ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 9 Issue 1 pp 49-80 March 2013

European merger control in the broadcasting sector: Does media pluralism fit?

*Konstantina Bania**

Over the past years, the European broadcasting industry has been experiencing major consolidation trends with very large concentrations getting the green light by the European Commission (hereafter the Commission). Such operations are detrimental to competition and media pluralism, two values that the Commission is bound to protect under the Treaties, the Charter of Fundamental Rights of the EU and the Merger Regulation. An overview of the relevant decision-making reveals that the Commission has focused on securing a diversity of suppliers in the broadcasting markets with the effects of a concentration on content diversity having abundantly been ignored thus far. In that regard, media pluralism has been catered for only coincidentally and to the extent that it fits the Commission's understanding of competitive broadcasting markets. Yet, assessing the impact of a concentration on content diversity is not only a legitimate subject for relevant merger inquiries, but also the Commission's duty under both primary and secondary EU law. This article argues that, while it would be unlawful for the Commission to conduct a politically contentious assessment and ban a merger operation on pluralism grounds, it is also true that European competition law does not operate in a vacuum but rather as an apparatus used for the realization of the European project. Therefore, merger control needs to be exercised in a pluralism-friendly manner.

1. INTRODUCTION

Within Europe, up until the early 1990s, the provision of broadcasting services was largely limited to national markets. However, over the past two decades, this picture has changed dramatically. The story is well known. After the Television without Frontiers Directive[1] entered into force, broadcasters have increasingly engaged in developing activities transcending national frontiers.[2] This expansion has not been restricted to

* Doctoral Researcher (European University Institute, Florence); LL.M. in Comparative, European, and International Legal Studies (European University Institute, Florence); LL.M. in International and European Law (Vrije Universiteit Brussel); MSc in Business Science (Universidad de Barcelona); LL.B. (Aristotle University of Thessaloniki and Universidad de Salamanca). This article benefited from comments by participants at the 19th CLaSF Workshop on Competition Law, Regulation and the Media and the 9th Harvard Workshop on Law and Economics. Special thanks go to my supervisor, Prof. Giorgio Monti, and Prof. Ioannis Kokkoris for their valuable comments on previous drafts. Any errors remain, of course, my own.

1 Council Directive 89/442/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television Without Frontiers Directive) [1989] OJ L 298/23

2 Harcourt 'Institution-driven competition: The regulation of cross-border broadcasting in the EU' (2004) European University Institute Working Papers, RSCAS No. 2004/44, 1. The paper is available online at: http://www.eui.eu/RSCAS/WP-Texts/04_44.pdf

direct broadcasts and the sale of program rights.[3] The abolition of obstacles to intra-Union trade has also facilitated an intense process of cross-border concentration.[4] The reasons for this development are manifold. The option to merge with a firm operating beyond national frontiers may be appealing to broadcasters that seek to attract critical mass to their content, share investment risks or because the national competition authority under the jurisdiction of which they fall did not let them proceed with a national merger.[5]

In the midst of this merger wave, competition concerns come to the fore and thus, the realization of the internal market project is put at stake. Surely, a concentration in the broadcasting industry, like any other concentration, may reduce competition within the common market through the creation or strengthening of a player with significant market power and subsequently harm consumers through higher prices, reduced choice or less innovation.[6] Consider, for instance, a concentration whereby a leading pay-TV operator acquires a major film studio producing films that are essential for the creation of an attractive program package. This operation may lead to the first having exclusive access to the second's movie rights which in turn may force the pay-TV operator's competitors out of business or prevent potential entrants from penetrating the pay-TV market.

However, distortions of competition are not the only concerns to which an intra-Union concentration affecting the broadcasting markets gives rise. The goods provided by media organizations are distinguished from other marketable commodities due to the role that media plays in and for democracy. More particularly, in a democratic system of governance, media outlets have the duty to inform the public, control the power holders and give voice to the citizens.[7] Performance of these functions enables the citizens to make informed decisions about matters of common concern and public officials and communicate to the governors their views on what is best for the society.[8] In that respect, to the extent that it limits the number of voices finding expression within the media universe, media concentration may also affect media pluralism, a 'sacred principle' whose protection is 'crucial for the democratic process in the Member States and in the European Union as a whole'.[9] Following the Council of Europe,

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3 Commission (EU), Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9; Commission (EU), 'Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication)' (2009) OJ C 257/1, para. 22.

4 Commission (EU), Staff Working Document on Media pluralism in the Member States of the European Union, op cit n 3, 9.

5 Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions (CoE), Report on Transnational media concentrations in Europe (2004) 10.

6 These are the key factors that define the Commission's merger policy. For more information see: http://ec.europa.eu/competition/mergers/overview_en.html

7 Nieminen and Trappel 'Media serving democracy' in Trappel, Meier *et al.* (eds.) *Media in Europe Today*, Bristol, Intellect, 2011, 141-143.

8 Ibid.

9 Statements made by Viviane Reding and Margot Wallström in the context of the three-step-approach adopted by the Commission with the aim to advance the debate on media pluralism within the European

pluralism here is perceived as 'internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organization, or external in nature, through a number of such organizations, each expressing a particular point of view'[10] and therefore the concept encompasses both a diversity of suppliers of media services and a variety in the range of contents available.[11]

The above considerations are of particular importance for the European broadcasting sector for three reasons. First, and in spite of the increasing use of the Internet, television remains the most popular medium for information in the European media landscape.[12] Second, domestic broadcasters are more often than not controlled by highly concentrated transnational media organizations. For instance, one of the most popular generalist channels of the Greek free-to-air TV market, Alpha TV,[13] belongs to the Luxembourg-based powerful media group RTL[14] whereas Sky Italia, the leading pay-TV operator in Italy, is 100% owned by the international media conglomerate News Corporation.[15] Third, broadcasters that are members of a concentrated media company frequently broadcast directly in a Member State other than the one in which they are established. For instance, in the UK, in addition to national channels, such as the BBC and Channel 4,[16] British households may also access for free France 24 English, a French news channel that belongs to the media group Audiovisuel Extérieur de la France.[17] France 24 is available in almost all the Member States of the EU (with the exception of Bulgaria and Spain).[18] Similarly, European consumers have free access to CNN International, an international news channel that belongs to international

Union. For more details see, for instance: http://www.euractiv.com/pa/media-pluralism-lifeblood-eu-democracy/article-160937.

10 Council of Europe, Activity Report of the Committee of Experts on Media Concentration and Pluralism (1994). See also Council of Europe, Recommendation of 31 January 2007 on media pluralism and diversity of media content. The same broad working definition of pluralism is also followed by the European Commission in its Independent Study on Indicators for Media Pluralism in the Member States: Towards a Risk-Based Approach. See, in particular, the relevant Preliminary Final Report (2007), 5 that is available online at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf

11 Commission (EU), Staff Working Document on Media pluralism in the Member States of the European Union, op cit n 3, 5.

12 According to the Commission, TV remains the foremost source of information and entertainment in Europe, with most homes having a television set and the average European watching up to 4 hours a day. See http://ec.europa.eu/avpolicy/index_en.htm For more information see also: http://europa.eu/legislation_summaries/audiovisual_and_media/l24107_en.htm

13 According to the MAVISE database, a database of TV companies and TV channels in the European Union developed by the European Audiovisual Observatory (CoE) for the European Commission, Alpha TV ranked third in 2010: http://mavise.obs.coe.int/country?id=15

14 http://mavise.obs.coe.int/channel?id=330 For more details on the countries to which the ownership of the RTL group expands see: http://mavise.obs.coe.int/company?id=2093

15 http://mavise.obs.coe.int/country?id=18 For the markets in which News Corporation is active see: http://mavise.obs.coe.int/company?id=2030 and http://www.newscorp.com/

16 http://mavise.obs.coe.int/country?id=14

17 http://mavise.obs.coe.int/channel?id=169 For the activities of the Audiovisuel Extérieur de la France see: http://mavise.obs.coe.int/company?id=6348

18 http://mavise.obs.coe.int/channel?id=169

groups Turner Broadcasting Inc. and Time Warner,[19] and CNBC Europe, an international business and financial news channel pertaining in NBC Universal.[20] It is worth mentioning that CNN International began its broadcasts in Europe in 1985[21] whereas CNBC Europe was launched in 1996.[22] This market offer demonstrates that audience members across Europe have interest in consuming 'non-national' content.

The above remarks indicate that the adverse effects of a media organization acquiring significant opinion-forming power on pluralism may transcend national frontiers irrespective of the form in which said organization operates in another Member State. Thus, concerns about how to effectively protect media pluralism against concentrations that may distort competition within the common market acquire a Union dimension. This point is illustrated by the Report on Transnational Media Concentrations in Europe prepared by the Advisory Panel to the CDMM (Steering Committee on the Mass Media) of the Council of Europe. The report states respectively that:

> '[C]ontent in a media environment dominated by transnational media owners will most likely become less local, less controversial, less investigative and less informative. The public watchdog function of the media will be reduced, the knowledge and attention towards local issues likewise […]. The challenge is to ensure […] pluralism of voices will be an integral part of the future European media environment, and that the European media will reflect and promote Europe's cultural and linguistic diversity'.[23]

Action that can be taken to protect the undistorted functioning of the European broadcasting markets is clearly defined in EU law. The Commission, under the powers vested in it by the Treaty and on the basis of the provisions of the Merger Regulation, is explicitly entrusted with checking whether a concentration of a Union dimension may significantly impede effective competition.[24] However, the legal framework is not so clear-cut for the protection of media pluralism. Due to competence limitations in the cultural domain, the European Union may not adopt sector-specific legislation aimed at safeguarding this value.[25] Yet, both primary and secondary Union law[26] lay down the

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19 http://mavise.obs.coe.int/channel?id=1061 For the activities developed by Turner Broadcasting Inc. and Time Warner see http://www.turner.com/company and http://mavise.obs.coe.int/company?id=2033 respectively.

20 http://mavise.obs.coe.int/channel?id=1060 For more details on the activities developed by NBC Universal see: http://mavise.obs.coe.int/company?id=2028

21 Chalaby, 'Transnational Television in Europe' (2002), European Journal of Communication 17(2), 188

22 http://www.themediabriefing.com/companies/cnbc-europe

23 Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions (CoE), Report on Transnational media concentrations in Europe, op cit n 5, 5.

24 Article 105 of the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/47 and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1, Article 2(2) and (3).

25 Article 167(5) TFEU explicitly excludes 'any harmonization of the laws and regulations of the Member States' in this field.

26 See, for instance, Article 167(4) TFEU, op cit n 25, 11(2) Charter of Fundamental Rights of the European Union OJ [2000] C 364/1 and Recital (23) EC Merger Regulation, op cit n 24.

Commission's obligation to have regard to non-economic goals when implementing the Union's competition policy. In spite of that, the Commission has been reluctant to openly address pluralism-specific concerns under its merger practice. Moreover, trends that have emerged in European merger control, in particular a more economics-based approach in merger analyses, have made increased efficiencies and welfare considerations the only factors that determine the Commission's decision to either permit or prohibit a merger. These approaches have led to non-economic values receiving limited attention in merger cases with media pluralism at Union level being catered for coincidentally in the Commission's efforts to ensure the protection of undistorted competition within the common market.

This article discusses the Commission's role in safeguarding pluralism under its merger practice in the broadcasting industry. An analysis of the relevant decision-making sufficiently proves that, while the Commission has focused on securing a diversity of suppliers in the markets affected by the notified operations, it has largely abstained from considering the effects of the concentration on content diversity. However, taking into consideration the particularities of the broadcasting markets, ensuring a diversity of suppliers does not necessarily guarantee a variety in the range of contents available,[27] and thus media pluralism at Union level seems to have been catered for only to the extent that it fits the Commission's understanding of competitive broadcasting markets. The article argues that appraising the impact of a merger deal on content diversity is not only a legitimate subject for relevant analyses but also the Commission's duty as laid down in Articles 167(4) TFEU and 11(2) and 51(1) of the Charter of Fundamental Rights of the EU. And, while it would be unlawful for the Commission to ban a merger operation on pluralism grounds, it is also true that European competition law does not operate in a *vacuum* but rather as an *apparatus* used for the realization of the European project. In that respect, competition policy is not the highest value in the Union, but one that needs to be reconciled with other values such as media pluralism. Therefore, merger control needs to be exercised in a pluralism-friendly manner.

Re-considering the Commission's merger practice in the broadcasting sector and its implications for pluralism is an issue timely and ripe. The disquietude stemming from the Commission's inadequate approach has culminated in light of the recent *Newscorp/BSkyB* concentration that, besides the possible anticompetitive effects it was likely to create, also gave rise to serious pluralism concerns in that it would further strengthen the Murdoch media imperium in the UK. In its assessment, the Commission adopted a hands-off approach in relation to the pluralism issues that arose and it approved the concentration on the grounds that it would not significantly impede price

[27] The fact that the relationship between diversity of ownership and diversity of content is not causal and direct has long been pointed out by the relevant literature. See, for instance, Klimkiewicz, 'Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies', in Czepek, Hellwig and Nowak (eds.), *Press Freedom and Pluralism in Europe: Concepts and Conditions*, Bristol, Intellect, 2009, 46; Craufurd-Smith, 'Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship' (2004) European Law Review, 29(5), 653; Ariño 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the gaps' (2004) Communications and Strategies (54), 99.

competition.[28] Such decision-making combined with continuous consolidation in the sector call for substantial modifications in the direction followed thus far so that concentrations in the broadcasting industry both stimulate competition and contribute to the protection of a pluralistic media landscape across Europe.

This article does not attempt to outline all relevant problems that arise in media merger cases, or suggest a clear-cut standard of incompatibility under the Merger Regulation. This is not appropriate, considering the fact-intensive analysis for each merger, and the rapidly changing nature of the industry. The objective is to illustrate how pluralism concerns can be considered when assessing mergers of a Union dimension affecting the broadcasting markets. Sections 2 and 3 examine selected issues that arise in each step of a merger analysis as conducted by the Commission, namely the definition of the relevant product and geographic markets and the competitive assessment, and critically appraise the relevant decision-making. Section 4 discusses the Commission's responsibility to take account of pluralism under its merger practice and inquires into how pluralism-specific considerations can be injected in a merger decision by means of an example. Finally, some conclusions are drawn.

2. DEFINITION OF RELEVANT MARKETS

2.1 Relevant product market for free-to-air television: Is advertising the only content broadcast?

With regard to the retail broadcasting markets, the Commission takes the stance that a distinction needs to be drawn between pay-TV and free-to-air television. In the past, the Commission noted that, due to the continuing digitization of free-TV and the general convergence trend in the media and telecommunications sectors, the boundaries between the two markets may become increasingly blurred,[29] however, recent cases demonstrate that it has not modified this approach yet.[30] More particularly, the Commission focuses on the trade relationship that exists between the broadcaster and its revenue provider and considers that, while in pay-TV there is a trade relationship between the program supplier and the viewer as subscriber, in advertising-financed television there is a trade relationship only between the program supplier and the advertising industry. On the basis of this trade relationship criterion, the key parameters in the case of pay-TV are the interests of the target groups of viewers and the level of subscriptions that they are willing to pay whereas in the case of advertising-financed television the determinant factor is the level of advertising rates.[31]

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[28] Commission decision *Newscorp/BSkyB*, Case COMP/5932 [2011] OJ C 37/02. See, in particular, paras 304-309.

[29] See, for instance, Commission Decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, para. 39.

[30] See, for instance, Commission Decisions *NewsCorp/BSkyB*, ibid, para. 99 and *SFR/Télé 2 France*, Case COMP/M.4504, SFR/Télé 2 [2007] OJ L 316/57, para. 45.

[31] See, for instance, Commission Decisions *Telenor/Canal+/Canal Digital*, Case COMP/C.2/38.287, [2003] OJ C 149/10 para. 28, *BSkyB/Kirch Pay-TV*, Case COMP/JV.37, [2000] OJ C 110/45, para. 24, *Bertelsmann/Kirch/Premiere*, Case IV/M.993, [1999] OJ L 053/1, para. 18 and *Kirch/Richemont/Multichoice/Telepiù*, Case IV/M.584, [1995] OJ C 129/6, para.15.

This approach, whereby the relevant product market for free access TV is defined solely by reference to the contractual arrangements between the broadcaster and the advertisers, aims at protecting price competition in the advertising markets without due regard to competition for the programs broadcast and is defective first because it seems to neglect certain important characteristics of the market in question. The market for free-to-air television, either financed through advertising or partly through advertising and partly through fees, is a two-sided market meaning that the broadcaster deals with two categories of consumers, namely the advertisers and the viewers.[32] In its notice on the definition of relevant market for the purposes of EU competition law, the Commission lays down that a relevant product market comprises all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.[33] Now considering that the supply of content to viewers and the supply of advertising space are 'fundamentally different products, meeting different needs and therefore belonging in separate relevant markets',[34] the market definition analysis is complete if it encompasses a substitutability assessment for both product markets. It has convincingly been argued that in cases where a competition agency decides on a merger between undertakings active in a two-sided market by assessing its effects on only one of the markets involved, the analysis 'neglects at least half of the story'[35] in that there are linkages between the two sides that cannot be ignored. This is particularly true for the market for free-TV as there is a strong interrelationship between the advertisers and the viewers.[36] For instance, if a broadcaster offers content which is appealing to a considerable amount of viewers, this will inevitably attract advertisers. If the broadcaster decides to increase the number of advertising minutes, this may cause the viewers' dissatisfaction and lead them to switch to a channel offering similar content.

Now, while the Commission itself has acknowledged that the audiences' preferences are 'an important indicator of the attractiveness and acceptance of the broadcasting channels',[37] it justifies its choice to focus on the advertising markets on the grounds

32 Evans, 'Two-sided market definition', ABA Section of Antitrust Law, Market Definition in Antitrust: Theory and case studies, March 2012. Available at SSRN (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1396751) (2009) 4. On the particularities of the two-sided markets see also: Rysman 'The Economics of Two-sided Markets' (2009) Journal of Economic Perspectives, 23(3), 125-143; Kaiser and Wright 'Price Structure in two-sided markets: Evidence from the magazine industry' (2006) International Journal of Industrial Organization, 24(1), 1-28; Anderson and Gabszewicz 'The media and advertising: A tale of two-sided markets' in Ginsburgh and Throsby (eds.), *Handbook of the Economics of Art and Culture*, Volume 1, the Netherlands, North-Holland, 2006, 567-614; Argentesi and Filistrucchi 'Estimating market power in a two-sided market: The case of newspapers' (2007) Journal of Applied Econometrics, 22(7), 1247-1266.

33 Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para. 7.

34 Europe Economics, Market Definition in the Media Sector: Economic Issues. Report for the European Commission, DG Competition (2002) 42, available at: http://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf

35 Evans, The Antitrust Economics of two-sided markets, SSRN Working Paper Series (2002) 51.

36 OECD Policy Roundtables, Two-sided markets (2009) 11 and 26, available at: http://www.oecd.org/dataoecd/38/61/44445730.pdf

37 Commission Decision *RTL/Veronica/Endemol (HMG)*, Case IV/M.553 [1996] OJ L 124/32, para. 20.

that the viewer does not pay for the programs broadcast and thus there is no trade relationship between the supplier and the end-user.[38] However, the Commission's perception of what constitutes trade is flawed and relevant drawbacks have been pointed out in a report elaborated by Europe Economics, an independent economics consultancy, as part of an assignment for the Media Unit of DG Competition. In assessing the Commission's practice in market definition analyses in the media sector, the report in question states that the Commission's perception of trade as an exchange of money for goods and services is limited in that there are cases in which a trade relationship does not entail a monetary exchange.[39] Indeed, trade is an 'economic concept that involves multiple parties participating in the voluntary negotiation and then the exchange of one's goods and services for desired goods and services that someone else possesses'.[40] Money is undoubtedly the most common medium of such an exchange yet, not the only one. In free access television, the viewers do not pay for the programs broadcast and the broadcasters do not pay the consumers to watch the said programs, however, there appears to be an exchange of value whereby the broadcaster provides content to the viewer and the viewer provides her attention to the broadcaster.[41] This exchange of content for attention may be conciliated with other forms of economic trade.[42] Accordingly, in free-to-air TV there exists a market for audiences (i.e. a market for the provision of content other than advertising messages) that is defined by other than pecuniary considerations. Does this market need to be defined for the purposes of competition law? The answer is unequivocally yes. Broadcasters compete for audiences by seeking to offer attractive content, because each viewer has a limited amount of attention to allocate between broadcasters. Therefore, access to audiences is a rivalrous good being allocated between broadcasters through competition.[43]

Yet, the Commission's persistence to focus on ensuring competition in the advertising markets is not simply erroneous because it ignores the consumers' preferences but it has further negative implications for the viewing experience. The definition of the relevant market determines the Commission's competitive assessment[44] and thus its decision to clear or prohibit a concentration. Under the trade relationship criterion currently used, if two free-to-air broadcasters decided to merge their news operations,

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38 See, for instance, Commission Decisions *BSkyB/Kirch Pay-TV*, op cit n 31, para. 24 and *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 18.

39 Europe Economics, op cit n 34, 43.

40 This is the definition given by the Investopedia Financial Dictionary, available at: http://www.investopedia.com/terms/t/trade.asp#axzz1nOcA9gsQ Similarly, Longman Dictionary defines trade as 'the activity of buying, selling, or exchanging goods within a country or between countries', see: http://www.ldoceonline.com/dictionary/trade_1

41 Europe Economics, op cit n 34, 43. Stucke and Grunes, 'Antitrust and the Marketplace of Ideas' (2001) Antitrust Law Journal 69 (1), 297.

42 Europe Economics, op cit n 34, 44.

43 Ibid.

44 Laboratorio di economia, antitrust, regolamentazione (Lear), 'Ex-post review of merger decisions: A study for the European Commission' (2006) 61, available at: http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf

but each independently set its own advertising prices, the merger would be found to be compatible with the common market on the grounds that, while active in the same product market, competition in the advertising markets would not suffer as a result of the merger. Nevertheless, competition in the market for audiences among the merging undertakings would be eliminated and an additional source of information would cease to exist. Giving another example, consider that two free-to-air broadcasters notify their intention to merge and the Commission finds that their combining forces is not likely to significantly impede effective competition in the advertising markets. Post-merger the firms may decide to increase the advertising/content ratio. The resulting increase in advertising time on offer would in practice mean a reduction in viewer choices and possibly a decline in advertising rates. Under the approach currently followed by the Commission, this behaviour would not raise anticompetitive concerns; to the contrary, it would be found to promote price competition. However, it would have a significant impact on the variety of programs broadcast which could further decrease considering that in many cases merging broadcasters tend to use the same programming so as to reduce production costs.[45] Therefore, this direction, which solely aims at securing price competition in the advertising markets, has a negative impact on content diversity of which the Commission has not taken due account.

2.2. Relevant geographic market: National in scope?

In its notice on the definition of the relevant market for the purposes of EU competition law, the Commission lays down that the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous.[46] The cases in the broadcasting sector have tended to see the geographic scope of the viewers' market as national because of the '*different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets*.'[47] In several instances, the Commission has also found that the geographic market may encompass linguistically homogeneous areas thereby extending beyond national frontiers.[48]

The application of criteria such as divergent regulatory frameworks and language and cultural differences is in line with the particularities of the sector. Indeed, such factors need to be taken into account when defining the relevant geographic market for the provision of broadcasting services. For instance, TV programs are more often than not broadcast only in the relevant national language whereas in several Member States foreign language films are almost never broadcast in the original language. Additionally, the content broadcast is largely determined by national cultural traditions, and therefore

45 OECD, op cit n 36, 25.

46 Commission notice on the definition of relevant market for the purposes of EU competition law, op cit n 33, para. 8.

47 See, for instance, Commission Decisions *Bertelsmann/CLT*, Case IV/M.779 [1996] OJ C 364/3, para. 20. and *UGC/Noos*, Case COMP/M. 3411 [2004] OJ C177/5, para. 11.

48 See, for instance, Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 22.

reflects specific preferences of the relevant audience.[49] Differences in the conditions of competition between Member States may also lead to the conclusion that the relevant geographic market does not extend beyond national frontiers. For instance, in *MSG Media Service*, the Commission found that determinants such as prices, the number of programs and relevant combination possibilities, and the encryption systems used by pay-TV suppliers across the Member States were differentiated to such an extent that the geographic market for the provision of pay-TV services in the case under scrutiny had to be restricted to Germany.[50]

This approach is said to address issues of plurality of supply national market by national market and thus seeks to inhibit media concentration at national level.[51] Yet, the assumption that a narrow geographic market definition secures competition and pluralism in a national media landscape is not conclusive, as the Commission did not hesitate to approve operations that significantly increased the power of the involved undertakings in one national market, the most prominent example being the *NewsCorp/Telepiù* clearance decision which created a quasi-monopoly situation in the Italian pay-TV market.[52] Additionally, the Commission's reasoning appears to neglect diversity of supply at Union level thereby facilitating the development of pan-European media conglomerates. Very large media concentrations were given the green light on the grounds that the undertakings involved were active in distinct national markets. For instance, the Commission approved the acquisition by News International of a stake in Vox, a German interest TV channel, *inter alia* because the acquiring undertaking was mainly active in the UK and Irish markets.[53] The same approach was followed when Kirch, active in Germany, and Richemont, a Swiss-based company with interests in Belgium, the Netherlands, and the Nordic countries, notified their intention to acquire joint control of Telepiù operating in the Italian market:[54] the Commission found that the concentration would not give rise to anticompetitive concerns, since the television activities of the involved undertakings were carried out in separate geographic markets.[55]

A narrow definition of the relevant geographic market has several negative implications for content diversity. It has correctly been pointed out that '[c]ross-European giants

[49] See, for instance, Commission Decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, para. 46 in which the Commission correctly highlights that '[w]hereas, for example, English language films are frequently broadcast in the Benelux countries and in Scandinavia with subtitles in the relevant national language, dubbing is the usual practice in Germany, France, Italy and Spain. This entails differing costs for the broadcasters'.

[50] Ibid., para. 48.

[51] Harrison and Woods, *European Broadcasting Law and Policy*, Cambridge, Cambridge University Press, 2007, 161.

[52] Commission Decision *NewsCorp/Telepiù*, op cit 30. See, in particular, paras. 40 and 48. The financial losses suffered by Stream and Telepiù determined significantly the clearance of the concentration. See, for instance, para. 87 of the decision.

[53] Commission Decision *Bertelsmann/News International/Vox*, Case IV/M.189 [1994] OJ C 274/9, paras. 1, 3 and 20.

[54] Commission Decision *Kirch/Richemont/Telepiù*, Case IV/M.584 [1994] OJ C 225/3, paras. 3, 5, 7.

[55] Ibid., see in particular, paras. 12 and 17.

might well result in homogeneous content across the Union, where, in order to secure maximum audiences, the content will be of the lowest common denominator'[56] such as popular series or Hollywood films. Moreover, if, for instance, two broadcasters active in the provision of international news in distinct national markets notified their intention to merge, the Commission would find the concentration to be compatible with the Treaty on the grounds that the undertakings involved in the transaction develop their activities in different territories but without considering how editorial diversity at Union level would be reduced as a result of the merger through, for instance, the use by the merged operators of the same news agency in their effort to reduce costs.

3. COMPETITIVE ASSESSMENT

3.1 From platform competition at any cost to regulated consolidation of the market: Ensuring a diversity of suppliers = Competitive broadcasting markets?

Since the beginning of its merger practice, the Commission has prohibited five concentrations in the broadcasting sector.[57] What all of these cases have in common is that the notified operations presented considerable vertical elements involving broadcasters with content and/or infrastructure providers.[58] In its analyses, the Commission found that the involved undertakings were already holding or would hold as a result of the concentration significant market power and thus feared that if the transactions were permitted, they would wall off the affected markets thereby precluding potential or existing competitors from developing activities therein. For instance, the first prohibited concentration, *MSG Media Service*, concerned the creation of a joint venture by Bertelsmann, a leading German media group with *inter alia* commercial television activities, Taurus, a holding company belonging to the Kirch group, the latter being the leading German supplier of feature films and television programming, also active in commercial television, and Deutsche Telekom, the German public telecommunications operator.[59] The object of the joint venture would be the technical and administrative handling of mainly pay-TV services and the provision of the necessary technical infrastructure for the supply of such services. The relevant markets identified by the Commission were the market for technical and administrative services for pay-TV suppliers, the market for pay-TV and the market for cable-television networks.[60] In its assessment, the Commission noted that MSG's first-

[56] Harrison and Woods, op cit n 51, 165.

[57] Reference is made to Commission Decisions *Bertelsmann/Kirch/Premiere*, op cit n 31; *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4; *MSG Media Service*, op cit n 49, *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20; *RTL/Veronica/Endemol,* op cit n 37.

[58] For a comprehensive overview of these decisions and other vertical mergers in the sector that fell under Commission scrutiny see, for instance, Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT sectors*, the Hague, Kluwer Law International, 2006, 138-161; Bavasso, op cit n 15, 293-308; Nitsche, *Broadcasting in the European Union. The Role of Public Interest in Competition Analysis*, the Hague, Kluwer Law International, 2001, 111-124. The vertical aspects of these concentrations is also pointed out by Ariño, op cit n 10, 109.

[59] Commission Decision *MSG Media Service*, op cit n 49, paras. 1 and 5-7.

[60] Ibid., para. 19.

mover advantage was likely to create a long-term monopoly in the market for technical and administrative services for pay-TV in Germany[61] that could further strengthen the position of Bertelsmann and Kirch on the downstream market for pay-TV. The Commission considered respectively that suppliers wishing to enter the pay-TV market following digitalization would be forced to take the relevant technical and administrative services from a company controlled by suppliers that were already in a leading position.[62] Additionally, it was felt that that the concentration would have adverse effects on the market for cable networks; while cable operators enjoyed a privileged position because of a restrictive procedure in Germany to serve home distribution without a link to Telekom, if this restrictive procedure was abandoned and the merger cleared, private network operators could find it difficult to obtain the programs of Bertelsmann and Kirch, which were considered to be necessary for attractive program packages, or could obtain them only on unfavourable conditions.[63] On these grounds, the Commission found that the concentration was likely to seal off all three markets and decided to ban the operation.[64]

The Commission took the same position in *HMG*, which concerned the creation of a joint venture by RTL (a supplier of Dutch-speaking TV and radio programs), Veronica (a Dutch broadcaster), and Endemol, (a Dutch independent producer of TV programs) and whose business would be the packaging and supply of TV and radio programs.[65] The Commission found that the markets affected by the proposed concentration, namely the market for TV broadcasting, the market for TV advertising and the market for independently produced Dutch TV programs,[66] were interconnected in such a way that the position of HMG or its parents on one market had a direct impact on their position in other markets.[67] After conducting an analysis whereby it considered the market structure pre- and post-HMG, the Commission concluded that HMG would acquire significant market power in the TV broadcasting and advertising markets[68] thereby rendering the entrance of newcomers to these markets very difficult, and also that the concentration would further strengthen Endemol's position on the independent Dutch TV production market with small Dutch TV producers being prevented from carrying on their business.[69]

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[61] Ibid., para. 55 et seq.

[62] Ibid., para. 82.

[63] Ibid., para. 93.

[64] Ibid., para. 102.

[65] Commission Decision *HMG*, op cit n 38, paras. 3-6. The Commission's decision was challenged before the General Court of the EU which upheld the Commission's findings. For more details see Case T-221/95, *Endemol v Commission*, [1999] ECR II-1299. It is also noted that after the Commission adopted its decision, the parties continued negotiations with the Commission and, after Endemol withdrew its participation from HMG and the remaining parties agreed to transform RTL5 into a news channel, the Commission declared the concentration compatible with the common market. See Commission Decision 96/649/EC OJ L 294, 19/11/1996, 14-17.

[66] Ibid., para. 17.

[67] Ibid., para. 30.

[68] Ibid., paras. 64 and 87.

[69] Ibid., paras. 104-105.

An approach similar to the one followed in *MSG Media Service* and *HMG* was adopted in the assessment of the other three prohibited operations, *Bertelsmann/Kirch/Premiere*,[70] *Deutsche Telekom/Beta Research*[71] and *Nordic Satellite Distribution*.[72] The Commission's reasoning in all five negative decisions is governed by its willingness to ensure inter-platform competition at any cost;[73] in spite of not being entirely certain about how the affected markets were likely to evolve, the Commission took a strict stance against vertical integration and did not hesitate to sacrifice the provision of new services in the short run, which would be possible as a result of the concentration, so as to ensure that a variety of suppliers could operate in the markets in question in the long run.[74] Indeed, vertical integration in the media markets may have several anticompetitive effects. As it has correctly been stated, '[i]f the content provider is dominant, a competing carrier might be unable to obtain enough valuable content in the appropriate language to offer a satisfactory selection of channels and programs. If the carrier is dominant, a competing provider might be unable to find satisfactory alternative broadcasters'.[75] The Commission seems to have been driven by such considerations and its determination to prevent market foreclosure resulting from vertical integration is also demonstrated by the fact that in all the above-mentioned cases the parties to the transactions proposed undertakings that were rejected as 'mere pledges of conduct',[76] 'meaningless',[77] 'insufficient',[78] or 'inadequate'[79] to solve the competition problems that arose.

This set of negative decisions represents almost 25% of all the blocked transactions that have fallen under Commission scrutiny thus far.[80] Yet, while this may imply that the Commission has treated concentration in the broadcasting sector more restrictively than in other industries,[81] by no means does the position it took in these cases constitute an established practice. It needs to be said that these decisions were adopted the period from 1994 to 1998 with the Commission's eagerness to secure platform

70 Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31.

71 Commission Decision *Deutsche Telekom/Beta Research*, op cit n 57.

72 Commission Decision *Nordic Satellite Distribution*, op cit n 57.

73 Ariño, op cit n 27, 111.

74 Harrison and Woods, op cit n 52, 164.

75 Temple Lang, 'Media, multimedia and European Community antitrust law', Speech, Fordham Corporate Law Institute, 17/10/1997, 60, available at: http://ec.europa.eu/competition/speeches/text/sp1997_070_en.pdf

76 Commission Decision *MSG Media Service*, op cit n 49, para. 99.

77 Commission Decisions *Deutsche Telekom/Beta Research*, op cit n 57, para. 65.

78 Commission Decisions *Nordic Satellite Distribution*, op cit n 57, para. 154, and *RTL/Veronica/Endemol*, op cit n 37, para. 112.

79 Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 155.

80 According to the Merger Statistics Table published by the Commission, from 21 September 1990 to 30 November 2011, 21 operations have been rejected. The table is available at: http://ec.europa.eu/competition/mergers/statistics.pdf

81 The consideration that the concentrations in the broadcasting sector have been treated more restrictively in comparison to notified operations in other sectors stems from the fact that no similar conclusions can be drawn for the remaining 16 operations that the Commission has banned to date with 12 representing one sector each, 2 concerning the passenger air transport industry and 2 the economic activity of retail sale in non-specialized stores.

competition at almost any cost having undergone significant change since. The outcome of relevant decisions that followed sufficiently demonstrates that, during the past 14 years, it has been more willing to clear relevant transactions subject or not to commitments undertaken by the parties to the transaction.

More particularly, since May 1998, date of adoption of the last in the series of prohibited operations previously referred to,[82] the Commission has given the green light to all notified merger transactions in the broadcasting sector, several of which upon the condition that the involved firms would respect the undertakings they proposed to the Commission in order to eliminate the anticompetitive concerns that resulted from the notified deal.[83] A good example of this approach is the *Vivendi/Canal+/Seagram* case, in which the Commission was asked to assess the acquisition of Seagram (primarily active in the entertainment business and owner of Universal, one of the six major Hollywood studios) by Vivendi (active *inter alia* in cinema and television and holder of a majority stake in Canal+, a leading pay-TV operator).[84] In its analysis, the Commission found that the concentration would result in a company with the world's largest film library, the second largest library of TV programming in the EEA and the first acquirer of output deals signed with the US studios.[85] The Commission also found that Canal+ was likely to have, as a result of the concentration, exclusive access to Vivendi's movie rights.[86] In spite of the above, the Commission approved the acquisition. An amalgamation of behavioural and structural commitments was found to eliminate the anticompetitive concerns to which the concentration gave rise. For instance, Vivendi undertook to divest its entire stake in BSkyB and not to grant to Canal+ the first-window rights covering more than 50% of Universal's production thereby leaving the remaining 50% to other operators.[87]

A similar approach was followed in another high-profile (horizontal) merger, *NewsCorp/Telepiù*, dealing with a concentration by which media conglomerate News Corporation, active in various markets for the supply of broadcasting services, would acquire control, via a special purpose vehicle company, of the Italian pay-TVs Telepiù and Stream. Under the proposed transaction, Telepiù and Stream would merge their activities in a combined Direct-to-Home (DTH) satellite platform in which Telecom Italia, the Italian telecom incumbent, would hold a minority stake. [88] While the Commission found that the merged entity would have a monopoly as regards the DTH

[82] Commission Decisions *Deutsche Telekom/Beta Research*, op cit n 57, and *Bertelsmann/Kirch/Premiere*, op cit n 31, both of them adopted on 27 May 1998.

[83] According to a search by NACE code, the Commission has adopted, since May 1998, in the information and communication sectors 29 decisions subject to commitments, 20 under Article 6(1)(b) and 9 under Article 8(2). However, these numbers must be seen with caution as Commission Decision *BSkyB/Kirch Pay-TV*, op cit n 31, adopted in 2000 and declaring the concentration compatible with the common market under Article 6(1)(b), does not appear in the Commission's list.

[84] Commission Decision *Vivendi/Canal+/Seagram*, Case COMP/M. 2050 [2000] C 311/03, paras. 1 and 4-8.

[85] Ibid., para. 15.

[86] Ibid., paras. 49-50.

[87] Ibid., at pp. 20 and 22.

[88] Commission Decision *NewsCorp/Telepiù* op cit 30, paras. 1 and 7-9.

means of transmission and would also have all the possibilities and economic incentives to foreclose actual and potential competitors wishing to enter the market through the same or other means of transmission by raising rivals' costs and further barriers to entry, [89] it declared the concentration compatible with the common market subject to a number of both behavioural and structural remedies. For instance, News Corporation committed to waive exclusive rights for pay-per-view, video on demand and near video on demand on all platforms and not to conclude contracts exceeding the duration of two years with football clubs and of three years with film studios. It also undertook to offer third parties on a unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents for as long as the combined platform would offer such premium contents to its retail customers. Telepiù engaged in divesting its digital and analogue terrestrial broadcasting assets and not to enter into any further digital terrestrial television activities, neither as network nor as retail operator.[90]

In another case, concerning the acquisition by BSkyB, active in the pay-TV business in the UK and Ireland, of a stake in Kirch, developing similar activities in Germany and Austria, the Commission did not hesitate to clear the operation despite its concerns that the concentration would result in Kirch acquiring a significant power in the German markets for pay-TV and digital interactive television services.[91] Again, the transaction was permitted upon the condition that a bundle of commitments undertaken by the parties would be respected, all of them behavioral this time. Kirch agreed to offer access to its technical platform to all interested third parties so as to permit access to the infrastructure necessary for the provision of pay-TV services.[92] The parties to the deal also undertook that, in the event they acquired rights for the exploitation of a major live international sports event on a multi-national basis, they would not give to one another the status of preferred bidder for such rights by granting, for instance, a right of first negotiation, first refusal or first offer.[93] This condition was imposed so as to address the anticompetitive concerns resulting from coordinated behavior in the market for pan-European sports events in which the parties to the transaction were likely to engage post-merger.[94]

A package of behavioral commitments was also proposed in the more recent *SFR/Télé 2* case, dealing with the plans of SFR, jointly controlled by Vivendi and Vodafone, to acquire sole control of the Internet access and fixed telephony business of Télé 2.[95] This concentration was found to affect the pay-TV market. More particularly, the Commission feared that the planned operation was likely to provide Vivendi with the opportunity to give its SFR/Télé 2 subsidiary preferential access to the television content it had in its possession thereby giving Télé 2 a significant advantage over other

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[89] Ibid., para. 140.

[90] Ibid., para. 225, (c), (d), (i), (g) and (k).

[91] Commission Decision *BSkyB/Kirch Pay-TV*, op cit n 31, paras. 1, 5-7, 9, 51 and 80.

[92] Ibid., at p. 20.

[93] Ibid., at p. 25.

[94] Ibid., see, in particular, paras. 90 et seq.

[95] Commission Decision *SFR/Télé 2 France*, op cit n 30, para. 1.

DSL operators.[96] Such conduct could lead to a severe weakening of other DSL operators both in the downstream distribution market and in the upstream market for the acquisition of television content.[97] In order to eliminate these concerns, Vivendi undertook *inter alia* to grant DSL operators access to its channels and allow the latter to distribute all the channels to which it would give access to SFR/Télé 2 on normal market terms. These terms could not be less favourable than those provided to SFR. For the sake of transparency and in order to permit an adequate monitoring of this undertaking, Vivendi also committed to keep separate accounts for each channel distributed wholesale in this way.[98]

This shift from platform competition to regulated market concentration indicates the adoption of an alternative approach, one that suggests that the Commission has gradually succumbed to the wider consolidation trends governing the industry. It has been argued respectively that the Commission has become increasingly 'aware of the reasons that lead companies to seek further integration'[99] and has thus decided to follow an approach which 'heralds a new era of realistic appraisal of the underlying financial conditions in which the sector operates'.[100] These justifications are clearly economics-based and supportive of the policy goal to create strong European players in the broadcasting sector, which more often than not appears in relevant Commission Communications,[101] but without due regard to the unique features of the products offered by media firms. In that respect, supporting the Commission's tolerance of consolidation in the broadcasting markets on the grounds that it constitutes 'a more pragmatic approach' reflecting 'its acknowledgment that certain aspects of media might require higher levels of concentration than most industries'[102] is problematic to say the least. This industry is particularly one that calls for a cautious approach whereby facilitating concentration in order to reap the efficiency gains of a proposed operation or as a means to strengthen European competitiveness vis-à-vis third countries needs to be carefully balanced against other Union values, such as pluralism in the media.

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96 Ibid., see paras 92 et seq.

97 Ibid., para. 101.

98 Ibid., para. 117.

99 Mendes-Perreira, 'Vertical and horizontal integration in the media sector and EU competition law', Paper presented at The ICT and Media Sectors within the EU Policy Framework, ULB-SMIT, Brussels, 7 April 2003, 10, available at: http://ec.europa.eu/competition/speeches/text/sp2003_009_en.pdf

100 Alexiadis and Cole, 'Revisiting Competition Law and Regulatory Analyses of Consolidations in the Communications Sector', Financier Worldwide's Industry Sector Review: Technology, Media and Telecommunications Report (2004) 14, available at: http://www.gibsondunn.com/fstore/documents/pubs/Alexiadis_Comm_Sector_Comp_Law.pdf

101 See, for instance, Commission (EU), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Digital Agenda for Europe', COM (2010) 245, p. 7; Commission (EC), 'White Paper on Growth, Competitiveness and Employment: The challenges and ways into the 21st century', COM (93) 700 final, p. 104 and Commission (EC), 'Communication to the Council and European Parliament on Audiovisual Policy', COM (90) 78 final 1990, pp. 3 and 11.

102 Nikolinakos, op cit n 58, 170.

Being the principal actor deciding on media concentration at Union level, the Commission's role in striking this balance is of significant importance.[103]

Now while this move demonstrates a significant change in policy, it needs to be pointed out that both approaches (platform competition and regulated consolidation) are driven in essence by the same objective, this being to secure a diversity of suppliers in the markets affected by the operations under scrutiny. The Commission pursues this objective by ensuring access to the relevant markets or access to those key elements, namely premium content and infrastructure, which allow new entrants to establish in those markets.[104] Yet, in both cases, the effects of a concentration on content diversity have largely been ignored with only a few Commission decisions addressing relevant concerns. For instance, in *Bertelsmann/Kirch/Premiere*, dealing with the plans of CLT-UFA and Kirch to merge their digital television activities in Germany into the Premiere venture,[105] the Commission considered how the acquisition of significant market power by an undertaking active in both the pay- and free-TV markets could have a negative impact on the quality and variety of programs provided by free-to-air television. The Commission particularly stated that:

> '[t]he more varied and attractive the programs offered by the free broadcasters, the less incentive there is for viewers to subscribe to pay-TV as well. […] The attractiveness of a channel is largely dependent on the program rights available to it. When a television operator has a leading position in pay-TV and free-TV, and also holds the main program rights for free-TV and pay-TV, he is in a position to control the interaction between free- and pay-TV'.[106]

Similar considerations were also made in *NewsCorp/Telepiù*.[107] However, reference to the impact of the concentration on the variety of the content provided remains the exception rather than the rule with related issues having been taken into account only marginally in the relevant decision-making.

It seems that the Commission considers that the provision of diversified content depends on whether a diversity of suppliers operates in the relevant markets. In *Bertelsmann/Kirch/Premiere*, the Commission stated that '[s]ince the parties will wall off and control the market, *other potential providers of digital pay-TV and multimedia services will be unable to develop freely and without restriction*' [emphasis added].[108] Similarly, in *NewsCorp/Telepiù*, it found that, if the merged undertakings restrict access to premium content, '*potential competitors will not be in a position to create an alternative successful pay-TV*

[103] This point will be analyzed further below (Section 4) in discussing the Commission's obligation to take account of pluralism under its merger practice.

[104] This is the Commission's main concern when assessing mergers in the media sector. See, for instance, http://ec.europa.eu/competition/sectors/media/overview_en.html See also Mendes-Perreira, op cit n 99, 12.

[105] Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 1.

[106] Ibid., paras. 87-88.

[107] Commission Decision *Newscorp/Telepiù*, op cit n 29, para. 37.

[108] Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 122.

platform' [emphasis added].[109] This suggests that if the market remains open to competition other undertakings may carry out activities therein which could subsequently result in a wide range of programs the consumers can choose from. Nevertheless, taking into consideration the particularities of the broadcasting markets, securing a diversity of suppliers does not automatically guarantee a variety of contents. A good example illustrating why the relationship between the number of suppliers and output diversity is not causal and direct is how the main source of financing of free-to-air TV, this being advertising, affects the content that is made available for consumption. As broadcasters depend mostly on advertising revenues to survive, they usually opt for producing distributing programs that appeal to the masses with the aim to attract advertisers.[110] This means in practice that they tend to either offer programming similar to what has already proved successful for a competitor or recycle a program which received good audience ratings in the past such as a popular TV comedy series, rather than invest in original programming which involves a significant expenditure and high risks or programming which serves the needs of cultural or linguistic minorities and attracts too small an audience to generate cost-recovery revenues. Thus, companies in a competitive broadcasting market may be conducive to filling the same middle ground[111] and, for this reason, an anomaly may arise whereby a considerable amount of broadcasters does not automatically provide a wide range of distinct programs the viewers can choose from but may rather lead to program duplication.[112] The Commission's persistence to secure a diversity of suppliers seems to ignore such attributes that distinguish the broadcasting markets from other industries thereby creating *lacunae* in the relevant decision-making.

A final point is made here as regards remedies. In mergers generally, the Commission prefers structural to behavioral commitments, as the former do not require medium or long-term monitoring measures.[113] Nevertheless, taking into consideration the cases previously discussed, the same conclusion cannot be drawn for the decisions that were adopted in the broadcasting sector with the Commission approving relevant operations subject to both structural and behavioral undertakings. Therefore, in several cases, it considered that divestiture of assets was not enough to eliminate the relevant anticompetitive concerns[114] and did not hesitate to put aside issues relating to the high

[109] Commission Decision *Newscorp/Telepiù,* op cit n 29, para. 184.

[110] Ariño, *Regulation and Competition in European Broadcasting. A study of pluralism through access*, PhD thesis, Florence, European University Institute, Department of Law, 2005, 58.

[111] Prosser, The limits of competition law: Markets and Public Services, Oxford, Oxford University Press, 2005, 209.

[112] Craufurd-Smith, op cit n 27, 653.

[113] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C 267/1, paras. 15 and 69.

[114] In Commission Decision *AOL/Time Warner*, Case COMP/1845 [2001] OJ L 268/28, which was adopted in 2000, the Commission considered that the structural undertakings proposed by the parties were enough for the transaction to go ahead. The approach followed in *AOL/Time Warner* must be seen in comparison to the most recent decisions adopted with conditions and obligations, for instance, Commission Decisions *SFR/Tele2*, op cit n 30 (adopted in 2007), and *NewsCorp/Premiere*, Case COMP/M. 5121 [2008] OJ C 219/4 (adopted in 2008), that were approved subject to behavioural commitments. This suggests a move to

monitoring and other enforcement costs that behavioral remedies may involve.[115] Undoubtedly, the latter 'offer a more customized, efficiency preserving approach to avoiding potential problems'[116] which suggests that the Commission has acknowledged to a certain extent the particularities of the broadcasting sector. However, as previously seen, the content-related behavioral remedies that the Commission has approved thus far are remedies that aim at ensuring access to premium content. Such commitments focus on guaranteeing a diversity of suppliers in the relevant markets rather than content diversity, the latter not necessarily having a direct or causal link to the former as previously discussed. Indeed, premium content is vital for an undertaking wishing to either penetrate the market or maintain its presence therein. Yet, the content in question, be it a major sports event or a Hollywood film, does not change irrespective of whether it is broadcast by the merged undertakings or a third operator not party to the transaction.

3.2 Public policy considerations in the Commission's merger practice: How decisive are they?

The Commission may have regard to public policy considerations when it is called upon to assess whether a concentration between media undertakings is compatible or not with the common market. The Treaty itself, in its Article 167(4) TFEU, establishes the legal basis for such an approach as it envisages the Commission's obligation to take cultural aspects into account when action is undertaken in the framework of the Union's competition policy. Besides this provision of constitutional character, Article 2(1)(b) of the Merger Regulation identifies several factors that the Commission must bear in mind when scrutinizing a merger, such as the interests of the intermediate and ultimate consumers and the development of technical progress. The considerations laid down in these provisions are the ones that have most commonly been referred to by the Commission in the decisions adopted thus far. The question which therefore inevitably arises and seeks for an answer in this section is whether and, if so, to what extent the Commission has made use of the possibilities offered by the aforementioned provisions so as to protect, in the context of a merger assessment, Union values other than undistorted competition in the common market. It is noted that the cases discussed below concern mainly operations affecting the broadcasting markets; however, where appropriate, reference is also made to decisions dealing with concentrations in other media-related industries to complement the analysis.

Public policy considerations under Article 2(1)(b) of the Merger Regulation: Technological development and the interests of the consumers

In *Bertelsmann/Kirch/Premiere*, which dealt with the plans of CLT-UFA and Kirch to merge their digital television activities in Germany into the Premiere venture,[117]

behavioural remedies that seem to be considered by the Commission more appropriate to eliminate the concerns to which concentrations in the broadcasting sector give rise.

[115] OECD, op cit n 36, 8.

[116] Ibid.

[117] Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 1.

previously referred to, the parties to the agreement stressed that the realization of the project required significant levels of investment. On that basis, they argued that it was only by joining forces that the infrastructure necessary for the breakthrough of digital television in Germany could be established and thus the envisaged operation, if it were to be permitted, would promote technical progress.[118] In its assessment, the Commission considered respectively that if, as a result of the concentration, the parties managed to secure the general acceptance of digital television in the German market, they would foreclose the market in digital pay-TV and bring it under their control on a lasting basis thereby making it impossible for the market to develop on a competitive basis.[119] The Commission further stated that, even if the project advances technical progress by contributing to the general acceptance of digital television, that contribution is irrelevant under the Merger Regulation, on the grounds that the criterion of technical progress contained in its Article 2(1)(b) is subject to the condition that it does not form an obstacle to competition.[120] It is reminded here that, after conducting the relevant analysis, the Commission found that the notified concentration was likely to impede effective competition in the affected markets[121] and thus the argument that the operation would stimulate technological development could not be accepted. The Commission's stance in the above decision, which accords with the wording of Article 2(1)(b) of the Merger Regulation, leaves no doubt that if a concentration is likely to distort competition, it will be prohibited even if it endorses the value of technological development. The same approach was followed a few years earlier in *MSG Media Service*. The Commission stated respectively that while '[i]t is true that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress […] the reference to this criterion in Article 2(1)(b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition'. [122]

A different approach is followed in *NewsCorp/Telepiù*. In its analysis, the Commission found that the concentration would lead to the creation of a near-monopoly in the pay-TV market in Italy[123] and that the conditions for the transaction to qualify as a rescue merger because of the financial difficulties faced by Stream were not fulfilled.[124] Nevertheless, the Commission argued that the risk of Stream exiting the market, if it were to materialize, was a factor to take into account in its assessment and considered that the authorization of the merger subject to conditions would be more beneficial to consumers than a disruption caused by a potential closure of Stream.[125] The Commission's reasoning seems to have been underpinned by the fact that neither

[118] Ibid., para. 119.

[119] Ibid., para. 122.

[120] Ibid.

[121] Ibid., paras. 100 and 118.

[122] Ibid., para. 100.

[123] Commission Decision *NewsCorp/Telepiù*, op cit n 29, para. 114.

[124] Ibid., para. 205 et seq.

[125] Ibid., para. 221.

Stream nor Telepiù had ever been profitable. It was therefore likely that one of them would exit the market anyway; this could further lead to the creation of an unregulated monopolist. On that basis, the Commission felt that 'regulated' consolidation was less detrimental to Italian pay-TV subscribers.[126] Yet, it reached this conclusion without making any reference to Article 2(1)(b) which establishes its obligation to consider the consumers' interests in a merger analysis and, most importantly, without further substantiating in which way the consumers would be worse off were Stream to exit the market. And, while a reading of the decision seems to indicate that the Commission took into account such interests as an exception to competition, it is difficult to define the extent to which their protection determined its reasoning.

In both *Berterlsmann/Kirch/Premiere* and *MSG Media Service*, the Commission's reasoning was not limited to considering that, while a concentration may promote technological progress, such progress should not be realized at the expense of a competitive market structure. It further expressed serious doubts about whether the projects under scrutiny would in fact have that effect as, to the extent that the merger would create significant entry barriers, it was likely to inhibit initiatives sought to be undertaken by other potential providers of digital pay-TV and multimedia services. In that regard, the Commission concluded that '[t]here is reason to fear that technical and economic aspects of the development of digital television and other digital services will be adversely affected by this'.[127] Similar considerations were made in *Deutsche Telecom/Beta Research*, where the Commission underlined the risk that the d-box developed by Beta Research would become the digital standard and thus, all new operators would be dependent on Beta Research's licensing policy.[128] Based on the above, it appears that the Commission draws a direct link between effective competition and technical progress and takes the view that in securing the former it automatically caters for the latter.

Public policy considerations under Article 167(4) TFEU: Cultural diversity and media pluralism

In *Bertelsmann/Planeta/Circulo*, the Commission was called upon to assess a concentration by which Planeta, involved in the production of news and cultural, educational and entertainment content for the Spanish and French-speaking markets, would acquire, jointly with the German publishing group Bertelsmann, control of Círculo, primarily active in the sale of books.[129] After conducting the relevant analysis, the Commission found that Círculo had a small presence in the markets affected by the transaction.[130] On that basis, the Commission considered that the notified operation would not have any significant impact on the diversity of books made available to

[126] Nikolinakos, op cit n 58, 168.

[127] Commission Decision *Bertelsmann/Kirch/Premiere*, op cit n 31, para. 122. The same conclusion was reached in *MSG Media Service*, op cit n 49, see, in particular, para. 101.

[128] Commission Decision *Deutsche Telecom/BetaResearch*, op cit n 57, paras. 37 et seq.

[129] Commission Decision *Bertelsmann/Planeta/Circulo*, Case COMP/M.5838 [2010] OJ C 228, paras. 1-5.

[130] Ibid., see in particular, paras. 39, 49, 57 and 59.

consumers and was therefore unlikely to menace cultural diversity.[131] It is noted that the Commission did not conduct a detailed analysis of the variety of products offered by Círculo and thus the market shares the latter held in the relevant markets were the only factor that it took into account in order to reach that conclusion. The Commission thus established a relationship between market power and cultural diversity and found that a concentration which is not likely to distort competition is not alarming for cultural diversity either but without considering, for instance, how the editorial content of Círculo could be dictated by the parent companies thereby reducing the variety of content produced by the acquired undertaking. A similar approach was followed in *Bertelsmann/KKR* in which Bertelsmann and Kohlberg Kravis Roberts notified their intention to establish a jointly controlled music publishing and rights management undertaking.[132] After conducting the competitive assessment, the Commission concluded that the notified deal would not significantly impede effective competition within the common market and, for this reason, it was also unlikely to have a negative impact on cultural diversity[133] without, however, discussing how the latter would, in accordance with Article 167(4) TFEU, be respected and promoted as a result of the proposed operation. It is also worth mentioning that in other decisions, which were found to affect the broadcasting markets, for instance, *SFR/Télé 2*[134] and *Unitymedia/LGE*,[135] the Commission refrains from making any reference to the effects of the concentration on cultural diversity.

In *NewsCorp/BSkyB*, the Commission scrutinized a concentration by which News Corporation, involved in the production and distribution of filmed entertainment, TV programming and broadcasting,[136] would acquire sole control of BSkyB,[137] active in a variety of sectors in the UK and Ireland such as the creation and wholesale supply of TV channels, retail distribution of pay-TV channels and provision of pay TV technical services.[138] In addition to the possible anticompetitive effects that it was likely to create,[139] the proposed concentration also gave rise to serious pluralism concerns on the grounds that, if it were to be permitted, it would give media entrepreneur, Rupert Murdoch, a dangerous level of control of the UK media.[140] In its decision, the Commission assessed the competitive impact of the notified operation on the relevant markets, but it adopted a hands-off approach regarding the pluralism-related issues. More particularly, in respect of the impact of the proposed transaction on media plurality, the Commission referred to Article 2(3) of the Merger Regulation in order to stress that the latter entrusts it with appraising mergers of EU dimension solely on

131 Ibid., para. 16.

132 Commission Decision *Bertelsmann/KKR*, Case COMP/M.5533 [2009] OJ C 240/01 para. 1.

133 Ibid., para. 79.

134 Commission Decision *SFR/Télé 2*, op cit n 30.

135 Commission Decision *Liberty Global Europe/Unitymedia*, Case COMP/M. 5734 [2010] OJ C36/1.

136 Commission Decision *News Corp/ BSkyB*, op cit n 28, para. 3.

137 Ibid., para. 1.

138 Ibid., para. 4.

139 Ibid., para. 28.

140 See, for instance, http://www.bectu.org.uk/news/1076

competition grounds[141] and avoided to make any mention of Article 167(4) TFEU which would provide the basis for an alternative approach. The Commission, therefore, limited its role to ensuring the protection of undistorted competition thereby leaving outside the scope of its analyses the possible effects of a merger on media pluralism and further took the stance that it is not its job to take into consideration whether such value is at stake as a result of a concentration. On this basis, it concluded that relevant concerns are for the UK authorities to address under Article 21(4) of the Merger Regulation[142] and, after conducting the competitive assessment, it decided to approve the concentration as it found that it did not raise serious doubts as to its compatibility with the common market. [143]

The above analysis sufficiently proves that public policy considerations have, at the most, played a marginal role under the Commission's merger practice. For instance, the approach followed in *MSG Media Service* and *Bertelsmann/Planeta/Circulo*, suggests that the Commission perceives technological progress and cultural diversity as a spontaneous result delivered by the undistorted functioning of the markets, objectives whose realization depends on the outcome of market forces. In *Newscorp/Telepiù*, the interests of the consumers seem to have been taken into account as an exception to competition policy but, as it has already been mentioned, the Commission abstained from conducting a detailed assessment to substantiate this finding and therefore, the extent to which such interests determined the outcome of the decision is not quantifiable. Lately, the Commission seems eager to distance itself from the protection of objectives that it does not consider relevant in the context of European merger control, the *Newcorp/BSkyB* decision being the most prominent example of this approach.

4. RETHINKING THE COMMISSION'S MERGER PRACTICE IN THE BROADCASTING SECTOR: EXERCISING MERGER CONTROL IN A PLURALISM-FRIENDLY MANNER

The Commission's role in safeguarding pluralism in the media has been extensively discussed and more often than not it is argued that the latter, due to the Union's competence limitations in the cultural domain, lacks the power to effectively protect this value.[144] More particularly, media pluralism has been perceived as a matter left upon the Member States to define and protect in accordance with national cultural traditions, the Commission being limited to ensuring that a merger operation will not significantly impede effective competition in the common market.[145] In that regard,

[141] Commission Decision *News Corp/ BSkyB*, op cit n 28, para. 306.

[142] Ibid., para. 309.

[143] Ibid., para. 310.

[144] See, for instance, Klimkiewicz, op cit n 27, 68 and European Publishers Council, 'Media Pluralism and the future of Professional Journalism' (2011) 2, available at: http://www.epceurope.org/factsheets/EPC_%20Media%20Pluralism%20and%20Journalism%20April%202011.pdf

[145] See, for instance, European Newspaper Publishers' Association, 'Response to the Commission Issues Paper on Media Pluralism – What should be the European Union's role?' (2005) 2, available at: http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-enpa.pdf

pluralism constitutes a social and political value which cannot be taken into account when conducting an economic analysis, driven by efficiency and welfare considerations. The derogation laid down in Article 21(4) of the Merger Regulation, on the basis of which national law may take precedence over EU competition law in cases where a concentration endangers media plurality in a Member State, is said to strengthen the view that the Commission's role in assessing a media merger is restricted to securing that the operation will not result in undue distortions of intra-Union competition.[146]

These arguments are far from convincing. Indeed, there are limits as to how far the Union can act in the field of media with Article 167(5) TFEU excluding the adoption of a legislative instrument aimed at the protection of a pluralistic media landscape across the Union through the harmonization of national media policies.[147] Nevertheless, pluralism is a Union value which thus needs to be protected when action is undertaken to implement its policies. This has long been acknowledged by the Union's institutions and is laid down in several Council[148] and European Parliament Resolutions[149] as well as hard-[150] and soft-law[151] instruments adopted by the Commission. In relevant political declarations, members of the Commission refer to pluralism as a 'sacred principle',[152] 'crucial for the democratic process in Member States and in the European Union as a whole' and 'the lifeblood of democracy'.[153] Additionally and most importantly, as previously discussed, Article 167(4) TFEU lays down that the Commission must take cultural aspects into account in the framework of the Union's competition policy. To this one must add Articles 11(2) and 51(1) of the Charter of Fundamental Rights that establish the Commission's responsibility to respect and promote pluralism. These provisions of constitutional character are not mere declarations but impose upon the Commission an obligation to cater for pluralism when implementing the Union's competition policy. The above considerations reinforce the argument that European competition law does not operate in a *vacuum* but rather as an *apparatus* used for the realization of the European project, the free-market objectives being only one of its

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[146] See, for instance, Commission Staff Working Paper on Media Pluralism in the Member States of the European Union, op cit n 4, 7.

[147] Article 167(5) TFEU lays down that '[i]n order to contribute to the achievement of the objectives referred to in this Article, the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States'.

[148] See, for instance, Council Resolution of 21 January 2002 on the development of the audiovisual sector [2002] OJ C 32/4.

[149] See, for instance, European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).

[150] See, for instance, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 332/27, Recitals 34, 48 and 94.

[151] See, for instance, Commission (EU), Broadcasting Communication, op cit 3, para. 47.

[152] Statement made by current Commission President, Jose Manuel Barroso, concerning the implementation of a controversial media law in Hungary. For more details see: http://www.euractiv.com/future-eu/barroso-media-freedom-our-sacred-principle-news-501012

[153] Statements made by Viviane Reding and Margot Wallström, op cit n 9.

several aspects. The Union's competition policy is not the highest value in the Union but one that needs to be reconciled with other values such as media pluralism.

On the basis of the above, merger control needs to be exercised in the spirit of the overall objectives pursued by the Treaties. This stance is also corroborated by the Merger Regulation which, in its Recital 23, stipulates that, while under its provisions the Commission is primarily entrusted with appraising whether a concentration significantly impedes effective competition in intra-Union trade, such an appraisal must be placed within the general framework of the achievement of the fundamental objectives laid down in the Treaties, among which are respect for cultural diversity and social cohesion. Media pluralism is clearly a facet of these objectives. Media foster cultural diversity through the provision of services that serve the needs of linguistic and cultural minorities and, in the context of a more integrated Union, promote national cultural identities whilst bringing closer the Union's peoples.[154] Additionally, ensuring media pluralism means in essence 'providing a space for dialogue, while responding to the specific needs or requests of certain groups in civil society and serving as a factor of social cohesion and integration'.[155] Besides Recital 23, Article 2(1) which, as discussed above, binds the Commission to consider the interests of the intermediate and ultimate consumers, allows the Commission to take into account the particularities of the broadcasting markets, and in particular the viewers' multifaceted interests, these not being limited to low prices but also encompassing a variety of sources of information and entertainment and a wide range of differentiated products to choose from.

Now, taking due account of the powers vested in the Commission under the competition law provisions of the Treaty and the Merger Regulation, I do not advocate for the development of a media merger practice dedicated to conducting politically contentious assessments. The Commission is not entitled to block a merger based on a gut feeling that the concentration under examination is likely to harm pluralism. However, the provisions referred to above do not merely leave scope for the Commission to conduct the relevant analyses in a pluralism-friendly manner but impose a duty to acknowledge that media services are unlike other commodities which present particularities, in particular due to their ability to shape public opinion, that need to be considered in a merger appraisal. Furthermore, the exception under Article 21(4) of the Merger Regulation does not mean that the Commission may adopt a decision that ignores the pluralism aspects that arise in a case falling under its scrutiny but that the Member States, in case they find that a concentration endangers plurality in their national media landscape, may impose stricter standards to ensure an adequate

[154] See, for instance, Council of Europe Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions, 'Report on Media Diversity in Europe' (2003) 7, available at: http://merlin.obs.coe.int/redirect.php?id=1327 See also Raboy, 'Background Paper for UNESCO on media pluralism and the promotion of cultural diversity' (2007), available at: http://media.mcgill.ca/files/unesco_diversity.pdf

[155] Council of Europe, Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue adopted by the Committee of Ministers on 11 February 2009 at the 1048th meeting of the Ministers' Deputies, available at: https://wcd.coe.int/ViewDoc.jsp?id=1409919

level of protection. Moreover, the fact that Article 21(4) has played a rather ornamental role to date[156] thereby suggesting that the Member States are more than willing to leave the fight against media moguls to the Commission and thus avoid the pressure from powerful media lobbies, combined with the fact that the provision of media services transcends national frontiers now more than ever, strengthen the Commission's responsibility to cater for a Union value which, though is also a national value and in principle is thought to be better served at national level, seems to have been neglected by domestic policies. And, while the Treaty does not provide a basis for non-economic pluralism-specific considerations to be taken into account as an exception to competition, there seems to be plenty of room to inject such considerations in relevant merger analyses.

An overview of the Commission's practice revealed that broader goals as the ones envisaged in Article 2(1) of the Merger Regulation and Article 167(4) TFEU have received limited attention in the few cases they were considered. Additionally, an analysis of the relevant decision-making provided sufficient proof that the Commission has mostly focused on securing a diversity of suppliers in the relevant markets with the effects of the concentration on content diversity having hardly been discussed in merger cases. However, it is well accepted that undertakings also compete on quality, service and innovation. The Commission itself acknowledges in its Guidelines on the assessment of horizontal and non-horizontal mergers the non-price dimensions of effective competition such as high quality, a wide selection of goods and services, and innovation, and takes the stance that its mission is to prevent mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An increase in market power in that regard refers to 'the ability of one or more undertakings to profitably increase prices, *reduce output, choice or quality of goods and services or diminish innovation*' [emphasis added].[157] It has convincingly been argued

[156] The Member States have made very limited use of this provision. The most well known case in the media sector concerns the Newscorp's proposed acquisition of BSkyB, a concentration that was discussed in more detail in the previous section. As I already mentioned, the Commission found the operation to be compatible with the common market, however, the UK authorities, due to the negative impact on pluralism that the concentration was likely to have in the UK, decided to take further action. The Secretary of Business, Innovation and Skills, who may intervene in mergers involving newspapers and/or broadcasting companies on public interest grounds, issued a 'European intervention notice', making the proposed operation subject to an additional review on media plurality issues by the competent UK authorities, namely OFT and Ofcom. After several undertakings proposed by the parties to the deal, the Secretary of State was, on the basis of the advice he received from OFT and Ofcom, to give the green light to the proposed transaction. However, due to a phone hacking scandal in which it was found to be involved the same period of time that the deal was being negotiated, Newscorp ended up dropping its plans to take full ownership of BSkyB. For an overview of this case see, for instance: http://blogs.lse.ac.uk/mediapolicyproject/resources/dossier-media-plurality/ It is also worth mentioning that the Member States have also made very limited use of the referral mechanism provided for by the Merger Regulation: According to a search by NACE code, the Commission has adopted 377 decisions in the media and telecommunications industries, including decisions in the publishing, broadcasting and telecommunications sectors. Out of these 377 cases, only 11 have been referred to the competent authorities of the Member States, 9 of them fully and 2 partially. Therefore, the referrals merely represent 3% of these decisions. The Commission has refused to refer a notified operation to a Member State only in two cases.

[157] Commission (EU) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, para. 8 and Commission (EU) Guidelines

that these dimensions of competition are 'of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices'.[158] The integration of such elements in relevant assessments does not solely encompass aspects of competition that need to be considered in the appraisal of mergers affecting the media markets but may also address pluralism concerns. As the Commission stated in its Staff Working Paper on Media Pluralism in the Member States of the European Union:

> '[m]edia pluralism is a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member States. […] *Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism*' [emphasis added].

Therefore, the appraisal of the effects of a merger on content diversity takes due account of dimensions of competition which more often than not drive the firms' behaviour to differentiate their products from the ones offered by the competitors and attends to pluralism issues that may arise in a merger case. In that regard, the incorporation of pluralism-specific considerations makes a merger analysis more complete and endorses a Union value which the Commission is bound to respect.

Now, the Commission's duty to accommodate to pluralism under its merger practice and the fact that content diversity is also relevant in competition law analyses call for the adoption of additional criteria which, while they need to be applied in media merger appraisals, have been ignored. The direction followed in the recent *NewsCorp/BSkyB* case, discussed above, in which the Commission drew a line between competition and media plurasm assessments stating that '*the focus in merger control is whether there is* a significant impediment to effective competition, including *the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger*' [emphasis added][159] shows that the latter is concerned with protecting price competition thereby neglecting its non-price dimensions already discussed above. Rapid technological developments that change broadcasting as we know it, such as the digital switchover and the increasing popularity of web-TV as a method to consume the content broadcast, and the continuing consolidation in the media industry in general, which gives rise to both competition and pluralism concerns now more than ever before, urge the Commission to modify certain flawed aspects of its practice.

I would now like to draw attention to an example of how pluralism-specific considerations can form part of a merger analysis in case two free-to-air broadcasters merge. In relation to the definition of the relevant product market in free access television, it has sufficiently been demonstrated above that the approach adopted by the Commission is incomplete because it does not conduct a substitutability assessment for one of the markets affected by the concentration, namely the market for audiences.

on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, para. 10.

[158] Stucke and Grunes, op cit n 41, 279.

[159] Commission decision *Newscorp/BSkyB*, op cit n 28, para. 307.

The Commission's focus on securing competition in the advertising markets neglects the viewers' preferences and fails to take account of the interaction between the two sides. This inevitably leads to a competitive assessment that abstains from considering the impact of the merger on the market for the supply of content. It has also been demonstrated that the Commission's perception of trade is flawed in that between the broadcaster and the viewer there is an exchange of value, which though not monetary, can properly be defined as trade. Therefore, the trade relationship criterion is equally applicable to the market for audiences. In that regard, besides the relevant advertising markets, the Commission also needs to define the relevant market for audiences before proceeding to the competitive assessment of the merger.

As a method to define the relevant product markets for the supply of free content, the Europe Economics report, already referred to, suggests the application of a hypothetical monopolist test underpinned by changes in quality rather than price. In general, the hypothetical monopolist test is based on the likely response of customers to a small permanent increase in price of the products under examination whilst keeping all other factors, in particular the price of the products not assumed to be provided by the hypothetical monopolist and the characteristics of all products, constant. Now where a need to define a market for audiences in free-to-air television arises, the test can be framed in terms of the likely response of customers to a small permanent increase in quality of the products under examination while holding other factors, namely the quality of the products not assumed to be provided by the hypothetical monopolist as well as the prices of all products, constant.[160] The report acknowledges the difficulties that arise when attempting to apply such a test in that quality is a subjective variable, but it manages to identify a change to a dimension of quality that is probably the most universally acceptable negative change in quality in free-to-air television, this being an increase in the number of advertising minutes per hour. On the basis of this factor, it is possible to run a hypothetical monopolist test by considering the likely effects of a small but significant increase in the number of advertising minutes per hour, keeping other broadcasters' content constant. If this change is expected to lead viewers to watch more of the other available channels, this would imply that the broadcaster competes in a wider viewer market including these other channels. If, however, this change is expected to lead the broadcaster's viewers to spend less time watching television, this would indicate that the broadcaster holds significant power in attracting viewers to its content.[161] For the sake of accurateness, the report also suggests that it may be more adequate to define these markets at a less aggregated level and proposes respectively to make distinctions by type of program and by time of day.[162]

This market definition analysis can be further complemented with survey evidence, which the Commission itself acknowledges as an appropriate type of evidence in order

160 Europe Economics, op cit n 34, 88.

161 Ibid., 89.

162 Ibid.

to assess whether two products are demand substitutes[163] and has extensively been used in merger investigations in other industries.[164] The Europe Economics report makes reference to the following factors that the Commission may take into consideration when conducting such surveys: What do consumers see as close substitutes? What are the consumers' switching rates and what are their drivers? What do consumers see as barriers to substitution to similar products?[165] The use of similar qualitative criteria to measure the success of a program has been suggested by the Copé Commission, which was set up by the French government with the objective to examine how to introduce a new public television. These criteria comprise: a. Measurement of the program's impact (What do we remember? What is the influence of the program?), b. Measurement of the program's audience and of its derivatives on all platforms/networks and on a long-time period, c. Measurement of the usage rate (percentage of persons having used at least once a service offered by the broadcaster on a given period) and d. Measurement of the program's cost/efficiency ratio by taking into consideration the particularities of each genre.[166] Relevant information can be obtained from the parties to the transaction but also from any other source that the Commission considers necessary in order to conduct a complete analysis,[167] for instance, national media regulators that more often than not gather such data and elaborate relevant research reports as well as independent consultancies that are active in measuring audiences.

Once both markets have been defined, the Commission will need to scrutinize how the said markets will be affected by the proposed operation. Insofar as advertising markets are concerned, the effects of the concentration on price competition therein must be considered. But, as regards the market for audiences, the impact of the merger on content diversity should occupy the key role in the relevant examination. This point has been highlighted by Averitt and Lande who, in discussing how US antitrust and consumer protection laws support one another as the two component parts of an overarching unity, this being consumer sovereignty, note that in certain sectors (among them broadcasting) diversity of options may be far more important to consumers than price competition. They particularly take the view that price may be an inadequate factor to measure such effects in cases where media markets are involved and state respectively:

> 'If the owner of one communications medium were to buy another firm of the same kind, the acquisition might not concentrate the market sufficiently to

163 Commission notice on the definition of relevant market for the purposes of Community competition law, op cit n 33, para. 41.

164 See, for instance, Commission decisions *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6 and *KLM/Martinair*, Case COMP/M. 5141 [2009] C 51/4.

165 Europe Economics, op cit n 34, 125.

166 Commission pour la nouvelle télévision publique 2008, 15 (translation from French), 'Rappor présenté au Président de la République par Jean-François Copé le 25 juin 2008', available at: http://www.culture.gouv.fr/culture/actualites/dossiers/Rapport_Cope/rapport_commission.pdf

167 See, in particular, the EC Merger Regulation, op cit n 25, Article 11(1) and DG Competition report on best practices on the conduct of EC merger control proceedings (2004) paras. 26-28, available at: http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf

> 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, and this 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 suggests that media mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming and, where that loss is sufficiently severe, that they be challenged under the Clayton Act, even if there has been no showing of harm to price competition'.[168]

Averitt and Lande illustrate this point by giving the example of a merger in the book publishing sector. They note that, while such a concentration may not necessarily result in higher prices, it is likely to lead to a decrease in editorial diversity and 'thus, to a narrowing of the competing marketplace options expressed in terms of the types of titles offered' which can be challenged under the 'ordinary, universal standards of Section 7, once that Section has been properly construed to recognize the role of options and of non-price competition.'[169] Stucke and Grunes take the same position in discussing how US antitrust law can be modified so that it can include in the relevant analyses the marketplace of ideas.[170] These arguments, which suggest a change in approach and thus a different interpretation of the relevant legislative instruments in order to assess the impact of a concentration on editorial competition, are equally valid for the Commission's relevant decision-making.

In our example, after considering the impact of the concentration on both markets, the Commission may find that the merger is not likely to significantly impede competition in the advertising markets but that it is likely to be detrimental to content diversity. In this case, it will need to assess how serious is the competitive harm to the variety in the range of contents available. Again, customer surveys may allow the Commission to measure such harm. If, on the basis of survey evidence, viewers do not mind giving up diversity, the Commission should permit the merger. If, on the contrary, the viewers value content diversity and find the effects of the concentration to be severe, then the Commission should block it or allow the deal to proceed upon appropriate conditions. And, when it comes to deciding which are the appropriate remedies to eliminate the anticompetitive concerns to which such a merger gives rise, the following considerations must be made. Structural remedies may contribute to reducing the market power of the parties to the transaction. However, how can structural remedies contribute to promoting content diversity if the divested undertaking is acquired by another powerful media market player? As it has correctly been stressed, 'it is questionable whether a change in market dominance from one company to another actually results in a change in services to viewers because they are still faced with little

[168] Averitt and Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) Antitrust Law Journal (65) 752-753.

[169] Ibid., 753.

[170] Stucke and Grunes, op cit n 41, 298.

choice'.[171] There are therefore limits as to how far structural solutions can go to secure content diversity that the Commission needs to consider depending on the particularities of the case. Behavioural remedies are said to serve a more tailor-made approach. Yet, the extent to which the latter ensure a certain degree of content diversity depends on the types of remedies chosen. The analysis made above suggests that, while the relevant undertakings accepted by the Commission thus far aim at ensuring access to premium content whose acquisition is undoubtedly a condition for firms to both enter the market and maintain a presence therein, they do not necessarily promote content diversity. Therefore, in certain cases, it may be more adequate to require the broadcaster to, for instance, acquire a share of its content from independent producers with the aim to preserve competition in the content market.[172]

5. CONCLUSIONS

The analysis of the Commission's merger practice in the broadcasting sector sufficiently proves that the latter has abstained from considering the effects of a concentration on the variety in the range of contents available. This approach is flawed in that content diversity in such assessments is also relevant and thus the practice it developed thus far neglects to a great extent the particularities of the broadcasting industry. Yet, appraising the effects of a concentration on content diversity is not only a legitimate subject for merger analyses but it is also the Commission's duty under both primary and secondary Union law. It was shown, however, that its focus on securing a diversity of suppliers fails to fully embrace pluralism and thus the direction it followed to date is inadequate. In the context of the continuous consolidation in the broadcasting industry, pluralism is at stake and therefore the problematic decision-making that the Commission has developed needs to be modified sooner rather than later.

Surely, the extent to which the values of competition and pluralism coincide is debatable. Differences in how the notion of public interest is perceived by each value or antitheses as to which are to be considered acceptable levels of industry concentration make such conciliation a challenging exercise. And, while there are cases in which a competition agency is entrusted with protecting both the undistorted functioning of the markets and the preservation of a pluralistic media landscape through the application of general competition law and sector-specific legislation,[173] the preceding analysis shows that the EU framework is not so clear-cut. Both the Treaty and the Merger Regulation bind the Commission to take due account of pluralism in a merger assessment but without further substantiating how to do so. This means in essence that it is the Commission's responsibility to develop its practice in a pluralism-friendly manner. Nevertheless, the Union's limited competence to regulate for

[171] Harrison and Woods, op cit 51, 161.

[172] OECD, op cit n 36, 8.

[173] This is the system envisaged by several Member States that apply, as a means to ensure media pluralism, general competition law complemented by sector-specific legislation. See, for instance the case of Greece: When it is called upon to assess concentrations in the media, the Hellenic Competition Commission applies, in addition to general competition law, Law 3592/2007. For more information see: http://www.epant.gr/img/x2/categories/ctg244_3_1193312884.pdf

pluralism combined with the fact that the Union's legislative agenda does not seem to include the adoption of such an instrument in the near future, should not be used as an excuse to leave aside the particularities of the broadcasting markets and ignore the protection of a Union value when implementing the Union's competition policy. Integrating pluralism-specific considerations in a merger analysis is undoubtedly far from an easy task but then again, as Chairman Pitofsky correctly noted, '[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws'.[174]

[174] Pitofsky, 'The Political Content of Antitrust' (1979) U. Pa. Law Review (127) 1051.