed out already, the problem in European digital broadcasting is the lack of a sufficiently strong regulatory alternative at the EU level. Current regulatory restrictions are weak and in the absence of common ownership regulation there is consequently no adequate European response to the impact of media mergers on the European marketplace of ideas. This brings me to my final point: the need for a stronger EU competence to regulate for media pluralism.

⁶⁸ AVERITT & LADE (1997) elaborate on this point.

⁶⁹ Particularly interesting is the way it has been instrumented in the UK, alongside the creation of Ofcom.

⁷⁰ I.e. Spain.

⁷¹ I.e. Germany, the Netherlands.

⁷² See Irish Competition Act, 2002, Section 23 (10).

A stronger EU competence in broadcasting

Under the EC Treaty, there is currently little scope for a European competence to deal with media pluralism, which is not even mentioned as such. However, with the progressive strengthening of European institutions, the competence balance originally drafted in 1950 has shifted. Community law has gradually restricted the capacity of member states to regulate their media. Yet, neither the *TVWF* Directive nor the *MR* have proved completely capable of tackling enduring threats to pluralism. In a perhaps illegitimate attempt to address this deficit, the Commission explored the possibility of passing a specific directive on information pluralism during much of the nineties, but, as I explained earlier, it ostensibly failed to do so.

However, the issue is by no means in the Brussels' dustbin. In November 2002 the Parliament called on the Commission to launch a broad and comprehensive consultation process to assess the development of new communications, and notably the impact of mergers on the internal market and media pluralism⁷³. The Commission was also requested to submit an appropriate proposal to the European Convention so that, 'the principle of freedom of the media may be given a stronger basis in the Treaty'⁷⁴. More recently, the Parliament, naturally worried about the 'peculiar' situation in Italy, published a report requesting the Commission to take action and address the issue of pluralism at a European level⁷⁵. In the recent *Green Paper on services of general interest* the Commission recognised that:

'Whilst the protection of media pluralism is primarily a task for the Member States, it is for the Community to take due account of this objective within the framework of its policies'⁷⁶.

Media pluralism is therefore not only a prerogative of member states, but also, and within its fields of competence, a *responsibility* of the EU. The explicit reference in the EU Charter of Fundamental Rights to 'freedom and pluralism of the media'⁷⁷ and, if adopted, the European Constitution, reinforce this responsibility.

⁷³ European Parliament resolution on media concentration, November 20th 2002, PE 325.103.

⁷⁴ *Ibid* at 6.

⁷⁵ European Parliament report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) Final A5-0230/2004, 5 April 2004.

⁷⁶ See Commission's Green Paper on services of general interest, COM(2003) 270 final, at p. 45.

⁷⁷ See Article 11.2 of the Charter of Fundamental Rights of the European Union.

Although doubts may remain regarding the most appropriate and/or effective ways to address the challenge of media pluralism, what cannot be ignored is that, in a context of an ever more closely integrated Union, the issue of pluralism has transcended national borders and will need to be jointly addressed by all member states. The capability of national authorities to deal with cross-national and cross-sectoral developments is increasingly threatened. Whilst pluralism issues remain an exclusively national competence, national regulators have been often confronted with over-spills of broadcasting across borders and are finding it difficult to maintain pluralism in their domestic markets, especially when they deal with international media conglomerates whose national affiliations are weak (FEINTUCK, 1997). Even if analogue commercial television continues to be dominated by home-grown companies at present, this is not the case for digital pay-television, the film, the music industry, advertising or the internet, which have seen their capital bought up by regional and international owners. Programme rights are no longer sold in a fragmentary way for each national market, but often on a European scale. On top of this, concentrations between already powerful players are increasingly tolerated and perceived by the Commission as inevitable. The question of the European competence for broadcasting regulation needs to be addressed sooner rather than later.

■ Conclusion

Competition authorities are currently major players in engineering the development of digital communications markets. I have shown how competition law often functions as a 'laboratory for regulation', anticipating developments and pre-empting certain regulatory options. In doing that, competition law authorities reveal their underlying assumptions with respect to how the market should be regulated (LAROUCHE, 1998). If the market at stake is the media, it seems reasonable to expect that the impact on pluralism be taken into consideration. Now, if we believe that the legitimacy of a competition authority to do so is questionable, then this could be assessed separately by a different independent authority (for example another Directorate or perhaps a network of representatives from media regulatory authorities from the member states, who could produce a binding report), but still *within* the EC competition law procedures.

I believe the idea of a media-responsive competition law complemented by solid European-based regulatory strategies is worth considering. This solution would inevitably mean reassessing the limits of the European competence in this field. The question is whether any added value can be created by EC intervention, that is, if Community action is *necessary* (because member states are not in a position to intervene effectively) and *useful* (the objectives are more easily attainable by action at Community level). The distribution of competences in the media arena should not be a power struggle between member states to avoid interference by the Community. It is not an 'either or' question. On the contrary, action by the EU should support and supplement member states and vice-versa (WEATHERILL, 2003). Both levels of governance are complementary and mutually reinforcing and the benefits of such cooperation in the media field should not be underestimated.

I fear that there is still little political will to address this issue. What is more unlikely: that MS consent to a EU competence for broadcasting or that competition law takes up pluralism as a fundamental objective to be achieved in media markets, with the blessing of economists? I have no answer. However, a continued rigid division in the allocation of competences, together with a narrow approach to competition law in the media are likely to prove damaging in the long run. I believe that, in the light of the changes that have accompanied the digital revolution of the last decade, the moment has come to re-open the debate at the very least.

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