POLICY ROUNDTABLES

Media Mergers

2003

Introduction

The OECD Competition Committee debated media mergers in May 2003. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt for the OECD, written submissions from Australia, Austria, Brazil, Canada, Czech Republic, Denmark, the European Commission, Finland, Germany, Ireland, Israel, Japan, Mexico, Spain, Chinese Taipei, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

Reviewing media mergers may be more complicated than reviewing other mergers because of the huge variety of possible media content and the two-sided market aspect of many media, i.e. those earning advertising revenue. A wide variety of content means that market definition is rendered more complex.

The two-sided market characteristic has important and sometimes far from obvious impacts on how mergers affect economic efficiency, media plurality and content diversity. Vertical integration can produce real efficiencies in media markets notably when it eliminates a double-marginalisation problem but it can sometimes create competition problems as far as access to content and final delivery to the consumer are concerned.

Adequate trade off between economic welfare and non-economic effects on social welfare, e.g. on pluralism, which are two separate goals, are difficult to make in reviewing media mergers. Although competition authorities tend to protect pluralism, most often they are reluctant to include pluralism considerations in merger reviews as they want to preserve their reputation for objectivity and evenhanded.

Behavioral remedies which are more frequently applied than divestiture impose high enforcement costs on competition authorities.

Related Topics

OECD Council Recommendation on Merger Review (2005)
The Objectives of Competition Law and Policy (2003)
Regulation and Competition Issues in Broadcasting in the Light of Convergence (1999)

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MEDIA MERGERS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Media Mergers which was held by the Competition Committee in May 2003.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled “Competition Policy Roundtables”.

PRÉFACE

Ce document rassemble la documentation dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur les fusions dans les médias, qui s’est tenue en mai 2003, dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l’OCDE, afin de porter à la connaissance d’un large public les éléments d’information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegate submissions and the background paper, a number of key points emerge:

(1) Market definition in media markets is a particularly difficult and time consuming exercise. Nevertheless, market definition and market share analysis is as necessary in reviewing media mergers as in reviewing any other mergers.

Market definition in media markets is especially complex because of: a multiplicity of products; pervasive price discrimination (including versioning) and bundling; rapid change; and sometimes an absence of transactions (due to vertical integration) and prices (as in free-to-air broadcasting)

Despite apparent difficulties, there appears to be considerable similarity across jurisdictions in market definition methodology and in resulting definitions.

(2) Due to significant first mover advantages and two-sided market effects, media markets sometimes manifest positive feedback cycles and downward spirals that need to be taken into account when predicting the effects of a merger.

One of the best examples of first mover advantages, seen in a number of country submissions, arises in pay-TV markets. The pay-TV company with an initial lead in share of subscribers may be in a favoured position to obtain exclusive rights to the premium movie and sports content critical to building market share. Exclusive rights to particularly desirable content could translate into a rapid growth in market share thus increasing the initial advantage in obtaining exclusive rights, and the positive feedback cycle would grow stronger. Mirroring this positive feedback cycle is a downward spiral by other pay-TV companies who are placed at a growing disadvantage compared to the first mover.

There could also be a positive feedback cycle/downward spiral effect in two-sided media markets, i.e. media supported at least in part by advertising revenue. Daily newspapers carrying advertisements are a good example of this. A newspaper's initial edge in content quality could translate into a larger readership which in turn would normally lead to higher advertising revenues both in an absolute and a per reader sense. The greater revenues would permit the newspaper to either increase its content quality edge and/or lower its newsstand and subscriber prices. The result of those moves would typically be a further increase in the number of readers and so on.

The positive feedback cycle/downward spiral effects in media might justify making upward or downward adjustments in market shares before using them to make preliminary assessments of a media merger's potential to harm competition. Alternatively, one could simply recognise that market shares may be a less reliable preliminary indicator of market power in two-sided media markets as compared with markets not subject to positive feedback cycle/downward spiral effects.

(3) In two-sided media markets, one cannot assess the impact of a merger on one side without taking into consideration effects on the other. Difficult trade-offs might be unavoidable.

In two-sided markets, suppliers compete on price structures as well as price levels. For example, some newspapers carry little advertising and charge relatively high subscriber and newsstand prices. Others may carry a great deal of advertising and charge relatively low subscriber and newsstand prices. A merger could lead a media firm to change its price structure, and that means some media mergers might improve welfare on one side of the market while reducing it on the other, sometimes for paradoxical reasons.

Consider, for example, free-to-air TV. Provided most viewers do not like advertising, it could happen that a merger reducing viewer choices could permit a post-merger increase in the advertising/content ratio and reduced welfare for the viewers disliking advertising. The resulting increase in advertising time on offer could simultaneously mean that television advertising prices decline despite what seems to be a less competitive advertising market.

(4) Vertical integration and associated risks of foreclosure can be an important concern in some media mergers. Remedies in problematic cases are often behavioural in nature as competition authorities try to eliminate anti-competitive effects while permitting the parties to reap substantial efficiencies.

There are several reasons why vertical integration could produce real efficiencies in media markets. Reduced transactions costs are an obvious one, but there is also the contribution vertical integration could make to efficient price discrimination, an important factor in an industry where fixed costs are an unusually high percentage of total costs. In addition, vertical integration can increase economic welfare when it eliminates a double-marginalisation problem. Such a problem could arise, for example, if a monopolist cable TV operator is negotiating for critical sports content from a seller with market power.

The competition problems sometimes associated with vertical integration in media largely have to do with access to content and final delivery to the consumer. As in other industries, competition authorities will have to make predictions about how markets will likely evolve and what consumers may be able to do to protect themselves if foreclosure actually materialises. An apparent ability to reduce competition may not translate into a profitable post-merger strategy. The rapidly changing nature of the media, including convergence trends, will have an important bearing on all this and could well affect both the analysis of competitive effects and the remedies fashioned.

Divestitures are one way to reduce foreclosure risks in media mergers. Behavioural remedies are another and might sometimes offer a more customised, efficiency preserving approach to avoiding potential problems. For example, if a merger gives a TV broadcaster control over a major premium content producer, that broadcaster could be required to deal in a non-discriminatory fashion with other content purchasers. In rare cases, it might also be necessary to require the TV broadcaster to purchase a minimum share of its content from independent producers in order to preserve competition in the content market.[1]

Although attractive in terms of reducing government interference in rapidly changing markets and of offering a customised approach to preserving efficiencies, behavioural remedies may suffer from the disadvantage of imposing high monitoring and other enforcement costs on competition authorities. This is especially pertinent if it is expected that the behavioural remedy will have to be altered as market conditions change. The advantages of such flexibility have to be weighed against the associated administrative costs.

(5) Media mergers could affect content diversity and quality, and could do so in ways that present competition authorities with awkward trade-offs.

In addition to possible effects on advertising/content ratios, media mergers can have other important effects on non-price dimensions of economic welfare such as content diversity, and general quality of the text, images and/or presentation. Media mergers can also have significant non-economic effects on social welfare, e.g. on pluralism.

Diversity, as the term is used here, refers to the variety of available *content*, whereas pluralism is reserved for describing the number and nature of *independent providers* of media services on the market.

To the extent content consumers are heterogeneous in tastes and preferences, media companies have an incentive to offer differentiated content to increase what consumers are willing to pay and to avoid competing on price. The profitability of such differentiation is strongly influenced, as in other markets, by economies of scale and competition considerations. For media companies in two-sided markets there is a further very important variable in the equation.

Given the offsetting incentives, it is difficult to predict how a media merger will affect diversity. Suppose, though, that diversity would be reduced, would that be a good reason to block it? Not necessarily. A reduction in diversity could induce greater reliance on price competition that may benefit consumers even more than the lost diversity did. In addition, a decline in diversity could be inseparable from increases in general quality made possible through reaping greater economies of scale. This means there could be another difficult trade-off to make, this time extending across different consumer groups. Consumers with main line tastes may not mind giving up diversity if that means higher quality in main line programming and/or a lower price, but those with more esoteric tastes could be net losers from the merger-induced change.

(6) The difficulties inherent in measuring diversity and quality, and in predicting how a merger might affect them is not a good justification for ignoring them in merger review. This is especially true if there is little or no sector regulation dealing with these matters.

The non-price effects of media mergers can have just as significant an impact on economic welfare in media markets as they have in other markets. It is quality-adjusted changes in prices that are pertinent for determining effects on economic welfare.

There could be jurisdictions where diversity and quality are so tightly regulated, through detailed content rules for instance, that competition authorities can justifiably assume that media mergers will leave diversity and quality unchanged or even improved. Absent such regulation, there is no *a priori* reason why the diversity and quality effects of media mergers should not be examined by competition authorities when diversity and quality changes have a direct effect on economic welfare.

(7) Economic welfare and pluralism are separate rather than coterminous goals, and there could be difficult trade-offs that need to be made between them in media merger reviews. Competition authorities will tend to protect pluralism whenever they block anti-competitive media mergers, but even media mergers not harming competition may sometimes harm pluralism.

The concern to protect pluralism is rooted in non-economic considerations having to do with supporting and preserving democracy and the rule of law by ensuring a multiplicity of voices are heard in the “marketplace of ideas”.

If pluralism is measured simply by the number of independent voices present in the marketplace of ideas, then merger review will protect pluralism whenever it results in blocking a media merger. In this simplified world though, maximising pluralism would suggest blocking all media mergers including those which are neutral in their competitive effects or even pro-competitive. Such a policy would merit close scrutiny.

From the social welfare perspective, it might make little sense to maximise either pluralism or economic welfare without regard to effects on the other goal. For competition authorities mandated to include pluralism in reviewing a merger, trade-offs would seem to be a better policy as long as the resulting flexibility does not unduly increase business uncertainty.

(8) There are at least two ways to deal with the issue of potentially diverging economic welfare and pluralism goals in media mergers, but there is no consensus on which is best.

One way to proceed would be to follow a division of labour approach, i.e. have the competition authority pay attention only to economic welfare, and the media regulator consider only other matters including pluralism. Under this approach, media mergers which reduce substantially either economic welfare or pluralism would presumably be blocked. Beyond that, it is difficult to predict the impact on both goals. Canada basically follows a division of labour approach, while the United States follows a variant of it. In the United States, the Federal Communication Commission considers effects on "diversity" (including pluralism) and local control, but looks as well at effects on competition whereas the United States Department of Justice is concerned only with the effects on competition of a merger

Another way is to require the competition authority to take direct account of pluralism issues in their merger reviews, or at least to formally assist the final decision-maker in assessing both competition and pluralism concerns. Examples of this approach can be found in Spain, Austria, the United Kingdom, and Ireland.

Judging from the country contributions to the roundtable, competition authorities are often reluctant to include pluralism considerations in merger reviews or even to advise concerning them. This reluctance is sometimes explained by referring to measurement difficulties, and a lack of synergy in terms of the expertise required to assess economic and pluralism effects. There are also concerns to safeguard a competition authority's independence from political pressure and to preserve its reputation for objectivity and even-handed dealing.

NOTE

1. This should rarely be a concern because the broadcaster will normally have a strong interest in enhancing its ratings by purchasing a variety of the best content available.

SYNTHÈSE

par le Secrétariat

Un certain nombre de points essentiels ressortent des débats de la table ronde, des contributions des délégués et du document de référence :

(1) La définition du marché dans le secteur des médias est un exercice particulièrement difficile qui demande beaucoup de temps. Néanmoins, la définition du marché et l'analyse des parts de marché sont aussi nécessaires à l'examen des fusions dans ce secteur que dans n'importe quelle autre branche d'activité.

La définition du marché dans le cas des médias est particulièrement complexe en raison de la multiplicité des produits, de l'ampleur des phénomènes de discrimination par les prix (y compris la déclinaison de produits sous différentes versions) et de ventes groupées; des mutations rapides et parfois de l'absence de transactions (due à une intégration verticale) ou de prix (comme dans la télévision gratuite).

Malgré ces difficultés apparentes, il semble qu'il y ait une grande similitude dans les méthodologies de définition du marché utilisées par les divers pays et dans les définitions correspondantes.

(2) En raison des avantages importants pour le premier à prendre l'initiative, les effets de la dualité des marchés, le secteur des médias connaît parfois des phases de cercle vertueux et des spirales de baisse qu'il convient de prendre en compte lorsqu'il s'agit de prédire les effets d'une fusion.

L'un des meilleurs exemples des avantages du premier à prendre l'initiative, que l'on évoque dans un certain nombre de contributions de pays, réside dans les marchés de la télévision payante. La société de télévision payante qui est la première à prendre l'avantage du point de vue du nombre d'abonnés peut être en position favorable pour obtenir des droits exclusifs sur des contenus cinématographiques ou sportifs de haute valeur, ce qui est essentiel pour se constituer une part de marché. Les droits exclusifs sur la diffusion de contenus particulièrement appréciés peut se traduire par une expansion rapide de la part de marché, ce qui accentue encore l'avantage initial consistant à obtenir des droits exclusifs et le cercle vertueux va s'amplifier encore. En contrepartie de ce cycle positif, on observe une spirale de baisse pour les autres sociétés de télévision payante qui sont de plus en plus désavantagées par rapport au premier à prendre l'initiative.

On peut aussi observer un phénomène de cercle vertueux et de spirale de baisse sur les marchés des médias à caractère dual, à savoir les médias financés au moins en partie par les recettes publicitaires. Les quotidiens comportant des publicités en sont un bon exemple. L'avantage initial d'un quotidien que lui procure la qualité de son contenu peut se traduire par un élargissement de son lectorat qui va lui-même aboutir à une augmentation de ses recettes publicitaires en termes absolus aussi bien que par lecteur. Ces recettes supérieures permettent dès lors au quotidien d'accentuer son avantage en termes de qualité du contenu et/ou de baisser ses prix en kiosque ou par abonnement. Le résultat de ces initiatives doit normalement être une nouvelle augmentation du nombre de lecteurs, etc.

Les effets de cercle vertueux/spirales de baisse dans les médias pourraient justifier des corrections à la hausse ou à la baisse des parts de marché avant de les utiliser pour une première évaluation du risque potentiel pour la concurrence d'une fusion entre médias. Autre solution, on pourrait simplement admettre que les parts de marché constituent sans doute un indicateur préliminaire moins fiable de la puissance sur le marché pour les médias à caractère dual que sur des marchés ne connaissant pas d'effets de cercle vertueux ou de spirale de baisse.

(3) Sur des marchés de médias à caractère dual, on ne peut pas évaluer l'impact d'une fusion sur un versant du marché sans prendre en considération les effets sur l'autre versant. Des arbitrages délicats sont sans doute inévitables.

Sur des marchés à caractère dual, les fournisseurs se concurrencent sur la structure comme sur le niveau des prix. Par exemple, certains journaux n'ont que peu de publicité et facturent des prix de vente par abonnement ou en kiosque relativement élevés. D'autres peuvent comporter un volume important de publicité et facturer des prix en kiosque ou par abonnement relativement faibles. Une fusion pourrait amener une entreprise de médias à modifier sa structure de prix et cela signifie que certaines fusions dans les médias peuvent apporter plus de bien-être sur un versant du marché tout en réduisant ce bien-être sur l'autre versant, parfois pour des raisons paradoxales.

Prenons l'exemple de la télévision gratuite. Si les téléspectateurs n'aiment pas la publicité, il peut arriver qu'une fusion réduisant le choix des téléspectateurs permette une augmentation, postérieure à la fusion, du ratio publicité/contenu et réduise le bien-être des téléspectateurs n'aimant pas la publicité. L'augmentation correspondante du temps de publicité proposé peut en même temps signifier que les prix de la publicité à la télévision diminuent malgré ce qui semble correspondre à une réduction de la concurrence sur le marché de la publicité.

(4) L'intégration verticale et les risques associés d'exclusion peuvent s'avérer particulièrement préoccupants dans certaines fusions de médias. Les solutions dans ces dossiers problématiques sont souvent de caractère comportemental car les autorités de la concurrence cherchent à en éliminer les effets anticoncurrentiels tout en permettant aux parties en présence de profiter d'efficiences substantielles.

L'intégration verticale dans les marchés des médias peut produire des efficiences réelles pour plusieurs raisons. La réduction des coûts de transaction en est évidemment une, mais il y a aussi la contribution que l'intégration verticale peut apporter à une discrimination efficiente des prix, facteur important dans un secteur dans lequel les charges fixes représentent un pourcentage particulièrement élevé du total des coûts. En outre, l'intégration verticale peut améliorer le bien-être économique lorsqu'elle élimine un problème de double marginalisation, problème qui se pose par exemple si un opérateur de télévision par câble en situation de monopole négocie l'achat de contenu sportif essentiel auprès d'un vendeur doté d'une puissance sur le marché.

Les problèmes de concurrence parfois associés à l'intégration verticale dans les médias concernent dans une large mesure l'accès au contenu et la prestation finale au consommateur. Comme dans d'autres secteurs, les autorités de la concurrence vont devoir faire des pronostics sur la façon dont les marchés sont susceptibles d'évoluer et sur ce que les consommateurs peuvent faire pour se protéger si une exclusion vient effectivement à se matérialiser. La capacité apparente à réduire la concurrence peut ne pas se convertir en une stratégie rentable après la fusion. La rapidité de l'évolution des médias, notamment les tendances à la convergence, vont exercer une influence considérable sur tous ces aspects et risquent fort d'affecter aussi bien l'analyse des effets sur la concurrence que les solutions élaborées pour y répondre.

Les désinvestissements sont un moyen de réduire les risques d'exclusion lors de fusions de médias. Les solutions comportementales en sont un autre et peuvent parfois, pour prévenir les problèmes potentiels, offrir une approche plus adaptée, de nature à préserver l'efficience. Par exemple, si une fusion donne à un diffuseur de télévision le contrôle sur un grand producteur de contenus de haute valeur, ce diffuseur peut être tenu de négocier avec d'autres acheteurs de contenu. Dans de rares cas, il peut aussi être nécessaire d'imposer au diffuseur de télévision d'acheter une part minimale de son contenu auprès de producteurs indépendants afin de préserver la concurrence sur le marché du contenu.[1]

Bien qu'elles soient intéressantes sous l'angle de la réduction de l'intervention des pouvoirs publics sur des marchés en mutation rapide et d'une démarche taillée sur mesure de préservation des efficiences, les solutions comportementales risquent de souffrir de l'inconvénient d'imposer aux autorités de la concurrence un suivi considérable et d'autres coûts de respect de la discipline. C'est particulièrement vrai, si l'on s'attend à devoir modifier la solution comportementale à mesure de l'évolution des conditions sur le marché. Les avantages de cette souplesse doivent donc être mis en regard des coûts correspondants d'administration.

(5) Les fusions de médias peuvent affecter la diversité et la qualité des contenus et ce, selon des modalités qui placent les autorités de la concurrence face à des arbitrages délicats.

Outre les effets possibles sur les ratios publicité/contenu, les fusions de médias peuvent avoir d'autres effets importants sur des aspects hors prix du bien-être économique comme la diversité des contenus et la qualité générale des textes, des images et/ou des exposés. Les fusions de médias peuvent aussi avoir des effets non économiques sensibles sur le bien-être social, par exemple, sur le pluralisme.

La notion de diversité, au sens où elle est utilisée ici, fait référence à la variété du *contenu* disponible, alors que celle de pluralisme sera réservée à la description du nombre et de la nature des *prestataires indépendants* de services de médias sur le marché.

Dans la mesure où les consommateurs de contenus sont hétérogènes par leurs goûts et leurs préférences, les sociétés de médias ont intérêt à proposer des contenus différenciés pour accroître le montant que les consommateurs sont disposés à payer et pour éviter la concurrence sur les prix. La rentabilité de cette différenciation est fortement influencée, comme sur d'autres marchés, par des considérations relatives aux économies d'échelle et à la concurrence. Pour les sociétés de médias intervenant sur des marchés à caractère dual, l'équation présente une autre variable très importante.

Compte tenu de la tendance des incitations à se compenser, il est en effet difficile de prédire la façon dont une fusion de médias va affecter la diversité. À supposer, cependant, que la diversité soit réduite, existerait-il une bonne raison de bloquer la fusion ? Pas nécessairement. Une réduction de la diversité pourrait amener les sociétés à recourir plus fortement à la concurrence par les prix, ce qui serait encore plus avantageux pour les consommateurs que ne l'était la diversité perdue. En outre, un recul de la diversité pourrait être inséparable d'augmentations de la qualité générale rendue possible par l'exploitation de nouvelles économies d'échelle. En d'autres termes, il pourrait y avoir là un autre arbitrage délicat, concernant cette fois différents groupes de consommateurs. Les consommateurs affichant les goûts du plus grand nombre peuvent ne pas être gênés de renoncer à la diversité si cela signifie une augmentation de la qualité des programmes grand public et/ou une baisse des prix, mais ceux qui ont des goûts plus ésotériques risquent d'être les perdants nets d'un changement induit par une fusion.

(6) Les difficultés inhérentes à la mesure de la diversité et de la qualité et au pronostic sur la façon dont une fusion peut les affecter ne justifient pas pour autant de les ignorer lors de l'examen d'une fusion. C'est particulièrement vrai si la réglementation sectorielle traitant de ces questions est limitée voire inexistante.

Les effets hors prix des fusions de médias peuvent avoir un impact tout aussi important sur le bien-être économique dans les marchés des médias que sur d'autres marchés. Ce sont les modifications des prix corrigées de la qualité qui sont pertinents pour déterminer les effets sur le bien-être économique.

Il peut y avoir des pays ou territoires dans lesquels la diversité et la qualité sont si étroitement réglementés, par exemple au moyen de dispositions précises sur les contenus, que les autorités de la concurrence peuvent légitimement considérer que les fusions de médias ne modifieront pas, voire amélioreront la diversité et la qualité. En l'absence de telles règles, il n'y a *a priori* aucune raison pour que les effets des fusions de médias sur la diversité et la qualité ne soient pas examinés par les autorités de la concurrence lorsque des changements de la diversité ou de la qualité ont un effet direct sur le bien-être économique.

(7) Le bien-être économique et le pluralisme sont des objectifs distincts plutôt que codéterminés et il pourrait y avoir des arbitrages délicats entre ces objectifs lors de l'examen de fusions dans les médias. Les autorités de la concurrence vont avoir tendance à protéger le pluralisme chaque fois qu'elles bloquent des fusions de médias anticoncurrentielles, mais même des fusions ne portant pas préjudice à la concurrence peuvent parfois nuire au pluralisme.

Le souci de protéger le pluralisme est profondément lié à des considérations non économiques dans un effort pour soutenir et préserver la démocratie et l'état de droit en garantissant que de multiples voix puissent se faire entendre sur le « marché des idées ».

Si le pluralisme est simplement mesuré par le nombre de voix indépendantes sur le marché des idées, le contrôle des fusions protégera le pluralisme chaque fois qu'il décidera de bloquer une fusion de médias. Dans ce monde simplifié cependant, le souci de maximiser le pluralisme inciterait à bloquer toutes les fusions de médias, y compris celles qui sont neutres dans leurs effets sur la concurrence, voire positives pour la concurrence. Une telle politique mériterait d'être étudiée de plus près.

Du point de vue du bien-être social, maximiser soit le pluralisme soit le bien-être économique sans tenir compte des effets sur l'autre objectif n'a guère de sens. Pour les autorités de la concurrence qui ont pour mission de tenir compte du pluralisme lors de l'examen d'une fusion, il semblerait plus judicieux de procéder à des arbitrages dès lors que la flexibilité qui en résulte n'accroît pas inutilement l'incertitude pour les entreprises.

(8) Il y a au moins deux façons de traiter la question de la divergence potentielle entre les objectifs de bien-être économique et de pluralisme dans les fusions de médias, mais il n'y a pas de consensus pour désigner celle qui est la meilleure.

Une façon de procéder peut résider dans une démarche de division du travail, à savoir que l'autorité de la concurrence ne se préoccupe que du bien-être économique, tandis que l'autorité de tutelle des médias ne prend en compte que les autres aspects, dont le pluralisme. Dans le cadre de cette approche, les fusions de médias qui réduisent sensiblement le bien-être économique ou le pluralisme devraient normalement être bloquées. Au-delà, il est difficile de prévoir l'impact d'une fusion sur les deux objectifs. Pour l'essentiel, le Canada suit une démarche de division du travail, tandis que les États-Unis suivent une variante de cette démarche. Aux États-Unis en effet, la Federal Communication Commission examine les effets sur la « diversité » (y compris le pluralisme) et le contrôle du marché local, mais aussi les effets sur la concurrence tandis que le ministère de la Justice ne se préoccupe que des effets d'une fusion sur la concurrence.

Une autre voie consiste à imposer à l'autorité de la concurrence de tenir directement compte des questions de pluralisme dans leur examen des fusions ou au moins à assister formellement l'instance prenant la décision finale pour évaluer les questions de concurrence comme de pluralisme. On trouve des exemples de cette démarche en Espagne, en Autriche, au Royaume-Uni et en Irlande.

À un juger par les contributions des pays pour la table ronde, les autorités de la concurrence sont souvent réticentes à tenir compte de considérations de pluralisme dans l'examen des fusions, voire à donner des conseils dans ce domaine. Cette réticence est parfois expliquée en évoquant les difficultés de mesure, ainsi que l'absence de synergie sur le plan des compétences nécessaires pour évaluer les effets économiques ou les effets sur le pluralisme. Il y a aussi le souci de préserver l'indépendance de l'autorité de la concurrence et sa réputation d'objectivité et d'impartialité.

NOTE

1. Cela ne devrait que rarement poser de problème, parce que le diffuseur aura normalement tout intérêt à améliorer son audience en achetant tout un éventail des meilleurs contenus disponibles.

BACKGROUND NOTE

by the Secretariat

> The question of who owns our newspapers, television and radio is vital to democracy. The information and opinion we draw on must reflect a range of different voices and views if we are to be able to understand and debate the issues of the day. The Government's task is to create a framework for media ownership which protects that plurality of voices and encourages a diversity of content whilst, at the same time, promoting the most competitive market for media businesses and attracting new investment.[1]
>
> Newspapers and broadcasters are not simple firms reducible to profit-generating equations but rather are large, complex social, cultural, and political institutions, and they need to be analyzed through an institutional economic model that takes into account externalities, both positive and negative, that have an impact on the public welfare.[2]

1. Introduction and key points

Few would dispute that competition law should be applied to media mergers to ensure consumers and advertisers are not over-charged or experience quality degradation because of a merger. There is considerable debate, however, about what sort of customized approach might be necessary to deal with special public policy interests arising in the media. Populations derive significant benefits through access to a wide range of political views and cultural offerings. These constitute important externalities that are not fully taken into account by persons consuming media products and advertisers seeking to reach them. Most countries have used subsidies and/or public ownership plus various regulations to ensure that favourable media externalities are preserved at a higher level than would otherwise be the case.

Media, as the term is used in this paper, refers to means of communication used to reach large numbers of people, i.e. to facilitate communication on a one-to-many basis. It therefore includes newspapers, magazines, radio and television broadcasting, cinema and the World Wide Web ("Web"). Strictly speaking, it also encompasses books and "billboards" (outdoor advertising). To simplify matters, books and billboards will largely be ignored in this paper, and cinema will only be briefly mentioned. Most of the discussion will in fact be focused on newspapers, television and radio broadcasting (including satellite and cable broadcasting services), and the Web. These are the sectors where the majority of the difficult media merger cases have so far arisen. These are also the media most likely to raise important diversity and pluralism issues, and to involve difficult analytical issues related to "two-sided markets".

Many media are at least partly financed by advertising, and the markets pertaining to such media can accordingly be regarded as being essentially two-sided. On the one side are advertisers, and on the other, content consumers, henceforth simply referred to as "consumers". When "consumers" could lead to some confusion we will instead refer to "content consumers".

The existence of important externalities would pose less of a problem for media merger review if it were not for certain other special features of media markets. Chief among them are the enormous economies of scale associated with producing and sometimes distributing content,[3] and the two-sided nature of media markets. These two factors, together with some others, tend to increase concentration in many media markets to the point where mergers could pose significant risks for both externalities and other matters of interest to competition authorities.

This paper is intended to assist competition authorities in identifying and analyzing the special problems presented by media mergers, including pluralism issues. We will begin by surveying the special features of media markets of relevance to merger review. Market definition issues will be tackled next, followed by a focus on vertical mergers. The paper will then turn to quality, diversity and pluralism issues, and end with a brief look at remedies and some final remarks.

1.1 Key points

The two-sided nature of many media markets present special challenges for merger assessment. One cannot assess the impact of a merger on one side of the market without taking into consideration effects on the other. This includes how content consumers may be affected by expected changes in the amount of advertising they will be exposed to.

Two-sided media markets could present difficult trade-offs for competition authorities, e.g. the same merger might lower advertising rates and simultaneously raise direct and indirect costs for consumers.

Owing to a multiplicity of products, pervasive price discrimination (including versioning) and bundling, market definition in media merger review can be a very time consuming process. It can also be very difficult because of rapid change and the absence of transactions (due to vertical integration) and prices (as in free-to-air broadcasting). Market definition based on the identification and assessment of substitutes can nevertheless play an important role in merger review by facilitating a preliminary assessment of the competitive effects of media mergers based on changes in market shares, and by helping to frame the analysis generally.

Divestments and/or mandatory access provisions may be required to deal with possible foreclosure effects associated with certain vertical media mergers, but they must be sensitive to the efficiencies lying behind the widespread use of vertical arrangements found in media markets.

Despite difficulties in measuring content quality and diversity, and in predicting how media mergers might affect them, merger review should not ignore these considerations.

Merger review can make a positive contribution to preserving media pluralism, but cannot alone adequately protect it.

2. Some special features of media pertinent to merger review

2.1 High fixed costs and resulting use of value-based pricing and versioning

The content delivered over a media commonly costs a great deal in the way of fixed costs to produce and distribute, but very little in the way of marginal costs occasioned by the addition of another

consumer. This is especially true in free-to-air broadcasting, but is less applicable to newspapers and magazines where additional copy costs are more significant.

Because of enormous fixed costs, prices will not be set equal to marginal costs. Instead, media companies will have to set prices above marginal costs and likely engage in various forms of value-based pricing. Price discrimination, especially if the economies of scale lead to some degree of market power, is highly likely provided arbitraging can be prevented and differences in demand elasticities can be identified. Redesigning the format or delivery, i.e. versioning, is one way to meet both those requirements.[4] Some examples of versioning in the media, including the consumer sorting characteristic presumed to be related to willingness to pay, are indicated in the following list:[5]

Delay	Patient/impatient users
User interface	Casual/experienced users
Convenience	Business/home users
Image resolution	Newsletter/glossy users
Speed of operation	Student/professional users
Format	On-screen/printed uses
Capability	General/specific uses
Features	Occasional/frequent users
Comprehensiveness	Lay/professional users
Annoyance	High-time-value/low-time-value users
Support	Casual/intensive users

Much of the creativity in media management revolves around adding to or modifying this non-exhaustive list and finding new ways of following the "create once, place everywhere" business strategy that characterises both the content and distribution side of media businesses.

2.2 Tendency towards high concentration

Other things equal, the greater are economies of scale in relation to the potential size of the market, the higher concentration will tend to be in that market. One might therefore expect to find high concentration levels in media markets. There are other forces as well that press in the same direction, i.e. spectrum scarcity, reliance on advertising and sometimes network effects.

The amount advertisers are willing to pay for advertising time or space is based on the expected size of audience reached. This means that the concentrating tendency linked to economies of scale could be substantially reinforced in media at least partly financed through advertising revenues. This is sometimes referred to as giving rise to a "downward spiral" effect. For newspapers, this effect has been described as follows:

> The newspaper with the larger circulation will tend to attract more advertisers. As the larger newspaper's revenues increase and the smaller newspapers' revenues decline, the latter have less money to spend on news, editorial departments, features and so forth. Their quality declines thereby reinforcing the decline in circulation which in turn causes a further drop in advertisers and advertising revenues. Charging a lower rate for advertisements will not necessarily help the smaller newspapers. Advertisers look not at the rate per line charged by the newspaper but at the rate for reaching a given number of readers with that line. Advertising with the larger circulation newspaper may therefore ultimately be cheaper. The smaller newspapers thus find themselves in a downward spiral which, if it does not result in their failure, at least results in one newspaper becoming increasingly dominant.[6]

The downward spiral effect is not confined to newspapers, and it will tend to be stronger: i) the more media depend on advertising; and ii) the more their prospective consumers regard advertising as a good rather than a bad.[7] It also will depend on the degree of overlap among media, meaning the degree to which consumers patronise more than one of a number of media. To take an extreme example, consider two free-to-air television channels (A and B) that split the audience during the 21:00 to 23:00 time slot. Suppose that few if any viewers ever switch between A and B. To reach the total audience, it will be necessary to advertise on both A and B. Things would be different if viewers do not have a strong loyalty to either channel, but A regularly captures 90% of the viewers at any particular time. In that situation, advertisers may decide to patronise only channel A.

There is still another factor that could contribute to creating or maintaining high levels of concentration in media markets. This has to do with standards and network effects. A particularly good example has to do with digital platform technology. To obtain access to digital television channels provided by various channel aggregators, consumers must purchase a set-top box decoder. To the extent that channel aggregators choose not to provide inter-operability in their set-top boxes, consumers will face considerable switching costs to change aggregators. Consumers will want to choose the set-top box likely to be chosen by most other consumers in order to have access to more and better content.[8]

Spectrum scarcity has had an obvious concentrating influence on free-to-air *terrestrial based* radio and television broadcasting, but it is considerably less important for broadcasting taken as a whole.

The advent of cable television and satellite broadcasting services has greatly increased available spectrum and simultaneously provided a ready means of excluding non-payers. The relevance of the extra spectrum offered depends, though, on whether free-to-air terrestrial based radio and television broadcasting are in the same market as cable television and satellite broadcasting services, a point we come back to later when discussing market definition.

2.3 Convergence/digitalisation

A European Commission Green Paper noted that convergence was difficult to define precisely "…but is most commonly expressed as: the ability of different network platforms to carry essentially similar kinds of services; or the coming together of consumer devices such as the telephone, television and personal computer."[9]

A background paper for an OECD roundtable held in October 1998 ("OECD broadcasting paper"), noted that convergence was a result of the following developments:

- digitalisation (which allows all forms of information content, including audio and video to be handled over the same networks in the same manner);
- the fall in the price of computing (allowing the development of sophisticated and affordable consumer equipment for encoding/decoding signals and interacting with the multimedia information);
- reduced costs of bandwidth (and compression technologies which allow existing bandwidth to be used more efficiently); and
- telecommunications liberalisation (allowing new firms to enter previously protected markets)[10]

The European Commission Green Paper noted that digital compression was cost-effectively reducing capacity restraints and fostering the emergence of digital television featuring "programme bouquets and thematic channels", "near video on demand", and "pay-per-view" services.[11] Digital television has the potential to considerably improve not just picture and sound quality but the range of consumer choice as well.

Despite its apparent promise, digitalization may not deliver as much consumer benefit as initially hoped, at least not as quickly as some have anticipated and not without intervention by competition authorities to ensure that market access remains open. Digital television in particular is very expensive and risky to introduce and so far seems to be the preserve of existing well-established analogue television broadcasters.[12] In addition, digitalization appears to create a number of significant gateways or potential bottlenecks surrounding the conditional access systems, subscriber management systems, and electronic programme guides which are all necessary to enforce payment and assist the consumer in navigating through the much wider choice on offer.[13]

The OECD broadcasting paper drew out three implications of convergence. The first was a "…tendency for both broadcasters and telecommunications firms to offer high-bandwidth two-way communication services which simultaneously provides access to a number of different channels of video programming, voice telephony and access to the Internet."[14] The second related to overlap in the market for content for newspapers, television, film and Internet publishing. The third was particularly relevant to the review of media mergers:

> …convergence in the multimedia/broadcasting industry is not unambiguously expected to increase competition. Strong concerns have been raised that companies will be able to position themselves to exploit new "bottlenecks" as they arise.[15]

2.4 Extensive regulation

The spectrum scarcity issue coupled with an inability to exclude non-payers presented potential problems for diversity in broadcasting. Many countries sought to resolve these, as well as ensure satisfactory levels of pluralism, through some combination of public broadcasting and regulation of both content and ownership. The impact of cable TV, satellite broadcasting services and the Internet have undermined the apparent need for such regulation and touched off a substantial debate in many countries about liberalising broadcasting.[16] In the future there could be a considerable reduction in ownership regulation which could lead to a substantial increase in merger activity.[17]

2.5 Two-sided markets

Many media support themselves partly, some even totally, on advertising revenues. This necessarily means that antitrust analysis must focus on both advertising and consumer markets. Owing to a number of important interactions between them, the existence of "two-sided markets" has effects reaching well beyond increasing the number of markets that might need defining.[18] These can be explored by taking the perspective of a media owner.

Media owners must initially decide what general content to carry, hence define their medium's overall character or position in product space. For example, a newspaper could choose to concentrate on news, entertainment, sports, etc., or instead try to offer a bit of all those categories. A medium's position in product space could have an important impact on how much competition it will face in both the short and long run, especially if there are substantial sunk costs involved in changing that position. After selecting an overall character, a medium owner must then continually decide what specific quality and nature of content to offer in specific issues or program slots.

In making general and specific content choices, a medium owner simultaneously affects programming costs, the number and type of consumers attracted, and what they can be charged (presuming there is a charge). These content and charging decisions will have significant ramifications for advertising revenues which are the product of the expected number of media consumers exposed to advertising and what the industry refers to as the CPM, i.e. cost per thousand people exposed to the advertising.[19]

Assuming the *supply* of advertising is increasing in price, the CPM will be affected by the underlying strength of advertisers' demand which itself depends on the degree to which advertisements carried by the medium can be expected to increase advertisers' profits by influencing media consumers to spend more on the advertisers' products. This means that the CPM will be affected by the medium's typical consumer profile, i.e. per capita disposable income, age and leisure activities. In addition, if the medium enjoys any market power, its CPM will be influenced by the quantity of advertising it offers.

In making content and advertising decisions, the media owner must also pay attention to how consumers may react to the volume of advertising s/he chooses to offer. Too much advertising, at least in media where it may generally be disliked such as radio and television broadcasting, could result in reduced audience sizes and possibly lower advertising revenues (this would depend on the price elasticity of the demand for advertising). On the other hand, if advertising is liked, as may be the case in local newspapers (especially their classified advertisements), more advertising might increase the medium's number of consumers.

Rochet and Tirole (2001) stress that in two-sided markets, including advertising supported media, "platforms" must choose both a price level and a price structure. In solving the chicken and egg problem that such media face, there is a wide range of possible price structures. In media, the price structure adopted will be closely related to the advertising/content ratio. For example, a newspaper could choose to carry almost no advertising and charge a high copy cost, or carry a great deal and charge a low copy cost. Which strategy is best depends partly on how sensitive reader demand is both to copy price and to the advertising/content ratio.

Suppose one is dealing with free magazines or free-to-air broadcasting, could these be regarded as two-sided "markets" even though consumers pay nothing? Economic theorists answer in the affirmative.[20] A competition authority may disagree, especially if its law requires defining a market and courts insist that markets do not exist unless a price is paid. The problem is aggravated if a competition authority is wed to using a hypothetical *price* increase in order to identify available substitutes.

In the case of freely distributed media, merger reviewers are compelled to return to first principles. Is the objective solely to protect consumers from rising prices, or should potential deterioration in non-price dimensions such as innovation, variety and quality factors also be considered? Robert Lande, in the course of arguing that competition policy should centre on preserving consumer choice, highlights the media as one of the best examples of markets in which non-price competition clearly matters to consumers, particularly as regards range of diversity and number of editorial voices.[21] We will return to these issues when discussing pluralism concerns.

Even if the consumer does pay something, quality issues can present difficult problems in reviewing media mergers. Consider for example a merger of cinema chains in which the parties argue that the post-merger entity will finally be large enough to earn revenues through pre-show advertising.[22] This could be treated as the pro-competitive introduction of a new advertising channel, but it simultaneously represents a possible reduction in quality at least for theatre goers who dislike advertising and do not wish to disturb other patrons (or take the last seats) by arriving just before the advertising ends. The analysis is further complicated through the introduction of a difficult trade-off if merger induced cinema advertising is expected to cause post-merger ticket price reductions, and/or if some cinema patrons like advertising. In

any event, the main point of this example is to highlight that there is no *a priori* reason that quality effects should be ignored in media mergers.

The cinema example brings up another important question this time having to do with a media merger's potential effect on diversity. What if two merging free-to-air television stations intend to make much more use of exactly the same programming post-merger. This will reduce both diversity, which may reduce consumer welfare, and programming costs, i.e. produce an efficiency. An awkward trade-off seems unavoidable here, and as always when quality is involved, it will be difficult to make since quality effects are hard to quantify.

There is another aspect of two-sided media markets requiring comment. There will naturally be a considerable overlap between consumers (of media) and the set of people buying the advertised products. If there is not, the advertiser is clearly wasting his money! In what sense then are free media truly free?[23] They would only be unambiguously free if advertising lowered prices (because of economies of scale effects) or left them unchanged. That may be true of advertising that is strictly informative, but to the extent it also has a brand-building, product-differentiating aspect, advertising could have the effect of reducing competition and raising prices.[24]

Many competition statutes' merger review provisions do not require or necessarily even permit assessing how a merger might affect markets outside of those served by the merging parties. It could be argued that price increases linked to an increased supply of brand building advertising are outside the scope of review. It might also be argued that such effects are too speculative to be concerned about. Brand-building advertising could well raise the prices of advertised products, but a drop in the price of brand-building advertising could have the opposite effect. This is because the price drop would permit other perhaps smaller firms with weaker brand images to counter at lower costs than before the accumulated brand building effects of their larger, stronger branded competitors.

Since a media merger will generally reduce or leave unaltered the vigour of competition prevailing in a medium's advertising market, it is counter-intuitive that a media merger could lower the CPM. Nevertheless, this paradox could occur because of the two sided nature of media markets. Consider for example a merger in free-to-air broadcasting and assume that advertising is disliked by media consumers. A merger of two free-to-air broadcasters could so reduce competition for audiences that the broadcaster will be less constrained than before in raising its advertising/content ratio. An increase in that ratio, assuming both broadcasters continued to operate post-merger, would translate into an increased supply of advertising and a consequent drop in CPM.

Continuing with the paradoxical declining CPM example, how would one assess its welfare effects? Assuming the increased advertising either lowered or left the advertised products' prices unchanged, one would conclude that the merger might have improved welfare. The final effect would depend on whether the associated gains in advertiser profits and consumer surplus on the advertised products markets outweighed the decline in media consumer satisfaction occasioned by a higher advertising/content ratio. Things are less favourable, however if the increased supply and incidence of advertising had the effect of raising the prices of advertised products, i.e. the advertising was strongly brand- building in nature. The advertisers would be the obvious winners from this media merger. The merged media and possibly their competitors could also be better off depending on the price elasticity of demand for advertising, and whether or not they could afford to reduce program costs (and quality) while simultaneously raising the advertising/content ratio. Consumers are clearly losers in this scenario because the media product has deteriorated and advertised products' prices have risen. Consumers might suffer a further negative impact, and this applies whether the advertising is mostly informative or brand-building in nature. To the extent the media merger reduces competition among the media, it might also affect the degree of program diversity on offer, a point returned to in a subsequent section of this paper.

A falling CPM is not the only paradox that a media merger could present. A media merger could also produce a price drop for consumers (in non-free media) despite *reduced* competition on the consumer side of the business. Once again this is largely due to the two-sided nature of media markets. Consider for example a newspaper that could obtain or increase market power on the consumer side of the market by merging with a competitor. Before the merger suppose the newspaper was charging $1 a copy. After the merger the newspaper might wish to take advantage of its increased market power by cutting the number of copies sold and raising the price to $1.20. Before it does so, however, it must consider the effects that would have, other things equal, on the newspaper's:

1. sales revenues (which would rise assuming the merger renders demand either inelastic or more inelastic than it was pre-merger);

2. its total costs (which would decline very little since most of the newspaper's costs are fixed); and

3. advertising revenues (which would tend to decline along with circulation).

The seriousness of the circulation related decline in advertising revenue will be greater if in addition to reducing competition on the consumer side of the market, the newspaper merger also has the effect of increasing the CPM. Each consumer lost because of the increase in copy cost will therefore produce a larger opportunity cost in foregone advertising revenues. Having worked through all these estimated effects, the newspaper *may* paradoxically find that its profits would be higher if it dropped its copy price post-merger.[25]

The literature dealing with the effect of media concentrations on the CPM (plus the related impact of changes in advertising on consumer welfare) and the price charged consumers suggests that a media merger's actual effects will be highly dependent on specific fact patterns. [26]

2.6 Summing up

The main points to retain from this section are:

a) media markets are likely to be characterised by a multiplicity of products plus extensive use of versioning and other forms of price discrimination;

b) important economies of scale in both production and distribution, plus the effects of dependence on advertising revenues and the presence of significant network effects could produce high levels of concentration in media markets;

c) the process of convergence in media and telecommunications industries is not unambiguously expected to increase competition in media markets;

d) media are commonly subject to regulation affecting diversity and pluralism;

e) the prices of media products and media advertising could rise or fall because of a media merger, and if they move in opposite directions, competition authorities could be confronted with a difficult trade-off; and

f) the welfare effects of a media merger are difficult to estimate since they should include price as well as non-price factors (including quality aspects and consumer dis-utility from advertisements in certain media).

This is a good point to take up market definition. After doing so, and looking at vertical merger issues, we will return to the quality dimensions in media mergers including content diversity and pluralism.

3. Market definition

As is typically the case in other markets, the review of media mergers normally includes making a market definition. In some countries this may be legally required in order to challenge a merger. Even where that is not the case, the market definition exercise can be a useful way to organise thinking about how a media merger could harm competition.

Since the primary concern of competition authorities in reviewing a merger is to determine whether it will be detrimental to consumers, market definition should focus on the substitutes they could turn to should the parties raise prices or lower quality post-merger. If the available substitutes are good enough, the merging parties would not find it profitable to raise prices or lower quality in the first place. As an illustration of some of the difficulties encountered in identifying substitutes on the advertising side of media markets, consider the following material relating to a Canadian newspaper merger:

> The extent to which a proposed transaction will affect the rates that the papers can charge to advertisers will largely depend on the paper's market power. But market power is not simply a question of how many newspapers, for example *Le Droit* might sell as compared to the *Journal de Montréal*. Other factors will influence this analysis, including the availability of substitutes. If the local paper raises its rates, an advertiser may switch to another medium - to television, radio, billboards, flyers or the Internet. Whether one medium can be substituted for another depends in large measure on what the switch will cost the advertiser. "Cost" in this sense is assessed broadly, encompassing more than just the additional expense of the new medium, but also how effectively the new medium will allow the firm to target its customers. A drop in sales as a result of switching would also be factored into a firm's "switching costs." Of course, costs might also be favourably affected by the switch - a dealer in used cars, for example, might find profit by switching from the *Ottawa Citizen* to the *Auto Trader*. However, an electronics retailer might not have such available substitutes. Demographic studies indicate that certain audiences tend to prefer certain media. People with university education, for instance, are more likely to read the *Globe and Mail* or the *National Post* than the *Sun*. Other demographic groups may rely on magazines, television, the Internet or radio as their source of information. For example, market studies indicate that the *Sun* is the paper of choice for males between the ages of 18-25 with a high-school education. Accordingly, an advertiser aiming its product at that demographic may have very limited substitutes, even in a seemingly competitive market such as Toronto, a city with four major dailies.[27]

The above description reflects that, because of the focus on the consumer, market definition centres on the demand side of the market. That does not exhaust the analysis, however. In some situations, a post-merger price increase would be unprofitable because of what the United States Horizontal Merger Guidelines treats as "uncommitted entry". This refers to entry that could be made quickly and without significant sunk (i.e. irrecoverable) costs of entry or exit. Where there are uncommitted entrants, the extra capacity they could add to the market should form part of the denominator when calculating market shares for both existing firms and uncommitted entrants. Market shares are subsequently used to calculate various concentration ratios to make *preliminary* estimates of the probability of a post-merger price increase. If these preliminary estimates indicate there could be a competition problem, competition authorities typically proceed to assess other factors such as the existence and extent of countervailing buyer power, barriers to entry, efficiencies and whether one of the parties is a failing firm.

It is worth digressing at this point to indicate that barriers to entry could be quite significant in media markets because there could be significant sunk costs associated with entry. This is true despite the convergence associated with digitalisation, a factor having greater influence in broadcast as opposed to print media. Some of the barriers to entry that arise because of sunk costs will be dealt with immediately below in the discussion of vertical mergers. One barrier to entry that has been alluded to but not developed has to do with the sunk costs associated with choosing a particular position in product space. This point is relevant to assessing the power of both new entrants and potential incumbents to constrain a post-merger price increase. For example, review of a television station merger in the United States revealed that:

> Other broadcast television stations in the Salt Lake City DMA would not change their programming in response to a price increase imposed by News Corp after the acquisition. Not only are television stations often committed to the programming provided by the network with which they are affiliated, but it often takes years for a station to build its audience. Programming schedules are complex and carefully constructed taking many factors into account, such as audience flow, station identity, and program popularity. In addition, stations typically have multi-year contractual commitments for individual shows. Repositioning would require changing many of the shows in a station's line-up, and would be risky, difficult, and time-consuming. A television station is unlikely to take such a risk simply to capitalize on a small but significant price increase by News Corp after the acquisition.[28]

Returning to market definition itself, one increasingly common way of identifying product and geographic substitutes can be referred to as the hypothetical monopolist approach to market definition . This involves repeated application of the SSNIP (i.e. small but significant non-transitory increase in price) test. A good description of this approach can be found in the United States Horizontal Merger Guidelines.[29] Beginning with each product sold and geographic market served by the merging parties, the SSNIP test is applied by asking whether a 5% (or some other fixed percentage) price increase would be profitable post-merger. It will not be if the price increase causes a sufficiently large number of current buyers to switch to good substitutes offered by other suppliers. If it indeed turns out that the hypothetical price increase would not be profitable, the product and geographic dimensions of the market are widened to include what appear to be the best substitutes. Within the expanded market, one again asks whether a 5% price increase would be profitable if imposed by a hypothetical monopolist. If not, one again adds the best substitutes to the market definition and repeats the exercise. This process of progressively widening the market stops as soon as a 5% price increase would be profitable. The set of products and geographical points of supply at that stage of the analysis constitute the market as defined for antitrust purposes. Existing customers of the merging parties are a prime source of information for applying the SSNIP test. Useful information might also be supplied by the merging parties, competitors and suppliers.

Although analytically straightforward, the SSNIP test can be very complex in practice. This is particularly true in media markets.

The European Commission recently commissioned two major studies on market definition in the media sector, one from Europe Economics, which we will refer to as the "Europe Economics study",[30] and the other by the law firm of Bird & Bird, i.e. the "Bird & Bird study".[31] The Europe Economics study noted that:

> Our analysis of the typical economic features of media industries indicates that the fundamental methodological problem of defining markets in the media sectors arises from rapid change. In addition, the analysis is sometimes complicated by the need to consider markets in which no or very few transactions take place.

> These features make the economic understanding of markets inherently difficult, since they require an analysis of competitive constraints to be performed without the support of a significant track record of the operation of the markets, and in particular without any of the price and volume data that are required by some quantitative techniques for market definition.[32]

The few transactions issue has more to do with vertical integration than with the absence of payment from content consumers in the case of freely distributed media. A history of substitution behaviour may be available in a merger involving freely distributed media, but this will not be the case where, owing to vertical integration, "transactions" are currently entirely internal to a firm. This could be the case for example if the sole provider of satellite delivered broadcasting chose to offer Internet access services but did not allow independent Internet access providers to use his satellite.

Another special complicating issue, this time related to the SSNIP test, arises from the two-sided nature of media markets. Consider a newspaper merger that might alter competitive conditions on both the advertiser and consumer sides of the market. One cannot determine the profitability of raising the newsstand or subscription price or advertising rates without considering effects on both sides of the market. To the extent that an increase in the former will reduce the newspaper's circulation, it will also depress advertising revenues.[33]

Two-sided markets are only the tip of the iceberg of another problem that is particularly acute in many media mergers. This has to do with the sheer multiplicity of markets, an issue already mentioned in connection with the price discrimination and versioning often found in media markets. Where price discrimination is already established or would likely be introduced post-merger, it will have the effect of multiplying the markets that must be defined if the objective is to protect all consumers from harm.

In considering media markets, both the content and the means of delivery could be important to consumers and may lead to separate markets. One cannot assume, for example, that there is an overall market for news reporting and that it makes no difference whether it is delivered by newspapers, radio, television or the Internet. Similarly one cannot assume that different television delivery formats are equivalent, i.e. there is no difference between news carried on pay-TV and within that domain, between cable and satellite delivered pay-TV. Gomery (2002, 11) observes:

> Ultimately, each component of the media system — newspapers, broadcast networks, cable, satellite, and the Internet — provides a distinct product of news, information, and analysis, and each has its own institutional framework, geographic orientation, and relationship with the user. Thus, far from being homogenous or interchangeable media outlets, the various print and electronic media organizations currently have distinct roles in informing and engaging citizens.

Using an extensive database, a United States Federal Communication Commission staff research paper recently looked at consumer substitution among media and stated:

> What do we find? Standing back, there is clearest evidence of substitution between Internet and broadcast TV, both overall and for news; between daily and weekly newspapers; and between daily newspapers and broadcast TV news. There is also evidence of substitution between cable and daily newspapers, both overall and for news consumption; between radio and broadcast TV for news consumption; and between the Internet and daily newspapers for news consumption. There is little or no evidence of substitution between weekly newspapers and broadcast TV, or between radio and either Internet or cable. There is also some indirect evidence of substitution in the greater use of national media by groups less targeted by local media. This study leads to several conclusions. First, we can reject the view that various media are entirely distinct. As noted above, certain media appear to compete with each other for consumers' attention. Second,

> the study provides evidence of substitution by consumers between and among certain media outlets. It cannot completely answer the question of whether substitution is sufficiently effective that all media should be considered substitutes for news and information purposes. Existing research, however, may provide useful clues. While entertainment provided through media channels is an end in itself, news makes it easier for citizens to know what is at stake in electoral contests and, in turn, can make them more likely to vote. If substitution were complete, then the decline of local daily newspapers would be offset by increased use of other media. The civic behaviours affected by media consumption would also be unaffected by changes in availability or use of any particular medium. Yet, existing research on media consumption and voting – reviewed in the study conclusion – suggests that, even if substitution operates, it is not complete in this sense.[34]

Somewhat related to the price discrimination and versioning issue, there is another way in which transactions in the media industry can involve a multiplicity of markets requiring definition. This has to do with widespread bundling in media industries. This can take the form of bundling two separate media such as when a cable TV operator also offers Internet access service. It can also show up as the offering of a number of media products that could be and often are sold separately such as happens when a cable TV operator offers different bundles of channels, or when a magazine subscription includes a discount if another magazine is also purchased. The Europe Economics study analyses the ways in which pure and mixed (i.e. the separate elements of the bundle can also be purchased separately) bundling could be used to price discriminate, reap economies of scope or deter new entry. More particularly about market definition, the study notes:

> Like price discrimination, bundling does not change the principles on which market definition is based. Instead it increases the number of products that need to be considered as potential competitive constraints on each other, as substitutability must be assessed between different bundles as well as between bundles and individual components. Furthermore, it is quite possible that there is a relevant market for the supply of a bundle of products and separate relevant markets for the supply of the individual components.[35]

There is a final complication in media markets that could bear significantly on market definition. This has to do with the importance and high incidence of vertical integration and arrangements in media markets. Where one or more parties to a media merger have important vertical links, their merger could raise significant competition issues at various levels of the value chain, i.e. content origination, content and service packaging, service provision, infrastructure provision and terminal vending.[36] It may be necessary to define markets at each of those levels even though only one of the merging parties is active on it.

The Europe Economics study extensively discusses the special problems connected with a substitution based approach to market definition in media mergers, and recognises that the necessary data may be difficult to obtain. It nevertheless urges caution regarding using alternative sources of evidence not based on substitutability:

> When relevant data are missing, they must either be collected (for example through customer surveys), or reliance must be placed on reasoned assumptions that lead to inferences on substitutability and can be subjected to scrutiny by interested parties and/or the courts. *The scarcity of relevant evidence cannot justify the use of irrelevant evidence*.[37]

This study also makes four important general points about market definition in the media sector:

a. First, little reliance can be placed on similarities or differences between products, for example in terms of the technology that they use, as a guide to market definition. In

particular, convergence of products and/or technologies is not a good guide to changes in market definition.

b. Second, the value of market definition precedents will often be quickly eroded by rapid change, and conclusions on market definition can rarely be transferred to new cases even if they appear superficially similar.

c. Third, the analysis is often complicated by the fact that competition in many media activities occurs on dimensions other than price, for example in circumstances where media content is provided for free.

d. Fourth, many potential markets need to be considered in connection with a competition inquiry, adding to the effort required to determine robust market definitions. For example, markets may need to be defined by time, by customer group, in terms of different bundles, and at different levels in a complex chain of production, as well as by the traditional characteristics of product type and geographical location.[38]

Europe Economics suggests three practical steps for market definition. Paraphrased, they are: identify precisely the products likely to be relevant (in mergers, the starting point would presumably be the products supplied by the merging parties), apply the SSNIP test to assess substitutability between the products, and check the results using other evidence such as precedents and price evidence to confirm or refute the tentative market definitions. The study also contrasts these three steps as applied in media and other markets:

> …in steady and simple industries Step 1 seems to be a formality, Step 2 is (or appears to be) difficult, and Step 3 often provides sufficient evidence to settle many market definition issues. In the media sector, by contrast, it is more typical for Step 1 to be an essential component of the analysis, where chains of production are analysed and trade (or potential trade) is identified, and for Step 2 to be at the heart of the delineation of markets, with Step 3 being often limited to a formality because indirect evidence cannot be used to disentangle the effects of rapid change from those of substitutability and competition.[39]

The Bird & Bird study has a different focus than the Europe Economics study. The former concentrates on providing comparative European legal analysis on market definition in media markets. Among its conclusions, Bird & Bird noted:

> Overall, it is difficult to identify throughout the case law the existence of a specific reference test to be used in the media sector to define relevant markets. As mentioned earlier, that absence is particularly blatant concerning the geographic market. However, even on the product/service market, there is a certain lack of consistency in the criteria applied and upheld. This does not mean that the market definitions finally upheld are inconsistent. Quite on the contrary, practice throughout the EU tends to show similarities or identities in such definitions. However, legal certainty and anticipation concerns should probably dictate the creation of a consistent and *ex ante* market definition test.[40]

Based on that finding and a desire to improve legal certainty with regard to the application of competition law to media markets, the Bird & Bird study considered a variety of criteria that have been used in market definition and then asked whether the "solution [may] lie in a more economic approach". While offering considerable criticism of the SSNIP test, including its supposed over-concentration on quantitative as opposed to qualitative factors,[41] the Bird & Bird study does not advocate its wholesale replacement. It does urge, however, that it be applied "very cautiously" and adds:

> At the end of the day, the perception of the consumers and companies present in a given sector may represent a more subjective approach to market definition, but not necessarily a less reliable one.[42]

Few persons supporting the SSNIP test as it is actually practiced would likely disagree with that statement especially since the views of consumers are critical to its application.

Before leaving the topic of market definition, some brief comments are offered in particular on market definition in relation to broadcasting. These are not intended as definitive conclusions that can be applied without analysis in any particular media merger. Instead they should be treated as thought-provoking guideposts.

3.1 Broadcasting as a separate market

Based on country submissions received for the OECD's earlier roundtable on broadcasting, the executive summary pertaining to it noted that:

> In the case of the consumption habits of consumers, although it is acknowledged that broadcasting competes with other forms of media (such as newspapers, cinema, magazines), in no case was it indicated that a market definition was adopted in which broadcasting and other forms of media were held to be sufficiently substitutable as to be in the same market from the perspective of consumers. In general, broadcasting has fewest substitutes (and therefore the greatest potential for market power) in the broadcasting of content for which timeliness is important (such as live sporting events).
>
> Furthermore, although there is clearly some substitution between the various forms of broadcasting, a market for pay television was systematically distinguished from the market for free-to-air television. Although it is clear, that, at one level, free-to-air (which relies on support from advertisers) will never be able to offer identical services to pay television, it appears that the extent of the substitutability between these products may depend upon the extent of regulation of free-to-air television. There is some evidence from Italy, Germany and the US that the growth of pay television is slower (and its market power more limited) in markets which have a large number of free-to-air channels. It is not clear whether or not the various forms of pay television (cable, satellite and microwave) operate in the same market. Mexico notes one case where an incumbent cable operator was held to not have market power as a result of competition from microwave and satellite services. In contrast, in one US case, a market for cable television was distinguished from the market for satellite or microwave television.
>
> Furthermore, the different genre of programmes are likely to be imperfect substitutes. Within sports broadcasting, it is likely that one sport is a relatively weak substitute for another. The overall picture of broadcasting that emerges is of a number of distinct markets for differentiated products.
>
> The situation with regard to the advertising market is similar. Most countries reported finding that different forms of media advertising were relatively weak substitutes (and, in some cases, may in fact be complements). In most cases the geographic scope of the market is national. Even within the EU, which has sought to reduce barriers to trade in television services, markets remain largely national in scope, probably partly as a result of language and cultural barriers. Only Switzerland, probably because of the special language characteristics of its population noted a significant level of cross-border competition.[43]

3.2 Radio and television as separate markets and some possible divisions within television

Following changes made to its telecommunications statute in 1996 that significantly liberalised the ownership of multiple radio stations, the United States experienced a wave of radio mergers. In a speech about a year later, based on the Department of Justice's experience in reviewing over 1000 radio mergers, Joel Klein noted that radio was very probably a separate antitrust market. The speech implied that radio mergers were analysed mostly if not entirely from the perspective of possible anti-competitive effects in advertising markets, and noted that:

> …our view of radio as a distinct market doesn't mean that there are no advertisers who can divert their advertising to other media to avoid a price hike, but only that such behaviour will not ultimately defeat an anticompetitive price increase. A key reason that leads us to this conclusion is that radio owners can, and routinely do, charge different rates to different customers depending on the customer's demand for radio. That is, radio stations raise prices for those customers who don't have other realistic options available, while they maintain prices for customers who do have such options. For example, if an advertiser is interested in reaching a particular demographic group -- let's say females aged 18 to 34 -- an owner who has all the stations that cater to that group will have more market power with respect to that advertiser than with respect to an advertiser who isn't aiming at that particular demographic group. When price negotiations take place, both sides are aware of these considerations. And since radio advertising rates are negotiated with each advertiser individually, the radio station owner is able to charge a higher price to the advertiser with fewer options, while keeping prices low to the advertiser with more alternatives. Again, I want to stress, we're not making this stuff up; our investigations have found business strategy memos indicating that this is precisely the kind of activity that takes place when it comes to pricing decisions.[44]

Klein's views receive support as well from empirical explorations of cross-elasticities of demand undertaken by the United States Federal Communications Commission. Focusing on local advertising, the FCC study suggests that:

> …local newspaper and television ads are complementary inputs in the sales efforts of local businesses. These results also suggest that local radio and television ads are also complementary inputs.[45]

There also appears to be evidence that television should be treated as a separate from radio and print media, and that free-to-air and cable television may not be good substitutes. The following was contained in material filed by the United States Department of Justice in opposition to a television merger proposed in 2001. Again the focus is on the advertising side of the market:

> Broadcast television spot advertising possesses unique attributes that set it apart from advertising using other types of media. Only television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target market and is therefore especially effective in introducing and establishing the image of a product. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Such customers would not switch to another advertising medium -- such as radio, cable, or newspaper -- if broadcast television spot advertising prices increased by a small but significant amount.
>
> For example, cable television, like broadcast television, is a visual medium, but it is not a meaningful substitute for broadcast television spot advertising because the audience for any one

> cable channel is typically very limited and specialized compared to the audience of broadcast television stations. Moreover, it is much more difficult for advertisers to predict the impact of a cable advertisement because information about program ratings is not as complete or readily available as it is with broadcast television. Other media, such as radio or newspapers, are even less desirable substitutes.
>
> Even though some advertisers may switch some of their advertising to other media rather than absorb an increase in the price of broadcast television spot advertising, the existence of such advertisers would not prevent stations from profitably raising their prices a small but significant amount. During individualized negotiations between advertisers and broadcast television stations, advertisers provide stations with information about their advertising needs, including their target audience. This enables television stations to identify advertisers with strong preferences for broadcast television advertising. At a minimum, broadcast television stations could profitably raise prices to those advertisers who view broadcast television as a necessary advertising medium either as their sole method of advertising or as a necessary complement to other advertising media. [46]

The fluid nature of media markets is also evident in competition between satellite and cable delivered broadcasting. In the past, satellite providers had an important edge in this because they were able to deliver both analogue and digital signals. This meant they were able to offer considerably more channels and interactive programming guides. Cable companies apparently responded by making huge investments to enable them to offer digital signals. A recent newspaper article notes:

> Today, the technological differences between satellite and cable are mostly a matter of delivery systems – land lines versus satellite dishes. Dishes offer the advantage of allowing less expensive, more widespread installation, because they do not entail laying cable in the ground.
>
> But the cable companies have ready ability to use their land lines to offer services, like video on demand and Internet access. And cable technology is more developed than satellite at this point to carry two-way data traffic.
>
> . . . . . .
>
> [Video on demand technology as offered over cable TV] lets consumers buy movies and other programming when they want to watch it, then use their remote controls to fast forward, rewind and pause as if the programming were on videotape. In fact, the programming is kept on the cable company's servers.
>
> . . . . . .
>
> But the satellite industry has its own answer to video on demand. It has aggressively moved to deploy personal digital video recorders that allow consumers to record hours of programming and surf through them with a remote control. The satellite industry maintains that these digital recorders effectively allow video on demand, because consumers can download the programming they want and watch it when they want to.[47]

The competition in video on demand is apparently a three-way race because consumers can also buy digital television recorders making it possible for them to record, store and play back programs obtained from either satellite or cable TV.

It is clear that technological factors have an important bearing on substitutability. It is also true that competition authorities cannot assume that either technological factors will stand still or will be

determinative in terms of what advertisers and consumers might be willing to do to protect themselves from potential adverse effects associated with a media merger.

4. A focus on vertical mergers

As in other markets, media mergers combining different levels of the vertical value chain can present threats to competition as well as offer efficiency gains. Vertical issues are particularly pertinent in the media sector because of pervasive links between content producers, packagers and infrastructure providers. The earlier mentioned OECD broadcasting paper examined these links and deduced that:

> …competition concerns were mostly likely to arise at opposite ends of the chain of production - i.e., in access to certain forms of content (such as major sporting events) and in the market for broadband access to consumers. As a result, policy makers and competition enforcement authorities should be most concerned about two categories of horizontal mergers: first, mergers which restrict the number of paths to the consumer (such as a merger between the PSTN and a cable operator, or between a significant satellite operator and a cable operator); second, mergers between two content providers with a strong position in the market for certain categories of content.[48]

That OECD broadcasting paper went on to explore the "one-monopoly-rent theory" according to which a dominant firm at one level of the value chain can obtain all the profit related to its market power by simply charging an appropriately high price for its output. Against that view, it was argued that exclusive arrangements or vertical integration might be necessary to efficiently extract rents in the presence of various problems related to:

- double marginalization (as when a monopolist content provider sells to a monopoly broadcasting network and the latter adds a margin without considering how that reduces profit upstream);

- price discrimination; downstream provided marketing services requiring a significant investment and giving rise to a free-rider potential; and

- sunk costs specific to the relationship between the firms which would have to be duplicated without exclusive vertical relationships or integration.

As has already been seen, economies of scale, advertising related factors, and network effects combine to increase concentration levels in both content production and network distribution, and therefore the possibility of various degrees of market power. Double marginalization is accordingly a very real issue and price discrimination tends to be more feasible in many media markets. The OECD broadcasting paper remarked that:

> If the upstream firm cannot identify in advance all of the potential sub-markets and carefully restrict each downstream firm to a single market, it may be able to increase its overall rents by selling [the rights] in the downstream market to a single downstream firm who then has both the willingness and the ability to fully exploit the different sub-markets.[49]

Both the double marginalisation and price discrimination issues may have become more serious in the broadcasting sector as a result of the huge increase in demand for content linked to the proliferation of channels occasioned by the roll-out of cable and satellite TV.[50] Although the barriers to entry may be low for content production taken generally, this is probably not the case for the new feature film and high-interest sporting event content apparently vital to ensure the profitability of pay-TV.[51]

Vertical integration could be a two-edged sword in terms of effects on economic welfare. It could mitigate the double marginalisation problem and facilitate efficient price discrimination, but it could also create or increase market power either upstream or downstream. The OECD broadcasting paper notes that economic theory does not provide a clear guide as to when vertical arrangements, including vertical integration, will likely reduce economic welfare.[52] This is immediately qualified, however, with:

> There is…a fairly straightforward argument as to why vertical foreclosure will be inefficient in certain specific cases. In many cases the downstream production technology will be subject to economies of scope. Economic entry into the downstream market in this circumstance requires production of the full range of downstream products. Although restricting access to a key input necessary for the production of just one of the range of products, will not enhance the market power of the integrated firm over the downstream market that requires the essential input, it will enhance the market power of the integrated firm over all of the other products sold using the downstream technology.
>
> The application to the broadcasting industry is straightforward. Suppose that the downstream technology is the broadcasting infrastructure. This can be used for providing a variety of broadcasting services, such as entertainment, sport, films, interactive multimedia and home shopping. If a firm can acquire a dominant position with respect to an input necessary for the provision of one of these services (by, say, acquiring the rights to broadcast major sporting events), the firm may limit the ability of other firms to provide that service and thereby restrict or prevent the entry of competitors in the infrastructure market. Doing so does not increase the value of the sports rights, but does reduce the level of competition (and therefore increases the monopoly rent) available on all of the other services that can be provided through the broadcasting infrastructure.
>
> The same arguments might also apply in an upstream direction in the chain of production. There are economies of scope in producing some forms of content for, say, both film and television. If an integrated broadcaster with a dominant position in infrastructure were able to deny a competitor access to the television audience, it may thereby be able to restrict competition in the joint market for film and television content and thereby also earn monopoly profits in the market for film content. This effect might explain why dominant national broadcasters have traditionally been highly vertically integrated and why, in most countries, relatively few films are produced without the involvement of a dominant national broadcaster. It might also explain why some countries require dominant national broadcasters to purchase content from independent producers. Such a restriction enhances competition in the market for films by providing access to the television market necessary to fully exploit the benefits of economies of scope.[53]

Miguel Pereira has recently provided an interesting review of various vertical integration issues encountered in three high profile European Commission cases: the Vizzavi joint venture between Vodafone and Vivendi; the AOL/Time Warner merger; and the Vivendi/Canal+/Seagram merger.[54] He organised his comments into five categories namely gate-keeper, source, path, leveraging and network issues.

In AOL/Time Warner the Commission was concerned about the merged entity apparently being in a position "…to dictate the technical standards for on-line music delivery, i.e. streaming and downloading of music from the Internet." If it could acquire that power, "Winamp" (i.e. AOL's on-line music player) would essentially support new gatekeeper power for AOL/Time Warner.[55]

Turning from gatekeeper to source issues, Pereira opined that the AOL/Time Warner merger together with the practically simultaneous merger, later abandoned, between Time Warner and EMI, would

have given the new entity control over what was estimated to be "…about half the music content available in Europe for on-line delivery."[56] This was believed to raise the danger that AOL/Time Warner would either refuse to supply music to its on-line competitors or supply it only on disadvantageous terms.

Pereira noted that the source issue arose as well in the Vivendi/Seagram merger but here it included both film and music. He developed this as follows:

> Vivendi is a leading company in the telecommunications and media sector, with interests in mobile telephony networks, cinema production and distribution, and pay-TV services [i.e. Canal+]. Seagram was a Canadian company which, among other interests, controlled the Universal music and filmed entertainment businesses. In terms of content, the merged entity would have the world's second largest film library and the second largest library of TV programming in the EEA. It would also be number one in recorded music combined with an important position in terms of publishing rights in the EEA.
> The position of Vivendi/Universal concerning music rights became particularly relevant in respect of the Vizzavi portal, a portal run by a joint-venture between Vivendi and Vodafone. The Vizzavi joint-venture had itself been notified to the Commission just some months before the Vivendi/Universal merger.[57]

The Vizzavi joint-venture provided Pereira with a good transition to path-related foreclosure issues. This transaction was described elsewhere as follows:

> Vizzavi was a joint venture between Vodafone and Vivendi, the purpose of which was to create an Internet portal service bringing together various information and transactional services accessible through standard PCs, television and mobile phones. The parent companies planned for Vizzavi to be the default portal for subscribers to Vivendi and Vodafone's mobile phone services and to Vivendi unit Canal+ pay TV offerings.[58]

Pereira believed that the Vizzavi joint venture proposal presented a clear path issue in respect of Internet access because of Vodafone's significant market position for mobile telephony in various European countries:

> Vodafone already had a very significant customer basis in these countries and therefore a solid path to the future customers of the JV was already established. As regards Internet access via TV set-top boxes, a similarly solid distribution channel was also owned by Canal+ in respect of its customer basis for pay-TV services. The concern therefore arose in respect of the ability of both Vodafone and Canal+ to migrate their customer basis from the mobile telephony and pay-TV markets to the Internet access markets by using the already existing distribution channels or paths.[59]

Turning to leveraging issues, Pereira stated that the Vizzavi joint venture "…raised concerns in respect of the ability of the parties to leverage their market power in the market for mobile telephony into the market for mobile Internet access."[60] He briefly motivated those concerns by referring to the stated purpose of the transaction and noting the parties' strong market position in various EU countries for mobile telephony services. He also referred to the Vivendi/Seagram/Canal+ merger noting that it might have allowed Canal+ to leverage "…its strong market position in the pay-TV market into the market for Internet access via set-top boxes."

Returning to the Vizzavi joint venture, Pereira added:

> A clear vertical leveraging issue arose still in the Vizzavi case, as regards the buying power of the J-V parties. Already before the operation, Canal+ was an important buyer of content for pay-TV, such as TV-programming, sports and films. Furthermore, it had a large customer basis accustomed to pay for content. The Vizzavi portal would combine a powerful new Internet access mechanism with paid-for content. Given the dominant position that the parties would acquire on the Internet access markets which I mentioned before, the operation would allow the parties to leverage their market power in the markets for Internet access into the market for the acquisition of paid-for content for the Internet. Moreover, the structural link between Vivendi and Canal+ and AOL France (55%) made the concern in respect of the increase in the bargaining power of the parties even more serious. The leverage allowed for by the operation would naturally work in detriment of the parties. competitors in the markets for mobile telephony and pay-TV.[61]

Pereira added that concerns about possible anti-competitive effects increased as regards the Vizzavi joint venture when Vivendi announced its intention to acquire Seagram's and with it the music and films business of Universal Studios.[62]

Pereira's discussion of network effects was confined to the AOL/Time Warner merger which combined a huge music library with a large Internet subscriber base:

> The network effects would work both ways: more subscribers would bring more content and more content would bring more subscribers. Newcomers would also be attracted to AOL community because the larger the community, the more the possibilities to chat and communicate through AOL.[63]

Pereira had earlier noted that AOL's two instant messaging services had "…tens of millions of members…."[64]

In all three of Pereira's case examples, the European Commission fashioned a remedy taking into account both the risks to competition and the efficiencies the parties were seeking through their vertical integration. The basic thrust of the remedies adopted "…was to ensure *access*, access to the source, access to the path and access through the gate."[65] In addition the Commission severed various structural links, such as AOL's links with Bertelsmann, believed to aggravate the source or path problems.

One can agree with the emphasis on ensuring access as a means to address the problems allegedly arising in Pereira's examples, without necessarily accepting that the problems were significant or certain enough to justify the remedies imposed, especially if they led to some efficiency losses. Pereira did not provide sufficient detail to allow one to conclude that the studied transactions not only *could* raise serious competition problems, but also that they *probably would*. The latter step requires going beyond demonstrating an ability to harm competition to examine as well the incentive, i.e. profitability, of doing so. That in turn calls for a thorough investigation into how competitors and customers might be able to protect themselves should anti-competitive conduct materialize. Assessing how thoroughly and convincingly this was done in the three transactions lies beyond the scope of this paper.[66]

In blocking joint ventures and mergers in an effort to keep access open in rapidly evolving media markets, there is a risk that competition authorities might end up blocking the development of new platforms. This may have happened as regards the digital pay TV sector in Germany.

In March 1994, Bertelsmann, Kirch and Deutsche Telekom proposed to form a joint venture, MSG Media Service. It was reported that:

> The new company…will initially focus on providing pay-TV and pay-per-view services and eventually video-on-demand and TV-shopping services to the 14 million households wired up by DT's cable television network.
>
> While the joint venture will not provide any content services, other media companies will become its clients to transmit their own movies, home-shopping and other programming.[67]

In 1994, Bertelsmann had interests in book and magazine publishing, book clubs, printing, music publishing, sound recording and commercial television. It was also active in foreign markets and made about 6% of its turnover outside Germany. Its arch rival Kirch was the leading German supplier of feature films and television programming and was active in commercial television. Kirch also had interests in pay-TV suppliers outside Germany. Deutsche Telekom was the incumbent telecommunications operator in Germany and was also the owner and operator of "nearly all the German cable-television networks."[68]

At the end of December 1994, the European Commission blocked this joint venture because of concerns arising in three vertically related markets:

1. technical and administrative services for pay-TV and other payment-financed communication services in Germany – the Commission concluded that MSG would acquire a "durable dominant position" in this market;[69]

2. pay-TV – the Commission deduced that:

   > If MSG held a dominant position on the market for technical and administrative services, this would considerably strengthen the position of Bertelsmann/Kirch on the downstream market for pay-TV. It would have to be expected that the setting-up of MSG would give Bertelsmann and Kirch a durable dominant position on the market for pay-TV.[70]

3. cable networks – the Commission deduced that:

   > It can be expected that the proposed concentration will in the long-term also adversely affect to a considerable extent effective competition on the market for cable networks in Germany….There is a danger that, by jointly operating the pay-TV structure together with the leading pay-TV suppliers, Telekom will strengthen its position as a cable network operator in such a way that, following liberaliszation, competition in the cable network market will be substantially impeded and thus Telekom's dominant position safeguarded.[71]

The parties offered a number of undertakings that the Commission considered insufficient to remove the competition concerns, mainly because they were mostly behavioural rather than structural in nature, and their enforceability was open to question.[72]

Humphreys (1998, 22) describes this failed joint venture as, "…a first attempt [in Germany] to set the scene for the digital age…." Following the Commission's prohibition, the parties went their separate ways to try, in concert with other partners, to develop digital television in Germany. Kirch in particular made major investments in a digital platform, but ended up going bankrupt in 2002.

De Streel (2002) has reviewed the *MSG Media Services* decision along with many other Commission merger decisions in the electronic communications markets. He acknowledged that anti-competitive vertical effects in emerging markets were an important potential problem,[73] that merging

markets should be left open to competition, and that such markets often involved substantial network effects hence were vulnerable to tipping in favour of the first mover. He questioned, however, whether the prohibitions and remedies imposed with regard to these mergers were truly warranted. In particular he believed the Commission should have looked deeper to see whether the parties really enjoyed enduring dominant positions in content or infrastructure which they might be able to leverage. He also thought that more analysis should have been undertaken spelling out why monopoly rents could not be taken without vertical integration. In other words, he questioned whether leveraging market power from the market with a pre-merger dominant position to an emerging market was the real motive for the merger.[74]

Kovacic and Reindl (1997, 26-27) also discussed the *MSG Media Services* case and noted that, "A similar relationship between parents and their planned joint venture situation led to a negative Commission decision in *Nordic Satellite Distribution*."[75] Kovacic and Reindl believed that this joint venture was blocked, as in *MSG Media Services*, because of the parents' market power in vertically related markets.[76] The parties in *Nordic Satellite Distribution* apparently argued, unsuccessfully, that "…the planned development of an integrated digital Nordic encryption system which could be used for the reception of cable and satellite signals outweighed any potential anticompetitive effects of the joint venture."[77] Kovacic and Reindl noted that both cases raised the possibility that due to vertical links, companies with significant market power might use a joint venture to leverage their market power so as to control at an early stage access to "newly developing markets".[78] They went on to state:

> Both cases also demonstrate the "vertical integration dilemma" which is not untypical for rapidly developing high tech markets. It appears almost unavoidable that major companies with the necessary financial background, rights to premium content and communications know-how will be the first to provide new services and use newly developed technology in markets where investment costs are high and consumer reception is still uncertain. Vertical integration therefore is a natural and necessary development. It also may create efficiencies, for example if companies that control the media "software" integrate forward in markets related to program delivery markets or *vice versa*. As the two decisions also demonstrate, the most significant problems arise if few powerful players cooperate in the development and distribution of new technologies and obtain a gatekeeper position in the chain from program production to delivery of programs to consumers.[79]

Crossing the Atlantic, the merger announced in September 1998 between Viacom and the Columbia Broadcasting System (CBS) raised some difficult vertical as well as horizontal issues. This merger was intended to combine:

> … the extensive motion picture and television production, cable network, video retailing, television station, television network, and publishing assets of Viacom, Inc. with the television network, radio station, and cable programming holdings of CBS, Inc., to create the world's second largest media conglomerate (behind Time-Warner), having combined 1998 revenues of $18.9 billion.[80]

The vertical concerns had to do with the combination of Viacom's substantial television production and programming resources with CBS' television network. As a result of the merger Viacom-CBS would be in an enhanced position to favour its own programming to the exclusion of programming sourced from independent and unaffiliated producers. The merger would also raise the possibility that Viacom-CBS would have an incentive to deny programming to its television rivals. Waterman (2000, 538) noted that there were significant economies of scope and transactions costs savings that could flow from integrating television production and distribution, and that if it resulted in the foreclosure of access to CBS by independent and unaffiliated producers, "…the viewing public would suffer from reduced diversity and quality of programming." Waterman described why vertical integration could produce foreclosure:

> There are several economic reasons why we might observe this tendency toward self-dealing in television production and distribution. One is that contracting costs tend to be lower if business is conducted within the same corporation. For example, opportunistic behaviour by a producer whose show becomes more successful than expected will not materially affect a corporation that owns both the network and the show. The network also desires to control the production process to ensure that quality and content conform to expectations. That control is probably easier with commonly owned facilities. A related factor is reduced risk. Under common ownership, the network has no need to fear unexpected migration of the program to another network, and vice versa with respect to cancellations. Also, it may be that information about programming ideas are more effectively conveyed to networks and programming needs conveyed to producers within integrated companies.[81]

Waterman found evidence from the two other vertically integrated U.S. television networks (ABC/Disney, and the Fox Network/Fox television studios) suggesting that competition concerns involving foreclosure probably were over-rated as regards television media.[82] More generally, he observed that:

> Unlike widgets, entertainment products—such as movies or television series—are unique and, in advance of their production, have notoriously uncertain demand and probably, to some degree, uncertain demographic appeal. It is thus very difficult for the owner of a distribution facility, such as a television network, to predict in advance the source of products that will be most appropriate for exhibition on that network. Complete vertical integration is thus impossible to achieve, inherently leaving open opportunities for independent suppliers. As expressed by one television executive: "You can't consolidate creativity."
>
> As a matter of definition, any degree of self-dealing due to vertical integration in television has some foreclosure effect on unaffiliated producers. From a public policy perspective, however, the most important issue is access by the creators of those programs. Obviously, producers provide important creative services. Nevertheless, the same writers, talent agents, and other agents of production still have the ability to sell their ideas to the production entities of the major integrated networks. The result of integration is likely to be replacement of some independent producers with vertically affiliated producers. The continued access of other creative agents to network decision-makers, however, mitigates restraints on the effective flow of ideas through the system to viewers. Also, independent producers can cooperate with vertically affiliated producers, as evidenced by co-produced prime-time programs appearing on both the Fox and ABC networks.[83]

After making these points Waterman homed in on a critically important issue. He emphasized that after the merger there would still be four major broadcast networks in the U.S. (excluding WB and UPN):

> What determines the diversity of programming available to viewers is not whether those gatekeepers choose to make their decisions on a program-by-program basis or through some ownership relation, but on the number and horizontal market power of separately owned gatekeepers that are making those decisions.

The Department of Justice apparently came to a similar conclusion and permitted the merger to go ahead after the parties agreed to a number of divestments that helped preserve horizontal competition among networks.

The United Kingdom's Competition Commission faced similar vertical issues in a proposed merger in 2000 involving Carlton Communications Plc, United News and Media plc and Granada Group plc.[84] The programming related issues were not found to be significant, even in the absence of divestments required to preserve competition in the television advertising market. The reasons cited had to do with the ease of entry into program production, evidenced by the existence of some 1200 producers, and the way the resulting network would be structured. Presumably, the latter referred to considerable decentralization in programming decisions by individual ITN television stations.

Summing up

It is clear that vertical mergers in media markets can present important efficiencies as well as real problems for competition. Difficult trade-offs may be required. The competition problems largely have to do with access to content and final delivery to the consumer. As in other industries, competition authorities will have to make predictions about how markets will likely evolve and what consumers may be able to do to protect themselves if anti-competitive effects materialise. An apparent ability to reduce competition may not translate into a profitable post-merger strategy, and this may especially be true of risks of foreclosure as regards content. The rapidly changing nature of the media, including convergence trends, will have an important bearing on all this and could well affect both the analysis of competitive effects and the remedies fashioned.

5. Effects of media mergers on general program quality and diversity

One possible non-price effect of a media merger on consumers (including in their capacity as consumers of advertised products) has already been discussed. That involves a merger induced change in a media's advertising/content ratio. We turn now to non-price effects linked to the benefits consumers derive from the information and entertainment provided by a medium.[85] As with any other product, media content has important quality dimensions. Three in particular stand out: diversity in content; general quality of the text, images and/or presentation; and pluralism of views presented.

"Diversity" and "pluralism" (or plurality) are often referred to in discussions of the media but display considerable variation in meaning. To facilitate discussion, this paper will adopt the formulation contained in a United Kingdom consultation paper, i.e.: "Diversity refers to the variety of available programmes, publications and services, whereas plurality is about the choice people can make between different providers of those services."[86] Diversity therefore refers to the variety of *content* on offer, while pluralism refers to the number of different *providers* of media services, i.e. the number of different voices competing for attention. Greater diversity tends to improve consumer welfare in two different ways. First, it improves the match between consumer preferences and what is available from the media. Second, greater diversity may assist in the maintenance and development of particular national or community cultures. Greater pluralism, on the other hand, has more of an indirect effect on welfare. It contributes to public debate on important political issues and helps ensure that both private and public decision-makers are held accountable for their actions. It is worth flagging that there could be a great deal of diversity in a media market despite a simultaneous lack of pluralism, and the converse could also be true.

This section of the paper will consider diversity issues and the next will focus on pluralism.

Diversity issues are complex and can only be briefly explored here. Before doing that, it is necessary to digress by making a distinction between what is sometimes referred to as "internal" versus "external" diversity. Media offering a large variety of content can be described as more internally diverse than media specialising for example in news or targeting a specific type of audience, e.g. theme TV channels for children. External diversity refers to the variety of content available at any particular time to a consumer. There might be very little external diversity despite high levels of internal diversity. That

would be the case for example if free-to-air TV channels all offered soap operas in the morning, news programs in mid-afternoon, cartoons in the late afternoon, news over the supper hour, etc. Although content regulators appear to be concerned about both internal and external diversity, perhaps because some consumers have a highly restricted set of media to choose from, attention in this paper will focus exclusively on external diversity referred to simply as "diversity".

Diversity is important in media mergers essentially because consumers are *not* what we will refer to as "strongly homogeneous". They would be strongly homogeneous if they have either the same single interest or the same set of interests and identical preference rankings across that set. If they were strongly homogeneous, what little diversity there would be in the media would be rooted in the comparative advantages enjoyed by different types of media in covering aspects of essentially the same interest (e.g. breaking news for TV, less time sensitive news stories in magazines).

Media consumers are presumably willing to pay more for content that more closely matches their preferences. That would push competing media, especially those not distributed for free, towards differentiating their content offerings. As in other industries, this pressure in favour of increasing product differentiation could be weakened by cost considerations. In media this refers primarily to a desire to spread any fixed costs of content and distribution/diffusion as thinly as possible. There is also the potentially homogenising pressure exerted by a desire to increase advertising revenues. *Other things equal*, advertising supported media will choose content likely to generate as large a number of consumers as possible. To the extent different content genres have different audience drawing power, the drive to maximise audience size may contribute to reducing content diversity.

Making the "other things equal" assumption masks at least two important considerations affecting diversity. *First*, a medium might find it advantageous to serve a smaller niche audience rather than a larger general one. This is partly because advertisers are presumably willing to pay a premium to target their advertising on the groups of consumers most likely to buy their products.[87] To take an obvious example, local businesses are willing to pay a higher CPM for advertisements in local interest newspapers than in national newspapers. *Second*, niche markets might also be attractive to media owners simply because they will be able to charge consumers more, or impose a higher advertising/content ratio on them, the more the content interests them and cannot readily be found elsewhere. This second effect could reinforce the first to the extent that niche market consumers patronise very few other media. In that case, advertisers are driven to patronise the niche market medium to be sure of reaching the set of consumers wed to it.

The relationship between concentration levels and diversity, hence the degree to which merger induced increases in concentration could affect diversity, could easily vary across media markets. In some markets, the different content genres could vary a lot in their power to draw audiences thus making for little diversity regardless of the level of media concentration. In other media markets, there could be little such difference in drawing power so that a good deal of diversity could materialise, hence opening the way for concentration levels to have a significant effect. Similarly, differences in the degree to which content diversity in fact shields a medium from competition would affect the relationship between concentration and diversity. The impact of a merger on diversity is further complicated by a likely non-linear relationship between concentration and content variety.

A simple example may help explain why there might be a non-linear effect of concentration on diversity. Let us assume that 80% of free-to-air television viewers will only watch sports programming while the other 20% are exclusively interested in news programs. Assume further that the CPM paid by advertisers is the same regardless of whether an audience is composed of sports or news lovers, that the costs of producing sports and news content are identical, and that the only product differentiation possible is sports versus news (i.e. there is no difference in audience drawing power as regards any two sports or

any two news programs). Under these assumptions, as long as content costs are sufficiently modest, a medium with an unassailable monopoly will find it attractive to offer one sport and one news channel, i.e. optimal diversity is supplied. But if instead of monopoly there were two, three or four television broadcasters each offering a single channel, none would offer news programming. Once the number climbs to five, however, a news channel would probably be offered.[88]

Generally speaking, the effect of a media merger on content diversity will depend on three factors. The first is the importance of content related fixed costs. The more significant these are, the more the post-merger firm will tend to offer the same content over all its constituent parts, hence tend to reduce content diversity from what it was pre-merger. The second factor relates to a desire to reduce cannibalisation, i.e. post-merger competition between the merged units. This is more pertinent the closer the merging entities are in product space. The third factor is a desire to pre-empt entry into the market. These three effects are discussed by Berry and Waldfogel (1999) who concluded that it was difficult to make a clear prediction on the basis of economic theory alone.[89] They therefore turned to empirical evidence and found a non-linear relation between concentration and diversity.[90] These results were based on what happened in program variety in U.S. radio broadcasting after the 1996 *Telecommunications Act* loosened restraints on the number of stations that could be owned in the same local market.

If it could be determined that a media merger would reduce diversity, would that provide a reason to block or condition a merger? The answer to that is not entirely straightforward. The problem is that diversity reduction could be inseparable from increases in general quality. Consumers with main line tastes may not mind reduced diversity and could stand to benefit from increased content quality or perhaps a lower price. This could present competition authorities with the need to trade-off benefits for one group of consumers against costs borne by another. Such a trade-off will arise, however, only if a media merger will indeed lead to a decrease in price or an increase in content quality. The previous section on two-sided markets indicated that a price drop was a possibility, but far from a certainty. As for a quality increase, this too can hardly be assumed.

A media merger will affect content quality if it alters either the marginal costs or revenues associated with changes in content quality. While it is not obvious why a media merger would systematically affect the marginal cost side of that equation, it is easy to see that it could impact on marginal revenues. The simplest way in which a merger could have such an effect is by increasing the number of consumers for each article/program carried on the combined media. Consider for example a newspaper merger in which one of the newspapers is simply closed down post-merger. This would probably result in a larger circulation for the merged entity. That in turn should translate into higher sales and advertising revenues per article printed and could increase the marginal revenue associated with an increase in content quality. Whether the merger and subsequent shut down of one of the papers will have such an effect depends in part on how much, if at all, the merger reduces competition for consumers. Reduced competition for consumers will translate into diminished incentives to maintain let alone increase the quality of articles printed.

An important implicit assumption in the previous paragraph is that media produce all their own content, i.e. there is no content market. If there is such a market, one cannot determine the effects of a media merger on quality without considering how the merger would impact on the content market.[91]

Summing up

This section has argued, that the effects of a media merger on both advertisers and consumers, cannot properly be assessed without considering how the merger might affect quality and diversity. One might agree with that statement and opt, however, to put very little emphasis, if any, on quality and diversity when reviewing media mergers. This is because these attributes are inherently difficult to

measure and the effect of a media merger on them is highly complex. Even worse, a media merger could increase quality and reduce diversity or *vice versa*. In addition, many countries address diversity issues through content regulation and subsidised public broadcasting. Given these complications and difficulties, competition authorities could well decide to leave diversity at least to the regulators.

As a final point about diversity, it should be noted that at least as regards television, the development and expansion of pay-TV, and the increase in spectrum availability due to compression technologies plus the advent of new distribution channels (i.e. satellite and Internet) together mean there are less reasons to be concerned about the effects of mergers on diversity.[92]

6. Media mergers and pluralism

In this section of the paper, attention shifts away from a concern for economic welfare, but economic concepts remain relevant. In particular there are important externalities that apply to the media. The principal externality has to do with the benefits all citizens receive when each voter makes wise choices. Given that externality, one might expect an undersupply of the kind of information needed to make such choices.

The media make two important contributions to establishing and preserving vibrant democracies and the closely related rule of law. First, the media serve as watchdogs to inform the public of shortcomings and wrongdoing both by private and public actors. Sometimes this leads to new laws and regulations being passed. More often, it simply ensures that a price is paid when the public trust is betrayed. Second, the media constitute the channels through which alternative political choices are communicated to the public, and subjected to critical assessment.

One can rely on politicians and political parties to finance their own advertising, and to some extent to expose the weaknesses of each other's proposals. That will likely fall short of providing the variety and completeness of background information, analysis and critique required to maintain a healthy democracy.

When it comes to the news and commentary functions of the media it is helpful to think in terms of a "marketplace of ideas", i.e. the "…sphere in which intangible values compete for acceptance."[93] In a document prepared by Ireland's Department of Enterprise, Trade & Employment, one reads:

> Political concern with media pluralism is born of a sense of the value of free speech, a recognition that speech in this context is intimately connected with an entitlement to read, watch and listen to a diversity of views and the shared value that such diversity is essential to the healthy functioning of a democracy. The conventional free speech philosophy is defended and characterised by the image of an atomistic market-place of ideas in which ideas freely jostle and compete with each other for the attention, loyalty and ultimately the belief of the citizen. Just as the process of competition in the market-place for goods leads to the more efficient production of better refrigerators for the benefit of the consumer, so it is envisaged that debate, disagreement and diversity will lead, in the end, to truth.[94]

A desire to ensure that many, if not all, points of view are represented in the marketplace of ideas is frequently referred to as the need to maintain pluralism in the media.

6.1 Why might pluralism be relevant to media mergers?

While it is self-evident that media mergers reduce the number of owners ultimately controlling the media, several reasons are sometimes advanced as to why this might not have any great significance for pluralism. *First*, there is a very large variety of *sources* of news and a merger is not likely to change that.

Against that view, however, one must remember that a multiplicity of sources matters little if they are denied access to the media. Media mergers could create or reinforce important bottlenecks.[95] *Second*, even if one particular type of media, say newspapers, were monopolized there might remain a sufficient number of alternative media. This clearly raises an important empirical issue which cannot be explored properly here. Suffice to say that the evidence reviewed in the section on market definition suggests it would be unwise to assume that consumers can readily substitute among different types of media as sources of news and news related commentary.

There is yet a *third* reason why concentration in media ownership may not matter much for pluralism. It has to do with the incentives and abilities media owners may have to determine media content. Baker (2002) provides an extensive discussion of this point beginning with elaborating the argument that profit maximising media owners are driven by competition to supply the range of content consumers want, presumably including content of a political nature. As in other markets, if barriers to entry are low competition among media could be vigorous even if concentration levels are high.

If competition is weak, however, and results in a certain degree of supra-competitive profits, media owners will acquire some lee-way to sacrifice profits in order, in effect, to subsidise content ideologically pleasing to them.[96] In addition, as the number of competitors declines, rivalry could produce the same kind of homogenising influence as it might regarding content diversity. Gabszewicz et al. (1999, 2) considered how both advertising and consumer financing of newspapers both tend to encourage the presentation of centrist as opposed to minority views:

> The first source of financing [from readers] calls for some matching between the political "image" presented by the editor of a newspaper, and the political preferences of his readers. Otherwise they could be tempted to buy the newspaper supporting the opposite opinion since the latter becomes a closer substitute to the former. On the other hand, the second source of financing, relying on advertising receipts, requires a sufficiently sizable readership in order to make the newspaper attractive as a media support for the advertisers: The impact of the advertising message increases with the size of the audience. It turns out, however, that confirming the political preferences of the readers in order to stabilize his readership may well have a negative impact on the advertising receipts of the editor. Take, as an example, a newspaper politically targeted to the left. If the editor decides to present his leftist ideas in a too extreme manner, confirming thereby the political preferences of his extreme left readership, he may well loose his customers who are closer to the centre, to the benefit of his rightist competitor! The resulting reduction of his market share makes him less attractive to the advertisers: The advertising messages promoting their products have now a weaker impact. On the contrary, the rightist competitor, now enjoying a larger audience, becomes more appealing to the advertisers! This dependence of advertising receipts on the political image displayed by the editors may lead them to moderate the political message of their newspapers. This tendency must be expected to be particularly significant when the readers do not give too much weight to the political content of the newspaper, or when advertising receipts are strongly correlated with the size of the readership. (footnote omitted)

Baker also presents, and later questions, the view that owners simply cannot effectively control the content of their media:

> Daily news is produced by the collective action of many journalists and editors who operate with set routines and behave largely according to professional standards. An owner is simply not in a position to dictate the practice of journalism and it is this practice, not ownership, that mostly determines the content of the news that people receive. Parallel, even if slightly weaker, claims

> can be made about the assertedly more creative world of entertainment content as well as about genres such as magazine writing.
>
> . . . . . .
>
> Rather than being controlled by owners…[the practices of the people constructing the news]…are overwhelmingly determined by some combination of professional education, on-the-job acculturation, and institutional or organisational imperatives that themselves often reflect the economic necessities of media production.[97]

Baker cites sociological evidence supporting these views but offers two principal critiques:

> …owners either directly or through top management whom owners…select can substantially affect the creation of the workplace culture and notions of acceptable and unacceptable routines….[O]wners can [also] vary dramatically in their orientation toward expertise, ideology, or diversity among employees. These factors mean that owners' choice of employees – or their choice of those employees (e.g., top editors) who choose other employees – can have tremendous consequences for the newsroom capabilities, culture, and biases that can translate into the orientation of the content finally produced. Finally, although direct interventions may be rare, their occasional occurrence can queue the direction and stimulate the practice of employee self-censorship, which journalists report to be a major determinant of content creation in most corporately owned media.[98]

Baker also suggests two positive reasons for preferring dispersed media ownership. They are:

1. "…it is plausible to expect that a larger number of competing "watchdogs," each of which competes to discover abuse, will better perform this role than would only a few…."; and

2. "Those that most need to be watched, those with political or economic power, often seek to control or co-opt the media. Control or corruption is likely to be easier the fewer media entities these co-opters need to control. A few can be purchased, threatened, bribed, intimidated, or appealed to. Control of larger numbers of *influential* media is more difficult."[99]

Baker's anecdotal evidence supporting these points highlights certain advantages and disadvantages of media conglomerates. On the one hand conglomerates present more points through which pressure can be exerted against a medium. On the other hand, to the extent conglomerates are large and diversified, they should be better able to withstand economic and political pressures, and to afford the high fixed costs required for investigative reporting. Against the latter position, Baker cites Eric Severeid, "…one of the United States most prominent television news commentators of the last generation…" who reportedly said:

> …the bigger the information media, the less courage and freedom of expression they allow. Bigness means weakness….Courage in the realm of ideas goes in inverse ratio to the size of the establishment.[100]

6.2 How does merger review under competition law contribute to media pluralism even when it is not explicitly concerned with that objective, and is such support enough?

Assuming ownership is critical to media pluralism, merger review focusing only on economic markets (i.e. ignoring the marketplace of ideas) nevertheless makes an important contribution to pluralism. It does this by preserving freedom of choice for both consumers and advertisers. It is through protecting

freedom of choice that competition authorities shield consumers and advertisers from anti-competitive increases in copy or viewing costs, reductions in content quality and diversity and increases in advertising rates potentially linked to a media merger. Where there is sufficient freedom of choice to prevent these negative effects, will there also be enough media pluralism to ensure the media can play their democracy enhancing roles? That is a much debated question, and there are good reasons to doubt a positive answer.[101]

It could happen that some media markets are highly concentrated or would become so if a media merger were permitted to proceed. If these same markets are also characterized by low barriers to entry and exit, media mergers might not reduce economic welfare. They might nevertheless have significant negative effects on media pluralism. A United Kingdom communications White Paper states:

> Fostering competition is the first step to promoting plurality in the media. A competitive market is likely to be one with many voices and diverse content, though there is no guarantee that this will be the case. Competition experts accept that the threat of potential new entry into the market is a factor which can act as a constraint on the pricing behaviour of larger companies and act as a deterrent to the exploitation of market power. However, in relation to media markets, if new entry does not occur, or existing companies fail to develop a diverse range of services, the number of sources of independent views might be limited. Given the democratic importance of the media, we are concerned to see that diversity of opinion and expression is actually maintained and increased. Therefore, we may continue to need backstop powers to underpin plurality of ownership and a plurality of views in the media.[102]

A subsequent United Kingdom consultation paper exploring the wisdom of ownership limits as a means of fostering pluralism added:

> Competition rules can address issues of concentration, efficiency and choice, and will tend to encourage dispersed ownership and new entry. They should do all this more effectively once the Enterprise Bill comes into force. However, they cannot guarantee any of it. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice.[103]

Bolstering the supposed asymmetrical effect of potential entry, i.e. it could ensure economic efficiency without protecting pluralism, there is also the point that product homogeneity is normally treated as indicative of a high potential for competition. When it comes to the media, however, highly homogeneous hence readily substitutable content is inimical to pluralism.[104]

Further to the potential entry point, it could happen that competition authorities justifiably rely on such entry to ensure a merger does not reduce economic efficiency, but it may prove quite inadequate to protect pluralism. Price or advertising rate changes are presumably noticed very quickly by consumers and potential entrants. It may take considerably longer for a significant number of citizens to recognize they are being served with biased or incomplete reporting. By the time they begin to search for alternative sources, perhaps linked to new entry, too much damage might already have been done to the body politic.

6.3 Should pluralism concerns be explicitly incorporated into competition law review of media mergers?

Some observers believe that something can and should be done to address pluralism in the course of competition law review of media mergers. This point of view is advocated, for example, by Stucke and Grunes (2001).[105]

Stucke and Grunes begin by noting that the "marketplace of ideas" is generally not part of United States antitrust analysis of media mergers.[106] They argue, though, that the legislative history of U.S. antitrust laws and some leading Supreme Court and lower court antitrust cases, "…support the inclusion of the marketplace of ideas in the antitrust analysis of media mergers."[107] Stucke and Grunes fully acknowledge, however, that there would be significant difficulties in applying the U.S. Horizontal Merger Guidelines, especially their concentration presumptions, to marketplace of ideas issues. The whole notion of product substitution might not really apply when pluralism is the issue. Referring to newspaper mergers, but the point has wider application, Stuckes and Grunes state that:

> …the marketplace [of ideas] is not about consumers switching from one homogeneous product to another. Rather, it is the net increase in consumer welfare from having many competing news sources and editorial voices. As Judge Hand aptly stated about the marketplace of ideas [in the *Associated Press* wire service merger] – and it bears repeating – "it is only by cross-lights from varying directions that full illumination can be secured." Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is not significant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.[108]

Stucke and Grunes made three proposals to guide how a merger's impact on the marketplace of ideas could be taken into account:[109]

1. "…antitrust agencies should look beyond price effects generally, and advertising prices specifically, in media mergers and consider other non-price dimensions of economic competition, such as diminished quality and choice."[110]

2. "…efficiencies need to be viewed against the backdrop of the marketplace of ideas." More particularly, "…when efficiencies are claimed in media mergers, one should recognise the tension between the efficiencies that arise from the homogenization and uniformity of products, on the one hand, and the desire for diversity in the marketplace of ideas."[111]

3. "…direct evidence of anticompetitive effects should be given significant weight by the agencies and the courts."

The third proposal refers to evidence of reduction in diversity and plurality.

Stucke and Grunes' first proposal is more straightforward and less controversial than the last two. Points two and three may require competition authorities to make problematic, essentially political trade-offs. As Gibbons (1999, 173) states:

> …it should not be assumed that a formula can be devised to determine the acceptable level of pluralism. Economic criteria can provide *presumptive* thresholds for political decisions. But media pluralism is a *political* issue and judgments about the appropriate amount of diversity in a society are based on experience and prudence.

Given the non-quantifiable, complex and inherently political nature of pluralism concerns, it is not surprising there are those who advocate leaving pluralism issues, including those arising from media mergers, to content and ownership regulation perhaps buttressed by public broadcasting.[112] This view is in line with what seems to be a general trend in favour of concentrating competition laws on economic welfare rather than larger public interest questions.[113]

A parliamentary inquiry into possible amendments to Canada's *Competition Act* devoted a chapter to how the *Act* applies to the newspaper industry and how that might be changed. It identified two approaches to dealing with "social capital" issues in newspaper mergers. The first was to amend the *Act* to create industry-specific provisions for newspapers so as to widen newspaper merger review to include non-economic factors.[114] It presented several arguments against that course of action. One of them was:

> In essence, there are simply no analytical models for expressing social concepts in an objective and meaningful way. Ultimately, to challenge a proposed transaction, the [Competition] Commissioner must be able to provide compelling and objective analysis detailing the expected impact of the deal on markets. Expanding the objectives of the Act to take account of such considerations would require Canada to make a complete paradigm shift, away from the analytical approach currently used by antitrust authorities the world over, towards a more holistic model relying not on economics, but on the disciplines of psychology, sociology and political science.[115]

The Canadian parliamentary inquiry also briefly considered a hybrid model mixing traditional antitrust analysis along with a more "holistic". This was immediately critiqued with some rhetorical questions:

> Which of the two factors would be given greater weight? The economic or social? How would the Tribunal gauge the merit of the parties' arguments on the social impact of the transaction?"[116]

Examples of customised approaches to media market merger review that appear in part to be motivated by pluralism concerns can be found in a number of countries. In the European Union, a specific derogation is provided to the European Commission's Merger Regulation, i.e. Article 21(3), to allow member states to adopt specific measures to promote plurality in the media. The United States *Newspaper Preservation Act* allows newspapers in financial difficulties, but falling short of the failing firm exception, to merge all but their editorial desks.[117] The United Kingdom also applies a special merger regime to newspapers but is currently discussing changing that.[118] Germany has formulated a modified approach to newspaper mergers. Through imposing lower thresholds for notification requirements and for deciding whether to subject newspaper mergers to extensive examination, Germany ensures they receive extra scrutiny.

Ireland's new competition statute, adopted in 2002, included a more far-reaching special regime for some media mergers. It applies to: "…a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; a business of providing a broadcasting service; or a business of providing a broadcasting services platform." The special regime works as follows:

> When the Authority receives notification of a merger which it considers to be a media merger, it must inform the parties that it is of this opinion, and forward a copy of the notification to the Minister. The Minister can direct the Authority to carry out a Phase 2 investigation, and can override Authority approval with or without conditions. In other words, if the Authority blocks a media merger, the Minister cannot unblock it, but if the Authority approves a merger, either absolutely or conditionally, the Minister can block it or can apply new or stricter conditions. In

making such a determination the Minister must have regard to, and only to, the "relevant criteria", which are (Section 23(10)):

a) the strength and competitiveness of media businesses indigenous to the State;
b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and undertakings;
c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings;
d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State; and
e) the share in the market in the State of one or more of the types of business activity falling within the definition of "media business" in this subsection that is held by any of the undertakings concerned, or by any other individual or other undertaking who or which has an interest in such an undertaking.

In dealing with a media merger at the Phase 2 stage, the Authority is to form an opinion on how the application of the relevant criteria should affect the exercise by the Minister of his powers, and shall inform the Minister of the opinion it has so formed on his request.[119]

With or without a customised approach to media market merger review, it is quite likely there will remain a need for regulation to preserve satisfactory levels of pluralism. As Baker (1999, 917-918) expressed it:

> …at least two considerations support subjecting media ownership to additional regulation. Pragmatically, the advantage of dual legal regime and dual agency enforcement is that lack of political will within one agency or narrow judicial interpretation of laws enforced by one agency will be less damaging. More fundamentally and conceptually, media specific concerns reflecting both features of media economics and special democratic roles of the media require media specific policies. Antitrust laws, even on their broadest interpretation, simply do not respond to all the media specific reasons to limit concentration. An expansive antitrust law interpretation may be sensitive to a merged entity's power to narrow consumer's content choice even when the merger did not lead to any power over pricing. However, antitrust law's focus on consumers is unlikely to embody the democratic concerns with assuring maximum numbers of separate owners participating in the "marketplace of ideas" or with democratic worries about concentrated power to influence public opinion. (reference omitted)

Where there is regulation, whether it be focused on diversity or pluralism issues, competition authorities should engage in competition advocacy to ensure the regulations reduce competition to the minimum extent necessary to permit the regulations to attain their objectives. They should also work out means of co-operating with media regulators to ensure that merger review is as quick and predictable as possible. Canada provides an example of how this can be formalised through a written agreement setting out a clear division of labour and describing how competition authorities and regulators will co-operate.[120]

6.4 Summing up

Pluralism presents a number of difficult and highly important questions for media merger review, but there is no consensus about how to answer them. Although competition authorities can make a positive contribution to pluralism even when not explicitly trying to do so, it is unlikely that review focused only on economic efficiency will adequately address pluralism concerns. This may be why many countries have ownership regulations that supplement merger review under competition law. There is no reason to expect a conflict between those regulations and merger review conducted by competition authorities, i.e.

companies can abide by both the regulation and the competition statute. There could, however, be situations where competition authorities would allow a merger that the ownership rules would block, and *vice versa*.

7. Remedy issues

Analysis of remedies actually used in media merger cases is beyond the scope of this background paper, but should be available in the many country submissions expected to be received, and eventually published, in connection with the roundtable discussion this paper pertains to. We confine ourselves to a few general remarks.

It is clear that media markets, or at a minimum broadcasting, are for the most part qualified to be treated as what an earlier OECD roundtable discussion referred to as "emerging high innovation markets".[121] In such markets, competition authorities are under pressure to take a minimalist approach to remedies on the grounds that competition problems, if they arise at all, will prove very short lived. The counter-argument is that first mover advantages connected to economies of scale and network effects could make it very difficult for the market to self-correct should competition be restricted post-merger.

Competition authorities generally prefer structural as opposed to behavioural remedies for anti-competitive mergers. There are good reasons though to give special attention to behavioural remedies, despite their inherent monitoring costs and difficulties, in markets characterised by rapid change. This is primarily because such remedies can be changed as market conditions evolve, and can also be time limited. Both features can make behavioural remedies considerably less interventionist than mandatory divestments. It should also be noted that in rapidly changing markets, competition *for* the market may be substantially more important than competition *in* the market. In such an environment, it might be very difficult to find a buyer for divested assets that will be able to employ them in a way that makes a significant ongoing positive contribution to competition.

There is one area in particular where competition authorities have shown a penchant for using behavioural remedies for problematic media sector mergers. This has to do with mergers creating or reinforcing a type of gatekeeper power. Often this has to do with controlling access to content essential to new entrants, e.g. premium content, especially sports rights, for new television and video platforms.[122] It also shows up in terms of access to final consumers.

In the section of this paper dealing with vertical mergers, reference was made to de Streel's (2002) review of a considerable number of European Commission reviews of electronic communication's mergers. One of de Streel's two main conclusions from that review was that: "…intervention in these cases is often more efficiently done by sector-specific regulation than merger remedies, which calls for an enhanced cooperation between the Commission and [national regulatory authorities]."[123]

8. Final remarks

There is no need to repeat the key points of this paper since they have already been listed in the introduction. There are three important points, however, that warrant a final emphasis.

The *first* point is that media mergers may present difficult trade-offs. In particular competition authorities might be confronted with a merger having beneficial effects on one side of a media market while having harmful effects on the other, e.g. advertising prices may go down but prices to content consumers go up. Competition authorities might also have to deal with situations where content diversity declines but its general quality rises, with the result that content consumers with majoritarian tastes are better off while other consumers are worse off. Another trade-off could arise if a merger will increase the

quantity of advertising. Consumers disliking advertising, especially when it is difficult to avoid (as in free-to-air television and radio), could be harmed by an increase in its quantity, while other consumers who like advertising may be pleased with that development. Finally, a difficult trade-off could materialise if a media merger changes the incidence of price discrimination or versioning. Once again, some consumers might be better off as a result, while others are harmed.

The *second* point warranting special emphasis is that although advertising and gatekeeper effects can be important in media mergers, they are not the only issues that should be considered. Effects on general quality and diversity should also be considered by competition authorities, even though they are difficult to measure and assess.

The *third* point has to do with pluralism. There may be considerable international variation in the degree to which competition authorities are willing and able to consider pluralism issues when reviewing media mergers. There might also be differences of opinion among competition authorities concerning the wisdom of including pluralism within the scope of merger review. All would likely agree, however, on a number of important points:

1. When media mergers are blocked or conditioned in order to prevent anti-competitive effects linked to higher levels of ownership concentration and/or higher barriers to entry, competition authorities simultaneously make a positive contribution to pluralism;

2. Since pluralism issues are hard to measure, complex and inherently political, competition authorities mandated to enhance or protect pluralism should also be given as much guidance as possible about how to make trade-offs involving pluralism and economic efficiency; and

3. Whether or not competition authorities include pluralism in their media merger reviews, they should co-operate closely with media regulators in order to economise on investigative resources and to ensure that regulatory goals are attained with minimal negative effects on competition.

NOTES

1. United Kingdom (2001, 5)

2. Gomery (2002, 2)

3. Some might insist that the main economies of scale in media are actually better described as highly significant fixed costs. Economies of scale technically refer to what happens to unit costs as *all* factors of production are proportionately increased, i.e. measured over the long run in which there are no fixed costs. It appears, however, that most articles on the media industry refer instead to economies of scale and that convention will be followed here.

4. Europe Economics (2002, para. 2.2.20) describes this as follows:

> Versioning can extract consumer surplus provided the menu of choices offered to consumers creates incentives for high-valuation consumers to opt for high-price versions, whilst low-valuation consumers still have an opportunity to purchase the cheaper products. The arbitrage problem is circumvented as the strategy involves offering the same options to all consumers but priced in such a way that consumers with different levels of willingness to pay for the same basic product choose different options, self-selected according to the product variation. The information problems associated with price discrimination by customer group may also be alleviated, if a correlation between consumer preferences and the value of product to them can be identified and used to design a suitable menu of products.

5. Europe Economics (2002, para. 2.2.21) citing Shapiro and Varian (1999, 62). This list was titled: "Product Dimensions Susceptible to Versioning and their Likely Users/Uses" and the two columns were headed "Product dimension" and "Likely users".

6. Ireland (2001, 3). See also United States (Department of Justice) (2000, 8).

7. There will probably be substantial variation across media as concerns consumers' attitudes to advertising. Perhaps informative advertising, i.e. of prices and points of sale, is more appealing to consumers than brand building advertising. But what if the brand building advertising operates by offering an image that consumers hope to be acquire by using the product? That advertising may generally be liked by consumers, including those who already own the product and want to be reassured concerning their purchase. It might also be true that advertisements are less disliked by some content consumers the easier they are to avoid. Newspaper and magazine advertising would fall at one end of the easy to avoid spectrum and radio advertising at the other. Television advertising would fall somewhere in the middle, thanks to the mute buttons on remote control devices and increasing use of recording devices that can be programmed to remove advertising.

   Gabsszewicz and Sonnac (2002, 1-3) cite various theoretical and empirical studies suggesting that attitudes to advertising in different media may well differ across countries. That suggests that what makes advertising liked or disliked is not necessarily straightforward or much explained by the factors mentioned just above.

8. Readers are referred to: Marsden (1999, 31-40) for a good description of the standards issues involved in set-top box decoders, and how these could produce important gatekeeper effects; and to MacKie-Mason (2000, 15 & 17) who notes that network effects linked to proprietary, non-interactive standards can give rise to powerful tipping effects and also constitute a powerful barrier to entry in some media markets.

9. European Commission (1997, 5)

10. OECD (1999, 43)

11. European Commission (1997, 11-12)

12. See Humphreys (1999, 9).

13. See loc.cit.

14. OECD (1999, 43)

15. Ibid., p. 44

16. See for example: United Kingdom (2000) and (2001)

17. There was a veritable merger wave in the United States when the 1996 *Telecommunications Act* relaxed certain ownership restrictions in radio broadcasting. See Klein (1997).

18. For a general introduction to the economics of two-sided markets, see Rochet and Tirole (2001), Armstrong (2002), Evans (2002) and Evans and Oldale (2003). In Evans (2002, 34) one reads:

> A market is two-sided if at any point in time there are (a) two distinct groups of customers; (b) the value obtained by one kind of customers increases with the number of the other kind of customers; and (c) an intermediary is necessary for internalizing the externalities created by one group for the other group. Two-sided markets tend to result in businesses that supply both sides of the market, that adopt particular pricing and investment strategies to get both sides of the market on board, and that adopt particular pricing and product strategies to balance the interests of the two sides. (reference omitted)
>
> After noting that economists use the term "indirect network effects" to refer to benefits each customer group receives when members of another customer group are on the same platform (see page 2), Evans and Oldale state:
>
> …firms in multi-sided markets secure profit opportunities from internalizing indirect network effects from distinct customer groups whose demands are interdependent. (4)
>
> Rochet/Tirole and Evans stress that two-sided markets involve an important "chicken and egg" problem that must be solved to get a business up and running, and that there are many different ways of doing this even within what may be the same market.

19. The relevant interactions, seen from the perspective of television stations have been succinctly summarised as:

> Broadcast television stations compete for advertisers by choosing programming to attract viewers to their stations. In choosing programming, a station tries to select shows that will appeal to the greatest number of viewers, and also tries to differentiate itself from other stations by appealing to specific demographic groups. Advertisers, in turn, are interested in using broadcast television spot advertising to reach a large audience, as well as to reach a high proportion of the type of viewers that are most likely to buy their products.

United States (Department of Justice) (2001, para. 18)

20. See Rochet and Tirole (2001) and Evans (2002). The latter distinguishes between two types of two-sided markets, i.e. "market makers" and "audience makers" – see pp. 15-17 of his paper. Media firms clearly fall in the latter category.

21. See Lande (2001, 517-518).

22. A certain size might be necessary to garner a sufficiently large and predictable audience to interest advertisers.

The author wishes to thank Allen Grunes of the U.S. Department of Justice for suggesting the cinema example.

23. Rochet and Tirole (2001) discuss the phenomenon that in some two-sided markets one side ultimately pays the total price regardless of how it is initially apportioned. See also Ludwig (2000).

24. See Dukes (2001) for an analysis of the importance of the informative versus brand-building advertising distinction. Dukes makes the argument that advertisers wishing to engage in brand-building advertising may desire media that are less competitive on the consumer side because these will tend to offer more advertising and lower advertising rates. The implicit assumption is that in such media, consumers generally dislike advertising so reductions in competition for consumers may be needed to make a higher advertising/content ratio profitable. In contrast, advertisers undertaking advertising of a more informative nature may prefer media to be more competitive on the advertising side because they will tend to offer less advertising at higher advertising rates. The result will be less informative advertising by producers taken together and, other things equal, higher profits for the advertisers.

For a brief overview of how advertising can help or harm consumers, see Tirole (1988, 289-295)

25. See George and Waldfogel (2000, 5-6 & footnote 9) for references to arguments that consumers might be better off with monopoly newspapers. Their footnote 9 included a reference to Chaudhri (1998) who found that newspaper prices are lower in monopoly as opposed to duopoly served cities in Australia. George and Waldfogel's footnote 9 points as well to three empirical studies for the newspaper industry apparently showing that "…concentration may in some cases benefit consumers."

26. Interested readers are referred to:

- George and Waldfogel (2000) - see n. 23 supra

- Dukes (2001) – considers how the degree of competition on the consumer side of the market will affect the quantity of advertising offered to advertisers and how that in turn will affect advertisers profits. As noted in n. 22 supra, that profits effect could depend on whether advertising is brand-building or informative in nature.

- Cunningham and Alexander (2002) – the main finding of their model was that the profit-maximizing response of broadcasters to a change in concentration depends in part on how consumers will respond to a change in the ratio of advertising to non-advertising content. These authors also consider the welfare effects of advertising induced increases in product prices.

- Gal-Or and Dukes (2002a) – this article notes that if advertising is informative, hence pro-competitive in nature, there is an additional reason to expect a media merger that increases the supply of advertising will reduce advertising rates. It is that the demand (i.e. the demand curve rather than quantity demanded) will decrease due to advertising tending to reduce rather than enhance advertisers' profits.

27. Canada (House of Parliament) (2000, 3)

28. United States (Department of Justice) (2001, para. 21)

29. See United States (Deparment of Justice and Federal Trade Commission) (1997, 4-8)

30. See Europe Economics (2002).

31. See Bird & Bird (2002).

32. Europe Economics (2002, paras. 1.4.3 and 1.4.4)

33. For a more general discussion of market definition problems specific to two-sided markets, see Evans (2002, 49-51).

34. Waldfogel (2002, 3-4)

35. Europe Economics (2001, para. 2.3.15)

36. This was the value chain identified in OECD (1999, 34). The Bird & Bird study presents a somewhat more extensive list: raw content; production of content; content aggregation; financing (i.e. advertising and public funding); wholesale distribution; and retail distribution. See Bird & Bird (2002, para. 184).

37. Europe Economics (2001, para. 1.5.6), emphasis added

38. Ibid., para. 1.4.5

39. Ibid., para. 3.5.32

40. Bird & Bird (2002, para. 1003)

41. Its final criticism, at para. 26, was:

> …the SSNIP test is exclusively focused on a quantitative approach to substitutability, *i.e.,* the reaction of consumers to a variation in price. Consequently, that test takes little if not no account of qualitative criteria such as strategic competition and innovation decisions, on the grounds of which a company may decide to compete not only on prices but also on services. However, that criterion may be crucial, particularly in the media environment, where innovation plays a key role. Companies would therefore tend to compete with new tools, which are often considered as more important than price. The likely reaction of consumers to a theoretical price increase may therefore be of limited use.

42. Ibid., para. 27

43. OECD (1999, 12-13), footnotes omitted

44. Klein (1997, 5). Empirical support for treating radio as a separate antitrust market can be found in Ecklund et al. (1999).

45. Bush (2002, 14). These conclusions were qualified because of some data problems, but following the qualification, Bush notes: "The estimated elasticities are not, however, inconsistent with economic theory and do not appear unreasonable." (14)

46. United States (Department of Justice) (2001, paras. 11 & 13)

47. Richtel (2003)

48. OECD (1999, 55)

49. Ibid., p. 58

50. See Pereira (2002, 2) and Humphreys and Lang (1998, 25).

51. See Humphreys and Lang (1998, 25) and Abbamonte and Rabassa (2001, 219)

52. This view is roughly supported by Abbamonte and Rabassa (2001, 215-216).

53. OECD (1999, 60 references omitted)

54. See Pereira (2002). Mr. Pereira was writing in a personal capacity rather than as a member of the European Commission's Competition Directorate (Media and Music Publishing Unit).

55. Pereira (2002, 3-4) outlined two ways in which this could come to pass:

> First, AOL/Time Warner would be in a position to develop a closed proprietary formatting technology for all the downloads and streaming of Time Warner and Bertelsmann tracks. The formatting language of AOL/Time Warner could become an industry standard and competing record companies wishing to distribute their music on-line would be required to format their music using the new entity's technology. Because of its control over the relevant technology, the new entity would be in a position to control downloadable music and streaming over the Internet and raise competitor's costs through excessive license fees.
>
> Alternatively, AOL/Time Warner could format its music (and Bertelsmann's) to make it compatible with its own software Winamp only, ensuring at the same time that Winamp could support and play different formats used by other record companies.
>
> …By formatting its music and the music from Bertelsmann to make them compatible with its own software Winamp only, the new entity would cause Winamp to become the only "player" in the world capable of playing virtually all the music available on the Internet. By refusing to license its technology, the new entity would impose Winamp as the dominant music player as no other player would be able to decode the proprietary format of TW and Bertelsmann music. As a result of the merger, the new entity would control the dominant player software and could charge supra-competitive prices for it. Consequently, AOL/TW could end up holding a dominant position on the emerging market for on-line music delivery.

It should be noted that both Time Warner and Bertelsmann were among the five largest owners of music content, and Time Warner had, through contractual links, preferential access to Bertelsmann music. See also Rabassa (2001, 46-47) where the gatekeeper issue around Winamp is mentioned. In addition, Rabassa discusses the foreclosure effects believed to arise in the Vivendi/Seagrams merger and Vizzavi joint venture.

56. Pereira (2002, 4)

57. Ibid., pp. 4-5

58. Griffiths, Mark (2000, 2 & 12)

59. Pereira (2002, 5)

60. Ibid., p. 6

61. Ibid., pp. 6-7

62. In specific, Pereira stated, at page 7:

> The Commission considered that Canal+ would further increase its dominant position on a number of European pay-TV markets at national level. Already before the operation Canal+ enjoyed an almost monopolistic position in respect of the acquisition of the exclusivity on Hollywood films produced by the major studios (in France, Spain and Italy). The acquisition of Universal Studios would further strengthen Canal+'s position as purchaser of Hollywood films, not only in respect of Universal itself but also in relation to other studios due to underlying financial links. Due to the vertical integration of Universal and Canal+, Canal+ would be able to leverage its position in order to secure the renewal of the exclusive agreements for pay-TV with all of the Hollywood studios and in fact also to enter into new deals. The bargaining power of Canal+ vis-à-vis the film studios would therefore be increased, allowing Canal+ to further foreclose the pay-TV markets where it already was active.

Abbamonte and Rabassa (2001, 216, reference omitted) fleshed this out a bit by noting that Canal+ would increase its power to acquire Hollywood films because "…Universal had a number of structural links and arrangements, such as film co-financing, with the other majors."

63. Pereira (2002, 7)

64. Ibid., p. 6

65. Ibid., p. 8. The access theme was strongly reiterated in Pereira's conclusion: "The keyword is access and the approach consists in ensuring that, no matter how far companies integrate, access is granted in respect of those inputs or those paths that may foreclose a given market or contribute to the creation of a dominant position." Ibid., p. 9

66. For more information regarding how the Commission analysed the Vivendi/Seagram and AOL/Time Warner mergers, see Abbamonte and Rabassa (2001).

We note in passing that the United States Federal Trade Commission (FTC) and Federal Communications Commission (FCC) also reviewed the AOL/Time Warner merger. Time Warner operated an important cable TV network in the U.S. but not in Europe, and it was cable TV related issues that principally attracted the FTC's attention. The FTC concluded that the merger would have had an anti-competitive impact on Internet access services, last mile Internet connection, and the market for interactive television which AOL had recently pioneered. It accordingly imposed access related conditions to address those concerns. The FTC did not find major problems in relation to AOL's Winamp and instant messaging services. Instant messaging was a concern however to the FCC. It restricted the merged entity in providing such services until it interoperated with other instant messaging services. [this footnote relies on details provided in Case Associates (2001)]

67. Press Review (1994, 1)

68. See European Commission (1994, paras. 5, 6 & 7)

69. Ibid., para. 73

70. Ibid., para. 74

71. Ibid., para. 92

72. See Ibid., paras. 94-99

73. He referred to a vicious circle: "Firstly, the parties, joining their forces to enter an emerging market, foreclose any entry by leveraging their market power from the traditional content or infrastructure markets. Secondly, the parties reinforce their power in the traditional market, by leveraging from their secured position in the emerging market.." (11)

74. See de Streel (2002, pp. 13-14 & 17).

75. Kovacic and Reindl (1997, 27). The cite for *Nordic Satellite Distribution* was O.J.L. 53/20 (1996).

76. See ibid., p. 27

77. Ibid. , p. 29

78. Loc. Cit.

79. Ibid., pp. 29-30, omitting footnotes referring to two other European Commission cases.

80. Waterman (2000, 531-532)

81. Ibid., p. 538

82. Summing up, Waterman stated: "Thus, while there is clear evidence of "self-dealing" in television programming and exhibition within both the Disney and Fox corporations, majorities of the prime-time programs exhibited by both networks are produced by other studios, and the production branches of both firms do business with competing networks. (537)

83. Waterman (2000, 539)

84. See United Kingdom (Competition Commission) (2000).

85. Some might include access to interactive services including electronic commerce as a further media service. This seems better characterised however as belonging to telecommunications than to media.

86. United Kingdom (2001, para. 1.3)

87. For further discussion of this point in the context of "broadcasting versus narrowcasting", see Chae and Flores (1998). The targeted advertising phenomenon *might* be stronger in the newer interactive media, such as the Web because of information consumers provide about themselves – see Hargittai (2000, 17). Experience in the last couple of years, however, suggests that targeted advertising might not be that easy to implement and sell on the Web.

The more specialised a medium's content, the more the medium's audience might also hold an additional attraction for an advertiser. The more advertising is confined to such a medium, and the more its audience exclusively patronises that medium, the easier it is for an advertiser to predict how many exposures a typical consumer has received and thus avoid buying advertising subject to significant diminishing (perhaps even negative) returns. This effect depends on an assumed correlation between specialisation in content and consumer loyalty to a medium.

88. For a general discussion of the effect noted in this paragraph, usually involving reference to the product differentiation model ascribed to Hotelling (1929), see Gabszewicz, Laussel and Sonnac (1999), and Hargittai (2000, 15-19). In addition to reviewing the relevant literature, Hargittai suggests that in sufficiently concentrated advertising supported media, a merger might lead to less content diversity as a means of tacitly coordinating the creation of a more competitive consumer side of the market.

Many of the economic models dealing with the Hotelling effect in the media assume a very small number of firms, i.e. focus on content diversity expected in monopoly or duopoly markets or situations where there are just three or four firms. Tambini (2001, 30) points out the shortcomings of such models:

> Hotelling proposed that economically rational competitors will always tend to crowd in the middle of the spectrum of consumer tastes rather than provide a diverse range of products (Hotelling, 1929). Although valid where there are three or four suppliers (for example, broadcast channels), this claim may be less convincing when viewed in context of media abundance, where there are ten competitors versus three. There has to be a critical point after which it is more rational to pitch products and services to a market niche than to intensify already hot competition in the middle-of-the-road. Thus Hotelling's analysis helps explain the evolution of parallel schedules and programmes of BBC1 and ITV, but may be less useful in a world of tens, if not hundreds, of media channels, competing on price as much as on quality. Applied to new media, Hotelling's effect suggests that the middle ground of each niche market may be crowded, but does not imply proliferation of hundreds of identical general entertainment channels with the explosion of bandwidth. The theory does, however, reinforce the recognition that a limited number of suppliers in a particular market may be inimical to pluralism. There may also be effects less easily written into the assumptions of the economists, such as a tendency for individuals to value certain 'common knowledge' – shared facts and cultural practices – simply because they are shared.

89. See Berry and Waldfogel (1999, 5). Van der Wurff and Cuilenburg (2001, 214-215) come to a similar conclusion in their review of the debate concerning whether or not competition among oligopolists tends to produce excessive sameness of content. See also Hargittai (2000, 15-19) for a review of the literature investigating whether the market can or cannot be relied on to produce an optimal amount of diversity.

90. For some generally supporting empirical work, though using a different measure of diversity and focusing on the effect of competition (defined somewhat unconventionally), see van der Wurff and van Cuilenburg (2001). This article examines what happened as the number of free-to-air television channels has increased in Holland.

91. To better appreciate this point, let us continue with the newspaper example, but make some simplifying assumptions. In particular, let us assume that both pre- and post-merger, the content market is completely monopolised by a firm not vertically integrated into newspapers and newspapers buy all their content from this monopoly firm. Let us further assume that no newspaper has any negotiating power, newspaper readers are "strongly homogeneous", in the previously mentioned sense, and the total number of newspaper readers will not be affected by the merger. The last assumption is equivalent to assuming either that the merger creates no market power on the consumer side of the market, or that demand in that market is completely inelastic.

Under the above very strict assumptions, both before and after the merger the content monopolist will charge all newspapers the same price *per reader* and that price will not be altered by the merger. In addition, the total number of expected readers and revenues for any particular article should not change because of the merger, and neither should the marginal revenue associated with changes in content quality. In sum, there is no obvious reason, at least on the marginal revenue side, to expect that the merger will affect content quality. One would reach the same prediction if in place of a non-integrated content monopolist, one were to assume that the content market functioned perfectly in the sense that there were no incentives for or against vertically integrating into content production. In that case, both before and after the merger, any articles the merging parties produce themselves are and will continue to be made available to other newspapers at efficient and unchanged prices. It is beyond the scope of this paper to determine how the deductions derived from these two stereotyped models would be altered by relaxing one or more of their constituent assumptions.

92. This view is, however, contested. See for example: Humphreys and Lang (1998) and Hooper (2002).

93. Stucke and Grunes (2001, 251, citing the Webster's dictionary)

94. Ireland (2001, 1), reference omitted. Gomery (2001, 15) expresses similar views:

> Media industries ought to facilitate free speech and political discussion. A democracy needs freedom of expression to make it work, and the mass media ought to be open enough to promote debate of all points of view. The marketplace of ideas calls for criteria of accuracy and completeness, and these qualities must count in any definition of diversity. Public regulations must seek to create as many voices as possible, realizing how central various means of expression are to a robust democracy. This goal should not be considered secondary, but rather equal to efficiency as a criterion to maximize.

95. Baker (2002, 894-899) provides a discussion of the view that the Internet substantially reduces the importance of media bottlenecks, and concludes (at 898-899):

> Thus, although the Internet certainly changes the competitive situation in various ways, there is no reason to believe that it eliminates even narrow antitrust concerns with concentration in various areas of *content creation*. Potential power of control over major portals remains an area for policy concern. Most excitingly, there is some possibility that the Internet will increase the number of "volunteer" (that is, non-profit oriented) publishers. But most dangerously, it also could lead – as firms such as AOL Time Warner or Disney presumably hope – to increased concentration in the production of professional quality media and an increase in the portion of the time that people spend on these concentrated media.

Tambini (2001, 33), looking at things from the angle of digitalization and resulting convergence, also doubts that bottleneck issues will soon cease to be important for pluralism:

> A digital dream is gripping the minds of media broadcasters and policymakers throughout the world. It is a dream of an infinitely plural media environment, in which the consumer is in complete control, and problems of pluralism, diversity and media control have vanished.
>
> The digital dream is unfortunately far from reality….It is precisely the abundance of new digital media that creates demand for new intermediaries and aggregators of content who occupy the position of powerful media gatekeepers. It is precisely the transition to digital that spurs the development of new vertically integrated media companies. Even where channel choice is huge, as in the US, consumers tend still to get the majority of their information from one or several sources. And the appearance of freedom on the net can be deceptive: search engines, commercially driven linking and searching and preferred placement strategies in fact mean that new digital media will provide at least as many challenges to media pluralism as did the old media. Many consumers will stay with the core broadcasting channels, and it is the overall share that we are concerned with, rather than the means of delivery. Even if the digital dream describes the future, there is no guarantee of how quickly we will get there. The challenge in this context is to devise an approach to pluralism that will protect it in the transition to digital. (reference omitted)

96. See Baker (2002, 873-883).

97. Ibid., pp. 899-900

98. Ibid., p. 902

99. Ibid., pp. 906 & 907. Interesting anecdotal evidence is offered in support of these propositions on pp. 908-909.

100. Ibid., p. 914

101. For two overviews of this debate, see Iosifides (2002), and Sauvageaux and Giroux (2001).

102. United Kingdom (2000, para. 4.2.6) Tambini (2001, 30) comes to a similar conclusion:

> First, competition policy might tolerate a market with a restricted number of providers, or indeed a single provider provided that this dominant player did not engage in anti-competitive behaviours. Economic efficiency might result in service from a huge, efficient provider. If there were no barriers to entry and the market in question was deemed to be contestable…, a regulatory regime based in competition policy might find this unexceptionable. The relevant market might be defined as including companies not currently making the product or offering the service in question but which could switch to doing so….Such a 'winner takes all' market might (or might not) be competitive but would not be characterised by pluralism of source, content or exposure.

See also Atkinson (1999, 2) where it is stated that: "…competition policy could tolerate what democratic theory would disallow: a huge but efficient provider in a contestable market with no barriers to entry."

103. United Kingdom (2001, para. 1.10)

104. See Tambini (2001, 32)

105. Stucke and Grunes work for the United States Department of Justice (Antitrust Division), but the views expressed in their article were strictly personal.

106. They noted in passing, though (at 257) that the Antitrust Division "…challenged [a recent newspaper merger] in part based on the loss of editorial competition."

107. Ibid., p. 273

108. Ibid., p. 283, references omitted.

109. See Ibid., 297-299

110. Lande (2001, 517-518) makes a similar point:

> The most important area where optimal levels of price competition may be insufficient to provide optimal levels of diversity and innovation may be the independent editorial programming of a communications medium. If one communications medium were to buy another of the same kind, the acquisition might not concentrate the market sufficiently to threaten price competition. Being competitive, the market might also soon produce the product menu that consumers desire, in terms of types and formats of shows. But the market would inevitably sustain a loss of editorial diversity. This loss cannot be recreated through the normal mechanism of non-price competition among the surviving firms; the new products would necessarily bear the editorial stamp of their common owner. This scenario suggests that media mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming. Where that loss is sufficiently severe, such mergers should be challenged under the *Clayton Act*, even if there has been no showing of harm to price competition. (references omitted)

111. Stucke and Grunes note that such efficiencies are grounded in the high fixed costs typical in media markets - see ibid., p. 299.

112. Ownership restrictions, including cross-ownership restrictions exist in many countries. See United Kingdom (2001,13). Tambini (2001, 21) pointed out that such restrictions promote but do not guarantee pluralism. Feintuck (1997, 6) apparently agrees: "There is a real sense in which the focus on competition via control of ownership can be viewed as surrogate for regulation for plurality in output."

113. The background paper for a recent OECD Global Forum on Competition discussion on the objectives of competition law and policy deduced from a number of country submissions that: "The gradual shift away from use of competition laws in OECD countries to promote public interest objectives suggests that a consensus may be emerging that it is sub-optimal, at least once a country has reached a certain level of

development, to use competition law and policy to promote such goals." OECD (2003b, para. 4). Two of the main reasons for this are well expressed in a submission for the same meeting received from Ireland:

> Policy makers may seek to use competition policy to further other (broader) policy objectives, such as industrial policy, regional development or the "public interest", as for example in a public interest test for mergers. There are two reasons why it is best not to use competition policy as a wider policy instrument. Firstly, broadly specified policy objectives can be ambiguous and as such are subject to "capture" or "hijack" by the politically strongest private interests, usually those of producers or workers. Thus *de jure* public interest objectives may de facto serve private interests. Secondly, non-competition policy mechanisms are generally superior for achieving non-competition policy objectives. To elaborate, restricting competition in an attempt to achieve a broader policy objective will have inevitable anti-competition side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be both ineffective and socially wasteful. Ireland (2003, para. 1.2)

A similar view can be found in the questionnaire responses provided by Mexico, Morocco, Spain and South Africa to the same Global Forum.

114. As currently practiced, Canada's review of media mergers is confined to economic factors, particularly effects on advertising rates. See: Canada (House of Parliament, Standing Committee on Industry) (2000, 3), and Canada (Competition Bureau) (2002c, 3).

115. Canada (House of Parliament, Standing Committee on Industry) (2000, 6). Tambini (2001, 26) takes this a step further: "Notions of pluralism, diversity and the marketplace for ideas are at best vague and malleable, at worst adjusted to the purpose of whoever invokes them."

116. Loc. Cit.

117. For a good overview of how this works, see United States (Department of Justice) (2000).

118. See United Kingdom (2001).

119. OECD (2002, paras. 22 & 23)

120. See Canada (Competition Bureau) (1999).

121. The issues paper for that roundtable identified the following characteristics of such markets:

1. high R&D intensity and dependence on intellectual property rights (IPRs) coupled with a closely related heavy reliance on human instead of physical capital;

2. rapid technological change and short product cycles;

3. increasing returns to scale;

4. important network effects;

5. significant compatibility and standards issues; and

6. a high degree of technical complexity.

OECD (2003a, 20). See also Evans and Schmalensee (2001).

122. See Ungerer (2002, 9-12).

123. De Streel (2002, 17)

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NOTE DE RÉFÉRENCE

par le Secrétariat

La question de savoir à qui appartiennent nos journaux, notre télévision et notre radio est essentielle pour une démocratie. Les informations et les opinions dans lesquelles nous puisons doivent refléter une diversité de voix et de points de vue si nous voulons être en mesure de comprendre les problèmes de l'heure et d'en débattre. La mission des pouvoirs publics consiste à définir un régime de propriété des médias qui protège cette pluralité des voix et encourage une diversité de contenu tout en favorisant le marché le plus compétitif pour les entreprises des médias et en attirant de nouveaux investissements[1].

Les journaux et les diffuseurs ne sont pas de simples entreprises que l'on peut réduire à quelques équations en vue de générer des bénéfices, mais plutôt de grandes institutions politiques, culturelles et sociales complexes et ils doivent être analysés au moyen d'un modèle économique institutionnel prenant en compte les externalités, à la fois positives et négatives, qui ont un impact sur le bien-être public[2].

1. Introduction et points essentiels

Rares sont ceux qui contesteraient que le droit de la concurrence devrait être appliqué aux fusions dans les médias pour veiller à ce que les consommateurs et les annonceurs ne soient pas surfacturés ou ne voient pas la qualité se dégrader à la suite d'une fusion. Un grand débat existe cependant sur la meilleure approche que pourraient adopter les pouvoirs publics face à leurs intérêts spécifiques dans les médias. Les populations tirent d'importants avantages de l'accès à une grande diversité de points de vue politiques et d'émissions culturelles. Ces avantages constituent des externalités essentielles qui ne sont pas entièrement prises en compte par les consommateurs de produits médiatiques et par les annonceurs cherchant à les atteindre. La plupart des pays ont eu recours à des subventions et/ou au contrôle public ainsi qu'à différentes réglementations pour s'assurer que les externalités des médias soient mieux préservées que cela aurait autrement été le cas.

Les médias, dans le sens où ce terme est utilisé dans le présent document, se réfèrent à un mode de communication employé pour atteindre un grand nombre de personnes, autrement dit pour faciliter la communication à partir d'une même source vers de nombreux destinataires. Ils comprennent par conséquent les journaux, les magazines, la diffusion d'émissions de radio et de télévision, le cinéma et l'Internet. Ils englobent aussi, au sens strict du terme, les livres et les panneaux d'affichage (publicité en extérieur). Pour simplifier les choses, les livres et les panneaux d'affichage ne seront dans l'ensemble pas pris en compte dans le présent document, et le cinéma ne sera que brièvement évoqué. La majeure partie de l'étude portera sur les journaux, la radiotélévision (y compris les services de diffusion par satellite et sur le câble) et l'Internet. Ce sont les secteurs où l'on a pu observer jusqu'à présent la majorité des cas difficiles de fusion dans les médias. Il s'agit en outre des médias le plus susceptibles de soulever des problèmes en matière de diversité et de pluralisme et de poser des difficultés d'analyse en rapport avec le phénomène de « dualité des marchés » en question.

De nombreux médias sont financés, du moins en partie, par la publicité et on peut donc considérer que les marchés se rattachant à ces médias présentent pour l'essentiel deux côtés. D'un côté, on a les annonceurs et, de l'autre, les consommateurs de contenu, que l'on appellera ci-après simplement « consommateurs ». Lorsque le terme « consommateurs » peut prêter à confusion, nous parlerons de « consommateurs de contenu ».

L'existence d'externalités importantes poserait moins de problèmes pour l'étude des fusions dans les médias si les marchés des médias ne présentaient pas d'autres caractéristiques. Parmi celles-ci, on compte les gigantesques économies d'échelle associées à la production et parfois à la distribution de contenu[3], et la nature duale des marchés des médias. Ces deux facteurs, conjugués à plusieurs autres, tendent à accentuer la concentration sur de nombreux marchés des médias au point que les fusions pourraient gravement menacer à la fois les externalités et d'autres aspects qui intéressent les autorités de la concurrence.

Le présent document a pour but d'aider les autorités de la concurrence à identifier et à analyser les problèmes spécifiques posés par les fusions dans les médias, et notamment ceux liés au pluralisme. Tout d'abord, l'examen portera sur les caractéristiques des marchés des médias qui peuvent être pertinentes dans le cadre d'un contrôle des fusions. Les problèmes de définition du marché seront ensuite traités, puis une attention particulière sera accordée aux fusions verticales. Les questions de qualité, de diversité et de pluralisme seront ensuite abordées et, pour finir, un bref aperçu sera donné des solutions possibles, suivi de quelques remarques de conclusion.

1.1 Points essentiels

1. La nature duale de nombreux marchés des médias pose des difficultés particulières pour évaluer les fusions. On ne peut en effet évaluer l'impact d'une fusion pour un côté du marché sans prendre en compte les conséquences pour l'autre. Cela vaut aussi pour les conséquences concernant les consommateurs de contenu lorsque l'on s'attend à des changements de volume de la publicité à laquelle ils seront exposés.

2. La dualité des marchés des médias pourrait amener les autorités de la concurrence à de difficiles compromis : par exemple une même fusion pourrait faire baisser les coûts publicitaires et en même temps augmenter les coûts directs et indirects pour les consommateurs.

3. Compte tenu de la multiplicité des produits, de la discrimination par les prix (y compris la déclinaison des produits sous différentes versions) et les offres groupées, la définition du marché aux fins du contrôle des fusions dans les médias peut prendre énormément de temps. Elle peut être aussi extrêmement difficile compte tenu de la rapidité des changements et de l'absence de transactions (en raison de l'intégration verticale) et de prix (comme dans la radiotélévision gratuite). La définition du marché qui se fonde sur l'identification et l'évaluation des substituts peut néanmoins jouer un rôle important dans le contrôle des fusions en facilitant une évaluation préliminaire des conséquences en terme de concurrence des fusions des médias en fonction des modifications de parts de marché et en contribuant à structurer l'analyse.

4. Des désinvestissements et/ou des mesures d'accès obligatoire peuvent être nécessaires pour remédier aux éventuels effets d'exclusion associés à certaines fusions dans les médias, mais ils doivent être sensibles aux efficiences à l'origine du recours fréquent aux dispositifs verticaux que l'on rencontre dans ces marchés.

5. Malgré les difficultés pour mesurer la qualité et la diversité du contenu et pour prédire comment les fusions dans les médias peuvent les affecter, le contrôle des fusions ne doit pas négliger ces considérations.

6. Le contrôle des fusions peut contribuer positivement à la préservation du pluralisme dans les médias, sans pouvoir à lui seul le protéger convenablement.

2. Quelques caractéristiques spécifiques des médias intéressant le contrôle des fusions

2.1 L'importance des coûts fixes et le recours à une tarification fondée sur la valeur et à la déclinaison des produits sous différentes versions

Le contenu diffusé par un média est généralement très onéreux en raison des frais fixes de production et de distribution, mais représente très peu de coûts marginaux liés à l'arrivée d'un consommateur supplémentaire. C'est particulièrement vrai de la radiotélévision gratuite, mais cela vaut moins pour les journaux et magazines pour lesquels le coût des exemplaires supplémentaires est plus important.

En raison de ces énormes frais fixes, les prix ne vont pas être définis de façon à couvrir les coûts marginaux. Les sociétés du secteur vont plutôt établir des prix supérieurs aux coûts marginaux et préféreront se livrer à diverses formes de tarification fondée sur la valeur. Les discriminations par les prix, notamment si les économies d'échelle induisent une certaine puissance sur le marché, sont très probables, sous réserve de pouvoir empêcher les arbitrages et de pouvoir mettre en évidence les différences d'élasticité de la demande. Redessiner le format ou le mode de distribution, c'est-à-dire la déclinaison sous plusieurs versions, est une façon de répondre à ces deux conditions[4]. On trouvera dans la liste ci-après quelques exemples de déclinaison sous différentes versions dans les médias, en indiquant notamment le critère de tri des consommateurs que l'on pense lié à la propension à payer [5] :

Retard	Consommateurs patients/impatients
Interface utilisateur	Consommateurs ordinaires/expérimentés
Commodité	Consommateurs en entreprise/à domicile
Résolution de l'image	Consommateurs de lettres d'information/presse magazine
Rapidité d'exploitation	Consommateurs étudiants/professionnels
Format	Utilisations sur écran/sur imprimé
Capacités	Utilisations générales/spécifiques
Caractéristiques	Consommateurs occasionnels/fréquents
Compréhensibilité	Consommateur non averti/professionnel
Ennui	Consommateurs accordant une forte/faible valeur au temps
Aide	Consommateurs ordinaires/intensifs

Une bonne partie de la créativité des dirigeants de médias tourne autour des ajouts ou des modifications apportés à cette liste non exhaustive et de la découverte de nouveaux moyens de suivre la stratégie commerciale consistant à « créer une fois pour diffuser partout » qui caractérise à la fois le volet du contenu et celui de la distribution des entreprises des médias.

2.2 Une tendance à une forte concentration

Toutes choses égales par ailleurs, plus les économies d'échelle sont grandes par rapport à la taille potentielle du marché, plus la concentration sur ce marché tendra à être forte. On peut donc s'attendre à

observer une forte concentration sur les marchés des médias. D'autres facteurs vont aussi dans le même sens, comme la rareté des fréquences, l'importance du recours à la publicité et parfois les effets de réseaux.

Les sommes que les annonceurs sont disposés à payer pour obtenir un créneau ou un espace publicitaire dépendent de l'importance du public que l'on compte toucher. En d'autres termes, la tendance à la concentration liée aux économies d'échelle pourrait être sensiblement amplifiée dans des médias au moins en partie financés par les recettes publicitaires. C'est ce que l'on désigne parfois comme le phénomène donnant lieu à « un effet de spirale à la baisse ». Pour les journaux, cet effet sera décrit ci-après :

> Le journal ayant la plus grande diffusion aura tendance à attirer plus d'annonceurs. Comme les recettes de ce journal augmentent et que celles des plus petits journaux diminuent, ces derniers ont moins de ressources à consacrer à l'actualité, aux services éditoriaux, aux articles d'opinion, etc. Leur qualité diminue de ce fait, ce qui amplifie le recul de la diffusion qui provoque elle-même une diminution supplémentaire du nombre d'annonceurs et des recettes publicitaires. Appliquer des tarifs de publicité inférieurs ne va pas nécessairement aider les plus petits journaux. Les annonceurs ne s'intéressent pas au tarif par ligne facturé par le journal, mais au tarif leur permettant de toucher un certain nombre de lecteurs avec cette ligne. La publicité dans un journal de grande diffusion peut donc en dernière analyse être meilleur marché. Les journaux plus petits se trouvent donc pris dans une spirale de baisse qui, si elle n'aboutit pas à leur faillite, se traduit au moins par l'affirmation progressive de la domination d'un journal[6].

L'effet de la spirale de baisse n'est pas propre aux journaux et il va tendre à s'amplifier : i) plus le média dépend de la publicité et ii) plus ses consommateurs prospectifs considèrent la publicité comme un bien plutôt qu'un mal[7]. Cela va aussi dépendre de l'importance du chevauchement entre les médias, donc de la question de savoir dans quelle mesure les consommateurs se portent sur plusieurs médias, parmi un certain nombre. À titre d'exemple extrême, prenons le cas de deux chaînes de télévision gratuite (A et B) qui se partagent l'audience durant la tranche de 21h00 à 23h00. Supposons que quelques rares téléspectateurs, si tant est qu'il y en ait, ne passent jamais de A à B. Pour atteindre le public dans sa totalité, il va falloir faire de la publicité à la fois sur A et sur B. Les choses seraient différentes si les téléspectateurs n'éprouvaient pas une forte loyauté vis-à-vis de l'une ou l'autre chaîne, mais A bénéficie régulièrement de la présence de 90 % des spectateurs à tout moment. En pareille situation, les annonceurs vont sans doute décider de privilégier B.

Il y a encore un autre facteur qui pourrait contribuer à créer ou maintenir une forte concentration dans les marchés des médias. Il a trait aux normes et aux effets de réseau. Un exemple particulièrement éloquent porte sur la technologie des plates-formes numériques. Pour avoir accès aux chaînes de télévision numérique proposés par les divers bouquets, les consommateurs doivent acheter un décodeur. Comme les bouquets choisissent de ne pas assurer l'interopérabilité de leurs décodeurs, les consommateurs subissent des frais de mutation considérables pour changer de bouquet. Ils vont donc vouloir trouver le décodeur susceptible d'être retenu par la plupart des autres consommateurs afin d'avoir accès à plus de contenu et de surcroît de meilleure qualité[8].

La rareté des fréquences exerce une influence manifeste sur la concentration dans le domaine de la radiotélévision gratuite *à relais terrestres* mais c'est beaucoup moins le cas si l'on prend en compte la radiotélévision dans son ensemble.

L'avènement des services de télévision par câble et par satellite a considérablement accru le spectre des fréquences disponibles tout en apportant un moyen immédiat d'exclure les consommateurs qui ne paient pas. L'importance de l'élargissement du nombre de fréquences disponibles dépend cependant de la question de savoir si la radiotélévision gratuite à relais terrestres se trouve sur le même marché que les

services de télévision par câble et par satellite, point sur lequel nous reviendrons plus tard lorsque nous examinerons la définition du marché.

2.3 Convergence/numérisation

Un récent livre vert de la Commission européenne a noté que le terme convergence était difficile à définir précisément « …mais est communément exprimé de la façon suivante : la capacité des différentes plates-formes à transporter des services essentiellement similaires, soit le regroupement des équipements grand public comme le téléphone, la télévision et les ordinateurs personnels[9]. »

Pour sa part, un document de référence destiné à une table ronde organisée par l'OCDE en octobre 1998 (« le document de l'OCDE sur la radiotélévision ») notait que la convergence était le résultat des évolutions suivantes :

- la numérisation (qui permet de traiter toutes les formes de contenu informatif, y compris audio ou vidéo, sur les mêmes réseaux et de la même manière) ;

- la baisse des prix de calcul (ce qui permet le développement de matériel perfectionné et abordable pour les consommateurs afin de permettre le codage et le décodage des signaux et l'interaction avec l'information multimédia) ;

- la réduction du coût de la bande passante (et les technologies de compression qui permettent d'utiliser de façon plus efficiente la bande passante existante) ; enfin,

- la libéralisation des télécommunications (qui permet à de nouvelles entreprises de prendre pied sur des marchés autrefois protégés)[10].

Le livre vert de la Commission européenne a noté que la compression numérique réduisait de façon économiquement efficace les limitations de capacités et favorisait l'apparition de la télévision numérique présentant des « bouquets de programmes et chaînes thématiques », des services de « quasi-vidéo à la demande » ou encore de « paiement à la séance[11] ». La télévision numérique offre la possibilité d'améliorer considérablement non seulement la qualité du son et de l'image, mais aussi l'éventail des choix offerts au consommateur.

Malgré cette promesse apparente, la numérisation n'apporte peut-être pas autant d'avantages aux consommateurs qu'on l'avait espéré initialement, du moins pas aussi vite que certains ne l'avaient prévu et pas sans intervention des autorités de la concurrence pour veiller à maintenir ouvert l'accès au marché. La télévision numérique notamment est très onéreuse et risquée à introduire et elle semble jusqu'ici rester l'apanage de diffuseurs de programmes de télévision analogique existants et bien établis[12]. En outre, la numérisation semble créer un certain nombre de portails importants ou de goulots d'étranglement potentiels entourant les systèmes d'accès conditionnels, les systèmes de gestion des abonnements et les guides électroniques de programmes qui sont autant d'éléments nécessaires pour faire appliquer le paiement et aider le consommateur à naviguer dans l'éventail beaucoup plus large de choix qui lui est proposé[13].

Le document de l'OCDE sur la radiotélévision a mis en évidence trois conséquences de la convergence. La première était une « …tendance aussi bien des diffuseurs que des sociétés de télécommunications à proposer des services de communication à large bande dans les deux sens qui donnent simultanément accès à un certain nombre de chaînes de programmation vidéo, à la téléphonie vocale et à l'Internet[14]. » La deuxième touchait au chevauchement des marchés du contenu destinés à la

presse, la télévision, le cinéma et la publication via l'Internet. La troisième concernait plus particulièrement le contrôle des fusions dans les médias.

> …l'intensification de la concurrence que l'on peut attendre de la convergence dans le secteur du multimédia et de la radiotélévision ne va pas sans ambiguïté. Certains craignent fortement que des sociétés ne parviennent à se placer pour exploiter de nouveaux « goulots d'étranglement » au fur et à mesure qu'ils apparaîtront[15].

2.4 Une réglementation extensive

La question de la rareté des fréquences conjuguée à l'incapacité d'exclure les consommateurs qui ne paient pas laisse entrevoir des problèmes pour la diversité dans le domaine de la radiotélévision. De nombreux pays ont cherché à les surmonter tout en assurant un pluralisme d'un niveau satisfaisant, en associant dans certaines proportions une radiotélévision publique et une réglementation à la fois des contenus et du contrôle des sociétés. L'impact de la télévision par câble et par satellite ainsi que l'Internet sont venus contester la nécessité apparente de cette réglementation et ont suscité un débat important dans de nombreux pays sur la libéralisation de la radiotélévision[16]. À l'avenir, on pourrait observer une réduction considérable de la réglementation du contrôle des sociétés qui pourrait aboutir à une augmentation substantielle des opérations de fusion[17].

2.5 La dualité des marchés

De nombreux médias se financent en partie, voire totalement, par les recettes publicitaires. Cela suppose que l'analyse par le droit de la concurrence s'attache à la fois aux marchés de la publicité et du consommateur. En raison d'un certain nombre d'interactions entre ces deux marchés, l'existence d'une « dualité des marchés » produit des effets qui vont bien au-delà de l'accroissement du nombre de marchés qu'il conviendrait de définir[18]. On peut aborder la question en adoptant le point de vue d'un propriétaire de médias.

Les propriétaires de médias doivent d'abord décider de la nature du contenu général qu'ils veulent transmettre, donc définir la nature ou la position globale de leur média dans un espace de produits. Par exemple, un journal pourrait choisir de se concentrer sur l'actualité, les loisirs, le sport, etc., ou au contraire d'essayer de proposer un peu de contenu de toutes ces catégories. La position d'un média dans un espace de produits pourrait avoir un impact important sur l'ampleur de la concurrence qu'il devra affronter à la fois à court et à long terme, notamment si le fait de modifier cette position comporte des coûts irrécupérables importants. Après avoir choisi une nature globale, le propriétaire d'un média doit ensuite décider en permanence quelle qualité et quelle nature spécifique du contenu il entend proposer sur des thèmes spécifiques ou sur des créneaux de programmation.

Lorsqu'il procède à des choix sur le contenu général ou spécifique, le propriétaire d'un média influe simultanément sur les coûts de programmation, le nombre et le type de consommateurs attirés et sur les montants qui peuvent leur être facturés (à supposer qu'il y ait facturation). Ces décisions en matière de contenu et de facturation auront des ramifications importantes pour les recettes publicitaires qui sont le produit du nombre attendu de consommateurs de médias exposés à la publicité et de ce que les spécialistes désignent comme le CPM, à savoir le coût par millier de personnes exposées à la publicité[19].

Dans l'hypothèse où *l'offre* de publicité voit ses prix augmenter, le CPM va être affecté par la vigueur correspondante de la demande des annonceurs qui dépend elle-même de la proportion dans laquelle on peut penser que les publicités diffusées par le média vont accroître les bénéfices des annonceurs en influençant les consommateurs de médias à acheter plus de produits des annonceurs. En d'autres termes, le CPM va être affecté par le profil du consommateur typique du média, à savoir son

revenu individuel disponible, son âge et ses loisirs. En outre, si le média bénéficie d'une quelconque puissance sur le marché, son CPM va être influencé par le volume de publicité qu'il propose.

Lorsqu'il prend ses décisions en matière de contenu et de publicité, le propriétaire de médias doit aussi prêter attention à la façon dont les consommateurs peuvent réagir au volume de publicité qu'il décide de proposer. Trop de publicité, à tout le moins dans les médias dans lesquels cela peut susciter un rejet général comme la radio ou la télévision risque d'aboutir à une baisse de l'audience et éventuellement à une diminution des recettes publicitaires (cela va dépendre de l'élasticité-prix de la demande de publicité). En revanche, si la publicité est appréciée, comme cela peut être le cas dans la presse locale (notamment ses annonces classées), un surcroît de publicité peut accroître le nombre de consommateurs du média.

Rochet et Tirole (2001) soulignent que, dans des marchés duaux, parmi lesquels les médias soutenus par la publicité, « les plates-formes » doivent choisir à la fois un niveau de prix et une structure de prix. Face à ce problème de l'œuf et de la poule, les médias peuvent choisir dans un large éventail de structures possibles de prix. Dans les médias, la structure des prix va être étroitement liée au ratio publicité/contenu. Par exemple, un journal pourrait choisir de ne comporter pratiquement aucune publicité et de facturer un prix élevé à l'exemplaire ou de laisser une large place à la publicité et de facturer un faible prix à l'exemplaire. La question de savoir quelle est la meilleure stratégie dépend en partie de la sensibilité de la demande du lectorat aussi bien au prix de l'exemplaire qu'au ratio entre publicité et contenu.

Si l'on prend le cas de quelqu'un qui travaille sur des magazines gratuits et de la radiotélévision gratuite, peut-on considérer qu'il y a là des « marchés duaux » alors même que les consommateurs ne paient rien ? La théorie économique répond par l'affirmative[20]. Une autorité de la concurrence peut ne pas être en accord avec ce point de vue, notamment si le droit nécessite de définir un marché et si les tribunaux considèrent que les marchés n'existent pas tant qu'il n'y a pas de prix acquitté. Le problème est aggravé si une autorité de la concurrence est portée à utiliser un *prix* hypothétique pour déterminer les substituts possibles.

Dans le cas de médias distribués gratuitement, les responsables du contrôle des fusions sont tenus d'en revenir à des principes premiers. L'objectif est-il uniquement de protéger les consommateurs contre la hausse des prix ou doit-on prendre aussi en considération la détérioration potentielle de dimensions indépendantes des prix comme l'innovation, la diversité et des facteurs de qualité ? Robert Lande, lorsqu'il affirme que la politique de la concurrence doit s'attacher à préserver le choix du consommateur, retient les médias comme l'un des meilleurs exemples de marchés sur lesquels la concurrence hors prix est manifestement importante pour les consommateurs, notamment en ce qui concerne la diversité et le nombre de journalistes[21]. Nous reviendrons sur ces questions lors de l'examen des préoccupations relatives au pluralisme.

Même si le consommateur ne paie rien, les questions de qualité peuvent poser des problèmes difficiles lors du contrôle des fusions dans le secteur des médias. Si l'on considère, par exemple, une fusion de circuits de cinémas lors de laquelle les parties affirment que l'entité issue de la fusion sera en fin de compte suffisamment importante pour générer des recettes par l'intermédiaire de la publicité avant le film[22]. Cela pourrait être traité comme l'introduction favorable à la concurrence d'un nouveau vecteur publicitaire, mais cela représente en même temps une possibilité de réduction de la qualité au moins pour les personnes qui se rendent dans une salle de cinéma et n'aiment pas la publicité et ne veulent pas perturber d'autres cinéphiles (ni prendre les dernières places) et arrivent ainsi avant que la publicité ne soit terminée. L'analyse est encore compliquée par l'introduction d'un arbitrage délicat si la publicité dans les cinémas induite par la fusion est censée aboutir à des réductions des prix d'entrée après la fusion ou si certains cinéphiles aiment la publicité. Quoi qu'il en soit, le principal intérêt de cet exemple consiste à mettre en lumière le fait qu'il n'y a pas de raison à priori pour que les effets sur la qualité ne soient pas pris en compte dans les fusions du secteur des médias.

L'exemple du cinéma amène une autre question importante en rapport cette fois avec l'effet potentiel d'une fusion dans les médias sur la diversité. Que se passe-t-il si deux chaînes de télévision gratuite veulent davantage exploiter exactement le même programme après la fusion ? Cela va réduire la diversité, ce qui peut restreindre le bien-être du consommateur et les coûts de programmation, en d'autres termes générer un gain d'efficience. Un étrange arbitrage semble inévitable en l'occurrence et, comme toujours lorsqu'il s'agit de qualité, il va être difficile de le régler puisque les effets de qualité sont difficiles à quantifier.

Un autre aspect de la dualité des marchés des médias appelle des commentaires. Il va y avoir naturellement un chevauchement considérable entre les consommateurs (de médias) et l'ensemble de la population achetant les produits vantés par la publicité. Si ce n'était pas le cas, l'annonceur gaspillerait manifestement son argent ! Dès lors, dans quel sens les médias libres sont-ils réellement libres [23] ? Leur liberté ne serait sans ambiguïté que si la publicité abaissait ses prix (en raison des effets d'économies d'échelle) ou si elle les laissait inchangés. Cela peut être vrai de la publicité strictement informative mais, dans la mesure où elle présente aussi une composante axée sur la stratégie de marque et cherchant à différencier les produits, la publicité pourrait entraîner une diminution de la concurrence et une augmentation des prix[24].

Les dispositions sur le contrôle des fusions de nombreux textes de loi sur la concurrence n'imposent pas nécessairement, voire permettent d'examiner la façon dont une fusion peut affecter les marchés extérieurs à ceux que desservent les parties prenantes à l'opération. On serait en droit d'affirmer que les augmentations de prix liées à une offre accrue de publicité axée sur une stratégie de marque sont en dehors du champs du contrôle. On pourrait également affirmer que de tels effets sont trop spéculatifs pour que l'on s'en préoccupe. La publicité liée à une stratégie de marque pourrait bien accroître le prix des produits ayant fait l'objet de la publicité, mais une chute du prix de ce type de publicité pourrait avoir l'effet inverse. Cela s'explique par le fait que la baisse des prix permettrait à d'autres entreprises peut-être plus petites, présentant une image de marque moins affirmée, de réagir à moindre coût que ce n'était le cas auparavant aux effets accumulés de la stratégie de marque de leurs concurrents ayant une image de marque plus forte.

Comme une fusion dans les médias va généralement réduire ou ne pas modifier l'intensité de la concurrence prévalant sur le marché publicitaire du média concerné, il paraît contraire à l'intuition qu'une fusion dans les médias puisse abaisser le CPM. Pourtant, ce paradoxe peut se produire en raison de la nature duale des marchés des médias. Prenons par exemple le cas d'une fusion dans la diffusion de télévision gratuite et partons de l'hypothèse que la publicité n'est pas appréciée par les consommateurs des médias. Une fusion entre deux diffuseurs de télévision gratuite pourrait donc tellement réduire la concurrence pour l'audience que le diffuseur sera moins contraint qu'auparavant de relever son ratio publicité/contenu. Une augmentation de ce ratio, à supposer que les deux diffuseurs continuent d'opérer après la fusion, se traduirait par une augmentation de l'offre de publicité et une baisse correspondante du CPM.

Poursuivons avec l'exemple du recul paradoxal du CPM : comment évaluerait-on ses effets en termes de bien-être ? À supposer que l'augmentation de la publicité ait abaissé ou laissé inchangés les prix des produits ayant fait l'objet de la publicité, on devrait en conclure que la fusion a peut-être amélioré le bien-être. L'effet final va dépendre de la question de savoir si, sur les marchés des produits ayant fait l'objet de la publicité, la progression des bénéfices de l'annonceur conjuguée au surplus pour le consommateur compense le recul de la satisfaction du consommateur des médias occasionné par l'augmentation du ratio publicité/contenu. Les choses se présenteraient cependant moins favorablement si l'augmentation de l'offre et de la fréquence de la publicité avait eu pour effet d'accroître les prix des produits ayant fait l'objet de la publicité, en d'autres termes si la publicité était fortement déterminée dans sa nature par une stratégie de marque. Les annonceurs seraient alors les gagnants manifestes de cette fusion

de médias. Le média issu de la fusion et éventuellement ses concurrents pourraient aussi s'en trouver mieux selon l'élasticité-prix de la demande de publicité et selon qu'ils ont pu ou non se permettre de réduire les coûts (et la qualité) des programmes tout en accroissant simultanément le ratio publicité/contenu. Dans ce scénario, ce sont manifestement les consommateurs qui sont perdants, car le produit de média s'est détérioré et que les prix des produits ayant fait l'objet de la publicité ont augmenté. Les consommateurs risquent en outre de subir un autre impact négatif, et cela vaut indépendamment du fait que la publicité est principalement informative ou déterminée par une stratégie de marque. Dans la mesure où la fusion de médias réduit la concurrence dans le secteur, cela peut aussi affecter la diversité des programmes proposés, point sur lequel nous reviendrons dans une section ultérieure de ce document.

La possibilité d'une baisse du CPM n'est pas le seul paradoxe que peut présenter une fusion de médias. En effet, une fusion de médias peut aussi entraîner une baisse du prix pour les consommateurs (dans les médias non gratuits) malgré une *réduction* de la concurrence sur le marché pour le côté consommateur. Une fois encore, ce phénomène est largement imputable à la dualité des marchés des médias. Prenons l'exemple d'un journal qui a pu obtenir un pouvoir de marché ou l'accroître du côté consommateur du marché en fusionnant avec un concurrent. Supposons qu'avant la fusion, le prix du journal était fixé à $1 l'exemplaire. Après la fusion, le journal peut vouloir tirer parti de l'augmentation de son pouvoir sur le marché en réduisant le nombre d'exemplaires vendus et en portant son prix à $1.20. Avant d'en venir là, il doit cependant prendre en considération les effets que cela pourrait avoir, toutes choses égales par ailleurs, sur :

1. les recettes de la vente du journal (qui devraient augmenter à supposer que la fusion rende la demande inélastique ou plus inélastique qu'avant la fusion) ;

2. les coûts totaux du journal (qui devraient très peu baisser puisque l'essentiel des coûts du journal sont fixes) ; enfin,

7. les recettes publicitaires (qui devraient tendre à baisser parallèlement à la diffusion).

Le recul des recettes publicitaires lié à la baisse de la diffusion sera encore plus grave si, non seulement la fusion du journal réduit la concurrence du côté consommateur du marché, mais encore si elle a pour effet d'accroître le CPM. Chaque consommateur perdu en raison de la hausse du prix de l'exemplaire va donc amplifier le coût d'opportunité de la perte des recettes publicitaires. Après avoir étudié tous ces effets estimés, le journal *risque* paradoxalement de constater que ses bénéfices auraient été supérieurs s'il avait abaissé le prix de l'exemplaire après la fusion[25].

Les travaux traitant de l'effet des concentrations dans les médias sur le CPM (auquel s'ajoute l'impact connexe des changements de la publicité sur le bien-être du consommateur) ainsi que sur le prix facturé aux consommateurs tendent à montrer que les effets concrets d'une fusion de médias vont fortement dépendre de schémas factuels spécifiques[26].

2.6 Résumé

Les principaux points à retenir de cette section sont les suivants :

a) les marchés des médias sont susceptibles de se caractériser par une multiplicité de produits, à laquelle il faut ajouter le large recours à la déclinaison de produits et à d'autres formes de discrimination par les prix ;

b) l'importance des économies d'échelle dans la production comme dans la distribution, à laquelle il faut ajouter les effets de dépendance vis-à-vis des recettes publicitaires et la

présence d'effets de réseaux considérables pourraient aboutir à une forte concentration dans les marchés des médias ;

c) on ne peut pas s'attendre avec certitude à ce que le processus de convergence des médias et des télécommunications intensifie la concurrence dans les marchés des médias ;

d) les médias sont couramment soumis à une réglementation affectant la diversité et le pluralisme ;

e) les prix des produits des médias et de la publicité dans les médias pourraient augmenter ou baisser en raison d'une fusion et, s'ils évoluent en sens inverses, les autorités de la concurrence pourraient être amenées à procéder à un arbitrage délicat ; enfin,

f) les effets de bien-être d'une fusion de médias sont difficiles à estimer car ils devraient prendre en compte des facteurs prix et hors prix (notamment des aspects de qualité et de désutilité pour le consommateur résultant des publicités dans certains médias).

Il est opportun d'aborder maintenant la définition du marché. Après quoi et en examinant les problèmes posés par les fusions verticales, nous reviendrons aux dimensions qualitatives des fusions de médias, notamment la diversité du contenu et le pluralisme.

3. Définition du marché

Comme c'est normalement le cas sur d'autres marchés, le contrôle de la fusion de médias passe par une définition du marché. Dans certains pays, cela peut être imposé par la loi si l'on veut contester une fusion. Même lorsque cela n'est pas le cas, l'exercice de définition du marché peut être une façon utile d'organiser la réflexion sur la façon dont une fusion de médias peut porter préjudice à la concurrence.

Comme la préoccupation première des autorités de la concurrence lors du contrôle d'une fusion est de déterminer si elle va s'exercer au détriment des consommateurs, la définition du marché doit s'attacher aux substituts vers lesquels les consommateurs pourraient se tourner si les parties à la fusion accroissent les prix ou abaissent la qualité après la fusion. Si les substituts disponibles sont suffisamment bons, les parties à la fusion n'auront pas avantage à relever leurs prix ou à réduire la qualité dans l'immédiat. A titre d'illustration de quelques difficultés rencontrées lors de la mise en évidence des substituts du côté publicité des marchés des médias, examinons les éléments suivants relatifs à une fusion de journaux canadiens :

> Dans quelle mesure une transaction proposée risque-t-elle d'influer sur les tarifs de publicité exigés par les journaux ? Cela dépend largement de l'emprise du journal sur le marché, laquelle n'est pas seulement fonction du nombre de journaux vendus, par exemple *Le Droit* par rapport au *Journal de Montréal*. D'autres facteurs entrent dans l'équation, y compris la disponibilité de produits de substitution. Si un journal local augmente son tarif, l'annonceur peut décider de passer à un autre média – la télévision, la radio, les panneaux publicitaires, les circulaires ou Internet. La possibilité d'opter pour un autre média dépend dans une large mesure de ce qu'il en coûtera à l'annonceur. En ce sens, le « coût » est évalué de façon large ; il ne s'agit pas uniquement des frais additionnels du nouveau média, mais également de l'efficacité avec laquelle ce dernier permet à l'entreprise de cibler ses consommateurs. Un repli des ventes résultant du changement entrerait également dans les « coûts de substitution ». Bien entendu, la transition peut être avantageuse – par exemple, un marchand d'autos usagées pourrait trouver plus profitable d'annoncer dans l'*Auto Trader* que dans l'*Ottawa Citizen*. Par contre, un détaillant de produits électroniques n'aurait peut-être pas de telles solutions de rechange à sa

> disposition. Des études démographiques montrent que certaines catégories de personnes ont tendance à préférer certains médias. Entre autres, les diplômés d'université sont plus suceptibles de lire le *Globe and Mail* ou le *National Post* que le *Sun*. D'autres groupes démographiques peuvent privilégier les périodiques, la télévision, la radio ou Internet comme source d'information. Par exemple, des études de marchés indiquent que le *Sun* est le journal préféré des hommes de 18-25 ans qui ont reçu une instruction secondaire. Il s'ensuit qu'un annonceur dont le produit s'adresse à ce groupe peut avoir très peu d'autres possibilités, même dans un marché en apparence concurrentiel comme celui de Toronto, une ville comptant quatre grands quotidiens[27].

La précédente description traduit le fait qu'en raison de la réflexion axée sur le consommateur, la définition du marché est centrée sur le côté de la demande. Or, cela n'épuise pas l'analyse. Dans certaines situations, une augmentation des prix après fusion ne serait pas rentable en raison de ce que les *Horizontal Merger Guidelines* des Etats-Unis (Principes directeurs sur les fusions horizontales) traitent comme une « entrée sans engagement ». Cela renvoie à l'idée d'une entrée qui pourrait se faire rapidement sans coût irrécupérable d'entrée ou de sortie. Lorsqu'il y a des entrées sans engagement, la capacité supplémentaire qu'ils pourraient ajouter au marché devrait faire partie du dénominateur lors du calcul des parts de marché des entreprises existantes comme des entrées sans engagement. Les parts de marché servent ensuite à calculer divers ratios de concentration pour effectuer des estimations *préliminaires* de la probabilité d'une augmentation des prix après la fusion. Si ces estimations préliminaires indiquent qu'il pourrait y avoir un problème de concurrence, les autorités compétentes interviennent néanmoins pour évaluer d'autres facteurs comme l'existence ou l'importance d'un pouvoir de contrepartie de l'acheteur, les obstacles à l'entrée, les efficiences et la question de savoir si l'une des parties est une entreprise en difficulté.

Il convient ici de faire une digression pour indiquer que les obstacles à l'entrée sont probablement assez importants dans les marchés des médias, dans la mesure où il pourrait y avoir des coûts irrécupérables considérables liés à l'entrée. C'est vrai en dépit de la convergence associée à la numérisation, facteur revêtant une influence plus grande dans la radiotélévision par opposition aux médias imprimés. Certains de ces obstacles à l'entrée liés aux coûts irrécupérables seront traités immédiatement après dans le passage consacré aux fusions verticales. L'un des obstacles à l'entrée auquel on a fait allusion sans s'y attarder a trait aux coûts irrécupérables associés au choix d'un positionnement particulier dans l'espace des produits. Cet aspect est pertinent pour évaluer la capacité des nouveaux venus comme des éventuelles entreprises en place à imposer une augmentation des prix après la fusion. Par exemple, le contrôle d'une fusion entre chaînes de télévision aux Etats-Unis a révélé que :

> Les autres chaînes de télévision de la DMA (designated market area – zone de diffusion définie) de Salt Lake City ne changeaient pas leur programmation en réaction à une augmentation des prix imposée par News Corp après l'acquisition. Non seulement, ces chaînes sont souvent liées à la programmation proposée par le réseau auquel elles sont affiliées, mais il faut souvent des années à une chaîne pour constituer son public. Les grilles de programmes sont complexes et soigneusement construites en tenant compte de nombreux facteurs, comme les flux d'audience, l'identité de la chaîne et la popularité du programme. En outre, les chaînes ont généralement conclu des contrats pluriannuels pour différentes émissions. Un repositionnement supposerait de modifier de nombreuses émissions dans la grille de la chaîne et ce serait risqué, difficile et demanderait beaucoup de temps. Une chaîne de télévision est peu susceptible de prendre un tel risque simplement pour capitaliser sur une augmentation limitée, mais significative de News Corp après l'acquisition[28].

Pour en revenir à la définition proprement dite du marché, une façon de plus en plus courante de définir les substituts en termes de produit et de région géographique peut résider dans ce que l'on peut qualifier d'approche monopoliste hypothétique de la définition du marché. Cela suppose l'application répétée du critère de l'ALSNTP (application limitée mais significative et non transitoire des prix). On

trouvera une bonne description de cette approche dans les *Horizontal Merger Guidelines* des Etats-Unis[29]. Partant de chaque produit vendu et du marché géographique desservi par les parties à la fusion, le critère de l'ALSNTP est appliqué en cherchant à savoir si une augmentation de 5 % des prix (ou d'un autre pourcentage fixe) serait rentable après la fusion. Elle ne le sera pas si cette augmentation incite un nombre suffisamment grand d'acheteurs actuels à passer aux bons substituts proposés par les autres fournisseurs. S'il s'avère de fait que l'augmentation hypothétique des prix n'est pas rentable, les dimensions du marché en termes de produits vendus et de zones géographiques desservies sont élargies pour intégrer ce qui apparaît constituer les meilleurs substituts. Dans le cadre de ce marché élargi, on se demande de nouveau si une augmentation de 5 % des prix serait rentable si elle était imposée par le détenteur d'un monopole hypothétique. Si ce n'est pas le cas, on peut une fois de plus ajouter les meilleurs substituts à la définition du marché et répéter l'exercice. Ce processus consistant à élargir progressivement le marché s'interrompt dès que l'augmentation de 5 % devient rentable. L'ensemble des points de diffusion en termes de produits et de régions géographiques à ce stade de l'analyse constitue le marché tel qu'il est défini aux fins du droit de la concurrence. Les clients existants des parties à la fusion sont la source première d'information pour appliquer le test de l'ALSNTP. Des renseignements utiles peuvent aussi fournis par les parties à la fusion, les concurrents et les fournisseurs.

Bien qu'analytiquement simple, le test de l'ALSNTP peut être très complexe dans la pratique. C'est particulièrement vrai dans le cas des marchés des médias.

La Commission européenne a récemment commandé deux grandes études sur la définition du marché dans le secteur des médias, l'une auprès de Europe Economics, que nous désignerons comme « l'étude de Europe Economics[30] », et l'autre auprès du cabinet juridique Bird & Bird, donc « l'étude de Bird & Bird[31] ». L'étude de Europe Economics a noté que :

> Notre analyse des traits économiques caractéristiques du secteur des médias indique que le problème méthodologique fondamental de la définition des marchés dans ces branches d'activité découle de leur évolution rapide. En outre, cette analyse est parfois compliquée par la nécessité de prendre en considération des marchés sur lesquels on n'observe que peu ou pas de transactions.
>
> Ces caractéristiques rendent intrinsèquement difficile la compréhension des marchés, dans la mesure où elles supposent de procéder à une analyse des contraintes concurrentielles sans l'aide d'antécédents importants sur le fonctionnement des marchés et notamment sans aucune des statistiques de prix et de volume qui sont nécessaires pour certaines techniques quantitatives appliquées à la définition du marché[32].

Le problème de la rareté des transactions tient plus à l'intégration verticale qu'à l'absence de paiement de la part de consommateurs satisfaits dans le cas de médias diffusés gratuitement. On peut retracer un historique des comportements en termes de substitution dans le cas d'une fusion impliquant des médias diffusés gratuitement, mais ce ne sera pas possible quand on se trouve en présence, du fait de l'intégration verticale, de « transactions » entièrement internes à une entreprise. Cela pourrait être possible, par exemple, si le seul prestataire de services de diffusion par satellite choisissait de proposer des services d'accès à l'Internet mais n'autorisait pas des fournisseurs d'accès indépendants à l'Internet d'utiliser son satellite.

Une autre question qui complique la situation et cette fois liée au test de l'ALSNTP, découle de la nature duale des marchés des médias. Prenons le cas d'une fusion de journaux qui risque de modifier les conditions de concurrence aussi bien du côté publicitaire que du côté consommateur du marché. On ne peut pas déterminer la rentabilité de relever le prix en kiosque ou le prix de l'abonnement ou les tarifs publicitaires sans étudier les effets produits des deux côtés du marché. Dans la mesure où une

augmentation du premier prix va réduire la diffusion du journal, il va aussi peser sur les recettes publicitaires[33].

La dualité des marchés ne représente que le sommet de l'iceberg d'un autre problème qui est particulièrement aigu dans de nombreuses fusions de médias. Cela tient à l'incroyable multiplicité des marchés, problème déjà évoqué en lien avec la discrimination par les prix et la déclinaison des produits que l'on observe souvent dans les marchés des médias. Lorsque la discrimination par les prix est déjà établie ou pourrait être introduite après la fusion, on aura alors une multiplication des marchés à définir s'il s'agit de protéger l'ensemble des consommateurs de tout préjudice.

Lorsque l'on étudie les marchés des médias, aussi bien le contenu que le mode de diffusion pourraient être importants pour les consommateurs et peuvent aboutir à distinguer différents marchés. On ne peut pas assumer, par exemple, qu'il existe un marché global pour l'actualité et que la diffusion de l'actualité par les journaux, la radio, la télévision ou l'Internet ne fait aucune différence. De même, on ne peut pas considérer que différents types de diffusion télévisuelle sont équivalents, en d'autres termes que des nouvelles transmises sur une télévision à péage et, à l'intérieur même ce domaine, sur le câble et par satellite, ne font pas de différence. Gomery (2002, 11) observe :

> En dernière analyse, chaque composante du système des médias — journaux, réseaux de diffusion, câble, satellite et l'Internet — fournit un produit distinct de nouvelles, d'information et d'analyse et chacun d'eux présente son propre dispositif institutionnel, sa propre orientation géographique et ses propres relations avec le consommateur. En conséquence, loin d'être des débouchés médiatiques homogènes ou interchangeables, les diverses organisations travaillant sur le papier ou par des moyens électroniques ont actuellement des rôles distincts pour informer et mobiliser les citoyens.

S'appuyant sur une vaste base de données, une étude interne de la Federal Communication Commission des Etats-Unis a récemment examiné la substitution de médias par les consommateurs et observé :

> Que constatons nous ? En arrière plan, il y a les signes les plus manifestes de substitution entre l'Internet et la télévision classique, aussi bien globalement que pour les nouvelles, ensuite entre les quotidiens et les hebdomadaires et entre les quotidiens et l'actualité télévisée sur les chaînes classiques. Il y aussi des signes de substitution entre le câble et les quotidiens aussi bien globalement que pour la consommation de nouvelles, puis entre la ratio et la télévision classique pour la consommation de nouvelles, enfin entre l'Internet et la presse quotidienne toujours pour la consommation de nouvelles. Il n'y a pas ou peu de signes de substitution entre les hebdomadaires d'actualité et la télévision classique ou entre la radio et l'Internet ou le câble. Il y a aussi certains signes indirects de substitution à travers le recours croissant aux médias nationaux par des groupes moins ciblés par les médias locaux. Cette étude amène à plusieurs conclusions. Premièrement, nous pouvons rejeter l'idée que les divers médias sont entièrement distincts. Comme on l'a vu précédemment, certains médias semblent concurrencer les autres pour retenir l'attention du consommateur. Deuxièmement, l'étude donne des éléments prouvant la substitution de la part des consommateurs entre certaines formes de médias. Cela ne permet pas de répondre complètement à la question de savoir si la substitution est suffisamment efficace pour que l'on considère l'ensemble des médias comme des substituts en matière d'actualité et d'information. Les études existantes peuvent cependant apporter des indices utiles. Même si les divertissements apportés par les chaînes de médias constituent une fin en soi, l'actualité permet aux citoyens d'apprendre plus facilement ce qui est en jeu dans des campagnes électorales et, les rendent par là-même plus susceptibles de voter. Si la substitution était complète, le recul de la presse quotidienne locale serait compensée par le recours accru aux autres médias. Les

> comportements civiques affectés par la consommation des médias ne serait en outre pas affectée par des changements dans l'existence ou l'utilisation d'un quelconque support médiatique en particulier. Pourtant, les travaux existants sur la consommation de médias et le vote aux élections — examinés dans la conclusion de l'étude — tend à montrer que, même si la substitution fonctionne, elle n'est pas complète en ce sens[34].

Un peu en rapport avec la question de la discrimination par les prix et de la déclinaison des produits, les transactions dans le secteur des médias peuvent impliquer d'une autre façon une multiplicité de marchés devant être définis. Cet aspect concerne les offres groupées largement répandues dans les secteurs des médias. On peut rencontrer une offre groupée de deux médias distincts, comme c'est le cas lorsqu'un opérateur de télévision par câble propose des services d'accès à l'Internet. On peut aussi rencontrer l'offre d'un certain nombre de produits de médias qui pourraient être vendus et le sont souvent de façon séparée, comme cela se produit lorsqu'un opérateur de télévision par câble propose différents bouquets de chaînes ou lorsque l'abonnement à un magazine comporte une remise en cas d'achat d'un autre magazine. L'étude de Europe Economics analyse les façons dont les offres groupées pures ou mixtes (à savoir lorsque les éléments distincts de l'ensemble peuvent aussi être achetés séparément) pourraient servir à introduire une discrimination par les prix, générer des économies d'envergure ou dissuader de nouvelles entrées. Plus spécifiquement à propos de la définition du marché, cette étude note :

> Comme la discrimination par les prix, les offres groupées ne changent pas les principes sur lesquels repose la définition du marché. Elles augmentent plutôt le nombre de produits qui doivent être considérés comme des contraintes concurrentielles les uns pour les autres, car la possibilité de substitution doit être également évaluée entre différentes offres groupées et composants individuels. En outre, il est tout à fait possible qu'il y ait un marché pertinent pour la fourniture d'une offre groupée de produits et des marchés pertinents distincts pour la fourniture des composants individuels[35].

Il y a une complication ultime dans le secteur des médias qui peut nuire considérablement à la définition du marché. Elle a trait à l'importance et à la grande fréquence des phénomènes d'intégration et de mécanismes verticaux dans les marchés des médias. Lorsqu'une ou plusieurs parties à une fusion de médias entretiennent des liens verticaux importants, leur fusion peut poser des problèmes de concurrence importants à divers niveaux de la chaîne de valeur, à savoir la création de contenu, la présentation du contenu et du service, la prestation de service, la fourniture de l'infrastructure et la distribution à l'utilisateur final[36]. Il peut être nécessaire de définir des marchés à chacun de ces niveaux même si une seule des parties à la fusion y intervient.

L'étude de Europe Economics examine longuement les problèmes spéciaux liés à une approche de la définition du marché fondée sur la substitution dans le cadre de fusions de médias et admet que les données nécessaires peuvent être difficiles à obtenir. Elle appelle néanmoins à la prudence quant à l'utilisation d'autres sources de preuves ne reposant pas sur la possibilité de substitution.

> Lorsque les données pertinentes ne sont pas disponibles, soit elles doivent être collectées (par exemple, au moyen d'enquêtes auprès des clients), soit il faut s'en remettre à des hypothèses raisonnées qui aboutissent à des déductions sur la substituabilité et qui peuvent faire l'objet d'un examen attentif par les parties intéressées et/ou les tribunaux. *La rareté des preuves pertinentes ne peut pas justifier le recours à des preuves non pertinentes*[37].

Cette étude soulève en outre quatre points généraux importants sur la définition du marché dans le secteur des médias :

(a) Premièrement, on ne peut guère s'appuyer sur les similitudes ou les différences entre produits, par exemple en termes de technologie à laquelle ils recourent, pour orienter la définition du marché. En particulier, la convergence des produits et/ou des technologies n'est pas un bon indicateur des changements de définition du marché.

(b) Deuxièmement, le bien fondé des précédentes définitions du marché va être souvent rapidement remis en cause sous le rythme des mutations et les conclusions sur la définition du marché peuvent rarement être appliquées à de nouveaux cas, même s'ils semblent superficiellement analogues.

(c) Troisièmement, l'analyse est souvent compliquée par le fait que la concurrence dans de nombreuses activités des médias intervient sur d'autres dimensions que le prix, par exemple dans des situations dans lesquelles le contenu est diffusé gratuitement.

(d) Quatrièmement, il faut prendre en considération de nombreux marchés potentiels en lien avec une enquête sur la concurrence, ce qui accroît les efforts nécessaires pour mettre en évidence des définitions du marché qui soient solides. Par exemple, des marchés peuvent devoir être définis en fonction du temps, des catégories de clients, des différents groupes de produits ou à différents niveaux d'une chaîne complexe de production, ainsi qu'en fonction des caractéristiques traditionnelles du type de produit et du lieu géographique[38].

Europe Economics propose trois étapes pratiques pour la définition du marché. Pour paraphraser cette étude, nous dirons que cela consiste à : identifier précisément les produits susceptibles d'être pertinents (dans les fusions, le point de départ sera sans doute les produits fournis par les parties à la fusion), appliquer le test de l'ALSNTP pour évaluer la substituabilité entre les produits et vérifier les résultats à l'aide d'autres éléments comme les fusions antérieures et les preuves en matière de prix pour confirmer les définitions provisoires du marché. Cette étude distingue aussi l'application de ces trois étapes aux marchés des médias et aux autres marchés :

> …dans des secteurs calmes et simples, l'étape 1 semble une formalité, l'étape 2 est (ou semble) difficile et l'étape 3 apporte souvent assez d'éléments pour régler de nombreux problèmes de définition du marché. Dans le secteur des médias, en revanche, il est plus normal que l'étape 1 constitue une composante essentielle de l'analyse au cours de laquelle les chaînes de production sont étudiées et où le métier (ou le métier potentiel) est mis en évidence et que l'étape 2 soit au cœur de la délimitation des marchés, tandis que l'étape 3 est souvent réduite à une formalité parce que les éléments de preuve indirects ne peuvent pas servir à démêler les effets des mutations rapides de ceux résultant de la substituabilité et de la concurrence[39].

L'étude de Bird & Bird se place sous un angle différent de celle de Europe Economics. La première se concentre en effet sur la réalisation d'une analyse juridique comparée à l'échelle européenne de la définition du marché dans le secteur des médias. Entre autres conclusions, l'étude de Bird & Bird note :

> Dans l'ensemble, il est difficile de mettre en évidence dans la jurisprudence l'existence d'un critère de référence spécifique devant être utilisé dans le secteur des médias pour définir les marchés pertinents. Comme on l'a vu précédemment, cette absence est particulièrement patente en ce qui concerne la zone géographique. Cela étant, même sur le marché d'un produit ou d'un service, il y a un certain manque de cohérence dans les critères appliqués et préconisés. Cela ne signifie pas pour autant que les définitions finalement retenues soient incohérentes. Tout au contraire, la pratique dans l'ensemble de l'UE tend à présenter des analogies ou des identités

> dans ces définitions. Toutefois, le souci de certitude et d'anticipation juridiques devrait sans doute dicter la création d'un test cohérent et *ex ante* de la définition du marché[40].

Sur la base de ce constat et compte tenu du souci d'améliorer la certitude juridique concernant l'application du droit de la concurrence aux marchés des médias, l'étude de Bird & Bird examine divers critères qui ont été utilisés dans la définition du marché et se demande ensuite si la « solution ne se trouve[rait] pas dans une approche plus économique ». Tout en critiquant largement le test de l'ALSNTP, notamment sa surconcentration supposée sur les facteurs quantitatifs plutôt que qualitatifs[41], l'étude de Bird & Bird ne plaide pas pour son remplacement intégral. Elle recommande en revanche d'appliquer ce test « de façon très prudente », tout en ajoutant :

> En fin de compte, la perception des sociétés et des consommateurs présents dans un secteur donné peut constituer une approche plus subjective de la définition du marché, sans qu'elle soit nécessairement moins fiable[42].

Les rares personnes qui plaident en faveur du test de l'ALSNTP tel qu'il est concrètement pratiqué désapprouveraient certainement cette déclaration, d'autant que les points de vue des consommateurs sont essentiels à son application.

Avant d'abandonner le thème de la définition du marché, on proposera quelques brefs commentaires portant plus particulièrement sur la définition du marché pour la radiotélévision. Il ne s'agit pas de tirer des conclusions définitives pouvant être appliquées sans analyse à n'importe quelle fusion de médias. Il faut plutôt y voir un certain nombre de repères destinés à provoquer la réflexion.

3.1 La radiotélévision en tant que marché distinct

Sur la base des contributions reçues pour la précédente table ronde de l'OCDE sur la radiotélévision, la synthèse qui y est consacrée notait que :

> Dans le cas des habitudes de consommation des consommateurs, même si l'on admet que la radiotélévision concurrence d'autres formes de médias (comme les journaux, le cinéma, les magazines), en aucun cas il n'a été indiqué qu'une définition du marché a été adoptée dans laquelle la radiotélévision et d'autres formes de médias ont été considérés comme suffisamment substituables pour être sur le même marché du point de vue des consommateurs. En général, c'est la radiotélévision qui présente le moins de substituts (et donc le plus grand potentiel de puissance sur le marché) dans la diffusion de contenu pour lequel la diffusion dans les délais est importante (comme les manifestations sportives en direct).
>
> En outre, bien qu'il y ait de toute évidence une certaine substitution entre les diverses formes de radiotélévision, on a systématiquement distingué un marché de la télévision à péage par rapport à celui de la télévision gratuite. Bien que, manifestement, à un certain niveau, la télévision gratuite (qui repose sur le soutien des annonceurs) ne pourra jamais proposer des services identiques à ceux de la télévision à péage, il semble que l'ampleur de la substituabilité entre ces produits peut dépendre de l'ampleur de la réglementation de la télévision gratuite. Certains éléments en Italie, en Allemagne et aux Etats-Unis prouvent que l'expansion de la télévision à péage est plus lente (et sa puissance sur le marché plus limitée) dans des marchés sur lesquels un grand nombre de chaînes gratuites sont présentes. On ne sait pas vraiment si les diverses formes de télévision à péage (câble, satellite et hyperfréquence) opèrent sur le même marché. Le Mexique relève un cas dans lequel un câblo-opérateur en place a été considéré comme dépourvu de puissance sur le marché par suite de la concurrence des services par hyperfréquence et satellite. En revanche, dans

un cas aux Etats-Unis, on a distingué un marché de la télévision par câble de celui de la télévision par satellite ou par hyperfréquence.

De plus, les différents genres de programmes ne sont sans doute que des substituts imparfaits. Au sein de la diffusion de programmes sportifs, il est probable qu'un sport constitue un substitut relativement médiocre vis-à-vis d'un autre. Le tableau d'ensemble de la radiotélévision qui ressort est celui d'un certain nombre de marchés distincts portant sur des produits différenciés.

La situation concernant le marché de la publicité est analogue. La plupart des pays ont fait état du constat que les différentes formes de publicité dans les médias constituaient de mauvais substituts (et dans certains cas étaient en fait complémentaires). Dans la plupart des cas, le champ géographique du marché est national. Même au sein de l'UE qui a cherché à abaisser les obstacles aux échanges de services de télévision, les marchés conservent dans une large mesure une envergure nationale, sans doute en partie par suite des barrières linguistiques et culturelles. Seule la Suisse, sans doute en raison des caractéristiques linguistiques de sa population, a noté une concurrence transnationale d'une ampleur significative[43].

3.2 La radio et la télévision en tant que marchés distincts et quelques divisions possibles au sein de la télévision

À la suite des changements apportés à ses textes législatifs et réglementaires sur les télécommunications en 1996, changements qui ont sensiblement libéralisé la propriété de multiples chaînes de radio, les Etats-Unis ont connu une vague de fusions de radios. Dans un discours prononcé il y a à peu près un an, s'appuyant sur l'expérience du Département de la Justice concernant le contrôle d'un millier de fusions de radios, Joel Klein notait que la radio constituait très vraisemblablement un marché distinct au regard du droit de la concurrence. Ce discours laissait entendre que les fusions de radios étaient pour l'essentiel, voire intégralement, analysées du point de vue de leurs effets anticoncurrentiels possibles sur les marchés de la publicité et il indiquait :

> …notre conception de la radio en tant que marché distinct ne signifie pas pour autant qu'il n'y a aucun annonceur susceptible de réorienter ses publicités vers d'autres médias pour échapper à une poussée des prix, mais simplement qu'un tel comportement ne permettra pas en dernière analyse de faire échouer une augmentation anticoncurrentielle des prix. L'une des raisons essentielles qui nous porte à cette conclusion est que les propriétaires de chaînes de radio peuvent, ce qu'ils font régulièrement, facturer des tarifs différents à leurs différents clients en fonction de la demande de programmes de radio de leurs clients. En d'autres termes, les stations de radio relèvent leur prix pour les clients qui n'ont pas d'autre solution réaliste à portée de main tout en maintenant les prix appliqués à des clients qui ont de telles solutions de rechange. Par exemple, si un annonceur cherche à toucher un public particulier — par exemple les femmes de 18 à 34 ans — un propriétaire qui détient toutes les chaînes desservant cette catégorie aura une puissance sur le marché plus importante vis-à-vis de cet annonceur que par rapport à un annonceur qui ne cible pas ce groupe démographique particulier. Lorsque des négociations interviennent sur les prix, les deux parties sont conscientes de ces considérations. Or, comme les tarifs de la publicité à la radio sont négociés individuellement avec chaque annonceur, le propriétaire de la chaîne de radio est en mesure de facturer un prix plus élevé à l'annonceur n'ayant que peu de solutions de rechange tout en maintenant de faibles prix pour l'annonceur ayant plus de solutions de rechange. Une fois encore, j'entends souligner que nos remarques ne sont pas le fruit de notre imagination ; nos enquêtes ont permis de trouver des messages de stratégie commerciale indiquant que c'est précisément ce qui se fait lorsqu'on en vient aux décisions de tarification[44].

Le point de vue de Joe Klein est conforté par des études empiriques des élasticités croisées de la demande entreprises par la Federal Communications Commission des Etats-Unis. S'attachant à la publicité locale, l'étude de la FCC indique que :

> …les publicités dans les journaux et la télévision sur le plan local sont des contributions complémentaires aux efforts de vente des entreprises locales. Ces résultats indiquent aussi que ces publicités dans les radios et les télévisions locales sont également des contributions complémentaires[45].

Il semble aussi y avoir des preuves que la télévision doit être traitée de façon distincte de la radio et des médias imprimés et que la télévision gratuite et câblée ne sont sans doute pas de bons substituts. Les commentaires suivants figurent dans les documents transmis par le Département de la Justice des Etats-Unis en opposition à un projet de fusion de télévisions de 2001. Là encore, l'accent est mis sur le côté publicitaire du marché :

> Le spot publicitaire diffusé à la télévision classique possède des attributs uniques qui le distinguent de la publicité sur d'autres supports. Seule la télévision associe l'image, le son et le mouvement, ce qui crée une publicité plus facile à mémoriser. De plus, de tous les médias, le spot publicitaire diffusé à la télévision classique touche la plus forte proportion de l'ensemble des clients potentiels sur un marché cible donné et il est donc particulièrement efficace pour introduire et établir l'image d'un produit. Pour un nombre important d'annonceurs, de par ses attributs uniques, le spot publicitaire diffusé à la télévision classique est un support publicitaire qui ne présente pas de substitut proche. Ces clients ne passeraient pas par un autre support publicitaire — comme la radio, le câble ou le journal — si les prix des spots publicitaires diffusés à la télévision classique augmentaient dans des proportions limitées, mais significatives.
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> Par exemple, la télévision par câble, comme la diffusion télévisée classique, est un support visuel, mais ce n'est pas un substitut important pour le spot publicitaire diffusé à la télévision classique car le public de n'importe quelle chaîne câblée est généralement très limité et spécialisé comparé au public des stations de télévision classique. De plus, il est beaucoup plus difficile pour les annonceurs de prévoir l'impact d'une publicité sur le câble parce que les informations sur les mesures d'audience ne sont pas aussi complètes ou immédiatement disponibles que dans le cas de la télédiffusion classique. D'autres médias, comme la radio ou les journaux, sont des substituts encore moins souhaitables.
>
> Même si certains annonceurs peuvent transférer une partie de leur publicité à d'autres médias au lieu d'absorber une augmentation du prix du spot publicitaire diffusé à la télévision classique, l'existence de ces annonceurs n'empêcherait pas les chaînes de relever de façon rentable leurs prix dans des proportions limitées, mais significatives. Lors des négociations individuelles entre les annonceurs et les stations de télévision classique, les annonceurs fournissent aux chaînes des renseignements sur leurs besoins de publicité, notamment le public visé. Cela permet aux chaînes de télévision d'identifier les annonceurs affichant de fortes préférences pour la publicité diffusée sur la télévision classique. À tout le moins, les chaînes de télévision classique, pourraient relever de façon rentable les prix qu'ils facturent aux annonceurs qui considèrent que la télévision classique comme un support publicitaire nécessaire soit comme leur seule méthode de publicité, soit comme un complément nécessaire à d'autres supports[46].

La nature fluide des marchés des médias est aussi manifeste dans la concurrence entre la télédiffusion par satellite et par câble. Par le passé, les prestataires de services de diffusion par satellite avaient un avantage important dans ce domaine parce qu'ils pouvaient transmettre des signaux aussi bien analogiques que numériques. En d'autres termes, ils étaient en mesure de proposer un nombre

considérablement plus important de chaînes ainsi que des guides de programme interactifs. Les sociétés du câble ont apparemment réagi en procédant à d'énormes investissements pour parvenir à transmettre des signaux numériques. Comme le note un article de presse récent :

> Actuellement, les différences technologiques entre le satellite et le câble sont essentiellement une affaire de mode de transmission — des liaisons terrestres par opposition aux paraboles du satellite. Les paraboles présentent l'avantage de permettre une installation moins onéreuse et plus étendue, parce qu'elles n'impliquent pas la pose de câbles souterrains.
>
> Mais les sociétés du câble sont d'ores et déjà à même d'utiliser leurs lignes terrestres pour proposer des services, comme la vidéo à la demande et l'accès à l'Internet. En outre, la technologie du câble est plus développée que celle du satellite en l'état actuel des choses pour assurer une transmission de données dans les deux sens.
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> . . . . . .
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> [La technologie de la vidéo à la demande proposée par la télévision câblée] permet aux consommateurs d'acheter des films ou d'autres programmes lorsqu'ils veulent les voir, puis d'utiliser leurs commandes à distance pour l'avance rapide, le rembobinage et la pause du programme comme si ce dernier figurait sur une bande vidéo. En fait, le programme est conservé sur les serveurs de la société du câble.
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> . . . . . .
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> Mais le secteur du satellite a sa propre solution pour la vidéo à la demande. Par une politique volontariste, il a entrepris le déploiement de magnétoscopes numériques qui permettent aux consommateurs d'enregistrer des heures de programmes et de surfer entre elles à l'aide d'une télécommande. Le secteur du satellite affirme que ces magnétoscopes numériques permettent effectivement de visionner des vidéos à la demande, parce que les consommateurs peuvent télécharger les programmes qu'ils souhaitent et les visionner lorsqu'ils le veulent[47].

La concurrence dans la vidéo à la demande constitue une course sur trois fronts parce que les consommateurs peuvent aussi acheter des magnétoscopes numériques leur permettant d'enregistrer, de stocker et de visionner des programmes obtenus aussi bien sur la télévision par câble et par satellite.

De toute évidence, les facteurs technologiques exercent une influence importante sur la substituabilité. Il est aussi vrai que les autorités de la concurrence ne peuvent pas partir du principe qu'il y aura un statu quo technologique ou que les facteurs technologiques seront déterminants pour ce que les annonceurs et les consommateurs pourraient vouloir faire en vue de se protéger contre les éventuels effets négatifs associés à une fusion de médias.

4. Le cas des fusions verticales

A l'image des autres marchés, les fusions de médias concernant divers échelons de la chaîne de valeur verticale permettent de gagner en efficience, mais peuvent faire peser une menace sur la concurrence. Les questions liées à l'aspect vertical sont particulièrement tangibles dans le secteur des médias à cause des liens omniprésents entre les producteurs de contenus, les intégrateurs de services et les fournisseurs d'infrastructure. Le document de l'OCDE sur la diffusion radiophonique et télévisuelle mentionné plus haut étudie ces liens et en déduit que :

> (…) des problèmes de concurrence devraient apparaître aux deux extrémités de la chaîne de production, c'est-à-dire au niveau de l'accès à certaines formes de contenu (comme les événements sportifs importants) et au niveau de l'accès à la bande large par les consommateurs. Les décideurs politiques et les autorités chargées de la concurrence devraient donc se préoccuper en premier lieu de deux catégories de fusions horizontales : les fusions qui restreignent le nombre de chemins d'accès pour les consommateurs (fusion entre le réseau téléphonique public commuté et un câblo-opérateur ou entre un important opérateur par satellite et un câblo-opérateur, par exemple) et les fusions entre deux fournisseurs de contenu jouissant d'une position forte sur le marché pour certaines catégories de contenu[48].

Le document de l'OCDE sur la diffusion radiophonique et télévisuelle se penche ensuite sur la « théorie de rente de monopole unique », selon laquelle une société dominante à un niveau précis de la chaîne de valeur peut encaisser tous les bénéfices liés à son pouvoir de marché en facturant simplement un prix suffisamment élevé pour sa prestation. Cette théorie a été contestée par le fait que les accords d'exclusivité ou l'intégration verticale pouvaient être nécessaires pour maintenir les rentes en cas de problèmes liés à :

- la double marge (lorsque un fournisseur de contenu en situation de monopole vend à un réseau de radiotélévision également en situation de monopole et que ce dernier ajoute une deuxième marge sans se soucier des bénéfices qu'il réduit se faisant en amont) ;

- la discrimination par les prix ; les services de marketing fournis en aval nécessitant un important investissement et donnant naissance à la possibilité de faire cavalier seul ;

- les frais fixes spécifiques aux relations entre les sociétés qui devraient se multiplier en l'absence de relation ou d'intégration verticale fondée sur l'exclusivité.

Ainsi qu'il a déjà été souligné, les économies d'échelle, les facteurs liés à la publicité et les effets de réseau s'ajoutent pour accroître l'ampleur de la concentration dans la production de contenu et dans la distribution en réseau, d'où la possibilité de voir se créer divers niveaux de pouvoir de marché. La double marge constitue par conséquent un réel problème et la discrimination par les prix est généralement plus facile à envisager sur de nombreux marchés de médias. Le document de l'OCDE sur la diffusion radiophonique et télévisuelle note que :

> Si la société en amont ne peut pas identifier à l'avance tous les sous-marchés potentiels ni restreindre chaque société en aval sur un marché unique, elle peut éventuellement accroître ses rentes totales en vendant [les droits] sur le marché en aval à une seule société qui voudra et pourra exploiter entièrement les divers sous-marchés[49].

Les questions de double marge et de discrimination par les prix ont pris de l'ampleur dans le secteur de la radiotélévision, consécutivement au fort accroissement de la demande de contenu lié à la prolifération de chaînes qui a suivi le lancement de la télévision par câble et par satellite[50]. Si les obstacles à l'entrée sur le marché sont peut-être peu élevés pour la production de contenu au sens large, il n'en va pas de même pour les longs métrages ni les événements sportifs très populaires, qui semblent désormais vitaux pour garantir la rentabilité de la télévision payante[51].

L'intégration verticale pourrait être une arme à double tranchant du point de vue de ses effets sur le bien-être économique. Elle pourrait atténuer le problème de la double marge et contribuer à une discrimination efficace par les prix, mais elle risque également de créer un pouvoir de marché, ou de l'accroître, en amont ou en aval. Le document de l'OCDE sur la diffusion radiophonique et télévisuelle note que la théorie économique ne fournit pas de ligne directrice claire sur le moment où les accords

verticaux, intégration verticale comprise, devraient réduire le bien-être économique[52]. Elle nuance cependant immédiatement en ajoutant :

> Il existe (…) une raison assez simple pour laquelle le verrouillage vertical du marché serait inefficace dans certains cas précis. La technologie utilisée en aval pour la production serait la plupart du temps soumise aux économies de champ. La pénétration sur le marché en aval nécessiterait alors de couvrir l'ensemble de la production en aval. La restriction de l'accès à un facteur essentiel pour produire un seul des biens de la gamme ne développerait pas le pouvoir de marché de la société intégrée sur le marché en aval ayant besoin de ce facteur de production essentiel, mais elle développerait son pouvoir de marché sur tous les autres produits grâce à la technologie utilisée en aval.
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> L'application de cette règle à la radiotélévision est évidente. Supposons que la technologie en aval soit l'infrastructure de radiotélévision. Elle peut servir à fournir divers services de radiotélévision : émissions de variétés, sport, films, multimédia interactif et téléachat, par exemple. Si une société réussit à dominer un facteur de production nécessaire à l'offre de l'un de ces services (en achetant par exemple les droits de diffusion des grands événements sportifs), elle peut limiter la possibilité dont disposent les autres sociétés de fournir ce service et donc restreindre ou empêcher l'entrée de concurrents sur le marché de l'infrastructure. Ce faisant, elle n'accroît pas la valeur des droits sur le sport, mais elle réduit le niveau de concurrence (en augmentant donc la rente de monopole) pour tous les autres services pouvant être fournis par l'infrastructure de radiotélévision.
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> Le même raisonnement peut s'appliquer en amont de la chaîne de production. La production de certaines formes de contenu, films et télévision par exemple, entraîne des économies de champ. Si une société de diffusion intégrée bénéficiant d'une position dominante dans l'infrastructure peut refuser à un concurrent l'accès aux téléspectateurs, elle peut du même coup restreindre la concurrence sur le marché regroupant le contenu des films et de la télévision et jouir de bénéfices de monopole sur le marché du contenu des films. Ce phénomène expliquerait pourquoi les sociétés de diffusion nationales dominantes ont toujours été verticalement très intégrées et pourquoi, dans la plupart des pays, peu de films sont produits sans la participation de l'une de ces sociétés nationales de diffusion. Il peut également expliquer pourquoi certains pays exigent de ces dernières qu'elles achètent leur contenu à des producteurs indépendants. Cette restriction accroît la concurrence pour les films en donnant accès au marché de la télévision, ce qui est nécessaire pour exploiter pleinement les avantages des économies de champ[53].

Miguel Pereira a récemment effectué une étude intéressante des divers problèmes d'intégration verticale soulevés par trois grands cas soumis à la Commission européenne : la coentreprise Vizzavi, issue de Vodafone et de Vivendi, la fusion entre AOL et Time Warner et la fusion entre Vivendi, Canal+ et Seagram[54]. Il a classé ses remarques en cinq catégories : le contrôle d'accès, la source, le chemin d'accès, l'effet de levier et le réseau.

Dans le cas de la fusion entre AOL et Time Warner, la Commission s'est inquiétée du fait que l'entité née de la fusion soit apparemment en position « (…) de dicter les normes techniques de l'offre de musique en ligne, par l'exécution en continu et le téléchargement de musique sur Internet ». Si AOL-Time Warner peut s'octroyer ce pouvoir, Winamp (le logiciel de musique en ligne d'AOL) servirait avant tout à contribuer au nouveau rôle de contrôleur d'accès d'AOL-Time Warner[55].

Pereira passe de la question du contrôle d'accès à celle de la source, en admettant que la fusion d'AOL et de Time Warner, associée à celle, pratiquement simultanée, avant d'être abandonnée, entre Time Warner et EMI, aurait donné à la société ainsi créée le contrôle sur ce que l'on estime être « (…) environ la

moitié du contenu musical disponible en Europe pour l'offre en ligne »[56]. Certains craignaient de voir AOL et Time Warner refuser de fournir de la musique à ses concurrents en ligne ou la fournir à des conditions désavantageuses pour eux.

Pereira note que la fusion entre Vivendi et Seagram soulève également la question de la source, dans le secteur du film et de la musique. Il ajoute :

> « Vivendi est l'un des leaders des télécommunications et des médias et possède des intérêts dans les réseaux de téléphonie mobile, la production et la distribution cinématographiques, ainsi que la télévision payante (Canal+). Seagram était une société canadienne qui, entre autres intérêts, contrôlait la musique et les émissions de variété enregistrées d'Universal. Du point de vue du contenu, la société née de la fusion aurait possédé la deuxième plus grande cinémathèque du monde et la deuxième plus grande bibliothèque de programmation télévisée de l'Espace économique européen (EEE). Elle serait également devenue leader de la musique enregistrée, avec une position importante du point de vue des droits d'édition au sein de l'EEE.
> La situation de Vivendi-Universal quant aux droits musicaux a pris une importance particulière avec le portail de Vizzavi, géré par une coentreprise regroupant Vivendi et Vodafone. Vizzavi avait été signalée à Commission quelques mois seulement avant la fusion entre Vivendi et Universal. »[57]

Vizzavi offre à Pereira une excellente transition vers les questions de verrouillage du chemin d'accès. Cette transaction a été ainsi décrite :

> « Vizzavi était une coentreprise regroupant Vodafone et Vivendi, dont l'objectif consistait à créer un service de portail sur Internet associant divers services d'information et de transactions, accessible par l'ordinateur personnel courant, la télévision et le téléphone portable. Les sociétés parentes prévoyaient que Vizzavi soit le portail par défaut des abonnés des services de téléphonie mobile de Vivendi et de Vodafone et de l'offre de télévision payante Canal+ de Vivendi. »[58]

Pereira pensait que Vizzavi présentait un problème évidant de chemin d'accès à Internet à cause de la position importante de Vodafone sur le marché de la téléphonie mobile dans différents pays européens :

> « Vodafone possédait déjà une base importante de clientèle dans ces pays et l'accès aux futurs clients de la coentreprise étaient déjà pratiquement assuré. Quant à l'accès à Internet au moyen d'un décodeur, Canal+ possédait déjà un solide canal de distribution en direction de sa base de clientèle de services de télévision payante. La question restait de savoir si Vodafone et Canal+ seraient capables de transférer leur base de clientèle de la téléphonie mobile et de la télévision payante vers l'accès à Internet par le biais des canaux et des chemins de distribution existant déjà. »[59]

Du point de vue de l'effet de levier, Pereira affirme que pour Vizzavi « (…) la question se posait de savoir si les parties seraient capables de s'appuyer sur leur pouvoir de marché dans le domaine de la téléphonie mobile pour développer leur activité sur le marché de l'accès à Internet sur le téléphone portable. »[60] Il explique brièvement ce problème en se référant à l'objectif déclaré de la transaction et en soulignant la forte position des parties sur le marché de la téléphonie mobile dans plusieurs pays de l'UE. Il fait également allusion à la fusion entre Vivendi, Seagram et Canal+, précisant qu'elle aurait permis à Canal+ de s'appuyer « (…) sur sa forte position sur le marché de la télévision payante pour développer celle sur le marché de l'accès à Internet par le décodeur ».

Revenant à Vizzavi, Pereira ajoute :

> « La question d'effet de levier vertical se pose clairement dans le cas de Vizzavi, au niveau du pouvoir que détiennent les parties pour l'acquisition de nouveaux intérêts. Avant l'opération, Canal+ achetait déjà un volume important de contenu pour la télévision payante, programmation télévisée, sport et films notamment. Elle possédait en outre une large base de clientèle habituée à payer le contenu. Le portail Vizzavi associerait un nouveau mécanisme puissant d'accès à Internet et un contenu payant. Etant donné la position dominante que les parties obtiendraient sur les marchés d'accès à Internet, ainsi que je l'ai indiqué précédemment, l'opération leur permettrait de s'appuyer sur leur pouvoir de marché dans ce domaine pour développer leur position sur le marché pour l'acquisition de contenu payant sur Internet. Le lien structurel entre Vivendi et Canal+ et AOL France (55 pour cent) augmenterait en outre le pouvoir de négociation des parties. L'effet de levier consécutif à l'opération serait évidemment nuisible à leurs concurrents sur le marché de la téléphonie mobile et de la télévision payante[61]. »

Pereira ajoute que le risque d'effets anti-concurrentiels éventuels s'amplifia dans le cas de Vizzavi lorsque Vivendi annonça son intention d'acquérir Seagram et avec elle les opérations de musique et de film d'Universal Studios[62].

La réflexion de Pereira sur les effets de réseau se limite à la fusion d'AOL et de Time Warner, associant une énorme librairie musicale et une importante base d'abonnés à Internet :

> « Les effets de réseau seraient à double sens : l'augmentation du nombre d'abonnés accroîtrait le contenu et l'accroissement du contenu augmenterait le nombre d'abonnés. La sphère d'AOL drainerait également de nouveaux consommateurs, car plus cette sphère serait étendue, plus il serait possible de discuter en ligne et de communiquer par le biais d'AOL[63]. »

Pereira avait déjà souligné que les deux services de messagerie instantanée d'AOL comptaient « (…) des dizaines de millions de membres (…)[64] ».

Dans les trois cas cités par Pereira, la Commission européenne a trouvé une solution en tenant compte à la fois des risques pour la concurrence et de l'efficience que recherchaient les parties par leur intégration verticale. L'idée de base des solutions adoptées « (…) consistait à veiller à l'*accès*, accès aux sources, accès au chemin et accès par le contrôle d'accès »[65]. La Commission mit fin à certains liens structurels, comme ceux d'AOL et de Bertelsmann, censés aggraver les problèmes de source et de chemin d'accès.

On peut approuver le fait que l'accès soit un moyen important de régler les soit-disant problèmes que soulève Pereira dans ses exemples, sans nécessairement admettre que ces problèmes sont assez graves, ni même réels, pour justifier les solutions imposées, notamment si elles conduisent à des pertes d'efficience. Pereira ne fournit pas suffisamment de détails pour permettre de conclure que les transactions étudiées *pourraient* ou *devraient* entraîner de graves problèmes de concurrence. Pour montrer qu'elles *devraient* entraîner de tels problèmes, il ne suffit pas de se contenter de démontrer la capacité à nuire à la concurrence. Il faut examiner l'aspect incitatif (la rentabilité) d'une telle opération. Ceci nécessite une étude minutieuse de la manière dont les concurrents et les clients pourraient se protéger en cas de conduite anti-concurrentielle patente. Cette communication n'a pas vocation à évaluer si cela a été fait de manière approfondie et convaincante pour les trois transactions[66].

En bloquant la création de coentreprises et les fusions sur le marché très évolutif des médias afin de préserver l'accès, les autorités chargées de la concurrence risquent de finir par empêcher la naissance de

nouvelles plates-formes. C'est ce qui aurait pu se produire en Allemagne, dans le secteur de la télévision numérique payante.

En mars 1994, Bertelsmann, Kirch et Deutsche Telekom ont proposé de créer un coentreprise, MSG Media Service. L'annonce en a été faite en ces termes :

> « La nouvelle société (…) se consacrera tout d'abord essentiellement aux services de télévision payante et à la carte, avant de se tourner vers les services de vidéo à la demande et de téléachat en direction des quatorze millions de foyers connectés au réseau de télévision câblée de Deutsche Telekom.
>
> La coentreprise ne fournira pas de contenu, mais les autres sociétés se consacrant aux médias auront recours à ses services pour diffuser leurs films, leurs programmes de téléachat et autres[67]. »

En 1994, Bertelsmann avait des intérêts dans l'édition de livres et de magazines, les clubs du livre, l'imprimerie, l'édition musicale, l'enregistrement et la télévision privée. La société était également implantée sur les marchés étrangers et effectuait environ 6 pour cent de son chiffre d'affaires en dehors de l'Allemagne. Kirch, sa rivale par excellence, était le premier fournisseur allemand de longs métrages et de programmes télévisés. Elle était également très active dans le secteur de la télévision privée et possédait des intérêts chez les fournisseurs de télévision payante en dehors de l'Allemagne. Deutsche Telekom était l'opérateur de télécommunications officiel allemand, ainsi que le propriétaire et l'opérateur de « la quasi-totalité des réseaux de télévision câblée allemands[68] ».

Fin décembre 1994, la Commission européenne empêcha la création de cette coentreprise à cause de problèmes apparaissant sur trois marchés concernés au niveau vertical :

1. le marché des services administratifs et techniques pour la télévision payante et les autres services radio-télévisés payants en Allemagne – la Commission a conclu que MSG acquerrait une « position dominante durable » sur ce marché[69] ;

2. la télévision payante – la Commission a conclu que :

   > « La détention par MSG d'une position dominante sur le marché des services administratifs et techniques viendrait considérablement renforcer la position de Bertelsmann et Kirch sur le marché de la télévision payante qui se situe en aval. La création de MSG donnerait à Bertelsmann et Kirch la possibilité d'occuper une position dominante durable sur le marché de la télévision payante. »[70]

3. les réseaux câblés – la Commission a conclu que :

   > « Le projet de concentration est aussi de nature à entraver de manière durable et significative une concurrence effective sur le marché des réseaux câblés en Allemagne (…) Il y a donc lieu de craindre que, en exploitant la structure de la télévision payante conjointement avec les principaux diffuseurs de télévision payante, Telekom puisse tellement renforcer sa position comme câblo-opérateur après le mouvement de libération que la concurrence sur le marché de la câblodistribution en sera entravée de manière significative et que Telekom consolidera de la sorte sa position dominante[71]. »

Les parties proposaient un certain nombre d'engagements que la Commission considéra comme insuffisants pour éliminer les problèmes de concurrence, principalement parce qu'ils étaient de nature

comportementale et non structurelle pour la plupart et parce que le respect de ces engagements était incontrôlable[72].

Humphreys (1998, p. 22) décrit l'échec de cette coentreprise comme « (…) une première tentative [en Allemagne] d'ouvrir la voie de l'ère numérique (…) ». Après l'interdiction décidée par la Commission, les parties tentèrent, chacune de son côté, mais en collaboration avec d'autres partenaires, de lancer la télévision numérique en Allemagne. Kirch notamment effectua d'importants investissements dans la plate-forme numérique, mais finit par faire faillite en 2002.

De Streel (2002) a étudié la décision relative à *MSG Media Services* ainsi que de nombreuses autres décisions de la Commission relatives aux fusions sur les marchés des communications électroniques. Il reconnaît que les effets anticoncurrentiels verticaux sur les marchés émergents constituent un problème parfois important[73], que les marchés qui fusionnent devraient être laissés ouverts à la concurrence et que, s'accompagnant d'importants effets de réseau, ils sont susceptibles de se ranger aux côtés du premier à prendre l'initiative. Il se demande cependant si les interdictions et les solutions imposées quant à ces fusions sont réellement efficaces. Il pense notamment que la Commission aurait dû étudier le cas de manière plus approfondie pour voir si les parties jouissaient vraiment de positions dominantes du point de vue du contenu ou de l'infrastructure sur lesquelles elles auraient pu s'appuyer. Il ajoute qu'une analyse plus minutieuse aurait été nécessaire pour expliquer clairement pourquoi les rentes de monopole ne pourraient pas être prises sans intégration verticale. En d'autres termes, il se demande si les sociétés fusionnent vraiment en s'appuyant sur leur pouvoir de marché lorsqu'elles jouissent d'une position dominante avant la fusion afin de conquérir un marché émergent[74].

Kovacic et Reindl (1997, pp. 26 et 27) se sont également penchés sur le cas de *MSG Media Services*, notant qu'« une relation identique entre les sociétés parentes et la situation de la coentreprise qu'elles souhaitaient créer a essuyé un refus de la Commission pour *Nordic Satellite Distribution* »[75]. Kovacic et Reindl pensent que la création de cette coentreprise a été empêchée, comme dans le cas de *MSG Media Services*, à cause du pouvoir de marché des sociétés parentes du point de vue vertical[76]. Pour *Nordic Satellite Distribution*, les parties ont avancé, sans succès, que « (…) la création prévue d'un système intégré de codage numérique scandinave pouvant être utilisé pour recevoir les signaux par câble et par satellite compensait tout effet anticoncurrentiel éventuel de la coentreprise »[77]. Kovacic et Reindl soulignent que dans les deux cas, à cause des liens verticaux, les sociétés, dont le pouvoir de marché était important, avaient la possibilité de recourir à la coentreprise pour servir de levier à ce pouvoir de marché de manière à contrôler plus tôt l'accès aux « nouveaux marchés en développement »[78]. Ils poursuivent :

> « Les deux cas illustrent également le "dilemme de l'intégration verticale" qui n'est pas rare sur les marchés très évolutifs des hautes technologies. Il semble quasiment inévitable que les sociétés les plus importantes disposant du soutien financier nécessaire, des droits sur les meilleurs contenus et du savoir-faire en matière de communications seront les premières à fournir de nouveaux services et à utiliser de nouvelles technologies sur les marchés où les coûts d'investissement sont élevés et l'accueil des consommateurs incertain. L'intégration verticale constitue donc une étape naturelle et nécessaire. Elle peut également engendrer de l'efficience, par exemple si les sociétés qui contrôlent les outils logiciels des médias s'intègrent sur les marchés se consacrant à l'offre de programmes ou vice versa. Les deux décisions montrent également que les problèmes les plus importants surviennent lorsque quelques acteurs puissants coopèrent à la création et à la distribution de nouvelles technologies et parviennent à contrôler l'accès sur la chaîne allant de la production des programmes à leur livraison aux consommateurs[79]. »

Outre-atlantique, la fusion annoncée en septembre 1998 entre Viacom et Columbia Broadcasting System (CBS) souleva d'épineuses questions au niveau vertical et horizontal. Elle visait à regrouper :

> (…) la totalité des actifs de production cinématographique et télévisée, de réseau câblé, de vente de vidéo au détail, de chaînes de télévision, de réseau de télévision et d'édition de Viacom, Inc. avec les intérêts de réseau de télévision, de stations de radio et de programmes câblés de CBS, Inc., afin de créer le deuxième plus grand conglomérat de médias du monde (après Time-Warner), représentant un chiffre d'affaires total de 18.9 milliards de dollars en 1998[80].

Les problèmes au niveau vertical étaient liés au regroupement de la production télévisée et des ressources de programmation importantes de Viacom et du réseau de télévision de CBS. Après la fusion, Viacom-CBS serait en position de favoriser sa propre programmation et d'exclure celle des producteurs indépendants et non affiliés. La nouvelle société pourrait en outre disposer d'un moyen de refuser ses programmes aux chaînes de télévision rivales. Waterman (2000, p. 538) souligne les importantes économies de champ et la réduction des coûts de transactions pouvant provenir de l'intégration de la production et de la distribution télévisées. Il ajoute que, si cela empêchait les producteurs indépendants et non affiliés d'accéder à CBS , « (…) le public concerné souffrirait d'une réduction de la diversité et de la qualité de la programmation ». Il explique en quoi l'intégration verticale pourrait susciter un tel verrouillage :

> Il existe plusieurs raisons pour lesquelles nous devons étudier cette tendance des sociétés à effectuer elles-mêmes la production et la distribution télévisées. La première, c'est que les coûts de sous-traitance sont généralement moins élevés lorsque les opérations sont effectuées au sein de la même société. Ainsi, le comportement opportuniste d'un producteur dont l'émission remporte davantage de succès que prévu n'aura pas de conséquences matérielles sur une société qui possède à la fois le réseau et l'émission. Le réseau souhaite également contrôler le processus de production pour veiller à ce que la qualité et le contenu soient conformes aux attentes. Ce contrôle est probablement plus aisé lorsque les installations sont communes. Il en découle une réduction du risque. En cas de propriété commune, le réseau n'a pas à s'inquiéter d'un transfert inattendu du programme vers un autre réseau. Il en va de même pour les annulations. Les informations relatives aux projets de programmation peuvent en outre être diffusées de manière plus efficace vers les réseaux et les besoins de programmation transmises de manière plus efficace vers les producteurs au sein des sociétés intégrées[81].

Waterman déduit des deux autres réseaux de télévision américains intégrés verticalement (ABC-Disney et Fox Network-studios de télévision Fox) que les problèmes de concurrence liés au verrouillage du marché sont probablement surestimés pour les médias télévisés[82]. Il remarque de manière plus générale :

> Contrairement aux « gadgets », les produits de divertissement -- films ou séries télévisées par exemple -- sont uniques et, avant leur production, on sait par expérience que la demande pour ces produits est incertaine et on ignore dans une certaine mesure comment ils seront accueillis par le public. Il est donc très difficile pour le propriétaire d'une maison de distribution, comme un réseau télévisé par exemple, de prévoir la source de produits qui sera la mieux adaptée à la diffusion sur ce réseau. L'intégration verticale complète est donc impossible, ce qui laisse par conséquent des possibilités aux fournisseurs indépendants. Un cadre de la télévision l'a d'ailleurs parfaitement exprimé : "La créativité ne se consolide pas."
>
> Par définition, la production et la distribution télévisées par les sociétés elles-mêmes, quelle qu'en soit l'ampleur, consécutivement à l'intégration verticale, entraîne des effets de verrouillage sur les producteurs non affiliés. Du point de vue politique, la question la plus importante demeure cependant l'accès par les créateurs de ces programmes. Les producteurs jouent évidemment un rôle important dans la création. Ces mêmes écrivains, dénicheurs de talents et autres agents de production conservent néanmoins la possibilité de vendre leurs idées aux sociétés de production des grands réseaux intégrés. L'intégration induira probablement le

> remplacement de certains producteurs indépendants par des producteurs affiliés verticalement. L'accès permanent des autres agents de création aux décideurs des réseaux limite cependant les restrictions du flux réel des idées dans le système en direction des spectateurs. Les producteurs indépendants peuvent en outre coopérer avec les producteurs affiliés verticalement, ainsi que le montre les programmes en *prime time* coproduits, diffusés sur les réseaux de Fox et d'ABC[83].

Après avoir abordé ces points, Waterman soulève une question extrêmement importante. Il souligne qu'après la fusion, il y aura toujours quatre grands réseaux de radio-télévision aux Etats-Unis (à l'exception de WB et d'UPN) :

> Ce qui détermine la diversité de la programmation disponible pour les spectateurs n'est pas le choix des contrôleurs d'accès de prendre leurs décisions programme par programme ou par le jeu de la propriété de ces programmes, c'est le nombre et le pouvoir de marché horizontal des contrôleurs d'accès possédés individuellement prenant ces décisions.

Le Ministère américain de la Justice a apparemment abouti à la même conclusion et il a autorisé la fusion après que les parties aient accepté un certain nombre de cessions d'actifs afin de préserver la concurrence horizontale parmi les réseaux.

Au Royaume-Uni, la Commission chargée de la concurrence a dû faire face en 2000 aux mêmes problèmes au niveau vertical lors de la proposition de fusion de Carlton Communications Plc, United News et Media plc avec Granada Group plc[84]. Les problèmes liés à la programmation ne se révélèrent pas très importants, même en l'absence de cessions d'actifs requis pour préserver la concurrence sur le marché de la publicité télévisée. Les raisons invoquées avaient trait à la facilité de pénétration de la production de programme, qu'illustrait l'existence de quelque 1 200 producteurs, et la manière dont le réseau ainsi obtenu serait structuré. Cette dernière raison faisait apparemment référence à la décentralisation considérable des décisions de programmation par les chaînes individuelles de télévision d'ITN.

Résumé

Il est évident que les fusions verticales sur les marchés des médias peuvent susciter une grande efficience, mais également de réels problèmes de concurrence. De délicats compromis peuvent être nécessaires. Les problèmes de concurrence sont largement liés à l'accès au contenu et à la livraison finale aux consommateurs. A l'image des autres secteurs, les autorités chargées de la concurrence devront prévoir comment les marchés devraient évoluer et ce que les consommateurs pourront faire pour se protéger en cas d'effets anticoncurrentiels avérés. La possibilité apparente de réduire la concurrence n'est pas toujours une stratégie judicieuse pour la fusion, particulièrement en ce qui concerne les risques de verrouillage du point de vue du contenu. La nature très évolutive des médias, et notamment la tendance à la convergence, aura un impact important sur la question et pourrait affecter l'analyse des conséquences sur la concurrence et les solutions formulées.

5. Conséquences des fusions des médias sur la qualité et la diversité générales des programmes

L'une des conséquences non pécuniaires de la fusion de médias sur les consommateurs (y compris en tant que consommateurs de produits faisait l'objet de publicité) a déjà été abordée. Elle conclut que la fusion modifie le rapport entre la publicité et le contenu du média. Voyons à présent les conséquences non pécuniaires liées aux avantages que les consommateurs tirent des informations et des divertissements fournis par le média[85]. Comme pour tous les autres produits, le contenu d'un média possède une importante dimension qualitative. Celle-ci se caractérise par trois domaines essentiels :

diversité du contenu, qualité générale du texte, des images et de la présentation et pluralisme des points de vue.

La diversité et le pluralisme (ou la pluralité) sont souvent cités au sujet des médias, mais leur définition varie considérablement. A des fins de clarté, cette communication adoptera la formulation figurant dans un document consultatif britannique, à savoir : « la diversité concerne la variété des programmes, des publications et des services offerts, tandis que la pluralité fait référence au choix disponible entre les différents fournisseurs de ces services »[86]. La diversité fait donc référence à la variété de *contenu* offert, tandis que le pluralisme fait référence au nombre de *fournisseurs* différents de services de médias, c'est-à-dire au nombre de voix différentes en concurrence pour attirer l'attention du public. Une plus grande diversité accroît généralement le bien-être des consommateurs de deux manières différentes. Elle améliore tout d'abord l'adéquation entre leurs préférences et ce que le média leur propose. Elle peut ensuite contribuer au maintien et au développement de la culture d'un pays ou d'un groupe précis. L'augmentation du pluralisme a en revanche un effet plus indirect sur le bien-être. Elle contribue au débat public sur les questions politiques importantes et permet de veiller à ce que les décideurs privés et publics soient tenus responsables de leurs actions. Il faut souligner qu'une très grande diversité et un manque de pluralisme peuvent cohabiter sur le marché d'un média et vice versa.

Ce chapitre se consacre aux questions de diversité. Le suivant aborde le pluralisme.

Les questions de diversité sont complexes et ne seront étudiées que brièvement dans cette communication. Mais il est préalablement nécessaire de faire la distinction entre ce que l'on appelle parfois diversité « interne » et diversité « externe ». On peut dire des médias offrant une grande variété de contenu qu'ils sont plus divers du point de vue interne que les médias spécialisés dans les actualités ou ciblant un public précis, comme les chaînes télévisées thématiques s'adressant aux enfants par exemple. La diversité externe concerne la variété de contenu disponible à tout moment aux consommateurs. Une diversité externe très faible peut cohabiter avec une diversité interne très importante. C'est le cas par exemple lorsque les chaînes de télévision gratuites diffusent toutes des séries américaines le matin, des émissions d'informations en milieu d'après-midi, des dessins animés en début de soirée, les actualités à l'heure du dîner, etc. Bien que les autorités chargées de réglementer les contenus semblent se préoccuper de la diversité interne et externe, peut-être parce que certains consommateurs disposent d'un choix de médias très réduit, cette communication se consacre uniquement à la diversité externe, qu'elle désigne simplement par « diversité ».

La diversité est importante dans les fusions de médias, essentiellement parce que les consommateurs ne sont *pas* « très homogènes ». Ils le seraient s'ils éprouvaient tous soit le même intérêt, soit le même groupe d'intérêts accompagné d'un ordre de préférence identique dans ce groupe. S'ils étaient très homogènes, le peu de diversité existant parmi les médias reposerait sur les avantages comparatifs dont jouiraient les différents types de médias en couvrant les aspects du même intérêt (ex. : toutes dernières nouvelles pour la télévision, actualité moins urgente dans les magazines).

Les consommateurs de médias sont supposés être prêts à payer plus cher pour un contenu plus proche de leurs préférences. Ceci inciterait les médias concurrents, notamment ceux qui ne sont pas distribués gratuitement, à différencier leur offre de contenu. A l'image des autres secteurs, cette pression pour une plus grande différentiation entre les produits pourrait être réduite par des considérations de coût. Dans les médias, il s'agit essentiellement du désir d'étaler tous les frais fixes de contenu et de distribution ou de diffusion afin de les réduire au maximum. Il existe également une tendance à l'homogénéisation due au désir d'accroître les recettes publicitaires. *Toute autre considération égale*, les médias financés par la publicité choisiront plutôt leur contenu afin d'atteindre le plus grand nombre possible de consommateurs. Dans la mesure où les différents genres de contenu ont un pouvoir d'attraction du public différent, la tendance à optimiser la taille du public peut contribuer à réduire la diversité de contenu.

Lorsque l'on pose comme condition « toute autre considération égale », on omet au moins deux aspects importants relatifs à la diversité. Tout d'abord, un média peut juger avantageux de servir un public plus restreint, sur une niche, plutôt qu'un public général plus large. Les annonceurs sont en effet normalement prêts à verser un bonus afin de cibler leur publicité sur les groupes de consommateurs susceptibles d'acheter leurs produits[87]. Pour prendre un exemple évident, les entreprises locales sont prêtes à payer un CPM plus élevé pour la publicité dans les journaux locaux que dans la presse nationale. Ensuite, les niches peuvent également êtes attractives pour les propriétaires de médias simplement parce qu'ils pourront facturer davantage les consommateurs ou leur imposer un rapport publicité-contenu plus élevé, d'autant plus que le contenu les intéresse et ne peut pas être trouvé facilement ailleurs. Cette deuxième considération peut étayer la première dans la mesure où les consommateurs du média constituant une niche ne sont fidèles qu'à très peu d'autres médias. Dans ce cas, les annonceurs sont incités à préférer le média constituant une niche pour être sûrs d'atteindre le groupe de consommateurs qui leur est fidèle.

La relation entre les niveaux de concentration et la diversité, et donc le degré auquel l'accroissement induit par les fusions sur la concentration peut affecter la diversité, varient facilement d'un marché de médias à l'autre. Sur certains marchés, les différents genres de contenu varient énormément par leur capacité à attirer le public et ne font donc pas preuve de beaucoup de diversité, quel que soit le niveau de concentration des médias. Sur d'autres marchés, la différence est parfois infime du point de vue de la capacité d'attraction, de sorte qu'une grande diversité existe et les niveaux de concentration peuvent avoir des conséquences importantes. De même, les différences de niveau de protection offert par la diversité de contenu à un média contre la concurrence affecteraient les relations entre la concentration et la diversité. L'impact d'une fusion sur la diversité se complique encore par la relation probablement non linéaire entre la concentration et la variété de contenu.

Un exemple simple aidera peut-être à expliquer l'existence d'un effet non linéaire de la concentration sur la diversité. Supposons que 80 pour cent du public de la télévision gratuite ne regardent que les programmes de sport et que les 20 pour cent restant ne s'intéressent qu'aux émissions d'actualité. Supposons encore que le CPM payé par les annonceurs soit identique, que le public soit composé d'amateurs de sport ou d'actualités, que les coûts de production du sport et des actualités soient également identiques et que la seule différentiation possible entre les produits soit leur nature (c'est-à-dire qu'il n'y ait aucune différence de capacité d'attraction du public entre deux émissions sportives ou deux émissions d'actualités). Selon ces suppositions, tant que les coûts de contenu demeurent suffisamment modestes, un média possédant un monopole imprenable voudra proposer une chaîne de sport et une chaîne d'actualités, offrant donc ainsi la diversité optimale. Mais, si, au lieu d'un monopole, deux, trois ou quatre diffuseurs proposent chacun une seule chaîne, aucun ne proposera d'émission d'actualités. Il faut que le nombre atteigne cinq pour qu'une chaîne d'actualités soit probablement proposée[88].

En général, l'effet de la fusion des médias sur la diversité de contenu repose sur trois facteurs. Le premier est l'importance des frais fixes liés au contenu. Plus ils sont élevés, plus la société issue de la fusion aura tendance à proposer le même contenu à travers tous ses composants et donc à réduire la diversité de contenu. Le deuxième facteur est lié au désir de réduire la cannibalisation, c'est-à-dire la concurrence entre les entités ayant fusionné. Ceci s'applique particulièrement aux entités proposant des produits très proches. Le troisième facteur est le désir de devancer la pénétration sur le marché. Ces trois effets sont abordés par Berry et Waldfogel (1999), qui concluent qu'il est difficile de prévoir clairement en se basant uniquement sur la théorie économique[89]. Ils se tournent donc vers la preuve empirique et trouvent une relation non linaire entre la concentration et la diversité[90]. Ces résultats se fondent sur l'évolution de la variété dans les programmes radiophoniques aux Etats-Unis après que la loi de 1996 sur les télécommunications ait assoupli les restrictions sur le nombre de stations pouvant être possédées sur le même marché local.

Si l'on pouvait prouver que la fusion des médias réduit la diversité, cela justifierait-il d'entraver cette fusion ou d'y poser des conditions ? On ne peut pas répondre directement à cette question. Le problème est que la réduction de la diversité est peut-être inséparable de l'amélioration de la qualité globale. Les consommateurs aux goûts courants ne regretteraient peut-être pas la diversité et pourraient bénéficier d'une meilleure qualité du contenu ou d'un tarif plus avantageux. Ceci conduirait alors les autorités chargées de la concurrence à prendre en compte les avantages pour un groupe de consommateurs, en augmentant les coûts supportés par un autre groupe. Un tel compromis ne se produira cependant que si la fusion des médias entraîne réellement une baisse des prix ou une amélioration de la qualité du contenu. Le chapitre précédent consacré aux deux côtés du marché indique que la baisse des prix est une possibilité, mais qu'elle est loin d'être une certitude. Quant à l'amélioration de la qualité, on ne saurait non plus la garantir.

Une fusion de médias affectera la qualité du contenu si elle modifie les recettes ou les coûts marginaux liés à l'évolution de la qualité du contenu. Les raisons pour lesquelles la fusion devrait systématiquement affecter les coûts marginaux ne sont pas évidentes, mais on voit aisément qu'elle peut avoir un impact sur les recettes marginales. Le moyen le plus simple pour que la fusion ait cet effet est l'augmentation du nombre de consommateurs pour chaque article ou programme diffusé par les médias ayant fusionné. Prenons par exemple la fusion de journaux dans laquelle l'un des journaux cesse ses activités après la fusion. Ceci augmenterait probablement la circulation pour l'entité résultant de la fusion, ce qui devrait se traduire par une hausse des ventes et des recettes publicitaires par article imprimé et pourrait accroître les recettes marginales liées à l'amélioration de la qualité du contenu. Le fait que la fusion et la cessation d'activité consécutive de l'un des journaux ait ou non un tel effet repose en partie sur l'ampleur de la réduction, le cas échéant, de la concurrence que provoque la fusion pour les consommateurs. La baisse de la concurrence pour les consommateurs réduira l'incitation à maintenir, et d'autant plus à améliorer, la qualité des articles imprimés.

Le paragraphe précédent suppose implicitement que les médias produisent leur propre contenu, c'est-à-dire qu'il n'y a pas de marché du contenu. Si ce marché existe, il est impossible de déterminer les effets de la fusion de médias sur la qualité sans tenir compte de l'impact de cette fusion sur le marché du contenu[91].

Résumé

Ce chapitre affirme que les effets de la fusion des médias sur les annonceurs et les consommateurs ne peuvent pas être correctement évalués sans tenir compte de la manière dont cette fusion peut affecter la qualité et la diversité. On peut approuver cette affirmation et accorder peu ou pas d'importance à la qualité et à la diversité lorsque l'on étudie les fusions de médias. Ceci est dû au fait que la qualité et la diversité sont par nature difficiles à mesurer et que l'effet de la fusion des médias sur celles-ci est très complexe. La fusion de médias peut, qui plus est, améliorer la qualité en réduisant la diversité et vice versa. De nombreux pays répondent en outre aux questions de diversité en réglementant les contenus et en subventionnant les émissions de radio-télévision publiques. Face à cette complexité et à ces difficultés, les autorités chargées de la concurrence pourraient décider de laisser la diversité au moins aux mains des législateurs.

Pour clore sur la diversité, il faut souligner qu'au moins en ce qui concerne la télévision, le développement et l'expansion de la télévision payante, ainsi que l'élargissement du choix disponible grâce aux technologies de compression et les avancées des nouvelles chaînes de distribution (satellite et Internet), constituent autant de raisons en moins de s'inquiéter des effets des fusions sur la diversité[92].

6. Fusions de médias et pluralisme

Dans cette partie du document, le bien-être économique n'est plus au centre des préoccupations, mais les concepts économiques n'en restent pas moins pertinents. Il existe en particulier des facteurs externes importants qui s'appliquent aux médias. Le principal d'entre eux concerne les avantages dont tous les citoyens bénéficient lorsque chaque électeur fait des choix avisés. Compte tenu de ce facteur externe, on peut s'attendre à une pénurie des informations nécessaires pour faire ces choix.

Les médias apportent deux contributions importantes à la création et à la préservation de démocraties vivantes et de l'État de droit qui y est étroitement associé. En premier lieu, ils jouent un rôle de surveillance et informent le public des manquements et des fautes des acteurs des secteurs privé et public. Cette fonction conduit parfois à l'adoption de nouvelles lois et réglementations, mais le plus souvent, elle a simplement pour effet de garantir qu'un prix est payé en cas de trahison de la confiance du public. En second lieu, les médias constituent des vecteurs par lesquels des choix politiques alternatifs sont communiqués au public et soumis à une évaluation critique.

On peut compter sur les responsables politiques et sur les partis politiques pour financer leur propre publicité, et dans une certaine mesure pour mettre en lumière les faiblesses des propositions de leurs adversaires. Cette situation ne permet probablement pas de fournir la variété et l'exhaustivité des informations générales, l'analyse et les critiques nécessaires pour conserver une démocratie saine.

Concernant les fonctions d'information et de commentaire des médias, il est utile de penser en termes de «marché des idées», c'est-à-dire la «…sphère dans laquelle des valeurs intangibles rivalisent pour être acceptées[93].» Dans un document rédigé par le ministère irlandais de l'Entreprise, du Commerce et de l'Emploi, on peut lire :

> Les préoccupations politiques quant au pluralisme des médias sont fondées sur le sens de la valeur de la liberté de parole, la reconnaissance que, dans ce contexte, la parole est intimement liée au droit de lire, de regarder et d'écouter une diversité de points de vue, et la croyance commune que cette diversité est essentielle au fonctionnement harmonieux d'une démocratie. La philosophie traditionnelle de la liberté de parole est défendue et caractérisée par l'image d'un marché atomistique d'idées, dans lequel les idées se bousculent librement et rivalisent entre elles pour gagner l'attention, la fidélité et à terme la conviction du citoyen. De même que le processus de concurrence sur le marché des produits conduit à une production plus efficace de réfrigérateurs de meilleure qualité pour le bénéfice du consommateur, on peut penser que le débat, le désaccord et la diversité aboutiront finalement à la vérité[94].

Le souhait de garantir qu'un grand nombre de points de vue, sinon tous, sont représentés sur le marché des idées est fréquemment associé à la nécessaire de maintenir le pluralisme parmi les médias.

6.1 Pourquoi les fusions de médias pourraient avoir une incidence sur le pluralisme

S'il est évident que les fusions des médias réduisent le nombre de propriétaires qui les contrôlent, plusieurs raisons sont parfois avancées pour expliquer pourquoi ces fusions seraient sans grande conséquence sur le pluralisme. *Premièrement*, il existe un grand nombre de *sources* d'informations différentes et une fusion n'y changera probablement rien. On doit toutefois opposer à cette opinion qu'une multitude de sources compte peu si on leur refuse l'accès aux médias. Les fusions de médias risquent de créer ou d'aggraver des goulets d'étranglement importants[95]. *Deuxièmement*, même si un type particulier de médias, les journaux par exemple, se trouvait en situation monopolistique, il resterait un nombre suffisant de médias alternatifs. Cela soulève à l'évidence une question empirique importante qu'il n'est pas possible d'analyser en détail dans le présent document. On se bornera à constater que les éléments

examinés dans la section consacrée à la définition du marché suggèrent qu'il serait faux de supposer que les consommateurs changent facilement de type de médias comme sources d'informations et d'analyse de l'actualité.

Il existe une *troisième* raison pour laquelle la concentration de la propriété des médias serait sans grande importance pour le pluralisme. Elle a trait aux incitations et aux facultés dont les propriétaires des médias disposent pour déterminer le contenu des médias. Baker (2002) examine ce point en détail, en commençant par analyser l'argument selon lequel les propriétaires de médias soucieux d'optimiser leurs bénéfices sont contraints, du fait de la concurrence, de fournir le contenu que les consommateurs attendent, ce qui inclut présumément un contenu de nature politique. Tout comme dans les autres marchés, si les barrières à l'entrée sont faibles, la concurrence entre les média pourrait être vigoureuse même si les niveaux de concentration sont élevés.

Si la concurrence est faible, cependant, et résulte dans une certaine mesure de profits supra concurrentiels, les propriétaires de média acquérront une certaine latitude pour sacrifier des profits afin de subventionner, en fait, un contenu qui corresponde à leurs préférences idéologiques[96]. En outre, avec la diminution du nombre de concurrents, la rivalité pourrait exercer le même effet d'homogénéisation qu'en matière de diversité du contenu. Gabszewicz et al. (1999, 2) ont examiné comment la publicité et le financement des journaux par les consommateurs tendent à favoriser la présentation d'opinion centristes plutôt que minoritaires :

> La première source de financement [les lecteurs] exige une certaine adéquation entre «l'image» politique présentée par le directeur de la rédaction et les préférences politiques de ses lecteurs. A défaut, ils pourraient être tentés d'acheter le journal qui soutient l'opinion opposée, car il deviendrait un substitut facile. En revanche, la deuxième source de financement, celle provenant des recettes publicitaires, exige un lectorat suffisamment important pour que le journal soit un support attractif aux yeux des annonceurs : l'impact du message publicitaire augmente avec la taille du lectorat. Toutefois, il s'avère que conforter les préférences politiques des lecteurs afin de stabiliser son lectorat pourrait bien avoir une incidence négative sur les recettes publicitaires de la publication. Prenons l'exemple d'un journal orienté politiquement à gauche. Si le rédacteur en chef décide de présenter ses idées de gauche de manière trop radicale, confirmant ainsi les préférences politiques de son lectorat d'extrême gauche, il risque de perdre ses clients plus proches du centre, au bénéfice de son concurrent de droite ! La contraction de sa part de marché qui en résulterait le rendrait moins attractif aux yeux des annonceurs : les messages publicitaires qui vantent leurs produits auraient alors un impact plus faible. A l'inverse, le concurrent de droite, qui bénéficie désormais d'une audience plus nombreuse, devient plus intéressant pour les annonceurs ! Cette dépendance des recettes publicitaires vis-à-vis de l'image politique affichée par les responsables de la rédaction peut les conduire à modérer le message politique de leurs journaux. Cette tendance est particulièrement marquée lorsque les lecteurs n'accordent pas beaucoup d'importance au contenu politique du journal, ou lorsque les recettes publicitaires sont fortement corrélées à la taille du lectorat (note de bas de page non mentionnée).

Baker présente également, avant de la remettre en cause, l'opinion selon laquelle les propriétaires sont tout simplement incapables de contrôler efficacement le contenu de leur média :

> Les informations quotidiennes sont le produit de l'action collective de nombreux journalistes et rédacteurs qui travaillent selon des usages établis et respectent des règles déontologiques. Un propriétaire n'est pas en mesure de dicter la pratique du journalisme et c'est cette pratique, et pas la propriété, qui est le principal déterminant du contenu des informations que les lecteurs reçoivent. Parallèlement, le même type d'argument, un peu moins solide, il est vrai, peut être

> avancé à propos du milieu plus ouvertement créatif du spectacle, ainsi que d'autres genres d'écrits comme les articles destinés à des magazines.
>
> . . . . . .
>
> Au lieu d'être contrôlées par les propriétaires…[les pratiques des personnes qui élaborent l'information]… sont essentiellement déterminées par une combinaison d'éducation professionnelle, d'acculturation sur le lieu de travail et d'impératifs institutionnels et organisationnels qui sont souvent le reflet des nécessités économiques de la production médiatique[97].

Baker cite des éléments concluants d'ordre sociologique qui corroborent ces vues, mais oppose deux principales critiques :

> …les propriétaires, soit directement, soit par le biais des hauts dirigeants que les propriétaires…sélectionnent, peuvent influencer considérablement la création de la culture au travail et les notions de pratiques acceptables et inacceptables….[L]es propriétaires peuvent [également] varier énormément dans leur orientation vis-à-vis de l'expertise, de l'idéologie ou de la diversité parmi les employés. Ces facteurs signifient que le choix des employés par les propriétaires – ou leur choix par ces employés (par exemple les rédacteurs en chef de haut vol) qui recrutent d'autres employés – peut avoir des conséquences considérables sur les capacités, la culture et les préjugés de la salle de rédaction, qui peuvent se répercuter sur l'orientation du contenu final. Enfin, bien que les interventions directes soient rares, leur survenue occasionnelle peut orienter le travail des employés et favoriser la pratique de l'autocensure en leur sein, que les journalistes considèrent comme un des principaux facteurs qui déterminent la création du contenu dans la plupart des médias appartenant à un groupe[98].
>
> Baker suggère également deux raisons positives de préférer une propriété dispersée des médias, à savoir :
>
> 1. «…on peut raisonnablement s'attendre à ce qu'un nombre plus élevé de 'chiens de garde' rivaux, qui entrent en concurrence les uns avec les autres pour débusquer les abus, jouent mieux ce rôle que s'ils étaient en nombre réduit….» ; et
>
> 2. «ceux qui ont le plus besoin d'être surveillés, ceux qui détiennent un pouvoir politique ou économique, cherchent souvent à contrôler ou à coopter les médias. Le contrôle ou la corruption est d'autant plus facile que le nombre de médias que ces groupes veulent contrôler est réduit. Lorsqu'ils sont peu nombreux, on peut les racheter, les menacer, les corrompre, les intimider ou les séduire. Le contrôle d'un grand nombre de médias *influents* est plus difficile[99].»

Les données non scientifiques réunies par Baker pour corroborer cette analyse mettent en évidence certains avantages et inconvénients des conglomérats de médias. D'un côté, les conglomérats offrent plus de prises à l'exercice d'une pression à l'encontre d'un média. D'un autre côté, dans la mesure où les conglomérats sont diversifiés et de grande taille, ils devraient être mieux à même de résister aux pressions économiques et politiques et de supporter les coûts fixes élevés qu'implique le journalisme d'investigation. Pour contredire cette dernière position, Baker cite Eric Severeid, «…l'un des commentateurs de télévision de la dernière génération les plus éminents aux États-Unis…» qui aurait déclaré :

> …plus la taille des médias d'information est importante, moins ils autorisent de courage et de liberté d'expression. Être grand, cela signifie être faible….Dans le domaine des idées, le courage est inversement proportionnel à la taille de l'entité[100].

6.2 Comment l'examen de fusions à l'aune du droit de la concurrence contribue au pluralisme des médias, même s'il ne poursuit pas explicitement cet objectif, et ce soutien est-il suffisant ?

En supposant que la propriété a une influence décisive sur le pluralisme des médias, l'examen des fusions qui se concentre exclusivement sur les marchés économiques (c'est-à-dire sans tenir compte du marché des idées) apporte néanmoins une contribution importante au pluralisme. Il le fait en préservant la liberté de choix à la fois pour le consommateur et pour l'annonceur. C'est en protégeant la liberté de choix que les autorités de la concurrence épargnent aux consommateurs et aux annonceurs les augmentations anticoncurrentielles des coûts de copie ou d'écoute, les baisses de qualité et de diversité du contenu et les augmentations des tarifs publicitaires qui peuvent résulter d'une fusion de médias. Lorsque la liberté de choix est suffisante pour empêcher ces effets pervers, le pluralisme des médias est-t-il suffisant pour garantir que les médias puissent jouer leur rôle de renforcement de la démocratie ? C'est une question très débattue et il y a de bonnes raisons de douter que la réponse soit positive[101].

Il peut arriver que certains marchés des médias soient fortement concentrés ou le deviennent si une fusion de médias est autorisée. Si ces mêmes marchés se caractérisent également par des barrières réduites à l'entrée et à la sortie, les fusions de médias ne réduisent pas forcément le bien-être économique. Elles peuvent toutefois avoir des effets néfastes significatifs sur le pluralisme médiatique. Un Livre blanc sur les communications publié au Royaume-Uni stipule :

> Soutenir la concurrence est la première étape pour promouvoir le pluralisme des médias. Un marché concurrentiel est probablement un marché où de nombreuses opinions et des contenus diversifiés peuvent s'exprimer, même si rien ne garantit que ce sera le cas. Les spécialistes de la concurrence admettent que la menace d'un nouveau venu potentiel sur le marché peut faire peser une contrainte sur la politique de tarification des grandes entreprises et avoir un effet dissuasif sur l'exploitation d'une position dominante sur le marché. Toutefois, sur les marchés des médias, si aucun nouveau venu ne s'implante ou si les entreprises existantes négligent d'élaborer une gamme diversifiée de services, le nombre de sources d'opinions indépendantes risque d'être limité. Compte tenu de l'importance des médias pour la démocratie, nous sommes attachés au maintien et au renforcement de la diversité d'opinion et d'expression. C'est pourquoi nous continuerons probablement d'avoir besoin de pouvoirs de secours afin d'appuyer le pluralisme dans la propriété et les opinions exprimées par les médias[102].

Un document de consultation publié ultérieurement au Royaume-Uni sur le bien-fondé des restrictions de propriété comme moyen de favoriser le pluralisme ajoute :

> Les règles de la concurrence peuvent traiter les questions de concentration, d'efficience et de choix, et auront tendance à encourager une propriété dispersée et l'entrée de nouveaux venus. Leur efficacité à cet égard devrait être encore plus grande dès lors que la Loi sur les entreprises sera entrée en vigueur. Toutefois, elles n'offrent aucune garantie en la matière. Le droit de la concurrence ne peut donc pas fournir la certitude dont nous avons besoin qu'un grand nombre de médias d'orientations différentes continueront de se faire entendre, ou que les nouveaux venus potentiels sur le marché pourront s'exprimer. En outre, il n'est pas en mesure de résoudre directement les préoccupations en matière de liberté rédactionnelle ou d'expression de la collectivité[103].

Dans la mesure où elle pourrait assurer l'efficience économique sans protéger le pluralisme, l'homogénéité des produits est normalement considérée comme le signe d'un potentiel élevé de concurrence, ce qui renforce l'effet asymétrique supposé d'une entrée potentielle sur le marché. Mais en matière de médias, un contenu très homogène et donc facilement remplaçable est défavorable au pluralisme[104].

Pour approfondir la question de l'entrée potentielle, il se peut que les autorités de la concurrence se fondent, pour de justes raisons, sur cette entrée pour veiller à ce qu'une fusion ne réduise pas l'efficacité économique, mais elle peut s'avérer totalement incapable de protéger le pluralisme. Les consommateurs et les candidats à l'entrée auront certainement tôt fait de remarquer les variations de prix ou de tarifs publicitaires, mais il faudra probablement beaucoup plus de temps à la majorité des citoyens pour s'apercevoir que les informations qu'ils reçoivent sont partiales ou incomplètes. Lorsqu'ils commenceront à rechercher des sources alternatives, éventuellement auprès d'un nouveau venu sur le marché, la société aura peut-être déjà subi trop de dommages.

6.3 Les préoccupations en matière de pluralisme devraient-elles être explicitement intégrées à l'examen des fusions de médias sous l'angle du droit de la concurrence ?

Certains observateurs estiment que l'on peut et que l'on doit faire quelque chose pour protéger le pluralisme lors de l'examen des fusions de médias sous l'angle du droit de la concurrence. Ce point de vue est soutenu par exemple par Stucke et Grunes (2001)[105].

Stucke et Grunes commencent par remarquer que le «marché des idées» n'est généralement pas inclus dans l'analyse antitrust des fusions de médias aux États-Unis[106]. Ils prétendent toutefois que l'histoire législative des lois antitrust américaines et certaines grandes affaires antitrust de la Cour Suprême et de tribunaux inférieurs «…soutiennent l'inclusion du marché des idées dans l'analyse antitrust des fusions des médias[107].» Toutefois, Stucke et Grunes reconnaissent pleinement que l'application à la problématique du marché des idées des Directives américaines en matière de fusion horizontale, surtout de leurs hypothèses de concentration, poserait de grandes difficultés. La notion même de remplacement de produit pourrait ne pas vraiment s'appliquer en matière de pluralisme. Évoquant les fusions de journaux, mais la pertinence du propos est plus large, Stuckes et Grunes déclarent que :

> …le marché [des idées] ne désigne pas le passage des consommateurs d'un produit homogène à un autre. C'est plutôt l'accroissement net du bien-être du consommateur qui résulte de la concurrence entre de nombreuses sources d'informations et sensibilités rédactionnelles. Comme l'a déclaré justement le juge Hand concernant le marché des idées [dans l'affaire de la fusion des services télégraphiques de l'*Associated Press*] – et il est utile de le rappeler ici – «seules des lumières croisées provenant de différentes directions peuvent assurer un éclairage complet.» A l'inverse des restrictions qui pèsent sur les produits ordinaires (les consommateurs peuvent se tourner vers des alternatives de deuxième choix mais l'impact global sur la société est minime), en matière de restrictions sur les médias, les alternatives peuvent être intrinsèquement insatisfaisantes et les coûts imposés à la société peuvent être considérables[108].

Stucke et Grunes formulent trois propositions sur les modalités de prise en compte de l'impact d'une fusion sur le marché des idées[109] :

1. «…les autorités antitrust chargées de l'examen des fusions de médias doivent voir au-delà des effets de prix en général et des tarifs publicitaires en particulier, et envisager d'autres aspects non liés aux prix de la concurrence économique, comme la réduction de la qualité et du choix[110].»

2. «…les efficiences doivent être examinées avec le marché des idées en toile de fond.» Plus particulièrement, «…lorsqu'on prétend que des fusions de médias ont un effet bénéfique sur l'efficience, il faut tenir compte de la tension entre les efficiences générées par l'homogénéisation et l'uniformité des produits, d'une part, et le souhait de diversité sur le marché des idées d'autre part[111].»

3. «…les autorités et les tribunaux doivent accorder beaucoup d'importance aux preuves directes d'effets anticoncurrentiels.»

La troisième proposition fait référence aux preuves de réduction de la diversité et du pluralisme.

La première proposition de Stucke et Grunes est plus directe et moins controversée que les deux autres. Les deuxième et troisième propositions peuvent exiger des autorités de la concurrence de procéder à des arbitrages problématiques, principalement politiques. Comme Gibbons (1999, 173) l'explique :

> …on ne doit pas supposer qu'il est possible d'élaborer une formule permettant de déterminer le niveau acceptable de pluralisme. Les critères économiques peuvent fournir des seuils *présumés* pour les décisions politiques. Mais le pluralisme des médias est une question *politique* et les jugements sur le niveau adéquat de diversité dans une société sont basés sur l'expérience et sur la prudence.

Compte tenu de la nature non quantifiable, complexe et intrinsèquement politique de la question du pluralisme, il n'est pas surprenant que certains préconisent de laisser les questions de pluralisme, y compris celles posées par les fusions de médias, aux responsables de la réglementation sur la propriété et sur le contenu, avec l'appui éventuel des sociétés publiques de radiodiffusion[112]. Cet avis concorde avec ce qui semble être une tendance générale en faveur de la concentration du droit de la concurrence sur le bien-être économique, plutôt que sur des questions plus larges d'intérêt général[113].

Une enquête parlementaire sur les amendements possibles de la *Loi canadienne sur la concurrence* consacre un chapitre aux modalités d'application de la *Loi* au secteur des journaux et aux modifications possibles. Elle identifie deux approches pour traiter les questions de «capital social» dans les fusions de journaux. La première consiste à amender la *Loi* afin de créer des dispositions spécifiques au secteur des journaux de manière à élargir l'examen des fusions de journaux pour inclure des facteurs non économiques[114]. Elle présente plusieurs arguments contre cette solution, l'un d'eux étant le suivant :

> Il n'existe aucun modèle analytique permettant d'exprimer des concepts sociaux de manière objective et judicieuse. A terme, pour contester une transaction proposée, le commissaire [chargé de la concurrence] doit être en mesure de fournir une analyse objective et convaincante qui détaille l'impact escompté de l'opération sur les marchés. Pour étendre les objectifs de la *Loi* afin de tenir compte de telles considérations, le Canada devrait opérer un changement de paradigme complet, et s'écarter de l'approche analytique actuellement suivie par les autorités antitrust dans le monde entier, en faveur d'un modèle plus holistique qui se fonderait non pas sur des critères économiques, mais sur les règles de la psychologie, de la sociologie et des sciences politiques[115]

L'enquête parlementaire canadienne examine brièvement un modèle hybride associant l'analyse antitrust traditionnelle à une approche plus «holistique». Ce modèle fut immédiatement critiqué et assailli de questions rhétoriques :

> Lequel des deux facteurs aurait le plus d'importance ? Le facteur économique ou social ? Comment le Tribunal pourrait-il juger le mérite des arguments des parties sur l'impact social de la transaction ? [116]»

On trouve dans plusieurs pays des exemples d'approches personnalisées de l'examen de fusions sur le marché des médias qui semblent en partie motivées par des préoccupations de pluralisme. Dans l'Union européenne, une dérogation spécifique est prévue au règlement sur les fusions de la Commission européenne, à savoir l'article 21(3), pour autoriser les États membres à adopter des mesures spécifiques visant à promouvoir le pluralisme dans les médias. La *Newspaper Preservation Act* américaine autorise les journaux aux prises avec des difficultés financières, mais qui ne peuvent pas se prévaloir de l'exception prévue pour les entreprises en cessation de paiement, à fusionner toutes leurs opérations à part les bureaux de la rédaction[117]. Le Royaume-Uni applique également un régime spécial pour les fusions des journaux, mais envisage actuellement de le réviser[118]. L'Allemagne a élaboré une approche modifiée des fusions de journaux. Bien qu'elle impose des seuils plus bas pour les obligations de notification et pour décider de soumettre ou non les fusions de journaux à un examen approfondi, elle assure qu'ils font l'objet d'une surveillance particulière.

La nouvelle loi irlandaise sur la concurrence, adoptée en 2002, inclut un régime spécial beaucoup plus détaillé pour certaines fusions de médias. Il s'applique à : «…toute entreprise de publication de journaux ou de périodiques regroupant principalement des nouvelles et des commentaires sur l'actualité ; toute entreprise de service de radiodiffusion ; ou toute entreprise qui fournit une plate-forme pour des services de radiodiffusion». Le régime spécial fonctionne selon les modalités suivantes :

> Lorsque l'Autorité reçoit une notification de fusion qu'elle considère être une fusion de médias, elle doit informer les parties de son opinion et adresser une copie de la notification au ministre. Le ministre peut demander à l'Autorité de mener une enquête de phase 2 et peut déroger à l'approbation de l'Autorité, avec ou sans conditions. En d'autres termes, si l'Autorité bloque une fusion de médias, le ministre ne peut pas la débloquer, mais si l'Autorité donne son autorisation à une fusion, assortie ou non de conditions, le ministre peut la bloquer ou peut appliquer des conditions nouvelles ou plus sévères. Pour prendre cette décision, le ministre doit tenir uniquement compte des «critères pertinents» qui sont (section 23(10)) :
>
> a) la vigueur et la compétitivité des entreprises de médias nationales ;
> b) la mesure dans laquelle la propriété ou le contrôle des entreprises de médias dans l'État sont répartis entre des personnes et des entités ;
> c) la mesure dans laquelle la propriété ou le contrôle de types particuliers d'entreprises de médias dans l'État sont répartis entre des personnes et d'autres entités ;
> d) la mesure dans laquelle les activités des différentes entreprises de médias dans l'État reflètent la diversité des opinions existantes dans la société irlandaise ; et
> e) la part du marché national d'un ou de plusieurs des types d'activités économiques couverts par la définition des « entreprises de médias » de cette sous-section qui est détenue par l'une ou l'autre des entités concernées, ou par toute autre personne ou entité qui détient un intérêt dans une telle entité.

Pour traiter une fusion de médias en phase 2, l'Autorité doit déterminer comment l'application des critères pertinents doit affecter l'exercice par le ministre de ses pouvoirs, et doit informer le ministre, sur sa demande, de l'opinion à laquelle elle est parvenue[119].

Avec ou sans approche personnalisée de l'examen des fusions de médias, il est tout à fait probable que la réglementation restera nécessaire pour préserver un niveau de pluralisme satisfaisant. Comme Baker (1999, 917-918) l'explique :

> …au moins deux considérations militent en faveur de l'assujettissement de la propriété des médias à des réglementations supplémentaires. Sur un plan pragmatique, l'avantage d'un régime

> juridique double et d'une double autorité chargée de faire respecter la législation tient au fait que l'absence de volonté politique de la part d'une autorité ou une interprétation étroite de la loi par une autorité aura moins d'effets pernicieux. Sur un plan plus fondamental et conceptuel, les préoccupations spécifiques aux médias qui reflètent à la fois les caractéristiques de l'économie des médias et leur rôle démocratique spécial nécessitent des politiques spécifiques aux médias. Les lois antitrust, même interprétées au sens le plus large, ne peuvent pas prendre en compte toutes les raisons spécifiques aux médias de limiter la concentration. Une interprétation large de la législation antitrust peut être sensible à la capacité d'une entité fusionnée de restreindre le choix de contenu du consommateur, même si la fusion n'a pas abouti à un pouvoir de fixation des prix. Toutefois, la concentration de la législation antitrust sur les consommateurs ne pourra vraisemblablement pas intégrer le souci démocratique d'assurer un nombre maximum de propriétaires différents participant au « marché des idées » ou les inquiétudes démocratiques face à la concentration du pouvoir d'influence de l'opinion publique (référence non mentionnée).

Lorsqu'une réglementation existe, qu'elle soit axée sur la diversité ou sur le pluralisme, les autorités de la concurrence doivent s'engager dans la défense de la concurrence pour veiller à ce que les réglementations ne réduisent pas la concurrence plus qu'il n'est strictement nécessaire pour leur permettre d'atteindre leurs objectifs. Elles doivent également élaborer des moyens de coopérer avec les organismes de réglementation des médias afin que les examens des fusions soient aussi rapides et prévisibles que possible. Le Canada fournit un exemple de mise en œuvre concrète, avec un accord écrit qui établit une division claire des tâches et qui décrit les modalités de coopération entre les autorités de la concurrence et les organismes de réglementation[120].

Synthèse

Le pluralisme pose un certain nombre de questions difficiles et cruciales pour l'examen des fusions de médias, mais aucun consensus ne se dégage sur les réponses à y apporter. Bien que les autorités de la concurrence puissent contribuer positivement au pluralisme même lorsqu'elles ne s'y emploient pas explicitement, il est peu probable qu'un examen portant uniquement sur l'efficacité économique répondra de façon adéquate aux préoccupations en matière de pluralisme. C'est peut-être la raison pour laquelle de nombreux pays ont adopté des réglementations sur la propriété qui complètent l'examen des fusions sous l'angle du droit de la concurrence. Il n'y a aucune raison d'escompter un conflit entre ces réglementations et les examens de fusions menés par les autorités de la concurrence, c'est-à-dire que les entreprises peuvent observer à la fois la réglementation et le droit de la concurrence. Néanmoins, dans certaines situations, les autorités de la concurrence autoriseraient une fusion qui serait bloquée par les règles en matière de propriété, et *vice versa*.

7. Mesures correctrices

L'analyse des mesures correctrices effectivement employées dans les affaires de fusion de médias dépasse le cadre de ce document de travail, mais doit figurer dans les nombreuses soumissions de pays qui devraient être reçues et à terme publiées, en lien avec la discussion de table ronde à laquelle ce document se rattache. Nous nous limitons à quelques remarques générales.

A l'évidence, les marchés des médias, ou du moins de la radiodiffusion, réunissent pour l'essentiel les critères pour être qualifiés de «marchés émergents très innovants»[121], pour reprendre la terminologie utilisée lors d'une discussion de table ronde de l'OCDE. Sur ces marchés, les autorités de la concurrence subissent une pression pour adopter une approche minimaliste des mesures correctrices, aux motifs que les problèmes de concurrence, à supposer qu'ils surviennent, seront de très courte durée. A l'encontre de cette thèse, on peut prétendre que les avantages de premier venu liés aux économies d'échelle

et aux effets de réseau font que le marché aura beaucoup de mal à s'autocorriger si la concurrence devait être restreinte après la fusion.

Les autorités de la concurrence préfèrent en général des mesures structurelles plutôt que comportementales aux fusions anticoncurrentielles. Il existe néanmoins de bonnes raisons d'accorder une attention particulière aux solutions comportementales, en dépit de leurs difficultés et de leurs coûts de contrôle inhérents, sur des marchés caractérisés par une transformation rapide. Cela s'explique essentiellement par le fait que ces mesures correctrices peuvent être modifiées en fonction de l'évolution des conditions du marché, et peuvent également être limitées dans le temps. Ces deux caractéristiques rendent les mesures comportementales beaucoup moins interventionnistes que les dessaisissements obligatoires. Il faut également noter que sur des marchés en mutation rapide, la concurrence *pour* le marché peut être beaucoup plus importante que la concurrence *sur* le marché. Dans cet environnement, il peut s'avérer très difficile de trouver un acheteur des actifs cédés qui sera capable de les employer de façon à apporter une contribution positive et notable à la concurrence.

Il existe un domaine en particulier où les autorités de la concurrence ont montré un penchant pour l'utilisation de mesures comportementales dans le cas de fusions problématiques dans le secteur des médias. Il s'agit des fusions qui génèrent ou renforcent un pouvoir de contrôle. Cela concerne souvent le contrôle de l'accès à un contenu indispensable aux nouveaux venus sur le marché, par exemple le contenu de haut niveau, notamment les droits sur la retransmission d'événements sportifs, pour de nouvelles plates-formes de télévision et de vidéo[122]. Cela se manifeste également en termes d'accès au consommateur final.

Dans la section de ce document traitant des fusions verticales, nous avons mentionné l'analyse par de Streel (2002) d'un nombre considérable d'examens menés par la Commission européenne sur des fusions dans le secteur des communications électroniques. L'une de ses deux principales conclusions est que : «…dans ces cas, l'intervention est souvent plus efficace lorsqu'elle prend la forme d'une réglementation spécifique au secteur plutôt que de recours contre les fusions, ce qui implique une coopération renforcée entre la Commission et les [autorités de réglementation nationales] [123].»

8. Remarques finales

Il est inutile de répéter les points saillants de ce document car ils ont déjà été énumérés dans l'introduction. Toutefois, trois aspects importants méritent d'être soulignés en conclusion.

Le *premier* point est que les fusions de médias imposent parfois des arbitrages difficiles. Les autorités de la concurrence en particulier peuvent être confrontées à une fusion qui a des effets bénéfiques sur un aspect du marché des médias, tout en ayant des effets pernicieux sur un autre. Par exemple, les tarifs publicitaires peuvent baisser, mais les prix pour les consommateurs de contenu augmenter. Les autorités de la concurrence peuvent également avoir à traiter des situations dans lesquelles la diversité du contenu décline mais où sa qualité globale augmente, avec pour conséquence que les consommateurs de contenu aux goûts majoritaires sont avantagés au détriment d'autres consommateurs. Un autre arbitrage peut s'imposer si une fusion augmente la quantité d'annonces publicitaires. Les consommateurs réfractaires à la publicité, notamment lorsqu'elle est difficile à éviter (comme à la télévision et à la radio hertziennes), risquent d'être lésés par une augmentation du volume publicitaire, tandis que d'autres consommateurs friands de publicité se féliciteront de cette évolution. Enfin, un arbitrage délicat peut survenir si une fusion de médias modifie l'incidence de la discrimination par les prix ou de la déclinaison de différentes versions. Là encore, certains consommateurs pourraient s'en réjouir, tandis que d'autres s'estimeront pénalisés.

Le *deuxième* point qui mérite d'être souligné est que, même si les effets liés à la publicité et à la fonction de contrôle peuvent être importants dans les fusions de médias, ce ne sont pas les seuls problèmes à considérer. Les autorités de la concurrence doivent également tenir compte des effets sur le niveau général de qualité et de diversité, même s'ils sont difficiles à mesurer et à évaluer.

Le *troisième* point concerne le pluralisme. La volonté et la capacité des autorités de la concurrence d'examiner les questions de pluralisme lors de l'examen de fusions de médias peuvent varier considérablement d'un pays à l'autre. De même, il peut exister des divergences d'opinion au sein des autorités de la concurrence concernant l'opportunité d'inclure le pluralisme dans le champ d'application des examens de fusion. Toutefois, tous s'accordent sur un certain nombre de points importants :

1. Lorsque des fusions de médias sont bloquées ou conditionnées afin d'empêcher des effets anticoncurrentiels associés à un niveau supérieur de concentration de la propriété et/ou à des barrières à l'entrée plus importantes, les autorités de la concurrence apportent une contribution positive au pluralisme.

2. Comme les questions de pluralisme sont difficiles à mesurer, complexes et de nature intrinsèquement politique, les autorités de la concurrence chargées de renforcer ou de protéger le pluralisme doivent être conseillées le mieux possible sur la manière d'opérer des arbitrages impliquant le pluralisme et l'efficience économique.

3. Que les autorités de la concurrence incluent ou non le pluralisme dans leurs examens des fusions de médias, elles doivent coopérer étroitement avec les organismes de réglementation des médias afin d'économiser les ressources consacrées aux enquêtes et de veiller à ce que les objectifs réglementaires soient atteints avec des effets négatifs minimums sur la concurrence.

NOTES

1. Royaume-Uni (2001, 5)

2. Gomery (2002, 2)

3. On serait en droit d'affirmer que les principales économies d'échelle dans les médias seraient en fait mieux définies comme des frais fixes très importants. Les économies d'échelle se réfèrent à ce qu'il advient des coûts unitaires lorsque *tous* les facteurs de production augmentent de façon proportionnelle, autrement dit lorsqu'ils sont mesurés à l'horizon éloigné où les frais fixes n'existent pas. Il semblerait, cependant, que la plupart des articles sur le secteur des médias font plutôt référence aux économies d'échelle et cette convention sera adoptée dans le présent document.

4. Europe Economics (2002, paragraphe 2.2.20) décrit le phénomène comme suit :

> La déclinaison sous plusieurs versions peut générer un excédent du côté des consommateurs sous réserve que la palette de choix proposée aux consommateurs incite les consommateurs attachant une grande importance à la forte valeur à opter pour des versions aux prix élevés, tandis que les consommateurs attachant peu d'importance à la valeur ont encore la possibilité d'acheter les produits meilleur marché. Le problème de l'arbitrage est contourné car la stratégie consiste à proposer les mêmes options à l'ensemble des consommateurs, mais à facturer de telle manière que les consommateurs manifestant une propension plus ou moins grande à payer pour le même produit de base choisissent différentes options, qu'ils ont eux-mêmes retenues selon la variante du produit. Les problèmes d'information liés à la discrimination par les prix de catégories de consommateurs peuvent être eux aussi atténués si l'on parvient à établir une corrélation entre les préférences des consommateurs et la valeur que représente le produit pour eux et à utiliser cette corrélation pour concevoir une palette adaptée de produits.

5. Europe Economics (2002, paragraphe 2.2.21), citant Shapiro et Varian (1999, 62). Cette liste est intitulée : « Product Dimensions Susceptible to Versioning and their Likely Users/Uses » [Caractéristiques de produits susceptibles d'être déclinés sous différentes versions et leurs utilisateurs/utilisations probables] et les deux colonnes sont intitulées « Caractéristique du produit » et « Utilisateurs probables ».

6. Irlande (2001, 3). Voir aussi Etats-Unis (Department of Justice) (2000, 8).

7. On constatera probablement d'importantes variations selon les médias quant à la perception de la publicité par les consommateurs. Une publicité informative, par exemple sur les prix et les points de vente, est peut-être plus intéressante aux yeux de consommateurs qu'une publicité relevant d'une stratégie de marque. Mais si le principe de la publicité axée sur la marque consiste à présenter une image que les consommateurs espèrent acquérir en utilisant le produit ? Cette publicité peut être dans l'ensemble appréciée par les consommateurs, y compris ceux qui possèdent déjà le produit et veulent être rassurés quant à leur achat. Il se peut aussi que les publicités ne provoquent pas autant d'hostilité de la part de certains consommateurs de contenu si elles sont plus faciles à éviter. La publicité dans les journaux et les magazines se situerait à une extrémité du spectre de la facilité à y échapper et la publicité à la radio se trouverait à l'extrémité opposée. La publicité à la télévision se situerait quelque part au milieu, en raison des boutons permettant de supprimer le son sur les télécommandes et du recours de plus en plus fréquent à des mécanismes d'enregistrement qui peuvent être programmés pour éliminer la publicité.

Gabsszewicz et Sonnac (2002, 1-3) citent plusieurs études théoriques et empiriques qui donnent à penser que les attitudes vis-à-vis de la publicité dans les différents médias peuvent fort bien varier d'un pays à l'autre. On peut en déduire que ce qui provoque un intérêt ou une hostilité vis-à-vis de la publicité n'est pas forcément évident et ne s'explique guère par les facteurs évoqués plus haut.

8. Les lecteurs sont invités à se référer à : Marsden (1999, 31-40) pour une bonne description des problèmes classiques liés aux décodeurs et les conséquences importantes en termes de filtrage de l'accès qu'ils pourraient avoir ; et à MacKie-Mason (2000, 15 & 17) qui remarque que les effets de réseaux liés aux normes non-interactives et exclusives peuvent donner lieu à de puissants effets d'amplification et constituer par ailleurs un gros obstacle à l'entrée sur certains marchés de médias.

9. Commission européenne (1997, 5)

10. OCDE (1999, 43)

11. Commission européenne (1997, 11-12)

12. Voir Humphreys (1999, 9).

13. Voir passage cité.

14. OCDE (1999, 43)

15. Ibid., p. 44

16. Voir par exemple : Royaume-Uni (2000) et (2001)

17. On a observé une véritable vague de fusions aux Etats-Unis lorsque le *Telecommunications Act* de 1996 a assoupli certains restrictions concernant la propriété dans le domaine de la diffusion radiophonique. Voir Klein (1997).

18. Pour une introduction générale à l'économie en cas de dualité des marchés, voir Rochet et Tirole (2001), Armstrong (2002), Evans (2002) et Evans et Oldale (2003). Dans Evans (2002, 34), on peut lire :

> On parle de dualité d'un marché si, à un moment quelconque, (a) on a deux catégories distinctes de clients ; (b) la valeur obtenue par une catégorie de clients augmente parallèlement au nombre de clients de l'autre catégorie ; et (c) un intermédiaire est nécessaire pour internaliser les externalités générées par une catégorie pour l'autre catégorie. Les marchés de nature duale tendent à se composer à terme d'entreprises qui fournissent les deux côtés du marché, qui adoptent des stratégies de facturation et d'investissement particulières afin d'attirer les deux côtés du marché et qui appliquent des stratégies de facturation et de produits particulières pour équilibrer les intérêts des deux côtés. (les références ne sont pas reproduites)
>
> Après avoir précisé que les économistes utilisent le terme « effets de réseau indirects » pour faire référence aux avantages que chaque catégorie de consommateurs obtient lorsque les membres d'une autre catégorie de consommateurs occupent la même plate-forme (voir page 2), Evans et Oldale déclarent :
>
> …les entreprises dans des marchés intéressant de multiples catégories de clients s'ouvrent des possibilités de profit en internalisant les effets de réseau indirects dus à des catégories de clients distinctes dont les demandes sont interdépendantes. (4)

Rochet/Tirole et Evans soulignent que la dualité des marchés pose un grand problème de type « l'œuf et la poule » qui doit être résolu pour que l'entreprise puisse exister et bien fonctionner et qu'il y a plusieurs moyens d'y parvenir même sur ce qui peut constituer un seul marché.

19. Les interactions correspondantes, vues sous l'angle des chaînes de télévision, ont été synthétisées comme suit :

> Les chaînes de télévision classiques se font concurrence pour intéresser les annonceurs en choisissant une programmation susceptible d'attirer des téléspectateurs. Lorsqu'elle définit sa programmation, une chaîne essaie de choisir des émissions qui plairont au plus grand nombre et s'efforce aussi de se différencier des autres chaînes en intéressant des groupes démographiques spécifiques. Les annonceurs, de leur côté, ont recours aux spots publicitaires à la télévision classique pour toucher une plus large audience et une plus forte proportion de la catégorie de téléspectateurs qui ont de très fortes chances d'acheter leurs produits.

Etats-Unis (Department of justice) (2001, paragraphe 18)

20. Voir Rochet et Tirole (2001) et Evans (2002). Cette dernière étude distingue deux types de marchés de nature duale, à savoir les « faiseurs de marchés » et les « faiseurs d'audience » – voir pp. 15-17 de l'étude. Les sociétés des médias font de toute évidence partie de cette deuxième catégorie.

21. Voir Lande (2001, 517-518).

22. Une certaine taille peut être nécessaire pour s'attirer une audience suffisamment importante et prévisible en vue d'intéresser les annonceurs.

L'auteur tient à remercier Allen Grunes du ministère américain de la Justice pour avoir suggéré l'exemple du cinéma.

23. Rochet et Tirole (2001) évoquent le phénomène qui se produit sur des marchés de nature duale lorsqu'un côté finit par payer le prix total indépendamment de la façon dont ce prix est réparti à l'origine. Voir aussi Ludwig (2000).

24. Voir Dukes (2001) pour une analyse de l'importance de la distinction entre publicité informative et publicité liée à une stratégie de marque. Selon Dukes, les annonceurs qui veulent placer de la publicité dans le cadre d'une stratégie de marque peuvent rechercher des médias moins compétitifs sur le plan des clients, car ces supports tendent à proposer plus d'espace à des tarifs inférieurs. L'hypothèse implicite est que dans le cas de tels médias, les consommateurs sont généralement hostiles à la publicité et qu'une diminution de la concurrence pour attirer des consommateurs sera peut-être nécessaire afin de rentabiliser un ratio publicité/contenu supérieur. En revanche, les annonceurs qui souhaitent passer de la publicité plus informative, peuvent préférer des supports plus compétitifs sur le plan publicitaire, car ces médias tendent à proposer moins d'espace à des tarifs plus élevés. On aboutira alors à un recul de la publicité informative générée par l'ensemble des fabricants de produits et, toutes choses égales par ailleurs, à une augmentation des bénéfices pour les annonceurs.

Pour un bref aperçu des effets favorables ou défavorables de la publicité pour les consommateurs, voir Tirole (1988, 289-295)

25. Voir George et Waldfogel (2000, 5-6 et note 9) pour les références aux arguments selon lesquels les consommateurs seraient peut-être plus avantagés par des journaux en situation de monopole. Leur note 9 comporte une référence à Chaudhri (1998), qui a constaté qu'en Australie les prix des journaux sont plus bas dans les villes desservies par un monopole plutôt que par un duopole en Australie. La note 9 de George et Waldfogel signale également trois études empiriques sur le secteur de la presse qui montrent apparemment que « ...la concentration peut dans certains cas avantager les consommateurs. »

26. Les lecteurs intéressés pourront se reporter à :

- George et Waldfogel (2000) - voir supra note 23.

- Dukes (2001) – étudie dans quelle mesure l'intensité de la concurrence sur le marché du côté des consommateurs aura un impact sur les bénéfices des annonceurs. Comme on l'a souligné plus haut dans la note 22, cet impact en termes de bénéfices peut varier, selon que la publicité est orientée vers une stratégie de marque, ou est informative.

- Cunningham et Alexander (2002) – la principale conclusion de leur modèle est que la réaction des diffuseurs pour maximiser leurs bénéfices face à une modification de la concentration dépend en partie de la réaction des consommateurs vis-à-vis d'un changement du ratio publicité/contenu non publicitaire. Ces auteurs considèrent en outre que les effets de bien-être de la publicité provoquent une hausse des prix des produits.

- Gal-Or et Dukes (2002a) – cet article souligne que, si la publicité est informative, et par conséquent favorable à la concurrence par nature, on a une raison de plus de penser qu'une fusion dans les médias qui augmente l'offre de publicité entraînera une réduction des tarifs publicitaires. En fait, la demande (autrement dit la courbe de la demande plutôt que la quantité demandée) diminuera car la publicité aura tendance à réduire les bénéfices pour les annonceurs plutôt qu'à les augmenter.

27. Canada (Chambre du Parlement) (2000, 3)

28. Etats-Unis (Department of Justice) (2001, paragraphe 21)

29. Voir Etats-Unis (Department of Justice et Federal Trade Commission) (1997, 4-8)

30. Voir Europe Economics (2002).

31. Voir Bird & Bird (2002).

32. Europe Economics (2002, paras. 1.4.3 et 1.4.4)

33. Pour une étude plus générale des problèmes de définition du marché propre à ces deux côtés du marché, voir Evans (2002, 49-51).

34. Waldfogel (2002, 3-4)

35. Europe Economics (2001, paragraphe 2.3.15)

36. Il s'agit de la chaîne de valeur identifiée dans OCDE (1999, 34). L'étude de Bird & Bird présente une liste un peu plus longue : contenu brut, création de contenu, compilation de contenu, financement (à savoir la publicité et les subventions publiques), distribution de gros et distribution au détail. Voir Bird & Bird (2002, paragraphe 184).

37. Europe Economics (2001, para. 1.5.6), souligné par nous.

38. Ibid., paragraphe 1.4.5

39. Ibid., paragraphe 3.5.32

40. Bird & Bird (2002, paragraphe 1003)

41. Sa dernière critique, au paragraphe 26, est la suivante :

> …le test de l'ALSNTP porte exclusivement sur une approche quantitative de la substituabilité, autrement dit la réaction des consommateurs à un changement de prix. Ce test tient donc peu, voire aucun compte des critères qualitatifs comme les décisions stratégiques liées à la concurrence et à l'innovation en fonction desquels une entreprise peut décider de s'attaquer à la concurrence non seulement sur les prix mais aussi sur les services. Or ce critère peut être déterminant, en particulier dans le domaine des médias, où l'innovation joue un rôle essentiel. Les entreprises auraient par conséquent tendance à se concurrencer avec de nouveaux outils, qui sont souvent considérés comme plus importants que les prix. La réaction probable des consommateurs à une augmentation théorique des prix peut donc s'avérer peu utile.

42. Ibid., paragraphe 27

43. OCDE (1999, 12-13), les notes de bas de page n'ont pas été prises en compte.

44. Klein (1997, 5). Des éléments empiriques étayent l'idée que la radio constitue un marché distinct au regard du droit de la concurrence dans Ecklund et al. (1999).

45. Bush (2002, 14). Ces conclusions ont fait l'objet de réserves compte tenu de certaines difficultés statistiques mais, après ces réserves, Bush souligne : « Les élasticités estimées ne sont cependant pas en contradiction avec la théorie économique et ne semblent pas dénuées de raison » (14)

46. Etats-Unis (Department of Justice) (2001, paragraphes 11 & 13)

47. Richtel (2003)

48. OCDE (1999, p. 55) (non disponible en français).

49. *Ibid*., p. 58.

50. Voir Pereira (2002, p. 2) et Humphreys et Lang (1998, p. 25).

51. Voir Humphreys et Lang (1998, p. 25) et Abbamonte et Rabassa (2001, p. 219).

52. Ce point de vue est plus ou moins partagé par Abbamonte et Rabassa (2001, pp. 215 et 216).

53. OCDE (1999, p. 60, à l'exception des références).

54. Voir Pereira (2002). M. Pereira s'y exprime en son nom personnel et non pas en tant que membre de la Direction générale de la concurrence de la Commission européenne (Unité médias, éditions musicales).

55. Pereira (2002, pp. 3 et 4) définit deux manière d'y parvenir :

> Tout d'abord, AOL-Time Warner serait en position de mettre au point une technologie de formatage lui appartenant pour tous les téléchargements et toutes les exécutions en continu des morceaux de musique produits par Time Warner et Bertelsmann. Le langage de formatage d'AOL-Time Warner pourrait devenir une norme de l'industrie et les maisons de disques concurrentes souhaitant distribuer leur musique en ligne devraient la formater en conséquence. En contrôlant cette technologie, AOL-Time Warner serait en position de contrôler la musique pouvant être téléchargée et son exécution en continu sur Internet et d'accroître les coûts des concurrents par des droits de licence prohibitifs.
>
> AOL-Time Warner pourrait également formater sa musique (et celle de Bertelsmann) afin qu'elle soit compatible uniquement avec son logiciel Winamp, en veillant en même temps à ce que Winamp puissent être compatible avec les divers formats utilisés par les autres maisons de disque.

> (…) En formatant sa musique et celle de Bertelsmann afin qu'elles soient compatibles uniquement avec son logiciel Winamp, AOL-Time Warner ferait de Winamp le premier logiciel du monde capable de diffuser pratiquement toutes les musiques disponibles sur Internet. En refusant d'attribuer une licence à sa technologie, la nouvelle société imposerait Winamp comme logiciel de musique dominant car aucun autre ne serait capable de décoder le format propre de la musique de Time Warner et de Bertelsmann. Après la fusion, la société contrôlerait le logiciel de musique dominant et pourrait le vendre en l'absence de toute concurrence. AOL-Time Warner pourrait donc finir par détenir une position dominante sur le marché émergent de l'offre de musique en ligne.

Il faut noter que Time Warner et Bertelsmann figuraient tous deux parmi les cinq plus grandes marques de contenu musical et que Time Warner bénéficiait, par le biais de contrats, d'un accès privilégié à la musique de Bertelsmann. Voir également Rabassa (2001, pp. 46 et 47) qui mentionne la question du contrôle d'accès et de Winamp. Rabassa aborde en outre les effets de verrouillage du marché évoqués à la suite de la fusion entre Vivendi et Seagrams et de la coentreprise Vizzavi.

56. Pereira (2002, p. 4).

57. *Ibid*., pp. 4 et 5.

58. Griffiths Mark (2000, pp. 2 et 12).

59. Pereira (2002, p. 5).

60. *Ibid*., p. 6.

61. *Ibid*., pp. 6 et 7.

62. Pereira précise page 7 :

> La Commission pensait que Canal+ affirmerait sa position dominante sur plusieurs marchés européens de télévision payante au niveau national. Avant l'opération, la société jouissait déjà quasiment d'un monopole du point de vue de l'acquisition de l'exclusivité des films produits par les « majors » d'Hollywood (en France, en Espagne et en Italie). L'acquisition d'Universal Studios renforcerait encore davantage la position de Canal+ pour l'achat des films d'Hollywood, non seulement grâce à Universal, mais également aux autres studios avec lesquels Canal+ était liée financièrement. Après l'intégration verticale d'Universal et de Canal+, cette dernière pourrait s'appuyer sur sa position afin de s'assurer le renouvellement des accords d'exclusivité pour la télévision payante avec tous les studios d'Hollywood et même d'en conclure de nouveaux. Le pouvoir de négociation de Canal+ vis-à-vis des studios de cinéma serait donc renforcé, ce qui lui permettrait de verrouiller encore davantage les marchés de la télévision payante sur lesquels elle était déjà implantée.

Abbamonte et Rabassa (2001, p. 216, à l'exception des références) sont allés encore plus loin en soulignant le fait que Canal+ étendrait son pouvoir d'acquisition des films d'Hollywood parce que « (…) Universal avait certains liens structurels et conclu des accords, comme le cofinancement de films, avec d'autres majors ».

63. Pereira (2002, p. 7).

64. *Ibid*., p. 6.

65. *Ibid*., p. 8. Pereira insiste fortement sur le thème de l'accès dans sa conclusion : « L'accès est le maître mot et l'approche consiste à veiller à ce que, quelle que soit l'importance de l'intégration des sociétés, l'accès soit garanti au niveau des moyens de production ou des chemins pouvant verrouiller un marché précis ou contribuer à la création d'une position dominante ». *Ibid*., p. 9.

66. Pour de plus amples information sur la manière dont la Commission a analysé la fusion entre Vivendi et Seagram et celle entre AOL et Time Warner, voir Abbamonte et Rabassa (2001).

Notons au passage qu'aux Etats-Unis, la Commission fédérale chargée du commerce (FTC) et celle chargée des communications (FCC) ont également étudié la fusion d'AOL et de Time Warner. Time Warner contrôlait un important réseau de télévision câblée aux Etats-Unis, mais pas en Europe, et ce sont les questions liées à la télévision câblée qui ont essentiellement attiré l'attention de la FTC. Cette dernière a conclu que la fusion aurait eu des conséquences anti-concurrentielles sur les services d'accès à Internet, la connexion Internet du dernier kilomètre et le marché de la télévision interactive qu'AOL avait récemment lancée. Elle imposa donc des conditions sur l'accès afin de résoudre ces problèmes. Le Winamp et les services de messagerie instantanée d'AOL ne posaient pas de problème majeur aux yeux de la FTC. La messagerie instantanée fut étudiée par la FCC qui restreignit l'offre de ces services par la société née de la fusion jusqu'à ce qu'elle opère en interconnexion avec d'autres services de messagerie instantanée (cette note se fonde sur des informations fournies par Case Associates [2001]).

67. Revue de presse (1994, p. 1).

68. Voir Commission européenne (1994, § 5, 6 et 7).

69. *Ibid.*, § 73.

70. *Ibid*., § 74.

71. *Ibid*., §. 92.

72. *Ibid*., §. 94 à 99.

73. Il parle de cercle vicieux : « Dans un premier temps, les parties regroupent leurs forces pour pénétrer un marché émergent et en verrouillent l'accès en s'appuyant sur leur pouvoir de marché dans le domaine des contenus et des infrastructures traditionnel. Ensuite, elles renforcent leur pouvoir sur le marché traditionnel en s'appuyant sur la position qu'elles se sont octroyées sur le marché émergeant » (p. 11).

74. De Streel (2002, pp. 13, 14 et 17).

75. Kovacic et Reindl (1997, p. 27). Voir le cas de *Nordic Satellite Distribution* dans le Journal officiel L 053, p.20 (1996).

76. *Ibid*., p. 27.

77. *Ibid*. , p. 29.

78. *Loc. cit.*

79. *Ibid.*, pp. 29 et 30, à l'exception des notes de bas de page faisant référence à deux autres cas étudiés par la Commission européenne.

80. Waterman (2000, pp. 531 et 532).

81. *Ibid.*, p. 538.

82. Waterman conclut : « Ainsi, tandis qu'il est clair que Disney et Fox effectuent elles-mêmes la programmation et la diffusion télévisées, la plupart des programmes en *prime time* diffusés par les deux réseaux sont produits par d'autres studios et les branches production des deux sociétés travaillent pour des réseaux concurrents » (p. 537).

83. Waterman (2000, p. 539).

84. Voir Royaume-Uni (Commission chargée de la concurrence) (2000).

85. Il peut s'agir de l'accès aux services interactifs tels que le commerce électronique en tant que service supplémentaire du média. Ceci entre néanmoins dans le domaine des télécommunications plutôt que dans celui des médias.

86. Royaume-Uni (2001, § 1.3).

87. Pour de plus amples informations à ce sujet dans le cadre de l'opposition entre radio-télévision « large » et radio-télévision « étroite », voir Chae et Flores (1998). Le phénomène de publicité ciblée *pourrait* être plus important dans les médias interactifs les plus récents, comme Internet, parce que les consommateurs fournissent des informations sur eux-mêmes -- voir Hargittai (2000, p. 17). Au cours de ces deux dernières années, l'expérience a cependant montré que la publicité ciblée pourrait ne pas être si facile à mettre en œuvre ni à vendre sur Internet.

Plus le contenu d'un média est spécialisé, plus le public est susceptible d'être attiré par un annonceur. Plus la publicité se confine à ce type de média et plus le public est fidèle à ce média, plus il est facile pour un annonceur de prévoir combien de fois le consommateur moyen a reçu son message et donc d'éviter d'acheter des publicités rapportant de moins en moins (voire entraînant des coûts). Ce mécanisme repose sur une corrélation supposée entre la spécialisation du contenu et la fidélité des consommateurs vis-à-vis du média.

88. Pour un exposé global du mécanisme décrit dans ce paragraphe, faisant généralement référence au modèle de différentiation des produits attribué à Hotelling (1929), voir Gabszewicz, Laussel et Sonnac (1999), ainsi que Hargittai (2000, pp. 15 à 19). Outre une étude des écrits sur la question, Hargittai affirme que dans le contexte de médias financés par la publicité et suffisamment concentrés, une fusion peut diminuer la diversité de contenu afin de créer de la concurrence sur le marché pour le consommateur.

De nombreux modèles économiques ayant trait à l'effet décrit par Hotelling dans les médias concernent un petit nombre de sociétés, c'est-à-dire qu'ils se consacrent à la diversité de contenu attendue sur les marchés monopolistiques ou bipolaires ou aux situations dans lesquelles il n'existe que trois ou quatre sociétés. Tambini (2001, p. 30) souligne les failles de ces modèles :

> Hotelling a affirmé que les acteurs économiques raisonnables ont toujours tendance à se regrouper au niveau moyen de l'éventail des goûts des consommateurs, au lieu d'offrir une gamme diversifiée de produits (Hotelling, 1929). Cette affirmation est valable lorsqu'il y a trois ou quatre fournisseurs (chaînes de radio-télévision par exemple), mais elle devient moins convaincante lorsqu'il y a abondance de médias, à savoir dix concurrents au lieu de trois. Il doit exister un point critique au-delà duquel il est plus raisonnable de promouvoir des produits et des services sur une niche que d'intensifier une concurrence déjà féroce au niveau moyen du marché. L'analyse de Hotelling aide donc à comprendre l'évolution des programmations et des émissions parallèles sur BBC1 et sur ITV, mais elle est moins pertinente dans le cas de dizaines, voire de centaines de chaînes, en concurrence du point de vue des tarifs comme de la qualité. Appliqué aux nouveaux médias, l'effet décrit par Hotelling implique que le niveau moyen de chaque niche peut être occupé, mais ne prévoit pas la prolifération de centaines de chaînes généralistes de divertissement identiques, due à l'explosion de la largeur de bande. La théorie permet néanmoins de confirmer l'idée selon laquelle un nombre limité de fournisseurs sur un marché précis peut nuire au pluralisme. Il existe peut-être également des effets moins évidents dans les suppositions des économistes, comme la tendance parmi les individus à accorder de l'importance à certaines « connaissances communes » -- faits et pratiques culturels partagés -- simplement parce qu'elles sont partagées.

89. Voir Berry et Waldfogel (1999, p. 5). Van der Wurff et Cuilenburg (2001, pp. 214 et 215) parviennent à la même conclusion lorsqu'ils étudient le débat visant à déterminer si la concurrence entre les oligopoles a

tendance ou non à produire une similitude excessive de contenu. Voir également Hargittai (2000, pp. 15 à 19) pour une étude des textes sur la question de savoir si l'on peut faire confiance ou non au marché pour produire une quantité optimale de diversité.

90. Van der Wurff et van Cuilenburg (2001) se sont globalement appuyés sur la méthode empirique, bien qu'en mesurant de manière différente la diversité et en se concentrant sur l'effet de la concurrence (définie de manière peu conventionnelle). Leur article étudie l'évolution de la situation parallèlement à l'augmentation du nombre de chaînes de télévision gratuites en Hollande.

91. Pour mieux comprendre ce point, reprenons l'exemple des journaux, mais en simplifiant les suppositions. Supposons notamment que, avant et après la fusion, le marché du contenu soit entièrement monopolisé par une société qui n'est pas intégrée verticalement dans le secteur de la presse et que les journaux achètent tout leur contenu à ce monopole. Supposons ensuite qu'aucun journal ne dispose d'un pouvoir de négociation, que le lectorat soit « très homogène », au sens défini plus haut, et que le nombre total de lecteurs ne soit pas affecté par la fusion. Cette dernière supposition revient à dire que la fusion ne crée pas de pouvoir de marché du côté consommateurs ou que la demande sur ce marché n'est pas du tout élastique.

Selon les suppositions très strictes qui viennent d'être énoncées, avant et après la fusion, la société détenant le monopole du contenu exigera de tous les journaux le même prix *par lecteur* et ce prix ne sera pas modifié par la fusion. Le nombre total de lecteurs et le montant des recettes prévus pour tel ou tel article ne devraient en outre pas être affectés par la fusion. Il en va de même pour les recettes marginales liées aux changements de qualité de contenu. Bref, il n'y a aucune raison évidente, au niveau des recettes marginales pour le moins, de s'attendre à ce que la fusion affecte la qualité du contenu. On ferait la même prévision si, au lieu d'un monopole de contenu non intégré, on supposait que le marché du contenu fonctionnait parfaitement, c'est-à-dire sans incitation pour ni contre l'intégration verticale dans la production de contenu. Dans ce cas, avant et après la fusion, tout article produit par les parties fusionnant serait et continuerait d'être à la disposition des autres journaux à un tarif efficace et stable. Cette communication n'a pas vocation à déterminer comment les déductions tirées de ces deux modèles stéréotypés se modifieraient en assouplissant un ou plusieurs éléments de leurs suppositions.

92. Ce point de vue est contesté. Voir par exemple Humphreys et Lang (1998), ainsi que Hooper (2002).

93. Stucke et Grunes (2001, 251, citant le dictionnaire Webster)

94. Irlande (2001, 1), référence omise. Gomery (2001, 15) exprime une opinion similaire :

> L'industrie des médias devrait faciliter la liberté de parole et la discussion politique. Une démocratie a besoin de la liberté d'expression pour pouvoir fonctionner, et les mass médias devraient être suffisamment ouverts pour promouvoir le débat entre tous les points de vue. Le marché des idées exige exactitude et exhaustivité, et ces qualités doivent entrer dans toute définition de la diversité. Les réglementations publiques doivent chercher à donner la parole au plus grand nombre d'opinions possible, sachant que la variété des moyens d'expression est indispensable à une démocratie vivante. Cet objectif ne doit pas être considéré comme secondaire, mais l'égal de l'efficacité en tant que critère à renforcer.

95. Baker (2002, 894-899) commente l'opinion selon laquelle l'Internet réduit considérablement l'importance des goulets d'étranglement des médias et conclut (898-899) :

> Ainsi, bien que l'Internet transforme la situation de la concurrence sur bien des plans, il n'y a aucune raison de penser qu'il supprime les préoccupations antitrust concernant la concentration dans différents domaines de la *création du contenu*. Le pouvoir de contrôle potentiel sur les grands portails d'accès demeure un sujet de préoccupation politique. La possibilité que l'Internet augmente le nombre d'éditeurs «bénévoles» (non axés sur les bénéfices) constitue l'aspect le plus prometteur. Néanmoins, le danger est qu'il n'entraîne – comme l'espèrent probablement des entreprises telles que AOL Time

> Warner ou Disney – un regain de concentration dans la production de médias de qualité professionnelle et une augmentation du temps que le public consacre à ces médias concentrés.

Tambini (2001, 33), qui aborde la question sous l'angle de la technologie numérique et de la convergence qui en résulte, doute lui aussi que les questions de goulet d'étranglement perdront rapidement de leur importance pour le pluralisme :

> Le rêve numérique accapare les esprits des entreprises de radiodiffusion et des responsables politiques dans le monde. C'est le rêve d'un environnement médiatique où régnerait un pluralisme absolu, dans lequel le consommateur exercerait un contrôle complet et où les problèmes de pluralisme, de diversité et de contrôle des médias auraient disparu.
>
> Le rêve numérique est malheureusement bien éloigné de la réalité… C'est justement l'abondance de nouveaux médias numériques qui génère une demande de nouveaux intermédiaires et regroupeurs de contenu qui occupent la position de gardiens des médias investis de grands pouvoirs. C'est précisément la transition vers le numérique qui stimule le développement de nouvelles entreprises de médias à intégration verticale. Même lorsque le choix de canaux est abondant, comme aux États-Unis, les consommateurs ont toujours tendance à se tourner vers une ou plusieurs sources pour s'informer. L'apparente liberté sur le net peut être trompeuse : les moteurs de recherche, les stratégies commerciales d'établissement de liens, de recherche et de placement font que les nouveaux médias numériques poseront au moins autant de défis en termes de pluralisme que les anciens. De nombreux consommateurs resteront fidèles aux canaux de radiodiffusion traditionnels, et c'est la part globale qui nous préoccupe, plutôt que les moyens de diffusion. Même si le rêve numérique préfigure l'avenir, rien ne permet de savoir quand il deviendra réalité. Dans ce contexte, le défi consiste à élaborer une approche du pluralisme permettant d'assurer sa protection dans la transition vers le numérique (référence omise).

96. Voir Baker (2002, 873-883).

97. Ibid., pages 899-900

98. Ibid., p. 902

99. Ibid., pages 906 et 907. On trouvera des éléments empiriques intéressants qui corroborent ces propositions pages 908-909.

100. Ibid., p. 914

101. Pour deux aperçus de ce débat, voir Iosifides (2002), et Sauvageaux et Giroux (2001).

102. Royaume-Uni (2000, par. 4.2.6). Tambini (2001, 30) parvient à une conclusion similaire :

> En premier lieu, la politique de la concurrence peut tolérer un marché comptant un nombre réduit de prestataires, ou même un seul prestataire, à condition que cet acteur dominant ne se livre pas à des comportements anticoncurrentiels. L'efficience économique peut justifier la fourniture de services par un prestataire efficace et de grande taille. S'il n'y a pas d'obstacle à l'entrée et si le marché en question est réputé contestable…, un régime réglementaire basé sur la politique de la concurrence peut juger cette situation irréprochable. Le marché concerné est un marché qui inclut des entreprises qui, actuellement, ne fabriquent pas le produit et n'offrent pas le service en question, mais qui pourraient décider de le faire… Ce marché «à un seul vainqueur» peut être (ou ne pas être) concurrentiel, mais ne serait pas caractérisé par le pluralisme des sources, du contenu ou de l'exposition.

Voir également Atkinson (1999, 2) qui stipule que : «…la politique de la concurrence pourrait tolérer ce que la théorie démocratique interdirait : l'existence d'un prestataire de grande taille mais efficient sur un marché contestable dépourvu de barrière à l'entrée.»

103. Royaume-Uni (2001, par. 1.10)

104. Voir Tambini (2001, 32)

105. Stucke et Grunes travaillent pour le département américain de la Justice (division Antitrust), mais les opinions exprimées dans leur article sont strictement personnelles.

106. Ils relèvent néanmoins au passage (point 257) que la division Antitrust «…a contesté [une fusion récente de journaux] en partie à cause de la perte de concurrence rédactionnelle.»

107. Ibid., p. 273

108. Ibid., p. 283, références omises.

109. Voir Ibid., 297-299

110. Lande (2001, 517-518) partage ce point de vue :

> Le domaine le plus important dans lequel un niveau optimum de concurrence sur les prix peut être insuffisant pour garantir un niveau optimum de diversité et d'innovation est probablement celui de la programmation éditoriale indépendante d'un média de communication. Si un média de communication en rachète un autre de même nature, cette acquisition peut ne pas générer une concentration du marché suffisante pour menacer la concurrence sur les prix. Comme le marché est concurrentiel, il peut rapidement offrir la gamme de produits que les consommateurs attendent, en termes de types et de formats. Mais le marché subirait inévitablement une perte de diversité rédactionnelle. Cette perte ne peut pas être compensée par le mécanisme normal de la concurrence hors-prix entre les entreprises survivantes ; les nouveaux produits porteraient nécessairement le sceau éditorial de leur propriétaire commun. Ce scénario suggère que les fusions de médias doivent faire l'objet d'un examen attentif en vue de déceler toute perte de concurrence hors-prix, parallèlement à la diversité des programmes. Si la perte est suffisamment grave, ces fusions doivent être contestées en vertu de la *loi Clayton*, même si rien ne montre que la concurrence sur les prix en pâtit (références omises).

111. Stucke et Grunes soulignent que ces efficiences sont fondées sur les coûts fixes élevés typiques aux marchés des médias - voir ibid., p. 299.

112. Les restrictions à la propriété, y compris les restrictions à la propriété croisée, existent dans de nombreux pays. Voir Royaume-Uni (2001,13). Tambini (2001, 21) souligne que ces restrictions favorisent le pluralisme, mais ne le garantissent pas. Feintuck (1997, 6) semble en convenir : «On peut considérer à juste titre que la concentration sur la concurrence par le contrôle de la propriété est un substitut à la réglementation du pluralisme des sources d'information.»

113. Le document de travail rédigé à l'occasion d'une discussion lors d'un récent Forum Mondial sur la Concurrence de l'OCDE consacrée aux objectifs du droit et de la politique de la concurrence conclut, à partir des soumissions de plusieurs pays, que : «L'abandon progressif de l'utilisation des lois sur la concurrence des pays de l'OCDE pour promouvoir des objectifs d'intérêt général suggère l'émergence possible d'un consensus, selon lequel l'utilisation du droit et de la politique de la concurrence ne serait pas un bon moyen de promouvoir ces objectifs, du moins après qu'un pays ait atteint un certain niveau de développement» OCDE (2003b, par. 4). Une soumission pour la même réunion reçue de l'Irlande explique bien deux des principales raisons de ce consensus :

> Les décideurs politiques peuvent être tentés d'utiliser la politique de la concurrence pour favoriser d'autres objectifs politiques (plus vastes), notamment la politique industrielle, le développement régional ou «l'intérêt général», par exemple en instituant un critère de l'intérêt général en matière de fusions. Deux motifs rendent préférable de ne pas utiliser la politique de la concurrence comme un instrument politique plus vaste. En premier lieu, des objectifs politiques énoncés en termes larges

> peuvent être ambigus et sont, en tant que tels, sujets à «confiscation» ou «détournement» par les intérêts privés politiquement les plus forts, généralement ceux de producteurs ou de travailleurs. Ainsi, des objectifs d'intérêt général *de jure* peuvent servir *de facto* des intérêts privés. En second lieu, des mécanismes politiques autres que ceux de la politique de la concurrence sont généralement supérieurs pour réaliser des objectifs politiques autres que ceux de la politique de la concurrence. Plus précisément, restreindre la concurrence dans un effort pour réaliser un objectif politique plus large produira inévitablement des effets secondaires anticoncurrentiels, par exemple en conférant le bénéfice d'un monopole protégé à une ou plusieurs entreprises. Il n'existe aucun motif de supposer que l'État aura la capacité, quand bien même en aurait-il la volonté, de contrôler l'étendue et la dissémination de ces effets secondaires. En résumé, restreindre la concurrence peut être à la fois inefficace et socialement dommageable. Irlande (2003, par. 1.2)

Une opinion similaire ressort des réponses au questionnaire fournies par le Mexique, le Maroc, l'Espagne et l'Afrique du Sud au même Forum mondial.

114. Dans sa pratique actuelle, l'examen par le Canada des fusions de médias se limite à des facteurs économiques, notamment aux effets sur les tarifs publicitaires. Voir : Canada (chambre du Parlement, Comité permanent de l'industrie) (2000, 3) et Canada (Bureau de la concurrence) (2002c, 3).

115. Canada (chambre du Parlement, Comité permanent de l'industrie) (2000, 6). Tambini (2001, 26) franchit une étape supplémentaire : «les notions de pluralisme, de diversité et de marché des idées sont au mieux vagues et malléables, au pire adaptées à l'objectif poursuivi par celui qui les invoque.»

116. Loc. Cit.

117. Pour un bon aperçu du fonctionnement, voir États-Unis (département de la Justice) (2000).

118. Voir Royaume-Uni (2001).

119. OCDE (2002, par. 22 et 23)

120. Voir Canada (Bureau de la concurrence) (1999).

121. Le document de réflexion pour la table ronde met en évidence les caractéristiques suivantes sur ces marchés :

1. haute intensité de R&D et forte dépendance vis-à-vis des droits de propriété intellectuelle (DPI) et, par conséquent, du capital humain plutôt que physique ;
2. évolution technologique rapide et produits à cycle de vie court ;
3. économies d'échelle ;
4. effets de réseau importants ;
5. problèmes significatifs de compatibilité et de norme ;
6. degré élevé de complexité technique.

OCDE (2003a, 20). Voir également Evans et Schmalensee (2001).

122. Voir Ungerer (2002, 9-12).

123. De Streel (2002, 17)

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QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

(Suggested Issues and Questions for Consideration in Country Submissions)

Media are here defined to refer to means of communication from one to many such as newspapers, magazines, radio, television, and the World Wide Web.

In what follows, a distinction will be made between:

a) advertisers and consumers, i.e. the latter refer only to those who consume media content; and

b) "plurality" and "diversity" in the media - plurality is taken to refer to the number of media providers in a market and is necessarily reduced by a merger among competitors in a properly defined market. Diversity refers to variety in content and is not necessarily reduced by a merger among competitors.

I. Market Definition

1. Are free-to-air terrestrial television, free newspapers, and free Internet access services in the same markets as their paid-for counterparts? What factors would you consider in making those determinations?

2. How has the incidence of price discrimination, including by way of "versioning", affected market definitions in your jurisdiction's review of media mergers?[1]

3. How, if at all, have rapid rates of innovation and increased supply side substitution reduced the utility of market definition and market share calculations in media merger assessment? If there has been such a reduction, has your competition authority responded with a greater willingness to skip over or de-emphasise market definition in favour of more directly focusing on how a merger might increase either single or collective market power?

II. Other Challenging Issues

1. Is there evidence in any particular media in your jurisdiction that a company gaining audience share through a merger will benefit from a virtuous circle, i.e. a larger audience translates into greater advertising revenues, and these in turn permit improvements in content quality thus attracting a still larger audience etc., while imposing a downward spiral on competitors? Are such contrasting spirals more often found in some media as opposed to others?

2. What in general are the principal pro- and anti-competitive effects your competition authority has focused on in (a) horizontal, (b) vertical and (c) conglomerate media mergers? Please provide actual case illustrations of each of these three types of mergers and explain how the pro- and anti-

competitive effects were analysed. Delegates might be particularly interested in learning more about cases featuring substantial reference to issues involving:

a) intellectual property rights, including those associated with standards;

b) risks that a merger would significantly raise barriers to entry (e.g. gatekeeper and foreclosure issues); and

c) expected changes in diversity of content post-merger (including through reactions of firms not involved in the merger).

In mergers expected to produce changes in diversity, how were the welfare effects of such changes assessed and considered along with other effects of the merger?

3. If your jurisdiction has had media mergers in which price discrimination (including versioning) was an issue, have separate markets been defined and mergers blocked or conditioned to ensure there will be no price rises in any of the separate markets, or has there instead been a willingness to trade-off benefits received by one group of consumers against welfare losses experienced by another?

4. Some researchers have discussed the possibility that reduced competition for audiences would allow media owners to increase the ratio of advertising to content.[2] The result of that could be an increased supply of advertising time leading to a drop in advertising rates thus benefiting advertisers. At the same time, however, consumers might be worse off, assuming they dislike advertising, if nothing is done to improve the diversity or quality of content they receive. Has this issue arisen in any media mergers in your jurisdiction, and if so, how was it handled?

5. Are the potential effects of media mergers on diversity and quality of content normally treated as within or outside the purview of merger review by your competition authority? Does this depend on the existence and effectiveness of content regulation?

6. If there is subsidised public broadcasting in your jurisdiction, how has this affected your assessment of mergers among un-subsidised media? For example, has it increased the weight assigned to claimed efficiencies or decreased concerns about diversity (including the promotion of national culture), plurality or universal services?

7. How has your competition authority dealt with claims that mergers are necessary in order to build national champions or standard bearers for the nation's culture, or simply to gain a larger share of worldwide rents for national interests?

III. Plurality Concerns

Please describe which of the following approaches to preserving plurality in various media markets are employed in your jurisdiction, and assess how well that is working out. In addition, delegates might be particularly interested in learning about changes made in the way plurality concerns are factored into merger review and what motivated those changes.

a) no special approach – blocking anti-competitive mergers is believed to preserve an adequate number of media providers in the affected markets;

b) lower thresholds are used to trigger full-scale merger review or to found a presumption that a merger is anti-competitive;

c) instead of market shares based on shares of revenues as a means of deciding whether to launch a full-scale review or to found a presumption of anti-competitive effect, the competition authority calculates the share of the audience served by each media provider/owner, with or without attaching different weights to the various types of media;

d) the competition authority applies a public interest test or an authorisation procedure in assessing media mergers and this includes considering effects on plurality;

e) steps are taken to facilitate joint ventures that will allow media to achieve a portion of the economies of scale that a merger would realise, but without reducing plurality (e.g. newspapers could be allowed to jointly operate printing presses);

f) plurality concerns are within the domain of a media regulator (perhaps through the application of ownership, cross-ownership, or share of audience limitations) which itself can block a media merger - if this option is used, how do the competition authority and regulator co-ordinate their work, and what are the advantages/ disadvantages of ownership versus share of audience restrictions?

g) some variant of ministerial over-ride is provided, i.e. a designated elected official is permitted to approve (block) a media merger blocked (permitted) by the competition authority – if this option is used, please describe the criteria provided to guide the application of the over-ride (what weight is given to competition concerns?);

h) some other system is used (please describe and assess).

NOTES

1. In the media context, "versioning" takes the form of different packaging, time of release or accessibility associated with essentially the same content. Two examples of versioning are glossy versus newsprint magazines and instant news, stock market or foreign exchange quotations versus the same information released at daily intervals.

2. See for examples: Gabszewicz, Laussel and Sonnac (1999), Gabszewicz, Laussel and Sonnac (2000), Hargittai (2000); Dukes (2001); Gal-Or and Dukes (2002); and Cunningham and Alexander (2002).

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QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT

(Questions proposées et questions à examiner dans les contributions nationales)

Les médias sont ici définis comme des moyens de communication de masse, tels que les journaux, les magazines, la radio, la télévision et le World Wide Web.

On établira ci-après une distinction entre :

a) les publicitaires et les consommateurs, ces derniers se définissant comme ceux qui consomment le contenu des médias, et

b) la pluralité et la diversité dans les médias – la pluralité se réfère au nombre de fournisseurs de médias sur un marché qui se trouve nécessairement réduit du fait de fusions entre concurrents sur un marché bien défini. La diversité se réfère à la variété du contenu et n'est pas nécessairement réduite du fait d'une fusion entre concurrents.

I. Définition du marché

1. Les services gratuits de télévision numérique terrestre, de presse ou d'accès à l'Internet sont-ils situés sur les mêmes marchés que leurs contreparties payantes ? Quels facteurs prendriez-vous en compte pour le déterminer ?

2. Quel a été l'impact de la discrimination par les prix, notamment par le biais du « versionnage », sur les définitions de marché lors des examens des fusions effectués dans votre juridiction ?[1]

3. Les rythmes rapides de l'innovation et l'augmentation des effets de substitution au niveau de l'offre ont-ils réduit l'utilité de la définition du marché et des calculs de parts de marché lors des examens de fusions de médias ? Si tel est le cas, votre autorité de la concurrence a-t-elle décidé d'accorder moins d'importance à la définition du marché et de s'intéresser plus particulièrement aux moyens par lesquels la fusion peut accroître un pouvoir de marché unique ou collectif ?

II. Autres enjeux

1. Y a-t-il des raisons de conclure, concernant un média donné dans votre juridiction, qu'une entreprise qui gagne des parts d'audience du fait d'une fusion bénéficie d'un cercle vertueux, c'est-à-dire qu'une grande audience entraîne des recettes de publicité plus importantes, qui permettent à leur tour d'améliorer la qualité du contenu, ce qui attire une audience encore plus large, etc. alors même que ce cercle vertueux se traduit par un engrenage de revers pour ses concurrents ? Ces effets d'escalade inverses sont-ils constatés plus souvent dans certains médias que dans d'autres ?

2. Quels sont en général les principaux effets pro- et anti-concurrentiels sur lesquels votre autorité de la concurrence a axé son attention à propos de fusions de médias (a) horizontales,

(b) verticales et (c) entre conglomérats ? Veuillez donner des exemples concrets de chacun de ces trois types de fusions et expliquer comment les effets pro et anti-concurrentiels ont été analysés.

Les délégués seront sûrement intéressés d'en savoir plus sur des cas de fusions comportant des références importantes à des questions telles que :

a) les droits de propriété intellectuelle, notamment ceux associés à des normes ;

b) les risques qu'une fusion n'augmente sensiblement les obstacles à l'entrée (problèmes de filtrage et d'éviction) ; et

c) les changements attendus de la diversité du contenu après la fusion (notamment du fait des réactions d'entreprises non impliquées dans la fusion).

Dans les fusions susceptibles d'entraîner des changements de diversité, quels sont les effets de ces changements sur le bien-être, tels qu'ils sont évalués et examinés par rapports aux autres effets de la fusion ?

3. Si votre juridiction a l'expérience de fusions de médias au cours desquelles la discrimination par les prix (notamment par le biais du versionnage) a posé problème, a-t-elle défini des marchés distincts et bloqué ou conditionné des fusions pour faire en sorte qu'il n'y ait pas de hausse des prix dans l'un ou l'autre de ces marchés, ou y a-t-il eu au contraire une volonté de pondérer les avantages reçus par un groupe de consommateurs et les pertes de bien-être expérimentées par d'autres ?

4. D'après certains chercheurs, une baisse de concurrence pour les audiences permettrait aux propriétaires de médias d'accroître le rapport publicité/contenu[2]. En conséquence, il pourrait y avoir une augmentation de l'offre de publicité, qui entraînerait une baisse des prix et avantagerait ainsi les publicitaires. Toutefois, les consommateurs pourraient s'en trouver désavantagés s'ils n'aiment pas les publicités, et si rien n'est fait pour améliorer la diversité de la qualité du contenu qu'ils reçoivent. Ce problème s'est-il posé lors de fusions de médias dans votre juridiction et si tel est le cas, comment a-t-il été traité ?

5. Les effets potentiels des fusions de médias sur la diversité et la qualité du contenu sont-ils généralement considérés comme relevant de la compétence de vos autorités de la concurrence dans le cadre des examens de fusions ? La réponse à cette question est-elle fonction de l'existence et de l'efficacité de la réglementation sur le contenu ?

6. S'il existe un programme public de radiodiffusion subventionné dans votre juridiction, quelle est son incidence sur votre évaluation des fusions de médias ne bénéficiant pas de subventions ? Cette incidence a –t-elle été d'augmenter le poids relatif des efficiences alléguées, ou de diminuer l'importance des considérations relatives à la diversité (notamment la promotion de la culture nationale), à la pluralité ou aux services universels?

7. Comment votre autorité de la concurrence réagit-elle à l'argument selon lequel les fusions sont nécessaires pour construire des champions nationaux, des piliers de la culture de la nation, ou simplement pour obtenir une part plus importante des rentes mondiales en faveur des intérêts nationaux ?

III. Préoccupations relatives à la pluralité

Parmi les différentes approches visant à préserver la pluralité sur différents marchés de médias, veuillez indiquer quelles sont celles qui sont employées dans votre juridiction, et évaluer leur efficacité. En outre, les délégués seraient peut-être particulièrement intéressés d'en savoir plus sur les changements opérés dans la manière dont les préoccupations relatives à la pluralité sont prises en compte dans les examens des fusions et sur ce qui a motivé ces changements.

a) aucune approche spéciale, le blocage des fusions anticoncurrentielles étant considéré comme le moyen de préserver un nombre adapté de distributeurs de médias sur les marchés concernés ;

b) les seuils sont abaissés pour déclencher des examens complets de fusions ou pour justifier l'allégation de fusion anti-concurrentielle ;

c) Au lieu d'utiliser les parts de marché fondées sur des parts de revenu pour décider s'il y a lieu de déclencher un examen complet ou de justifier une allégation d'effet anti-concurrentiel, l'autorité de la concurrence calcule la part d'audience obtenue par chaque distributeur/ propriétaire de média en attachant ou non différents valeurs relatives aux différents types de médias ;

d) l'autorité de la concurrence utilise un test d'intérêt public ou une procédure d'autorisation pour évaluer les fusions de médias, ce qui implique un examen des effets sur la pluralité ;

e) des mesures sont prises pour faciliter les co-entreprises qui permettront aux médias d'obtenir une partie des économies d'échelle qu'une fusion pourrait produite, mais sans réduire la pluralité (des journaux par exemple pourraient être autorisés à gérer conjointement des presses à imprimer) ;

f) les préoccupations relatives à la pluralité relèvent de la compétence d'un responsable de la réglementation des médias (application de limites par exemple aux participations, aux participations croisées ou à la part d'audience), ce qui peut en soi bloquer une fusion de médias. Si cette solution est choisie, comment l'autorité de la concurrence et le responsable de la réglementation coordonnent-ils leurs travaux, et quels sont les avantages et les inconvénients de restrictions applicables aux participations ou aux parts d'audience ?

g) un certain degré d'intervention politique est possible, c'est-à-dire qu'un élu désigné est autorisé à approuver (bloquer) une fusion de médias bloquée (approuvée) par l'autorité de la concurrence. Si cette option est utilisée, veuillez décrire les critères retenus pour décider de cette intervention (quel poids donne-t-on aux préoccupations relatives à la concurrence ?) ;

h) un autre système est utilisé (veuillez le décrire et l'évaluer).

NOTES

1. Dans le contexte des médias, le versionnage veut dire que le même produit peut faire l'objet de présentations, moments de diffusion ou facilités d'accès différents alors qu'il s'agit essentiellement du même contenu. Deux exemples de versionnage : la présentation sur magazines ou sur journaux, et les nouvelles en temps réel sur la bourse ou les cotations de change , ou les mêmes informations diffusées quotidiennement.

2. Voir par exemple : Gabszewicz, Laussel et Sonnac (1999), Gabszewicz, Laussel et Sonnac (2000), Hargittai (2000), Dukes (2001), Gal-Or et Dukes (2002) et Cunningham et Alexander (2002).

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AUSTRALIA

1. Executive summary

1.1 Overview

The Australian Competition and Consumer Commission's (the Commission's) consideration of mergers focuses on the likely effect on competition in the relevant markets. Public benefit implications do not generally form part of the Commission's or a court's consideration of a merger. Issues related to diversity and quality of content are considered to the extent that they impact on the nature of rivalry between firms and the impact of this upon competition.

1.2 Australian mergers and media specific rules

The merger provisions of the *Trade Practices Act 1974* (TPA) apply to media mergers. The Commission is required to address certain statutory merger factors when assessing any merger or acquisitions under s.50 of the TPA. In addition to s.50 of the TPA, other factors may be considered, while the weighting given to factors is guided by the Commission's Mergers Guidelines.

A number of provisions of the *Broadcasting Services Act 1992* (BSA) require the Australian Broadcasting Authority (ABA) and the Commission to consult and interact in relation to media mergers or acquisitions. The ABA is also required to consult with the Commission in relation to the allocation of subscription television broadcasting licences.

In addition to the merger provisions of the TPA, the BSA prescribes a number of restrictions in relation to ownership of media. The main restrictions include cross-media ownership restrictions, which apply to commercial free-to-air (FTA) television licences, commercial radio licences and major newspapers, and foreign ownership restrictions for FTA and pay-TV licences. These restrictions are monitored and enforced by the ABA.

The BSA also sets out other limits on ownership of broadcasting media assets including limits on the aggregate reach of television stations under common control and the number of licences which can be controlled by any one person in the same licence area.

Commercial radio broadcasters are also limited to controlling no more than two commercial radio broadcasting licences in the same licence (and associated directorship restrictions).

In addition there are also controls on foreign investment in the media under the *Foreign Acquisitions and Takeovers Act 1975*.

1.3 Recent Australian media merger experience

This paper uses a number of recent examples to illustrate the Australian experience with media mergers. The most notable of these is the Foxtel – Optus content sharing arrangements considered by the

Commission in 2002. Although the proposed arrangements were not a merger, it raised a wide range of issues relevant to a merger.

In March 2002, Australia's first and third largest pay TV operators, Foxtel and Optus, and its largest telecommunications carriers, Telstra, (which has a 50% stake in Foxtel), announced proposed content sharing arrangements that would allow: Optus to resell Foxtel pay-TV services (including the sport content of Fox Sports), increasing the attractiveness of its pay-TV offering; Foxtel to take over the bulk of programming content from Optus, including the associated Hollywood movie contract liabilities; and Foxtel to buy 12 transponders on Optus' new satellite, enabling it to distribute both its own satellite service and that of Austar's (Australia's second largest Pay TV company).

In June 2002 the Commission concluded that the proposed arrangements were likely to breach the TPA by substantially lessening competition in a number of markets. Its principle areas of concern were the acquisition of content (ie. Optus would cease to bid for programs, increasing Foxtel's negotiating position with program suppliers eg. Australian sports bodies) and the likely dominance of the Foxtel distribution network. The Commission was also concerned by the possible effect on consumer choice and the provision of channels to third parties wishing to supply pay-TV to clients, particularly those third parties who might wish to bundle Foxtel's pay-TV service with their own telephony products to compete with Telstra's bundled offerings.

The parties then offered a series of undertakings to secure the Commission's agreement to the proposal. Key components of the package included: access to third parties who own, operate or control cable, satellite or MDS networks to Foxtel programming; Foxtel and Optus to acquire particular pay-TV channels on a non-exclusive basis only; and a commitment by Foxtel to commence supplying digital set top unit services, and by Telstra to commence supplying a digital subscription television carriage service.

On 13 November 2002 the announced that it would not oppose the planned pay-TV arrangements, having been satisfied that the court-enforceable undertakings proposed by Foxtel, Optus, Telstra and Austar addressed concerns about the potential anti-competitive effects of the planned pay-TV arrangements between Foxtel and Optus.

1.4 Proposed changes to current regulation

A number of changes to media ownership regulation have been introduced into Parliament under the Broadcasting Services Amendment (Media Ownership) Bill 2002. The Bill is aimed at abolishing or relaxing the foreign ownership and cross-media ownership rules contained in the BSA, as well as encouraging greater competition and use of new technologies while providing strict safeguards to ensure diversity of opinion and minimum levels of local news and information.

2. Market definition issues

2.1 Separate markets for free and pay media?

The matter of whether the forms of media which are supplied free to consumers operate in the same market as those of their paid-for counterparts has really only fallen for consideration for the Australia Competition and Consumer Commission ("the Commission") in relation to three matters – one concerning pay television and two concerning community newspaper mergers.

2.1.1 Subscription television

In July 1997 the Commission commenced legal action in relation to a proposed merger between two of Australia's major pay TV operators, Foxtel and Australis. The merger proposal was subsequently terminated. The Commission had determined in this case that the relevant markets affected were:

- pay TV services at both the retail and wholesale levels;
- telephony services, including local call, long distance and network services; and
- broadband on-line interactive services transmission.

Last year the Commission considered a content supply arrangement between two of Australia's major pay television companies, Foxtel and Optus, ("the Foxtel-Optus matter"). In the end the matter did not fall for consideration under the mergers provisions but, nevertheless, the Commission needed to consider the nature of the relevant markets and the competitive impact of the arrangements on those markets.

The Commission ultimately determined that free-to-air television and subscription television were in separate markets. The Commission noted that there were overlaps between pay TV and free-to-air TV (FTA). Some substitutability was seen as existing between the two as: a consumer who has access to pay TV can switch between channels on pay and FTA TV; to some extent demand for pay TV is influenced by programmes shown on FTA TV; and some competition exists between pay TV and FTA operators in bidding for programming rights.

Nevertheless, the Commission was of the view that they were separate markets as there were a number of relevant factors distinguishing FTA from pay TV and limiting their competitiveness with each other. This was based on several reasons, including differences in funding models and the disparity in choice and range of programming available and legal restrictions limiting the level of competition between FTA and pay TV. In particular, in Australia there is anti-siphoning legislation which prevents pay TV operators from acquiring exclusive rights to certain highly attractive sports programs, which are key drivers in the uptake of pay TV services.[1] In addition, multi-channelling restrictions prevent FTA broadcasters from using their digital spectrum for multi-channelling (the provision of multiple separate programs) or subscription television services. In addition, there was evidence that broadcast right suppliers and channel suppliers segment markets and sell programs separately to pay TV and FTA channels. Further, the fact that pay TV operators retransmit free to air signals suggests that Pay TV sees free-to-air as a complementary rather than directly competing product.

Whilst there is some overlap in programming inputs for FTA and pay TV, pay TV was considered to offer a more diverse and specialised range of product, and it offered greater flexibility in viewing for subscribers. The range of pay TV programming choices and the ability to provide specialist interest channels cannot be duplicated by FTA and thus the ability of free to air to constrain pay TV operators was considered to be limited.

In terms of supply, FTA broadcasters are supplying programs so as to maximise advertising revenue. Pay TV operators on the other hand are supplying programs to maximise subscription revenue. The different revenue sources between pay TV and free-to-air lead to different supply behaviour. Free-to-air operators can only program a single channel or network. To maximise revenue they must try to maximise audience share. Thus, FTA programming is ratings driven and directed towards the largest possible market. Pay TV on the other hand is able to respond to minority interests where those minority interests are prepared to pay directly for particular types of programming. Consequently, as pay TV

develops more channels and offers a more diverse range of programming, substitution possibilities between pay TV and FTA will become even more limited.

Overall, therefore, FTA was not seen as providing a sufficient competitive constraint on the ability of a hypothetical pay TV monopolist to increase prices. Hence, they were considered to belong to separate markets.

2.1.2 Newspapers

Case 1

In a newspaper merger considered by the Commission in 1997 the market for the provision of advertising services in free suburban newspapers was distinguished from their paid-for counterparts on the basis of a number of factors, including:

- the papers are free of charge to consumers;
- they are solely funded through advertising;
- the different nature of the advertising in the two – particularly given that the bulk of the advertising in the free newspaper related to local businesses or events; and
- advertising was more costly in the more widely distributed paid-for newspapers and hence not cost-effective for local advertisers.

Case 2

However, in a more recent, but somewhat different, case the Commission's findings were different. That case concerned a merger between a small independent publisher of a community weekly classified advertisements publication and a publicly listed company with broad interests in newspapers and commercial printing. There was strong empirical evidence here of the major newspaper responding to the free advertising offered by the target by introducing some free advertising and the volume of advertisements appearing in the major newspaper fell substantially following the launch of the weekly classified advertisements publication. Consequently, the two were considered to operate in the same market. The relevant market in that particular case was considered to the market for classifieds and local display style print advertising in the state of Western Australia. Within this context the term:

- local display was used to describe the geographic specific nature of the content of advertisements and was therefore used to exclude national based advertising; and
- print advertising included advertisements appearing in newspapers and magazines but excluded directories such as the Yellow Pages.

The target was a weekly publication containing classifieds and local display style advertising for items such as real estate, motor and marine, and general goods for sale, with no news content. It was distributed throughout metropolitan Perth and regional areas in Western Australia and offered individuals the opportunity of a number of free ads within the publication while businesses were required to pay according to specified advertising rates. Approximately 60% of revenue was derived from the $2.00 cover price, with the remaining 40% being from paid business advertising. The acquirer owned a daily regional paid-for newspaper which contained news and advertising. The acquirer contended that while there was some peripheral overlap arising from the target's paid advertising business, the advertising services

provided by the two should be distinguished in terms of the value of goods being advertised, target audiences and advertising rates. There was also considerable disparity in the rates charged for advertising between the publications (ie the acquirer charged $5.49 per line of advertising compared to the $2.75 per line of the target). Nevertheless, the empirical evidence of the competitive response to the entry of the target into the market indicated there was a sufficiently close field of rivalry and substitutability between the two to classify them within the same market, even despite the differences noted above.

2.1.3 Internet

The incidence of free internet access services in Australia is relatively low. The issue of whether or not free and paid-for internet service providers fall into the same market has not really been the subject of Commission or judicial consideration. In the most recent internet services merger which fell for Commission consideration in February 2000, the Commission considered the relevant market to be the national retail market for Internet Access. No distinction was made between free and paid-for internet service providers.

2.2 Incidences of price discrimination, including "versioning"

Price discrimination has not featured as a major consideration in relation to market definition for any recent Australian media mergers. The following, nevertheless, provides some commentary on some relevant issues.

2.2.1 Pay television

2.2.1.1 Different technologies used to deliver the services

In Australia the pay television operators do not tend to price discriminate amongst customers, other than perhaps certain cost differences being reflected in the differing pricing where different technology platforms are used for delivery of the service (eg MDS, satellite or cable). In addition there may be some differences in the pricing for installation depending upon the difficulty or location of the installation. Whilst there may be some limited, discernible difference between the standard of service or number of channels available between the different technologies, given the limited extent of competition in pay TV in Australia very few customers actually have a choice of the type of delivery medium, having instead to accept whatever technology is on offer in that particular area from the particular service provider(s) who offer services in that area. The vast majority of Australians can receive at least one of the three major pay TV services, but only around a third have a choice of provider.[2] The Commission considers that satellite and cable operate in the same product market. This is largely on the basis that while there may be some differences in the service and economics of providing pay TV services via different technologies, consumers generally viewed the services as similar and to a large degree substitutable.

2.2.1.2 Analogue vs digital television

The Commission has not distinguished between analogue and digital pay TV services to date as digital services have not been well-developed or well-established in Australia. The first real commercial digital pay TV service is not expected to be available in Australia until late 2004 at the earliest. However, in a recent merger relating to the sale of some broadcast and network aggregation equipment between two pay TV operators the Commission did note that the advent of digital television could possibly see customers being given the option for a period of time to select either analogue or digital services. Digital services are expected to be more expensive than their analogue counterparts, primarily reflecting the additional costs involved with the digital set top unit and the different and enhanced /advanced features available with digital programming.

It could well transpire that customers are then segmented between those willing to pay a higher price for the more sophisticated, better quality digital services and those merely wishing a more basic analogue service. However, the Commission considers that whilst there may be a transitional period during which analogue and digital services will both be available in Australia, when digital services become fully developed and established, it is likely they will supersede analogue services. Customers are likely to demand the more advanced and superior quality services which are able to be provided by digital transmission. The Commission considers that analogue and digital pay television should not be distinguished as operating in separate product markets. Rather, digital pay TV is the next stage of development of analogue pay TV. Further, the Commission has been advised that it is becoming increasingly difficult for pay TV operators to source analogue set top units and consequently it is likely that analogue television will become obsolete within a few years after the introduction of the digital technology.

2.2.1.3 Residential vs licensed premises

The issue of whether or not the supply of pay TV services to residential premises constituted a separate market from licensed premises did arise for consideration in the Foxtel-Optus matter. Here it was noted that pay TV operators tended to offer a different package of programming to licensed premises than those offered to residential customers. In particular some channels were not available to licensed premises and the customer had a bit more flexibility in relation to which programming it was required to acquire. Licensed premises appeared to only wish to acquire a limited range of the more popular entertainment shows such as sports and movies. In addition, there was some evidence that, in some cases at least, completely different pricing structures applied (eg residential customers paid a flat fee for access to a set number/package of channels whilst licensed premises might pay on the basis of percentage of bar sales). There also appeared to be some differences in terms of the demand for programming, with licensed premises generally only being interested in acquiring some of the more popular movies, sports and entertainment programming which appealed to broad viewer interests, whereas residential consumers appeared more willing to subscribe to a more diverse range of programming, some of which might only appeal to a more limited section of viewers.

In addition, the Commission has noted that some suppliers of content impose licensing restrictions preventing the pay TV operators from supplying certain channels to licensed premises. Some content suppliers prefer to supply the product directly to the licensed premises themselves, whilst others may not wish their product to be viewed in such premises. Such licensing restrictions, therefore, impede supply side substitution between residential and licensed premises for some of the pay TV operators or content suppliers. However, given the nature of the particular arrangements under consideration it was not necessary for the Commission to form a final view as the content sharing arrangements did not markedly impact on the nature of arrangements or competition in relation to the supply of programming to licensed premises. Nevertheless, the differences in demand and supply side behaviour, including the use of differing licensing arrangements and pricing models, and given the lack of overlap between the two types of customer groups it may be arguable that residential and licensed premises may constitute separate markets for the supply of pay TV services. However, further detailed analysis would be required prior to the Commission forming a final view in relation to this issue.

2.2.2 Geographic price discrimination

Geographic discrimination has not been a major issue in relation to the Commission's consideration of pay TV related matters - mainly because of the nature of operations of the merger parties, the impact geographic licensing restrictions have had on the ability of operators to supply certain areas and the lack of overlap in the operations of the various pay TV operators. With the exception of one company in one small area, Australian pay TV operators have not tended to discriminate in their pricing according to

geographic areas, preferring instead to offer one set price for all their service areas for a particular technology. In fact one of the major operators advised the Commission that it prefers to adopt a national pricing regime as it is easier to manage and affords it some protection against allegations of deceptive or misleading conduct. If, as a result of recent undertakings accepted by the Commission in relation to the Foxtel-Optus matter there is a growth in the number of cable operators supplying more localised cable pay TV services, it is possible that the two major satellite operators may feel the need to engage in some form of geographic price discrimination in order to be more competitive in a particular area. If this were the case the issue of market definition would warrant further analysis.

Furthermore, the Commission would be concerned if there was the potential for a pay TV operator that supplies services to the less competitive regional areas to cross-subsidise lower prices in the more competitive metropolitan areas by increasing prices in the regional areas. This could be achieved either by price discrimination according to geographic location, or possibly by charging higher prices to satellite customers (as cable customers are generally located in the most densely populated metropolitan areas). However, the issue has not received detailed consideration by the Commission as yet given the current market structure and competitive dynamics (particularly in light of certain regional/metropolitan licensing restrictions on some of the providers and the poor financial state of the industry and the lack of competitive pressure being felt by any party that might be capable of such discrimination).

2.2.3 Internet services

In relation to the consideration of the merger of two internet service providers in early 2000 the Commission determined that the national retail market for Internet access can be differentiated from the provision of Internet access to corporate and other larger customers on the basis of service level and cost characteristics. In particular, a significant cost premium was seen to be attached to services supplied to corporate and other larger customers who purchased Internet access which was directly supplied over a permanent link. It was noted also that such customers also generally required more sophisticated services such as the hosting of a web-site and network management.

At that time given the relative low level of deployment and low uptake of broadband services the Commission was uncertain as to whether there was sufficient substitutability between dial-up and broadband Internet connections in order to classify them in the same market. Broadband was acknowledged as offering a much superior service but there was a significant premium attached to those services. At that stage only two market participants were currently able to provide broadband service, hence it was questionable whether broadband represented an effective competitive constraint on dial-up access services at the time. Cable and satellite Internet access services were considered to be close substitutes for the dial-up Internet access service and the two types of services were included as part of the same product market.

2.2.4 Newspapers

The issue of price discrimination did arise in relation to the provision of advertising services in *Case 2* outlined in question 1 above. In that case the target offered private individuals the opportunity of a number of free ads within the paper while businesses were required to pay according to the specified advertising rates. Approximately 40% of the target's revenue was derived from paid business advertising. The acquirer owned a daily regional paid-for newspaper which contained news and paid-for advertising. The acquirer endeavoured to argue that while there was some peripheral overlap arising from the target's paid advertising business, the advertising services provided by the two should be distinguished in terms of the value of goods being advertised, target audiences and advertising rates. Nevertheless, the empirical evidence of the competitive response to the entry of the target into the market indicated a broader market

definition, encompassing both free and paid-for classifieds and local display style print advertising was appropriate.

3. Have rapid rates of innovation and increased supply side substitution reduced the utility of market definition and market share calculations in media merger assessment?

The Commission considers that rapidity of innovation and increased supply side substitution have not reduced the utility of market definition and market share calculations in considering mergers under Australia's competition law. Market definition is necessarily an integral part of the Commission's competition analysis under Australia's merger's legislation[3] - but the Commission is also required to take into account a range of other factors before forming a view on the competitive outcome of a merger.[4] The list of factors the Commission may take into account is not limited to those listed in s50(3) of the Trade Practices Act 1974 ("TPA"). Further, the Commission does not simply make its analysis on the basis of evidence of concentration or market share alone. However, concentration levels are used as a screening device to determine which mergers will be subject to close scrutiny.

The Commission recognises that competition and substitution are dynamic processes and that innovation offers the potential to change both the boundaries of the market and the competitive dynamics within a market. In addition, Australian courts have recognised that a market does not necessarily have to involve an actual trade in goods or services – a market can exist if there is the potential for close competition even though none in fact exists.[5] The Commission also takes into account a time dimension in relation to its consideration of market definition by considering the period over which substitution possibilities ought to be considered. The Commission is therefore cognisant of trends and likely developments in order to determine market definition, the likelihood of substitutability between products and the likely effect on competition over a reasonable period of time.

Rapid innovation, or the expectancy of innovation or convergence between products or markets, does however create some particular challenges in the assessment of merger cases. For example, in relation to consideration of pay television issues the Commission was conscious of the advent of digital technologies and the potential for new products to emerge which would change competitive dynamics in not only retail pay TV but upstream and downstream and related markets. Also, in the Foxtel-Optus matter the Commission was concerned at the potential for the arrangements to adversely impact on competitive dynamics in the developing area of 3G telecommunications technology. It was also concerned to assess the implications of the arrangements for the future development and use of ADSL technology for the provision of pay TV services. 3G technology was not yet deployed and there was some uncertainty about the capabilities of and the services likely to be deployed using it. ADSL was not yet suited to point to multipoint broadcasting. Nevertheless, they were seen to involve likely future developments which could impact on the nature of relevant telecommunications, television markets and broadcast rights markets. The Commission was particularly concerned to consider what the implications would be for these technologies and related products and markets in light of the ownership interests held by Telstra, Australia's incumbent telecommunication carrier, in Foxtel.

The Commission is mindful that market definition can be problematic in emerging/ converging markets where new products/services are yet to be developed or deployed. Whilst a number of issues were raised during market inquiries in relation to those products/services subsequent analysis indicated that the arrangements themselves did not appear to worsen the situation. Consequently, it was not necessary to precisely define the markets in which those services might fall for future consideration.

Innovation by definition involves the introduction of something new or different and hence is generally directed at the creation of new goods or improvements in existing goods or processes. The identification of future product markets and the characteristics of such markets is a complex matter. The

small but significant and non-transitory increase in price test ("SSNIP") which is generally used to assess substitutability of products requires one to infer the response on both the demand side and the supply side to a notional small percentage increase in the price of the products in question. Where new products are concerned the lack of available information on the cross-elasticity of demand and the cross-elasticity of supply of products present challenges for the application of the test. Past precedent can have limited value in innovative, rapidly developing markets and hence one needs to give careful consideration to market definition on a case by case basis.

The Commission effectively takes such matters into consideration as part of its analysis in considering the proscribed merger factor set out in s50(3)(g). Under this factor the Commission is required to assess market dynamics in forming its view on the likely effect of the merger. Hence, the Commission is required, and does, take into account the impact of innovation and supply side substitution which may lower barriers to entry and facilitate new entry and see market shares or leaders change over time. Similarly, whether a market is growing or declining can have significant implications for the potential erosion of market power over time.

New technology can facilitate supply side substitution and facilitate new small scale entry into a market. For example, in a newspaper merger the Commission took into account the impact the use of desk top publishing had in lowering barriers to entry for publishing and newspaper markets. In the Community Newspaper/Hills Gazette matter considered by the Commission in late 1997, it was acknowledged that barriers to entry were relatively low. This took into account the fact that advances in technology, particularly in the area of desk-top publishing systems have substantially lowered the cost of setting up a suburban newspaper in recent years. The Commission noted in that case that the publishing industry was one that had been characterised by a relatively high level of innovation and technological development. Previously, high capital investment had made the costs of establishing such a service very high. However, with desk top publishing having revolutionised the production of newspapers a company could commence publishing a suburban newspaper on a small scale using desk-top publishing technology and by outsourcing the printing of the newspaper.

3. Other challenging issues

3.1 Evidence of a merger where the firms enjoy the benefit of virtuous circles

3.1.1 Programming rights virtuous circle

The Commission has recognised the implications of the creation of a virtuous circle in its consideration of a number of matters related to the pay TV industry. The acquisition of a significant market share (i.e. subscribers) can deliver a significant competitive advantage to a pay TV operator when negotiating for supply of programming - not only in relation to the terms and conditions applying to the acquisition/supply but such that content suppliers may be prepared to grant exclusive rights to a significantly large or dominant operator. Sometimes a premium may apply to the grant of exclusivity, but on other occasions the supplier may simply be prepared to grant exclusivity or otherwise chooses not to supply the smaller competitors in order to avoid the transaction costs and resourcing requirements associated with administering smaller contracts. The Commission has particular concerns about the use of exclusive contracts or vertical integration in programming to hinder or foreclose competition in downstream pay TV markets by denying access to the key pay TV programming which a new entrant needs in order to viably enter the market or related markets.

The Productivity Commission considers that the development of competition in the pay TV market and in some telecommunications markets has been hindered by the control of pay TV content.[6] In particular, the Commission has been concerned that lack of access to premium pay TV content has been

preventing the efficient deployment of broadband infrastructure, particularly in regional areas. In a number of investigations into pay TV related matters the Commission has been advised that the competitive dynamics of pay TV service provision have a major impact on the incentives for broadband service suppliers to invest in networks and open their systems to access seekers. Pay TV is viewed as a quality factor for attracting customers to a bundle of services provided across cable networks and therefore increasing the take-up of various services on those networks. Bundling can lead to increased revenue, economies of scope and reduce churn rates. These are all crucial considerations in funding the costs of network roll out. Premium content in particular, such as movies and sports programming, is seen as the key to drive demand and uptake for pay TV.

There is a strong link between market share and the ability to acquire good programming. If a pay TV operator is able to secure the rights to distribute premium content, it gains the capability to attract a large number of subscribers to its pay TV service. Sports and movie channels are generally recognised as the drivers of pay TV subscriptions in Australia. The number and diversity of channels offered in a package is also influential in determining a subscriber's choice of operator. Content suppliers generally seek to maximise their revenue. This may be achieved either via broad distribution to subscribers, usually across a number of platforms, or by the impost of a premium charge for the grant of exclusivity to a particular platform.

Whilst content suppliers, in seeking to maximise their revenues, will ordinarily look to distribute their product as widely as possible, if one pay TV operator has developed a significantly larger subscriber base than other operators, it will likely be in a position to insist on exclusivity thereby precluding the content supplier from offering the content to any other operator. This may be in exchange for a premium price or for guaranteed programming hours, which makes the content supplier relatively indifferent between accepting the offer or insisting on non-exclusivity. Having been denied this programming the position of competing pay TV service suppliers to attract subscribers is significantly weakened. A number of content suppliers have also expressed the view that they may be reluctant to supply some of the smaller operators once they have secured a contract with a sufficiently dominant operator as such licensing contracts tend to be complicated and time-consuming and add little value to their business. Also, some of the smaller pay TV operators have advised that there has been a disinclination for some channel owners to make channels available to new, competing operators for fear of endangering their commercial relationship with a more dominant operator on whom the content suppliers have a high degree of business dependency. They also advised that some channels are made available to the larger operators under what appears to be informal exclusive arrangements.

In Australia, experience to date has shown that there generally is a range of programming which is supplied by the various content suppliers to the smaller pay TV operators but a lack of access to the premium movies and sports programming has hindered their ability to drive uptake of their services. Even where exclusivity is not a barrier the application of minimum subscriber guarantees to some of the more popular programming can act to prevent the smaller operators from acquiring the programming or else sees them having to bear crippling costs for much-needed programming. In addition the operators with a large market share can often exert stronger bargaining power in order to extract more favourable terms of supply.

Concerns about the inability of a number of pay TV operators to access premium programming and the enhanced bargaining power Australia's major pay TV operator would gain were major concerns at the forefront of the Commission's mind when considering the Foxtel-Optus content sharing arrangements. A number of firms who had invested in or were considering investing in new cable networks had advised they were experiencing considerable difficulty in securing access to key programming and that without such programming they would not be able to offer pay TV services on their networks. This significantly increased the risk of investing in such networks as multiple revenue streams are generally needed to make

the network investment commercially viable for such operators. Pay TV was seen to be an important part of the bundle of services to be offered on such networks – not only in terms of deriving extra revenue but also in facilitating uptake of a bundle of services by consumers and reducing customer churn. Without access to quality programming, the necessary revenues may not be available to fund cable investment. Without this investment, an important source of facilities-based competition could be foreclosed from both telecommunications and pay TV markets.

The smaller operators were already experiencing difficulties in acquiring much-needed programming. The increase in the concentration of control of key programming which might have arisen out of the Foxtel-Optus arrangements was likely to raise barriers to entry and make it even more difficult for competing networks and potential future networks or operators to access premium programming. Exclusive channel supply contracts and ownership links between Telstra, Foxtel and some key channel suppliers provided the means by which key programming could be withheld. Furthermore, there were incentives for Telstra to use control of pay TV content (through its vertical integration and ownership links) to foreclose competition in this market. Hence, pay TV content was reinforcing Telstra's market power and was impacting on the development of new delivery systems.

Concerns about the virtuous circle related to pay TV programming were one of the main reasons for the Commission's initial opposition to the proposed Foxtel-Optus arrangements. The Commission would not approve the transaction in the absence of specific undertakings which would ensure the availability and supply of certain programming to other pay TV operators, as well as the provision of access arrangements for content suppliers to access the Foxtel cable platform. The "access to content" undertaking was to address issues in relation to competition in the retail pay TV market and the telecommunications fixed customer access market by ensuring access to programming was not foreclosed to actual and potential competitors in these markets. The "access to carriage services" and "access to set top units" undertakings were largely to address concerns in the market for acquisition of broadcast rights for pay TV and the wholesale aggregation and supply of programming for pay TV market by ensuring that Foxtel was not able to foreclose distribution of content providers' product.

3.1.2 Virtuous circles related to advertising

The issue of advertising has not been a significant issue for the Commission to date in relation to pay TV given the limited uptake of pay TV services in Australia and regulatory requirements that pay TV operators must rely for the greater share of their revenue from subscriptions. Furthermore, pay television only accounts for approximately 3% of national television advertising revenue.[7] Advertising-related issues are more likely to be of greater concern if pay TV penetration increases markedly.

The issue has not featured to any significant extent in relation to any newspaper or internet mergers considered by the Commission either.

3.1.3 Are such downward spiral effects more likely to be found in certain media?

The Commission has not considered the issue of whether such virtuous circles and downward spiral effects are more often found in certain media, rather than others. Given the nature and limited number of media mergers considered by the Commission in recent years it is unable to comment in detail on the matter. The following nevertheless offers some thoughts on the matter.

It would appear that to some extent all forms of media would be susceptible to downward spiral effects as all are dependent upon the need to either attract paying customers by offering quality content and/or attract advertising revenue. Appealing programming attracts viewers/readers. Rates charged for advertising generally reflect the overall ratings/circulation and nature of the demographics of the market. In

the case of free-to-air television or radio, the audience share and advertising rates are key parameters for the success of their business. In the case of pay television or paid-for newspapers a key objective is to shape the product to meet the interests of target groups of viewers/readers who are willing to pay for that content. Hence, pay television providers or paid-for newspapers will seek to maximise customer revenue by offering content which is of direct appeal to existing and potential subscribers – they are heavily dependent upon the need to attract compelling, quality content or a diversity of content which is not catered for by their free counterparts. Free broadcasters/newspapers on the other hand will seek to maximise advertising revenue by supplying content with mass appeal which will therefore attract advertisers.

The difference in funding models between the free-to-air and pay tv broadcasters has supply and demand side implications. On the demand side for paid-for media, the customers must be persuaded that the product is sufficiently unique that it cannot be substituted with its free counterpart. For example a pay tv operator will not be able to succeed without channels devoted exclusively to compelling programming. For most consumers, the uniqueness or range of programming choices is a major reason for purchasing pay television, in that they are presented with a particular type of programming or an increased diversity of programming which is not available elsewhere, and for which they are willing to pay. Hence, once paid-for media suffer from a lack of quality programming their customers are likely to fall away fairly quickly (subject to any contractual obligations) and the downward spiral effect would be felt acutely. The fact that their free counterparts are generally available to a broader cross-section of the community and that customers do not face switching costs in switching between the various competitors possibly means they are less dependent upon particular programming for their overall success.

Forms of media where viewer preferences are skewed towards particular tastes or content are possibly likely to be more susceptible to the downward programming spiral effect. For example movies and sports are considered particularly important to attract pay TV subscribers and the lack of access to this type of programming could cause considerable damage or even threaten the future viability of a pay tv operator's business. Pay TV operators are definitely dependent upon having movies and premium sports programming. Free to air television operators on the other hand have indicated that they can respond to an absence of such content by targeting other demographics. Further, the fact that there is only a limited amount of programming able to be shown on free to air at present in Australia given multi-channelling restriction and limitations on the number of licences means that only a limited amount of content can be played on any one service. The free-to-airs are less likely therefore to find themselves foreclosed from access to all the major appealing programming.

3.2 Principal pro-and anti- competitive effects considered in media mergers

As noted above the Commission is required to address certain statutory merger factors when assessing any mergers or acquisitions under s 50. The factors to be taken into account are as follows:

TPA s50(3) (a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and

(i) the nature and extent of vertical integration in the market.

Regard may also be had to other factors as well. The weight to be given to any particular factor is determined in the context of the facts of the relevant case.[8]

a) In horizontal media merger cases

A pay television example

The Foxtel-Optus matter, whilst not a merger or acquisition, required the Commission to analyse a range of issues in relation to a much closer association between two of the major pay TV operators in Australia. It provides a useful example of the sort of issues which can arise in media mergers analysis.

The Foxtel-Optus matter involved an agreement between the parties for Foxtel to supply its pay TV channels to Optus for resale on the Optus cable network. Foxtel would be able to dictate the placement and tiering of the programming on the Optus services. If Optus acquires any new movie or sports cable rights it is required to arrange for the programming to be made available to Foxtel for distribution on Foxtel's cable service on equivalent terms. Optus is also required to supply any programs it currently produces or may produce in the future to Foxtel. In addition, Foxtel would assume the majority of Optus' financial obligations under most of its content supply agreements with programme suppliers and it agreed to lease a number of transponders on a new satellite which was to be launched by Optus. Concurrently, Foxtel entered into a separate agreement with its 50% shareholder, Telstra, enabling Telstra to commence reselling the Foxtel services together with Telstra branded telecommunications services.

The Commission's main focus in relation to horizontal effects was largely upon whether closer ties between Foxtel and Optus would enable the entities to exercise market power and raise their prices in the relevant market(s) to the detriment of consumers. The Commission's analysis of the likely effects given the horizontal nature of the arrangements, therefore, tended to focus on what competitive constraints would operate on the behaviour of the parties post the transaction. In particular, the Commission had to consider whether there would be any loss of direct competition in relevant markets in which the parties both operated, whether or not the market position of the entities would likely be strengthened and whether or not there were any counterbalancing factors which would preclude Foxtel from being able to significantly and sustainably increase prices or profit margins. Given the highly concentrated nature of the market the Commission was also concerned about any potential increase in the likelihood of collusion.

In this matter the parties argued that the proposed arrangements had the following **pro-competitive** effects:

- The arrangement would improve Optus' cost base and enable Optus to compete more vigorously (in both pay TV and telecommunications markets). Optus had previously been suffering significant losses in relation to its pay TV operations and it submitted that it needed

to gain scale in order derive economies of scale (this was particularly so given the high fixed costs it incurred);

- Access to the superior Foxtel content would improve Optus' capability to compete and attract customers;

- The arrangement would help to "rationalise" the pay television industry and put it on a more sustainable footing as the enhanced purchasing power of the parties would enable them to secure better prices for programming. The pay television industry had been characterised by substantial ongoing losses, largely attributable to the high cost associated with premium programming. The parties maintained that scale was needed to acquire premium content at economically viable prices. It was submitted that the Australian market was not large enough for multiple players to gain this scale;

- The arrangements would assist Optus to remain a competitive force, and perhaps become a more competitive force, in both pay TV and telecommunications markets (particularly since Optus offered bundled pay TV and telephony products). Optus was one of the major competitors in pay TV and a particularly important competitor in relation to telecommunications markets. There was the possibility that in the absence of the arrangements Optus would exit from both the pay television and telephony markets;

- Consumers may benefit from access to a broader range of programming from the entities; and

- The proposed arrangements would facilitate the introduction of digital television as an improvement in Foxtel's financial position would assist with funding its investment in the relevant infrastructure.

The main **anti-competitive concerns** considered by the Commission included the following:

- Foxtel may not continue to be subject to competition in pay television;

- competition may move away from content-based competition to other non-price factors, and this may adversely impact on consumers;

- a reduction in the competitive pressure to innovate and introduce new services (Optus had been a leader in developing and trialling digital and interactive services);

- the implications for non-price competition (e.g. in terms of conditions of supply or the composition and shape of pay TV packages);

- Foxtel may become a monopsony purchaser of pay TV content and be able to dictate price and terms for the acquisition of content (including positioning/tiering of programming, viewing times, exclusivity, relative splits of revenue between suppliers and Foxtel);

- the ability of Foxtel to lock-up programming and foreclose supply to other pay TV operators and to current and potential operators of competing fixed customer access networks;

- a reduction in the competitive tension between the main pay TV operators in relation to competition for content may make it difficult for some content providers to secure distribution of their product;

- increased potential for collusion and the exercise of co-ordinated market power;

- the extent to which Foxtel would control the gateway to a significant proportion of Australian consumers for the supply of all new digital services and its ability to influence the industry standard for set top units ("STUs") and associated technology and to control important proprietary technology; and

- the implications for independent Australian content production.

Following concerns expressed by the Commission after its initial consideration of the matter a number of undertakings were offered to, and accepted by, the Commission to address those concerns, including:

- arrangements for Foxtel to make its content available to infrastructure operators on specified terms under an infrastructure operator content supply agreement, which was based on a retail minus pricing approach;

- undertakings for access to Foxtel's cable and satellite set top units and for carriage services to be provided to pay TV content suppliers or operators on the cable network on which Foxtel delivers its services;

- a commitment for Foxtel to digitise its services (subject to certain pre-conditions);

- commitments by Foxtel and Optus that they would not to exclusively acquire particular content;

- commitments to a minimum amount of spend by Foxtel and Optus on independent Australian programs;

- a commitment to a minimum level of non-affiliated content in Foxtel's basic package;

- a price cap on Foxtel's basic package for 3 years;

- a commitment by Optus to supply a number of channels on its pay television service for a period of time which were not currently offered by Foxtel; and

- a commitment that Optus would continue for a period of time to compile and provide two channels comprising programming created or acquired by Optus.

Ultimately, the Commission took into account the various merger factors and the pro-competitive and anti-competitive concerns outlined above and had to balance and weigh up the relevant factors in order to determine the likelihood of there being a substantial lessening of competition as a result of the arrangements. Where possible the Commission sought and considered available empirical evidence and examined the views of market participants on the likely effects. In particular, the Commission noted that the current level of competition between retail pay TV operators was relatively limited and while Optus did make a positive contribution to competitive dynamics in the pay TV market, its competitive position had weakened in recent years. In this context, on balance, the undertakings were considered to be sufficient to overcome the Commission's competition concerns.

b) In vertical media merger cases

The Foxtel-Optus arrangements had elements of a vertical transaction as both Foxtel and Optus produce and supply pay TV programming and both parties exert control over infrastructure and delivery systems used to supply pay TV services.

The relevant **anti-competitive concerns** here included:

- Foxtel's position within a range of levels of the supply chain relating to pay TV operations would be strengthened, including the ability of Foxtel or its related entities to acquire programming on favourable terms compared with that of its competitors;

- Foxtel's vertical integration with content suppliers, delivery platforms and participants in other markets provided it with the incentive to discriminate against unaffiliated suppliers to foreclose distribution of content in a range of pay TV and telecommunications markets;

- barriers to entry for pay TV operators would be heightened as access to programming may become more difficult given Foxtel would be able to exert considerable influence over the availability and terms of supply for a large range of programming. The increase in the concentration of control of key programming would make it even more difficult for current and potential competing operators to access key programming;

- Should Foxtel choose not to acquire or broadcast certain channels, channel suppliers would likely find themselves unable to secure adequate distribution as Optus would likely no longer acquire the programming;

- Foxtel would gain the ability to exert some influence over access to distribution on the Optus network and could possibly foreclose distribution on both its own and Optus' network;

- Foxtel would become the major wholesale supplier of programming to retail pay TV operators and it may gain considerable control over the shape, content and price of the product supplied by the pay TV operators. The pricing model for the supply of the content to other pay TV operators had the potential to make the pricing structure of other pay tv competitors very much dependent upon Foxtel's;

- the presence of certain exclusive dealing arrangements would limit the ability of current or new pay TV competitors from competing in the future (in particular from using the Optus cable network);

- the enhanced market power Foxtel acquired in the various pay TV markets would potentially afford it the ability to leverage its market power into a number of telecommunication markets and adversely impact on competition for related telecommunication services (e.g. internet services, 3G and high speed broadband services). This was particularly worrying given Telstra's majority shareholding in Foxtel;

- there may be some diminution of vigour stemming from vertical arrangements as Optus will become more dependent on Foxtel for supply of its programming;

- the application of geographical and technological restraints concerning where and how Optus could supply the programming it sources from Foxtel would create a barrier to any future Optus expansion;

- the potential for Foxtel to leverage its control over delivery infrastructure into market power in relation to the development of digital interactive TV services (including its ability to influence standards and the design and use of new equipment, technologies or services); and

- the ability for Foxtel to discriminate in relation to price and terms for the supply of programming to non-affiliated downstream competitors and to engage in price squeezing; and

- the fact that Foxtel's related entity Telstra would be able to bundle pay TV with its telecommunications products, whereas the majority of other telecommunications companies would be unable to offer pay tv in their bundle of services.

The pro-competitive effects are essentially those outlined in the section above on horizontal mergers.

As noted above, the Commission ultimately accepted a number of undertakings which were considered to have addressed the concerns arising from the arrangements.

c) In conglomerate media merger cases

No recent relevant examples of a media merger where the two firms operated in completely separate industries come to mind. Cross media ownership restrictions in Australia effectively preclude conglomerate media mergers.

As a general rule, conglomerate mergers do not tend to raise competition concerns. Nevertheless, the Commission will examine such matters to see whether they could possibly involve the removal of a potential competitor, or whether there are any overlaps in terms of inputs or distribution networks etc that the companies rely on, or whether there are any potential foreclosure effects. The Commission will also examine these sort of matters closely where they may be likely to deliver the acquirer some other competitive advantage over its competitors, such that there could be a substantial lessening of competition.

3.3 Media mergers where price discrimination was an issue

Price discrimination has not been a significant issue in any of the media mergers the Commission has considered.

3.4 Possibility of increased ratio of advertising to content resulting from reduced competition

This has not been raised as an issue in any of the recent Australian media mergers.

3.5 Consideration of diversity and quality of content issues

The Commission's consideration of mergers matters focuses on the likely effect on competition in the relevant market(s). Questions such as whether the conduct gives rise to some off-setting public benefit and whether such a benefit could be achieved by less restrictive means do not generally form part of the Commission's (or the courts') analysis in Australia. To the extent that issues of diversity and quality of content impact on the nature of rivalry between independent firms, such that competition will be lessened substantially in relation to price competition, service, technology, quality of products etc, they are an issue to be considered.

For example, in the Foxtel-Optus matter the Commission was concerned that content supply arrangements between the two major metropolitan pay TV operators may see a diminution in the level of

product differentiation between the retail offerings of both parties. Prior to these arrangements Optus' basic package was much smaller than Foxtel's and it enabled customers to access a limited range of pay TV product at a much lower price than that offered to Foxtel customers. Furthermore, upon implementation of the arrangements Optus would be more likely to source the majority of its programming from Foxtel, making it very difficult for content suppliers to gain distribution on Optus' platform if they were not also supplied on Foxtel. In effect, over time, the proposed arrangements had the potential to significantly neutralise inter-brand competition and foreclose distribution for a number of content providers. The problems would be exacerbated as long as analogue technology was used because of the associated capacity limitations. Concerns were also raised in relation to the impact of the arrangements on independent local content production as Optus had previously displayed a greater propensity to invest in local content production and it was likely this would diminish if it sourced most of its programming from Foxtel. Hence, whilst issues of diversity or content regulation etc as a general rule are not of themselves directly relevant to competition concerns, there may be certain circumstances where such issues are taken into account in a competition assessment. Normally, however, issues such as diversity and quality of content would be more relevant to an analysis in relation to an authorisation process where a public benefit test is applied.

Similarly, the existence and effectiveness of content regulation may be taken into account to the extent that it impacts on competitive dynamics. For example, in Australia the anti-siphoning legislation impacts on competition between free-to-air and pay TV and is taken into account in relation to any analysis of market definition and competitive dynamics for the television sector.

Australia's current cross-media ownership and foreign ownership rules are currently subject to proposed legislative change. One of the main issues which is the subject of debate in relation to those changes is whether there is a need to consider a media-specific mergers test which would take into account the Government's social policy objectives relating to diversity and plurality in the media. (Further details on this are provided in 6. below).

In the meantime, however, the merger provisions of the Trade Practices Act while maintaining competition within markets, would not necessarily maintain plurality and diversity across different markets. That is, the Act would not necessarily block for example, the acquisition of a newspaper and a TV station by a telecommunications company.

3.6 Implications of subsidised public broadcasting

The Commission's mergers assessment is concerned with the level of competition in the relevant markets, and whether a particular proposal will result in, or is likely to result in, a substantial lessening of competition in those markets. It is concerned with the structure of the markets in which firms compete, rather than the competitiveness of individual firms.

Subsidised broadcasting has not really affected the Commission's assessment of mergers amongst un-subsidised media. The statutory mergers and authorisation tests still apply. To the extent that any subsidised broadcasting entities impact on competitive dynamics within a market such impacts are taken into account in relation to mergers (or in the case of an authorisation any public benefits/detriments are considered). Otherwise, issues concerning diversity, plurality and universal services generally rest within the domain of the relevant media regulator, the Australian Broadcasting Authority ("ABA"). For example, the ABA administers matters to do with the allocation of, and conditions applying to, commercial broadcasting licences, as well as limitations on the number of licences allowed to be held by one operator within a given (geographic) licence area and restrictions on cross media ownership, foreign ownership and content regulation.

3.7 National champions issue

Whilst the national champions issue has featured in debates on mergers regulation in Australia the argument that a merger may be necessary in order to build national champions in terms of exporting Australian "culture" has never been employed to justify a merger proposal.

4. Plurality concerns

4.1 Overview

In Australia:

- There is generally no special approach to considering plurality issues and the blocking of anti-competitive mergers is generally believed to preserve an adequate number of media providers in the relevant markets; and

- Plurality concerns are generally within the domain of the relevant media regulator, the Australian Broadcasting Authority.

The normal merger provisions apply to media mergers. In addition there are cross-media and foreign ownership restrictions which are regulated through the Broadcasting Services Act 1992 ("BSA") and monitored and enforced by the Australian Broadcasting Authority ("ABA"), the details of which are outlined below. These rules apply in addition to the general competition law. In addition, a number of provisions of the BSA require the ABA and ACCC to consult and interact in relation to media mergers or acquisitions. In particular, under s96A of the BSA the ABA, in consultation with the Commission, must monitor the cross-media ownership of the holders of licences allocated under section 96 in the context of the objects of the BSA, particularly to encourage diversity in control of the more influential broadcasting services. Also under ss 93 and 97 of the BSA the ABA is required to consult with the Commission in relation to the allocation of subscription television broadcasting licences. Upon request from the ABA the Commission is required to report within 45 days on its opinion as to whether the allocation of subscription television licence to a particular applicant would likely constitute a contravention of Part IV of the TPA.

Other than in relation to the issues identified above there is no specific need or requirement for the ACCC and the ABA to co-ordinate their work. The two organisations do, nevertheless, consult and interact with each other on an informal basis as required in order to inform relevant analysis and decision-making processes within their scope of operations. Furthermore, the Chairperson of the ABA is an ex-officio member of the ACCC and the ACCC's Merger's Commissioner is an associate member of the ABA.

4.2 Main current regulatory barriers

The Broadcasting Services Act 1992 prescribes a number of restrictions in relation to ownership of media. The main restrictions include:

Cross-media ownership restrictions

- A person must not own or control more than one of the following in any geographic licence area

  – A commercial free to air television licence;

- A commercial radio licence; or
- A major newspaper.[9]

Foreign ownership restrictions for television

- Foreign persons must not be in a position to control a fta television licence and the total foreign interests must not exceed 20%;[10]
- Foreign interests are limited to a 20% company interest in a pay TV licence for an individual and a 35% company interest in aggregate.[11]

(A person is regarded as being in a position to exercise control of a licence, company or newspaper if the person has company interests exceeding 15%. Company interests can be a shareholding, voting, dividend or winding up interests. The ABA may also have regard to other non-company interest factors in determining the issue of control).

No limits apply to control of subscription television licences or commercial radio licences by foreigners.

4.2.1 Other limits on ownership of broadcasting media assets

4.2.1.1 Commercial television

A person must not be in a position to exercise control of more than one commercial television broadcasting licence in the same licence area.[12]

The aggregate reach of television stations under common control cannot exceed 75% of the Australian population.[13]

4.2.1.2 Commercial Radio

A person must not be in a position to exercise control of more than 2 commercial radio broadcasting licences in the same licence (and associated directorship restrictions).[14]

In addition there are also controls on foreign investment in the media under the *Foreign Acquisitions and Takeovers Act* 1975 which requires:

- prior approval of all direct proposals by foreign interests to invest in the media sector irrespective of size. Where the Treasurer believes that a proposed acquisition may be contrary to the national interest he may make an order prohibiting the acquisition; and
- For newspapers the maximum permitted aggregate foreign interests in national and metropolitan newspapers is 30%, with a 25% limit on any single foreign shareholder. For provincial and suburban newspapers the aggregate limit is 50%.

4.3 Proposed changes to current regulation

Australia's cross-media rules are generally aimed at ensuring diversity in the sources of information and opinion and a plurality in the ownership of the media.[15] Australia's cross-media rules are seen to act as an absolute barrier to media firms taking advantage of economies of scale and scope which

might arise from owning different types of media in the same market. At the same time convergence within the communications sector is considered as making these restrictions increasingly redundant and anachronistic.[16]

A number of changes to media ownership regulation were recently introduced into Parliament, mainly relating to abolition or relaxation of the foreign ownership and cross-media ownership rules. The Broadcasting Services Amendment (Media Ownership) Bill 2002 was introduced into Federal Parliament on 21 March 2002 and is aimed at encouraging greater competition and use of new technologies while providing strict safeguards to ensure diversity of opinion and minimum levels of local news and information.[17] It seeks to remove regulatory barriers to foreign investment in relation to commercial and subscription television and authorises the Australian Broadcasting Authority to grant cross-media exemption certificates which will protect the holder of the certificate from being in breach of existing cross-media rules provided the conditions of the certificate are satisfied.

Parliament recently delayed final debate on the removal of the cross-media and foreign ownership laws until at least May 2003.

NOTES

1. Section 115 of the *Broadcasting Services Act* 1992 refers. The anti-siphoning provisions allow the Minister for Communications, Information Technology and the Arts to formally list events that should be available on FTA for viewing by the general public. Under the anti-siphoning rules the right to broadcast listed events can only be acquired by pay TV licensees if live broadcast rights are held by commercial television licensees (who have the right to televise the event to a total of more than 50 per cent of the Australian population) or by a national television broadcaster (the ABC or SBS). If live broadcast rights to a listed event are not held by a FTA broadcaster, a pay TV licensee may request that the Minister remove a particular event from the list.

2. Australian Communications Authority, *Telecommunications Performance Report 2000-2001*, February 2002, p 209.

3. The legislation requires an assessment of what is the relevant market and whether or not that market is substantial and will the acquisition be likely to substantially lessen competition. All of these elements are interrelated.

4. See Trade Practices Act 1974, section 50. Section 50(3) requires regard to be had to a non-exhaustive list of "merger factors". Section 50(3)(g) requires regard to be had to the dynamic characteristics of the market, including growth, innovation and product differentiation.

5. *Queensland Wire Industries Pty Ltd v Broken Hill Property Co Ltd* (1989) ATPR 40-925.

6. Productivity Commission, *Telecommunications Competition Regulation*, Inquiry Report No. 16, 21 September 2001, Ausinfo, Canberra, p 511.

7. Per Foxtel presentation to ACCC, 2 July 2002.

8. Australian Competition and Consumer Commission, *Mergers Guidelines*, AusInfo, Canberra, June 1999, p 28.

9. Per ss 60, 61 Broadcasting Services Act 1992.

10. Per ss57, 58 Broadcasting Services Act 1992.

11. Per s109 Broadcasting Services Act 1992.

12. Per ss 52, 55 Broadcasting Services Act 1992.

13. Per s53 Broadcasting Services Act 1992.

14. Per ss54, 56 Broadcasting Services Act 1992.

15. Broadcasting Services Amendment (Media Ownership) Bill Revised Explanatory Memorandum, 21 March 2002, paragraph 92. http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/ Linked/ 23100208.pdf

16. Broadcasting Services Amendment (Media Ownership) Bill Revised Explanatory Memorandum, 21 March 2002, paragraphs 92-95.

17. F. Papndrea, “Reform of Media Ownership Regulation”, *(2002) 9 Agenda 3, 253.*

AUSTRIA

Preliminary remarks

Merger Control has been introduced in Austria only about 10 years ago**,** i.e. the relevant provisions of the Austrian Cartel Act 1988, §§ 41,42a-e, have come into force on 1.10.1993. Since then only few decisions have been passed that contain special considerations affecting media mergers. This is due to the fact that - unless an in-depth investigation (control procedure phase II) has been initiated by the official parties - the formal approval of a notified merger by the Cartel Court does not contain any substantive reasoning. With support of officials from the Cartel Court two decisions concluding a phase II procedure in the field of media merger could be traced.

The following submission will therefore concentrate on giving an overview of the law for media merger and provide experience from case-law where it is available.

According to § 42c para 5 Cartel Act media mergers can be prohibited, if media diversity will be impaired. After the issue had been raised, if media diversity referred to the number of media providers in a market or to the variety in content/freedom of opinion, the term was defined by an amendment (§ 35 para 2a Cartel Act) in year 2002. The provision defines media diversity as to the number of independent actors on a market. Independence of a company is assumed if no other company owns shares exceeding 25% or exerts control. The Court's scrutiny now extends to media diversity as well as to media plurality with priority of safeguarding media plurality.

I. Market Definition

1. Are free-to-air terrestrial television, free newspapers, and free Internet access services in the same markets as their paid-for counterparts? What factors would you consider in making those determinations?

No case law

1. How has the incidence of price discrimination, including by way of "versioning", affected market definitions in your jurisdiction's review of media mergers?[1]

No case law.

2. How, if at all, have rapid rates of innovation and increased supply side substitution reduced the utility of market definition and market share calculations in media merger assessment? If there has been such a reduction, has your competition authority responded with a greater willingness to skip over or de-emphasise market definition in favour of more directly focusing on how a merger might increase either single or collective market power?

No case law.

II. Other Challenging Issues

1. Is there evidence in any particular media in your jurisdiction that a company gaining audience share through a merger will benefit from a virtuous circle, i.e. a larger audience translates into greater advertising revenues, and these in turn permit improvements in content quality thus attracting a still larger audience etc., while imposing a downward spiral on competitors? Are such contrasting spirals more often found in some media as opposed to others?

No case law.

2. What in general are the principal pro- and anti-competitive effects your competition authority has focused on in (a) horizontal, (b) vertical and (c) conglomerate media mergers? Please provide actual case illustrations of each of these three types of mergers and explain how the pro- and anti-competitive effects were analysed.

Case 26 Kt 342, 369, 380, 381, 382, 383/00, 26.1.2001, ("Formil"), refers to a merger of several weekly news magazines. Since the two mergers' parties formed part of major media groups, Bertelsmann and Mediaprint respectively, the merger also had conglomerate effects. In its reasoning of pro- and anti-competitive effects the Cartel Court first explained the meaning of the conditions for justification laid down in § 42b para 3 Cartel Act: (1) Improvements in competition that outweigh the disadvantages of the domination of the market or (2) improvement of the international competitiveness of the businesses involved, if justified by the national economy. According to the Court the first criteria involves improvements on third markets but not rationalization effects that tend to strengthen the dominant position. This is, because improvements on the affected markets are considered already in the overall evaluation of a dominant market position. The Court states that even the rehabilitation of a company does not per se meet the requirements of the first criteria. As regards the second criteria the capacity of permanently participating in international marketing activities is meant. Both criteria were not fulfilled in the case. Finally the Court evaluated an impairment of media plurality. Justification in this case is possible only if the above criteria (2) is met. Since the merger put the parties into a quasi monopolist position the Court mentions the danger of changes in diversity and diminishing of critical report, if economic interests of one of the parent companies are concerned. Moreover, the Court stated, there was a likelihood that the two media groups would support each other by way of advertising for their own companies and contra transactions, and this is apt to further Mediaprints' dominant position on the market for daily newspapers. The merger was cleared with conditions.

Case 26 Kt 143, 186, 191, 192/01, ("Wolters Kluwer /Linde") deals with a merger on the market for publishing and trading legal newspapers, books and electronic databases as well as organising legal seminars. The Court stated that the merger would result in a market share of 48 - 57% of the parties and after repeating the legal reasoning above that no reason for justification was given. With regard to media diversity it mentioned that not only media diversity but according to the legal definition in § 35 Cartel Act amended in 2002 media plurality had to be maintained. It continued that a different standard had to be applied to legal literature as compared to other press products, because in legal literature there was no danger of diminishing diversity of titels or freedom of opinion. The merger was blocked.

3. If your jurisdiction has had media mergers in which price discrimination (including versioning) was an issue, have separate markets been defined and mergers blocked or conditioned to ensure there will be no price rises in any of the separate markets, or has there instead been a willingness to trade-off benefits received by one group of consumers against welfare losses experienced by another?

No case law.

4. Some researchers have discussed the possibility that reduced competition for audiences would allow media owners to increase the ratio of advertising to content.[2] The result of that could be an increased supply of advertising time leading to a drop in advertising rates thus benefiting advertisers. At the same time, however, consumers might be worse off, assuming they dislike advertising, if nothing is done to improve the diversity or quality of content they receive. Has this issue arisen in any media mergers in your jurisdiction, and if so, how was it handled?

No case law.

5. Are the potential effects of media mergers on diversity and quality of content normally treated as within or outside the purview of merger review by your competition authority? Does this depend on the existence and effectiveness of content regulation?

See the introduction above: Since media diversity in Austrian law aims at safeguarding plurality in the media, matters of media diversity are basically not at the centre point of judicial control in merger procedure. Nevertheless such considerations come into play once a media merger is not blocked, but cleared with conditions (as it happened in the Formil-Case). There is no indication in the law that such considerations are dependent on the existence or effectiveness of content regulation in a particular media market.

6. If there is subsidised public broadcasting in your jurisdiction, how has this affected your assessment of mergers among un-subsidised media? For example, has it increased the weight assigned to claimed efficiencies or decreased concerns about diversity (including the promotion of national culture), plurality or universal services?

In the second half of the nineties private radio stations first started broadcasting in Austria. A proper legal basis for their activity has been passed only in year 2001 along with a law liberalizing private TV. As yet there have not been any phase II procedures dealing with mergers in this field.

7. How has your competition authority dealt with claims that mergers are necessary in order to build national champions or standard bearers for the nation's culture, or simply to gain a larger share of worldwide rents for national interests?

See above Pt. 2: A domination of a market is outweighed by improvements of international competitiveness that is justified by national economy. This criteria simply protects the capacity of Austrian companies of permanently participating in international marketing activities.

III. Plurality Concerns

Please describe which of the following approaches to preserving plurality in various media markets are employed in your jurisdiction, and assess how well that is working out. In addition, delegates might be particularly interested in learning about changes made in the way plurality concerns are factored into merger review and what motivated those changes.

As mentioned in the introduction above in year 2002 the Cartel Act was amended, clarifying that merger procedures' objective was to safeguard plurality in the media. This happened as reaction to heavy critics by public opinion after the clearance of the merger in the Formil-Case.

a) no special approach – blocking anti-competitive mergers is believed to preserve an adequate number of media providers in the affected markets;

b) lower thresholds are used to trigger full-scale merger review or to found a presumption that a merger is anti-competitive;

According to § 42c para 4 Cartel Act turnovers of media companies have to be multiplied by 200, turnovers of auxiliary media enterprises (printing-offices, advertising agencies, film distribution companies etc) by 20. As such it is safeguarded that even mergers of relatively small companies have to be notified.

c) instead of market shares based on shares of revenues as a means of deciding whether to launch a full-scale review or to found a presumption of anti-competitive effect, the competition authority calculates the share of the audience served by each media provider/owner, with or without attaching different weights to the various types of media;

No case law. Yet there is evidence from Court decisions regarding market abuse on the market of newspapers that the share of audience served by a media is used to ascertain its market position. The method is moreover used by the Austrian Competition Authority ("BWB"), that acts as an official party in Anti-trust and merger procedures, and the media regulator, KOMMAustria.

d) the competition authority applies a public interest test or an authorisation procedure in assessing media mergers and this includes considering effects on plurality;

See above introduction, Pt. 2 and 5.

e) steps are taken to facilitate joint ventures that will allow media to achieve a portion of the economies of scale that a merger would realise, but without reducing plurality (e.g. newspapers could be allowed to jointly operate printing presses);

No case law.

f) plurality concerns are within the domain of a media regulator (perhaps through the application of ownership, cross-ownership, or share of audience limitations) which itself can block a media merger - if this option is used, how do the competition authority and regulator co-ordinate their work, and what are the advantages/ disadvantages of ownership versus share of audience restrictions?

The Austrian Media regulator (KOMMAustria) grants licences for private broadcasting of radio and TV according to PrR-G and PrTV-G. This involves an examination of several issues of media diversity and media plurality. In the enforcement of PrR-G and PrTV-G the KOMMAustria is obliged to withdraw licences, if the standards of media diversity/plurality set by PrR-G and PrTV-G or in its decisions are not met. According to the Cartel Act KOMMAustria has no particular role in merger procedure. Persuant to § 10 WettbG the BWB is – with reference to rules of confidentiality - obliged to transfer to KOMMAustria information that it needs for the execution of its duties. The two authorities agreed that BWB regularly transfers notifications of mergers involving broadcasting companies to KOMMAustria and that KOMMAustria gives its opinion on the merger and makes available specific factual knowledge of the markets involved.

g) some variant of ministerial over-ride is provided, i.e. a designated elected official is permitted to approve (block) a media merger blocked (permitted) by the competition authority – if this

option is used, please describe the criteria provided to guide the application of the over-ride (what weight is given to competition concerns?);

Not known to Austrian competition law.

NOTES

1. In the media context, "versioning" takes the form of different packaging, time of release or accessibility associated with essentially the same content. Two examples of versioning are glossy versus newsprint magazines and instant news, stock market or foreign exchange quotations versus the same information released at daily intervals.

2. See for examples: Gabszewicz, Laussel and Sonnac (1999), Gabszewicz, Laussel and Sonnac (2000), Hargittai (2000); Dukes (2001); Gal-Or and Dukes (2002); and Cunningham and Alexander (2002).

BRAZIL[1]

1. Introduction

1.1 The Brazilian System for Competition Defense

The Brazilian System for Competition Defense (SBDC) is formed by three institutions: the Administrative Council for Economic Defense (CADE), the Secretariat of Economic Law (SDE), both linked to the Ministry of Justice and the Secretariat for Economic Monitoring (SEAE), linked to the Ministry of Finance. They perform complementary roles enforcing the Competition Law n. º 8.884, enacted in June 1994. SEAE and SDE have analytical and investigative functions. Both are responsible for issuing non-binding opinions on mergers and anti-competitive practices cases. CADE is an administrative tribunal and its decisions can only be reviewed by the Judicial Courts.

Concerning mergers, acquisitions and other types of corporate transactions, SEAE begins the analysis and issues a technical report (found on economic aspects), based on the application of common Merger Guidelines developed by SEAE and SDE. In the concluding remarks of that report SEAE always makes one of the following recommendations: approving the operation; approving the operation under specific conditions; or blocking the operation. The case is then sent to SDE, where another technical report is issued (found on legal aspects). The third step is the final administrative decision to be issued by CADE, which has a structure and attributions that resemble an administrative tribunal.

1.2 Portrait of the Brazilian media sector

The media industry is a major field of economic activity, handling billions of dollars, accelerating the adoption of technological innovation and contributing to the information, entertainment and education of billions of people all over the world. These reasons are more than enough so that antitrust authorities deal with media cases in a carefully way.

Over the last two years, 62 merger cases related to media markets - such as pay-TV, Internet and newspapers - have been analyzed by SEAE. Given the particularities of the media sector, a Co-ordination specifically focused on analyzing merger cases and anti-competitive behavior in media markets - the Coordination for Media and Digital Convergence Affairs - was created as a subdivision of the General-Coordination for Services and Commerce Affairs.

We will begin this article with some general considerations about media markets in Brazil, after we will describe in detail an important pay-TV case analyzed by SEAE. An interesting aspect of the analysis on this case was its similarity to analysis carried out by DGIV and by the United States antitrust authorities, mainly concerning the relevant market definition, the anti-competitive concerns raised by the merger, as well as the restrictions proposed. This similarity suggests not only “technological” convergence but also convergence of the antitrust analysis framework.

2. An overview of the main media markets in Brazil

Brazil is a continental-size country, with more than 8 million square kilometers and over 160 million people. Given these figures, it's no surprise that media industry has always been subjected to careful attention by governmental authorities.

In fact, during the non-democratic period (1964-1985), media industry was regarded as an essential element to promote national integration and country unity. This special character, by the way, help us to understand some features of the media industry in Brazil.

19. Below we figure out some general data relating to Brazilian markets of newspapers, Internet, advertisement, broadcasting (also known as free-to-air, free access or just free television) and pay-TV.

2.1 Newspapers[2]

The newspaper is still an important media in Brazil, since it reaches a significant part of the population (despite the advances in other types of media). Moreover, it puts together some characteristics distinct from the other media. Although newspapers can not compete with television in terms of speed and updated information they usually could offer a more accurate perspective of the news, including a richer critical and analytical dimension, which sometimes is not revealed on TV.

Brazil is one of the countries which has the greatest amount of centenarian newspapers; two of them – Diário de Pernambuco and Jornal do Commercio – are the oldest in Latin America and exist since 1820.

The newspaper Brazilian market presented a sales increase of almost 80% from 1990 to 2002, which is a significant evolution (although the sales decreased in the last two years, 2000-2002). Brazil is the second country in number of daily newspapers titles, behind the United States only. This is surprising because many regions in Brazil still have to deal with illiteracy. Over the last years, one could notice some mergers and acquisitions among newspapers companies; at least, one great acquisition, some joint-ventures in the distribution area and a joint-venture in the publishing area. In the last two years, at least nine newspapers were launched in Brazil, which focused on market niches, such as popular and economical information.

Newspapers are still an attractive media for advertisement, in spite of some decrease in the advertising budget in the last years, which affected the different types of media as a whole. The share of newspapers in the advertisement budget was 27, 5% in 1991 and it has now became stable in 21, 2%.

The competition among newspapers has taken place according to some qualitative issues, such as new colors and different kinds of figures. Over the last two years, this competition happened through gifts, as for CDs, books, etc.

The table below presents some data concerning newspapers in Brazil.

Table 1 – The Brazilian Newspaper Market

Period	Number of Titles
Daily Papers	491
Not Daily	
Weekly	937
Half-Monthly	249
Monthly	176
Biweekly	93
Triweekly	34
Subtotal Not Daily	1489
Total	1980

Sources:
ANJ Database
ABRE – Assoc. Brasileira de Representantes de Veículos de Comunicação

2.2 Internet

In Brazil, as well as in the rest of the world, Internet has reached an expressive growth, but has also been a victim of the happenings that shook the world economy, like the burst of dot.com and telecom bubbles and the September 11th. Due to these events, the share of advertisement budgets destined to this kind of media also shrank and many business models have to be rethought. The concentrated income distribution still prevailing in Brazil prevents the increasing in the newspaper readers' base and the expansion of the pay TV market, so the consumers of such services are concentrated in the A and B classes.

Even though, according to the Brazilian Electronic Commerce Chamber, on-line sales grew by 50% last year, reaching R$ 900 million (around US$ 300 million), and the number of on-line consumers reached by 69%, up to 1.4 million people - although the number of Internet users is far superior than these figures (around 14,3 million people). In turn, on-line purchases average value was, in 2002, of R$ 230,00 (around US$ 80,00), around ten times higher than the average ticket in conventional ("brick-and-mortar") stores. The forecast for 2003 is that sales amount to R$ 1,2 billion, disregarding automobiles' and fly tickets' sales. This growth may bring advertisement investments back to Internet and enhance the market for content providers.

We see below an estimation of the market share, measured in terms of unique audience, of the main domain-names, in March 2003.

Table 2 – National Ranking by Domain-Names

Domain-Name	Unique audience March 2003 (in thousands)	Reach % Active Users – March 2003
Uol.com.br	4857	64,36
Ig.com.br	4812	63,76
Globo.com	4003	53,04
Terra.com.br	3597	47,67
Yahoo.com.br	3509	46,49
Msn.com	2578	34,16
Google.com.br	2450	32,46
Bol.com.br	2436	32,28
Kit.net	2359	31,25
Passport.com	2211	29,30

Source: Nielsen/Netratings

2.3 Advertising

The nature of the media sector - that can be in large part thought as double-sided markets, specially if one considers that these firms act as a broker among enterprises, consumers and advertising agencies - justify some considerations about the advertising market whenever one thinks about media markets.

Most of the major players in the global advertising markets have a presence in Brazil. One can see below a table showing the market share of the greatest advertising groups:

Table 3 – Market Share of the Brazilian Advertising Industry

Groups	Market share (%) (2001)
Interpublic	14,88%
WPP	10,71%
Bcom3	8,4%
Omnicom	7,79%
Total	3,35%
DPZ Duailibi Petit Zaragoza Propaganda Ltda.	2,84%
Grupo Interamericano de Comunicação	2,56%
Talent	2,48%
Havas Advertising	2,07%
Newcommbates	1,64%
Others*	44,7%
Brazilian Market Total	100,0%
*Including 56 firms with shares between 1,16% - 0,01%. *Source*: Agências & Anunciantes (June 2002), Meio & Mensagem.	

The advertising market is by most measures still a fragmented one in Brazil, although there is a trend towards consolidation - some 20 mergers were registered over the last two years. Lately, advertising agencies have tended, through mergers and acquisitions, to become large "one stop shopping" entities, providing a range of complementary services like brand consultancy, public relations and promotional marketing.

Over the last few years, antitrust authorities acknowledged some potentially worrying movements in the market. Several associations of media vehicles, advertising companies and advertisers have created an institution called CENP - Executive Council of Standard Rules - with the declared goal of normalizing some commercial aspects of the relationship between media vehicles and advertising agencies, as well to assure the quality of the advertising by issuing certificates to the advertising agencies. Given the considerable potential for price-fixing agreements and foreclosure of potential competition, the SBDC started investigations and the case is now under appreciation of CADE.

2.4 Broadcasting (Free TV)

Television showed up in Brazil in the 50's, when Assis Chateaubriand, the owner of a large group of newspapers (the Diários Associados), has launched TV Tupi in the Brazilian state of São Paulo.

In 1951, the advertising agencies McCann Ericsson and J. W. Thompson began exploring commercial TV in Brazil, displaying the first advertisements designed for TV. In December 21 of that same year, the first soap opera made for Brazilian TV was broadcasted - since then, soap operas have become one of the most popular audience-drivers of major channels. Over the following years, many other broadcasting stations were launched in Rio de Janeiro and São Paulo, such as TV Paulista, TV Record, TV Rio, TV Excelsior and, in 1965, TV Globo, in Rio. In 1966, broadcasting already held nearly 40% of advertising budgets in Brazil. In 1967, Embratel was created and the regulatory benchmark in Brazil was reinforced.

Nowadays, almost 90% of Brazilian homes have TV sets, which clearly shows that broadcasting is, in Brazil, the most far-reaching media vehicle, touching every region and social class of the country. One can see below the amount of broadcasting networks and their generators:

Table 4 – Commercial TV Stations per Networks

BROADCAST NETWORKS	GENERATORS (Commercial TV Stations)
Rede Globo	113
Sistema Brasileiro de Televisão (SBT)	91
Rede Bandeirantes de Televisão	37
RedeTV!	21
Rede Record de Televisão	63
Central Nacional de Televisão (CNT)	23
TV Gazeta S.Paulo	1
MTV (generators)	9
Educational TV Networks	26

Source: Grupo de Mídia de São Paulo, Midiadados (2001)

Relating to geographical scope, the biggest groups reach a great share of near 5.800 Brazilian cities, as seen on the table below:

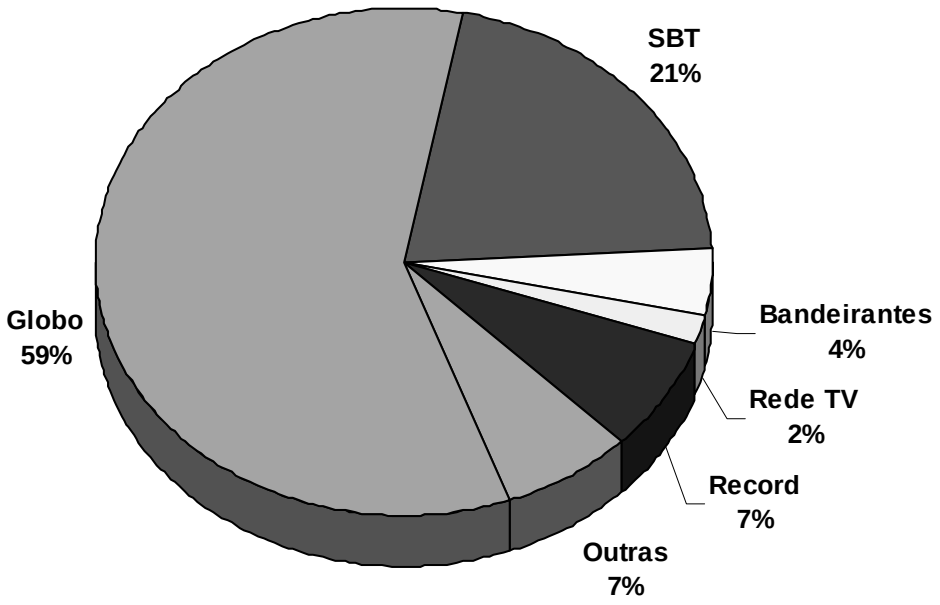
Table 5 – TV Geographical Coverage

Broadcasting Networks	Cities reached by (*)	Homes reached by (%) (**)
Globo	5.444	99,86
SBT	4.903	97,12
Bandeirantes	3.325	87,03
Record	2.319	76,81
Rede TV!	3.527	80,26
CNT	249	35,77
GAZETA	247	21,99

SOURCE: Grupo de Mídia de São Paulo, Midiadados (2001)
(*) 1996 data
(**) forecast from Grupo de Mídia for 2001

Finally, the figure below shows the audience shares of the main Brazilian TV Networks, by homes, in the evening, throughout the national territory:

Figure 1 - Network Audience Shares - Total Population - EVENING (18:00 – 24:00)



Source: Grupo de Mídia de São Paulo, Midiadados (2001)

2.5 Pay-TV[3]

The first pay-TV stations took place in the United States, during the 40's, when small country-side villages that received poor broadcasting transmission signals joined to fit out high sensitivity antennas, with signals delivered to homes through coaxial cables (the so-called CATV, or Community Antenna Television). In Brazil, pay-TV history had a somewhat similar evolution, beginning some forty years ago due to the need to deliver TV signals from broadcasting stations in Rio to country-side towns in Serra do Mar (a group of mountains in the Southern Brazilian Coast), with reasonable sound and video quality. Serra do Mar's towns then started to be served by a network of coaxial cables that delivered TV signals to homes, after receiving these signals by antennas put on the top of the mountain. The homes that have chosen to receive those signals had to pay a monthly fee, much alike today in modern pay-TV services.

Only in the 80's the first effective pay-TV transmissions took place, using the UHF band and a codified channel. Such services were the embryo of current pay-TV services, whose regulation began in 1989.

In 1991, major communications groups like Globo, Abril, RBS and Algar entered this sector, investing in new technologies (including pay-TV through satellite, in C band).

With the promulgation of the Cable TV Law (Law n. º 8.977/95), former DISTV permitions (former cable TV licenses) became concessions and government decided that new concessions should be bid. The promulgation of the General Telecommunications Law, in 1997, created Anatel (Telecommunications National Agency) designed to perform the role of regulatory body in every telecommunications service - including pay-TV - and has been continuing the biddings for expanding services.

Since the regulatory phase, the industry has presented an oscillatory performance, in 1999 it suffered a great crunch due to Real[4] depreciation (not yet fully absorbed), which fiercely increased the costs of pay-TV companies (that depends on imported inputs, namely TV programs). The main technology standards in pay-TV are used in Brazil, such as cable, MMDS and DTH (DBS).

Concerning the reaching, it's estimated that in 2002 there were 3,48 million subscriptions, less than the 3,53 million in 2001 (see the Pay TV subscribers evolution in Figure 2). This figure represents about 8% of the 40 million homes reached by free TV and a public estimated in 12,4 million people. However, even with this decline on the subscribers' base, pay-TV advertising has been growing over the last years - 28% in 2002, against only 5,9% in broadcasting. These figures can be cleared, perhaps, by the fact that pay-TV subscribers are most within classes A and B, with higher purchasing power, and probably because the advertisers and advertising agencies have been increasingly aware of the segmented nature of pay-TV, in comparison to free-to-air TV. Even though, pay-TV holds a minimal share of total advertisement budget - nearly 2%.

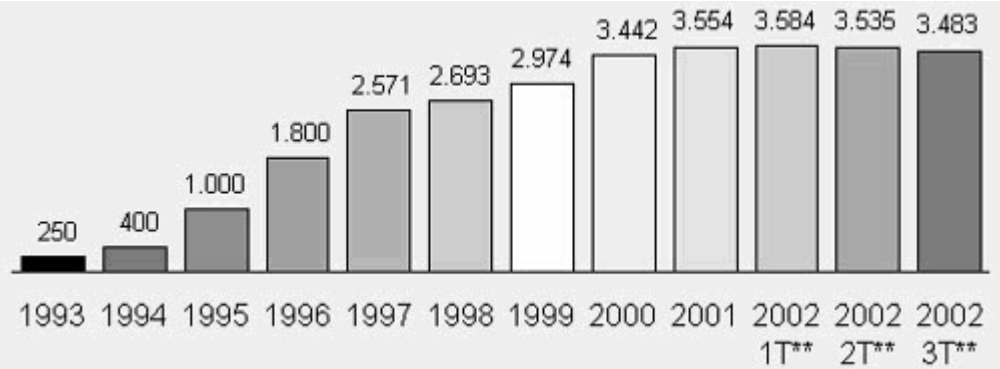


Figure 2 – Pay TV Subscribers Evolution

Source: ABTA.

Over the last two years, 10 merger cases involving pay-TV market have been submitted to the SBDC. The most complex ones, that have triggered some kind of restriction from SEAE, are the cases related to broadcasting rights for sports events, as it will be shown in the second part of this presentation.

3. Case Study

In this section, a detailed description of the most interesting case analyzed by SEAE last years, took place in pay TV market, is showed to illustrate how SEAE handle with antitrust issues in that industry.

3.1 Globosat/ESPN Brasil Case[5]

3.1.1 The Parties and the Operation

Over the last years, the most important case in the Brazilian media market was the undertaking of ESPN Brasil 25%' shares by Globosat. Both companies are part of major media groups in Brazil, respectively ESPN and Globo. This acquisition took place at the end of 2000.

The Globo Group - the main media player in Brazil - operates on most media, such as broadcasting (free-to-air TV), pay TV, radio stations, newspapers, magazines, Internet, etc. In the pay TV market, Globo holds interests in some companies, many of them operate within the pay TV market's value chain. Some examples are: pay TV service providers (on cable, MMDS and DBS), program supplier/content provider (Globosat, the main supplier of local TV programs for pay TV in Brazil) and pay TV channels' buyer association (Net Brasil)[6], also a pay TV service providers' franchiser. Globo had also acquired (via Globosat) broadcasting rights in pay TV for national/premium sporting events and other kinds of pay-TV drivers (such as first window films).

Globosat produces and supplies several pay-TV channels of different kinds to the Brazilian pay TV market, for example Sportv (a "premium" or "national" sports channel)[7] and the Telecine channels (the local main competitors of HBO). It must be noticed that the Globo Group holds a dominant presence in all markets mentioned above. Besides, Globo receives 75% of the whole broadcasting advertising expenditures, reaching 99,84% of the Brazilian territory.[8]

ESPN Inc. (a subsidiary of The Walt Disney Company, which is part of ABC Group Inc.) is a major worldwide supplier of sports channels. In Brazil, such Group supplies two pay-TV sports channels: ESPN International, focused on international sporting events, and ESPN Brasil, focused on both national sporting events and journalism. The latter was, before the acquisition mentioned above, the main competitor of Globosat's Sportv in the Brazilian pay TV markets for distribution of sports channels and for acquisition of broadcasting rights for "premium" sporting events, specially soccer matches.

20. Despite the minor subscription of ESPN Brasil shares by Globosat (25%), this company would play a decisive role with respect to ESPN Brasil management. In addition, Globosat would be able to exclude its single rival within the Brazilian market for acquisition of broadcasting rights for "premium" sports events. It's important to point out that, in the last years, ESPN Brasil channel was losing its main broadcasting rights to Globosat.[9] Besides, ESPN Brasil was not distributed by the Globo Group' affiliated pay-TV service providers, which harmed ESPN Brasil's ability to reach the minimum scale needed to maintain its operations.

3.1.2 The Relevant Markets Definition

3.1.2.1 The Relevant Markets – Product Dimension

The relevant market definition in this case was a significant challenge for SEAE, given its lack of expertise in antitrust analysis in pay-TV markets at that time. The parties defined the relevant market as the "passive visual entertainment market", which would include pay-TV, broadcasting, home video/DVD and cinema. SEAE considered this definition too broad and started working on a more accurate delineation.

3.1.2.1.1 The Market of Premium (National) Sport Channels for Pay TV

Aiming at the relevant market definition (in its product dimension), SEAE first checked out how the different actors involved in pay-TV markets (service providers, program suppliers and so on) related to each other. After establishing that the commercial relationship occurred among themselves (and not

between them and pay-TV subscribers directly), SEAE concluded that the relevant market should be restricted to the pay-TV market, mainly because of the commercial relations between program suppliers and service providers and the differences among the other forms of "passive visual entertainment market".

In order to delimit the precise boundaries of the relevant market in this case, some classical antitrust tools - such as the hypothetical monopolist test - were used to verify the substitution among all kinds of pay TV channels. Many pay-TV companies were consulted by SEAE and the international literature on antitrust in pay-TV markets (consisting of books, papers and European Commission and FTC published decisions) was extensively reviewed.

Hence, SEAE concluded that: (1) broadcasting and pay-TV are different, but not substitute services - they can rather be regarded as complementary to each other, as attested by most international authorities[10]; (2) different kinds of channels (e.g., sports channels and family channels) cannot be regarded as substitutes (it holds true mainly in the case of "essential" channels - pay-TV drivers -, such as sports and movie channels); and (3) sports channels focused on international events cannot be regarded as good substitutes to sports channels focused on national events.

With respect to the first conclusion, three main aspects differentiate broadcasting from pay-TV market: (i) the way each one receives its revenues (advertising in the case of broadcasting market and monthly subscriptions for pay-TV market)[11]; (ii) the greater diversity of content offered by pay-TV, which can be segmented into several kinds of programming (sports, movies, comics, music, etc.); and (iii) the superior quality of image and sound offered by pay-TV (mainly through the DBS technology).

Regarding to the second conclusion, its sources were surveys on pay-TV service providers, subscribers and program suppliers, CADE previous decisions, the fact that sport channels fall within the category of "pay-TV drivers", the lack of a regulation on content supply for pay-TV market and the huge differences among prices of each kind of channel. These sources led SEAE to segment pay-TV market into several markets according to the content of each channel.

Concerning the third conclusion, the cross elasticity of demand between national sports channels and international sports channels suggests that they constitute distinct markets. As a conclusion, SEAE defined the relevant product market of this case as the market for "national sports pay-TV channels" (or premium sports channels for pay TV market).

3.1.2.1.2 The Market for the Acquisition of Broadcasting Rights in Pay TV for Sporting Events

Due to the fact that both Globosat and ESPN Brasil held operations in the market for acquisition of broadcasting rights in Pay-TV for national/premium sporting events, this one was also defined as a relevant market by SEAE. Before the acquisition there was a strong competition between the parties for the best broadcasting rights for national sporting events (mainly soccer matches). In fact, the parties usually had competed for this market.

For a better definition, SEAE tried to contact the major players of this market, i.e., the holders of broadcasting rights (the most important Brazilian sports leagues) and the main pay-TV service providers.

Three questions emerged: (i) the differences between broadcasting rights for sporting events and other kinds of broadcasting rights; (ii) the differences between pay-TV and broadcasting "windows"; (iii) the differences between national and international broadcasting rights for sporting events.

Concerning the first question, it seems clear that broadcasting rights for sporting events cannot be considered as substitutes to non-sporting broadcasting rights. Cost structures are totally different, reflecting

different prices. Besides, under the demand point of view, a program supplier that produces a sport channel would never see any other kind of content as a good substitute, for it would deviate from its core business.

In regard to the second question, both buyers and sellers of sporting broadcasting rights pointed out that these rights were sold separately for broadcasting window (for example, for free-to-air, pay TV or pay-per-view). The prices charged by these rights display great variation depending on the means of distribution. As a consequence, broadcasting (free-to-air TV) in Brazil pays much more for these rights than pay-TV channels. Even within this market, there is a distinction between rights sold to pay-TV channels and rights sold to "pay-per-view". Under the point of view of rights sellers, the different means of communications constitute complementary revenues instead of substitute ones, so that they are not part of the same relevant market.

Concerning the third question, SEAE decided to separate broadcasting rights for national sporting events from international ones. The main reason was the greater public-attraction offered by a national (or "premium") sport event, compared to international sports events. For instance, a channel that broadcasts (live) games of a Brazilian soccer championship holds stronger attraction on potential pay TV subscribers than a channel that broadcasts games of the German soccer championship.

Indeed, these different abilities to attract subscribers translated into different prices charged by these broadcasting rights. The market segmentation for broadcasting rights according the sport and its "attraction power" is also adopted by the European Commission, who divides this relevant market according to the event. However, SEAE didn't divide this market into event or kind of sport because both Globosat and ESPN Brasil represented this whole relevant market. The likelihood of abuse of Globosat's market power would be even higher if we had further segmented this relevant market into more restrict ones, such as the Brazilian football championship or the Brazilian basketball championship broadcasting rights.

3.1.2.2 The Relevant Markets – Geographical Dimension

Finally, concerning the geographic dimension of the defined relevant markets and given the definitions of the product aspect, there was no other definition than the national territory. As SEAE defined the first market as the "national sporting pay-TV channels", there was no possibility of substitution for a foreign channel, mainly because there are no channels worldwide with these characteristics. As for the second market ("market for acquisition of broadcasting rights in Pay-TV for national/premium sporting events"), SEAE has also defined the relevant geographic market as the national territory, mainly because these broadcasting rights are usually acquired for some specific region and because broadcasting rights holders regard the revenues from international buyers as complementary instead of substitute. In fact, prices paid for these rights by local buyers are much higher than the prices paid by an international buyer interested in broadcasting that event to another country. SEAE's relevant market definitions are in accordance with several international decisions on this issue.[12]

3.1.3 The Dominance Analysis and the Barriers to Entry in Both Relevant Markets

As the acquisition was concluded, Globosat was in a monopolistic position on the "premium sports channels for Pay TV" market and in a monopsonic position in the market for acquisition of broadcasting rights in Pay-TV for national/premium sporting events. Given the likelihood that Globosat could successfully exercise market power, SEAE began to analyze the entry alternatives in each relevant market. The Brazilian antitrust authorities examine the timeliness, likelihood and sufficiency of a potential entrant. If the entry is easy and prompt, the acquisition/merger raises no antitrust concern.[13]

In the presented case some barriers to entry were detected in each relevant market. The most important were: (i) high sunk costs related to advertising of a new premium sport channel; (ii) difficult access to national ("premium") content; (iii) difficult access to the distribution channels needed for the new channel to reach the minimum scales for its operation; (iv) high costs associated to the broadcasting rights for national sporting events; and (v) the degree of vertical integration in the Brazilian pay-TV market.

In regard to the sunk costs of advertising, a new sport channel would spend more than the amount spent in advertising by Sportv and ESPN Brasil, since these ones had already consolidated their brands. The new entrant would have do make itself known by the Brazilian pay TV subscribers. It is important to note that even the amount spent in advertising by Sportv and ESPN just to "maintain" their brands, in the last years, was already a high share of their respective budgets. SEAE concluded therefore that a new entrant in this market would have more difficulties to "sell" its brand to the Brazilian pay TV subscribers.

The second barrier mentioned above concerns the access to national ("premium") sport content, which would allow a new entrant to launch a premium sport channel. Undoubtedly, this is one of the main barriers to entry for a new national sport channel in Brazil. Nowadays, every broadcasting rights related to national sport events is hold by Globosat or by ESPN Brasil, most of which are being assured by long-term contracts and English clauses.[14] SEAE did not realize any possibility of easing the access to premium content. Actually, international antitrust authorities usually mention this barrier to entry on their decisions concerning this issue as the most important one. The literature also points out the access to premium content as essential to raise the likelihood of new entrants.

Regarding the access to the pay-TV service providers platforms (essential players in a hypothetical launch of a new national sport channel), SEAE concluded that this is one of the main barriers to entry in the market of pay TV premium sports channels.

At the time of the acquisition, the Globo Group held about 63% of the Brazilian market of pay-TV service providers. TV Globo (Globo Group's free-to-air broadcaster) held about 75% of the market for broadcasting advertising, reaching almost every Brazilian home, as well as high audience rates in almost every time of the day. This dominant position gives Globo a strong buyer power when acquiring broadcasting rights for premium sport events. The refusal of the pay TV service providers affiliated to Globo Group to distribute a new premium sport channel made it difficult for a new entrant the minimum viable scale to operate in the Brazilian market (situation attested by some competitors of Globo). The very evolution of Brazilian pay-TV market reinforces this assessment.

Due to this market configuration, no other program supplier has succeeded in launching a new premium sport channel in Brazil (except ESPN Brasil and Globosat). Recently, the sport channel PSN (Panamerican Sports Network) - the only one close to ESPN Brasil and Globosat in terms of quality and attractiveness, was distributed in Brazil by a great share of the pay-TV service providers, including the ones affiliated to Net Brasil (despite not transmitting any national sport content). However, PSN was distributed by Globo Group service providers as a "*à la carte*" channel.[15]

It should be noticed that PSN didn't compete, at any moment, for national sport content with Globosat and ESPN Brasil, although that channel held some attractive broadcasting rights for international sport events (such as Libertadores da America Cup - a South-American football championship with the presence of some Brazilian teams). PSN didn't survive for a long time and cancelled its activities in mid-2002. Another potential competitor that has never tried to enter Brazil is Fox Sports. This company distributes its sport channel to the whole Latin America.[16] Lately, another pay-TV sport channel was launched in Brazil - Bandsports. This channel doesn't provide premium content and informed SEAE that it would not follow Sportv and ESPN Brazil layout. SEAE therefore did not consider Bandsports as a player

of the relevant market as defined above and, as such, it would not be able to reduce the probability of market power exercise by the parties.

The other barriers to entry mentioned above (high costs of broadcasting rights and degree of vertical integration on Brazilian pay-TV market) were related to the barriers explained above.

The high costs of broadcasting rights for national sports events arise from the buyer power hold by Globo Group, which relates to Globo's dominant position in the market for pay-TV service providers and in the market for broadcasting. In Brazil, there was no pay-TV player able to compete with Globo in the market for acquisition of broadcasting rights in Pay-TV for national/premium sporting events. For this reason, the high costs of broadcasting rights for premium content were considered as entry barriers.[17]

Finally, the high degree of vertical integration of the Brazilian pay-TV market relates to the dominant presence of the Globo Group in every level of the vertical chain in that market. It is worth noting that the Globo Group, at the time of the acquisition, held about 63% of the Brazilian pay-TV service providers market, what means that the Group had a dominant position on both relevant markets of this analysis. This vertical integration means economies of scale and of scope that can be considered important barriers to entry.

Given all these barriers to entry, SEAE conducted an analysis of the figures provided by the parties, such as their revenues in the last five years, quantity of subscribers per year, expenses with premium content and total expenses, and compared these figures to the sales opportunities post-merger. The conclusion was that an effective entry in the Brazilian market for national sports pay-TV channels[18] could not be considered a likely event in the short run.

The barriers to entry previously pointed out are also a reality in the market for acquisition of broadcasting rights in Pay-TV for national/premium sporting events. Certainly, no company would enter this market to compete with Globo without being assured the means of distribution for these broadcasting rights. However, there was no other national sport pay-TV channel, except ESPN Brasil and Sport. Thus, SEAE concluded that the entry in this market was also unlikely.

The analysis made clear that the exercise of market power by Globosat would be both possible and likely after the acquisition. Moreover, there were risks associated to the vertical integration of Globo Group in the Brazilian pay-TV market. The acquisition enhanced Globo's Group dominant position in the upstream market (premium sports channels for pay-TV), reaching a monopolist status. As a consequence, this group has assured what antitrust literature calls "bottleneck position". From this position, Globo could deny access to essential inputs to its competitors on the downstream market (pay-TV service providers).[19] Another possibility, which will be discussed later, relates to the foreclosure of the upstream market, meaning that Globo could deny distributing channels that compete to its own channels. Given Globo's dominant presence in the downstream market (63% of market share), a competitor content provider could be unable to find alternative means of distribution that provided the minimum scale needed.

Besides all the questions previously discussed, the contracts among Globosat, ESPN Brasil and Net Brasil included many clauses considered anti-competitive by SEAE. Unfortunately, given the confidential nature of these documents, its details must not be presented in this paper. In general, it can be said that these clauses reinforced Globosat's monopsonic position in the market for acquisition of broadcasting rights for premium sports events in Pay TV, thus increasing the barrier to entry related to the access to essential inputs.

Despite all the concerns raised throughout this paper, SEAE tried to assess the potential economic efficiencies generated by the acquisition in order to compare these efficiencies to the costs on the

economic welfare.[20] The parties were asked to present the efficiencies arising from the merger, but they denied to prove that the liquid effect of the operation on the economic welfare would not be negative. Instead, they tried to challenge the relevant market definition adopted by SEAE, defending their own definition ("passive visual entertainment market").

3.1.4 The Approval Conditions

After internal discussions, SEAE suggested the following restrictions (which would neutralize the likelihood of abuse of marker power by Globosat):

a) Forbidding ESPN from selling ESPN Brasil channel with exclusivity to pay-TV service providers affiliated to Globo Group, for a period of time not inferior to five years which could be postponed by the antitrust administrative tribunal (CADE) after assessing the competition aspects of the Brazilian pay-TV market.

b) Compelling ESPN to sell ESPN Brasil channel to any player who wishes to distribute this channel in Brazil, in non-discriminatory conditions. In order to reduce the monitoring costs of this decision, every contract signed (including the ones already signed in past and the ones to be signed in the next five years) between ESPN Brasil and Globo Group affiliates (Net Brasil) should become public and be submitted to the antitrust authority.

(c) Forbidding for ten years (that CADE could postpone), tied sales of channels (tying) by both Globosat and ESPN Brazil.

(d) Precluding two specific clauses from the shareholders agreement, given its anti-competitive nature (as said earlier, the precise content of these clauses cannot be put here, given the confidential nature of the document).

(e) Precluding the exclusivity clauses from every ongoing contract related to broadcasting rights in pay TV for national sports events, both by Globosat and ESPN Brasil. With this restriction, SEAE expected to reduce the main barriers to entry in the premium sports channels market, given the trend of decrease in prices charged by those rights.

(f) Besides these restrictions, SEAE suggested SDE to start an administrative investigation (an anti-competitive conduct case) against Net Brasil and Globosat, in order to assess: 1) if the deny of Net Brasil to distribute sports channels that compete to Sportv and ESPN Brasil could be regarded as an infringement to the Competition Law (Law nº 8.884/94), given its dominant position on Brazilian pay-TV service providers market; and 2) if the acquisition by Globosat of many broadcasting rights related to national sports events with clauses establishing exclusivity for pay-TV and with the so-called "English clauses" could be regarded as an infringement to the Competition Law.

4. Conclusions

The undertaking of ESPN Brazil by Globosat, plus the joint venture established between Globosat, ESPN Inc. and Fox Sports who later withdraw from the agreement were the first cases analyzed by the Brazilian antitrust authorities regarding the market of content distribution for pay-TV. In 2001, CADE had analyzed an anti-competitive conduct behavior related to exclusive content distribution of a pay-TV service provider operating DBS technology. Broadly speaking, Directv (DBS pay-TV service provider) denounced TV Globo (the biggest free-to-air broadcaster in Brazil) for abusing its dominant

position in this market, refusing to distribute its signals to Directv and selling them exclusively to Sky, which was Directv's main competitor in Brazilian DBS pay-TV market and part of Globo Group.

However, CADE's analysis was too centered on legal aspects, given its lack of expertise in dealing with pay-TV markets at that time. This case was also analyzed by Anatel - Brazilian regulatory authority on telecommunications markets.[21] Thus, although the CADE's Commissioner in charge of this case had accepted and recognized Directv's complaints as valid and fair, no other Commissioner supported him, which led to the rejection of the complaint by the Tribunal.

From these first experiences, Brazilian antitrust authorities - and specially SEAE - have been trying to increase their knowledge and expertise on media mergers. At the end of 2001, a sub-coordination of media and digital convergence was created inside the General-Coordination of Services and Commerce. This sub-coordination, however, is still in its early stages. Media mergers are still analyzed according to the same classical rules, practices and tools used in regular antitrust analysis. There are no specific procedures to antitrust analysis in media markets, although SEAE contemplates such possibility in the near future.

At the present moment, SEAE is analyzing two anti-competitive conduct cases. The first case was initiated by Neo TV against Globosat. The former agent consist of pay-TV service providers non-affiliated to Globo Group that accuses Globosat of denying to sell Sportv (its "premium" sports channel) to any pay TV service provider that is not affiliated to Globo Group. The second case, broader than the first one, is moved by CADE and aim at investigating both the market of joint selling of broadcasting rights for sporting events and of acquisition for these rights (specially the exclusivity clauses often contained in the contracts signed up by the players of this market).

The main characteristic of Brazilian pay-TV market is the vertically integrated structure of its major player, Globo Group, which acts in every level of the pay TV value chain. This vertical integration has led to some practices that are currently under the analysis of the Brazilian antitrust authorities. These practices includes: (i) Globosat's refusal to sell its premium channels to its competitors; (ii) Globosat's attempt to put itself in a monopsonic position in the market for broadcasting rights for premium sporting events; and (iii) Globosat's attempt to leverage its market power from one market to another. These problems are worsened by the lack of a regulation on these markets in Brazil. [22] In its published decisions, SEAE has tried to keep the same competitive settlement existing before the mergers. In the administrative investigations under analysis, SEAE looks for solutions that minimize some possible anti-competitive conduct arising from the competition Brazilian model of the pay-TV market.

At the present, there are three law drafts under discussion at Brazilian National Congress, aiming at regulating the market for broadcasting rights for sporting events.[23] All these projects try to discipline the question related to exclusive broadcasting rights in that market. The Federal Government, through its Ministry of Communications, is also working on a new law concerning pay-TV and broadcasting.[24]

The Brazilian Association of Pay-TV Service Providers (ABTA)[25] presented, during its annual congress, a proposal for restructuring Brazilian pay-TV market, in October 2002. The new structure proposed, which establishes the end of overbuilding between cable and MMDS and the end of program exclusivity, might be a significant step towards the solution of most of Brazilian pay-TV conflicts. It is worth noting that these conflicts are mainly related to access to premium content. This project is still under internal discussions by ABTA members, given the conflicting interests.

Brazilian antitrust authorities still do not have much expertise in analyzing media markets. Nevertheless, this expertise has been continuously improved, and foreign experience on this issue has helped Brazil to settle a specific methodology for analyzing media markets mergers. Experience derived

from Globosat/ESPN cases has strongly reinforced SEAE skills on defending consumer welfare in this industry. SEAE has tried to minimize the anti-competitive effects originated by these mergers, avoiding a gatekeeper in the market for distribution of premium sports channels to pay-TV and thus assuring some diversity in the sporting content in Brazil

Brazilian antitrust authorities must assess, in the following months, the acquisition of the second biggest pay TV provider by DBS technology in Brazil, by another important shareholder of the biggest player. This operation is probably going to represent the most important case ever analysed by Brazilian antitrust authorities in the media industry. The recent international expertise, such as the Echostar/Directv case in the USA (by DOJ's Antitrust Division and FCC), Telepiú/Stream in Italy and Sogecable/Via Digital in Spain, certainly will contribute to the assessment of the antitrust effects of such kind of transaction.

NOTES

1. Text prepared by Luis Fernando Rigato Vasconcellos (Deputy Secretary at the Secretariat for Economic Monitoring, Ministry of Finance), Marcelo de Matos Ramos (General Coordinator for Commerce and Services Affairs), Mário Sérgio Rocha Gordilho Júnior (Coordinator for Media and Digital Convergence Affairs), Thiago Veiga Marzagão and Andrea Pereira Macera (Technical Assistants).

2. Source: Rede Alcar and Grupo de Mídia de São Paulo

3. Sources: ABTA e Grupo de Mídia de São Paulo.

4. Real is the Brazilian currency.

5. It must be stressed that this case was not decided by CADE until the conclusion of this paper.

6. Net Brasil is active, in Brazil, representing all Globo Group's affiliated pay TV service providers in acquiring content, from all content providers around the world. Net Brasil also works as a kind of "franchiser". The Globo Group's affiliated pay TV service providers acquire programming (channels) through Net Brasil, uses its brand and its marketing. It must be stressed that a great number of affiliated pay TV service providers belong to Globo Group.

7. In this paper, a "premium" or "national" sport channel must be understood as a channel which broadcasts the main national sporting events, i.e., events with the participation of Brazilian teams or athletes and that are more attractive for the Brazilian pay TV subscriber. These channels are sold within the programming packages, and not separately. In the case of Sport, this channel holds exclusive rights to broadcast, in pay TV, all main Brazilian sports events, like the Brazilian Football Championship, Brazil's Soccer Cup, and main Regional Football Championships. Besides, it has the exclusivity for main international sports events with the participation of Brazilian athletes, like Fifa's World Cup, main tennis tournaments and Formula 1. This definition is necessary because "national" or "premium" sports channels have more attractiveness than other sports channels which don't have broadcasting rights for relevant sport events to Brazilians subscribers. This classification was also made, by Globosat and ESPN Brasil, in their contracts, in order to differentiate "national" or "premium" to "international" sports channels.

8. The Brazilian pay TV market is difficult to develop because there is a strong market for free TV in Brazil. The strength of the Brazilian free-to-air television contributes to hinder the penetration of pay TV services that count with a mere 8% stake among households with TV sets.

9. It is worth to point out that until 1997 ESPN Brasil and one of its owners at that moment, TVA, a pay TV service provider and main Globo Group's rival in this market, had exclusivity in Pay TV to broadcast the Brazilian Football Championship, the main sport event in Brazil. After an intense juridical battle, the Brazilian Soccer Confederation (CBF) broke unilaterally the contract with ESPN Brasil and TVA concerning broadcasting rights for the Brazilian Football Championship. CBF paid a fine to ESPN Brasil and TVA and immediately sold those broadcasting rights until 2004 with exclusivity in pay TV, free-to-air and pay-per-view to Globosat and Globo TV. This contractual disruption caused the divestiture of TVA's participation in ESPN Brasil. Since then, ESPN Brasil hasn't competed against Globosat for the main broadcasting rights in pay TV. Nowadays, Globosat has all the main broadcasting rights for national sporting events and ESPN Brasil only shares some of these rights with Globosat, by sublicensing. But Globosat only sublicenses those rights that are less attractive for the Brazilian subscribers.

10. As samples, we can mention the following cases (analyzed by the European Comission over the last years) where free TV and pay-TV were defined as distinct markets: B Sky B / Kirch Pay TV (21/03/2000); ABC / Generale Des Eaux / Canal + / W.H. Smith TV (10/09/91); NC / Canal + / CDPQ / Bank America (03/12/98); Bertelsmann / News International / Vox (06/09/94); Vivendi / Canal + / Seagram (13/10/2000).

11. This difference is most prominent in Brazil, where free TV is quite strong and whose quality is regarded in general as reasonable by the consumers. Thus, pay-TV consumer demands mainly the greater diversity of content and the superior sound and video quality offered by pay-TV (in comparison to broadcasting). Therefore, the complementary feature of these services is most prominent in Brazil than in other countries with a free TV less spread and with less quality.

12. For more information, see the definition of the relevant geographic market in three recent cases analyzed by the European Comission: case n.º COMP/JV.37 (21/03/2000) – B Sky B/Kirch Pay TV; case n.º COMP/M.2483 (13/11/2001) – Canal+/RTL/GJCD; e case n.º 37.576 (19/04/2001) – *UEFA's broadcast regulations*.

13. Entry is regarded as timely when there is a high probability of happening within two years from initial planning to significant market impact. Entry is regarded as likely when the minimum viable scale is lesser than the likely sales opportunity available to entrants. Entry is regarded as sufficient when the tangible and intangible assets required for entry are adequately available for entrants to respond fully to their sales opportunities.

14. "English clause" is known as a clause that allows the actual buyer, at the moment of the re-negotiation of a contract of broadcasting rights with the seller, to match the bid of its competitors. This kind of clause might distort competition and make the reallocation of the rights at the expiry of the exclusive contracts nearly impossible.

15. Subscribers of Globo Group's affiliated pay TV service providers had to pay an extra fee and to buy the whole programming pack (which included Sportv and ESPN Basil) if they wanted to receive PSN signal on their TV sets. Therefore, there wasn't any possibility of buying only PSN and, thus, there was no real competition between PSN and Sportv/ESPN Brasil.

16. In late 2000, Fox Sports tried to enter the Brazilian pay-TV market through a joint venture with Globosat and ESPN International. In this operation, a new sports channel for distribution in Brazil - called ESPN Fox Sports, focused on international sporting events - would be created. This channel was intended to substitute ESPN International, currently distributed in Brazil and with the same program focus. It is worth to note that the new channel would be complementary to Sportv (Globosat) and to ESPN Brasil (Globosat/ESPN) or, put in other words, it wouldn't directly compete to them in the same relevant market. However, after the analysis made by SEAE suggesting the approval only under certain restrictive conditions, the parties aborted the merger and the case was filed.

17. The costs of acquiring broadcasting for sporting rights have been considered by Sportv/ESPN Brasil' potential competitors as the main ones to the launch of a new "premium" sports channel. Even Sportv and ESPN/Brasil have had, over the last years, high costs in acquiring broadcasting sporting rights when comparing to their revenues in the same period. In some cases, the programming provider responsible for the channel spent over 50% of its revenue in the same year.

18. Before its acquisition ESPN Brasil Channel wasn't distributed by Net Brasil and it was not profitable. After the acquisition, Net Brasil started to distribute ESPN Brasil, and it has doubled its subscribers. Even so, this channel hasn't reached its break even point yet.

19. This is already a reality concerning Sportv, distributed only by Globo Group's pay TV service providers since its launch.

20. Following mainly the North-American doctrine, Brazilian antitrust authorities consider subject to approval the mergers whose specific economics efficiencies (i.e., which could not be triggered by any other means) offset its costs.

21. According to the Telecommunications General Law (Law No. 9.472/97), antitrust analysis involving pay-TV service providers, a regulated market, fall under the exclusive sphere of action of Anatel. Therefore, SEAE and SDE didn't act in this case.

22. In Brazil - unlike other countries -, there are no rules regarding cross ownership in media markets, limitations to their market shares (assessed in terms of audience, for example), and limitations to exclusive broadcasting rights or to contracts containing exclusivity clauses between content suppliers and pay-TV service providers etc.

23. Bills n.º 4.352/2001, 4.932/2001 e 5.865/2001, whose authorship is due respectively to the following representatives: Jovair Arantes; José Rocha and Augusto Franco; and Walter Pinheiro, Gilmar Machado and others.

24. This Law is known as Mass Communication General Law. The previous government ended in 2002 has produced a draft of this law (which is currently being analyzed by the Ministry of Communications), which creates new rules for content distribution (regulating, for instance, the issues concerning cross ownership of means of communications and exclusivity clauses).

25. Several data about the Brazilian pay TV market, including the proposal for reorganization of competition model in this industry, are available at ABTA's website (www.abta.com.br).

CANADA

Introduction

The issues raised in the OECD's discussion paper of March 14th, 2003, are not new nor unique to any one country. In 1962, the United Kingdom's Royal Commission on the Press commented that:

> "Then it may be said - and said truly - that the proposal involves treating the newspaper industry differently from industry in general. The answer is that the public interest in relation to the newspaper industry is different. The discrimination is based on the proposition that freedom and variety in the expression of opinion and presentation of news is an element which does not enter into the conduct of other competitive industries and that it is of paramount public interest."[1]

Over the last four decades, the media industry has repeatedly been the focus of public debate in Canada[2]. Usually the catalyst for these debates have been a change in ownership that increases the level of concentration either within or across traditional media sectors. As with any merger, such changes in control are subject to review by the Competition Bureau (the "Bureau") under the merger provisions of the *Competition Act* (or its predecessor legislation, the *Combines Investigation Act*). Because these statutes have been the only pieces of Canadian legislation that allow for a review of the potential impact of such changes in ownership in the unregulated sectors of the media industry (most notably, the newspaper sector), it is to be expected that the conclusions of the Bureau have also often become the focus of public debate. Frequently, these commentaries have focussed on the perceived shortcomings in the Bureau's review, particularly the fact that the Bureau has focussed solely on the economic impact of a change in control and has not adopted a broader approach in its review.

These are views that have been expressed since the 1986 amendments to the *Competition Act* and ignore the efforts of the Bureau under the previous legislation. In that period, the Bureau considered the issue of editorial content and diversity of voice during its reviews of media mergers and, indeed, argued it directly during its presentation of the facts in some cases. As such, it is hoped that this paper will provide some insight into the experiences of the Bureau during that period and subsequently, following the amendments which established the current *Competition Act*.

The following paper is divided into four sections. The first section addresses the Bureau's work in reviewing media mergers prior to the 1986 amendments to the *Combines Investigation Act*; the second section reviews the Bureau's approach to media mergers since the 1986 amendments; the third section provides some commentary based on the Bureau's experiences on the specific issues raised in the OECD's discussion paper, and; the fourth section will set out some brief conclusions.

1. Section I: The Combines Investigation Act

Prior to 1986, the Bureau enforced the merger and monopoly provisions as set out in the *Combines Investigation Act*. Under that legislation, the definition of a merger and a monopoly were set out under section 2 and the offence was set out in section 33. Section 33 was a criminal offence, and as such, the Bureau was required to satisfy the criminal burden of proof, that being "unreasonable doubt", before it could obtain a conviction under this provision. The second was that both the merger and the monopoly provisions required that the Bureau demonstrate that either the merger or the monopoly was or was likely

to have a detrimental affect against the interest of the public. The burden of proof issue was a significant hurdle for the Bureau when pursuing these cases. As well, the question of what constituted public detriment was an equally difficult challenge.

There were two prosecutions involving the merger and monopoly provision of the *Combines Investigation Act* in the newspaper industry between 1960 and 1986[3]. As well, there were three reports issued by the Restrictive Trade Practices Commission[4] (the "RTPC") concerning the newspaper industry. Of these various files, two are of interest because broad questions of detriment to the public were raised during the consideration of the file.

The RTPC investigation into the supply of newspapers in Vancouver was prompted by the creation of Pacific Press Limited in 1957, following an agreement between Sun Publishing Company Ltd. and The Southam Company Ltd., which included a joint production and revenue sharing agreement. Following its creation, Pacific Press controlled all three daily newspapers in the Vancouver market - the Herald, the Province and the Sun. It closed the Herald, converted the Province from an evening to a morning paper and left the Sun as the only evening paper in the market. The two partners in Pacific Press agreed that Southam should control the appointment of the Province's editorial board and Sun Publishing Company should control the editorial board of the Sun. In its final report, one of the issues addressed by the RTPC was the detriment to the public that resulted from the lessening of diversified reporting of events. It noted that:

> "The conduct of our affairs in a democratic manner both locally and nationally is dependent upon the formation of public opinion. If the public cannot get the significant facts about what is going on, if it cannot get them sorted out in a significant way, if it is not enlightened by discussion that points out the possible consequences of the alternative courses of action before the community, too many opinions will be ill informed and muddled and likely to be temporary and unstable. If well-informed public opinion is an essential of sound public policy then the channels through which information flows to the members of the public have an importance which cannot be over-emphasized."[5]

The RTPC concluded that public detriment had resulted from the formation of Pacific Press but it recognized that some protection for independent editorial comment remained as a result of the arrangement whereby each of the two owners independently controlled the appointment of the two editorial boards. As a result, the ability to obtain a conviction under the *Combines Investigation Act* was seen as unlikely. In the end, the owners of Pacific Press gave written undertakings to the Director of Investigation and Research (as the Commissioner of Competition was then called) to not make further alterations to their agreement without the prior approval of the Director.

The other case that addresses the issues being considered here is the case of R. v. K.C. Irving, Ltd. et al[6]. Following a series of acquisitions that spanned the period between 1948 and 1971, the Irving family of New Brunswick acquired all five English-language newspapers in the province of New Brunswick. This resulted in the laying of charges under both the merger and the monopoly provisions of the *Combines Investigation Act* in 1972. During the trial, the Crown argued that diversity of voice was an issue which should be considered when determining whether a merger was likely to result in a lessening of competition to the detriment or against the interest of the public.

In his findings at trial, Mr. Justice Robichaud found no evidence that K.C. Irving had influenced, or had attempted to influence, the publishers or editors of the newspapers he owned. Nonetheless, the judge acknowledged that as a result of the mergers whereby he acquired complete and total ownership of the newspapers in question, K.C. Irving was in a position to control editorial content and this position was sufficient to support a conviction. The Supreme Court of Canada, however, found that actual evidence of

detriment would be required and could not be presumed from solely a conclusion that there was a monopoly.

As noted above, the Bureau was involved in another major case involving the two leading newspaper chains in Canada that stemmed from a series of mergers that took place on the same day in 1980. The events that led to the laying of those charges[7] also led to the formation of The Royal Commission on Newspapers (also referred to within Canada as the Kent Commission). The Royal Commission was given the task of inquiring "generally into the newspaper industry in Canada" with a view to recommending a "better course for newspapers in Canada; to recommend whether law or policy should be different for the future."[8] It published its findings in 1981, drawing a number of conclusions and making a series of recommendations. Among those conclusions was the following observation:

> It is the Commission's considered view, however, that competition laws, regardless of how strengthened, are simply inappropriate to the regulation of monopolies in the newspaper industry.
>
> The simple, inescapable fact is that newspapers are not like other business ventures. The public's interest in vigorous competition among newspapers is not one that can be quantified in any dollars-and-cents terms. It has to do with the number and quality of independent voices finding expression, voices undaunted and undiminished by dollar concerns."[9]

2. Section II: The *Competition Act*

In 1986, the *Combines Investigation Act* was substantially amended, resulting in the creation of the current *Competition Act*. As part of the amendments, new provisions were introduced addressing both the abuse of dominant position provisions as well as the merger provisions. The new legislation included for the first time a purpose clause. Section 1.1 of the *Act* states that:

> **1.1** The purpose of this *Act* is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

It is clear from the purpose clause that the intent of Parliament in passing this legislation was to promote economic competition within the Canadian economy. With respect to both the merger provisions and the abuse of dominance provisions, this was further emphasized by the fact that the new legislation removed the public detriment test from the legislation. It was replaced in both with a test that, in part, requires the Commissioner to demonstrate that a substantial lessening or prevention of competition is occurring or is likely to occur. This, in combination with the purpose clause, has prompted the Bureau to adopt a more rigorous and predictable approach in its reviews of mergers and of situations involving abuse (as demonstrated by the Bureau's Merger Enforcement Guidelines as well as its Enforcement Guidelines on the Abuse of Dominance Provisions, both of which clearly focus on the economic impact of a merger or an abuse situation).

The new legislation also moved both the merger provisions and the abuse of dominant position provisions from the criminal part to the civil part of the legislation, thereby lowering the burden of proof to the civil standard of balance of probabilities. The overall impact of these changes are significant - they allow the Bureau to focus specifically on a well defined concept (a substantial lessening or prevention of

competition) as compared to the previous standard (public detriment) which was vague and difficult to define. At the same time, the creation under the new legislation of the Competition Tribunal (which is the adjudicative body for matters involving the civil provisions of the *Competition Act*) was intended to provide a forum wherein judicial, economic and industry expertise could be combined in one panel when deciding the merits of merger cases.

As a result of the amendments, and those requiring notification of proposed mergers of a certain size, the Bureau has been very active reviewing mergers in the media sector. The focus of the Bureau's interest in merger review, however, has become much more focussed on economic consequences. In determining whether any possible prevention or lessening is substantial, the central question becomes whether the merging parties are able, or are likely able, to exercise a greater degree of market power following the transaction. In evaluating the question of market power of the merged firm, the focus is normally on price, i.e., would prices likely be higher than if the merger did not proceed? In newspaper mergers, the only product market in which the merged entity could attempt to profitably exercise market power or influence price is where there is a source of revenue generation, i.e., newspaper advertising or possibly circulation rates. Thus, the focus of the Bureau's examination has been on the economic effect a transaction will have on competition in advertising markets.

In 1990, the Director brought an application under the merger provisions of the *Competition Act* in respect of the acquisition of two community newspapers in the Vancouver area where Southam already owned the two daily newspapers. The Director concluded that the acquisition of two community newspapers resulted in a substantial lessening of competition in the print retail and print real estate advertising markets served by these papers. The Competition Tribunal held that community newspapers were not in the same product markets (the markets that were under consideration were retail advertising and real estate advertising) as daily newspapers and thus the acquisitions neither prevented nor lessened competition. The Supreme Court upheld the decision of the Tribunal on the basis of curial deference, indicating that as a matter of law, appellate courts should be very reluctant to overturn decisions of specialized tribunals. On real estate advertising, the Tribunal dismissed the Director's application with the exception of one small area where Southam owned all of the print outlets for real estate advertising. The Tribunal found, however, that it was necessary to fashion a remedy that included a much broader geographic market. This remedy was appealed unsuccessfully at all levels. Subsequently, as a result of negotiations with the parties, it was possible to implement a more focussed resolution.

Another series of cases that attract significant public attention were the various newspaper acquisitions by Hollinger Inc. in Canada during the 1990's. In May, 1996, the Director issued an Advance Ruling Certificate (ARC) with respect to the acquisition by Hollinger Inc. of 21.5 percent of the common shares of Southam Inc., indicating that he would not challenge the proposed increase in Hollinger's shareholding in Southam[10] to 41 percent. This transaction generated a great deal of media coverage, including numerous editorials about the number of newspapers now controlled by Hollinger. Many articles spoke of corporate concentration in the media, a decline in newspaper quality, interference in the editorial views of newspapers and a concomitant decrease in editorial diversity across Canada. However, the transaction did not result in the acquisition of any newspaper publications or other businesses in addition to those previously held by either party. As well, it did not increase the degree of overlap between Southam and Hollinger in any geographic area or market in Canada. The concerns expressed by the various media stories may have been valid social concerns but it was the view of the Director that the *Competition Act* did not provide a mandate to consider these factors and as a result, his decision was based solely on the economic impact of the proposed transaction.

Hollinger was again involved in another high profile merger review by the Bureau in 2000, when it decided to sell the majority of its Canadian newspapers to Canwest Global Communications, one of the three major television networks in Canada. The assets that were acquired included 11 daily newspapers,

146 community newspapers, a 50 percent share of *The National Post* (one of two national daily newspapers in Canada), as well as various Internet assets. During the same period, BCE Inc., the holding company of Canada's largest telecommunications provider (Bell Canada), acquired the CTV television network, and, shortly thereafter, a fifty percent interest in The Globe and Mail (the other national daily newspaper in Canada). In both cases, the rational for the transaction lay in the then commonly held business views regarding the importance of convergence between content and delivery in the ever expanding world of the Internet.

In both cases, the Bureau's review focussed on the economic issues associated with the acquisitions, and particularly the impact on advertisers. The Bureau concluded that there was no evidence at that time that the Internet or television was competing directly for the same type of retail advertising that makes up the majority of the advertising found in newspapers. As a result, the Bureau concluded that there was no evidence that either transaction would likely lead to a substantial lessening of competition in such markets.

However, the Bureau expressed competition concerns about that part of the Canwest/Hollinger transaction that related to a partnership between Canwest and The Globe and Mail in a business-oriented specialty television channel, Report on Business TV ("ROBTv"). The transaction would have resulted in a connection between the two principal national business newspapers in Canada. As a result of the Hollinger acquisition, The National Post, through its new affiliation with Canwest, would become linked with The Globe & Mail in ROBTv. As a result of both the Bureau's concerns and its own interests, Canwest entered into negotiations to terminate its partnership in ROBTv.

The Bureau has also taken an active role in reviewing mergers in other sectors of the media industry, particularly the broadcast sector. However, these reviews can become more complicated because the Canadian RadioTelevision and Telecommunications Commission (the "CRTC"), the Canadian broadcast and telecommunications regulator, also has jurisdiction in this area. Under the *Broadcasting Act,* the CRTC has the authority to review mergers in industries that are regulated by that statute and, under the *Telecommunications Act*, it has the authority to monitor company ownership as it may affect Canadian ownership and control. In order to address the overlapping jurisdictional issues, the Bureau and the CRTC entered into an Interface Agreement in 1999 in order to clearly define each organization's areas of responsibility (attached as Appendix A). Under the Interface Agreement, the CRTC has continued responsibility for technical issues related to interconnection and network access, and for promoting social policy goals in areas such as affordability, service in high-cost areas, broadcasting content, etc. Both agencies continue to have responsibility for the review of mergers. The Bureau's review of mergers is restricted to competition issues under the merger provisions of the *Competition Act* while the CRTC has a broader public interest mandate in the case of broadcasting mergers (in telecommunications, the CRTC's review is limited to ensuring Canadian control). Under the Agreement, the Bureau continues to exercise exclusive authority over such areas as conspiracy to lessen or prevent competition, bid rigging and resale price maintenance.

An example of the Bureau's work in the broadcasting sector arose in 2000, when the Bureau reviewed the proposed acquisition of Groupe Vidéotron by Quebecor. The acquisition, as initially structured, would have given Quebecor control of Canada's first and third largest French language television networks, TVA and TQS respectively. The Bureau concluded that competition would have been substantially reduced as a result, with Quebecor controlling more than half of all French-language television advertising revenues in the French speaking Province of Quebec. In light of this, Quebecor agreed to enter into a Consent Order with the Bureau before the Competition Tribunal in which it promised to sell its existing interests in TQS. At the same time, the transaction was also subject to review by the CRTC.

Another example of a merger involving the broadcasting sector was the more recent merger between two of Quebec's major radio networks. In 2001, the Bureau filed an application with the Competition Tribunal challenging the proposed acquisition by Astral Média Inc. of eight French language radio stations owned and operated by Télémédia in the Province of Québec and of the fifty percent interest held by Télémédia in Radiomédia. In its review, the Bureau determined that the proposed transaction was likely to prevent or lessen competition substantially in six relevant markets. Through the acquisition of Télémédia, Astral would have a near monopoly in French-language radio stations in four radio advertising markets (Hull/Ottawa, Sherbrooke, Trois-Rivières and Chicoutimi-Jonquière) and substantial control over French-language radio advertising markets in Montréal and Québec City. The Bureau concluded that radio advertising has some unique attributes which distinguish it from other forms of advertising and that control of all or most radio advertising in a given market could significantly raise prices. As in the Vidéotron/Quebecor file, the merger was reviewed by the CRTC, which subsequently gave its approval to the merger. The Bureau continued to have concerns about the competitive impact of the transaction following the CRTC decision. The substantive competition issues were resolved to the Bureau's satisfaction before it was heard by the Competition Tribunal. This resolution was then filed as a Consent Order with the Tribunal.

3. Section III: Selected Comments on the OECD Discussion Paper

Rather than addressing each of the OECD's question in turn, the following will provide a range of general comments on some of the key issues set out in the OECD's discussion paper.

Following the 1986 amendments, there was an increased emphasis placed on the Bureau's role to maintain and enhance competition in the Canadian marketplace. Staff at the Bureau have developed considerable expertise in assessing issues related to competition and are responsible for enforcing a modern and effective *Competition Act*. The Bureau has always been concerned about such issues as increased concentration, cross market mergers and ownership restrictions. However, our interests in these issues as they affect any industry, including the media, broadcasting and telecommunications industries, are strictly limited to their impact on the level of economic competition in the key relevant product markets. The Bureau recognizes that the Government has other policy objectives beyond competition, including cultural and social goals. As with any broad policy that affects economic markets, the challenge is to find approaches to these cultural and social goals which are efficient, effective and permit economic competition.

Freedom of expression encompasses the principle of an open marketplace of ideas and serves to maintain and strengthen democracy. Diversity of voices, however, is not an issue of economic competition and, consequently, does not fall within the purview of the Bureau's mandate, nor, in our view, should it fall within the mandate of competition law generally. As illustrated above, when the Bureau has tried to address this issue in a competition law environment, it has failed. This was primarily because of the difficulty of trying to find a quantifiable measure of editorial quality that allows for an economic assessment of the impact on competition.

This is not to say that these issues should not be subject to government policy and review. In our view, however, it is essential that the two areas - competition policy and social policy - be kept separate and should not become the responsibility of a single regulator. If they were combined under the authority of a single agency, the agency would too frequently be required to balance conflicting interests, resulting in unsatisfactory trade-offs for the parties, consumers and the industry as a whole. We believe that other venues are more appropriate for addressing the social policy concerns that can arise.

In Canada, this task is a natural adjunct to the CRTC's mandate to maintain and enhance Canadian culture. In this regard, we have publicly advocated that the CRTC's mandate should be amended

so that it clearly states that it has a responsibility to preserve a diversity of voices within Canada's broadcasting system, and its regulations should be consistent with, and foster the freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms. At the same time, we believe that the CRTC should develop objective measures of content-domination and apply regulations to the industry to preserve the diversity of voices, thereby providing clear guidance to the industry on its standards in a fashion similar to that which the Bureau provides on merger review.

As noted above, in terms of broadcast media mergers, currently both the CRTC and the Bureau possess the power to review and approve certain broadcasting transactions. We are in favour of a clear division of responsibilities and jurisdictions, such as is outlined in the interface agreement between the Bureau and the CRTC. The CRTC's review of proposed transactions should not attempt to duplicate the commercial review conducted by the Bureau, but should be focussed solely on the impact that a proposed merger would have on the attainment of core cultural objectives. In this way, the Bureau would deal with the consequences of the merger in terms of economic impact while the CRTC would deal with the consequences of the merger in terms of cultural values.

One useful example from the Canadian experience of a model for the integration of various public policy objectives into a single merger review framework exists under the *Investment Canada Act*. The purpose of this *Act* is "to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada". All investments in excess of a certain size or in certain industries (most notably for this paper, cultural industries) are reviewable. Authority for the review and approval of foreign investments related to cultural industries rests with the Minister of Canadian Heritage. Cultural industries include businesses involved in the publication, distribution or sale of books, magazines, periodicals and newspapers. Also covered are those involved in film and video recordings and audio and video music recordings.

In determining whether a proposed investment will result in a net benefit to Canada, various criteria are examined, including the effect on competition within any industry in Canada[11]. With respect to cultural industries, Heritage Canada has established additional criteria which are also included in the overall assessment[12]. It is the responsibility of the Competition Bureau to provide the government with the assessment on the impact of the investment on competition. This assessment, whether it is positive, neutral or negative, is then incorporated into the overall assessment of the net impact of the proposed investment on Canada. In this fashion, the government is able to balance the various social and economic consequences of a transaction in order to reach a conclusion. It is important to point out that the Bureau retains its right under its own legislation to review and if necessary, challenge, the merger based on whether it is or is likely to substantially lessen or prevent competition in any relevant market.

The question of cross-media ownership is a timely question regardless of whether one believes in convergence or de-convergence. From the media reports, it would appear that there are many media assets in play around the world as firms seek to rationalize their holdings after the substantial acquisitions they made in the push to achieve convergence. Whether this marks a move towards de-convergence or is simply a settling process following the aggressive merger activity of the 1990's remains to be seen, but the implications are clear: there is a need to have clear and effective rules in place to allow this process of adjustment to work effectively.

For an efficient process to occur, it is necessary to have a clear and well understood framework of rules for industry that will let people align themselves where they see the greatest opportunities. The Bureau has such guidelines for mergers to assist companies to understand not just the *Act*, but also how it will be applied. This reduces uncertainty for businesses and has the added virtue of forcing us to be transparent about how we work.

We have not set specific rules governing cross-media ownership because we see no need for them. We would analyse each proposed transaction from the perspective of the impact on levels of competition in the affected markets. Should a cross-media merger cause a significant lessening of competition in any of these affected markets, then we would seek to block or find a remedy for the transaction. In short, we are already prepared to examine the economic effects of cross- media ownership, but only where there is evidence of a substantial lessening or prevention of competition in a relevant market. Historically, the principal markets we have focussed on are the advertising markets. It is not part of our mandate to take into account impacts on cultural objectives such as diversity of voices.

As a final point, we would also like to comment briefly on the question of limits on foreign ownership. In Canada, reviews are currently under way regarding the level of foreign ownership for telecommunications common carriers or broadcast distribution undertakings regulated either by the *Telecommunications Act* or the *Broadcasting Act.* The Bureau is of a view that access to capital is essential for a dynamic and efficient industry and squeezing out foreign capital is not consistent with an effective capital market. For optimal functioning of a market there is a need for a diversity of options and sources of capital, including diverse sources, diverse risk acceptance, and diverse terms and conditions. Foreign capital is not just about bringing cash to a country, but involves bringing outside financial ideas, financial influence, sources of technology and managerial efficiency. It may also provide another means of allowing an existing market participant to continue operating as opposed to merging with another domestic competitor. As we approach the expected adjustments in the communications industry in the near term, access to foreign capital can only facilitate the transition and ensure a stronger domestic industry in the end.

4. Section IV: Conclusions

Freedom of expression encompasses the principle of an open marketplace of ideas and serves to maintain and strengthen democracy. Diversity of voices, however, is not an issue of economic competition and, consequently, does not fall within the purview of the Bureau's mandate, nor, in our view, should it fall within the mandate of competition law generally. This is not to say that these issues should not be subject to government policy and review. It is our view, however, that avenues other than competition law are more appropriate to address these concerns.

Similarly, the Bureau believes that it is inappropriate to combine the review of competition policy issues with the review of social policy issues in a single agency. While such an approach may offer some element of regulatory efficiency, the inherent conflicts and necessary trade-offs in determining the outcome of merger review would be too significant to warrant pursuing.

Cross-media ownership is an important issue for competition policy but only as it may affect competition in the appropriately defined economic markets. For an efficient process to occur, it is necessary to have a clear and well understood framework of rules to assist companies in understanding the law and how it will be applied.

As a final point, it is important to recognize the constraints that foreign ownership restrictions place on any industry, in terms of access to capital, financial ideas, financial influence, sources of technology and managerial efficiency. They also restrict the range of options when changes in control are being considered and can increase levels of concentration, particularly in small economies.

Appendix A

Backgrounder

CRTC/Competition Bureau Interface

Introduction

As the transition of the telecommunications and broadcasting industries from regulated monopolies to competitive markets continues, it would be beneficial to describe the authority of the Canadian Radio-television and Telecommunications Commission under the *Telecommunications* and *Broadcasting Acts* and that of the Competition Bureau under the *Competition Act*.

This is particularly so given the complementary roles of the two organizations and the fact that the Commission is now moving beyond opening markets to competition and is exercising its powers to forbear from regulation in the area of telecommunications.

Industry stakeholders, including the general public, need greater clarity and certainty as to the overall regulatory and legal framework in which telecommunications and broadcasting firms must conduct their affairs.

Nothing in this document is intended to limit the responsibility or authority of the Commission or the Bureau to administer the respective legislation for which they are responsible. It is recognized that in addition to competition issues, the Commission has many other statutory objectives, while the focus of the Bureau is on matters related to competition.

Issues of authority with respect to competition can be grouped into four areas:

- Where the Commission has forborne or exempted from regulation;
- Where the Commission and the Bureau both have authority;
- Where the Commission is exercising exclusive authority;
- Where the Bureau is exercising exclusive authority.

1. Where the Commission has Forborne or Exempted from Regulation

1.1 Background

Under the *Telecommunications Act*, the CRTC has authority to exempt classes of carriers from application of the *Act*. Exemption orders may be subject to conditions. The Commission also has the power to forbear in whole or in part from most regulatory responsibilities where it finds, for example, that services or classes of services are subject to sufficient competition to protect the interests of users and that forbearance would not likely unduly impair the development or continuance of a competitive market. Forbearance orders may also be conditional, and can be varied or rescinded.

As a law of general application, the *Competition Act* has an established administrative framework, jurisprudence and a market test standard of ““substantial prevention or lessening of competition”” with which to deal with competition issues. However, it is generally accepted that during the

transition to competitive markets, competition safeguards beyond those available under the *Competition Act* are required.

1.2 Modus Operandi:

- Where the Commission has unconditionally exempted or has forborne from regulation in whole and unconditionally, until such time as it exercises its authority to review, rescind or vary its exemption or forbearance orders and decisions, the *Competition Act* would apply.

- Where the Commission has forborne only in part or has exempted or forborne conditionally, the Bureau considers that the *Competition Act* would apply to the activities exempted or conditionally forborne from regulation.

- To the maximum extent possible, the Commission identifies in its orders and decisions the powers and duties which the Commission will no longer exercise.

1.3 Transitional Safeguards

As all markets are not yet subject to effective competition, the Commission will continue to enforce regulatory safeguards to deal with issues such as bundling of services by the telephone companies, contract and access issues for multi-dwelling buildings, and exclusive programming rights practices. During the transition to competition, the Commission can deal with these issues more efficiently than a case-by-case approach under the *Competition Act*.

One notable issue in the transition to competition is anti-competitive cross-subsidization. Until all telecommunications markets are subject to effective competition, the Commission will need to guard against incumbent carriers cross-subsidizing services offered in highly contested markets with revenues from services where effective competition does not exist. Imputation tests and bundling restrictions imposed by the Commission are intended to address this issue. Safeguards imposed by the Commission seriously diminish the likelihood of anti-competitive cross-subsidization.

When the Commission deems that markets have become sufficiently competitive and the Commission forbears from regulation, the *Competition Act* would address anti-competitive pricing issues should they arise.

2. Where the Commission and the Bureau both have Authority

(a) Merger Review

Background

Under the *Telecommunications Act*, prior approval of telecommunications mergers is not required. However, the CRTC has specific responsibility under the *Telecommunications Act* for ensuring compliance with foreign ownership and control rules and has broad regulatory authority over the Canadian telecommunications system. Under the *Competition Act*, all mergers are subject to review and those which exceed proscribed economic thresholds must be formally prenotified to the Bureau.

Under the *Broadcasting Act*, prior approval of the Commission is required for changes of control or ownership of licensed undertakings. Whereas the Bureau''s examination of mergers relates exclusively to competitive effects, the Commission's consideration involves a broader set of objectives under the *Act*.

This may encompass consideration of competition issues in order to further the objectives of the *Act*. The Bureau's concern in radio and television broadcast markets relates primarily to the impact on advertising markets and, with respect to broadcast distribution undertakings, to the choices and prices available to consumers. The Commission's concerns include those of the Bureau except that its consideration of advertising markets relates to the broadcasters'' ability to fulfil the objectives of the *Act*.

It is generally Government and Commission policy to encourage competition in broadcasting, particularly in the distribution of broadcasting services.

Modus Operandi

Consequently, with respect to merger review:

- there is parallel jurisdiction.
- any transaction must comply with the legislation administered by both organizations.
- the merger and related pre-notification requirements of the *Competition Act* apply to telecommunications and broadcasting mergers.
- review by the Commission under the *Telecommunications Act* deals with ensuring compliance with foreign ownership and control limitations and may include other regulatory issues that may arise as a result of the transaction - prior approval, per se, is not required.
- review by the Commission under the Broadcasting Act applies to changes in ownership or control of licensees under the *Act*.

(b) Marketing Practices

Depending upon the specific circumstances, marketing practices can be addressed by the Commission or the Bureau.

The Commission will, for example, deal with slamming complaints in the telephone market. However, the Bureau may act in cases where the slamming practice involves an element of false or misleading advertising. The *Competition Act* applies to all false or misleading advertising in the communications industry, as well as to telemarketing fraud.

The Bureau considers that the *Competition Act* will apply to exclusive dealing, tied selling and other trade restraints not covered by regulatory safeguards imposed by the Commission.

Both the Commission and the Bureau would support the appropriate use of industry codes of conduct or ombudsman models as complementary vehicles to deal with consumer concerns. As appropriate, the Commission and the Bureau will review industry codes to ensure compliance with their respective legislation.

3. Where the Commission is Exercising Exclusive Authority

3.1 Background

Interconnection and access are critical for telecommunications competition. They require a high degree of technological and economic expertise, as well as flexible and timely dispute resolution. While

the *Competition Act* applies to access and interconnection issues in unregulated network industries, they have been a primary focus of economic regulation in telecommunications by the CRTC.

Modus Operandi

The CRTC will continue to deal with issues related to interconnection and access.

4. Where the Bureau is Exercising Exclusive Authority

4.1 Background

Activities such as conspiracies to fix prices or otherwise prevent or lessen competition unduly, bid rigging and price maintenance are subject to criminal prohibition under the *Competition Act*.

Modus Operandi

- The Bureau will deal with price fixing, bid rigging and price maintenance.

Canadian Radio-Television and Telecommunications Commission Competition Bureau October 8, 1999

NOTES

1. Royal Commission on the Press. Report. HMSO. Cmnd 1811. London, 1962. P. 106.

2. This includes one a significant study the a committee of the Canadian Senate in 1970 (Canada. Special Senate Committee on Mass Media, Report. Ottawa: 1970; (Chairman: Hon. Keith Davey)) as well as royal commission ten years later (the Royal Commission on Newspapers. Report. Ottawa. Ministry of Supply and Services Canada, 1981; (Chairman: T. Kent)).

3. The two cases are R. v. K.C. Irving, Ltd. et al (1974), 16 C.C.C. (2d) 49 (trial); (1975), 23 C.C.C. (2d) 479 (N.B.S.C., App. Div.); (1978) 1 S.C.R. 408 (S.C.C.), and; R. v. Southam Inc. et al (unreported decision, December 8, 1983, Ont. H.C.J.).

4. The RTPC was a Commission established under the *Combines Investigation Act* with the power to issue orders pursuant to certain sections of the *Act* as well as the power to conduct research inquiries into specific market situations The three reports are entitled "The report concerning the production and supply of newspapers in the city of Vancouver and elsewhere in the province of British Columbia, 1960; The Report on the Production, Distribution and Supply of Newspapers in the Sudbury-Copper Cliff Area, 1964, and; The Report Relating to the Thomson Newspapers Acquisition of the Fort William Times-Journal, 1965.

5. Restrictive Trade Practices Commission. Report Concerning the Production and Supply of Newspapers in the City of Vancouver and Elsewhere in the Province of British Columbia, Ottawa: Queen's Printer,1960, p. 164.

6. It should be noted that evidence was introduced in R. v. Southam Inc. et al, regarding the impact of the closure of the Winnipeg Tribune on editorial and news content in the Winnipeg market but this argument lost its impact with the subsequent start up, during the period leading up to the trial, of a new Winnipeg daily newspaper, the Winnipeg Sun.

7. On August 27, 1980, the Thomson and Southam newspaper chains simultaneously announced the closure of one of two daily newspapers in both Winnipeg and Ottawa, the transfer of assets of an already closed newspaper in Montreal to Southam from Thomson and the sale of the remaining 50% ownership interest in Pacific Press from Thomson to Southam in Vancouver. This led to the laying of 8 counts under the conspiracy, merger and monopoly provisions of the *Combines Investigation Act*. For a more detailed account of developments, reference is made to the Bureau's annual reports for the years 1981-1984.

8. Royal Commission on Newspapers, p. XI.

9. Royal Commission on Newspapers. Report. Ottawa. (Chairman: T. Kent). p. 59.

10. In January 1993, when Hollinger made its initial 22 percent (later diluted to 18.5 percent) investment in Southam, the Director reviewed the transaction to determine whether there was a substantial prevention/lessening of competition in any market. Similarly all subsequent newspaper acquisitions by Hollinger were examined to see whether there was any competitive overlap between the newspaper being acquired and either a Hollinger or a Southam publication. None was found.

11. Other factors include the effect of the investment on such factors as the level of economic activity in Canada, employment; resource processing; utilization of parts and services produced in Canada and on exports from Canada; productivity, industrial efficiency, technological development.

12. These include promoting the creation, dissemination and preservation of diverse Canadian content; cultural participation and engagement; fostering and strengthening connections among Canadians, and; active citizenship and civic participation.

CHINESE TAIPEI

1. Introduction

This submission, written by the Fair Trade Commission (FTC) in collaboration with the media regulator, the Government Information Office (GIO), presents the regulatory framework for media mergers in Chinese Taipei.

The FTC administers the Fair Trade Law in an effort to maintain the functioning of the market and to prevent consumer interests from being jeopardized because of anti-competitive behavior. The GIO is responsible for the development and regulation of all media industries, including both the print and broadcast media.

For many years now, no cases of media mergers have had any significant implications vis-à-vis competition with the exception of a few in the cable TV market. This submission, therefore, places its focus on market conditions and considerations affecting media mergers in the cable TV industry.

2. Legal Framework

To prevent over concentration and maintain a competitive environment, Chinese Taipei has adopted a dual regulatory process for mergers in all of the various television-related media. Apart from the merger control provisions in the Fair Trade Law which generally apply to all sectors and which promise all benefits reaped from economic efficiency, still other regulations are stipulated in the Broadcasting Law and the Cable Broadcasting Law. More specifically, these strictly prohibit over concentration in the over-the-air television and cable TV sectors, and thereby protect diversity and plurality in these media segments, while ensuring that all views and opinions are given the right to be expressed.

2.1 Fair Trade Law

According to the Fair Trade Law, it is required that once merging parties reaching sales volume set by the FTC, one of merging parties reaching one-fourth of the market share, or merged entity reaching one-third of the market shares post-merger, notification shall be made to the FTC prior to the realization of a proposed merger.

To assess a merger proposal, the Fair Trade Law requires that the FTC determine whether it is satisfied that the overall economic benefits brought about by the proposed merger do, in fact, outweigh any disadvantages that may result from possible restraints on competition. If this is, indeed, the case, then the FTC shall not prohibit the notifying merger.

2.2 Broadcasting Law and Cable Broadcasting Law

While, at its own discretion, the FTC is provided with a rather flexible framework with which to review and control concentration in the media sector, the laws governing the over-the-air broadcasting businesses and the cable TV industry employ stricter, more rigid means to constrain the concentration of the said media, and this is accomplished by enforcing various restrictions pertaining to share of system operators' market share and share of subscribers.

For mergers in the over-the-air broadcasting sector, the Enforcement Rules of the Broadcasting Law require that the transfer of the stock shares of a radio/television business shall receive prior approval from the GIO. Neither of the following shall be approved by the GIO:

3. In the case where the transferee is a natural person, if the transferee in combination with his/her close relatives holds more than 50 percent of the shares of the business, or holds more than 10 percent of the shares in a newspaper or radio/television business; and

4. In the case where the transferee a legal person, if the transferee holds more than 50 percent of the total shares of a newspaper, radio/television businesses, or a related business.

To prevent cable TV system operators that undertake vertical integration of upstream channel providers and/or horizontal merger with competitors to acquire market power to the degree that they could easily engage in anti-competitive behavior, Article 21 of the Cable Broadcasting Law stipulates that system operators, their affiliates, and their directly or indirectly controlled system operators shall observe the following rules:

1. The number of subscribers acquired shall not exceed one-third of the total number of subscribers in the nation;

2. The number of system operators acquired shall not exceed one-half of the total number of system operators in an administrative district; however, this limitation shall not apply to an administrative district where there is only one system operator; and

3. The number of system operators acquired shall not exceed one-third of the total number of system operators in the nation.

2.3 Merger Remedies

As for the cable TV industry, the fact that one-third of the total number of subscribers or system operators in the nation, as stipulated in the Cable Broadcasting Law, and that the threshold of a merged entity reaching one-third of the market shares post-merger, as set forth in the Fair Trade Law for merger notification, is the same is not a coincidence. Because legislators believe that one-third of total market shares would, to a certain extent, have a strong impact on market power, they decided to establish a clear boundary of the cap of scale for the cable TV industry.

In light of consistency between regulations, structural remedies provided for in the Cable Broadcasting Law for illegal mergers are similar to those set up in the Fair Trade Law, and include:

4. disposition of all or part of the shares;

5. transferring of all or part of the business;

6. termination of an individual’s official duties; and

7. other necessary methods.

3. Market Definition

Whether the over-the-air television and various types of the pay TV segments are in the same market is a question of primary importance for the FTC, and requires full attention on the part of the FTC

when they review and assess mergers in the television market. Important factors that would normally be taken into account include penetration ratio, fees charged, and the number of programs provided.

Currently, the over-the-air television, the cable TV, direct broadcast satellite (DBS), and multimedia-on-demand (MOD) run by telecommunication operators provide audiences with programs through different platforms of delivery. The FTC determined that the cable TV segment is the most influential one, while none of the others could hardly be considered effective substitutes at this moment.

Still, over-the-air television is the most penetrating segment since it is free-of-charge. Approximately 99.3% of all households in Chinese Taipei own TV sets and the number of subscriptions to cable TV has reached 85% of all households. However, the DBS and the MOD have very limited market shares, mainly because of the much more expensive installation fees required and the fewer programs provided.

The regulations of the Cable Broadcasting Law do strengthen cable TV system operators' market power in the overall television market. First, the said Law requires that system operators shall not refuse any portion of the potential audience in their service areas from subscribing to their services, i.e. they are obliged to provide universal services. This requirement actually affords system operators quasi-utilities status.

Second, the Cable Broadcasting Law provides that system operators shall concurrently re-transmit programs and advertisements of over-the-air television stations without altering the form, content, or channel position; they shall include over-the-air channels among their basic channels; and they don't have to pay any licensing fees for such re-transmissions which do not constitute copyright infringement by the said system operators.

Subscribers of cable TV are protected by the said Law as it safeguards their "basic rights" to freely watch programs provided by over-the-air television stations. Five existing over-the-air television stations now account for only five channels among the some 70 channels of the cable TV system and thus can hardly serve as a substitute for the latter. Over-the-air television stations only compete with other channel providers in programming and advertising markets.

The FTC thus concludes, at least at this moment, that cable TV enjoys very strong market power in the television market on account of its penetration ratio which is further enhanced by its obligation to provide universal service, its installation and subscription fees, and the number of channels it provides. Undoubtedly, Cable TV plays a key role, serving as the most important arena for the expression of views and ideas.

Nevertheless, other forms of television, including direct broadcasting satellite and MOD, might still have their advantages if new technologies can improve their competitiveness in the future. The FTC has always kept new developments in mind and revises its decision-making and accordingly.

4. Enforcement Issues

Generally speaking, the cable TV industry is composed of upstream channel providers who provide programs and advertisements under specific names, and downstream system operators who transmit programs and advertisements to subscribers through cable.

Upstream channel programs are protected under the Copyright Law. Programs of the same type compete with each other, but for the most popular programs, there is little room for substitutions due to copyright restrictions. Given the pressure brought about by the limited number of channels system

operators can own, program owners used to form and/or authorize channel providers to collectively negotiate with system operators for better and longer term trade offers.

The service areas for downstream system operators must be approved by the GIO in accordance with the Cable Broadcasting Law. Geographic markets, therefore, are clearly defined under the discretion of the media regulator. Most system operators are monopolies or oligopolies in their service area and, as such, enjoy a certain degree of market power.

4.1 Horizontal merger

According to the Cable Broadcasting Law, system operators can only operate (their businesses) in their respective service areas, as approved by the GIO. Thus, to obtain an economy of scale and operate efficiently, system operators tend to merge horizontally, and in so doing, form multiple system operators (MSO's). Currently, there are 47 service areas across Chinese Taipei, and in each of 30 of these, there is only one system operator. In addition, in total, of the 64 system operators across the country, 45 are operated by 5 MSOs, and the remaining, only 19, are unaffiliated system operators.

When reviewing horizontal mergers among system operators, the FTC is always concerned as to whether the MSOs could possibly misuse their market power to engage in anti-competitive behavior, such as refusing to deal with or discriminatively dealing with upstream channel providers, or even use their collective bargaining power over these upstream channel providers, practices which obviously would reduce the quality of their services and decrease the number of channels provided to their subscribers.

4.2 Vertical integration

Vertical integration between system operators and channel providers benefits both sides in that, for the system operators, the provision of programs is stabilized and external costs from not having to constantly re-negotiate licensing fees with channel providers are reduced. As for channel providers, the risk from investing in new programs can be significantly decreased with the integration of system providers.

The main concern with respect to vertical integration in the cable TV market is whether the merger might result in market foreclosure to non-parties to the merger. Vertical integrated businesses are in a better position to refuse to deal or engage in discriminative deals with non-parties, especially with unaffiliated system operators and independent channel providers. Diversity in terms of content of programming can possibly be reduced through anti-competitive behavior.

To avoid any undesirable effects produced by vertical integration, the Cable Broadcasting Law requires that program channels provided by system operators and their affiliated enterprises shall not exceed 25 percent of all usable channels.

On the part of the FTC, to maintain diversity in programming as well as equal access to programs for the full potential audience, as promised by the merging parties in the conditions specified in merger approvals when vertical integration proposals are reviewed, are important factors to solve the competition authority's concerns.

4.3 Case 1

The Eastern Group and the Giga Group are the two largest program providers in Chinese Taipei, with each controlling the provision of more than ten channel programs. In 2000, the Eastern Group and the Giga Group each applied to merge with more than ten system operators across Chinese Taipei. The FTC, after reviewing the market conditions, believed there was a strong incentive for the merging entities to

discriminate or refuse to provide channel programs to system operators which were not parties to this merger. This would have made it lose its interest in trading with other independent channel programs, and as a result, threaten the existence of independent program providers and system operators. The applications were therefore rejected by the FTC.

The above mentioned businesses filed applications in 2001 again, with undertakings that they would not engage in discrimination or refuse trade with independent program providers and system operators post-merger. To resolve the FTC's concerns with respect to competition, they also sold their shares in certain channel providers to another channel provider which was non-party to this merger prior to their application. The FTC was satisfied with the reduction in the risk concerning potential anti-competitive effects and therefore approved their applications.

4.4 Case 2

In June 2002, the only two system operators running in the Neihu service area, Hsin Taipei Cable TV Co. and Li Kwan Cable TV Co., filed a merger application with the FTC. The two system operators belong to the two largest MSOs, the Eastern Group and Giga Group. The FTC was concerned that this merger not only would form a monopoly in the Neihu service area but would also reduce consumer choices, which would then also create a setting for possible collusion between the two largest MSOs to divide the service areas through exchanging the subscribers. The FTC was not satisfied that the possible overall economic benefits produced by this merger would outweigh the disadvantages resulting from competition restraints and, consequently, rejected the application.

5. Advertisement Issues

5.1 Ratio of advertisement to content

To prevent cable TV's operators from misusing their market power to increase the ratio of advertising to content, thus producing undesirable effects, as indicated in the Secretariat's questions, the Cable Broadcasting Law specifies that the duration of all advertising shall not exceed one-sixth of the total transmission time of each program. The Law also prohibits the so-called "advertisation" of the programs, and requires that programs maintain their completeness and be distinguishable from advertisements.

6. Plurality Concerns

In general, system operators tend to horizontally merge with each other, or vertically integrate with upstream channel providers to obtain economy of scale and economy of density as well as to reduce transaction costs. However, by their nature, horizontal mergers reduce the number of market players, while vertical integration can possibly build entry barriers to newcomers. Simply put, both market practices have clear implications on plurality.

To protect plurality in the cable TV market, the Cable Broadcasting Law, administered by the GIO, specifies limitations to shares of system operators by MSO, and shares of subscribers by system operators to one-third of the national market. The number of MSOs or unaffiliated system operators shall not be reduced to the extent that the expression of opinions and ideas is controlled by a limited number of businesses.

To prevent channel programs from being monopolized by certain system operators and to keep the channels of presentation of different views open, the Cable Broadcasting Law also requires that program channels provided by system operators and their affiliated enterprises shall not exceed one-fourth of the usable channels.

The FTC, when reviewing mergers in the cable TV sector, works closely with the GIO to ensure that any proposed merger does not violate any regulation of scale in the Cable Broadcasting Law. If so, then the proposed merger will be rejected before being permitted to enter a second stage of investigation.

CZECH REPUBLIC

1. General legal framework for the area of media in the Czech Republic (including the issue of securing plurality)

The Act on the Protection of Competition, which contains the legal regulation of merger control in the Czech Republic, fully covers all sectors of economy, including the area of media. Application of this Act is limited only in case of undertakings providing services of general economic interest, to which the Act is applied only if the application of it does not prevent provision of these services. All concentrations of undertakings that meet the general notification criteria therefore must be duly notified to the Office for the Protection of Competition (hereinafter "the Office"). The Office assesses concentrations from the view of their impact on competition on the basis of standard competition criteria applied to all economic sectors. More detailed description of assessing the concentrations in the area of media by the Office, including particular cases, is presented in the second part of this document.

Besides the competition assessment of mergers in the area of media, the Czech Republic has at its disposal special provisions in the framework of sector regulation delimited by the Act on operating radio and TV broadcasting of 2001. Supervision over adherence to this Act is in competence of Rada pro rozhlasové a televizní vysílání (the Council for radio and TV broadcasting – hereinafter "the Council"), which is the administrative body independent on the government and its members are elected by the Chamber of Deputies of the Parliament of the Czech Republic. The Council, in accordance with provisions of the Act on operating radio and TV broadcasting decides on granting licenses for operating radio and TV broadcasting, supervises the adherence to the duties of operators of broadcasting stipulated by law and license conditions, supervises preserving and development of plurality of the programme offer and information in the area of radio and TV broadcasting and observes its content independence.

The provisions of the Act on operating radio and television broadcasting prohibit property interconnection among providers of whole-area TV or radio broadcasting or any amalgamation whatsoever among them. At the same time, the provisions restrict the maximum coverage provided by license holders interconnected by property to 70% of the Czech Republic´s population. In case of breaching these provisions the Council shall withdraw the license from the operator of broadcasting. The law also imposes on the broadcasting operators the duty to notify the Council on any concentration among operators of TV or radio broadcasting. For transferring a share in the company of an operator of TV or radio broadcasting to a third party it is necessary to obtain preliminary consent of the Council. The operator of the broadcasting is also obliged to ask the Council for preliminary consent among others with the change of way of distributing the voting rights, change of deposits of individual partners or members and the amount of their business shares, a change in a partnership contract or a memorandum of association, a covenant and a list of partners or shareholders. The Council is in such case obliged to decide on a change of these facts within 60 days from the day of delivering the application of an operator. In approving these changes, the Council regards all the facts decisive for granting a license for broadcasting, including the requirement for transparency of the ownerships relations of the applicant and regards the necessity of securing plurality of information pursuant to the above-mentioned provisions of the Act on operation of radio and TV broadcasting. Approval of these facts by the Council is realised within an administrative proceeding independent on a possible proceeding on approval of a concentration of undertakings by the Office, which

nevertheless does not exclude mutual consultation and co-operation of both institutions in cases of concentrations in the area of radio and TV broadcasting.

The area of periodical press issue is in the Czech Republic regulated by the Act on the rights and duties in periodical press issue (hereinafter "the Press Act") of 2000. This Act regulates the obligatory register of periodic press publishers kept by the Ministry of Culture and stipulates rights and duties of publishers. Contrary to the Act on operation of radio and TV broadcasting it does not contain any specific provisions for securing plurality of information in this area.

There is also no special legal regulation stipulating restricting conditions for acquirement of share assets in different kinds of media by a single owner. The Office in the framework of competition advocacy supported legislative changes, which should have prevented cross interconnections between individual media (radio broadcasting, TV broadcasting and publishing of periodic press). These changes constituted a part of the governmental draft Act on operation of radio and TV broadcasting of 2000, which, however, was not passed by the Chamber of Deputies of the Parliament of the Czech Republic. Instead of this draft Act, a deputies´ draft was adopted, which did not include the prohibition of the cross interconnection among individual types of media and regulated the question of securing plurality of information in the above-mentioned way.

2. Assessment of concentrations of undertakings in the area of media by the Office

The Office assesses notified concentrations in the framework of a two-stage administrative proceeding, exclusively from the view of their impact on competition. In case that the Office comes within the second stage of the proceeding to a conclusion that a concentration would result in a substantial distortion of competition, it rejects the notified concentration. The Office may accompany its approval of a concentration by conditions and restrictions stipulated in favour of preserving effective competition or condition an approval of a concentration by meeting the commitments adopted for this purpose by the concentrating undertakings.

In case of a concentration in the area of media the Office assesses, similarly to other sectors, especially the need to preserve and develop effective competition, structure of all affected markets, share of the concentrating undertakings on these markets, their economic and financial power, legal or other barriers to entry of other undertakings to the markets affected by the concentration, the possibility of the concentrating undertakings to select their suppliers or customers, development of supply and demand on affected markets, the needs and interests of consumers and research and development, the results of which are favourable for consumers and do not prevent effective competition. An integral part of this competition analysis is constituted by a definition of relevant markets, the principles of which are fully applicable also to the area of media.

In the framework of delimitation of relevant markets and subsequent competition analysis, the Office regards not only the current situation on the market, but also the expected development of the given sector. For example, in the case of access to Internet, the Office in its decisions regarded not only the current ways of connection, but also assessed as potential competition the new technologies in the testing stage. The Office took similar steps also in the case described below, concerning a concentration of cable TV operators. Calculation of market shares is based on current situation on the market, however, the calculated market share is always put into relation with possible future development and alternatives of new technologies. The pace of innovation is regarded within assessment of market power both during delimitation of the relevant market and during assessment of the market´ s stability. The possibility of maintaining a strong position on a dynamically developing market, such as the media market, is more difficult for an undertaking than on a mature market, where the innovative dynamics is low. In case of assessing market power the Office also considers the structure links and operation of undertakings on

neighbouring markets, which are in the area of media represented for example by production of TV programmes (or the production of the content provided by different media in general), or the polygraphic production in case of daily press. Particular cases of relevant markets defined by the Office in the framework of assessing concentrations of undertakings in the area of media are presented below with the individual cases.

3. Merger cases in the area of media assessed by the Office

3.1 Baring Communications Equity (TES)/Vision Networks Tsjechie Holding (cable TV)

As a result of acquiring direct control by the company Baring Communications Equity (TES) over Vision Networks Tsjechie Holding, which had been approved by the Office in December 2002, a concentration was realised between two important cable TV operators in the Czech Republic – TES Media and Intercable CZ, which led to establishment of the second most important competitor in this area in the Czech Republic, following company UPC.

The Office, in accordance with its hitherto practice, defined the relevant market as the services consisting in supplies of TV signal by means of a cable distribution system. The relevant geographic market is defined by relevant localities to which the TV signal is supplied by means of a cable distribution system of the concentrating undertakings. The Office on the basis of a detailed analysis took the view that the service of supplying TV signal by means of a distribution system was not in that time fully interchangeable with any other form of transferring TV signal (terrestrial, satellite, etc.) used in the Czech Republic as a result of significant differences especially in the extent of transmitted content (programme packages), the quality of transmissions and costs for users. Nevertheless, with regard to fast development of new technologies and ongoing liberalisation in the area of electronic communications and broadband services, the Office considered in the assessment also other ways of transmitting TV signal (classic phone lines using xDSL technologies, video streaming via Internet, digital terrestrial broadcasting, MWS – Multimedia Wireless Systems) that represented potential competition for the operators of cable distribution systems in medium-term to long-term horizon.

Both companies operated with some exceptions on different geographic markets within the Czech Republic, on which no increase of market shares occurred after the concentration. The concentration strengthened economic and financial power of the concentrating undertakings, but this was, however, counterbalanced by comparable power of both another important cable TV operator in the Czech Republic – company UPC and a potential competitor – the most important Czech telecommunications company – Český Telecom. With regard to this fact, the Office came to the conclusion that the concentration would have not resulted in establishing or strengthening of dominant position of the newly established subject.

The Office also dealt with the possibility of establishment of collective dominance of the entity created by the concentration and UPC company on the markets, where these undertakings struggled each other (in purchases of programme, sale of advertisement or in the area of marketing) with possible negative impacts on final consumers. In its analysis the Office supportively proceeded from the basis of its decision-making practice in the area of collective dominance within EC competition law and especially from the criteria stipulated by the Court of First Instance in the last year case Airtours (transparency of market, sustainability of tacit co-operation in time on the basis of the motivation not to leave the joint strategy and the possibility of retaliatory measures, non-existence of a threat to the results of the joint strategy on the basis of reactions of existing or potential competitors and customers). The transparency in the area of mutual struggling of both entities is relatively low especially due to bilateral character of the negotiations on purchase of programmes. Despite the fact that both undertakings have to a certain extent symmetric market shares, the sum of which exceeds 80% and the products offered by them are to a large extent homogeneous, there are some differences between both undertakings related especially to the level of

modernisation of the cable distribution networks, economic and financial power and the negotiation position in relation to the providers of programmes. The entity established by the merger will be in these areas in a weaker position in comparison with its competitor, which prevents existence of both competitors´ unified motivation to maintain the common strategy. From the view of the competitors´ reaction, it is possible to expect in middle term horizon an entry of important potential competitors from the side of new technologies, which substantially threatens the certainty of both competitors regarding the results of possible common strategy. After assessment of all these circumstances the Office concluded that the merger would have not resulted in creation of a collective dominant position, which would have been sustainable in time and which could have distorted economic competition.

After thorough assessment of all the above-mentioned facts the Office stated that the assessed merger would have not resulted in creation or strengthening of dominant position, which could have led to a substantial distortion of competition, and it approved the concentration. The assessed merger should have contributed to further development of competition in the field of telecommunications, in particular in the field of voice and data services providing, which is actually happening for example in the area of access to Internet. The newly established entity has already sufficient capacity for investments into necessary modernization of cable networks, by means of which it could become in future the next important competitor for the dominant telecommunications provider in the Czech Republic.

3.2 Elemedia / Radio Bonton (radio broadcasting)

The concentration consisted in acquiring complete control by foreign company Elemedia over the company Radio Bonton, operating a regional radio station in the Czech Republic. For the purpose of assessing the merger the Office considered dividing the area of radio broadcasting into two independent markets – national broadcasting and regional broadcasting – taking into account in particular the different groups of listeners. In the field of media advertisement the Office similarly considered division into individual markets according to individual types of media including the market for radio advertisements. However, due to the fact that the current market share of Radio Bonton, even if the narrowest definition of the relevant market was taken into account, did not exceeded 5% in both areas, and that no overlap of the merging parties´ activities resulted from the merger, the Office left the exact definition of the markets open and approved the merger.

3.3 Ringier ČR / Československý sport (daily newspapers)

In 2001 the Office approved a merger between companies Ringier ČR and Československý sport, which were both active, among others, also in the field of daily newspapers publishing. The relevant market was defined as the market for daily newspapers in the Czech Republic and the market for sale of advertisement space in daily press. In defining the market of daily newspapers, the Office first dealt with the issue of substitutability between written press and other information media – in particular radio and television broadcasting. In the Office´s opinion, it was not possible, from the final customer´s point of view, to consider the latter media to be substitutes for the written press because of their differences related to physical features, transfer of information, the way in which information is offered and their extent and thoughtfulness. Furthermore, the Office in the framework of written press distinguished daily newspapers from other journals and magazines with other period of publishing because the latter satisfied different information needs of customers, and there are differences in production technology, way of distribution and price level as well.

In the case of daily newspapers the Office dealt thoroughly with the issue whether it was necessary to distinguish national newspapers from regional ones. Although there were some differences in these two categories due to the emphasis put by regional dailies on regional topics, the Office concluded that both kinds of daily newspapers fell within a single relevant market. That conclusion resulted from the

fact that especially in the recent years the regional daily newspapers has been on the one hand bringing, besides regional news, also overall summary of actual national and foreign news comparable with news included in national dailies, and on the other hand, a whole number of important national dailies (including the daily Blesk published by the company Ringier ČR) is sold in their regional versions or with special regional inserts, depending on different regions of the Czech Republic. The Office came to a conclusion that the division of dailies into national and regional ones was blurred in case of the Czech Republic and that both these categories compete with each other within a single daily newspapers market. Furthermore, the Office analysed possible distinction of dailies by their content (general information, sport, financial and economical information) or by quality of provided information ("serious" newspapers and "tabloids"). Due to the existing extent of information overlap in the dailies of various categories and due to the vagueness of these individual categories the Office concluded that all the dailies were perceived by important part of customers as substitutable sources of actual printed information and they produced competitive pressure on one another. Moreover, in the given proceedings, the possible division of the daily newspapers market into sub-markets by content features would have not changed the assessment of the case because the dailies published by the merging undertakings would have fell within different content categories (Ringier publishes the daily Blesk focused on general information of rather tabloid nature while Československý sport publishes a daily focused only on sport information).

The market for advertisements in daily newspapers was another market influenced by the merger. The Office has considered this market to be an independent relevant market separated from the sale of advertisement space in other media and periodicals in particular with regard to differences in target groups reading these media and with regard to the style and form of adds in written print comparing with the similar ones broadcasted in television or radio.

On the grounds of relevant market defined in such way, the Office came to the conclusion that the merger would have not resulted in creation or strengthening of dominant position on the markets where the competitor possessed 23% share on the market of dailies and 9% on the market of sales of advertisements in the dailies. Due to the existence of other important competitors who publish daily newspapers in the Czech Republic there was no threat of such a growth of the market power, which would have enabled the competitor Ringier to behave independently on other competitors and consumers and which could have resulted in a significant distortion of competition after its merger with the undertaking Československý sport. The Office therefore subsequently approved the merger.

3.4 Bertelsmann Springer CZ / E 63 and Bertelsmann Springer CZ / UNIPRESS (periodicals)

In 2002, the Office assessed two mergers in which Bertelsmann Springer CZ acquired control over company E 63 and UNIPRESS, publishing journals focused on motor sport. According to the Office, narrower definition of the relevant market as the market for publishing journals with the motor sport topic was in these cases more suitable than a broader definition of market for journals publishing. The motor sport journals have been focused on specific group of readers and by their content they have not been interchangeable for their readers with any other periodicals. Considering the position of individual publishers on this market the Office took also into account providing of advertisement services in the journals since the advertisement constituted approximately 80-90% of publishers´ proceeds. However, due to the fact that by neither of these relevant market definitions the merger would have caused, with regard to low resulting market power of the undertaking Bertelsmann Springer CZ, negative impacts on the economic competition, the Office left the final definition of market open and approved the mergers.

3.5 Image ČR / Česká Typografie (daily newspapers, printing production)

This merger resulted in vertical integration of competitors operating on the market of daily newspapers´ publishing (company Image ČR as a part of publishing group Ringier) and on the market for

printing production of daily newspapers (company Česká typografie). The concentration also included horizontal integration in the field of printed production of daily newspapers. From the view of vertical integration (when the merged entity had market shares on both of vertically integrated markets on the level slightly above 20%), the Office concluded that the assessed merger would not result in distortion of competition on these markets. Several other important competitors of the merging undertakings operate on the market of daily newspapers´ publishing in the Czech Republic, who are also vertically interconnected and operate on the market of printing production of journals. Several other printing companies, which are not vertically interconnected with publishers of press, compete with the merged entity. For this reason the merger did not result in a threat of closing the market by the vertically integrated subject. The Office thus came to a conclusion that the assessed merger would not result in significant strengthening of the market power of the above mentioned competitors, who would hereafter face significant competitive pressure from other competitors and that was the reason why the Office decided to approve the merger.

DENMARK

1. Introduction

This paper contains some aspects on media mergers in Denmark, among these the experiences made by the Danish Competition Council on media mergers.

Section 2 describes some important characteristics of the Danish media market. These characteristics are of importance in cases concerning media mergers as well as in other cases concerning the competition act.

Provisions concerning mergers was introduced in the Danish Competition Act in 2000. Mergers must be notified to the Competition Authority depending on the turnover of the companies involved.

The Danish Competition Council has made decisions in four media mergers[1]. Currently two new media merger is under consideration. These cases are described below in sections 3 and 4.

2. The Danish media market

The largest advertisement media in Denmark is the daily newspapers covering approximately 30 percent of all advertisements in the media. The second largest advertisement media are local newspapers and television covering respectively 20 percent and 16 percent of the market. The rest of the market contains i.a. other written media, the Internet, cinemas.

The Danish media market is characterised by a high degree of concentration. As an example the two largest newspaper groups in Denmark – Berlingske and Politiken/Jyllands-Posten - has a total market share of 88 percent. However, the market shares of the two newspaper groups in question are relatively equal. On the television market there are three competitors. The largest is one of the state owned television stations, TV2, which has a market share well above 50 percent.

Another significant characteristic of importance for the competition situation on the Danish media market is, that Denmark is a small language area. This will normally lead to delimitation of the relevant geographical market nationally to Denmark. In some cases the market delimitation could be Denmark including border areas of the countries close to Denmark.

Finally the media area is characterised by different co-operation agreements among the competitors in the media market. An example of this is the many advertisement agreements among the actors in the newspaper area. These actors have also entered into co-operation agreements concerning printing and distribution. The Danish Competition Authority has approved some of these agreements due to the fact that they will contribute to greater efficiency in the market.

3. Mergers in the newspaper area

3.1 Orkla's take over of Berlingske

In 2001 the Danish Competition Council approved that Orkla, which is the second largest media company in Norway, bought the majority of shares in the largest Danish media company, Berlingske.

The merger was approved due to the fact that the two companies are not operating on the same market. The merger therefore did neither create nor strengthen a dominant position in Denmark.

3.2 The FAS-decision

In September 2002, the Danish Competition Council approved a merger subject to a number of remedies.

The three largest newspaper groups in Denmark merged their archive databases and certain affiliated activities in a common company named FAS.

The new company would contain a database with more than 8 million electronic articles from more than thirty different sources. Also the new company would offer electronic newspaper summaries - a relatively new product in Denmark. Finally the new company would get access to a large variety of digital news articles, which would make it possible to deliver innovative products at a reasonable price.

The Competition Council found that the merger could lead to significant advantages for the owners, who could increase their turnover and profit. Also the merger could lead to advantages for the customers of the new company i.e. companies, institutions and consumers in Denmark. At the same time the merger gave rise to considerable competition problems in two areas, both related to press surveillance.

Firstly the new company had a three-year exclusive right to utilise news from the mother companies' nation wide newspapers in electronic form. The Competition Authority found that this is a problem if the new company due to its special advantages is capable of obtaining a large share of the market and eventually a dominant position within three years. Secondly there could be a serious risk that the mother companies even when the exclusive right has expired would abstain from giving other companies access to the news articles on equal term, thus protecting their investment in the new company and choosing not to deliver to competitors of the new company.

These two problems were solved through a decision by the Competition Council to approve the merger only on certain conditions. The companies agreed to limit the exclusive right of the new company to exploit news from the mother companies to eighteen months instead of three years if the new company obtains a market share above 30 percent within one year. If the market share of the new company does not exceed 30 percent the exclusive right of three years can be maintained. Secondly, the mother companies were obliged to deliver to the competitors of the new company on non-discriminating terms after the expiration of the exclusive right. Depending on the turnover of the new company this obligation to deliver can be postponed.

3.3 Print activities

In 2002 the Competition Council approved a joint venture between the two largest newspaper groups in Denmark. The new joint venture would be active in the printing market. The new company would print for the mother companies as well as for others. At the same time the two mother companies would carry on their existing printing business. The merger can be characterised as a technical co-operation between the newspaper companies.

The merger was approved, since it did not create or strengthen a dominant position in the relevant market. Important factors in that case were the fact that there is a certain amount of over capacity in the market and the fact that there are a number of relatively large actors in the market.

3.4 Jobzonen

The Competition Council approved in 2001 a joint venture among the three largest nationwide newspapers concerning advertisements on the Internet of jobs.

In that case the Council made a distinction between advertisements of jobs on the Internet and advertisements of jobs in written media. The merger was approved primarily due to the very low market share of the new company.

4. Merges currently under investigation

The Danish Competition Authority is currently considering a new merger in connection with Jobzonen, where the television station TV2 is planning to enter the joint venture.

At the same time the Competition Authority is considering another merger where the companies behind Jobzonen is establishing a joint venture which shall make advertisements concerning automobiles, travel and housing on the Internet.

The key aspects still to be considered in these mergers includes the delimitation of the markets, the calculation of market shares on the Internet and the assessment of the consequences of the mergers on the relevant markets.

NOTE

1. The Competition Council has also approved two mergers in the border field between media and infrastructure.

FINLAND

Introduction

In the Finnish contribution to the OECD Roundtable on Mergers in Media Markets, we start with a general survey of the Finnish media markets. We then describe the product markets and geographical markets defined by the FCA in media merger cases. Few media mergers have been processed by the FCA. Below, we present a summary of two major Finnish media mergers, however.

1. Finnish Media Markets

The size of the Finnish mass media market amounted to 3.5 billion euros in 2001 according to Statistics Finland. There was an annual growth of 4-5% in the markets during the latter half of the 1990s but last year the growth was only 0.5%. Of the whole of mass communications, the shares of graphic, electronic and recorded media remained almost the same compared to the previous year. The share of graphic communications made up over 70% of the total media market in 2001, i.e. 2.5 billion euros.[1]

More than a billion euros were spent in media marketing in Finland in 2002. The press reaches the Finns well. When the number of population is compared to the total circulation of the press, Finland comes third in the world statistics[2]. The newspaper has retained its position as the most popular advertising medium with a share of approximately 50% of the total advertising market.

To the press, advertising is the main source of income. Almost one half of the income generated by TV operations also comes from advertising. The biggest income item of TV operations in Finland is the television fee paid by viewers and, in cable TV operations, annual fees and pay TV compensations. The weekly press gains the majority of its income from subscription fees. Single copies still sell rather poorly. Books sound recordings and visual recordings do not, as a rule, contain any advertisements at all.

Increasing company size and becoming internationally competitive is the objective of many companies within the media markets as well. Because the language area of Finland is small the entry barriers for foreign companies are rather high. This is why the Finnish companies active in the domestic market have traditionally been protected from foreign competition. The share of domestic production and producers is still extremely high in Finland in almost all sectors of mass communications. As much as 99.8% of the press was domestic in 2002 according to Statistics Finland. Of the TV channels, 54% of Yleisradio's supply, 52% of MTV3's supply and approximately 30% of channel Nelonen's supply is domestic.

There are few media giants in Finland. Measured by turnover, the biggest media group is SanomaWSOY. Alma Media holds second place, and has a Swedish majority shareholder Bonnier AB. Both groups governing the media field obtained their current structure in late 1990s. Both groups also engage in TV operations funded by advertising income. The MTV3 channel forms part of SanomaWSOY and the Nelonen channel belongs to the Alma Media group. The state-owned Yleisradio channel, for a long time the biggest media company, is currently smaller than the other two. The ten biggest companies also include TS-Yhtymä, Otava-Kuvalehdet, Edita, Talentum, A-lehdet, Pohjois-Karjalan Kirjapaino and Ilkka.

2. Market Definition in the Media Markets

In 1998, the FCA chose the media market as one of its central areas of investigation. Since there are few media mergers in number, in the present paper, we also discuss market definition based on the experiences obtained while processing competition restraints cases, i.e. other than mergers. To a certain extent, graphic and electronic communications may be mutual substitutes to the advertiser. But the press and the electronic media still have many differences from the viewpoint of advertisers and customers alike. The production technique of advertisements and commercials in the different mass media varies considerably, causing differing production costs. In TV and radio advertising, the commercial message does not contain as much information as the newspaper advertisement. The methods used in the commercials also differ in electronic and graphic communications. On these grounds, the FCA has defined the electronic and graphic communications as two distinct markets.

In its case law[3] on advertising markets, the FCA found that the different marketing methods are not total substitutes. For example, direct marketing differs from other marketing methods in the mass media. In direct marketing, advertisers choose their target audiences themselves whereas in media marketing they choose the media with which they presume to reach the customers. The effectiveness of media marketing is based on how interesting and reliable the chosen media is and what its coverage is, and not solely on the advertisers, their products and the number of deliveries, as in direct marketing. In media marketing, the target audience cannot be precisely defined which is the case with direct marketing where the effectiveness and receipt of the message require that the target audiences read specific advertising leaflets.

However, the FCA has noted that there is no nationally meaningful competition between the graphic advertising media groups in Finland, for the circulation areas of the newspapers do not generally overlap. In most decisions, the geographical markets have been defined as regional. Brand advertising forms an exception, however. The FCA found in its decision involving the issue[4] that the different advertising media could best replace each other precisely in national brand advertising.

2.1 SONERA/TALENTUM[5] merger

The FCA conditionally cleared an acquisition whereby the Sonera Group obtained joint control in the WOW Web Brand Corporation previously solely owned by Talentum. The case involved assessing the competitive scene in the new electronic media market and the adjacent market effects, in particular.

Sonera is the biggest telecommunications company in Finland and has a particularly firm hold of Finnish mobile communications and Internet services. Sonera's service portfolio also includes content services available via portals. In its previous decisions, the FCA has found that Sonera holds a dominant position in the Finnish mobile communications market. Talentum, the other party to the merger, engages in the publishing and new media business. WOW Web Brand Corporation, the object of acquisition, maintains web services to various target groups as well as the paid web services transferred to it from Talentum.

The competitive effects of the acquisition were assessed in several product markets where the parties engage in either overlapping, vertical or parallel operations. The FCA held that the Internet advertising market forms a separate relevant product market from the advertising and media advertising markets, for the pricing, demand and supply of Internet advertising do not closely reflect the developments in other advertising markets. The Internet advertiser seeks a wholly or totally new target audience than the advertiser using more traditional marketing methods. Additionally, Internet marketing can be technically better directed to the desired target groups than can other advertising media. This applies to content, the

recipient's technique, time, country and language. It is also possible to follow and measure advertising in real time. Both Sonera and the joint venture operate in the Internet advertising market.

The assessment of the acquisition also included the web content procurement market where the operators are companies who do not produce web content themselves; instead, they buy it from third service providers. The FCA found that the web content procurement market forms its own relevant market both from the viewpoint of the content seller and buyer. To Internet and mobile phone operators offering web content services, purchasing web content and services from third parties cannot be reasonably compensated by the fact that the operators, who sell and maintain the connections and network infrastructure, would produce the web content services themselves. Of the parties to the arrangement, Sonera obtains services from outside providers and the joint venture from Talentum. Additionally, the joint venture also produces web content services itself.

The Internet connection market was assessed as a third product market, i.e. access to the Internet for using the Internet services. The FCA found it possible that, due to differences in competitive conditions, the Internet connections offered to large corporations form a separate market in addition to the Internet connection market offered to consumers and small-sized companies.

The FCA held in its decision that the geographical market area of all the above-mentioned markets is Finland. This was due to the supply and demand competition of Finnish customers being entirely or principally limited to the services of companies engaging in business in Finland.

In its assessment, the FCA found that the merger had effects, which would cause impediments to competition and prevent market entry. In the arrangement, the leading Finnish telecommunications operator acquired the web services developed by the biggest Finnish new media company. This would have resulted in the termination of competition between two of the most popular web services. As a content packager and telecommunications operator, Sonera is an important party to many content producers in obtaining entry access to the web content market and the new mobile communications content market in particular. The primary competitive problem of the merger was the risk that Sonera would focus its content procurement and different know-how related to information transfer and consumer behaviour to its joint venture. Sonera's vertical integration to a content production company could have seriously complicated the competitive possibilities of small and medium-sized new media companies in particular. Additionally, the wide range of added value services that Sonera offered with its connections created portfolio power, based on the total solutions favoured by the customers.

To remove the competitive problem, the parties committed to Sonera treating the joint venture and its competitors evenly in the procurement and delivery of web content and not focusing its know-how for the use of the joint venture alone. Due to Sonera's strengthening position, the parties committed to conditions due to which competition between the joint venture and Sonera would not be entirely prevented in the sales of advertising space.

The Swedish Telia and Sonera subsequently merged in 2002[6].

2.2 SANOMA/WSOY merger

The merger between WSOY, Sanoma Osakeyhtiö and Helsinki Media Company exemplifies a major media merger, which resulted in the creation of the second biggest Nordic communications group. The merger also exemplifies an arrangement implemented without the specific approval of the FCA. The companies decided to merge shortly before the provisions on the control of concentrations became effective in 1998. Hence, the FCA did not have the authority to investigate the potential competitive

problems, which this conglomerate merger created. The Parliament put a written question about the matter to the government.

WSOY is a book publisher and Sanoma Osakeyhtiö a newspaper publisher: the group e.g. publishes the Helsingin Sanomat, the biggest Nordic newspaper. Helsinki Media Company is a company engaging in magazine publishing and electronic communications in its various forms. The biggest individual subsidiary of the new company is Rautakirja, and the merging companies jointly own 55% of its shares. In effect, Rautakirja is the sole Finnish company offering wholesaling and logistical services of newspapers and magazines. Additionally, the Rautakirja group has a strong position in the kiosk business and the sales of single copies of magazines. The largest Finnish bookstore chain Suomalainen Kirjakauppa is also part of the group. The operations of the merging companies support each other in that the concentration covers all sectors of the media and gains a considerable market power in the media market.

The major concern was the potential distortion of competition in the distribution channel of newspapers and magazines. In wholesaling and supply of logistical services, there was the risk of Rautakirja favouring newspapers and magazines of the Sanoma-WSOY group at the expense of other newspapers. In its extreme form, the situation may have resulted in the exclosure of the competing company from the markets by preventing this from getting its products in the distribution network. A potential problem was also cross-marketing, which would place competing advertisers in a weaker position than those within the group. A strong position in the retail trade of the field's products also enabled, at least in theory, the promotion of own products at the expense of others.

Since national provisions were lacking, the FCA could have referred the case to the European Commission under Article 22 of the EC merger control regulation[7]. But instead of an ex ante assessment of the competitive effects of the acquisition, the FCA decided to monitor the market ex post facto by controlling the abuse of dominant position. The FCA also secured that the delivery contracts of Rautakirja did not contain terms, which would have limited the competitors' freedom of operations. The new SanomaWSOY informed that it would maintain publishing and newspaper and magazine deliveries as two distinct operations.

3. Conclusions

The headline poses the question of what weight should be given to competition and other factors in assessing media mergers. The FCA's answer is conclusive. The assessment of media mergers does not differ from the assessment of mergers in other sectors. The Competition Act does not contain special provisions on the field of media. In practice, mergers are assessed on a case-by-case basis, which makes it possible to consider all the aspects affecting effective competition.

On the FCA's experience, the vertical relation of the parties seems to heighten in the assessment of the competitive effects of media mergers. The blurring of the boundaries between the media also makes market definition more challenging in the future. Since a key feature of the media market is the delivery of the message from one sender to several recipients, excessive concentration may lead to a decrease in diversity and thus the problem of one-sided content. In Finland the competition analysis of the media market does not, however, take a stand on content issues as such. Rather it aims at maintaining the number of media providers, i.e. plurality, hence securing the existence of the customer's choices.

NOTES

1. Joukkoviestimet - Finnish Mass Media 2002. SVT, Kulttuuri ja viestintä 2002:3. Statistics, Finland.

2. Ministry of Transport and Communications, Communications Market, Press, www.mintc.fi, 8 April 2003.

3. FCA's proposal of 12 January 1998; abuse of dominant position by Lapin Kansa Oy in the newspaper advertising market in its own publishing area, Dno 287/61/96.

4. FCA's exemption to national and partly national cooperation in brand marketing and retail chain marketing, 25 October 1999, Dno 274/67/99.

5. FCA's decision of 20 December 1999; Clearing an acquisition; Sonera and Talentum, Dno 582/81/99.

6. European Commission's decision of 10 July 2002, Case No COMP/M.2803 - Telia / Sonera.

7. Council Regulation (EEC) N:o 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

GERMANY

1. Legal Framework

1.1 Act against Restraints of Competition (ARC)

Concentration processes in the media sector in Germany are in general subjected first of all to control under the general competition law, the Act against Restraints of Competition (ARC). In view of the sector neutrality of the ARC, i.e. the application of this law to any business activity of companies irrespective of the economic sector involved, this approach is consistent. The ARC applies irrespective of whether the merger involves the print media, telecommunications, broadcasting or other economic sectors. Accordingly the examination standard (intervention criterion), which also applies to the entire media sector, is whether dominant positions are created or strengthened by a merger of companies. The fact that examination is carried out on the basis of purely competition law criteria also means that other aspects such as diversity of opinion and media quality may not be applied.

The third amendment to the competition law (1976) introduced special rules for the print-media sector with the aim to counteract particularly pronounced concentration in the publishing sector at regional and local level. For example, in over 55 % of Germany's administrative districts and independent cities only one regional subscription daily is in circulation in each of them. Firstly, merger control regulations without a minor market threshold also became applicable to small publishing firms. Secondly a calculation clause (twenty times the turnover revenues) provides for the control of mergers with an aggregate turnover revenue between the merging parties of already 25 million euros. The examining standard for merger control, i.e. the criterion of dominance in the competitive assessment, is not affected by this. German competition law has no cross-ownership regulations for the press sector.

In the 6th amendment of the competition law in 1999 (Section 38 (3) of the ARC) the press clause was extended to apply to the broadcasting sector. Here the objective of the lawmaker is to apply the ARC effectively to the entire media sector. How effective the ARC can be in preventing media concentration which is problematic under competition law is not least evident from approximately 30 prohibition decisions on mergers in the press and publishing sector and the prohibition of the Kirch/Bertelsmann/Premiere merger.[1]

At European level the examination of concentration in the media sector is also carried out on the basis of purely competition-related criteria. Mega cross-border mergers fall under the European Merger Regulation and are examined by the European Commission, the sole authority responsible in this case. This regulation contains no provisions for further special examination under media law.

1.2 Ministerial Authorisation

In exceptional cases, as in all other economic sectors, the Federal Minister of Economics can, upon application, authorise a merger prohibited by the Bundeskartellamt, if the restraint of competition is outweighed by advantages to the economy as a whole resulting from the merger, or if the merger is justified by an overriding public interest (Section 42 (1) 1 of the ARC).

Since merger control was introduced in 1973 ministerial authorisation has only been granted in 7 cases, partly with obligations. No decision has as yet been taken in the media sector, which two of a total of 18 applications involve.

In the case of the merger of the two large German publishing houses Burda-Verlag and Axel-Springer-Verlag which was prohibited by the Bundeskartellamt in 1981 the applicants withdrew their application because they saw no chance of success. In its non-binding comment the Monopolies Commission, a body of independent experts in competition theory and practice had recommended that such an application be refused.

One current application on which the Federal Minister of Economics has yet to decide, concerns the merger of the two publishing houses v. Holtzbrinck (Der Tagesspiegel) and Berliner Verlag (Berliner Zeitung). These publish the regional Berlin subscription dailies "Der Tagesspiegel" and "Berliner Zeitung". In December 2002 the Bundeskartellamt prohibited the merger, fearing that this would create a dominant position on the Berlin reader market for regional subscription dailies.[2] In January 2003 v. Holtzbrinck applied for ministerial authorisation, on which no decision has yet been taken.

The opinion published by the Monopolies Commission in April 2003 sees no grounds for authorising this merger project which would compensate for its restraining effects on competition. In particular in the Commission's view the argument that the merger is in the public's interest because it would safeguard the existing diversity of the press on the Berlin newspaper market constitutes no grounds for authorising it. The ministerial authorisation was not an appropriate instrument for safeguarding diversity in the print-media sector. As far as the newspaper market was concerned, it could be assumed that economic competition between newspaper publishers was an adequate prerequisite for diversity. Competition in the economy was also guaranteed in particular by merger control and this was an essential requirement for maintaining diversity of opinion. According to the constitutional neutrality requirement the Minister was also prevented from allowing his decisions to be influenced by the content or quality criteria applied to a newspaper. In so far the argument that a newspaper is a particularly valuable publication in terms of democratic opinion forming could not be taken into consideration in the minister's decision.

A decision by the Federal Minister of Economics is expected by mid-May 2003.

1.3 Special control in the broadcasting sector

Apart from general control under the ARC further control of concentration specifically in terms of media law is carried out in the broadcasting sector. In order to guarantee diversity of opinion under the National Broadcasting Treaty (RSTV) agreed by the *Länder*[3] a commission is assigned to the media regulation authorities of the *Länder* to investigate concentration in the media sector (KEK)[4]. The KEK can take measures if a company gains dominating influence over public opinion in television. The existence of a dominating influence on public opinion in television is assumed in a ratio of 30:100 viewers (Section 26 (2) p.1 RSTV). The concept of dominating influence over public opinion laid forth in the RSTV also covers, in contrast to the ARC, the internal growth of broadcasting companies.[5]

On the one hand the RSTV only allows for the control of dominating influence over public opinion by a single provider. The ARC, on the other hand, also prevents the creation or strengthening of dominant oligopolies.

The control of concentration under media law has been ineffective. Apart from the equally powerful public-service broadcasters, the three companies RTL, SAT.1 and PRO7, in other words the two broadcasting "families" Kirch and Bertelsmann, currently virtually share out the entire viewers market in the German private television sector between them. This situation has not changed with the entry to the

German market of the private investment company associated with the name of Mr Haim Saban who acquired the insolvent Kirch group's TV assets consolidated in the company ProSiebenSat.1 Media AG.

Advocates of specific concentration control in the broadcasting sector argue that the ARC contains no positive regulations for creating diversity as required for example under the National Broadcasting Treaty (*Rundfunkstaatsvertrag*) and the Broadcasting Acts of the Länder.[6] Past experience shows, however, that such measures for creating diversity can lead to contra-productive interlocking processes such as multiple ownership, dormant equity holdings and undisclosed trusteeships, and may prevent a clear allocation of media responsibility.[7]

In addition it is assumed that the protection of economic competition as a rule also ensures competition in the media. What is vital is that markets are kept open. This applies particularly in view of the technical and economic development which ruled out frequency shortages and financing requirements as grounds for the failure of the market.[8] On the whole, the actual conditions in the broadcasting market have thus changed in such a way that entry barriers to the broadcasting market are considerably lower today than they were some years ago. Therefore the concept of plurality provided for by the ARC, i.e. competition between several providers of private TV and radio channels, seems necessary but also sufficient for ensuring diversity of opinion.

Even the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) has dealt with the relationship between the control of concentration in the broadcasting sector and general provisions on competition under the ARC. The Court holds that while it is true that the freedom of broadcasting, which is ensured by Article 5 (1), sentence 2 of the Basic Law, requires positive regulations by the lawmaker in order to safeguard diversity of opinion, the decision how to fulfil this task principally lies with the lawmaker itself[9]. As regards the development of the dual broadcasting structure[10] the Federal Constitutional Court assigns the task of providing "basic services" to the public-service broadcasters. The Court holds that as long as and to the extent that this task is fulfilled by the public-service broadcasters there is no need to make the same demands on private broadcasters as on public-sector broadcasters in order to ensure balanced diversity.[11] In order to prevent irreversible adverse developments, the Federal Constitutional Court encourages preventive concentration control. In this connection it acknowledges the notification procedure applied by the Bundeskartellamt as being in principle suitable.[12] In addition, however, the Federal Constitutional Court has demanded that the lawmakers of the *Länder* be obliged, on the basis of their exclusive competence for broadcasting, to take precautions independently of the control under the ARC, in order to prevent a dominant influence on public opinion in broadcasting. The lawmakers of the *Länder* intended to achieve this objective by setting up the KEK.[13]

2. Market definition

In the print media sector the Bundeskartellamt generally distinguishes between reader markets and advertising markets.

In further dividing up reader markets into product markets, for example a market for regional subscription dailies or a market for political weekly magazines, the Bundeskartellamt is guided by external and formal criteria (publication frequency, topical emphasis etc.) and not content-related criteria such as political orientation and journalistic quality.

In assessing the respective competitive structure the connection between reader market and advertising market is taken into account.[14] The main connection between reader market and advertising market is the fact that a high number of readers strengthens a newspaper's position in the advertising market. A high readership level makes a newspaper more attractive for advertising customers. Conversely, a high advertising volume improves sales in the reader market. Besides content, readers are also interested

in the advertising section. In addition, a high volume of revenue from advertising extends the financial margin for high-quality content which, in turn, may have positive effects on the reader market (so-called "spiral of advertising and circulation")

The notion of market within the meaning of the ARC is of an economic nature and principally requires a paying relationship. Consistently, only print media against payment are included in the definition of the reader market. Since free newspapers and magazines do not involve a paying relationship between reader and publisher, they cannot be considered in defining the reader market, although they may be relevant for opinion-forming. According to the Bundeskartellamt's experience, however, this has not resulted in any gaps in the control of positions of economic power. Since advertisers are generally charged for placing adverts in advertising journals, the advertising revenue earned from this is relevant for the advertising market.

The required merger assessment based on individual markets, i.e. the assessment whether the merger leads to the creation or strengthening of dominant positions, does not allow for an examination including different types of media. It has to be examined in each individual case how the market is to be defined under the so-called *Bedarfsmarktkonzept* (demand-side oriented market definition)[15] and what effects the merger has on this market. Accordingly, in a merger case involving a publishing house, which publishes a regional daily newspaper and also holds an interest in a local radio station, and a local TV channel, the Bundeskartellamt did not base its examination on a uniform advertising market for all three media. Since advertising is presented in different forms in the media, advertising media are also employed in different ways. In addition, the various forms of advertising differ significantly in price. As a rule, the various media are employed complementarily and thus have to be assigned to different markets. However, the Bundeskartellamt takes potential substitutional relationships into account in its overall assessment.[16]

The influence of new electronic media such as the Internet and its significance for market definition has to be established in each individual case. In its practice so far, the Bundeskartellamt has not been able to conclude that print media and the Internet are interchangeable from the perspective of the opposite side of the market (readers/advertising customers), even for a foreseeable prognosis period, and thus belong to a common market.[17] Print media and the Internet differ in technical and qualitative terms. Reading an online service and advertising in it require a PC and an Internet connection. Online editions offer possibilities for research and interactivity which are not provided by the print media. Differences also exist with regard to time and frequency. While newspapers, for example, generally publish advertising columns only once or twice a week, online advertising columns are available around the clock. Finally, printed editions and online editions differ greatly in price.

In mergers in the TV sector, the Bundeskartellamt distinguishes between pay-TV and free-TV markets. Pay TV in its various forms (pay-per-channel, pay-per-view) constitutes a separate product market, as opposed to private TV which is financed by advertising and public-service free TV which in Germany is financed by fees and advertising. A further division of the pay-TV market into analogue and digital pay-TV is not made since it is assumed that analogue pay-TV broadcasting will be replaced by digital pay-TV broadcasting in the future. Of course the Bundeskartellamt considers the effects of free-TV on competition in the pay-TV market in its assessment.[18]

Market volumes and market shares in the free TV sector are established on the basis of TV advertising revenue. A paying relationship only exists between the provider and the advertising customer since programmes provided in advertising-financed TV are used by viewers free of charge. It is true that the number of viewers is an important parameter for the level of advertising revenue. However, the public-service TV channels, which by the way are financed through fees, have very limited advertising time due to requirements under media law and can thus only to a limited extent take part in the TV advertising market. Their viewer rates are thus not entirely reflected in the TV advertising market.

Consequently, the Bundeskartellamt has not assumed a specified viewer market in its practice. Neither has this so far been necessary for the effective control of positions of economic power.[19]

NOTES

1. BKartA decision of 1 October 1998, WuW/E DE-V 53 ff. - "Premiere".

2. BKartA, 10.12.2002 "Holtzbrinck/Berliner Verlag" http://www.bkarta.de/B6-119-02a.pdf .

3. In Germany the *Länder* are solely responsible for broadcasting legislation.

4. The KEK is made up of 6 independent experts (Sect 25ff. of the 6th amendment of the RSTV, in force since 1.7.2002); cf. for current area of competence of the KEK: Hepach, ZUM 2003, 112 ff.: Renck-Laufke, ZUM 2003, 109 ff.

5. The BkartA has rejected the Monopolies Commission's proposal to treat the granting of licences as "concentration fiction" as a systemless form of control of internal corporate growth, BkartA comment on the 11th main opinion of the Monopolies Commission 1994/1995.

6. Enquete Kommission "Zukunft der Medien in Wirtschaft und Gesellschaft - Deutschland Weg in die Informationsgesellschaft" [The future of media in industry and society – Germany's path to the information society], deviating SPD report, BT-Drucks.13/6000, p.55.

7. The first National Broadcasting Treaty provided for a so-called model of participation, i.e. a limitation of the level of stakes in providers; critical comment on this model by Clausen-Muradian, ZUM 1996, 934, 935.

8. Möschel points out in *Festschrift für Gaedertz*, p.431, 434 f. that it is much easier economically to operate a broadcasting channel than to bring a new daily on to the market.

9. BVerfG E 73, 118, 152f., E57, 295, 230f.

10. In Germany there are both public-service broadcasters (financed mainly by fees and to a limited extent by advertising) and private TV channels financed exclusively by advertising.

11. BVerfG E 73, 118, 158f.

12. BVerfG E 73, 118, 173f.

13. It is doubtful whether such specific control of influence on public opinion is still necessary today. The ARC is an adequate guarantee for plurality.

14. Rulings by the Federal Supreme Court, e.g. WuW/E BGH 1854,1856,1858 "Zeitungsmarkt München"; BKartA, 10.12.2002 "Holtzbrinck/Berliner Verlag" http://www.bkarta.de/B6-119-02a.pdf .

15. Established practice of the courts, e.g. WuW/E BGH 2433,2436f – Gruner + Jahr – Zeit II.

16. BKartA, 15.04.1999, Oberbayerisches Volksblatt/Regional Fernsehen Rosenheim para 10 http://www.bkarta.de/B6-141-98.pdf

17. BKartA, 26.09.2000, Axel Springer Verlag /Jahr Verlag para 9, http://www.bkarta.de/B6-88-00.pdf

18. BKartA, 01.10.1998, Premiere, WuW/DE-V 53,58 f.

19. The possibility to define a viewer market is not excluded; cf. Commission decision of 20 September 1995 (IV/M.553 - RTL/Veronica/Endemol), OJ 1996 No. L 134/32 para 17, 20 f.: the issue whether the market in question constituted a market in the strict economic sense was left open since it was not relevant for the purposes of this case; affirmed by K.-E. Schmidt, ZUM 1997, 472ff., who points out that the viewer makes a sacrifice time-wise by watching commercials.

IRELAND

Introduction

Part 3 of the Competition Act 2002 provides the framework for the examination of mergers, including media mergers, in Ireland. The legislation came into effect on 1 January 2003.

While all other mergers subject to notification under the legislation will be examined by the Competition Authority under a substantial lessening of competition test, additional criteria may be taken into consideration in examining media mergers and, the Minister for Enterprise, Trade and Employment may play a role in the process.

All media mergers in which one or more of the undertakings involved carries on a media business in Ireland, regardless of the turnover of the undertakings involved[1] must be notified to the Competition Authority. Media mergers are differentiated under the Act because of the unique role of the media in society. The imparting of information and ideas through the broadcasting and print media on a range of public interest issues is one of the principal ways in which the right to freedom of expression is exercised. The Act acknowledges the inherent danger of concentration in this sector by requiring the Competition Authority to forward a copy of the notification to the relevant Minister. Furthermore, the importance of ensuring a diversity of opinion in media is underlined by the requirement to notify all media mergers to the Competition Authority.

At first instance, a media merger will be assessed by the Competition Authority. The Competition Authority applies a substantial lessening of competition test in assessing a media merger in an initial Phase One investigation.

Where the Competition Authority has determined to allow a merger as a result of a Phase One investigation, the Minister may nevertheless direct the Competition Authority to undertake a Phase Two investigation. If, after this investigation, the Competition Authority determines that the merger should be allowed, or allowed subject to conditions, the Minister has the right to review this decision and make his or her own determination of the matter. The Minister will consider various criteria (discussed below), and the Competition Authority, while not formally considering these criteria in its own investigation, shall form an opinion on the criteria to assist the Minister in his or her decision.

The Minister may only overturn a decision on the basis of the application of the additional criteria, he or she cannot overturn on the basis that he or she believes the Competition Authority has not applied the substantial lessening of competition test correctly. The Minister must publish a statement of reasons for his or her decision to allow or block a merger.

To date, no media mergers have been examined under the new regime.

Questions Raised in OECD Request for Submissions

1. Market Definition

The approach to be taken by the Competition Authority in defining markets in relation to media mergers will be the same as the approach taken in relation to other mergers. This is set out in the Authority's guide to merger analysis.[2]

Whether different forms of media such as free-to-air terrestrial television, free newspapers and free Internet access services will be included in the same market as their paid-for counterparts, would be considered on a case by case basis, together with issues such as the impact of versioning and the impact of innovation on market definition.

2. Other Challenging Issues

The Competition Authority has not dealt with any media mergers yet under the new legislation and accordingly has not had sufficient practical experience of the issues raised in the OECD Issues Paper to comment at this time.

3. Plurality Concerns

The Competition Act 2002 recognises to some extent the importance of plurality in media in assessing media mergers.

It imposes a lower threshold for notification of media mergers than the threshold applicable to other mergers. As outlined above any media merger, irrespective of the level of turnover is subject to notification in the State of Ireland. It is only necessary that one of the undertakings involved in the transaction be carrying on a media business in the State to show sufficient nexus to the State to trigger the notification requirements.

In broad terms, a media business is defined as:

- The publication of newspapers or periodicals consisting substantially of news and comment on current affairs;

- The business of providing a broadcasting service, being a compilation of programme material (audio-visual or audio) transmitted via wireless telegraphy, a cable system or multipoint microwave distribution system, a satellite device or other transmission system except the Internet,[3] or supplying a compilation of programme material for the purpose of such a transmission; or

- The business of providing a broadcasting services platform.

The Competition Act requires the Minister to have regard to, and only to the following criteria in assessing a media merger should he or she elect to further investigate the transaction when the Competition Authority has cleared it after a Phase 2 investigation:

- The strength and competitiveness of media businesses indigenous to the State.

- The extent to which ownership and control of media businesses in the State is spread amongst individuals and other undertakings.

- The extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings.

- The extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State.

- The share in the market in the State of one or more of the undertakings involved, or any individual or other undertaking who or which has an interest in such an undertaking.

While it is clear that these criteria enable consideration of factors beyond those which would be considered in relation to the substantial lessening of competition test, including issues of preservation of local media, diversity of views and plurality (across media generally and within certain sectors of the media) it is uncertain what weight will be placed by the Minister on each factor.

NOTES

1. All other types of mergers only trigger notification requirements where the worldwide turnover of each of the undertakings involved is not less than €40M, at least one of the undertakings involved has turnover within the State of not less than €40M, and both undertakings carry on business in any part of the island of Ireland.

2. The Competition Authority, *Notice in respect of Guidelines for Merger Analysis*, N/02/004, 16 December 2002.

3. However, a proposed merger between an Internet business and a media business in the State would still fall for consideration under the rules relating to media mergers because one of the parties is carrying on a media business in the State.

ISRAEL

1. General Background

In March 2002, the General Director approved, with conditions, a merger between the three cable television companies operating in Israel. The merger created a merged cable company possessing over 70% of the multi-channel-television market. The companies have not yet fully merged their activities.

In May 2002, the satellite multi-channel television company appealed the General Director's decision to the Antitrust Tribunal, and the appeal is awaiting decision.

Prior to the merger approval, each cable company independently operated cable television services in different geographic regions, and each was declared a regional monopoly in multi-channel television services. The companies competed with the satellite multi-channel television company, which commenced national broadcasting in 2000 and is owned by Bezeq The Israel Telecommunication Corp., Ltd., a declared monopoly in basic telephony services (the sole provider of these services).

In July 2001, the Communication Law (Telecommunications and Broadcast) (1982) was amended so as to abolish the exclusivity theretofore provided for cable television operation in each region, and to provide for the supply of other communication services via the cable network, such as telephony and broad-band Internet.

The IAA's examination of the effect of the merger on competition was focused on potential competition among the companies by means of overbuilding or of an open access regime whereby each could transmit utilizing the other companies' infrastructures. Moreover, it focused on the effects of the merger in foreclosing content vis-à-vis the satellite company.

In light of the convergence tendency in telecommunications (the tendency to provide clusters of services to the consumer) it was expected that in the future the weight of the merged cable company in providing cluster of services will not be as substantial as their weight in the provision of multi-channel television services. The other company providing clusters of telecommunication services is Bezeq, alongside with its subsidiary, the satellite company.

The IAA found that the merger would lead to efficiencies and to greater competition in the various telecommunication markets due to the convergence tendency. These efficiencies are expected to result mainly from the ability of the merged firm to become an actor in the national telephone and Internet infrastructure market.

2. Specific Competition Concerns

The main competitive aspects that were examined by the IAA with respect to several distinct markets, and the main findings of the examination are as follows:

2.1 Subscribers' multi channel television:

Prior to the merger the multi channel television market was composed of the three cable companies, each one operating in a distinct geographic region, and the satellite that offered services nationally (it should be noted that this market does not include free to air broadcasting). The merger was expected to create two national providers of multi channel services: the satellite company and the merged cable company.

The IAA's examination of the merger determined that the merger of the three cable operators did not constitute a horizontal merger since the companies do not compete with each other in the regional markets and are not potential competitors to each other.

The cable companies are not considered potential competitors since it was found that in the foreseeable future it would not be worthwhile for any of the companies to overbuild in the geographical regions of the other companies. Moreover, it was found that even in case of the facilitation of cooperation between the three companies with respect to their infrastructure, the companies would not compete with each other for a number of reasons, including the following:

1. Mutual forbearance: The economic incentive of each company to compete with the others in its region is small since entrance of one of the companies in the other's region will lead to counter-entrance of the other firm into its region;
2. The cooperation in infrastructure will lead to a spillover effect in providing multi channel pay TV, and the competition between the companies will be impaired;
3. Lack of sufficient broadband as long as the companies provide analogical services alongside the digital services;
4. The granting of territorial licenses by the telecommunication ministry.

As aforesaid, it was concluded that the three cable companies are not potential competitors to each other.

The merger was expected to lead to the existence of only two national multi-channel television providers (the satellite company and the merged entity), instead of maintaining four competitors, i.e, the three cable companies, each one competing with the national satellite company in a different region. The concern was that the merger would increase the ability to coordinate between those two national companies.

In light of this concern that also stemmed from the tendency in the communications market to provide clusters of services, it was decided to impose conditions concerning the entrance of the merged cable company to the telephony services market. Those conditions were aimed at preventing mutual forbearance.

The concern was that the cable companies would not enter the telephony services market and the provision of telecommunication services, and would thus avoid harming Bezeq in return for reducing the measure of competition on behalf of Bezeq and the satellite company in the multi-channel market. The conditions instruct the merged cable company to enter the telephony services market within a predetermined period of time, and indicated the required minimal scope of customers.

2.2 Purchase of foreign content and foreign channels:

The three cable companies compete with the satellite in the purchase of foreign content and foreign channels. The competitive concern that was examined was the uniting of purchasing power of the

three cable companies as result of the merger in comparison with the purchasing power of the satellite company.

It was found that the companies do not possess market power or purchasing power in foreign content and channels, and do not enjoy economies of scale.

In past years the Antitrust Tribunal authorized the cable companies to purchase contents together in order to strengthen their purchase power.

In view of past exclusive agreements signed between the three cable companies and the major studios that actually harmed the ability of the satellite company to compete with them, the IAA was concerned about adopting similar practices in the future. Therefore, it was decided to impose a "must–sale" condition concerning certain contents.

The principle of the "must–sale" condition is that the cable companies will have to sell the content they purchased from certain major studios to the satellite company under the same conditions indicated in the agreements with those studios. The must-sale condition will be valid until the termination of those agreements.

2.3 Purchase of local channels:

The existence of three distinct cable companies and a satellite company in the multi-channel television market enabled the channels' producers to choose with whom to contract, i.e. a channel producer was not obliged to contract with all three cable companies, since contracting with the satellite company, and even with only one of the cable companies, would have enabled that producer to operate.

As a result of the merger, these channel producers would need to contract with both the satellite and the merged cable company, since the satellite does not have enough subscribers in order to enable the channel to continue operating.

In practice, the IAA found that prior to the merger all three cable companies offered the same variety of channels, and only in a few cases did a channel not connect with all three of them. Moreover, the companies enjoy economies of scale with respect to part of the channels, and have market power vis-a-vis the channels' producers.

In light of these findings, it was decided to impose conditions aimed at reducing the dependence of channels on the merged cable company. The conditions concerned:

1. Open access (the ability of a channel producer to sell directly to subscribers by purchasing the broadband required from the cable company);

2. The method of settling of accounts between the channels and the united cable company;

3. A prohibition on the merged cable company to have any holdings in or influence on the channels' producers (or any other affinity) aside from the two existing channels that were already jointly owned.

2.4 Purchase of local content:

Although the companies purchase local content separately, a merger between all three of them is not expected to lead to monopsony power due to the existence of many other competitors, such as

broadcast free to air channels and specialized channels. The joint market share in purchasing is expected to be no greater than 10%.

In view of the abovementioned findings, the General Director decided to approve the merger subject to conditions that remove the competitive concerns the merger raised.

JAPAN

1. Introduction

In recent years, competition between enterprises－including those in the media industry－has been heating up through advances in computerization. It is therefore thought that more and more M&As among media companies in Japan like other countries may occur as a means of coping with this situation.

And media plurality is ensured by the principle of excluding multiple ownership of the media, whose point of view is different from the competition policy, as explained below.

In Japan, there are no M&As that could have significant impacts on competition in media industry recently, in consideration of the above mentioned situation, studies of analytical methods for examination of M&As among media enterprises would be necessary.

2. Examinations of M&As based on the Antimonopoly Act

Under the Antimonopoly Act (AMA), if a specified type of M&As (merger, corporate division, acquisition, etc.) with a certain scale occurs, parties involved must notify the M&A to the Fair Trade Commission (FTC) before it takes place.

The FTC examines whether or not the notified M&A may be substantially to restrain competition in any particular field of trade and, if the FTC determines that it may be, the FTC prohibits the notified M&A or orders divestiture of assets, etc.

In order to make it clear what kind of M&As may be substantially to restrain competition in a particular field of trade, the FTC established and published ''the M&A Guidelines''(the Guidelines) and examine specific M&A cases in accordance with the Guidelines. The term ''substantially to restrain competition'' means to bring about a state in which a specific firm or a group of firms can control the market by manipulating price, quality, volume, and various other conditions with some latitude as its or their own volition.

3. Examinations of M&As among media companies based on the AMA

There are no special stipulations regarding M&As among media companies in the AMA, and the Guidelines make no mention of M&As among media companies. Thus, in all cases among media companies, the AMA shall be applied in the same manner as they are to M&As of other businesses, and these M&As shall be examined from the viewpoint of whether or not they may be substantially to restrain competition in any particular field of trade.

Furthermore, the factors requiring consideration in the Guidelines shall also be considered in examinations of M&As among media enterprises. When examining a M&A, the FTC determines whether or not the notified M&A may be substantially to restrain competition based on comprehensive consideration of not only market share and rank but conditions of entry and so on. Thus, while the FTC

does not evaluate the notified M&A based solely on market share and rank, it does use market share, etc., as a fundamental indicator of the positions of relevant companies on market.

4. Maintaining media plurality

4.1 Scheme to ensure plurality in broadcasting

In Japan, measures to ensure plurality in broadcasting are taken based on the Broadcast Law, the Radio Law and related regulations as shown below. It corresponds to the approach "f" in the questionnaire.

The Broadcast Law of Japan provides that the Minister of Public Management, Home Affairs, Posts and Telecommunications set "the Basic Broadcasting Plan ", which stipulates the guideline to ensure freedom of expression should be shared among as many people as possible by ensuring opportunity of broadcasting for many entities as possible.

The Basic Broadcasting Plan provides that:

1. Opportunity of private broadcasting should be opened to many entities as possible, by limiting the number of the broadcasting systems that are owned or governed by the same entity in principle.

2. Concentrating ownership of mass media in each local community to limited entities, in principle, should be avoided.

By reflecting the purport of the Broadcast Law as explained above, on the occasion of examination of application for licenses of broadcasting stations, "the Essential Standards for Establishing Broadcasting Stations", in principle, prohibit establishment of the broadcasting station by the broadcasters those who governs broadcasters, and those who are governed by broadcasters. These standards are also applicable to the mergers of broadcasting stations, assignation of enterprises and so on. (The criterion of governance; possession of over 10% of the right to vote when establishing stations in the same broadcast service area, possession of 20% and over of the right to vote when establishing in the different broadcast service areas. It is also limited the executives to hold posts of more than one broadcaster concurrently.)

In regard to newspaper enterprises, in principle, it is prohibited to govern all three types of media, i.e. television, AM radio, and newspaper, in all the same broadcast service area.

And, in regard to the approval of the program-supplying broadcast business, the capacity of transmission of the program-supplying broadcast business to the same entity is limited.

4.2 Significance of the present measure that ensures plurality in broadcasting sector

As shown above, the principle of excluding multiple ownership of the media is to be sought through limiting shareholding in the broadcaster to the specified ratio, with the object of ensuring plurality and diversity of speech.

The principle of excluding multiple ownership of the media has following distinctions:

8. It regulates capital relationship by a certain specified standard, from the point of view of the cultural policy and plurality of speech, and

9. It is applicable to the particularity of advertisement broadcasting market where broadcasters and viewers are not under contract.

In this regard, this principle has significance different from the competition policy.

Nowadays, development in broadband communications, multimedia and multi-channel are offering more means to provide information.

Even in such situation,

10. The risks that the means to provide information are concentrated to a particular entity still exists, and once such a risk is realized, it is difficult to be restored.

11. And it needs to be taken account of the people who only view specific traditional media.

Therefore, the principle of excluding multiple ownership of the media, which ensures plurality of broadcasting entities by limited ownership over media, needs to be maintained continuously.

The final report of Study Group on Broadcasting Policy, held at the Ministry of Public Management, Home Affairs, Posts and Telecommunications (MPHPT) (press release in February, 2003), gave a suggestion that "appropriate relaxation of the principle of excluding multiple ownership of the media is basically justified, by considering the changes in media environment, above all, increasing choices of media for viewers. This relaxation is expected to promote sound broadcasting and consumers' benefit".

Now, the current principle of excluding concentration of mass media is under review, at the MPHPT.

MEXICO[1]

1. Regulatory Framework

The broadcasting industry, as well as the telecommunication sector as a whole, has traditionally been regulated by the Ministry of Communications and Transportation. In 1996, a major part of the ministry authority and responsibilities to regulate telecommunications was transferred to the newly established Federal Telecommunications Commission. This Commission is a so-called desconcentrated agency of the Ministry of Communications and Transportation, with technical and operational autonomy. The Ministry of the Interior has certain authority to regulate content.

The current regulation for the sector includes the Federal Law for Radio and Television (1960), the Federal Telecommunication Law (1995), and the Regulations for Restricted Television and Audio Services (2000). The Law for Radio and Television is still most important for open (as opposed to subscriber) radio and TV services. The Telecommunications Law and the Regulation for Restricted Television and Audio Services fully apply to pay radio and pay TV services.

In Mexico there are no local or regional laws or regulations that apply to the telecommunications sector.

1.1 Entry and licensing regulation

The Telecommunications Law defines as "public telecommunications networks" all systems that use the radio spectrum, satellite connections, wires, electric transmission networks, or any other means of transmission, and through which communications services are commercially exploited. Public telecommunications networks include all broadcasting networks, independent of the technology they use.

Under the Telecommunication Law, the installation or operation of a public telecommunication network requires a concession granted by the Ministry of Communications and Transportation. Concessions for the use of radio spectrum and for satellite communications are allocated by means of public auctions, and are complementary to the concessions for public networks. Concessions for public telecommunications networks, including those for restricted radio and TV services, may be applied for at the Ministry of Communications and Transportation. Applications must include, among other things, proof of financial and technical capacity, a business plan, and programs and obligations with respect to investments, coverage and service quality. All concession holders have certain obligations with respect to consumer protection, service quality, non-discriminatory service provision, etc. Most of these obligations are established generally in the regulations, but individual concessions may include additional ones.

Under the Law of Radio and Television, only commercial open radio and TV stations need concessions, which are granted by the Ministry of Communications and Transportation. Official, cultural and educational stations only require a permit. The Congress is currently evaluating some changes to the Federal Law for Radio and Television, which would require a favorable opinion of the Federal Competition Commission (FCC) for the Ministry of Communications and Transportation to grant any concession

In the case of open radio and TV, foreign ownership of concessions is not allowed, while in restricted radio and TV it is limited to 49 percent.[2]

2.2 Merger Regulation

In Mexico there is a general mandate-driven division of labor, whereby competition law is exclusively applied by the Federal Competition Commission (FCC) and regulation exclusively by technical economic regulators. The 1993 Federal Law of Economic Competition (the Competition Law) fully applies to all sectors, including broadcasting. The only exceptions are certain areas defined as "strategic" under the Constitution, including, among others, crude petroleum, postal services and electricity.

The Federal Law for Radio and Television does not establish any restraint on the transfer of concessions, except that they need authorization from the Ministry Communications and Transportation. However, the Congress is currently evaluating changes to this law, which would require a favorable opinion from the FCC for any transfer of radio and TV concessions.

The Regulations for Restricted Television and Audio Services establishes that a favorable opinion from the FCC is required to: 1) grant two or more different concessions in the same area to one person; and 2) authorize the transfer of rights that may result in a person controlling two or more different concessions in the same area.

Merger review is part of the Competition Law. The law states that the FCC will prohibit mergers whose objective or effect is to reduce, distort or hinder competition. To prevent possible anticompetitive concentrations, parties to a merger are required to notify the FCC if the operation exceeds certain thresholds. In its analysis, the FCC considers factors such as whether the merging parties would obtain the power to fix prices unilaterally or to substantially restrict competitors' access to the market, and whether actual or potential competitors likely would inhibit such power. The Regulations of the Competition Law provide for an explicit efficiency defense for mergers, where the burden of proof lies upon the merging parties. A failing firm defense is not explicitly included, but it may be and has been taken into account in the evaluation of harm to competition.

The FCC must be notified of the following concentrations before they are carried out:

- If the value of the transaction exceeds 12 million times the minimum general wage for the Federal District (approximately $49.7 MUSD at the current exchange rate).
- If the transaction implies the accumulation of 35 percent or more of the assets or shares of an economic agent whose assets or sales amount to more than 12 million times the minimum wage for the Federal District ($49.7 MUSD).
- If the assets or annual sales of the merging parties, separately or jointly, exceed 48 million times the minimum wage for the Federal District ($198.8 MUSD), and the transaction in question implies an additional accumulation of assets or capital stock in excess of 4.8 million times the minimum wage ($19.9 MUSD).

2.3 Tariff regulation

Under the Law for Radio and Television and the Regulation for Restricted Television and Audio Services, the Ministry of Communications and Transportation imposes minimum tariffs for radio and TV services, including advertising.

Under the Telecommunications Law, all other concession and permit holders are free to set tariffs for telecommunication services. Tariffs must only be registered at the Telecommunications Commission.

The Telecommunications Commission may impose special regulations regarding tariffs, service quality, and information upon a concession holder who has substantial market power in some relevant market, according to the standards established in the Federal Law of Economic Competition. The Federal Competition Commission is the agency in charge of determining whether a concession holder has substantial market power.

2.4 Content regulation

Content for broadcasting is included in the respective law and regulations. For example, under the Law for Radio and Television, each radio and TV channel must transmit free of charge up to 30 minutes a day of educational, cultural or social programming which is administered by the Ministry of the Interior. The regulations associated to this law also establish a maximum daily advertising time equivalent to 18 percent of total transmissions. There are also restrictions with respect to the advertising of alcoholic drinks and lotteries, and to false advertising.

Since 1969 all radio and TV concessionaries were subject to a special tax that can be covered by providing to the government, free of charge, 12.5 percent of their daily transmission time. However, under a recent regulation (2001) concessionaires satisfy this tax by providing daily, free of charge, 18 minutes of transmission in the case of TV stations and 35 minutes in the case of radio stations. The Federal Government uses this transmission time.

The Regulations for Restricted Television and Audio Services is more specific. For example, 80 per cent of all programming must be in Spanish (either spoken or subtitled). Cable pay-TV must transmit daily at least one hour of local programming and 7 percent of daily transmissions must be national programming. Pay-TV services using satellites must transmit national programming equivalent to 8 percent of total programming. Furthermore, the regulations provide for the classification of programs according to rules set out by the Ministry of the Interior. They also establish a maximum of 6 minutes of advertising per each hour of transmission. Additional restrictions apply on the advertising of alcoholic drinks, tobacco, health products, lotteries, financial institutions, and false advertising.

Under current laws and regulations, the Ministry of the Interior has the authority to review the content of transmissions in the broadcasting industry, with the purpose of assuring it is respectful of private life, personal dignity, family values and public morality, and that it promotes the integral development of children, national values, as well as the knowledge of international community.

3. Merger cases in Broadcasting

The Competition Commission has full authority to act against monopolistic practices and mergers in the broadcasting sector. It also plays an important competition advocacy role in the regulatory reforms of the telecommunications industry in general and broadcasting in particular.

The Competition Commission’s main activities related to broadcasting have been the following:

- An advocacy role in the regulatory reform of telecommunications infrastructure for broadcasting;

- An advocacy role in the design of Regulations for Restricted Television and Audio Services;

- An advocacy role in the design of the proposed changes to the Federal Law of Radio and Television;

- Review of participants in the privatization of satellites and in the auctions of radio spectrum;

- Review of a large number of (mainly horizontal) mergers between broadcasters; and

- Assessment of alleged monopolistic practices with respect to broadcasting rights for certain sport events.

Below we describe two of the most relevant cases the FCC has addressed in mass media mergers.

The following characteristics of the broadcasting industry will be useful to understand the context of the cases discussed below.

- In 2001, total private (as opposed to government) expenses in advertising amounted to $2,240 MMUSD, allocated as follows: 72 percent in television, 11 percent in radio, 7 percent in newspapers, 5 percent in magazines, 1 in Internet, and 4 percent in other media.

- The television industry is dominated by two broadcasters: Televisa and TV Azteca. Both are nation-wide commercial broadcasters. Televisa owns 4 nationwide television channels (Channel 2, Channel 4, Channel 5, and Channel 9), which together have a market share of 59 percent. TV Azteca owns 2 nationwide television channels (Channel 13 and Channel 7), which together have a market share of 36 percent. Both TV Azteca and Televisa are vertically integrated, engaging in program production, packaging and delivery.[3]

- In the case of radio broadcasting, industry structure varies in each locality. In Mexico City, by far the largest market, there were 55 commercial radio stations in 2001 (31 AM and 24 FM stations) and both AM and FM frequency spectrums were saturated. These radio stations were concentrated by corporate groups as follows: Grupo Radio Centro 20 percent; Grupo ACIR 13 percent; Nucleo Radio Mil and Radiopolis 11 percent each; and Organización Radioforma 9 percent. The rest of the stations are owns by smaller concessionaires.

3.1 Radio Centro and Radiodifusión Red

At the end of 1994, Grupo Radio Centro notified its plans to acquire Radiodifusión Red. Both firms had their main radio stations in the Mexico City area. The Competition Commission's analysis focused on the advertising market. It found that advertisers usually consider several media alternatives in deciding how to spend their advertising budget, including radio stations, TV stations and newspapers. However, the services of TV stations with national coverage are of less interest to advertisers whose business is limited to Mexico City. Likewise, newspapers were considered to compete only partially with services that radio provides, due to their more limited coverage. Thus, the relevant market was defined as radio broadcast advertising services in the Mexico City area.

The acquisition would increase the number of radio stations controlled by Grupo Radio Centro from 10 to 13, a 24 percent share of all stations in Mexico City. It would also concentrate 39.2 percent of all advertising sales and 45.6 percent of radio audience. The main reason for the differences between the share in the number of stations and the share in audience is that the acquisition included the highly popular

Monitor news program. New entry into the market is limited due to saturation of the frequency bands available for radio broadcasting.

The Competition Commission imposed a number of conditions on the acquisition. For example, Grupo Radio Centro had to eliminate the exclusivity restrictions on news services, informational programming and special events included in the contractual relationship with Infored, a firm that had formerly provided these services exclusively to the Monitor news program. Grupo Radio Centro was also required to refrain from tying the purchase of advertising time from the stations it acquired to the purchase of advertising from the stations it already owned.

3.2 Grupo Televisa, SA/ Grupo Acir Comunicaciones, SA de CV

Certain confidentiality restraints apply to this case, so that this document only refers to public information and general aspects of the case.

On 26 September, 2000, Grupo Televisa, SA (Televisa), Mexico's largest broadcasting group, notified the FCC its intent to merge its subsidiary Sistema Radiópolis, SA de CV (Radiópolis), with Grupo Acir Comunicaciones, SA de CV (Acir), one of the country's top radio group. As mentioned above, Televisa owns 4 nationwide television channels, which together have a market share of 59 percent, and Radiopolis operates several radio stations nationwide with a participation of 11 percent in the number of radio stations in Mexico City. Grupo Acir, on the other hand, owns several radio stations nationwide with a participation of 13 percent in the number of radio stations in Mexico City.[4].

Since public broadcasting firms obtain their revenues from selling advertising spaces in their programming. The FCC considered that the relevant market for this transaction was the market for transmitting advertising in open radio, which has a strong complementary relationship with the market for transmitting advertising in open television.

On September 30, 2000, the FCC objected this transaction because it believed it would have anticompetitive effects on the relevant market.

4. Final Remarks

The specific regulations for the broadcasting industry take special public interest goals into account when imposing restrictions on radio and TV programming: maximum time limits and other restrictions on advertising, minimum time limits for cultural, educational and social programming, minimum time limits for Spanish content, local and national programming, and time dedicated to the Federal Government. Also, these regulations limit foreign investment. Additionally, the Ministry of the Interior has certain authority to regulate content.

On the other hand, the Competition Law focuses only on protecting the competition process and free market entry, rather than on other goals. This law fully applies to the broadcasting industry and other mass media. Thus, when reviewing media mergers, the FCC considers only their effects on the competition process and free market entry. It does not consider any other public interest. Nevertheless, when protecting competition in the media merger cases resolved by the FCC, it has also contributed to maintain plurality and diversity.

NOTES

1. This document will focus on mergers in the broadcasting industry, because in Mexico there have not been any relevant mergers cases in other mass media.

2. The only exception is wireless telephony networks, for which 100 percent foreign ownership is allowed.

3. Source for market shares: www.zonalatina.com/Zldata41.htm

4. Source: Grupo Radio Centro's 2001 report.

SPAIN

Introduction

The Spanish Competition Authorities experience in the assessment of media mergers has been significant both in quantitative terms and in variety because of the many sectors affected. These mergers have been part of the structural evolution of our media markets due in part to the liberalization process and to technological innovations which entailed, like in many other countries, new structural conditions, mainly in the telecom sector, in a much more global world. The sectors involved were newspapers, radio, television and internet.

Since 1999, 13 mergers were in fact notified and assessed by the Servicio de Defensa de la Competencia. They all were finally cleared after the establishment of some remedies only in two of the three cases that went into the second phase in the Tribunal de Defensa de la Competencia.

Stress must be made on the fact that the competition assessment did not vary compared to mergers in other sectors. Remedies were mainly based on dynamic economic efficiency considerations and focused on the maintenance of competition conditions in the affected markets. In particular, conditions tried to avoid the creation of new entry barriers, to reduce the existing ones and to guarantee that consumers were beneficiaries of efficiency gains derived from the merger, respecting at the same time business logic and feasibility.

In spite of this more recent experience, it is worth noting that the Supreme Court has recently annulled a Government decision adopted in 1994 concerning a merger of two radio operators. The concentration was then subject to certain conditions (mainly divestiture of radio stations) based on competition concerns but the Supreme Court decided that it was void, for it did not take appropriately into account "information pluralism" considerations. This led the Government to include in the more recent decision concerning two pay TV operators (Sogecable-Vía Digital) a provision for the fulfilment of sector regulation concerning "information pluralism" and some additional conditions to those of a competition policy nature established for the merger.

1. Summary of Main Cases

Here below are summarised the five main merger cases recently assessed by the Spanish Authorities where pay TV, radio, internet, press and cinema advertising markets were affected. The reports of the Servicio and the Tribunal de Defensa de la Competencia on these cases can be found in the respective Web pages (www.mineco.es/dgdc/sdc y www.tdcompetencia.org).

1.1 SOGECABLE I VIA DIGITAL

The merger was highly influenced by the financial difficulties of both operators, especially in the case of Via Digital with expected losses of more than 300 million euros in 2002.

The merger consisted on the integration of DTS Distribuidora de Televisión Digital S.A. (Vía Digital), the second pay TV operator in Spain, in Sogecable S.A., leader of the Spanish pay TV market. The former was controlled by the Spanish Telefónica group. The latter was jointly controlled by means of a shareholders' agreement by the Spanish media group Promotora de Informaciones S.A. (Prisa) and Groupe Canal + S.A., belonging to Vivendi Universal. After the merger Sogecable would continue to be controlled by Prisa and Canal+, while Telefónica would hold a significant participation in the merged entity.

The merger agreement included also the acquisition by Sogecable of the capital of Audiovisual Sport (AVS), a joint venture of Sogecable, Admira and Televisión de Catalunya, created to jointly manage the rights of football matches between Spanish teams (Liga Española and the Copa del Rey) owned by each one of the three AVS shareholders. After the merger, the new group would have 80% of shares of AVS but, nevertheless, this would not imply a change in the control structure and thus this was not analysed as an independent merger.

The operation was notified in 2002 to the Commission and the Spanish authorities requested the referal of the case under article 9.2 (a) of Merger Regulation 4064/89. The Commission decided to refer the case to the Spanish Competition Authorities given the national scope of the markets affected by the merger and therefore the case was assessed under Spanish competition law.

Sogecable is a Spanish company whose principal areas of business are the operation of terrestrial television (Canal+) and direct-to-home satellite pay television services (Canal Satélite Digital), the production and distribution of films, the acquisition and sale of sports rights and the provision of technology services.

Vía Digital offers pay TV via satellite in Spain and was controlled by Telefónica, which would remain as a reference shareholder in the company resulting from the merger.

A. Relevant and other affected markets

Considering the products and services supplied by the merger parties, the product relevant market was the pay television market. Nevertheless, there were other product markets, linked or closely related to pay TV which could also be affected by the concentration. No relevant regulatory entry barriers existed.

Pay TV market consists on the broadcasting of codified programmes which can only be seen trough a periodic payment subscription along with the installation of the necessary technique devices for receiving and converting the codified signal. According to Commission decisions, Spanish authorities have considered that this is a separate – though closely related – market to free TV and includes analogical or digital television services which are distributed by means of any technology: terrestrial, satellite or cable. As regards interactive and pay per view services, Spanish authorities have also included them into this market because of the present low degree of development but may in the future consider them as a separate market. Technical and administrative services have also been included into this market because of their tight relationship.

Other affected markets were: a) The acquisition of rights of premium contents (the "main drivers" for consumers that decide to subscribe to a pay TV): regular football events in which Spanish teams participate and exclusive rights for premium films; b) the production and sale of TV thematic channels; c) The production and sale of audiovisual works for television (any type of audiovisual works for analogical or digital, free or pay TV); d) Telecommunication services (telephony and Internet access) and e) wholesale digital platform services.

In all cases, the relevant geographic markets were considered to be national in scope given the existing cultural and language barriers of national nature.

B. Competition effects in the different product markets

1. **Pay TV market.** Sogecable, as a first entrant in the Spanish pay television market through its terrestrial TV channel Canal +, could have access to the more attractive contents, thus obtaining an important basis of subscribers in a very short time. This position was afterwards strengthened with the creation of the first satellite pay television platform, Canal Satélite Digital.

   Canal Satélite Digital and Canal + , had a combined market share of around 55%, in terms of number of subscribers. The integration of Via Digital in Sogecable would raise this market share to around 80%. Sogecable would become the sole satellite television platform in Spain and would only compete with cable operators in the geographic areas where they are legally and technically established.

   In spite of this high market share, the main risks of the merger came from the position of the parties in the upstream markets of acquisition of rights of premium contents (football, premium films, and thematic channels) strongly related to pay TV market and from the position of Telefónica in telecommunications markets.

2. **Acquisition of rights of premium contents market.** The merger had a negative effect on effective competition in the market of acquisition and sale of rights of football events, hindering new entrance. This effect was due, on the one side, to the fact that Sogecable would hold English clauses for more than 50% of the Spanish football clubs in the forthcoming negotiation of the broadcasting rights concerning the *Liga Española and the Copa de S.M. El Rey;* on the other hand, anticompetitive effects would have also arisen from excessively long exclusivity periods for these rights. Nonetheless, the market of football rights in Spain has a significant difference with other European countries as the national Law imposes the free transmission of the best match of the premier league each week.

   The merger also generated anticompetitive concerns in the market of acquisition of exclusive rights to broadcast films produced by the *Major American Studios* for first and second pay TV windows; this market would suffer a reduction of the demand without a simultaneous intensification of competition between producers and distributors for getting into the programming of the new platform. This effect steamed from the addition of Sogecable' seven Major Studios rights to the only one Major Studio right held by Via Digital, and also from the exclusivity period agreed.

3. **Production and commercialisation of TV thematic channels/Production and marketing of audiovisual works for TV.** After the merger these markets would suffer a reduction in demand without a simultaneous intensification of competition for getting into the programming of the new platform. This effect was due to the current commercialisation conditions of these products along with the vertical integration of Sogecable (present in the market on the supply and demand side). These effects could appear in two forms: impossibility of access to the new platform for certain producers and distributors and a completely dependent position on Sogecable of cable operators concerning the access to contents that would be offered on their programming.

4. **Telecommunication services market.** The participation of Telefonica in Sogecable as the company that will control the main contents for pay TV, along with its activity as a provider of fixed telephony services, broadband Internet access and television through ADSL, would have produced anti competitive effects in these markets. Such circumstance becomes more sensitive considering the foreseen launching by Telefonica of its project Imagenio, which will provide these services as an integrated package all over the national territory.

   The type and number of services which could be provided through broadband technologies as ADSL enable what is known as "triple play": simultaneous provision of Internet access, audiovisual contents, voice and data. This technological development allowed the telecommunication operators to provide integrated package services which include pay TV services as the key element to attract clients. Such integration of services makes that the notified operation might produce effects not only over the single service of pay broadband TV but also over other services which may be offered jointly with this one.

   Besides, Sogecable and Telefónica would be interested in developing a joint supply of pay TV, voice and data services. In this scenario, it would be very difficult for the rest of the companies which offer Internet access services to compete with a joint offer of the ADSL services of Telefónica and the Sogecable contents; this would lead to strengthening the position of Telefónica in the broadband Internet access market and the fixed telephony market.

C. Economic efficiencies of the transaction

The notified operation would enhance economic efficiencies in the resulting TV platform due to the acquisition of a critic number of subscribers which would enable the new entity to be profitable through the transformation of fixed costs (linked with the acquisition of rights of certain contents) into variable costs and, thus, to profit of the economies of scale which are typical of this model of business. It was therefore relevant that the new platform would have incentives to transfer these efficiencies to consumers both via prices and via better contents, given that this last circumstance would also lead to increase the number of subscribers in a market where the level of penetration is still very low (both parties had around 2,5 million subscribers last year).

D. Conditions

The lessening of competition that the notified operation would produce could be compensated with the compliance of a set of conditions by Sogecable, aiming basically at the following objectives:

- To offer the satellite platform as a carrier for other independent TV channels.

- Guarantee information pluralism (obligation to carry any information channel, prohibition of any common strategy of Sogecable and Telefónica in other media markets, and fulfilment of the ban to simultaneously participate in two private televisions, already imposed by sector regulation.

- The protection of competition in emergent markets avoiding the creation of new entry barriers through the prohibition of acquisition of exclusive rights for transmission means different than television and, in particular, mobile telecommunications and Internet.

- The reduction of the existing entry barriers through the limitation of the duration of the contracts for acquisition of premium films and football events along with the elimination of the English clauses.

- The passing of efficiencies to consumers by means of an enlargement of the channel offers and maintaining the quality of contents.

- The establishment of a limit to the increasing subscriber prices in order to avoid passing the cost of the operation to consumers.

- In order to avoid the lessening of effective competition in the Telecommunication market due to the participation of Telefonica in Sogecable, the joint commercialisation of the products of both undertakings was forbidden as well as any discrimination which would benefit Telefónica in the marketing of Sogecable's products and any incentive or obligation for subscribers to choose Telefónica's network as a return path for interactive services.

- The establishment of a private arbitration mechanism to guarantee the resolution of conflicts and, mainly, full compliance with the commitments.

1.2 GRUPO CORREO-PRENSA ESPAÑOLA

The operation, which took place in 2001, consisted on the acquisition by Grupo Correo, leader in the local daily newspapers of general information, of the control of Prensa Española S.A. which is active in the same market at the local and national level. Both media groups are also active in the radio and free TV sectors, in the production of TV contents and films sectors and in Internet.

After the merger, Grupo Correo would become the leader in the Spanish daily press market of general information (written press), with a market share of around less than 25% in terms of sales and of diffusion (number of issues sold).

A. Relevant and other affected markets

The relevant product market was the market of daily press of general information which can be divided in two different markets: national market (Prensa Española), and regional or local markets (Grupo Correo).

B. Competition effects

The competition authorities considered that there were no negative competition effects because the high market share of the resulting Group in some regional or local markets existed before the merger (there were no overlaps) and the strong activity and economic importance of competitors guaranteed the maintenance of effective competition in a market where the entry barriers do not exist.

1.3 ANTENA 3-MOVIERECORD

The merger, notified in 1999, consisted on the acquisition by Antena 3 TV, one of the three private broadcasters, of Movierecord Cine, leader in advertising in cinemas.

The relevant market included the cinema advertising activity, a highly concentrated market with just three operators. Besides, Movierecord held a market share bigger than 60% of screens and 50% of

spectators. Other markets such as film production and advertising through other means were also affected and the geographical market was determined to be strictly national.

No significant entry barriers were found.

As the result of the merger, Movierecord did not increased its market share in the cinema advertising activity but it would strengthen its already relevant position by integrating in a big Media Group such as Antena 3 TV.

Thus, the government cleared the merger subject to the condition that the Temporary Enterprise Joint existing between Movierecord and the second leading enterprise of the sector (Distel) was put to an end.

1.4 WANADOO/ERESMAS INTERACTIVA

The operation notified on August 2002 consisted on the acquisition by WANADOO (controlled by FRANCE TÉLÉCOM) of ERESMAS, an Internet Service Provider of the AUNA Group.

According to Community decisions, the Spanish authorities have considered separate markets for Internet access and portal services. A further segmentation of Internet access could be possible considering technologies, category of users (domestic users, SME's and large firms), retail and wholesale services. On the other hand, the portal services market could also be segmented into: advertising services on-line, directories, horizontal and vertical portals, e-commerce, etc. In this case, a narrow market definition was not necessary.

The geographical scope of the market was national, due mainly to linguistic and sector legal barriers.

The criteria available for assessing market shares were revenues and connection time for Internet access and advertising revenues for portal services (the remaining services were irrelevant from the revenues point of view).

The concentration did not raise any competition concerns in none of the relevant markets given the strong position of the leader Telefónica/Terra.

1.5 UNIPREX – RADIOS DE EL MUNDO

The operation, notified in December 2002, consisted on the acquisition by UNIPREX S.A. (owned by ANTENA 3 TV) of the control of 13 radio licenses from UNEDISA jointly controlled at that time by several media operators (RCS, RECOLETOS/ PEARSON and the promoters).

With reference to market definition public radio was excluded because it is subsidized by the State and does not compete with private operators for raising advertising revenues. Therefore the relevant product market is the sale of advertising space in radio programmes. Competition authorities have considered this market as a separate one from other media advertising markets.

The geographic market was defined as a local one, due to the fact that the licences are granted on local basis, this being the main barrier to entry in the market.

The criteria available for assessing market shares in this market are revenues, number of licences and programme audience. In this market it is relevant to mention that big radio operators associate themselves with local ones into chains in order to enlarge their audience and their revenues. According to

available data, after the merger the buyer would not strengthen significantly its position in the market as second or third operator (depending on the criteria).

2. Special Consideration

2.1 Market Definitions

Spanish competition authorities have had the opportunity to analyse, up to date, cases in pay TV, advertising in cinemas, press and internet markets.

In spite of this, pay TV market was recognized to be closely linked to free TV market and both subject to mutual competition pressures. In particular, high quality free TV hinders subscriber expansion in pay TV market and, at the same time, a growing number of pay TV subscribers reduces free TV audience levels and hence its advertising revenues.

In the case of pay TV market, Spain has taken into account previous Community decisions and has thus considered that this is a different market from free TV due to the different relationship established between supply and demand in both markets (operator-subscriber in pay TV and operator-advertiser in free TV), the need to have special technical devices to receive pay TV services and the different products offered by both kind of operators.

In the case of the press market, Spain has not taken a decision whether to considerate free press as a separate market due to the relatively recent and scarce presence of free newspapers. Nevertheless, if the relevant market is press advertising, free newspapers should be included.

As regards price discrimination, it has not been considered as an important element when defining markets.

With reference to innovation, Spanish competition authorities do always follow a dynamic analysis and take into account any technological change so that market definitions are flexible and subject to change. This is special relevant in internet and pay TV markets as a consequence of the technological convergence which is taking place nowadays and is allowing new services (interactive services, for example) and the offer of a set of services through the same network (TV, internet and telephony through via cable, for example).

2.2 Plurality Concerns

After some judicial decision, Spanish competition authorities do pay attention to information pluralism when assessing mergers on media markets despite specific sector regulation. Nevertheless, possible conditions established in this area are complementary and independent to those of a purely competition nature and information pluralism does not alter the basic elements for assessing a merger, be it in the first or in the second phase of the analysis.

2.3 Competition Assessment

When assessing mergers, Spanish competition authorities take into account potential effects not only in the affected markets but also in upstream/downstream markets and all other markets linked or closely related where the parties or their main shareholders are active.

Among issues identified to analyse pro and anticompetitive effects, a great amount of importance is given to barriers of entry and transfer of efficiencies to consumers. Up to now, no particular stress has been made on intellectual property rights.

As regards price discrimination, it has not been a focal issue in cases already analysed by the Spanish authorities. Nevertheless, in case Sogecable/Via Digital one of the conditions for approval was that the resulting company should maintain a uniform policy of prices and contents in the whole of Spain precisely in order to avoid price discrimination between Communities with cable operators and those without them.

UNITED KINGDOM

Introduction

From the perspective of the Office of Fair Trading (OFT), mergers in the media sector follow the same path as mergers in other sectors. The same analytical principles for assessing impact on competition and the same published guidelines are followed. The aim is the same - to ensure that mergers do not result in markets working less well for consumers. Post merger competition should maintain lower prices, innovation and improvement of customer choice delivering benefits to customers. Other, non-competition, issues that are also identified by the OECD as arising from concentrations in media industries – from quality of content and content-to-advertising ratios, to plurality of ownership and diversity of views – are governed by media regulation lodged in other parts of government. So what, if any, special considerations affect our consideration of media mergers?

1. The regime

The current UK merger regime operates under the Fair Trading Act 1973 (FTA) and involves a two stage merger regulation process based on a 'public interest' test. At the first stage the Secretary of State for Trade and Industry, upon the recommendation of the OFT, decides whether to refer a qualifying merger to the Competition Commission for more detailed investigation. The second stage involves the Competition Commission considering whether the merger is likely to operate against the public interest. If it does so, the Secretary of State for Trade and Industry, with advice from the OFT, can prohibit the merger or accept measures to remedy the adverse effects identified by the Competition Commission.

The concept of the "public interest" would suggest that issues other than competition are considered. However, in practice most references are made on the basis of the substantial lessening of competition (SLC) test. This principle was enshrined in 1984 by former Secretary of State Norman Tebbit and has been publicly endorsed by the current government.

Although UK merger legislation will change this summer when the Enterprise Act 2002 is due to come in to force, the focus on competition will not change. The Enterprise Act replaces the public interest test with an explicit focus on competition through the SLC test.[1] The Secretary of State will in general terms no longer be involved in deciding whether or not to refer a case to the Competition Commission.

However, the "public interest" may take on a wider meaning in practice. In newspaper mergers, the OFT currently has no role (except for mergers not reaching the very low circulation threshold set out in the FTA[2] but nevertheless meeting the jurisdictional thresholds of the normal mergers regime) as any mergers exceeding this threshold are reviewed by the Secretary of State and the Competition Commission. The Secretary of State and the Competition Commission have a duty to consider plurality, diversity and competition in coming to a conclusion on whether a merger is against the public interest. The Communications Bill, currently before Parliament, is due to pass the role of assessing the effect of newspaper mergers on competition to the OFT and on plurality and diversity to Ofcom, the new media regulator. The OFT will in future consider newspaper mergers as it does other mergers but can pass any representations about plurality and diversity to Ofcom or to the Secretary of State. The Secretary of State

will still make the decision whether or not to refer such cases to the Competition Commission after considering competition advice from the OFT and plurality advice from Ofcom.

In other media sectors, plurality and diversity are protected by legislation and sectoral regulators, such as the Independent Television Commission (the ITC). The ITC enforces limits on the number of regional TV licences that can be held together, the ratio of advertising to content, the minimum level of independent productions that must be purchased (although, in the case of the BBC, this last is monitored by the OFT), cross-media and overseas ownership. Similarly, the Radio Authority (RA) caps the number of licences in any one region, or nationally, that can be held by the same person. As part of a merger assessment the OFT consults with the ITC or the RA on the competition impact of a merger. Any breach of the broadcasting regulations is a matter for them. It is proposed by the Communications Bill that many of the existing ownership restrictions will be lifted and that the regulators will be merged into a single communications regulator known as the Office of Communications (Ofcom).

2. Media mergers assessed by the OFT

The OFT has assessed mergers in a variety of media and media related sectors in the last 5 years – radio, pay and free to air TV, publishing, outdoor advertising, music publishing, programme production, studios, cable TV distribution, sports rights and cinemas. We will focus in this note on common features that have arisen in cases involving TV and radio, including two cases recently referred to the Competition Commission. In addition, although this is not part of the OFT's remit, we will outline how the Secretary of State and Competition Commission have enforced the newspaper merger regime, as this combines assessments of a merger's impact on both competition and diversity.

3. Common features in the competition analysis of media mergers

The OFT's assessment of media mergers has, as explained earlier, been one based purely upon an assessment of a merger's effects on competition. The issues raised by such mergers are generally similar, as mergers involving media companies tend to involve highly differentiated products in innovative industries. Some of the thornier issues we have addressed in the assessment of mergers within this area are:

(1) The nature of media products (radio, TV, and newspapers) means they are attempting both to attract audiences and to sell advertising space. These facets of competition interact given that the attractiveness of the media to advertisers depends upon the audience (although the reverse need not be true).[3] In the most recent such case, Carlton/Granada[4], the effect of the merger on both advertisers and viewers was considered. However, here, the overall amount of advertising is strictly regulated and consequently the impact of the merger on the amount of airtime dedicated to advertising was not an issue. Within the UK television sector, competition in content and competition in advertising are not symmetric, given the public service broadcasting by the BBC which is not allowed to sell advertising airtime. In practice the OFT, as a first stage investigator, has not been presented with a cases where it has had to consider the potential trade offs between competition in advertising and competition for viewers/listeners/readers.

A similar situation exists where a merger would create or involves a vertically integrated content producer and distributor. For example, the merger of Carlton and Granada would unite two of the largest programme producers with one of the biggest purchasers of TV content in the UK. Whilst there is concern that such a merger may result in foreclosure of the distribution outlet to third party providers, there is a strong commercial incentive for media firms to use the best available content to attract viewers or readers, and hence advertisers. In our analysis of the Carlton/Granada case, we concluded that the

comparative value of programme supply as against advertising revenue and the incentive to maximise viewers for the lowest cost, combined with a regulatory quota for independent production, would offset the possibility of foreclosure.

(2) The highly differentiated nature of the products involved in media mergers, combined with a propensity for price discrimination, makes precise market definition difficult and the analysis of competitive effects. This has tended to result in a broad examination of the substitutability of the type of media at the market definition stage whilst substitution within that type of media has tended to form part of the main competitive assessment. For example in the recent merger of Scottish Radio Holdings and GWR Radio Group/Galaxy Radio Wales and West Limited,[5] consideration was required on the substitutability for local advertisers of different formats of radio stations and different (but overlapping) broadcast areas. It was the advertisers' perception of the extent to which different audiences were substitutable which was key rather than, for example, the extent to which audiences considered them substitutable. Examining the type of advertisers using local radio stations was the most direct method of assessing this question at the OFT stage of investigation.

Given the highly differentiated nature of the advertising offered, customers can vary tremendously in terms of what is and is not a viable substitute and consequently their price sensitivity. This was an important issue in the assessment of Carlton and Granada. Here the specific nature of the way advertising space is regulated suggested that supply may be fixed. Namely the average amount of advertising minutage is fixed to an average of 7 minutes per hour and the parties are required to sell all available advertising airtime. Nevertheless, here the potential of a reduction of rivalry leading to greater price discrimination led to the possibility of an increase in average prices. In effect, the available capacity allocated to advertisers with little choice could be reduced whilst the capacity allocated to those with the most choice increases. Uniquely, if we accept supply is fixed, the welfare effects of such price discrimination are unambiguous in leading to a loss of consumer surplus.

(3) The nature of the potential effect of the merger under consideration can be important in determining the frame of analysis. For example when examining the acquisition of Manchester United by BSkyB[6], the primary interest was the vertical link between the leading pay TV supplier and a premium sports right supplier. Here it was appropriate to consider the ultimate effect on competition for subscribers to pay TV[7]. In considering the proposed merger between Carlton and Granada, where advertising was the primary interest, we believed it inappropriate to exclude the constraint offered by the ability to advertise on pay-TV from the analysis.

(4) In examining radio and newspaper mergers, competition can be local and considerations of the local nature of competition and the boundaries of competition has been one of the most important aspects. This is linked to the discussion on the differentiated nature of competition. Given the overlapping boundaries of broadcast areas for local radio stations, we have tended to concentrate on the broadcast area most directly affected by the merger whilst considering the constraint offered by stations whose broadcast area overlaps. As a result we have looked at very small markets in terms of value and geography. The impact on competition in such narrow markets may well be such that a reference to the Competition Commission may be warranted, as it was in Scottish Radio Holdings and GWR Radio Group/Galaxy Radio Wales and West Limited.

(5) Another common theme to arise is the propensity for minority share interests in competitors and cross-media ownership. This is exemplified in two mergers focused on Scotland, one, Scottish Media Group (SMG, who own TV and newspaper companies in Scotland) acquired a stake in Scottish Radio Holdings (who operate the majority of the main radio stations in Scotland).[8] Here we concluded that the separate types of media were in separate markets and bundling was unlikely to raise significant competition issues given that such bundling was unlikely to be possible or attractive let alone anti-competitive.

The second merger again involved Scottish Radio Holdings, who acquired a minority stake in a local radio station (Kingdom FM) whose broadcast area overlapped with one of SRH's local stations[9]. Our investigation showed that, whilst SRH was the most immediate constraint on Kingdom FM, the reverse was not the case for the relevant SRH station (Forth FM and AM). Basically Forth's broadcast area subsumed Kingdom's but Kingdom's represented 24% of Forth's (whereas other competing stations covered a larger proportion of Forth's area). Also the majority of the audience covered by Forth (Edinburgh, one of the largest cities in Scotland), receives Forth but not Kingdom. Given this, it was believed unlikely that the influence conferred by the minority interest was sufficient to convince Kingdom FM to raise prices, as this would be an unprofitable strategy for the majority of Kingdom FM's shareholders.

(6) A common theme that emerged from a series of cases involving pay-TV platforms was that of vertical foreclosure reducing innovation. For example in Vivendi/BSkyB[10] a horizontal merger of the two main conditional access technologies used in the EU might have led to an enhanced position in conditional access technology stifling future competition in that market and foreclosing the down stream market for pay-TV platforms. This could be facilitated by Vivendi withdrawing development support from competing platform operators and passing strategy and performance details about other pay-TV platforms to BSkyB. After consideration the Competition Commission concluded that the form of future convergence was unclear and that consumers might equally benefit from convergence or interoperability between systems.

Similarly BSkyB/Hilton Group Plc[11] - a proposed joint venture between the pay-TV operator and owner of Ladbrokes betting business - would have established a link between the leaders in both markets that would impact markets downstream. Ladbrokes expertise in betting and in store promotion may have increased BSkyB's pay-TV sports channel revenue such that it could outbid competitors for premium sports right and, in turn, for pay TV subscribers. As a provider of interactive digital television the addition of betting services could also have foreclosed such services to non-Sky channels.

The proposal that Microsoft acquire a 23.6% interest in the UK cable company Telewest raised concerns about foreclosure and network effects. [12] Microsoft was developing software for set-top boxes. Customers clearly prefer software that can run as many applications as possible, leading to network externalities because the popularity of particular software increases the incentive for writers of applications software to write for the same software developer's operating systems. This positive feedback will reinforce demand for the original software package and may tip the market towards a monopoly software supplier. As switching software supplier once the boxes are operational is costly and time consuming, if Microsoft could use the ubiquity of its PC software operating system to gain sufficient market presence in set top box software through converging applications it could foreclose the market for set-top box software. Given the rapid evolution of such technologies and the unpredictable nature of convergence this concern

made assessing the merger by means of a static contestable market and barriers to entry too speculative.

Throughout all these assessments the core analytical framework for assessing these mergers has not differed from any other merger in an innovative industry and there has been no need to modify the type of assessment of competition. The framework to come into effect with the Enterprise Act will allow assessments of customer benefits which could arise from such mergers. In practice it is not envisaged that a merger leading to a trade off between competition and customer benefits is likely to occur**.**

4. Newspapers: diversity, plurality and competition

The need to safeguard the expression of diverse views through safeguarding plurality is set out in the FTA's special newspaper merger regime. Here the public interest test is drawn wide to include "all matters that appear relevant and in particular the need for accurate presentation of news and free expression of opinion."[13] To ensure that all cases under which diversity may be an issue are captured, the FTA sets up a regime stronger than that for other mergers in UK. This includes compulsory notification of all mergers of newspaper enterprises with a combined circulation of over 500,000 per week, backed by criminal sanctions. A similar test is currently drafted in the Communications Bill, considering the need for free expression of opinion, accurate presentation of news and plurality of views.

In terms of competition issues, the local nature of most newspaper mergers means that narrow markets are considered. Free and paid for newspapers are seen as substitutes as both compete for both advertisers. With the direction of concentration in local newspapers tending towards producing regional clusters of ownership the impact on competition for advertisers – in particular classified advertising – can be substantial.

Where national newspapers are involved diversity of opinion clearly can be an issue. For example, when News International acquired The Times in 1981 the CC considered it necessary to protect independent editorial control by ensuring the appointment of the editor was placed in the hands of independent directors.

Local newspaper mergers can also generate diversity issues, although usually as a result of particular circumstances. For example the acquisition of the Belfast Telegraph by the owner of a major newspaper based in Eire was carefully considered by the DTI [and CC], as accurate presentation of news and free expression of opinion is obviously important in Northern Ireland. The Belfast Telegraph was found to appeal to a broad cross-section of readers across the political and religious divide. The acquirer had a strong record in favour of editorial freedom and had strong commercial reasons why it would wish to continue this policy. Accordingly the transaction was not found to operate against the public interest in that regard.

Acquisition of a local newspaper by the owner of a national newspaper has also raised non-competition concerns. With no competition issues apparent the main public interest issue in the acquisition of the Bristol Evening Post Group by David Sullivan, owner of the national Daily Sport newspaper[14], was the likely effect of the transfer on the character and content of the local papers. The Daily Sport is characterised by a large amount of pornographic material and a relative lack of news. The Competition Commission felt that Mr Sullivan could be expected to influence editorial policy such as to harm both the accurate presentation of news and the free expression of opinion, as well as reducing both the standing and circulation of the paper. A similar case involving a magazine company with a large portfolio of pornographic titles acquiring a stake in a national newspaper group was cleared by the OFT, who had no remit to consider the possible impact of the merger on the content and character of the newspaper, but did draw the issue to the attention of the Secretary of State.

It would appear that concerns about diversity are not offset against competition concerns in practice; indeed one would not expect to see a pro-competitive merger raising diversity concerns. Reference can be made on one or the other grounds alone. For example in the most recent case, Johnston Press/Trinity Mirror,[15] despite the relatively small proportion of editorial content[16] in the newspapers a number of allegations of systematic political bias on the part of the acquirer were made. Systematic examination of the titles led to the conclusion that this was not the case and that any general loss of diversity would have a minimum impact because of the weakness of the editorial content. In fact half the transaction was prohibited on competition grounds.

5. Conclusion

For the OFT media mergers, while raising interesting questions, do not give rise to special considerations. The specialised media regulators are left to ensure that broader issues of public interest are safeguarded and are encouraged to feed in their views on the competition impact of mergers affecting their sectors to the OFT, as part of the normal merger review process. As the new merger legislation is implemented the OFT's focus will remain, as it should, on competition assessment and that will be undertaken in line with the assessment of mergers in other industries.

NOTES

1. The guidance on its application is set out in the consultation paper Mergers: Substantive Assessment, published at www.oft.gov.uk

2. Section 58 (1) FTA - Where the acquirer plus the titles proposed to be acquired have a circulation of less than 500,000 newspapers per day.

3. This is often referred to as two-sided markets.

4. Advice of the OFT of 11 February 2003 on proposed merger of Carlton Communications and Granada plc, published at www.oft.gov.uk. Currently under consideration at the Competition Commission

5. Advice of the OFT of 20 December 2002 on merger of Vibe Radio Services Limited/ Eastern Counties Radio Ltd/ Galaxy Radio Wales and the West Ltd (Galaxy, published at www.oft.gov.uk. Competition Commission due to be published May 2003.

6. British Sky Broadcast Group plc and Manchester United plc: Report on proposed merger, Competition Commission, 12 March 1999.

7. In this case the sports rights concerned were premier league football rights which are considered of considerable importance in attracting pay TV subscribers in the UK. In this case the Competition Commission concluded a separate market exists for pay TV sports premium channels.

8. OFT Advice of 21 June 2002 on completed acquisition by SMG plc of 29.5% shareholding of Scottish Radio Holdings plc, published at www.oft.gov.uk

9. OFT Advice of 11 March 2002 on the completed acquisition by Scottish Radio Holdings plc of 22.5% shareholding in Kingdom FM Radio Limited, published at www.oft.gov.uk

10. Vivendi SA and British Sky Broadcasting Group plc: A Report On A Merger Situation, Competition Commission, 18 April 2000

11. OFT Advice of 27 September 2001 on the Proposed joint venture between Hilton Group Plc and British Sky Broadcasting Group Plc, published at www.oft.gov.uk

12. OFT Advice of 2 November 2000 on the completed acquisition by Microsoft Corporation of 23.6% interest in Telewest Communication plc, published at oft.gov.uk

13. Section 58(3) FTA

14. Mr David Sullivan And The Bristol Evening Post Plc: Report On The Proposed Transfer Of A Controlling Interest, Competition Commission, 31 May 1990

15. Johnston Press plc and Trinity Mirror plc: A report on the proposed merger, Competition Commission, 3 May 2002

16. Despite this being the case a ratio of advertising to news is not considered as an issue, it being assumed that the commercial imperative to ensure sufficient readers and therefore advertisers will maintain a balance.

UNITED STATES

Under the U.S. antitrust laws and the enforcement policy of the U.S. antitrust agencies, mergers in the media sector are, with one exception discussed below, analyzed in the same manner as other mergers. Thus, there is no special approach to preserving competition in the review of media mergers. This paper will first discuss the handling of market definition issues in recent media merger cases. It then reviews the treatment of plurality and diversity matters by the sectoral telecommunications regulator in the United States, the Federal Communications Commission. It concludes with a brief description of the Newspaper Preservation Act.

1. Market Definition

1.1 Echostar/DirecTV

The U.S. Department of Justice recently considered the issue of market definition in media markets during its investigation of the proposed merger of the Echostar and DirecTV direct broadcast satellite services. On October 28, 2001, General Motors Corp. agreed to sell Hughes Electronics Corporation, the owner of DirecTV, to Echostar Communications Corp. for approximately $26 billion in cash and stock. DirecTV and Echostar are essentially the only two direct broadcast satellite (ADBS@) distributors of multichannel video programming to consumers in the United States. DirecTV has more than 10.9 million subscribers and Echostar has more than 7.5 million subscribers. In this matter, the Department determined that the relevant product market was multichannel video programming distribution ("MVPD"), sometimes referred to as "pay television" service. It includes services provided by landline cable systems as well as satellite delivered services. The Department determined that the relevant geographic markets in which to examine the transaction's competitive effects were local areas.

In large portions of the United States accounting for millions of households, DirecTV and Echostar are the only two options for Apay television@ service. The Department determined that in these areas, this merger would have created a monopoly. For most of the rest of the United States (all but around 5% of households), DirecTV, Echostar, and the local landline cable company are the only three options for "pay television" service. In these areas, this merger would have reduced the number of market participants from 3 to 2 and would have created a "pay television" duopoly. Because the Department believed that the merger was likely to significantly reduce competition and harm consumers, it filed suit in federal court on October 31, 2002, to block the merger. The Federal Communications Commission also indicated its opposition to the merger based on its evaluation of the public interest provision of the Communications Act, which includes, among other things, promotion of competition and diversity among media voices. Faced with these objections, the parties agreed to abandon the proposed deal on December 10.

One key issue in this matter involved the scope of the product market. Among other things, the Department had to consider whether free, over-the-air broadcast television was in the same product market as the "pay television" service provided by the merging satellite broadcasters and cable providers. In examining this issue, the Department applied the test delineated in the Horizontal Merger Guidelines issued by the Department and Federal Trade Commission in 1992: would a hypothetical monopolist over Apay television@ (cable and satellite) be able to profitably impose at least a small but significant increase

in price? In answering this question, the Department attempted to ascertain the degree of substitutability between "pay television" and "free television" by examining all the available evidence, including the characteristics of the products in question and various econometric data.

Whereas free over-the-air television consists of a handful of channels, typically fewer than 10, cable and satellite Apay television@ services generally provide access to at least dozens and more frequently, hundreds of channels. Moreover, standard over-the-air broadcast television does not include the variety of programming services that are available to Apay television@ subscribers: it does not provide access to popular sports, news, and entertainment services such as ESPN, CNN, and TNT; it does not permit access to premium movie services such as HBO or Showtime; and it does not provide access to advanced features such as pay-per-view events and movies or interactive channels. Accordingly, even though most U.S. consumers can receive over-the-air stations for free, most are willing to pay a significant sum--several hundred dollars a year--for Apay television@ service. Indeed, over the past several years, despite the fact that prices for Apay television@ service, particularly cable, have increased significantly, the percentage of households subscribing to such service has actually also increased. The FCC reported that as of June 2001, over 85 million U.S. households (more than 80% of total households) subscribed to a Apay television@ service.

Thus, the Department noted that most consumers do not consider broadcast television an acceptable substitute for cable and DBS services. Moreover, the Department's econometric estimation of demand elasticities, together with an assessment of profit margins, indicated that a hypothetical monopolist over "pay television" would indeed be able to profitably raise prices by significant amounts. The fact that free over-the-air television was unlikely to constrain anticompetitive conduct by the merging firms was a significant factor in the Department=s enforcement decision to challenge the proposed transaction.

With regard to geographic market, it was self-evident that consumers purchasing Apay television@ services can only select from among those companies that can offer such services directly to the consumer=s home. The geographic markets relevant for competitive analysis were thus delineated around groups of customers who face similar choices among pay television services. Although both DirecTV and Echostar are nationwide services that can reach any customer in the continental United States with an unobstructed view of the satellite, cable system operators in the United States are not nationwide and typically operate on a community-by-community basis. They generally must obtain a cable franchise from local, municipal, or state authorities in order to construct and operate a cable system in a specific area and, in fact, build wires out to the homes in that area. Consumers cannot purchase services from a cable firm operating outside their area because that firm does not have the authority to run wires to the consumer=s home and, indeed, has not run such wires. Thus, although the set of providers able to offer service to individual consumers= residences generally is the same within each local community, it differs from one local community to another. Accordingly, in DirecTV-Echostar, the Department delineated local markets by aggregating customers in a county or other jurisdiction served by the same cable system, or by no cable system, who essentially all faced the same competitive choices; the geographic markets, therefore consisted of hundreds of local markets covering the United States.

1.2 Univision/Hispanic Broadcasting Corporation

The Department's investigation of Univision Communications Inc.'s ("Univision") proposed acquisition of Hispanic Broadcasting Corporation ("HBC") also raised significant media market definition issues. The transaction, announced in June 2002, would have resulted in Univision, the largest Spanish-language television broadcaster in the United States (1) owning all of HBC, one of the largest Spanish-language radio broadcasters in the United States, and (2) owning a 30% equity stake and possessing significant director and shareholder control rights in Entravision Communications Corporation

("Entravision"), a Spanish-language media company that is HBC's principal Spanish-language radio competitor in numerous geographic markets.

On March 26, 2003, the Department filed a complaint in United States District Court alleging that, due to Univision's partial ownership and governance rights in Entravision, the proposed acquisition of HBC would lessen competition substantially in the provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic areas of the United States. On the same date, the Department filed a proposed consent decree which would require Univision to reduce its equity interest in Entravision to fifteen percent of outstanding shares within three years from the filing of the proposed decree and to ten percent within six years. The decree also would require Univision to relinquish its right to place directors on Entravision's Board, eliminate certain rights Univision has to veto important Entravision actions, and restrain certain conduct that would interfere with the governance of Entravision's radio business. The United States District Court will decide whether to enter the proposed decree as being in the public interest after the conclusion of a statutory public notice and comment period.

The Department's finding of likely anticompetitive effects depended on the analysis of the relevant product and geographic markets. Market definition depends on options available to customers – in this case, the advertisers who purchase advertising time. (This contrasts with the Direct TV/Echostar investigation, in which the Department focused on the end-user consumers that purchased satellite subscription TV services.)

In *Univision*, the Department found that Spanish-language radio stations charged different advertisers different prices, based on individual negotiations that reflected the circumstances of the negotiations and the preferences of the advertisers. Thus, the Department utilized a price discrimination analysis in defining the relevant product market. Although radio stations typically publish "rate cards" setting uniform prices for advertising time, these published rates are rarely, if ever, the final price. Rather, radio advertising rates are typically the result of individual negotiations between the radio station and the advertiser, and the resulting price for advertising time reflects these circumstances.

Accordingly, in the *Univision* investigation, the Department focused its inquiry on how the transaction would impact the many different advertisers that purchased time on HBC and Entravision radio stations in the numerous relevant geographic markets where the two companies competed against each other. In many of these markets, HBC and Entravision were the only significant radio stations offering Spanish-language programming.

The Department found a significant number of advertisers in the overlap geographic markets that consider Spanish-language radio to be particularly effective in reaching desired customers who speak Spanish and who listen predominately or exclusively to Spanish-language radio. Such advertisers view Spanish-language radio, either alone or in conjunction with other media, to be the most effective way to reach their target audience and do not consider other media, including non-Spanish-language radio, to be a reasonable substitute. These advertisers would not switch to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio or a reduction in the value of the services provided.

Due to the nature of individualized negotiations between radio stations and advertisers discussed above, Spanish-language radio stations are likely able to identify advertisers that place a high value on utilizing Spanish-language radio to reach their targeted audience. Such advertisers would not find it economical to switch, or credibly threaten to switch, to other media to avoid a post-merger price increase. Thus, Spanish-language radio stations would be able to profitably impose a price increase on these advertisers. This is true even though a general increase in price to *all* advertisers might cause such significant substitution that the price increase would not be profitable. The Department found that in

certain geographic markets, there are a significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective medium, and the provision of advertising time on Spanish-language radio stations to these advertisers is a relevant product market for purposes of analyzing the antitrust issues raised by the transaction.

With regard to geographic markets, the Department concluded, as it has done in numerous radio merger investigations, that the relevant geographic markets consist of local areas traditionally referred to as "Metro Survey Areas" ("MSAs").[1] In this case, the Department examined six geographic markets[2] where Entravision and HBC each operated stations. Geographic markets in radio cases are local in nature (rather than national or regional) due to the fact that advertising placed by local and national advertisers on radio stations in each geographic market is aimed at reaching listening audiences within that geographic market, and radio stations outside that market do not provide effective access to these audiences. If there were a small but significant increase in the price of advertising time on Spanish-language radio stations within, for example, Phoenix, then advertisers who want to reach Phoenix customers would not switch enough purchases of advertising time to stations outside Phoenix and/or otherwise reduce their purchases to defeat the price increase. In other words, advertisers do not substitute Los Angeles radio stations for Phoenix stations to reach Phoenix customers.

1.3 AOL/Time Warner

Whether free-to-air terrestrial television, free newspapers, or free Internet access services are in the same markets as their paid-for-counterparts must be decided on a case-by-case basis. Under the antitrust laws, the appropriate questions are, first, what are the characteristics of each of the services at issue and, second, whether the "free" services exert any price-constraining influence on the "paid" services. This analysis enables the agencies to evaluate whether a merger of media services is likely to have any economically significant impact on consumers by permitting the merging parties to achieve a small but significant non-transitory increase in price. Rapid rates of innovation and increased supply-side substitution require a careful examination, or re-examination, of issues of product market definition in each new case.

The investigation of the proposed acquisition by America Online, Inc., ("AOL") of Time Warner Inc. raised significant media market definition issues for the Federal Trade Commission. The transaction raised competitive issues in three relevant product markets: (1) broadband Internet access; (2) residential broadband Internet transport, or last mile access; and (3) interactive television ("ITV") services. The Federal Trade Commission accepted a consent order, entered into by the parties, to remedy these alleged anticompetitive issues.

The first relevant product market on which the Commission focused was the market for high speed or "broadband" Internet access in individual geographic areas served by Time Warner's cable systems. These geographic areas could be as small as a community or as large as an MSA. AOL was and is the largest narrowband Internet Services Provider ("ISP") in the United States. It was positioned to become a significant broadband ISP competitor throughout the country because of its extremely large customer base. Time Warner provided broadband Internet access exclusively through its partially-owned Road Runner subsidiary. AOL and Road Runner were two of the most significant broadband ISP competitors in Time Warner cable areas. In its complaint, the Commission alleged that the market for broadband Internet access in Time Warner cable areas would have become highly concentrated post-merger, with the merged firm able to unilaterally exercise market power in Time Warner cable areas and throughout the United States. The complaint also specified that new entry was unlikely to have been timely, likely, or sufficient to prevent the combined firm from exercising market power.

In the market for broadband Internet transport services, the Commission's complaint alleged that that cable television wires or lines and digital subscriber lines ("DSL") offered in areas nearby telephone companies' central office locations were the two principal means of providing last mile access for broadband ISPs to customers. The Commission explained that satellite and fixed wireless technologies also provided last mile access, but that consumers did not view them as viable alternatives for DSL or cable broadband access. Prior to the merger, AOL's principal means of providing broadband access to its subscribers had been through DSL, and each broadband subscriber it obtained represented a lost revenue opportunity for cable broadband providers. The Commission alleged that the merger would have reduced AOL's incentive to promote and market broadband access through DSL in Time Warner cable areas, which in turn would have adversely affected DSL rollout in those areas and nationally, thereby increasing the merged firm's ability to exercise unilateral market power.

Finally, at the time of the review, ITV was a nascent technology that combined television programming with Internet functionality. In its complaint, the Commission noted that cable television lines have distinct competitive advantages over DSL in providing ITV services to broadband customers and that local cable companies will play the key role in enabling the delivery of ITV services. During 2000, AOL launched AOL TV, a first generation ITV service, which was well-positioned to become the leading ITV provider. As described in the Commission's "Analysis of Proposed Consent Order to Aid Public Comment," the Commission found that the merger could have enabled AOL to exercise unilateral market power in the market for ITV services in Time Warner cable areas, which also could have affected the ability of ITV providers to compete nationally.

2. Plurality and Diversity Rules in the Telecommunications Sector

The Federal Communications Commission has long sought to regulate media ownership and cross-ownership without infringing on the First Amendment rights (including freedom of expression) of broadcasters and consumers. The FCC has stated three main goals that guide regulation of the media industries: the promotion of diversity, competition, and localism in media markets. The FCC's radio and television ownership rules and broadcast/newspaper and radio/television cross-ownership rules evolved over the last sixty years independent of each other. Until recently, courts have generally approved the ownership and cross-ownership rules during most of this evolutionary period.

The Telecommunications Act of 1996 significantly changed the media ownership landscape. The Act requires the FCC to conduct a biennial review of its broadcast ownership rules to determine the continued necessity of such rules in the public interest. Moreover, the Act repealed the prohibition on common ownership of cable and telephone systems, and overrode the regulatory limits on cable/broadcast network cross-ownership.[3] Since the passage of the Act, the DC Circuit Court of Appeals has vacated the FCC's television station/cable system cross-ownership rule. This rule prohibited common ownership of a television station and a cable system if the station's predicted Grade B signal strength overlapped the cable system's service area.

The changing nature of the media markets, court actions, and the changed statutory requirements have combined to prompt the FCC to re-evaluate its ownership rules. Currently, the FCC is evaluating radio/television cross-ownership and newspaper radio/television cross-ownership rules as well as other rules related to broadcast ownership.[4]

2.1 Radio/television cross-ownership rule

The radio/TV cross-ownership rule limits the number of commercial radio and television stations one entity may own in a given local market. The rule allows common ownership of at least one television station and one radio station in a geographic market represented as a Designated Market Area (DMA). In

larger markets, a single entity may own additional radio stations depending on the number of other "voices" present in the market. More specifically, the rule allows a company to own one or two TV stations (provided it is permitted under the TV duopoly rule) and up to six radio stations in any single geographic market where at least twenty independent "voices" would remain post merger; two TV stations and up to four radio stations in a market where at least ten independent "voices" would remain post-merger; and one radio station and one TV station regardless of the number of independent "voices" in the market, post-merger. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For the radio cross-ownership rule, "voices" include independently owned and operated commercial and non-commercial broadcast TV and radio stations, independently owned daily newspapers of a certain size measured in terms of circulation, and cable systems within the DMA (provided that all cable systems within the DMA are counted as a single voice).[5]

When the radio/television cross-ownership rule was first adopted in 1970, the FCC stated that the purpose of the rule was to promote diversity and foster competition in local media markets. Diversity, also characterized as competition in the marketplace of ideas, is the cornerstone of the FCC's media ownership policy related to local media markets. The presence of independent voices in the market, it is thought, ensures viewpoint diversity[6] so that the public has access to a wide range of diverse and competing opinions and interpretations. Unlike the competition for goods and services, competition in the marketplace of ideas does not have a set measure of output and performance. In the absence of such measures, the FCC has relied upon diversity in ownership as a proxy for, or means of achieving, diversity of viewpoints.

While the media ownership rules, including the radio/TV cross-ownership rules, primarily aim to preserve viewpoint diversity, the FCC also sought to foster economic competition in the relevant local product and geographic markets. There may be potential benefits from relaxing the limit on radio/TV cross-ownership, *e.g.*, in terms of fostering innovative broadcasting based on new types of programming and new broadcast-based technologies and services. The FCC is currently reviewing the extent of such benefits as well as other factors in its biennial broadcast ownership review.[7]

The FCC's third main goal in its broadcast ownership policy is to foster localism. In the past the FCC has promoted localism primarily by allocating licenses locally (*i.e.*, within small geographical areas) and by requiring the licensee to present local news and public affairs programming, and programming based on the particular needs and interests of the local community. In 1989, the FCC concluded that the cost savings and aggregated resources of combined radio-television operations appeared to contribute to an increase in news and public affairs programming, and other non-entertainment programming.[8] Based partly on that finding, the FCC adopted a policy of allowing increased radio/TV ownership in the top-25 television markets, and, in certain situations, allowed the acquisition of "failed" stations.

2.2 Newspaper/broadcast cross-ownership rule

The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication. Since adopting the rule in 1975, the FCC has not only prohibited potential newspaper-broadcast mergers, it also has required existing newspaper/broadcast combinations in highly concentrated markets to divest holdings in order to come into compliance within five years.[9] The FCC, however, also grandfathered broadcast/newspaper combinations in some markets and recently has contemplated waiving the rule for existing and future combinations under certain circumstances. The FCC, as part of its biennial review, is reviewing this rule.

The broadcast/newspaper cross-ownership rule, like other local media ownership rules, is based on the FCC's three policy goals of promoting viewpoint diversity, economic competition, and localism. The FCC has reasoned that structural regulation, *i.e.*, a restriction on newspaper/broadcast cross-ownership, promotes diversity of ownership, which, in turn, promotes viewpoint diversity. By assuming a positive relationship between ownership diversity and viewpoint diversity, the FCC traditionally has emphasized the number of owners rather than the number of media outlets as the appropriate measure of viewpoint diversity. According to this theory, numerous media outlets controlled by a small number of owners would be detrimental to viewpoint diversity. The broadcast/newspaper cross-ownership rule, unlike the radio/television cross-ownership rule, does not have an "independent number of voices" test for ensuring viewpoint diversity.

The FCC historically has considered competition in the local advertising market as a measure of economic competition in local markets. The local advertising market is thought to be important because advertisers provide the financial support needed for radio and TV programming. To some extent, advertising also covers the costs of publishing a newspaper. There is considerable debate, however, on the extent to which advertising in one medium is a substitute for advertising in the other and thus on the extent to which they are in the same relevant product market.[10]

2.3 Policy options in a changing media marketplace

The cross-ownership rules were initially adopted in an era when media outlets were dominated by radio, television, and newspapers. In recent years, the media marketplace has changed drastically. Although there are 200 fewer daily newspapers in the country today than in 1975, the number of broadcast stations and media using non-traditional broadcast mediums such as cable, DBS, and the Internet, has grown substantially. Given these changes, the challenge before the FCC is to devise a regulatory regime that will promote diversity, competition, and localism while allowing companies to reap the benefits of economies of scale and scope associated with cross-ownership mergers.

A valid analysis of economic competition and competition in the marketplace of ideas requires careful evaluation of the relevant product and geographic markets, and the relative strengths of each market participant. If, for example, radio and television do not compete for audiences and are not good substitutes for each other in local advertising markets, then they probably are not in the same product market. Imposing structural regulation in such a situation would not be very effective in promoting either diversity of viewpoints or economic competition. Furthermore, some product markets may be interrelated, *e.g.*, advertising, program acquisition, and program production may all be interrelated. In such a case, what is the proper measure of competition? Is it advertising revenue, competition for viewers/listeners/readers, or competition for programming/editorial content, or any combination of those factors? Similarly, what is the proper measure of diversity? Should new media outlets, *e.g.*, DBS and the Internet, be included in the number-of-voices test? Should the FCC assign different weights to different voices from media outlets according to the extent they are relied upon by consumers? Should programming channels that are distributed within a community by multiple video programming distribution platforms, such as cable and DBS, count as one voice or multiple voices? The FCC is carefully examining these and other questions.

In addition to the above questions, the FCC sought comment in the newspaper/broadcast cross-ownership Notice of Proposed Rule Making (NPRM) on whether to redefine the geographic area in which the newspaper/broadcast cross-ownership rules operate.[11] The FCC sought comment on whether the local area in which broadcast stations and newspapers compete should be measured without regard to contour overlap. The FCC also sought comment on the appropriate measures of market concentration for broadcast stations and newspapers. Another option under consideration by the FCC includes permitting common

ownership of newspapers and broadcast stations, but requiring structural separation of their news operations.[12]

3. Newspaper Preservation Act

As noted in the introduction to this paper, the U.S. antitrust laws and the enforcement policy of the U.S. antitrust agencies do not take a special approach to preserving competition in the review of media mergers. The one exception to this rule is the Newspaper Preservation Act, 15 U.S.C. §§1801-1804, which prescribes the failing firm requirements for the newspaper industry:

> The Newspaper Preservation Act is designed to promote the preservation of independent editorial voices in newspapers by relaxing the requirements of the failing firm doctrine. The statute provides that a newspaper "in probable danger of financial failure" is eligible to enter into a joint operating agreement [JOA] with a competing paper under which editorial functions are kept separate, but business functions – including sales of papers and advertising space – are merged. Under the act, the Attorney General makes an initial determination of whether its requirements are met, subject to judicial review."[13]

Note that "failure to obtain advance approval of such an arrangement merely subjects the arrangement to the ordinary antitrust tests without the benefit of any special immunity by virtue of this statute," and "[w]hile the statute permits joint arrangements, it expressly refuses to immunize exclusionary practices that 'would be unlawful under any antitrust law if engaged in by a single entity.'"[14]

NOTES

1. An MSA is a geographical unit for which Arbitron, a company that surveys radio listeners, furnishes radio stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating radio audience size composition.

2. The six markets were: Dallas, Texas; El Paso, Texas; Las Vegas, Nevada; McAllen-Brownsville-Harlingen, Texas; Phoenix, Arizona; and San Jose, California. Each of these markets is a relevant geographic market for the purpose of analyzing the antitrust issues raised by the merger.

3. Federal Communications Commission, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act ("2002 Biennial Regulatory Review"),* Washington, D.C., September 23, 2002, page 5.

4. FCC, *2002 Biennial Regulatory Review.*

5. FCC, *2002 Biennial Regulatory Review,* Pages 33-34.

6. The FCC has considered three additional aspects of diversity including source diversity, outlet diversity, and program diversity. Briefly, source diversity ensures that the public has access to information and programming from multiple content providers; program diversity refers to a variety of programming formats; and outlet diversity is the control of media outlets by a variety of media owners. For a detailed explanation, see FCC, *2002 Biennial Regulatory Review,* pages 14-16.

7. FCC, *2002 Biennial Regulatory Review*.

8. FCC, *2002 Biennial Regulatory Review,* page 35.

9. Federal Communications Commission, *Cross-Ownership of Broadcast Stations and Newspapers ("Broadcast/newspaper cross-ownership NPRM"),* Washington, D.C., September 20, 2001, page 2.

10. FCC, *Broadcast/newspaper cross-ownership NPRM,* page 11.

11. FCC, *Broadcast/newspaper cross- ownership NPRM,* page 15.

12. FCC, *Broadcast/newspaper cross- ownership NPRM,* page 20.

13. ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), at 350.

14. IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 251e, at 143-44 (2d ed. 2000).

EUROPEAN COMMISSION

1. Market Definition (Product/Geographical)[1]

In the field of product market definition the Commission has classically distinguished between the pay TV and the free-to-air television markets. In addition, the Commission considers there is no reason to distinguish between markets for analogue and digital pay television. Digital pay-TV is only a further development of analogue pay-TV and therefore does not constitute a separate relevant product market from a competition point of view. Moreover, account should be taken of the fact that in the next few years analogue broadcast pay-TV is likely to be superseded by digital broadcast pay-TV.

On terms of media content experience has shown that, to be successful as a pay television operator, it is essential to include film and sports channels as part of the service. Indeed, pay television channels composed of recently released films and live exclusive coverage of attractive sports events attract the largest viewing figures and therefore constitute key sales drivers. The subscriptions to such channels are the most expensive: while thematic or general interest pay television channels are generally supplied to customers as part of a package, film and sports channels are often charged on an individual basis. For pay-TV, the fact that sports and films programmes achieve very high viewing rates is crucial, as it is a reflection of viewer's willingness to pay more for sports and films channels. Moreover, the demand of subscribers for such channels also reflects pay television operators' demand and thus determines the wholesale market for the acquisition of broadcasting rights in particular for films and sporting events.[2]

We can expect to witness the emergence of new markets in the future, which may or may not be close substitutes to established ones, while some markets will disappear. Market delineation will have to be done on a case by case basis.[3] It is interesting to note that the "death of the middle-man" or of the intermediaries was announced as one of the main features of the Internet revolution. We are, however, seeing the appearance of new forms of intermediaries trying to add value to the transactions – such as the development of B2B market places and Internet Portals. New intermediaries are also responding to perceived problems relating to navigation, authentication and security.

The Pay-TV market, in geographical terms, has been consistently defined by the EU Commission as being national in scope for mainly cultural and language reasons and because pay-TV generally needs to address specific national consumer tastes. The same factors are liable to determine the geographical market definition regarding new media services, such as digital interactive television services (e.g. entertainment or education). Geographic delineation of closely related markets, such as technical services for the provision of those interactive services, is also likely to follow the same criteria. Another example could be Internet portals or pay-services supplied via the Internet for which there is an increasing need to adapt to the national tastes and consumer preferences. On other occasions, vertical links, specific national regulatory frameworks, brand loyalties or delivery costs will determine captive customers who can be charged different prices and therefore narrower market definitions are warranted.

It is advanced by some authors that Media/Internet related markets must necessarily lead to broader geographical market definitions mostly global. This theory generally stresses supply-side considerations: geographical location becomes less important for the interaction between sellers and buyers. Enhanced economies of scope would also militate in favour of wider market definitions. Although

possible in some situations, it is not necessarily so in all cases. Demand-side considerations of substitutability often will still prevail in the assessment.

In a possible distinction between retail and wholesale markets the geographic scope of wholesale acquisition (content) markets is potentially broader than that of the retail markets. An interesting example is the Nordic region where pay-TV operators have a similar, if not identical, demand structure regarding the acquisition of premium content/channels. As a result, the content delivered through national pay-TV channels is similar (except for different language subtitles) in the different Nordic countries. However, that does not necessarily lead to retail markets equally being supra-national as final consumers, for technical and language reasons, may normally not switch between different national pay-TV offerings.

2. Substantive assessment

2.1 Pro- and anti-competitive effects in horizontal and vertical media mergers

The European Commission's experience with media mergers includes both horizontal[4] and vertical mergers.[5] Issues such as foreclosure, barriers to entry, intellectual property rights and standards play an important role in many media mergers examined by the European Commission. In the assessment of these cases, the European Commission attached great importance to ensuring open market access. We propose to illustrate the Commission's decisional practice with cases of pay-TV and multimedia mergers.

a) Horizontal mergers

The most recent example of a horizontal merger is the conditional clearance of the merger between the two Italian pay-TV operators Stream and Telepiù.[6] As a result of the operation, the new platform which is solely controlled by Newscorp, will have a near-monopoly in the Italian pay-TV market. The Commission has taken the view that appropriate conditions framing the authorisation of the merger would be more beneficial to consumers than a prohibition decision followed by the likely closure of Stream, the smaller of the two existing and loss-making operators. The main objective of the conditions for clearance is therefore to ensure that the market remains open for competition.

Competitive constraints will come in the future from cable operators, DTT[7] broadcasters and satellite TV channels. For these competitive constraints to materialise, it is indispensable that premium content such as blockbuster movies and football matches be accessible. As regards potential competition from satellite operators, access to Newscorp's satellite platform and related services is crucial. In the absence of corrective measures, Newscorp would have become a "gatekeeper" for access both to the technical satellite platform and the Conditional Access System (CAS) technology.

In order to address the European Commission's competition concerns, Newscorp submitted a comprehensive remedy package. These commitments will ensure access both to content and to the platform. Newscorp will waive its exclusive rights for non-satellite transmission of blockbuster movies, football matches and other sport events. In addition, Newscorp will propose an unbundled and non-exclusive "wholesale offer" to non-satellite competitors. As for potential satellite competitors, access to content will be facilitated by allowing right owners to unilaterally terminate ongoing contracts with the combined platform and by limiting the duration of future contracts to two years for football rights and three years for movie rights. Moreover, Newscorp will grant satellite competitors access to its own platform, will offer all related services under fair and reasonable conditions, will grant non-discriminatory licences for its CAS[8] technology or will enter into simulcrypt agreements with competitors preferring a different CAS technology. In order to favour potential competition via alternative means of transmission, Newscorp will divest Telepiùs's terrestrial broadcasting activities. The European Commission has concluded that this

package of commitments will lower barriers to entry and create the conditions for effective actual and potential competition.

b) Vertical integration

Vertical integration was an important issue in the assessment of the multimedia mergers resulting in the creation of AOL Time Warner[9] and Vivendi Universal[10] which were both cleared under conditions in October 2000. These mergers led to the combination of strong positions in both content and infrastructure markets.

(1) AOL/Time Warner

The merger between the Internet access provider AOL and the media and entertainment company Time Warner could have led to the creation of a dominant position on the emerging market for on-line music delivery. Due to AOL's structural links with German media group Bertelsmann, the new entity would have had access to Bertelsmann's content. In combining the large music libraries of Bertelsmann Music Group (BMG) and of Warner Music, AOL Time Warner would have controlled the leading source of music publishing rights in Europe. Since music is a very important content for Internet access providers, the new entity could have acquired a gatekeeper position for the access to the emerging market of on-line music delivery. As a consequence, it would have been able to dictate proprietary technical standards for on-line music delivery, thereby foreclosing this market. A similar scenario was likely to occur in the market for on-line music player software where AOL Time Warner's Winamp player could have been imposed as the dominant software player.

In order to meet the European Commission's concerns regarding open market access, the parties proposed to sever the structural links with Bertelsmann. This commitment solved the competition problem at the source, namely the gatekeeper position which resulted from the combined access to the music publishing rights of both Warner Music and BMG.

(2) Vivendi/Canal Plus/Seagram

The merger resulting in the creation of Vivendi Universal raised similar competition concerns as the AOL / Time Warner case. The merger combined Vivendi's activities in cinema production and distribution, pay-TV services (Canal Plus) and mobile telecommunications (SFR) with Seagram's Universal music and filmed entertainment businesses. In terms of content, the combined entity would have had the world's second largest film library and the second largest library of TV programming in the EEA as well as the largest music library. In terms of distribution, Canal Plus was the leading pay-TV operator in Europe. Due to the multi-access portal Vizzavi, a joint venture of Vivendi and Vodafone, the parties were likely to become a leading player also for Internet distribution.

The European Commission identified three markets that raised serious doubts as to the merger's compatibility with the common market. On the market for pay-TV, Vivendi's Canal plus was likely to have exclusive access to Universal's movie rights which constitute crucial premium content. Canal Plus would thereby have been able to foreclose competitors from the pay-TV market and to strengthen its dominant position on this market. The combination of Universal's music content with the multi-access portal Vizzavi raised serious doubts with respect of the creation of a dominant position on the emerging markets for portals and for online music delivery.

In order to ensure open access to these markets, the parties committed to grant access to Universal's music content to any third party on a non-discriminatory basis. Regarding the pay-TV market, the parties committed not to offer more than 50% of Universal's film production to Canal Plus, thereby reducing concerns of market foreclosure.

These examples illustrate that the European Commission accepts first mover advantages which accelerate the emergence of new services and markets and therefore benefit consumers. However, the European Commission is also very concerned about any potential for market foreclosure. Therefore, it does not hesitate to intervene to ensure effective and open market access.

Pursuant to Article 2 (1) (b) of the EC Merger Regulation, the Commission also takes into account in its assessment the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition. In several decisions regarding pay-TV mergers the European Commission assessed whether the set-up of a digital TV infrastructure actually fulfilled these criteria.[11] However, as all these concentrations would have eliminated competition, the Commission had to prohibit the transactions.

2.2 Virtual circles/upward spiral

The issue of positive network effects was discussed in the above multimedia merger cases. In AOL/Time Warner, the European Commission found that the new entity's strong positions in both content and distribution markets were likely to mutually strengthen each other. The attractive content would deprive subscribers from any incentive to abandon AOL as Internet access provider and would attract new customers. It can be concluded that an increased subscriber base generally generates higher advertising revenues. This analysis may be summarised as follows: "more subscribers bring more content and vice versa". With respect to the multi-access portal Vizzavi, the European Commission found that the vertical integration of Universal's content and Vivendi's Internet portal would generate reciprocal positive network effects and could result in the creation of dominant positions on the markets for pan-European Internet portals and for on-line music delivery.

3. Plurality Concerns

The EU Commission follows in the assessment of media mergers the same legal and economic standards as in other sectors. Pursuant to Article 2 (3) of Council Regulation (EEC) N° 4064/89 of 21 December 1989 on the control of concentrations between undertakings (hereinafter "the EU Merger Regulation") *"a concentration that creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market".* Therefore, the *"competition"* factor prevails over any other *"factor".*

Consumer welfare considerations are decisive in the final assessment of the cases. European consumers are of course entitled to the best quality, choice and prices. The issue of consumer welfare in media markets is closely linked with the innovation process driven by companies. Both factors are part of the assessment pursuant to the first paragraph of article 2 of the Merger Regulation *("...the interests of the intermediate and ultimate consumer, and the development of technical and economic progress…")*

However, maintaining media plurality and ensuring effective competition are to a certain extent complementary purposes. In keeping market access open, competition rules may thus contribute to the plurality of media providers. In some cases the application of competition rules therefore also ensured the maintenance of media plurality.[12]

We have witnessed new phenomena of mega-companies resulting from operations like AOL-Time Warner[13]. It is interesting to note that this type of merger involves more economic resources than the GDP of many countries.Questions regarding democracy and the role of politics with regard to these giants have been raised. In particular the risk that the power and resources at their disposal put them beyond the reach of the national legislative frameworks and give them opportunities to unduly influence the decisions

of Governments. The Commission's exclusive jurisdiction on mergers with Community dimension does not prevent Member States from taking appropriate measures in order to protect plurality of the media.

Article 21 (3) of the EU Merger Regulation sets out that:

"…*Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.*

Public security, plurality of media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interests must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication."

In the notes on the Merger Regulation[14] that intend to clarify the scope of certain articles of the regulation, attention is drawn to some interpretative elements concerning article 21 (3). In particular:

- The plurality of media as a *legitimate interest consideration* can be applied by a Member State either to prohibit a concentration or to make it subject to additional conditions. Member States cannot authorize on those grounds concentrations that the Commission may have prohibited under the EU Merger Regulation.

- The plurality of media claim must be compatible with the general principles and other provisions of Community law. Therefore, it is essential that prohibitions or restrictions placed on the forming of concentrations should constitute neither a form of arbitrary discrimination nor a disguised restriction of trade between Member States.

- The measure eventually taken by a Member State to protect the plurality of media must respect the principle of proportionality. The Member States must therefore choose, where alternatives exist, the measure which is objectively the least restrictive to achieve the end pursued.[15]

NOTES

1. See *inter alia* Case IV/M.469-MSG Media Service; Case IV/M.490-Nordic Satellite Distribution; Case IV/M.709-Telefónica/Canal+ Spain/Cablevision; Case IV/M.993-Bertelsmann/Kirch/Premiere; Case IV/M.1207-Deutsche Telekom/BetaResearch; Case IV/M.1439-Telia/Telenor; Case Comp/M.2050-Vivendi/Canal+/Seagram; Case COMP/M2845 Sogecable/Canalsatélite Digital/Vía Digital (article 9 referral to Spain); Case COMP/M.2876 – Newscorp/Telepiù.

2. See Commission decision 1999/242/EC, TPS; see case N° IV.36.539 -British Interactive Broadcasting/Open.

3. Thus, e.g. the question arises whether pay-services over the Internet, such as DSL streaming of live football matches, will be a substitute for traditional pay-TV services of the same nature, ultimately resulting in the delineation of a broad pay-services market independently of the transmission mode.

4. Horizontal mergers are mergers between direct competitors that are active in the same relevant markets. However, horizontal media mergers frequently imply also vertical effects such as foreclosure.

5. Vertical mergers are mergers where the companies involved are operating at different levels of the production or distribution chain.

   Conglomerate mergers can be defined as mergers between firms that are in a relationship which is neither purely horizontal nor vertical. In practice, the focus is on mergers between companies that are active in related or neighbouring markets, e.g. mergers involving suppliers of complementary products. The role of conglomerate media mergers has so far been rather limited in the European Commission's decision practice.

6. COMP/M.2876 – Newscorp/Telepiù.

7. DTT = Digital Terrestrial Transmission.

8. CAS = Conditional Access System.

9. Case COMP/M.1845 (AOL/Time Warner).

10. Case COMP/M.2050 (Vivendi/Canal Plus/Seagram).

11. Case IV/469 (Media Service Gesellschaft) ; IV/M.490 (Nordic Satellite Distribution) ; IV/M.993 (Premiere).

12. Cf. Cases IV/M.469 (Media Service Gesellschaft) ; IV/M.553 (RTL/Veronica/Endemol « HMG ») ; M.993 (Bertelsmann/Kirch/Premiere).

13. Case Comp/M.1845-AOL/Time Warner

14. Published in "Merger Control Law in the European Union" , European Commission, Brussels-Luxembourg, 1998.

15. See Newspaper Publishing (Case IV/M423).

SUMMARY OF DISCUSSION

1. Introduction

The Chairman made three general opening points: market definition is an important issue in most jurisdictions, and seems to be fairly similar across countries; behavioural remedies are heavily used and are highly case specific; and competition authorities are wrestling with the relationship between competition and pluralism issues but generally try to avoid it. Some competition authorities believe that promoting competition in itself promotes pluralism so nothing else is needed from competition authorities. Some contributions note, however, that competition authorities are criticised for not going far enough in protecting pluralism.

The Chairman decided not to spend much time on market definition because there appeared to be a fair amount of consensus on methodology and results. He flagged, though, three contributions dealing with some particularly interesting aspects of market definition: Australia (supply side issues); United States (price discrimination); and United Kingdom (product differentiation).

2. Virtuous circles and downward spirals in two-sided markets

The Chairman remarked that the Australian contribution includes a fairly detailed discussion of this issue including with regard to the *Foxtel-Optus* matter in which two major pay-tv operators attempted to get closer together. He called on Australia to develop the virtuous circles and downward spiral theories and to discuss the *Foxtel-Optus* case in particular.

An Australian delegate pointed out that there are significant first mover advantages associated with an early start in gaining a significant market share of subscribers. This confers an important advantage in terms of obtaining exclusive rights to content. It might well be that the largest operator pays a premium for it, but exclusivity, particularly for premium movies and sports, confers a significant advantage in gaining subscribers. A larger subscriber base in turn makes it possible to spend more on content thus obtain still more subscribers etc. A market like this could tip rapidly in favour of the dominant firm.

The virtuous circle effect can also occur in other media such as newspapers where it is based on the interaction between dual revenue sources, i.e. copy price and advertising revenues. To attract readers the newspapers need to provide outstanding general content or serve a specialised niche. Better content leads to more readers which in turn increases advertising revenues and makes it possible to both improve content further and to diminish the cover price, which in turn increases circulation etc. The result is often just one mainstream mass market newspaper in each geographical market plus maybe some specialist, usually financial newspapers.

In 2002, Australia's two metropolitan pay-TV operators, both cable companies, approached the ACCC regarding a content sharing arrangement. The larger of the two was Foxtel, a joint venture between Australia's largest telecommunication company (the former government monopoly Telstra) and Rupert Murdoch's News Corporation. Foxtel would obtain exclusive access to Optus' content and in turn share its own much superior content with Optus. Crucially important to the ACCC was the fact that Optus' pay-TV

business was in decline, caught in a downward spiral. The ACCC was concerned that the decline in Optus' pay-TV business would ultimately reduce its power to compete in telephony and broad-band cable business.

The ACCC ultimately approved the *Foxtel-Optus* joint venture subject to a very broad content access regime. Under the arrangement, Australian controlled content, which is generally held by Foxtel, must be made available to all other pay-TV providers. The ACCC was concerned that Foxtel's control of content was hindering the development of cable-TV competitors. Since Telstra is Foxtel's largest shareholder one could legitimately be concerned that Foxtel might refuse content if that would hinder the development of potential competition not just for pay-TV but also for Telstra in the broad-band Internet access and telephony markets.

3. Vertical issues and market foreclosure

To address this issue, the Chairman turned first to the Finnish contribution which included the statement: "The assessment of media mergers does not differ from the assessment of mergers in other sectors." (para.23) This view can also be found in a number of other contributions. The Finnish contribution also acknowledges that concerns about vertical relationships are especially important in the media sector. A good example can be found in the *Sonera/Talentum* merger which raised both upstream and downstream competition concerns.

The Finnish delegate noted that in *Sonera/Talentum* the Finnish Competition Authority (FCA) analysed the electronic media market. It conditionally cleared the acquisition thereby allowing Sonera to obtain joint control of the WOW Web Brand Corporation previously solely owned by Talentum.

In this transaction, Sonera, the leading Finnish telecommunications operator, acquired the web services developed by the biggest Finnish new media company, Talentum. In previous decisions, the FCA had determined that Sonera held a dominant position in the Finnish mobile communications market. The competitive effects of the acquisition were assessed in several product markets: Internet advertising; web content procurement; and the Internet connection market. The geographical market for all three products was considered to be Finland.

The FCA found that the transaction would raise impediments to competition and prevent market entry. As a content packager and telecommunications operator, Sonera was seen as an important party to many content producers in obtaining entry to the web content market, as well as the new mobile communications content market. The primary competition risk was that Sonera would focus its content procurement and information transfer and consumer behaviour know-how on its joint venture.

Sonera's vertical integration with a content production company would have seriously affected the competitive options of small and medium-sized new media companies. To remove the competition problem, the parties committed to Sonera treating the joint venture and its competitors evenly in the procurement and delivery of web content, and not to focus its know-how on the joint venture alone. The parties also committed to conditions that secured continued competition between the joint venture and Sonera in selling advertising space.

The Chairman commented on several aspects of the Mexican contribution. One was its list of regulations applying to the media sector. The Mexican contribution notes that because of all the regulation taking care of public interest goals, the competition authority can focus exclusively on competition issues. In discussing those issues, it presents several cases, including two on radio, one of which involves significant vertical concerns. The Chairman wished to learn more about those mergers.

A Mexican delegate noted that despite the current heavy regulations, historically substantial aspects of radio and TV programming were unregulated. For example, the Federal Law on Radio and Television did not restrict the concentration of concessions. The result was high concentration in the market before the Competition Law was issued and the Federal Competition Commission (FCC) created in 1993.

The Competition Law fully applies to the broadcasting industry but focuses only on protecting the competition process and free entry. Before turning to specific cases, the delegate noted that the Mexican television industry is dominated by two broadcasters: Televisa with 59 percent of the market and TV Azteca with 36 per cent of the market. Both broadcasters are vertically integrated, engaging in program production, packaging and delivery. In the case of radio broadcasting, the industry structure varies. In Mexico City, by far the largest market, there are 55 commercial radio stations, 64% owned by 5 broadcasters, and the frequency spectrum is saturated.

At the end of 1994 Radio Centro notified its plans to acquire Radio Red. Both firms had their main radio stations in Mexico City. Due to advertisers' preferences, the relevant market was defined as radio broadcast advertising services in Mexico City.

The acquisition would increase the number of radio stations controlled by Radio Centro from 10 to 13, a 24 percent share of all stations in Mexico City. However, it would account for 39.2 percent of advertising revenues and 45.6 percent of radio audience. The main reason for these differences in shares was that the acquisition included the highly popular news program "Monitor".

The FCC imposed a number of conditions on the acquisition including the elimination of exclusivity terms in Infored (the firm producing Monitor) contracts applying to news services, informational programming and special events. Radio Centro was also required to refrain from tying the purchase of advertising in several of its radio stations.

The *Televisa/Acir* case is the most important media merger the FCC has dealt with. In 2000, Televisa notified its intent to merge its subsidiary Radiópolis, with Acir, one of the country's top radio groups. Televisa has a 59 percent market share in the TV sector, and its subsidiary Radiopolis operates several radio stations nationwide with a participation of 11 percent in the number of radio stations in Mexico City. Acir owns several radio stations nationwide including 13 percent of the radio stations in Mexico City. The FCC considered that the relevant market was the market for radio advertising which is strongly complementary with TV advertising. The FCC objected to this transaction because it believed it would have anticompetitive effects on the relevant market.

At this point the Chairman turned to the European Commission and drew attention to two particular aspects not covered in other contributions. The Commission stated that it: "…accepts first mover advantages which accelerate the emergence of new services and markets and therefore benefit consumers. However, the European Commission is also very concerned about any potential for market foreclosure. Therefore, it does not hesitate to intervene to ensure effective and open market access." (para. 17) The Chairman wanted to learn more about how these dynamic and static considerations are balanced in concrete cases. He also highlighted Article 21 (3) of the Merger Regulation which allows member states to take appropriate measures to protect the plurality of the media. The Chairman asked for more detail about this Article as well as examples of it resulted in blocking mergers the Commission would have cleared.

A delegate from the European Commission stated that first mover advantage is a tricky concept because sometimes it is offset by second mover advantages, i.e. benefiting from learning about what works well in the market. In terms of balancing the static and dynamic effects, the Commission does not really

have much room for manoeuvre. Article 2 of the Merger Regulation states that the Commission will include in its assessment the development of technical and economic progress provided it is to the consumer's advantage and does not form an obstacle to competition. In practice this means that if a merger creates or strengthens dominance the Commission will have to block it even if it also creates efficiencies.

Concerning pluralism, the delegate noted that Article 21 provides a clear legal framework. The Commission has exclusive competence to deal with mergers of Community dimension, and it applies a solely competition based assessment. At the same time, however, the Merger Regulation provides that member states can take more severe, tougher measures on grounds of pluralism once the Commission has ruled on competition grounds. For example, in a newspaper case, the Spanish media group PRISA, the Italian media group l'Espresso and a British group the Mirror Group notified a joint acquisition of Independent Newspaper Publishing plc. The Commission did not find a competition problem and cleared the case. The parties, however, also had to satisfy British requirements having to do with preserving the expression of free opinion, accurate presentation of news etc. All the Commission requires in such a case is that it be kept informed by the member state authorities of conditions eventually imposed. The Commission will check to ensure the conditions are proportional, aimed at achieving plurality, not likely to discriminate among European companies and unlikely to reduce trade among member states.

Referring to the United Kingdom's contribution, the Chairman noted it included an extensive discussion of *Carlton/Granada* in which two of the largest programme producers would be united with one of the biggest purchasers of TV content in the U.K. This case revealed that the Office of Fair Trading (OFT) may be more sceptical of foreclosure effects than some other competition authorities. The Chairman cited the following passage from the submission: "Whilst there is concern that such a merger may result in foreclosure of the distribution outlet to third party providers, there is a strong commercial incentive for media firms to use the best available content to attract viewers or readers, and hence advertisers. In our analysis of the Carlton/Granada case we concluded that the comparative value of programme supply as against advertising revenue and the incentive to maximize viewers for the lowest cost, combined with a regulatory quota for independent production, would offset the possibility of foreclosure." [para. 8(2)] The Chairman wondered how much OFT's view of the foreclosure risk in this case was influenced by the fact that there was a quota for independent production. This in itself seemed to ensure there would be a certain amount of market openness for other content providers.

A United Kingdom delegate clarified that although the OFT had no concerns in the first phase of the investigation, the *Carlton/Granada* merger was being referred for a second phase investigation on another issue. Carlton and Granada are both regional ITV licensees and broadcast content purchased through the ITV network. So one of the considerations was whether gaining control over the ITV network would change their incentives. The Chairman mentioned the 25 percent minimum quota for independent program production and acquisition. When the case was examined, Carlton and Grenada were comfortably exceeding that.

There were several reasons the OFT did not object to *Carlton/Grenada*. One was that their advertising revenue greatly exceeded the income received from programme production, and consequently it was not clear they would ever have an incentive to put that at risk through favouring their own programming. In addition, the independent production sector has been very vibrant in the U.K., having over 50 medium and 500 small active programme producers. This tends to indicate an absence of significant barriers to entry into the sector. Those were the main reasons why the OFT was not concerned about vertical foreclosure. The 25% quota was really only a supporting consideration.

4. Merger remedies

The Chairman reiterated that behavioural remedies are heavily relied on by competition authorities in media mergers. An example is found in the Danish contribution's *FAS* case in which the Competition Council was confronted with the three largest Danish newspaper groups forming a joint venture to merge their archive database and certain affiliated activities. The Council was concerned about the joint venture having three year exclusive use of news from its parent companies and the consequent risk of foreclosure. It did not oppose the merger, however, because the parties agreed to condition the three year exclusivity on the joint venture's market share remaining below 30% in the first year, and also agreed to treat third parties on a non-discriminatory basis after the exclusivity period. The Chairman wondered how easy it is to monitor such a condition, what exactly the joint venture has to do to ensure it remains below the 30 percent market share, and what would happen if that share were exceeded.

The Danish delegate stated that three separate product markets were delineated in the *FAS*: news databases; press surveillance; and the market involving rights to exploit news articles in electronic format, which is the market where the parent companies are active. The geographical market was Denmark. The delegate believed the commitments in the *FAS* case are fairly easy to monitor because they are based on objective criteria. It is too early to conclude, however, whether that is in fact true. As to the question of whether the Competition Council will review FAS' market share at the end of 2003, the exact nature of follow-up has not yet been decided. Competitors will be sure to keep the competition authority focused on developments in this case.

Turning to Brazil, the Chairman noted its enormous experience in media merger cases. Over 62 had been analysed in the two years preceding the roundtable. The Chairman was particularly interested in the *Globosat/ESPN* merger in 2000, in which concerns about foreclosure led to a long list of approval conditions, in particular the elimination of exclusivity clauses and tied sales practices. The Chairman wanted to know whether a) these conditions are easy to monitor, and b) whether entry has subsequently occurred or there is other evidence of market openness.

A Brazilian delegate mentioned that Globosat, belonging to Brazil's main media group, i.e. Globo, is a content provider and the main supplier of local TV programs for pay-tv in Brazil including Sportv, a "premium" or "national" sports channel. ESPN Inc., a subsidiary of The Walt Disney Company, is a major worldwide supplier of sports channels. In Brazil, this Group supplies two pay-TV sports channels: the ESPN International, focused on international sporting events, and the ESPN Brasil, focused on both national sporting events and journalism. ESPN was Globosat's Sportv main competitor in the Brazilian pay-tv markets for distribution of sports channels and for acquisition of broadcasting rights for "premium" sporting events, especially soccer matches – regional or national championships. In the few years preceding the merger, ESPN Brasil was losing its main broadcasting rights to Globosat. In addition, ESPN Brasil was not distributed by the Globo Group's, which harmed ESPN Brasil's ability to reach the minimum scale needed to maintain its operations.

The parties defined the relevant market as the passive visual entertainment market, which would include pay-TV, broadcasting, home video/DVD and cinema. The Secretary for Economic Monitoring (SEAE), an antitrust body linked to the Ministry of Finance, considered this definition too broad and produced its own narrower delineation.

The acquisition resulted in Globosat having a monopolistic position on the premium sports channels for pay-tv market and in a monopsonic position in the market for the acquisition of pay-tv broadcasting rights for national/premium sporting events. Some important barriers to entry existed in each relevant market, namely: (i) high sunk costs related to advertising of a new premium sport channel; (ii) difficult access to national sport content; (iii) difficult access to the distribution windows needed for a new

channel to reach minimum viable scale; (iv) high costs for broadcasting rights for national sporting events; and (v) the degree of vertical integration in the Brazilian pay-TV market.

The Globo Group held about 63% of the Brazilian pay-TV service providers market. The refusal of the pay-tv service providers affiliated to this group to distribute a new premium sport channel could make it difficult for a new entrant to achieve the minimum viable scale to operate in the Brazilian pay-tv market. Outside of ESPN Brasil and Globosat, no other program supplier has succeeded in launching a new premium sport channel in Brazil. The analysis made it clear that the exercise of market power by Globosat would be likely after the acquisition including with regard to the Globo group's vertical integration.

SEAE tried to compare the possible welfare losses with possible gains in efficiency, but the parties chose not to supply evidence of efficiencies and instead concentrated on challenging SEAE's market definition. Finally SEAE suggested a number of restrictions to neutralize the likelihood of abuse of marker power by Globosat, including: (a) forbidding ESPN for at least five years from exclusively selling ESPN Brasil channel to pay-TV service providers affiliated to Globo Group; (b) compelling ESPN, on non-discriminatory conditions, to sell ESPN Brasil to companies wishing to distribute this channel in Brazil,; (c) forbidding for ten years tied sales of channels by both Globosat and ESPN Brazil; (d) dropping exclusivity clauses from every ongoing Globosat or ESPN Brasil contract related to broadcasting rights in pay-tv for national sports events. In addition to the restrictions, SEAE suggested that the Secretariat for Economic Law (SDE), another antitrust body linked to the Ministry of Justice, start an administrative investigation of Net Brasil (a Globo subsidiary) and Globosat to determine whether certain refusals to deal, exclusivity agreements and the use of "English clauses" could be regarded as an infringement of the Competition Law. SEAE believes that the Brazilian players in the pay-TV market are going to help the Brazilian System for Competition Defense to monitor the accomplishment of these conditions.

After *Globosat/ESPN*, SEAE has worked on increasing its knowledge of media mergers, especially in pay-TV and new media markets. At the end of 2001, a sub-Coordination unit for Media and Digital Convergence Affairs was created inside the General-Coordination for Commerce and Services Affairs. Media mergers continue to be analyzed according to the same rules, practices and tools used in other markets, although SEAE is considering changing that.

The Chairman next focused attention on Israel whose contribution included a merger in 2002 between three non-overlapping cable TV-operators, possessing about 70 percent of the multi-channel TV market. This merger raised both competition concerns and possible efficiencies. He quoted from the contribution: "The [Israel Antitrust Authority – IAA] found that the merger would lead to efficiencies and to greater competition in the various telecommunication markets due to the convergence tendency. These efficiencies are expected to result mainly from the ability of the merged firms to become an actor in the national telephone and Internet infrastructure market." (para. 7). The Chairman also noted that the IAA imposed conditions on the merger instructing, "…the merged cable company to enter the telephony services market within a predetermined period of time, and indicated the required minimal scope of customers." (para. 15) The Chairman asked whether the cable companies wanted to enter the telephony market, and wondered what would happen if they do enter but do not get enough costumers within the set period. He was also concerned about possible encouragements to engage in predatory practices to meet the market share target.

An Israeli delegate referred to four major competition concerns in this case. The first was the loss of potential competition. This was not believed to be a serious issue because the possibility of such entry was low. The second concern was the possible creation of monopsony power with regard to content providers. This too was not believed to be a significant risk because a satellite company remained a potential program buyer. The third concern was coordinated effects between duopolists, i.e. the satellite

company and the united cable company. This threat was dismissed because of highly differentiated products. In addition ongoing convergence pointed to some kind of cluster competition emerging.

The fourth concern was the one behind the conditions imposed. There was a potential for mutual forbearance between the national telephony monopoly and the united cable company. For years both have had monopolies in their respective businesses. This situation was potentially altered in 1997 when the government declared that the international telephony market would be opened to competition. Some of the cable companies entered this market. Just one year later the telephony monopoly announced it would enter the multi-channel TV market, and did so quite aggressively in 2000. A multi-contact market situation had emerged and with it the possibility of a strategic game involving either mutual forbearance or competition in all markets.

The cable companies had made plans to extend their entry into local telephony, so the IAA did not create that. It merely acted to increase the chances the plans would be executed.

The remedy adopted in this case was quite extraordinary, but not necessarily very risky. Having invested some 70 million euros, i.e. what the IAA required in the way of cable upgrading, the cable companies are almost certain to offer competition in local telephony.

Referring to the Czech Republic contribution, the Chairman drew particular attention to a merger between two cable TV providers, i.e. *Baring Communications Equity (TES)/Vision Networks Tsjechie Holding* case. He asked for more information about this merger and particularly the potential for greater competition for the dominant telecommunications provider.

The Czech delegate stated that alongside the application of standard competition law, there are also special rules (i.e. content and ownership regulations) applying to media mergers designed to safeguard media plurality. These rules are applied by the Council for Radio and Television Broadcasting, an administrative authority independent from the Czech government.

The *Baring…/Vision…* merger created a clear duopoly structure in the cable-TV sector. The competition authority unconditionally cleared it. The parties to the merger operated on different geographic markets, and the concentration resulted in the strengthening of the economic and financial power of the merging entities. In addition, any resulting increase in market power was counterbalanced by the market power of UPC, a major free-to-air TV broadcaster, and Czech Telecom, the principle Czech telecommunications operator. These companies are, or will in the medium term become, competitors of the cable TV operators as regards new technologies for broadcasting television signals, namely classic phone lines using xDSL technology, video streaming via Internet, digital terrestrial broadcasting, and the Multimedia Wireless System. The merger analysis included examining the possibility of collective dominance among the merged entity and UPC as regards content purchasing, advertising rates and general marketing.

The cable-TV operators will need to invest in modernising their networks in order to provide alternative data transfer and voice services, which are key aspects for maintaining their competitiveness. The merger will presumably increase the new entity's investment potential and facilitate eventual competition with UPC and with Czech Telecom. The latter company has a modern network capable of offering parallel voice, data and picture transfer to virtually every household in the Czech Republic. The merger creates conditions for setting up a similarly developed infrastructure able to compete with the dominant provider of telecommunication services. In this, the delegate fully agreed with what the Israeli delegate said.

5. Pluralism – Should competition authorities be directly involved in preserving pluralism in the media? How should they relate to media regulators? What are the pros and cons of ownership restrictions?

5.1 Ownership Restrictions

The Chairman began by considering the ownership restrictions existing in many countries. Three contributions in particular deal with this: Chinese Taipei, Japan and Germany. The contribution from Chinese Taipei basically says that ownership restrictions are natural complements of competition laws. Japan's contribution notes that there has been a call by a study group to relax the rule on ownership, and Germany's is extremely sceptical, and even extremely critical of ownership rules.

The delegate from Chinese Taipei explained that to prevent over-concentration and maintain plural channels for expression of opinions and ideas, Chinese Taipei applies a dual regulatory process for mergers in the cable TV market. The Fair Trade Law, administered by the Fair Trade Commission (FTC) requires prior notification of mergers above a certain size or market share threshold. The FTC determines whether the overall economic benefits of a proposed merger outweigh any disadvantages resulting from possible restraints on competition. In addition, the Cable Broadcasting Law, administered by the Government Information Office (GIO), stipulates that system operators, their affiliates, and their directly or indirectly controlled system operators must abide by the following restrictions: 1) the number of subscribers acquired must not exceed one-third of the total number of subscribers in the nation; 2) the number of system operators acquired must not exceed one-half of the total number of system operators in an administrative district; and 3) the number of system operators acquired must not exceed one-third of the total number of system operators in the nation.

The Fair Trade Law is mainly concerned with overall economic benefit produced by efficiency, rather than with plurality of competitors in the relevant market. It is possible that the FTC could approve a merger generating a greater than one-third national market share. The Parliament therefore believes that competition law is inadequate to guarantee plurality in the cable TV market and has assigned that task to the GIO.

Turning to Japan, the Chairman noted that a study group on broadcasting policy released a report suggesting that: "…appropriate relaxation of the principle of excluding multiple ownership of the media is basically justified by considering the changes in the media environment…." (para. 21) He called on Japan to present its views on media ownership constraints.

The first speaker from Japan's Fair Trade Commission (JFTC) conceded that limits on mass-media concentration made sense in terms of under-girding democracy through protecting freedom of speech. However, from the viewpoint of competition policy, the JFTC believes that broadcast media ownership restrictions should be limited as much as possible and less restrictive means should be sought to achieve the legitimate public policy objective.

A speaker from the Ministry of Public Management, Home Affairs, Posts and Telecommunications, i.e. the broadcasting and telecommunications regulator and policy maker, added that media ownership rules are applied through limiting shareholding in the broadcaster to a specified ratio, with the object of ensuring plurality and diversity of speech. The Ministry believes that the principle of media ownership rules continues to be needed. It recognises, however, that there is a need to relax a portion of the media ownership rules because of changes in the media environment, namely increased media choices for viewers. The media ownership rules are currently under review at the Ministry.

The principle behind the media ownership rules is based on cultural policy and plurality of speech, a concept derived from the Constitution, and the rules are comparatively easy to apply to two sided broadcasting markets. Despite the increased means to provide information to public, there are still risks entailed in media concentration, and once such concentration occurs it is difficult to undo. It is also worth noting in Japan there are still people who only view one specific media such as free terrestrial TV. Half of the Japanese population watch free-to-air terrestrial TV and do not subscribe to either cable or satellite broadcasting services.

The Chairman next drew attention to the German contribution and its view that the control of concentration through the media law has been ineffective. In spite of this law there are two major media groups in Germany. The Chairman wanted to know whether that was a consequence of both the competition law and media law, or amounts only to a criticism of the media law? If the latter, is it a result simply of bad design or are ownership rules ineffective *per se*?

A German delegate from the Federal Cartel Office (FCO) began by clarifying that the scepticism about control over media concentration attaches only to the media law constraints not to review under general competition law. The media law's restrictions apply only if a company obtains a dominating influence over public opinion. This is presumed to occur if a company reaches 30 percent of the viewers.

There has been no case in Germany of a merger being cleared under either the competition or media law but running into problems under the other law. For example the pay-TV joint venture between the two German private TV groups, Bertelsman and Kirch, was prohibited by the FCO and also presented difficulties under the media law. Given this record, one can really doubt whether an additional control under media law is necessary. In any case, the protection of economic competition as a rule also ensures pluralism and diversity in the media.

Specifically with regard to ownership limits, the delegate made three points. In Germany there are no restrictions on foreign investments in the media and this helps to create diversity. Second, there has been a negative experience with the media law limitations on share ownership in TV companies, i.e. 25 percent. This did not prevent the emergence of oligopolies but did prevent a clear allocation of media responsibility which is perhaps why the restriction was amended. Third, there are no limits on cross ownership in German competition law. If the TV market and the newspaper markets are different markets, bearing in mind the possibility of substitutability among different media, and competition is maintained in these properly defined markets, this should also ensure sufficient diversity and plurality.

A delegate from the Ministry of Economics and Technology added that specific media control is the exclusive competence of the *Länder* not of federal institutions, and the *Länder* face a kind of conflict of interest. They are concerned about restricting cross-ownership, but they also wish to attract investments from the big media companies. That is perhaps one reason why media control is not as effective as it might and should have been.

5.2 Countries in which there is a strong feeling that the competition authority should not address the issue of pluralism

The Chairman divided the next set of contributions into two groups. The first group takes the view that the competition authority should have nothing to do with pluralism or broader social concerns, and usually institutes a division of labour between a sectoral regulator and the competition authority. The second group practices a much less obvious separation of competition and pluralism protection. The United States and Canada fall in the first group.

A delegate from the United States' radio, TV, cable and telecommunications regulator stated that the Federal Communications Commission (FCC) media ownership rules have worked well during the past fifty-to-sixty years. This is partly due to the fact that the FCC took a dynamic approach in regulating the media marketplace. The FCC's policy of limiting the number of radio stations in a given community that can be owned by the same entity was codified in the FCC's rules during the early 1940s. Since then, many more ownership and cross-ownership rules have been adopted. The objective has been to promote three important goals: diversity, competition, and localism, without harming consumers or infringing constitutionally protected freedom of expression.

The media ownership rules landscape experienced a drastic change as a result of passage of the *1996 Telecommunications Act*. It repealed the cross-ownership rule affecting common ownership of cable TV and telephone systems, and made other changes affecting media ownership generally. Among these other changes, the Act eliminated the national cap on the number of radio stations a single operator can own and increased the cap on the number of local TV broadcasters (measured in terms of national audience reach) a national TV network can own. More importantly, the Act required the FCC to review its entire slate of media ownership and cross-ownership rules every two years to determine whether they are still necessary in the public interest. This biennial review focuses, among other things, on changes in the status of competition in the media industries.

The courts, until recently, were supportive of the FCC's media ownership rules. But in a series of challenges by the owners of media companies during the late-1990's, the courts vacated the cable-TV broadcaster cross-ownership rules, remanded the rules setting a cap on the number of local TV broadcasters a national TV network can own, and remanded the rules pertaining to the number of subscribers a cable operator can reach. In some cases, the courts have pointed out inconsistencies in the FCC's various media ownership rules. For example, the court opined that when determining the number of independent "voices" present in local TV broadcast markets for the purpose of implementing the national TV audience-reach cap, the FCC included only local TV broadcasters in its definition of local markets, while for the purpose of implementing its radio-TV broadcast cross-ownership rules, the FCC included other media "voices" in addition to local TV broadcasters.

The combination of the *1996 Telecommunications Act*, recent court decisions, and the rapidly changing media marketplace forced the Commission to review all of its media ownership rules in 2003. Some of the issues currently under consideration were included in the U.S. contribution for this roundtable. For example, the FCC is considering the appropriate measure for diversity, i.e., whether diversity should be measured in terms of view point, source, ownership, or number of programming outlets; and whether or not new media outlets and new types of media such as the Internet should be included in the number-of-voices test determining media diversity. Significant changes in the ownership rules are expected in the course of 2003.

The Chairman remarked that the Canadian contribution reveals a possible trade-off when it comes to competition law and pluralism. It asserts that competition and social policies should be kept separate because if combined under a single authority, the result too frequently would be unsatisfactory trade-offs for the parties, consumers and the industry. Later in the contribution one also reads: "Frequently… commentaries have focussed on the perceived shortcomings in the Bureau's review, particularly the fact that the Bureau has focussed solely on the economic impact of a change in control and has not adopted a broader approach in its review." (para. 2) Observing that it seems the purer one is the less relevant one becomes, at least in the eyes of the general public, the Chairman then asked why trade-offs are better made through combining the decisions of two different authorities instead of being concentrated within the competition authority.

A Canadian delegate confirmed that the Competition Bureau focuses only on the economic competition aspects of media mergers, for example the effects on advertising rates, to the exclusion of diversity issues. This focus also means that distinct antitrust markets are examined despite media critics preferring that attention be paid to effects in several markets simultaneously.

The Competition Bureau only has skills in analysing legal and economic issues and also has a single Commissioner. In contrast, the Canadian Radio-Television and Telecommunications Commission (CRTC) is a multi-member body with different skill sets and makes social policy decisions on the basis of public hearings. The CRTC is accordingly much better suited to ascertain and determine social policy and national interests. For example, the *Broadcasting Act* provides that the broadcasting system should serve to safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada.

If the merger review process were consolidated into one regulator, how would the regulator balance the impact of higher prices against the superior news reporting that higher revenues might produce? Reliance on two regulators allows both economic and social policy to be independently assessed. If a merger substantially lessens competition, remedies can be designed to address this. If it allows the parties to improve their reporting on social issues, another regulator can weigh and report on that aspect. Transparency is inherent in this model because there is no trade-off involved in the decision-making process. There is no need, as there would be in the one regulator model, to resolve the conflict in favour of one goal over another.

As a follow-up question, the Chairman asked whether having a full commission instead of a single commissioner would make much difference. The Canadian delegate responded that the single commissioner is responsible for competition aspects only. There is no other commissioner responsible for other policy aspects.

Countries in which the competition authority addresses (at least partially) the issue of pluralism

The Chairman noted that Canada's views might be particularly interesting to Austria. Paragraph 42c of its *Cartel Act* provides that media mergers can be prohibited if media diversity is impaired. The Austrian contribution traces this provision to an amendment adopted in 2002, "…as [a] reaction to [strong public criticism] after the clearance of the merger in the Formil case." (para. 13) So the Federal Competition Authority (FCA) is forced to make difficult tradeoffs. The Chairman asked how it was going to do that.

Merger control, the Austrian delegate stated, was introduced into Austria 10 years ago. In that period of time, only a few decisions have been taken dealing with special considerations affecting media mergers. The *Formil* case was a merger of several weekly news magazines. Since the merging parties belonged to two major media groups, Bertelsmann and Mediaprint, the merger had horizontal effects. In its analysis of pro- and anti-competitive effects, the Cartel Court first explained the meaning of the *Cartel Act's* two justifications for permitting an anti-competitive merger, namely: 1) improvements in competition that outweigh the disadvantages of the domination of the market; or 2) improvement of the international competitiveness of the businesses involved, if justified by the national economy. It found that neither criterion was met in the case.

Since the *Formil* merger produced a quasi-monopolist position, the Court mentioned the danger of diminished diversity and media criticism especially as regards one of the parent companies. The Court concluded there would be an impairment of media plurality and also noted that the two media groups would likely support each other by way of advertising for their own companies and this was apt strengthen Mediaprint's dominant position on the market for daily newspapers. The merger was cleared with conditions.

Concerning how the FCA will protect diversity and pluralism in reviewing media mergers, the delegate stated that the FCA, set up only in July 2002, is unable to decide mergers itself. It must bring them to the Court, and this is what it will do if doubts arise about media pluralism and diversity. So at the end of the day, the difficult trade-off will be made by the Cartel Court.

The Chairman next turned to the United Kingdom whose contribution noted that: "From the perspective of the Office of Fair Trading…, mergers in the media sector follow the same path as mergers in other sectors." (para. 1) Yet in the current system the OFT has no role in newspaper mergers. Instead, the Secretary of State and the Competition Commission have a duty to consider plurality, diversity and competition in coming to a conclusion on whether a merger is against the public interest. Furthermore, according to the Communications Bill, the OFT will in future be assess the effect of newspaper mergers on competition. Ofcom, the new media regulator, will assess the effect of newspaper mergers on plurality and diversity, but the OFT "…can pass any representations about plurality and diversity to Ofcom or to the Secretary of State." (para. 5) The Chairman asked how the Competition Commission assessed the issues of plurality and diversity in the past. He also queried whether the OFT will be in a position to pass comments to Ofcom about plurality and diversity in newspaper mergers in the future if it analyzes media mergers like any other mergers?

A United Kingdom delegate began by saying that newspapers are rather different from TV and radio, in the U.K. at least. There are no sets of rules relating to plurality or diversity of ownership. All of the issues are dealt with on a case by case basis when mergers are proposed and then referred through the system. The special nature of newspapers was recognized in legislation establishing separate provisions for newspapers whereby OFT is not implicated in referring mergers to the Competition Commission. Such mergers are instead directly referred by the Secretary of State if various thresholds are exceeded.

Current proposals call for newspaper merger review to be brought more into line with what happens in other products and media, and for the government to withdraw from direct involvement in competition policy. The proposed changes represent more a rearrangement of administrative procedures than a major change in substance. They will probably result in fewer newspaper mergers being referred to the Commission.

Concerning plurality, it should be clarified that the Commission is required to look at the need to maintain accurate presentation and free expression of opinion. In the past the Commission generally interpreted this primarily as a need to examine how a merger would affect editorial freedom. This issue has arisen in very few of the mostly local rather than national newspaper mergers over the past 30 years. It has not raised particular problems or resulted in a merger being blocked, except for one interesting case. In that merger, two newspapers representing opposite sides of the sectarian divide in Northern Ireland would have merged. It was felt very unlikely that a single owner would be able to maintain editorial freedom to the point where the views of both sides of the divide would be reflected accurately.

Concerning OFT's particular role in newspaper mergers, OFT focuses predominantly on competition issues and in practice that means focusing on advertising markets. The currently proposed system will give Ofcom a strong role specifically as regards diversity and plurality. Another delegate added that OFT will simply pass plurality concerns on to Ofcom and will refrain from assessing them.

The Chairman said that the situation in Spain seems to be a bit complicated because the Supreme Court recently decided that a 1994 Government decision regarding a merger of two radio operators was void since: "…it did not take appropriately into account "information pluralism" considerations." (para. 4) So the competition authorities have to consider information pluralism. This led the Government to include in the conditions attaching to a merger of two pay-TV operators (*Sogecable/Via Digital*) a provision relating to "information pluralism". This is a particularly interesting case because it involved some

efficiency considerations stemming from offering the same content to the subscribers of the two merging parties. The Chairman wished to know more about the efficiency/diversity trade-off made in this case.

A Spanish delegate noted that in *Sogecable/Via Digital*, the focus was on the national pay-TV market. The markets for rights to premium cinema and football content were also examined as were other markets in the fields of audiovisual production and telecommunication (one of the operators was controlled by Telefónica, Spain's principal phone company). The convergence of technologies and especially the fact that there are new means which can convey different services, such as cable and telephony (via ADSL), along with TV, argued in favour of considering telephony.

The parties to the merger were the two main pay-TV companies in the market, both of which were in financial difficulty. It was believed that blocking the merger would probably lead to there being just one operator. The market was also thought to be very dynamic with rapid technological change and no significant barriers to entry apart from control of premium content such as football or films. After the merger, Sogecable would be the main player in pay-TV, cable operators being the principal remaining competitors. Therefore, the Government focused on remedies to compensate the disappearance of one operator, to hinder the establishment or reinforcement of barriers to entry in the various affected markets, and to reduce negative effects on pluralism and diversity.

Various conditions, related to the non-discriminatory provision and limited duration of exclusivity in relation to content contracts, were designed to assist new operators, especially cable operators which were already active in pay-TV in Spain. Remedies were designed as well to facilitate access to the satellite platform's information and content channels, and there were restrictions on common strategy in media.

These remedies were believed to have a positive impact on pluralism. Nevertheless, competition law is an inefficient way to guarantee pluralism, which is in any case difficult to define. In addition, due to rapid evolution of the market, any regulation related to pluralism concerns should perhaps be periodically reviewed and, if necessary, revised. In media mergers, the sectoral regulator supplies input and makes a report. The final decision is taken by the government which can consider competition issues, including efficiencies, and the regulator's report.

Finally, attention was paid to ensuring the transfer of merger induced efficiencies to consumers. In that regard, it was required that the new entity not transfer any costs of the merger to consumers (e.g. the costs associated with changing satellite dishes or decorders). One effect of that was the new entity decided to maintain the old set of decoders so consumers did not have to bear the cost of changing them. The merger was also subject to a three year price increase limit. This was not expected to have a negative effect on innovation because it only applied to products of the same quality. For different products, such as a greater number of channels, different prices are permitted. The price restriction is easy to monitor because prices are published.

Turning to the last contribution, the Chairman said that the Irish *Competition Act* of 2002 recognises to some extent the importance of plurality in media merger review. Media mergers receive special treatment in two ways. First, there are more extensive notification requirements. Second, there is an interesting interaction between the competition authority and the Minister. The law provides for phase one and phase two investigations. Even if the competition authority finds in phase one that there is nothing wrong with the merger, the Minister can order it to enter into a phase two investigation. If that phase also reveals no problems, the Minister can decide to apply other criteria. The Chairman wanted to know what the focus of the phase two investigation would be in a situation where phase one failed to find a problem, and also wondered about the extent to which the Minister's other criteria would be considered in the course of a phase two investigation.

An Irish delegate stated that the competition authority had just received its first media merger filing and the phase one investigation had begun. Other than that there was no experience with media mergers. Concerning the Chairman's question about what to examine in a phase two investigation if phase one revealed no problem, the delegate suggested there were several options. First, the authority could simply redo its SLC analysis perhaps in greater detail. The second option would be to undertake a phase two analysis focused on the plurality criteria set forth in the statute. For that task, the competition authority has neither the expertise, nor a comparative advantage. A third, and probably most attractive, alternative would be to assist the Ministry in analyzing plurality effects, such as the strengths and competitiveness of the media businesses indigenous to the pertinent state, while at the same time refining the competition analysis.

6. General Discussion

A United States delegate pointed to a general tension inherent in merger review that might be still stronger in the case of media mergers. On the one hand, there is a concern to protect competition in media markets, which some say should go beyond protecting advertisers to include concern for plurality issues. But on the other hand, there is a need to avoid undue interference in the marketplace, a concern highly pertinent to media markets because the idea of free media is freedom from undue government interference. The concern about competition enforcers looking at plurality issues is that unlike in straight economic competition issues where economics based evaluation standards can be applied, the standards for assessing pluralism are much less clear. How many media outlets are enough? The answer could well vary depending on who is sitting in the enforcer's chair.

If one cannot entirely trust the free markets in the media, and if competition in advertising is an inadequate proxy for sufficient diversity of viewpoints in the media, the probable solution is a regulatory rather than a case by case approach. At least this will mean clear, up-front standards are applied, and the public can comment on whether those seem suitable.

A Brazilian delegate supported the Canadian and U.S. views regarding competition authorities and pluralism. He noted, however, that although price competition had become the sole standard for competition analysis, consumer welfare also involves other dimensions and there could be trade-offs that have to be made. Perhaps this should be done, as Canada argued, by separate agencies, but things could get difficult. Consider for example the possibility of two newspapers entering a joint venture to fund reporting on some foreign war. This might produce less diversity, but without the joint venture perhaps there would be no indigenously sourced reporting of the war at all. Or consider a joint venture between broadcasters to fund polling for presidential elections. In the U.S. this resulted in several synchronised mistakes in calling the last presidential election. When the antitrust authorities considered the joint venture they did not think this could happen. In both the newspaper and broadcasting joint venture examples, there were efficiencies plus diversity and quality considerations, but good antitrust enforcement would presumably lead to opposite results. So it is sometimes unfortunately difficult to separate things out in media mergers and one cannot avoid quality and diversity considerations.

The Chairman interjected that a number of scientific articles based on the Hoteling-model of competition show how the content of the newspaper will depend on the competitive circumstances. This tends to show that quality of output and quality of competition are somewhat inseparable.

A United States delegate noted that in complex merger analysis one has to consider not just what might go wrong if a merger is permitted, but also what consumers might lose if it is blocked. And in making difficult judgement calls, as in the broadcasting case mentioned by Brazil, it is good to avoid coming down on the side of too much government interference especially in dictating what viewpoints ought to be preserved or sacrificed.

The Brazilian delegate registered his agreement, and noted that the desire to avoid government intervention could be an argument in favour of episodic involvement by a competition authority versus more frequent involvement by a sector regulator.

A Korean delegate noted that one must distinguish between the advertising and content consumer markets and the former should be treated as subordinate to the latter. Companies want to advertise in papers with many readers. Also the price elasticity of demand in the content consumer market is quite low, because a reader or viewer of a certain media chooses the content based on his or her personal tastes. On the other hand the price elasticity of demand in the advertising market is quite high. The delegate therefore endorsed the views of the Secretariat's paper supporting a behavioural rather than structural approach to media merger remedies. However the behavioural approach should be taken not just because of market related change, but also because there is low price elasticity in the content market.

A BIAC delegate, introduced Campbell Cowie, Director of Public Policy for AOL Time Warner Europe, as someone who brings an economic perspective to media mergers. Commenting on the Secretariat's paper, Mr. Cowie said that it would be good to add further consideration of the impact of digitalisation on the scale of entry barriers, as distinct from the impact on entry barriers of the convergence of TV and telecoms. Although related, the two are very different phenomenon and have different effects on barriers to entry. He questioned the view that barriers to entry are high in all media markets and asked that any supporting economic evidence be included in the paper. Instead, the Secretariat's paper should recognise that entry barriers are different at different stages of the market and in different markets. He also drew the Secretariat's attention to the recent finding of the European Commission in the *Telepiu/Stream* merger. That decision, he said, reflects a sensible shift in approach from one which supports platform competition at almost any cost towards one which is more willing to recognise that platform competition is not always sustainable and that the correct focus of the investigation should be on the identification of appropriate remedies to ensure fair access to a dominant (but financially viable) platform. An outstanding concern is that not all OECD members have specific regimes for regulating access to Conditional Access, services, access to API technology, access to verification software and other technical bottlenecks. Where there are no appropriate regulations in place, competition authorities may have to specify what is meant by fair and reasonable terms. Mr. Cowie also would welcome more analysis in the Secretariat's paper on methods by which competition authorities might assess the incentives that a firm has to abuse a dominant position resulting from a merger. Merger simulation models provide one analytical technique for identifying commercial as opposed to theoretical incentives firms have under certain market conditions.

Mr. Cowie drew attention to proposals from the European Commission to reform its Merger Regulation, in particular the proposal to place greater weight on efficiency arguments. He invited more detail on the kinds of efficiency arguments that would be acceptable in media merger cases and the data that would be required to support these arguments. Mr. Cowie expressed concerns that many of the efficiency benefits merging parties might cite as efficiency benefits, might equally be used against them as arguments to prohibit the merger. A review of efficiency gains that have resulted from previous mergers in the media sector would be a welcome contribution. The OECD is well placed to undertake that kind of review.

On the matter of the separation in many cases of competition law from other public policy and socio- political rules, Mr. Cowie referred the Committee to ICN work on merger review regimes around the world, especially as concerns how various jurisdictions incorporate other socio-economic and social-political considerations into their analyses.

A European Commission delegate agreed that the *Telepiu/Stream* decision contrasted with the Commission's normal preference for platform based competition, but in this case such competition was no longer viable. Ensuring free access was the best that could be done for consumers. The case does not

represent a general shift in policy. There may be a parallel in certain telecom cases where facility based competition may be a better long term solution, but service based competition also benefits consumers. Concerning the relationship between competition law and plurality, the Commission agrees with the U.S. and German focus on competition and economic assessment, leaving pluralism to other agencies.

A German delegate mentioned the merger of two Berlin newspapers that illustrates the antagonism between pluralism and competition concerns. The merger was blocked by the Bundeskartellamt on purely competition grounds, but the parties asked for a ministerial over-ride based partly on pluralism arguments. Concerning remedies in such a case, the delegate stated that pluralism for a newspaper has to do with editorial freedom and this cannot be assured by a government agency. The parties proposed to create a private foundation, financed on a stable basis for 20 years, charged with controlling the editorial freedom of the merged newspapers. The merger is still under consideration by the Minister.

7. Chairman's summary remarks

There appear to be three different ways competition authorities explain their aversion to dealing with pluralism. First there is the absence of objective measures for pluralism, hence the ostensible need for it to be regulated by someone outside applying somewhat arbitrary criteria known to everybody. But one could ask, where are the objective criteria for assessing efficiencies or for making market definitions and using data on market shares? Competition authorities may fabricate objectivity in using HHI thresholds even though theory does not fully support their significance. Secondly, there is the reputational concern, which seemed to be reflected in the Canadian and Austrian remarks. One can get a bad name by getting it "wrong" and that can be done by coming down on either side of a merger. Competition authorities looking at pluralism can be criticized and this could be seen as undermining their reputation for objectivity. The problem with this argument is exactly what is written in the Canadian contribution. Competition authorities could be criticized as well for being irrelevant or having too narrow a view. This could lead to the reaction seen in both the U.K. and Austria. Legislators may require competition authorities to go beyond merely looking at competition issues to consider pluralism as well, knowing that this is where the real problems may be. Finally, there is the desire to reduce risks associated with possibly being wrong by clearly demarcating what will be the responsibility of the competition authority and what will lie outside. Where the line is drawn is really a question of personal taste in terms of risk taking and philosophy. The roundtable discussion has at least clarified the debate and demonstrated competition authority uneasiness about pluralism and diversity.

RÉSUMÉ DE DISCUSSION

1. Introduction

Le Président ouvre la table ronde en soulignant trois points : premièrement, la définition du marché, élément crucial pour la plupart des juridictions, est entendue de manière à peu près équivalente d'un pays à l'autre ; deuxièmement, les mesures comportementales, le plus souvent définies au cas par cas, sont très usitées ; troisièmement les autorités de concurrence sont confrontées à nécessité de concilier concurrence et pluralisme, mais ont tendance à éviter cette situation. Pour certaines autorités de concurrence, promouvoir la concurrence est, en soi, bénéfique au pluralisme, et par conséquent leur rôle peut s'arrêter là. D'autres contributions notent toutefois que les autorités de concurrence se voient reprocher de ne pas protéger suffisamment le pluralisme.

Le Président décide de ne pas trop s'appesantir sur la question de la définition du marché puisqu'il existe déjà un certain consensus sur les méthodes et les résultats. Il souligne toutefois trois contributions qui abordent certains aspects particulièrement intéressants de la définition du marché : celle de l'Australie (questions relatives à l'offre) ; celle des États-Unis (discrimination par les prix) ; et celle du Royaume-Uni (différentiation des produits).

2. Cercles vertueux et effets de spirale descendante dans les marchés bipolaires

Le Président remarque que la contribution de l'Australie comprend un développement assez détaillé sur cette question, avec l'affaire *Foxtel-Optus*, dans laquelle deux grands opérateurs de télévision à péage avaient envisagé un rapprochement. Il demande à l'Australie de développer les théories du cercle vertueux et de la spirale descendante et d'expliciter l'affaire *Foxtel-Optus.*

Un délégué de l'Australie explique qu'il existe d'importants avantages au premier entrant parce qu'il peut gagner une part significative du marché des abonnés avant les autres. Cela lui confère un avantage notable pour obtenir des droits d'exclusivité sur le contenu. Certes, il est très possible que l'opérateur le plus puissant paie une prime pour en bénéficier, mais l'exclusivité, en particulier pour les films récents et le sport, représente un sérieux atout pour attirer des abonnés. Une importante base d'abonnés permet alors de dépenser plus pour acheter du contenu, lequel contenu attire encore des abonnés, etc. Un marché de ce type peut ainsi rapidement basculer en faveur de l'acteur dominant.

On retrouve également cet effet de cercle vertueux dans d'autres médias, notamment dans la presse écrite, grâce à l'interaction entre une double source de revenus : les ventes et les recettes publicitaires. En presse généraliste, pour attirer des lecteurs, les journaux doivent proposer un contenu excellent, à moins qu'ils ne se positionnent dans un marché de niche très spécialisé. Le fait d'offrir un meilleur contenu permet d'accroître le lectorat, ce qui dope les recettes publicitaires, ce qui permet à la fois d'améliorer encore le contenu et de diminuer le prix de vente, ce qui accroît la circulation du titre, etc. Il en résulte généralement qu'on retrouve un seul journal grand public généraliste par marché géographique, plus éventuellement quelques journaux spécialisés, généralement financiers.

En 2002, les deux opérateurs australiens de télévision à péage desservant les zones urbaines, tous deux câblodistributeurs, ont soumis à l'Australian Competition and Consumer Commission (ACCC) un projet d'accord de partage de contenus. Des deux acteurs, le plus puissant était Foxtel, filiale commune du premier opérateur australien de télécommunications (l'ancien monopole public Telstra) et du groupe News Corporation de Rupert Murdoch. Foxtel devait obtenir un accès exclusif aux contenus d'Optus, en échange de quoi il partagerait ses contenus – nettement plus attractifs – avec Optus. Aux yeux de l'ACCC, un élément a beaucoup pesé dans la balance : l'activité de télévision à péage d'Optus était en perte de vitesse, en fait prise dans une spirale descendante. L'ACCC redoutait que le déclin de l'activité télévision à péage d'Optus ne finisse par pénaliser la compétitivité du groupe dans ses autres activités à savoir la téléphonie et l'Internet large bande par câble.

L'ACCC a donc donné son agrément au rapprochement, sous réserve d'un régime d'accès très large aux contenus. Les contenus contrôlés par des acteurs australiens, généralement par Foxtel, devaient être mis à la disposition de tous les autres opérateurs de télévision à péage. L'ACCC craignait en effet que le contrôle des contenus par Foxtel ne pénalise le développement d'autres concurrents de télévision par câble. Telstra étant le premier actionnaire de Foxtel, on pouvait légitimement craindre que Foxtel ne refuse l'accès à ses contenus si cela pouvait freiner le développement non seulement d'une concurrence potentielle en matière de télévision à péage, mais aussi de concurrents à Telstra dans les marchés de l'accès Internet large bande et de la téléphonie.

3. Aspects verticaux et mainmise sur le marché

Pour aborder l'étude de ce chapitre, le Président s'appuie sur la contribution de la Finlande, qui indique au paragraphe 23 : « L'évaluation des fusions dans la communication ne diffère en rien de l'évaluation des fusions dans les autres secteurs » (paragraphe 23). Plusieurs autres contributions vont dans le même sens. La contribution de la Finlande note également que les problèmes liés aux relations verticales sont particulièrement préoccupants dans le secteur de la communication. On peut en trouver une bonne illustration avec la fusion *Sonera-Talentum*, qui avait soulevé des problèmes de concurrence tant dans l'amont que dans l'aval.

Le délégué de la Finlande note que dans l'affaire *Sonera-Talentum*, l'autorité finlandaise de la concurrence (FCA) avait analysé le marché des médias électroniques. L'acquisition avait reçu l'agrément de la FCA sous certaines conditions, ce qui permettait ainsi à Sonera d'obtenir le contrôle conjoint de la WOW Web Brand Corporation, contrôlée jusqu'alors uniquement par Talentum.

Par cette transaction, Sonera, le premier opérateur de télécommunications en Finlande, a acquis les services web développés par Talentum, le plus grand groupe de nouveaux médias en Finlande. Dans de précédentes décisions, la FCA avait déterminé que Sonera bénéficiait d'une position dominante sur le marché des communications mobiles. Les effets concurrentiels de l'opération ont été évalués pour plusieurs marchés de produits : celui de la publicité sur Internet, celui l'acquisition de contenus web, et celui de la connexion Internet. Pour ces trois marchés, la zone géographique retenu était la Finlande.

La FCA a déterminé que la transaction produirait des freins à la concurrence et bloquerait l'entrée sur le marché. En tant que « *content packager* » (distributeur et producteur de contenus) et opérateur de télécommunications, Sonera apparaissait comme un acteur incontournable pour de nombreux producteurs de contenus souhaitant avoir accès au marché des contenus web et au nouveau marché de contenus pour mobiles. Le premier risque pour la concurrence était que Sonera favorise sa filiale conjointe pour l'acquisition et la fourniture de contenus web, ainsi que pour son savoir-faire en matière de transfert d'information et de comportement des consommateurs.

L'intégration verticale de Sonera avec un producteur de contenus aurait considérablement réduit les choix concurrentiels des petites et moyennes entreprises du secteur des nouveaux médias. Pour remédier à ce problème de concurrence, les parties se sont engagées à ce que Sonera accorde le même traitement à sa filiale commune et à ses concurrents dans l'acquisition et la fourniture de contenus web, et à ce qu'elle ne réserve pas son savoir-faire au seul bénéfice de sa filiale. Elles ont aussi promis de respecter des conditions assurant le maintien de la concurrence entre Sonera et sa filiale dans la vente d'espaces publicitaires.

Le Président souligne plusieurs aspects de la contribution du Mexique. Le premier est la liste de réglementations applicables au secteur de la communication. Il est précisé dans la contribution que, étant donné les nombreuses réglementations visant à protéger l'intérêt public, l'autorité de concurrence peut se consacrer exclusivement à la concurrence. Pour illustrer ces questions, elle présente plusieurs cas, dont deux dans le secteur de la radio, dont l'un pose d'importants problèmes au niveau vertical. Le Président souhaite davantage de précisions sur ces fusions.

Un délégué du Mexique note que, si les réglementations actuelles sont particulièrement contraignantes, par le passé, d'importants aspects n'étaient pas réglementés au niveau des programmes de radio et de télévision. Par exemple, la loi fédérale sur la radio et la télévision ne limitait pas la concentration des concessions. Il en est résulté une forte concentration de ce marché, qui a perduré jusqu'à l'adoption de la loi sur la concurrence et à la création en 1993 d'une autorité de concurrence, la Comisiòn Federal de Competencia (CFC).

La loi sur la concurrence s'applique intégralement à l'industrie de la radiodiffusion mais a pour objet exclusif de protéger le fonctionnement de la concurrence et l'entrée sur le marché. Avant de passer à des cas spécifiques, le délégué explique que le paysage audiovisuel mexicain est dominé par deux acteurs : Televisa, qui contrôle 59 % du marché, et TV Azteca, avec 36% du marché. Ces deux acteurs, intégrés verticalement, sont présents dans la production, la distribution et la fourniture de programmes. Dans le cas de la radiodiffusion sonore, la structure du marché diffère. La ville de Mexico, de loin de plus gros marché, compte 55 stations de radio commerciales, dont 64% appartenant à 5 groupes, et le spectre des fréquences est saturé.

Fin 1994, Radio Centro annonçait son projet d'acquérir Radio Red. Chacun des deux groupes avait sa principale radio à Mexico. Compte tenu des préférences des annonceurs, le marché en cause a été défini comme étant celui des services de publicité par radiodiffusion sonore à Mexico.

L'acquisition faisait passer de 10 à 13 nombre des stations contrôlées par Radio Centro, soit 24% des stations de la capitale, mais totalisant 39,2 % des recettes publicitaires et 45,6 % de l'audience radio. Ce décalage de parts s'explique principalement par l'acquisition d'un programme d'information à grand succès, « Monitor ».

La CFC a imposé un certain nombre de conditions, notamment l'élimination des clauses d'exclusivité dans les contrats d'Infored (l'entreprise productrice de Monitor) s'appliquant aux services de nouvelles, aux programmes d'information et aux événements spéciaux. Il a également été demandé à Radio Centro de ne pas lier la vente d'espace publicitaires dans ses différentes stations de radio.

L'affaire *Televisa-Acir* est la plus importante fusion dans le secteur de la communication que la CFC ait eu à traiter. En 2000, Televisa annonçait son intention de fusionner sa filiale Radiópolis avec Acir, l'un des premiers groupes de radiodiffusion du pays. Televisa contrôlait 59 % de parts de marché du secteur de la télévision et sa filiale Radiópolis était opérateur de plusieurs stations de radio dans tout le pays, dont 11 % émettant à Mexico. Acir possèdait également un certain nombre de stations dans le pays, dont 13 % de celles de Mexico. La CFC a estimé que le marché en cause était le marché de la publicité

radio, qui présente une forte complémentarité avec celui de la publicité télévisée. La CFC a fait obstacle à cette transaction, en raison de ses effets anti-concurrentiels sur le marché en cause.

Le Président se tourne alors vers la Commission européenne et souligne deux aspects particuliers dont il n'est pas question dans d'autres contributions. La Commission indique qu'elle «…tolère l'avantage au premier entrant lorsqu'il conduit à accélérer l'émergence de nouveaux services et de nouveaux marchés, et donc lorsqu'il bénéficie aux consommateurs. Toutefois, la Commission européenne est également très vigilante à l'égard des risques de forclusion. Elle n'hésite par conséquent pas à intervenir pour assurer que l'accès au marché soit effectif et ouvert » (paragraphe 17). Le Président souhaite en savoir plus sur la manière dont on arbitre entre ces considérations statiques et dynamiques dans des situations réelles. Il cite également l'article 21 (3) de la réglementation relative au contrôle des concentrations, qui autorise les États membres à prendre les mesures appropriées pour assurer la protection du pluralisme. Le Président demande des précisions sur cet article, ainsi que des exemples de cas où il a conduit à empêcher des fusions que la Commission aurait autorisées sans lui.

Un délégué de la Commission européenne explique que l'avantage au premier entrant est un concept délicat car il est souvent compensé par des avantages au second entrant : celui-ci peut tirer des enseignements sur ce qui fonctionne bien sur le marché en question. S'agissant des arbitrages entre effets statiques et dynamiques, la Commission ne dispose pas d'une grande marge de manœuvre. L'article 2 du règlement relatif au contrôle des concentrations stipule que la Commission tiendra compte, dans son évaluation, de l'évolution du progrès technique et économique, pour autant que celle-ci soit à l'avantage des consommateurs et ne constitue pas un obstacle à la concurrence. Concrètement, cela signifie que si une fusion crée ou renforce une position dominante, la Commission devra l'interdire même si elle permet aussi des gains d'efficience.

S'agissant du pluralisme, le délégué note que l'article 21 constitue un cadre juridique clair. La Commission a compétence exclusive pour les concentrations de dimension communautaire et son évaluation porte uniquement sur la concurrence. Toutefois, dans le même temps, le règlement dispose que les États membres peuvent prendre des mesures plus sévères et plus rigoureuses pour protéger le pluralisme une fois que la Commission a statué sur la concurrence. Par exemple, dans le domaine de la presse écrite, l'espagnol PRISA, l'italien l'Esspresso et le britannique Mirror Group ont notifié leur intention d'acquisition conjointe de Independent Newspaper Publishing, plc. La Commission n'a rien trouvé à redire sur le plan de la concurrence et a autorisé l'opération. Les parties en revanche, devaient satisfaire aux impératifs du Royaume-Uni concernant la préservation de la liberté d'expression, la juste représentation des opinions, etc. Tout ce que demande la Commission en pareil cas c'est d'être informée par les autorités des États membres des conditions éventuelles imposées. La Commission s'assurera que les conditions sont proportionnées, qu'elles ont pour but de préserver le pluralisme, qu'elles ne semblent pas susceptibles d'entraîner une discrimination entre sociétés européennes et qu'elles ne risquent pas de pénaliser les flux commerciaux entre États membres.

Évoquant la contribution du Royaume-Uni, le Président note qu'elle contient un développement approfondi sur l'affaire *Carlton-Granada,* dans laquelle deux des plus importants producteurs de programmes se retrouveraient unis à l'un des premiers acheteurs de contenu au Royaume-Uni. Cette affaire a démontré que l'Office of Fair Trading (OFT) ne croit pas probablement pas aux effets de forclusion autant que d'autres autorités de la concurrence. Le Président cite un passage de la contribution : « Certes, il existe un risque qu'une telle fusion entraîne une fermeture des débouchés de distribution à des producteurs tiers, mais les groupes de communication ont tout intérêt à proposer le meilleur contenu possible pour attirer des spectateurs ou des lecteurs et, partant, des annonceurs. Dans notre analyse de l'affaire Carlton-Granada, nous avons conclu qu'étant donné la valeur comparative de l'offre de programmes par rapport aux recettes publicitaires et la logique de l'opérateur, qui a intérêt à attirer un maximum de spectateurs pour un coût minimum, l'application d'un quota réglementaire de productions

indépendantes suffisait à atténuer le risque de fermeture du marché. » [paragraphe 8(2)]. Le Président demande dans quelle mesure c'est l'existence d'un quota de productions indépendantes qui a conduit l'OFT à relativiser le risque de fermeture de marché. On peut penser que le quota à lui seul assurerait un certain degré d'ouverture du marché pour les autres fournisseurs de contenu.

Un délégué du Royaume-Uni précise que, si l'OFT n'a pas eu d'inquiétudes suite à la première phase de l'enquête, l'opération Carlton-Granada doit faire l'objet d'une deuxième phase d'enquête concernant un autre aspect. Carlton et Granada ont tous deux des licences régionales d'ITV et diffusent des contenus achetés par l'intermédiaire du réseau d'ITV. L'un des problèmes était de savoir si le fait d'acquérir le contrôle du réseau d'ITV altérerait ses motivations. Le Président rappelle qu'il existe un quota minimum de 25 pour cent de création et d'acquisition de programmes indépendants. Lorsque l'affaire a été examinée, Carlton et Granada dépassaient ce minimum d'une marge confortable.

Si l'OFT ne s'est pas opposée au rapprochement Carlton-Granada, c'est pour plusieurs raisons. La première est que leurs recettes publicitaires étaient largement supérieures aux revenus provenant de la production de programmes, et que le nouveau groupe n'aurait pas intérêt à risquer les premières pour favoriser les seconds. Autre motif, le secteur de la production indépendante est particulièrement actif au Royaume-Uni, avec plus d'une cinquantaine de producteurs de programmes de taille moyenne et un demi millier de petits. Cela semble indiquer qu'il n'existe pas de véritables obstacles à l'entrée dans ce secteur. Telles sont les principales raisons pour lesquelles l'OFT ne redoutait pas de forclusion verticale. Le quota de 25 % ne faisait en fait que renforcer cette certitude.

4. Mesures correctrices

Le Président rappelle que les autorités de la concurrence ont souvent recours à des mesures comportementales dans les fusions touchant au secteur de la communication. Il s'appuie sur l'exemple de l'affaire *FAS*, relatée dans la contribution du Danemark, dans laquelle le Conseil de la concurrence devait statuer sur la formation d'une entreprise conjointe par les trois plus grands groupes de presse du pays, ayant pour objet de fusionner leurs bases d'archives et un certain nombre d'activités affiliées. Un aspect inquiétait le Conseil : l'exclusivité au profit de la nouvelle structure, pour une période de trois ans, sur les articles produits des trois sociétés mères : il existait un risque de forclusion. L'opération n'a toutefois pas été bloquée, car les parties ont accepté que l'exclusivité de trois ans ne tienne que tant que la part de marché de l'entité nouvelle ne dépassait pas 30 % la première année, et se sont engagées à traiter sans discrimination avec les acteurs tiers à l'issue de la période d'exclusivité. Le Président pose plusieurs questions : est-il facile de veiller à la bonne exécution de cette condition ? quelles mesures au juste l'entreprise conjointe doit-elle prendre pour rester au dessous de la barre des 30 % ? que se passe-t-il si ce seuil est franchi ?

Le délégué du Danemark explique que dans l'affaire *FAS*, on a défini trois marchés de produits distincts : les archives d'articles ; la surveillance de la presse ; et le marché des droits d'exploitation des articles sous forme électronique, qui est celui dans lequel les sociétés mères opèrent. Le marché géographique est le Danemark. Le délégué estime que les engagements pris dans cette affaire sont relativement faciles à contrôler puisqu'ils reposent sur des critères objectifs. Il serait toutefois prématuré de conclure que c'est bien le cas. Quant à savoir si le Conseil de la concurrence examinera la part de marché de FAS à la fin 2003, le contenu exact du suivi n'est pas encore déterminé. Les concurrents se chargeront de rappeler au Conseil de surveiller cette affaire.

Se tournant alors vers le Brésil, le Président note que ce pays possède une expérience considérable en matière de fusions dans le secteur de la communication. Les deux années précédentes, plus de 62 affaires ont été analysées. Le Président s'intéresse tout particulièrement à la fusion *Globosat/ESPN* en 2000, affaire dans laquelle des risques de forclusion ont conduit à une longue liste de conditions,

notamment l'élimination des clauses d'exclusivité et l'interdiction des ventes liées. Le Président souhaite savoir si a) ces conditions sont faciles à vérifier, et b) si le marché a vu l'arrivée de nouveaux entrants ou si d'autres éléments attestent de l'ouverture du marché.

Un délégué du Brésil explique que Globosat, qui appartient au premier groupe de communication du pays (Globo), est un fournisseur de contenu et qu'il est la principale source de programmes des chaînes locales à péage au Brésil, parmi lesquelles on peut citer Sportv, une chaîne « premium » « nationale » spécialisée dans le sport. Au Brésil, ce groupe alimente deux chaînes payantes thématiques consacrées au sport : ESPN International, qui couvre essentiellement les manifestations sportives internationales, et ESPN Brésil, qui se concentre sur les compétitions nationales et le journalisme. ESPN était le principal concurrent de Sportv (Globosat) sur le marché brésilien de la télévision à péage pour la distribution de chaînes dédiées au sport et pour l'acquisition des droits de diffusion des retransmissions sportives « premium », principalement les matchs de football – championnats nationaux et régionaux. Au moment de la fusion, depuis quelques années, ESPN Brésil perdait ses droits de diffusion au profit de Globosat. De plus, ESPN Brésil n'était pas distribué par le groupe Globo, ce qui le pénalisait dans son effort pour atteindre une taille critique minimum nécessaire pour continuer à opérer.

Les parties ont défini le marché en cause comme le marché du loisir visuel passif, comprenant la télévision à péage, la télévision sans péage, la vidéo et le DVD et le cinéma. Le Secrétaire à la Surveillance de l'économie (SEAE) organisme anti-trust lié au ministère des finances, estimant cette délimitation trop large, a donné une autre définition.

La conséquence de l'acquisition était que Globosat se retrouvait en position de monopole sur le marché des chaînes de télévision de sport « premium » à péage, et en position de monopsone sur celui de l'acquisition de droits de diffusion pour les retransmissions sportives nationales « premium ». Quelques importants obstacles à l'entrée existaient dans chacun des marchés pertinents : (i) le niveau élevé des coûts irrécupérables liés à la publicité d'une nouvelle chaîne « premium » consacrée au sport ; (ii) la difficulté d'accès aux programmes nationaux de sport ; (iii) la difficulté d'accès aux créneaux de distribution nécessaires pour un nouvelle chaîne pour atteindre une taille critique minimale ; (iv) le niveau élevé des droits de diffusion pour les rencontres sportives nationales ; et (v) la forte intégration verticale du marché de la télévision à péage au Brésil.

Le groupe Globo détenait environ 63 % du marché des opérateurs de services de télévision à péage au Brésil. Si les opérateurs de télévision à péage affiliés à ce groupe refusaient de distribuer une nouvelle chaîne premium consacrée au sport, il serait difficile à un nouvel entrant d'atteindre la dimension critique minimum pour exister sur le marché de la télévision à péage au Brésil. Hormis ESPN Brésil et Globosat, aucun autre fournisseur de programmes n'a réussi à lancer une nouvelle chaîne premium de sport au Brésil. Il ressortait clairement de l'analyse que l'exercice de sa puissance de marché par Globosat après l'acquisition est probable, notamment au regard de l'intégration verticale du groupe Globo.

La SEAE souhaitait comparer les pertes de bien-être possibles avec les gains d'efficience possibles, mais les parties se sont refusées à fournir des éléments sur les gains d'efficience, et ont contesté la définition du marché proposée par la SEAE. Finalement, la SEAE a suggéré un certain nombre de restrictions visant à lever la possibilité d'abus de puissance de marché par Globosat : (a) interdiction à ESPN pendant une période d'au moins cinq ans de vendre l'exclusivité de la chaîne ESPN Brésil à des opérateurs de télévision à péage affiliés au groupe Globo ; (b) obligation pour ESPN de vendre ESPN Brésil dans des conditions non discriminatoires à des opérateurs souhaitant distribuer la chaîne au Brésil ; (c) interdiction pendant dix ens de la vente liée de chaînes par Globosat et ESPN Brésil ; (d) abandon des clauses d'exclusivité pour tous les contrats Globosat ou ESPN en cours concernant des droits de diffusion d'événements sportifs nationaux sur des chaînes à péage. Outre ces restrictions, la SEAE a suggéré que le Secrétariat au droit économique (SDE), autre organisme antitrust relevant du Ministère de la justice, lance

un enquête administrative sur Net Brasil (filiale de Globo) et Globosat pour déterminer si certains refus de vente, certains accords d'exclusivité et le recours aux « clauses anglaises » peuvent être considérés comme des infractions au droit de la concurrence. La SEAE compte sur les acteurs du marché de la télévision à péage au Brésil pour aider le Système brésilien pour la défense de la concurrence à veiller à la bonne application de ces conditions.

Après l'affaire *Globosat-ESPN,* la SEAE s'est attelée à mieux comprendre les fusions dans le secteur de la communication, particulièrement dans la télévision à péage et les nouveaux médias. Fin 2001, une unité consacrée aux affaires de convergence média-numérique a été créée au sein de la Coordination générale sur le commerce et les services. Les fusions dans le secteur de la communication sont, encore aujourd'hui, analysées selon les mêmes règles, les mêmes pratiques, et avec les mêmes instruments que dans les autres marchés, mais la SEAE envisage de remettre en question cet usage.

Le Président s'intéresse ensuite à Israël, qui dans sa contribution évoque le cas d'une fusion intervenue en 2002 entre deux opérateurs de télévision par câble actifs dans des marchés distincts, contrôlant environ 70 % du marché de la distribution de télévision multi-chaîne. Cette fusion soulevait des problèmes de concurrence, mais pouvait faire espérer des gains d'efficience. Il cite la contribution : « L'autorité antitrust israélienne (IAA) a déterminé que le rapprochement produirait des gains d' efficience et relancerait la concurrence dans les différents marchés de télécommunications grâce à au mouvement général de convergence. Ces gains d'efficience proviendraient essentiellement de la capacité de l'entité fusionnée à devenir un acteur du marché national de la téléphonie et de l'infrastructure Internet » (paragraphe 7). Le Président note également que l'IAA a donné son agrément à l'opération, en imposant des conditions originales : « le câblo-opérateur fusionné devra faire son entrée dans le marché de la téléphonie pendant une période prédéterminée, et devra toucher un nombre minimum de clients » (paragraphe 15). Le Président demande si ces câblo-opérateurs souhaitent effectivement entrer sur le marché de la téléphonie et s'interroge sur ce qu'il se produirait s'ils n'obtenaient pas suffisamment de clients pendant la période fixée. Il craint également que cet arrangement ne constitue un encouragement à se livrer à des pratiques de prédation pour remplir l'objectif de part de marché.

Un délégué d'Israël explique que cette affaire soulève quatre grands problèmes de concurrence. Le premier est la perte de concurrence potentielle. Ce n'est probablement pas un vrai problème car de toute façon les chances de voir un nouvel entrant sur le marché étaient faibles. Le deuxième problème est la création possible d'une puissance de monopsone face aux fournisseurs de contenu. Ce risque n'est pas non plus très préoccupant, parce qu'il reste une société de télévision par satellite qui peut acheter des programmes. Le troisième risque était celui d'effets coordonnés entre des duopolistes, à savoir la société de télévision par satellite et le câblo-opérateur fusionné. Cette menace n'est pas prise au sérieux en raison de la forte différentiation des produits. De plus, le mouvement actuel de convergence semble indiquer l'apparition d'une forme de concurrence intragroupes.

Le quatrième problème tenait aux conditions imposées. Il y avait un risque d'abstention réciproque entre le monopole national de téléphonie et le câblo-opérateur fusionné. L'un et l'autre bénéficient depuis des années d'une position de monopole dans leurs activités respectives. Cette situation a été modifiée en 1997 lorsque les pouvoirs publics ont imposé l'ouverture à la concurrence du marché de la téléphonie internationale. Quelques câblo-opérateurs se sont lancés dans cette activité. Exactement un an plus tard, l'ex-monopole de téléphonie annonçait son intérêt pour le marché de la distribution multichaînes de télévision et faisait une entrée relativement massive en 2000. On était en présence d'une situation de coexistence sur plusieurs marchés, qui pouvait déboucher sur un jeu stratégique caractérisé soit par l'abstention réciproque, soit par la concurrence sur tous les marchés.

Les câblo-opérateurs prévoyaient de toute façon d'étendre leur pénétration à la téléphonie locale. On ne peut donc pas dire que la situation ait été créée par l'IAA, mais l'autorité a simplement accru les chances d'exécution de ces projets.

La mesure correctrice appliquée dans ce cas était assez audacieuse, mais pas nécessairement risquée. Les câblo-opérateurs, après avoir investi quelque 70 millions d'euros (coût estimé par l'IAA de la mise à niveau du réseau câble) vont presque à coup sûr amener de la concurrence dans la téléphonie locale.

Passant à la contribution de la République tchèque, le Président s'intéresse maintenant à une fusion entre deux opérateurs de télévision par câble, *Baring Communications Equity (TES) et Vision Network Tsjechie Holding*. Il demande davantage d'explications sur cette fusion, et particulièrement sur les possibilités d'une concurrence accrue pour l'opérateur de télécommunications dominant.

Le délégué de la République tchèque explique que, outre le droit de la concurrence au sens strict, il existe aussi des règles particulières (réglementations sur le contenu et sur les concentrations) applicables aux fusions dans le secteur la communication, dont l'objectif est de sauvegarder le pluralisme dans les médias. Ces règles sont appliquées par le Conseil pour la radiodiffusion sonore et télévisuelle, une instance administrative indépendante du gouvernement.

La fusion *Baring-Vision* a clairement donné naissance à un duopole dans le secteur de la télévision par câble. L'autorité de concurrence l'a autorisée sans imposer de conditions. Les deux entités opéraient sur des marchés géographiques différents, et la concentration entraînait le renforcement de la puissance économique et financière de l'une et de l'autre. En outre, l'éventuel accroissement de la puissance de marché était contrebalancé par la puissance de marché détenue par UPC, un important diffuseur de télévision hertzienne, et Czech Telecom, le premier opérateur de télécommunications du pays. Ces sociétés sont ou deviendront à moyenne échéance des concurrents des opérateurs de télévision par câble pour les nouvelles technologies de diffusion du signal de télévision, à savoir l'utilisation de lignes de téléphone traditionnelles adaptées au xDSL, la diffusion de flux vidéo sur l'Internet, le numérique terrestre et le Multimédia Wireless System (multimédia sans fil). Dans le cadre de l'analyse de la fusion, on a examiné la possibilité de position dominante collective entre le nouvel ensemble et UPC sur l'achat de contenu, les tarifs de la publicité et l'ensemble des ventes.

Les opérateurs de télévision par câble devront investir dans la modernisation de leur réseau afin d'offrir des services concurrents de transfert de données et de téléphonie, deux domaines clés pour maintenir de leur compétitivité. Il est probable que la fusion accroîtra le potentiel d'investissement de la nouvelle entité et l'aidera à terme à concurrencer UPC et Czech Telecom. Cette dernière possède un réseau moderne capable d'assurer un service parallèle de téléphonie, transfert de données et d'image et desservant la quasi-totalité des ménages du pays. La fusion crée les conditions d'établissement d'une infrastructure de développement similaire, capable de concurrencer l'opérateur dominant. En cela, le délégué s'associe pleinement aux arguments du délégué d'Israël.

5. Pluralisme : les autorités de concurrence doivent-elles s'occuper directement de préserver le pluralisme dans les médias ? Quelles doivent être leurs relations avec les autorités de régulation de la communication ? Quels sont les avantages et les inconvénients des restrictions sur la structure capitalistique des entreprises de communication ?

5.1 Restrictions sur la structure capitalistique des entreprises de communication

Le Président commence en rappelant que de telles restrictions existent dans de nombreux pays. Trois contributions traitent particulièrement de cet aspect : celle du Taipei chinois, celle du Japon et celle de l'Allemagne. Dans sa contribution, le Taipei chinois estime que les restrictions sur les concentrations

sont les compléments naturels des lois sur la concurrence. Le Japon indique dans la sienne qu'un groupe d'étude à appelé à l'assouplissement de la législation relative aux concentrations. L'Allemagne est quant à elle très sceptique, voire très critique à l'égard des restrictions sur les concentrations.

Le délégué du Taipei chinois explique que pour empêcher une concentration excessive et pour assurer l'existence d'une pluralité de canaux d'expression des idées et des opinions, le Taipei chinois applique un processus de régulation en deux volets pour les fusions dans le marché de la télévision par câble. D'une part la Fair Trade Law, administrée par la Fair Trade Commission (FTC) exige la notification préalable des fusions au dessus d'un certain plafond de part de marché. La FTC détermine si l'ensemble des avantages économiques d'une fusion proposée sont supérieurs aux inconvénients résultant d'une éventuelle perte de concurrence. D'autre part, la Cable Broadcasting Law, administrée par le Government Information Office (GIO), stipule que les opérateurs, leurs affiliés et les opérateurs qu'ils contrôlent directement ou indirectement, sont soumis aux restrictions suivantes : 1) le nombre d'abonnés acquis ne doit pas être supérieur au tiers du nombre total d'abonnés dans le pays ; 2) le nombre d'opérateurs acquis ne doit pas être supérieur au nombre total d'opérateurs dans un district administratif donné ; et 3) le nombre d'opérateurs acquis ne doit pas être supérieur au tiers du nombre total d'opérateurs dans le pays.

La Fair Trade Law s'intéresse essentiellement au bienfait économique global produit par les gains d'efficience, plutôt qu'à la pluralité de concurrents dans le marché en cause. Il est possible que la FTC approuve une fusion donnant naissance à une part de marché nationale supérieure à un tiers. Le législateur estime ainsi que la loi sur la concurrence n'est pas suffisante pour garantir la pluralité sur le marché de la télévision par câble et cette tâche est confiée au GIO.

Se tournant vers le Japon, le Président note qu'un groupe d'étude sur la politique audiovisuelle a publié un rapport dans lequel il est suggéré : que « au regard de l'évolution du paysage de la communication, un assouplissement adéquat du principe interdisant de contrôler plusieurs entreprises de communication apparaît justifié… » (paragraphe 21). Il invite le Japon à présenter ses vues sur les contraintes s'appliquant aux concentrations des entreprises de communication.

Le premier représentant de la Fair Trade Commisssion du Japon (JTFC) concède que les limites sur la concentration de entreprises de communication se justifient par le souci de préserver la démocratie tout en protégeant la liberté d'expression. Toutefois, en termes de politique de la concurrence, la JTFC estime que les restrictions sur les concentrations s'appliquant aux entreprises de radiodiffusion doivent être réduites au minimum et qu'il faut rechercher des moyens moins contraignants pour atteindre cet objectif politique légitime au demeurant.

Un représentant du Ministère de la Gestion publique, des affaires intérieures, des postes et des télécommunications (à la fois autorité de régulation et responsable des politiques publiques en matière de télécommunications et de radiodiffusion) ajoute que les règles en matière de concentration des entreprises de communication consistent dans des plafonds de participation dans les sociétés de radiodiffusion, et ont pour objet d'assurer la pluralité et la diversité d'expression. Le ministère estime que le principe des règles limitant la concentration dans le secteur de la communication reste d'actualité. Il reconnaît toutefois qu'il y a lieu d'assouplir certains aspects de cette législation, étant donné l'évolution du paysage des médias, c'est-à-dire de la multiplication des choix offerts au téléspectateur. La législation en matière de concentration des entreprises de communication est actuellement réexaminée par le ministère.

Le principe qui justifie les règles de limitation des concentrations dans le secteur de la communication tient à la politique culturelle et la pluralité d'expression, concepts qui figurent dans la Constitution, et les règles sont relativement aisées à appliquer à des marchés de radiodiffusion bipolaires. Bien que l'on observe une multiplication des voies d'information du public, il existe toujours des risques liés à la concentration des entreprises de communication, et lorsque cette concentration se produit il est

difficile de revenir en arrière. Il faut aussi souligner qu'au Japon il reste toujours des téléspectateurs qui n'accèdent qu'à un seul média, la télévision hertzienne terrestre, gratuite. La moitié de la population, faute d'abonnement câble ou satellite, n'a accès qu'au hertzien.

Le Président revient alors sur la contribution de l'Allemagne, qui tient que le contrôle des concentrations exercé au moyen de la loi sur la communication n'a pas été opérant. Cette législation n'a pas empêché qu'il n'existe que deux grands groupes de communication en Allemagne. Le Président souhaite savoir s'il faut y voir une conséquence de l'effet combiné de la loi sur la concurrence et de la loi sur la communication, ou si seule la loi sur la communication est à incriminer. Dans ce deuxième cas, est-elle simplement mal conçue, ou est-ce que les règles concernant les concentrations dans le secteur de la communication sont intrinsèquement vouées à l'échec ?

Un délégué de l'Allemagne de l'Office fédéral des cartels (OFC) commence par préciser que si le contrôle de concentration dans le secteur de la communication a mauvaise presse, c'est uniquement en raison les restrictions relevant de la loi sur la communication, et non de l'examen au regard du droit de la concurrence. Les restrictions de la loi sur les médias s'appliquent seulement si un acteur du marché acquiert une influence dominante sur l'opinion. Il est établi que cela se produit à partir de 30 % des téléspectateurs.

Il n'y a eu en Allemagne aucun cas de fusion dans lequel les législations sur la communication et sur la concurrence soient parvenues à des conclusions opposées, l'une conduisant à autoriser, l'autre à bloquer une opération. Par exemple, le projet de coentreprise de télévision à péage entre les deux groupes privés de télévision, Bertelsmann et Kirsch a été bloqué par l'OFC, et présentait aussi des difficultés au regard de la loi sur la communication. A la lumière de l'expérience passée, on peut douter nécessité du filtrage supplémentaire de la loi sur la communication.

Précisément s'agissant des limites posées aux participations, le délégué souligne trois points. Premièrement, il n'existe pas en Allemagne de restrictions sur les investissements étrangers dans les entreprises de communication, ce qui contribue à créer une certaine diversité. Deuxième point, il y a eu l'expérience négative liée à la législation sur le plafond de participation dans les sociétés de télévision, lequel était fixé à 25 %. Cette loi n'a pas empêché l'émergence d'oligopoles, mais à porté atteinte à la transparence des responsabilités dans les médias, ce qui explique probablement pourquoi elle a été amendée. Troisième point, le droit de la concurrence n'interdit pas les participations croisées. Si la télévision et la presse écrite constituent des marchés distincts – sans écarter toutefois la possibilité de substitution entre différents médias – et si la concurrence est assurée sur ces marchés clairement définis, alors la diversité et la pluralité devraient être suffisantes.

Un délégué du Ministère de l'économie et de la technologie ajoute que la situation d'entreprises de communication spécifiques est du ressort exclusif des *Länder* et non des instances fédérales, et que les *Länder* se trouvent confrontés à un conflit d'intérêts. Soucieux de limiter les participations croisées, ils sont aussi désireux d'attirer les investissements des grandes entreprises de communication. Cette situation explique peut-être en partie pourquoi le contrôle des entreprises de communication n'a pas été aussi opérant qu'on aurait pu le prévoir et le souhaiter.

5.2 Certains pays sont convaincus que l'autorité de concurrence ne doivent pas s'occuper de pluralisme

Le Président divise la série suivante de contributions en deux catégories. La première catégorie estime que l'autorité de concurrence ne doit pas se mêler de pluralisme ou d'autres enjeux sociaux au sens plus large, et préconise une séparation stricte entre les fonctions de régulation du secteur des médias et l'autorité de concurrence. La seconde catégorie envisage une séparation beaucoup moins nette entre la

protection de la concurrence et celle du pluralisme. Les États-Unis et le Canada relèvent de la première catégorie.

Un délégué des États-Unis représentant l'autorité de régulation de la radiodiffusion sonore, télévisuelle, du câble et des télécommunications, estime que les principes de la FCC (Federal communications commission) en matière de concentration des médias ont bien rempli leur office depuis une cinquantaine ou une soixantaine d'années qu'ils existent. Cela s'explique en partie par le fait que la FCC a suivi une démarche dynamique dans la régulation du secteur de la communication. Dès le début des années 1940, la FCC a codifié la limitation du nombre de stations radio pouvant être contrôlées par une même entité émettant dans une zone donnée. Depuis lors, de nombreuses autres règles limitant les concentrations et les participations croisées ont été adoptées. Trois objectifs importants étaient visés : diversité, concurrence et localisme, sans gêner les consommateurs ni porter atteinte à la liberté d'expression, protégée par la constitution.

En 1996, l'adoption du *Telecommunications Act* a considérablement modifié le paysage de la communication au niveau des structures de capital des entreprises. La règle de participation croisée limitant le contrôle conjoint de chaînes de télévision et d'opérateurs de téléphone a été éliminée ; le plafonnement du nombre de stations radio contrôlables par un même opérateur a été supprimé, et le plafond du nombre de chaînes de télévision locale pouvant être possédées par un « network » national de télévision a été relevé. Plus important, le *Telecommunications Act* sommait la FCC de réexaminer tous les deux ans l'ensemble de ses règles en matière de concentration et de participations croisées dans le secteur des médias, afin de déterminer si elles correspondaient toujours à l'intérêt public. Ce réexamen biennal porte notamment sur l'évolution de la configuration concurrentielle dans les différentes branches du secteur des médias.

Jusqu'à une date récente, les tribunaux étaient favorables aux règles de la FCC en matière de concentration dans les médias. Toutefois, à la fin des années 90, à la suite d'une série de recours déposés par les propriétaires d'entreprises de communication, les tribunaux ont annulé les règles concernant les participations croisées entre les opérateurs de télévision hertzienne et par câble, et ont renvoyé devant une instance supérieure les règles concernant le nombre maximal d'abonnés que peut atteindre un câblo-opérateur. Dans certaines affaires, les tribunaux ont souligné les incohérences existant entre différentes règles encadrant le contrôle des médias. Par exemple, pour déterminer le nombre de « voix » indépendantes présentes sur les marchés de télévision hertzienne locale afin d'appliquer le plafond national d'audience des télévisions nationales, la FCC n'inclut que les radiodiffuseurs locaux dans sa définition des marchés locaux, alors que lorsqu'il s'agit d'appliquer les règles concernant les participations croisées, la FCC considère les autres « voix » en plus des diffuseurs de télévision locale.

En application de la loi sur les télécommunications de 1996, des décisions récentes des tribunaux, et avec la mutation rapide du secteur de la communication, la Commission a dû réexaminer l'ensemble de ses règles en matière de concentration des médias en 2003. Quelques unes des questions examinées sont abordées dans la contribution des États-Unis à cette table ronde. Par exemple, la FCC s'interroge sur la manière dont il convient de mesurer la diversité (doit-elle être mesurée en termes de points de vue, de sources, de contrôle capitalistique ou de nombre de créneaux de programmation) ; et faut-il inclure les nouveaux débouchés et les nouveaux types de médias comme l'Internet, dans le comptage du « nombre de voix » utilisé comme critère d'évaluation de la diversité ? Il faut s'attendre à d'importants changements en 2003 dans les règles encadrant la structure du capital des entreprises de communication.

Le Président observe que la contribution du Canada traite du compromis à trouver entre les exigences du droit de la concurrence et celles du pluralisme. Le Canada réaffirme que la politique de la concurrence et les politiques concernant la société au sens large doivent être bien distinctes car si elles étaient confiées à une même instance, il en résulterait trop souvent des solutions de pis-aller ne satisfaisant

ni les parties en cause, ni les consommateurs ni l'ensemble du secteur. Plus loin dans la contribution, on lit également « Un certain nombre de commentaires ont stigmatisé les insuffisances perçues dans l'examen du Bureau, et notamment le fait qu'il s'intéresse exclusivement à l'impact économique d'un changement dans la structure capitalistique et perd de vue les conséquences au niveau global » (par 2). Observant que plus une démarche est puriste plus elle risque d'être jugée inadaptée, du moins par le grand public, le Président demande s'il vaut mieux parvenir à une solution de compromis en combinant les décisions de deux organismes différents ou si cette synthèse doit être opérée par la seule autorité de concurrence.

Un délégué du Canada confirme que le Bureau de la concurrence s'intéresse exclusivement aux aspects économiques des fusions d'entreprises de communication, notamment à leurs effets sur les tarifs de la publicité, à l'exclusion des problèmes de diversité. Cela signifie également que l'on considère séparément les différents marchés définis au titre de la lutte anti-trust, même si les tenants de l'approche sectorielle média préféreraient que l'on considère plusieurs marchés simultanément.

Le Bureau de la concurrence n'est compétent que pour analyser les aspects juridiques et économiques, et n'est doté que d'un seul commissaire. En revanche, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) est un organisme constitué de plusieurs membres représentant tout un éventail de compétences, qui rend des décisions sur la base d'auditions publiques. Le CRTC est donc beaucoup mieux placé pour définir et déterminer la politique sociale et l'intérêt national. Par exemple, la loi sur la radiodiffusion dispose que le système de radiodiffusion devrait servir à sauvegarder, enrichir et renforcer la structure culturelle, politique, sociale et économique du Canada.

Si le processus d'examen des fusions était confié à un seul organisme de régulation, comment s'y prendrait-il pour équilibrer l'impact d'un relèvement des tarifs par rapport à la meilleure qualité d'information que pourrait apporter cet accroissement des recettes. En s'appuyant sur deux organismes de régulation, les aspects économiques et les aspects sociaux peuvent être examinés de manière indépendante. Si une fusion a pour effet de réduire notablement la concurrence, des mesures correctrices peuvent être prises. Si elle permet aux parties de dispenser une meilleure qualité d'information sur les dossiers sociaux, un autre organisme de régulation peut évaluer cet aspect et en rendre compte. La transparence inhérente à ce modèle, car il n'y a pas de compromis à trouver dans le cadre du processus décisionnel. Il n'est pas nécessaire, comme dans la configuration à un seul organisme de régulation, de donner la priorité à l'un des enjeux plutôt qu'à l'autre pour résoudre ce conflit.

Poursuivant sur ce point, le Président demande si le fait d'avoir une commission aux effectifs plus étoffés, au lieu d'un commissaire unique, serait vraiment un plus. Le délégué du Canada répond que le commissaire ne s'occupe que des questions de concurrence. Il n'y a pas d'autre commissaire chargé des autres aspects.

Dans d'autres pays l'autorité de concurrence doit s'intéresser (même partiellement) au problème du pluralisme

Le Président note que les vues exprimées par le Canada apportent un éclairage qui pourrait être intéressant pour l'Autriche. Le paragraphe 42c de la Loi sur les cartels prévoit que les fusions d'entreprises de communication peuvent être interdites si elles portent atteinte à la diversité des médias. Comme l'explique l'Autriche dans sa contribution, cette disposition remonte à un amendement adopté en 2002 « en réaction à des vives protestations contre l'agrément obtenu pour la fusion Formil » (par 13). L'autorité fédérale de concurrence (AFC) autrichienne est appelée à faire des choix difficiles. Le Président demande comment elle compte procéder.

Le contrôle des concentrations, explique le délégué de l'Autriche, existe dans son pays 10 ans. Pendant cette période, seul un petit nombre de décisions ont dû être rendues en tenant compte de

considérations spécifiques aux fusions dans les médias. L'affaire *Formil* concernait un rapprochement entre plusieurs magazines d'information. Comme les entités en question étaient contrôlées par deux grands groupes de communication, Bertelsmann et Mediaprint, l'opération entraînait des effets horizontaux. Dans son analyse des effets pro- et anti-concurrentiels, le Tribunal des cartels a d'abord rappelé les conditions qui pourraient le conduire à approuver une fusion anti-concurrentielle : 1) des avantages au niveau de la concurrence plus importants que les inconvénients liés à la domination du marché ; ou 2) une amélioration de la compétitivité des entreprises en cause, si l'économie nationale le justifie. Le tribunal a estimé qu'aucune des deux conditions n'étaient remplie.

Comme la fusion *Formil* produisait une situation de quasi monopole, le Tribunal a évoqué le danger d'une perte de diversité et d'un affaiblissement de la fonction critique des médias, particulièrement au regard de l'une des sociétés-mères. Le tribunal a conclu que l'opération pouvait porter atteinte à la pluralité des médias et a noté que les deux groupes de communication avaient de fortes chances de s'entendre et de favoriser leurs propres entreprises dans la publicité, ce qui pouvait renforcer la position dominante de Mediaprint sur le marché des journaux quotidiens. La fusion a reçu l'agrément des autorités assorti d'un certain nombre de conditions.

S'agissant la manière dont l'AFC protège la diversité et le pluralisme dans son examen des concentrations dans la communication, le délégué explique que l'AFC, qui n'existe que depuis juillet 2002, ne statue pas elle-même sur les concentrations, mais elle saisit le tribunal si elle le juge nécessaire. C'est ce qu'elle fera en cas de doute concernant le pluralisme et la diversité dans les médias. Au bout du compte, c'est au tribunal des cartels que revient la tâche difficile de concilier les deux impératifs.

Le Président se tourne alors vers le Royaume-Uni, qui dans sa contribution note que : « Du point de vue de l' OFT (Office of Fair Trading), les fusions qui concernent le secteur de la communication suivent la même procédure que celles qui interviennent dans d'autres secteurs » (paragraphe 1). Dans la situation actuelle, l'OFT ne joue aucun rôle dans les fusions entre organes de presse. En revanche, le Secrétariat d'État et la Commission de concurrence, lorsqu'ils déterminent si une opération va à l'encontre de l'intérêt public, doivent prendre en compte les aspects de pluralité, de diversité et de concurrence. De plus, le projet de loi sur la communication prévoit que l'OFT devra évaluer les effets concurrentiels des fusions entre journaux. L'Ofcom, organisme nouvellement créé de régulation des entreprises de communication, examinera l'impact des fusions d'entreprises de presse sur la pluralité et la diversité, mais l'OFT « … peut transmettre à l'Ofcom ou au Secrétariat d'État tous éléments pertinents relatifs à la diversité et la pluralité» (paragraphe 5). Le Président demande comment la Commission de concurrence a procédé par le passé pour évaluer les aspects de pluralité et de diversité. Il demande aussi si dans l'avenir l'OFT pourra transmettre à l'Ofcom ses observations sur la pluralité et la diversité dans les fusions d'entreprises de presse si elle analyse les concentrations dans le secteur de la communication comme dans n'importe quel autre secteur.

Un délégué du Royaume-Uni explique avant tout que les entreprises de presse sont traitées de manière assez différente des entreprises de radio et de télévision, du moins au Royaume-Uni. Il n'existe pas un ensemble de règles concernant la pluralité ou la diversité de la structure capitalistique. Lorsque une fusion est notifiée, tous les points sont examinés au cas par cas, et la demande suit alors son cours à travers différentes instances. Eu égard à la nature particulière de la presse écrite, la législation prévoit un traitement particulier pour les fusions de journaux : dans ces cas, l'OFT n'intervient pas dans le renvoi devant la Commission de la concurrence. C'est le Secrétariat d'État qui saisit directement la Commission à partir de certains seuils.

Certains proposent que le contrôle des concentrations dans la presse écrite soit aligné sur celui qui se pratique pour les autres produits et les autres médias, et souhaiteraient que le gouvernement n'intervienne plus dans la politique de la concurrence. Les changements proposés représentent davantage

une refonte des procédures administratives qu'une réforme de fond. Elles auraient probablement pour conséquence de diminuer le nombre d'affaires de fusions d'entreprises de presse renvoyés devant la Commission.

S'agissant du pluralisme, il importe de préciser que la Commission est tenue de considérer la nécessité de préserver une présentation objective et la libre expression des différents courants d'opinions. Par le passé, la Commission a généralement interprété cette mission comme revenant à examiner dans quelle mesure la fusion affecterait la liberté éditoriale. Depuis une trentaine d'années, ce problème ne s'est présenté que très rarement ; la plupart des fusions d'entreprises de presse ont impliqué des titres régionaux et non nationaux, et n'ont pas soulevé de problèmes particuliers, ni donné lieu au blocage d'une opération, à l'exception d'un cas intéressant. Dans cette affaire, la fusion aurait dû rapprocher deux journaux représentant les deux camps adverses dans l'opposition religieuse qui divise l'Irlande du Nord. Il semblait très peu probable qu'avec un propriétaire unique, la liberté éditoriale soit préservée de manière à ce que les opinions des deux camps soient reflétées avec objectivité.

S'agissant du rôle particulier de l'OFT dans les fusions d'organes de presse, cet organisme s'intéresse essentiellement aux problèmes de concurrence ce qui, en pratique, revient à observer les marchés de la publicité. Le système proposé actuellement affecterait à l'Ofcom un rôle important au regard de la diversité et de la pluralité. Un autre délégué ajoute que l'OFT renverrait simplement devant l'Ofcom les affaires posant un problème de pluralisme, et s'abstiendrait de les examiner elle-même.

Le Président note qu'en Espagne, la situation paraît assez compliquée : la Cour suprême a récemment décidé de déclarer nulle une décision prise en 1994 par l'État concernant la fusion de deux opérateurs de stations de radio car « … elle ne prenait pas suffisamment en compte les considérations de « pluralisme de l'information » ». (paragraphe 4). Les autorités de concurrence doivent donc examiner le pluralisme de l'information. Pour cette raison, dans l'affaire du rapprochement de deux opérateurs de télévision à péage (Sogecable-Via Digital), le gouvernement a dû inclure dans les conditions une disposition relative au « pluralisme de l'information ». Il s'agit là d'un cas particulièrement intéressant car l'opération offrait des perspectives de gains d'efficience – le même contenu devant être offert aux abonnés des deux groupes. Le Président souhaite entendre des explications complémentaires sur le compromis qu'il a fallu faire dans cette affaire entre gains d'efficience et diversité.

Un délégué de l'Espagne explique que dans l'affaire *Sogecable-Via Digital*, le marché considéré était le marché national de la télévision à péage. Les marchés des droits de diffusion de cinéma et de football « premium » ont également été examinés, de même que d'autres marchés touchant à la production audiovisuelle et aux télécommunications (l'un des opérateurs était contrôlé par Telefonica, principal opérateur de téléphonie du pays). Le choix de considérer le marché de la téléphonie a été motivé par la convergence des technologies, et particulièrement par les nouvelles possibilités d'assurer différents services par différentes technologies – câble, téléphonie (ADSL) et télévision.

Les acteurs qui envisageaient un rapprochement étaient les deux principaux opérateurs de télévision à péage du marché, l'un et l'autre en difficulté financière. On pensait que le blocage de l'opération conduirait probablement à ce qu'il ne subsiste plus qu'un opérateur. On estimait également que le marché était très dynamique, étant donné la rapidité des évolutions technologiques, et qu'il ne présentait pas d'obstacles notables à l'entrée, hormis pour le contenu « premium » (football et cinéma). A l'issue de la fusion, Sogecable devait être le premier acteur en télévision à péage, les principaux concurrents restants étant des câblo-opérateurs. Par conséquent, les pouvoirs publics ont réfléchi aux mesures correctrices possibles pour compenser la disparition d'un opérateur, afin d'empêcher l'établissement ou le renforcement des barrières à l'entrée des différents marchés concernés, et de réduire l'impact négatif de l'opération sur le pluralisme et la diversité.

Pour aider les nouveaux opérateurs – et surtout les câblo-opérateurs déjà actifs dans la télévision à péage en Espagne – différentes conditions ont été fixées, imposant la vente sans discrimination et limitant la durée de l'exclusivité des contrats de diffusion. Des mesures correctrices ont également été prévues pour faciliter l'accès aux chaînes d'information et de contenu de la plate-forme satellite, et des restrictions ont été posées aux stratégies coordonnées dans les médias.

On espérait que ces mesures auraient un impact positif sur le pluralisme. Mais le droit de la concurrence n'est pas un bon outil pour garantir le pluralisme, lequel est par ailleurs toujours difficile à définir. De plus, étant donné la rapidité de l'évolution du marché, toute règle qui vise à défendre le pluralisme doit être réexaminée périodiquement, et le cas échéant révisée. Dans les fusions affectant le secteur de la communication, l'instance de régulation sectorielle apporte l'information et dresse un rapport. C'est le gouvernement qui prend la décision finale, en tenant compte des enjeux de concurrence (y compris des gains d'efficience) et du rapport de l'instance de régulation.

Enfin, on a veillé à assurer que les gains d'efficience amenés par la fusion soient transmis aux consommateurs. A cet égard, il a été précisé que les coûts de la fusion (notamment liés au changement des antennes satellites et des décodeurs) ne devaient pas être supportés par les consommateurs. Cette mesure a notamment eu pour effet de conduire la nouvelle entité à conserver les anciens décodeurs, pour éviter un surcoût pour les consommateurs. Autre condition assortie à la fusion : le gel des tarifs pendant trois ans. On estimait que cette restriction n'entraverait pas l'innovation car le gel des tarifs ne s'appliquait qu'aux produits de qualité équivalente. Pour des produits différents, notamment aux bouquets comprenant davantage de chaînes, les prix pouvaient augmenter. Le respect du gel des tarifs est facile à contrôler puisque ces tarifs sont publiés.

Le Président passe à la dernière contribution, et note qu'en Irlande, la loi de 2002 sur la concurrence reconnaît dans une certaine mesure l'importance de la pluralité dans l'examen des fusions. Le traitement des fusions du secteur de la communication est particulier à deux égards. D'abord, les impératifs de notification sont plus contraignants. Deuxièmement, il existe une interaction intéressante entre l'autorité de concurrence et le ministre. La loi prévoit deux phases d'investigation. Même si à l'issue de la phase 1, l'autorité de concurrence établit que rien ne s'oppose à la fusion, le ministère peut décider d'une phase 2 d'investigation. Si cette deuxième phase ne soulève pas de problèmes, le ministère peut décider d'appliquer d'autres critères. Le Président souhaite savoir quels aspects seraient examinés dans la phase 2 si la première phase d'investigation ne mettait en évidence aucun problème, et demande dans quelle mesure les autres critères fixés par le ministre sont examinés dans le cadre d'une investigation de phase 2.

Un délégué de l'Irlande explique que l'autorité de concurrence vient de recevoir sa première notification de fusion dans le secteur de la communication, et que l'investigation de phase 1 a commencé. C'est la seule expérience de l'Irlande dans ce domaine. Concernant la question du Président sur les aspects qui seront examinés en phase 2 si la phase 1 ne révèle aucun obstacle, le délégué suggère plusieurs options. D'abord, l'autorité peut simplement procéder à une nouvelle analyse SLC (analyse de restriction substantielle de la concurrence), éventuellement de manière plus détaillée. La seconde option serait d'entreprendre une analyse de phase 2 en se concentrant sur les critères de pluralité énoncés dans la loi. Dans ce domaine, l'autorité de concurrence ne possède ni l'expertise requise, ni aucun avantage comparatif. La troisième option, qui semble la plus intéressante, serait d'assister le ministère dans l'analyse des effets de l'opération sur le pluralisme, par exemple en examinant les atouts et la compétitivité des entreprises de communication du marché pertinent, et de contribuer en même temps à affiner l'analyse de la concurrence.

6. Débat général

Un délégué des États-Unis note que le contrôle des concentrations dans le secteur de la communication se caractérise par une certaine tension qui n'existe peut-être pas dans d'autres domaines.

D'une part, il est nécessaire de préserver la concurrence dans les marchés de communication, non seulement pour protéger des annonceurs, mais aussi eu égard à des considérations de pluralisme. D'autre part, il est important d'éviter toute intervention injustifiée sur le marché, a fortiori dans le domaine de la communication car des médias libres le sont aussi par rapport aux pouvoirs publics. La problème pour les autorités de concurrence lorsqu'elles examinent les problèmes de pluralisme, c'est que, à la différence des enjeux de concurrence purs, où l'on peut appliquer des critères d'évaluation strictement économique, les critères d'évaluation du pluralisme sont beaucoup moins clairs. Combien de médias faut-il au minimum ? La réponse à cette question peut varier considérablement selon la personne qui va se prononcer.

Si on ne peut pas entièrement faire confiance au libre jeu du marché dans les médias, et si la concurrence dans la publicité n'est pas un indicateur suffisant pour la diversité des points de vue dans les médias, la meilleure solution est certainement d'ordre réglementaire, plutôt qu'un examen au cas par cas. Cela permettra du moins l'application de critères clairs et transparents, que le public pourra approuver au désapprouver.

Un délégué du Brésil approuve les vues exprimées par le Canada et les États-Unis concernant les autorités de concurrence et le pluralisme. Il note toutefois que, si les effets de la concurrence sur les prix sont devenus le seul critère retenus dans l'analyse de la concurrence, le bien-être des consommateurs comprend d'autres dimensions, et des compromis peuvent être nécessaires. La solution peut être d'avoir des organismes séparés, mais cela peut être compliqué. Imaginons par exemple deux journaux, qui créent une entreprise commune pour couvrir une guerre dans un pays étranger. Cela peut nuire à la diversité, mais sans cette entreprise commune, cette guerre ne pourrait peut-être pas être couverte du tout par des journalistes du pays. Ou prenons le cas d'une entreprise commune entre des chaînes de télévision pour financer des sondages avant une élection présidentielle. Lorsque les autorités antitrust avaient examiné cette co-entreprise, elles n'avaient pas envisagé cette possibilité. Ces deux exemples soulèvent des questions de gains d'efficience, outre les aspects de diversité et de qualité, mais la lutte antitrust conduit peut-être à des résultats différents. Malheureusement, il est parfois difficile de séparer les enjeux, et on ne peut faire l'impasse sur les considérations de qualité et de diversité.

Le Président objecte que plusieurs articles scientifiques reposant sur le modèle Hoteling de la concurrence montrent que le contenu des journaux dépendra de la configuration de concurrence. Cela tend à montrer que qualité de production et qualité de la concurrence sont parfois indissociables.

Un délégué des États-Unis note que dans l'analyse des cas les plus complexes de fusions, il faut envisager non seulement les risques encourus si l'opération reçoit l'agrément des autorités, mais aussi ce que les consommateurs perdront si elle est bloquée. Et lorsqu'il faut prendre des décisions difficiles, comme dans l'affaire de télévision citée par le Brésil, il importe d'éviter une interférence excessive du gouvernement, surtout lorsqu'il s'agit de déterminer les points de vue doivent être préservés et ceux qui doivent être sacrifiés.

Le délégué du Brésil acquiesce, et note que le souci d'éviter l'intervention des pouvoirs publics peut plaider en faveur d'une intervention épisodique de l'autorité de concurrence, plutôt que l'intervention plus fréquente de l'organisme de régulation du secteur de la communication.

Un délégué de la Corée note qu'il faut faire la distinction entre le marché de la publicité et celui du contenu pour les consommateurs, le premier devant être subordonné au second. Les annonceurs préfèrent placer leurs publicités dans des journaux à forte circulation. Or, l'élasticité de la demande par rapport aux prix est relativement faible dans le marché du contenu , car un lecteur ou un spectateur choisit le contenu en fonction de ses goûts. En revanche, dans le marché de la publicité, l'élasticité de la demande par rapport aux prix est relativement forte. Le délégué approuve donc les vues exposées dans le document du Secrétariat, à savoir que, pour les fusions dans le secteur de la communication, l'approche

comportementale est plus adaptée que l'approche structurelle. Et cette approche est préférable non seulement en raison des évolutions liées au marché, mais aussi du fait de la fiable élasticité par rapport aux prix dans le marché du contenu.

Un délégué du BIAC présente Campbell Cowie, Directeur responsable des politiques publiques de AOL Time Warner Europe, qui porte un éclairage économique sur les fusions. Commentant le document du Secrétariat, M. Cowie note qu'il serait souhaitable de considérer également l'impact de la numérisation sur les barrières à l'entrée, indépendamment de l'impact la convergence entre télévision et télécommunications sur ces barrières. Ces deux aspects sont, certes, liés, mais constituent des phénomènes très différents et leurs effets sur les barrières à l'entrée sont très différents. Il pose la question de savoir si les obstacles à l'entrée soient élevés dans tous les marchés de médias et demande que tous les éléments économiques apportant un éclairage sur ce point soient inclus dans le document. Le document du Secrétariat devrait reconnaître que les obstacles à l'entrée varient selon le marché et selon son degré de maturité. Il attire aussi l'attention du Secrétariat sur une conclusion récente de la Commission européenne dans l'affaire *Telepiu Stream*. Cette décision, observe-t-il, reflète un changement d'approche bienvenue : après avoir soutenu la concurrence entre plates-formes presque à tout prix, la Commission reconnaît maintenant que la concurrence entre plates-formes n'est pas toujours viable et que l'objectif doit être de trouver les mesures appropriées pour assurer un accès dans des conditions équitables à une plate-forme dominante (et financièrement viable). L'un des problèmes incontournables est que tous les membres de l'OCDE ne possèdent pas de régime spécifique concernant l'accès conditionnel, les interfaces de programmes d'application (API), les logiciels de vérification et d'autres technologies. Lorsqu'il n'existe pas de réglementation appropriée, les autorités de la concurrence peuvent être appelées à préciser ce qu'elles entendent par « conditions équitables et raisonnables ». M. Cowie souhaiterait également que le document du Secrétariat approfondisse l'analyse des méthodes par lesquelles les autorités de concurrence peuvent évaluer les incitations d'une entreprise à abuser d'une position dominante acquise suite à une fusion. Les modèles de simulation des fusions constituent une technique d'analyse possible pour identifier les enjeux commerciaux (plutôt que théoriques) des entreprises dans certaines configurations de marché.

M. Cowie évoque des propositions de la Commission européenne visant à réformer sa réglementation en matière de fusions, dont une en particulier qui reviendrait à accorder davantage de poids aux arguments de gains d'efficience. Il souhaiterait davantage de détails sur les arguments de gains d'efficience qui seraient recevables dans les affaires de fusions en matière de communication, et sur les données qui seraient nécessaires pour étayer ces arguments. M. Cowie redoute que beaucoup des arguments de gains d'efficience que les entreprises invoqueront pour justifier les fusions ne soient retenus pour bloquer les fusions. Un examen des gains d'efficience découlant des précédentes fusions dans le secteur de la communication constituerait une contribution utile à cet égard. L'OCDE serait bien placée pour entreprendre ce type d'étude.

Sur la question de la séparation de la loi sur la concurrence des autres règles tenant aux politiques publiques et aux considérations sociopolitiques, M. Cowie renvoie le Comité à des travaux du Réseau international de la concurrence (RIC) sur les différents régimes existant à travers le monde en matière de contrôle de concentration, surtout concernant la manière dont les différents pays intègrent les considérations socioéconomiques et sociopolitiques dans leurs analyses.

Un délégué de la Commission européenne convient que la décision prise par l'Espagne dans l'affaire *Telepiu-Stream* va à l'encontre de la préférence de la Commission pour la concurrence entre plates-formes, mais en l'espèce, ce type de concurrence n'était plus viable. Le mieux que l'on pouvait faire pour les consommateurs était d'assurer le libre accès. Cette affaire ne marque pas un changement d'orientation dans les politiques. On peut tracer un parallèle avec les certaines affaires dans les télécommunications, dans lesquelles la concurrence entre équipements pourrait être une solution à long terme, mais la concurrence entre services est également souhaitable pour les consommateurs. S'agissant de

la relation entre concurrence et pluralisme, la Commission pense comme les États-Unis et l'Allemagne que l'accent doit être mis sur l'évaluation économique et la concurrence, le pluralisme étant l'affaire d'autres instances.

Un délégué de l'Allemagne cite le cas d'une affaire de fusion entre deux journaux de Berlin, qui illustre l'antagonisme entre pluralisme et concurrence. Le Bundeskartellamt s'est opposé à la fusion en s'appuyant uniquement sur des arguments tenant à la concurrence, mais les parties ont demandé au ministère d'annuler la décision du Bundeskartellamt pour des raisons de pluralisme. S'agissant des mesures correctrices dans cette affaire, un délégué note que le pluralisme pour un journal relève de la liberté éditoriale et ne peut pas être préservé par une agence gouvernementale. Les parties proposent la création d'une fondation privée, financée sur une base stable pendant 20 ans, chargée de contrôler la liberté éditoriale des journaux fusionnés. Le dossier est toujours en attente de décision du ministre.

7. Synthèse du Président

La réticence des autorités de concurrence à traiter les aspects de pluralisme est justifiée par trois types d'arguments. D'abord, l'absence de mesures objectives du pluralisme, et donc la nécessité d'une régulation par une personne extérieure appliquant des critères arbitraire connus de tous. Mais, pourrait-on objecter, quels peuvent être les critères objectifs d'évaluation des gains d'efficience, ou de définition des marchés, et comment exploiter les données de parts de marché ? Les autorités de concurrence peuvent introduire une mesure d'objectivité en utilisant des seuils HHI (Herfindahl-Hirschman Index), même si leur bien-fondé n'est pas toujours justifié par la théorie. Deuxièmement, il y a le problème de la crédibilité, que reflètent les observations du Canada et de l'Autriche. Une instance peut se discréditer en prenant une décision si elle est contestée, comme cela peut se produire lorsque l'on se prononce pour ou contre une fusion. Une autorité de concurrence qui se préoccupe de préserver le pluralisme peut être critiquée, ce qui peut être préjudiciable à sa réputation d'objectivité. Le problème est exactement celui que soulève la contribution du Canada. Une autorité de concurrence peut également être taxée d'inutilité ou de manque d'ambition. Cela peut conduire à une situation telle que l'on a observée au Royaume-Uni ou en Autriche. Le parlement peut demander à l'autorité de concurrence de ne pas s'arrêter au problème de la concurrence et d'envisager également la question du pluralisme, sachant que c'est là un aspect qui peut vraiment poser problème. Enfin, il y a le souci de réduire les risques associés à une erreur éventuelle, en délimitant exactement les domaines qui relèvent de responsabilité de l'autorité de concurrence et ceux qui n'en font pas partie. Cette délimitation est véritablement une question d'appréciation individuelle par rapport au risque, et de philosophie globale. Du moins cette table ronde aura-t-elle eu le mérite de clarifier le débat et d'illustrer l'incertitude des autorités de concurrence autour des questions de pluralisme et de diversité.