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## Editorial - Media Markets: A Crucible for Assessing the Intrinsic and Extrinsic Challenges for Competition Law and Policy

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The media and communications industries comprise a significant and dynamic component of the wider economy in the UK and in Europe.<sup>1</sup> Yet, the likely future development of these market sectors has been rendered highly uncertain. The associated drivers of technological innovation, digital convergence and the advent and consolidation of new media have provoked both the dismantling or sublimation of long-standing business models, and the emergence of previously unconceived-of alternatives.<sup>2</sup> There have been tectonic shifts in industry structures with new entrants quickly seizing enormous market shares. The dangers attendant on potentially long-lasting market dominance have immediately suggested themselves. At the same time, there has been concern that if market strength can be fast-won it may be correspondingly unstable, and that regulatory interventions hastily undertaken may be proven to have been unnecessary, perhaps even iatrogenic, by the passage of time. All the while, the theoretic and analytical difficulties introduced by this technologically-driven state of flux are compounded by the socio-political importance of the outputs that characterise the sector. The media is important not only for its contribution to the economic 'bottom-line'. State - and political interests more generally - may have influenced economic potentiality too far; or perhaps not enough. For these reasons, media markets provide a crucible in which many of the most challenging issues - both intrinsic and extrinsic - that face competition policy today can be observed.

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<sup>1</sup> In the most recent iteration of its annual review of media and communications markets, Ofcom noted that total UK sector revenues amounted to £53.2bn in 2011, with telecoms revenues standing at £39.7bn, television revenues (advertising and subscription) at £12.3bn, and radio revenues at £1.2bn - see Ofcom, *Communications Market Report 2012* (London: Ofcom, 2012). Available at: [WWW] <http://tiny.cc/z8nqow> (accessed December 2012). It has been estimated that in 2010 the total newspaper market in the UK enjoyed revenues of around £5.8bn per annum (Key Note, *Newspapers Market Report 2012* (Teddington: Key Note, 2012)), the books and magazine publishing markets were valued at around £9bn in 2009 (Key Note, *Publishing Industry Market Review 2010* (Teddington: Key Note, 2010)), while the market for films was valued at £4.2bn in 2008 (Key Note, *Film Market Review 2009* (Teddington: Key Note, 2009)).

<sup>2</sup> This range of interlocking factors is currently the focus of a House of Lords Communications Committee inquiry, and will provide the back drop to the DCMS White Paper on the Communications Review in early 2013. For a review of regulatory developments and approaches in this context, see Ibanez Colomo, *European Communications Law and Technological Convergence: Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications* (London: Wolters Kluwer, 2011).

## THE MEDIA AND INTRINSIC CHALLENGES TO COMPETITION POLICY

In recent years, competition regulators have been called upon to assess a startling range of issues arising in media markets.<sup>3</sup> Due in part to the shifting nature of the markets concerned, and in part to the relatively unusual nature of business in media markets, a good number of these cases have thrown up new conceptual problems intrinsic to competition law and policy. Inquiries and decisions have concerned the assessment of agreements between firms that might impact on consumer welfare by affecting quality, choice or price,<sup>4</sup> exploitative<sup>5</sup> and - more often - exclusionary behaviour by dominant firms,<sup>6</sup> and the preservation of 'commercial space' for private companies in the face of supposedly overweening public service providers.<sup>7</sup>

In the first of three papers in this issue, *The EBU's Eurovision system governing the joint buying of sports broadcasting rights: unfinished competition business*, Ben Van Rompuy and Karen

<sup>3</sup> For a brief review of cases in 2011, see Bavasso and Long, 'The application of competition law in the communications and media sector: a survey of 2011 cases' (2012) *Journal of European Competition Law & Practice*, 3(4), 385-395.

<sup>4</sup> See for instance, the sports and other premium content broadcasting rights cases, including the *UEFA Champions League decision* (2003) OJ L291/25, *German Bundesliga decision* (2005) OJ L134/46, and *FA Premier League decision* (2006) OJ C7/18 (both latter decisions taken under Article 9, Regulation 1/2003; see generally, Subiotto and Graf, 'Analysis of the Principles Applicable to the Review of Exclusive Broadcasting Licences Under EC Competition Law' (2003) *World Competition*, 26(4), 589-608); cases involving concerns over the impact of proposed concentration on advertising markets, such as Competition Commission, *Carlton Communications plc / Granada plc*, Cm 5983, 7 October 2003 (notably, there were no similar concerns in Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9% of the Shares in ITV plc*, 14 December 2007), and the general scheme of access pricing regulation in the European telecommunications sector - see generally, Walden (ed), *Telecommunications Law and Regulation* (4th edn, Oxford University Press, 2012), esp chs. 4 and 8. Most recently, in December 2013, the European Commission accepted commitments from Apple and four international publishing groups under Article 9, Regulation 1/2003 to bring to an end a suspected concerted practice aimed at raising the price of e-books in the European Economic Area. At the time, Amazon was the uncontested leader in the retail market for e-books. The concerted practice included a 'most-favoured customer clause' in relation to the Apple iTunes online store that had the effect of aligning the incentives of the publishers with respect to Amazon and other retailers. For a similar analysis in an earlier investigation, see Commission (2004) Commission closes investigation into contracts of six Hollywood studios with European pay-IVs, press release IP/04/1314, 26 October.

<sup>5</sup> See, for example, *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38.

<sup>6</sup> See, for example, the complaints of predatory pricing in *Aberdeen Journals Ltd v Director General of Fair Trading* [2003] CAT 11 and regarding the pricing strategy of *The Times* newspaper in the 1990s (see Harrison, 'Murdoch guilty in Times price war' (1999) *The Independent*, 22 May); of unlawful tying in the Windows Media Player element of the 2004 Microsoft decision (C(2004)900 final, 21 April), and of (prospective) refusal to supply necessary inputs or allow access to content in *Radio Telefis Eireann v Commission* (1995) ECR I-743 (*Magill* case), *Tierce Ladbrooke v Commission* (1997) ECR II-923, and Case M.2050 *Vivendi/Canal+/Seagram* (2000) OJ C311/3.

<sup>7</sup> A range of state aid cases have concerned media markets. For comment on recent decisional practice in this area, see Held and Kliemann, 'The 2009 Broadcasting Communication and the Commission's decisional practice two years after its entry into force' (2012) *European State Aid Law Quarterly*, 11(1), 37-47; Lewke, 'Drawing the line: the application of State aid provisions to Internet activities of public broadcasters. *Journal of European Competition Law & Practice*, 2(3), 217-226. For general insight and commentary on the application of the state aid regime to the media context, see Communication from the Commission on the application of State aid rules to public service broadcasting (2009) OJ C257/1-14; Castendyk et al, *European Media Law* (Kluwer Law International, 2008), 207-244; Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005), ch.9; Hancher et al, *EC State Aids* (3rd edn, London: Sweet & Maxwell, 2006), ch. 17.

Donders revisit the *Eurovision* decisions of the European Commission and of the Court of First Instance.<sup>8</sup> These decisions respectively comprised and ruled unlawful exemptions from Article 101 granted to a scheme for the collective purchasing of sports broadcasting rights. This renewed attention is warranted by the recent judgment of the Court of Justice in the joined cases of *FA Premier League v QC Leisure and others* and *Murphy v Media Protection Services*.<sup>9</sup> In that ruling, the court held that the sale of the broadcasting rights to Premier League matches on a country-by-country basis, backed up with prohibitions to prevent the licensed content from being accessed outside the country in question, violates EU law. In the view of Van Rompuy and Donders, this decision challenges the business model of media rights holders that currently license their content on an exclusive territorial basis, and will once again make a strong case for the joint acquisition of (EU-wide) sports broadcasting rights. In such a scenario, the Eurovision system might regain importance and competition concerns may be resurrected should private content operators file complaints against any revived joint acquisition scheme. Hence, the authors aspire to reevaluate the ‘old’ *Eurovision* cases in light of anticipated future developments regarding the joint acquisition of sports broadcasting rights in Europe, and pose a range of interrelated questions concerning the purpose and efficacy of European competition law in this context. The paper offers a thoughtful and interesting prospectus.

Underpinning many competition cases in the media domain have been debates over the conduct of the market definition exercise upon which the wider assessment is predicated.<sup>10</sup> Most famous in this respect was the divergence of opinion on the integration of the Microsoft Media Player with the Windows operating system: was there a ‘separate’ market for media players distinct from the operating system, and could this properly be understood as a ‘market’ if no payment was involved; was the best metaphor that of the car without its steering wheel, or the car without its CD-player or its fluffy-dice?<sup>11</sup> Similar criticism has been levelled at Ofcom’s approach to its Pay-tv market investigation.<sup>12</sup> If the primary competitive constraint on Sky is not the challenge from other providers on pay-tv markets, but rather the offer made to

<sup>8</sup> Commission Decision 93/403/EEC (1993) OJ L179/23 (annulled by Cases T-528/93 etc *Metropole Télévision SA v Commission* [1996] ECR II-649), and Commission Decision 2000/400/EC (2000) OJ L151/18 (annulled by T-185/00 *Metropole Télévision SA (M6) v Commission* [2002] ECR II-3805).

<sup>9</sup> [2012] All ER (EC) 629. The preliminary ruling of the Court of Justice in this case was subsequently applied at the domestic level courts in *Murphy v Media Protection Services Ltd* [2012] EWHC 466 (Admin). In that case, a publican’s convictions under section 297(1) of the Copyright, Designs and Patents Act 1988 - the restrictions deemed to be unlawful by the Court of Justice - were quashed. The publican had been using a foreign satellite decoder card to screen domestic football matches in her public house.

<sup>10</sup> See, for example, *Aberdeen Journals Ltd v Director General of Fair Trading* [2003] CAT 11.

<sup>11</sup> See Killick, ‘IMS and Microsoft judged in the cold light of IMS’ (2004) *Competition Law Review*, 1(2), 23-47.

<sup>12</sup> Ibanez Colomo, ‘The Future of Communications Regulation after Ofcom’s Pay-TV consultation’ (2010) *Utilities Law Review*, 18(3), 99-107. Notably, Ofcom’s investigation was conducted, perhaps questionably, under section 316 of the Communications Act 2003 and not under competition powers per se. Section 316 empowers Ofcom to impose such licence conditions as it deems appropriate to ensure fair and effective competition. The final decisions reached by Ofcom were published in March 2010 (Ofcom, *Pay TV Statement* (London: Ofcom). Available here: [WWW] <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/pay-tv/> (accessed December 2012). The substantive decisions made by Ofcom were overturned by the Competition Appeal Tribunal in August 2012 - *BSkyB Ltd v Ofcom* [2012] CAT 20.

consumers by other bundlers of telephone, broadband, mobile, and audio-visual content services (BT; Virgin, and others), then Ofcom's narrow definition is a disputable starting point.

In the media context, relatively familiar problems over market definition in complex areas of business are exacerbated by the fact of the 'two-sidedness' of markets. This problem - alongside the rapid pace of innovation - provides the underpinning of the second paper in this issue. In 'Product market definition in online search and advertising', Nicolo Zingales focuses on the recently-emerged markets for online search and advertising populated most obviously by Google inc. He highlights the particular difficulty of the market definition exercise in cases involving two-sided markets where the product or service on one side of the market is offered at no cost to consumers. Ultimately, he seeks to offer a starting point for market definition in such contexts that can provide the basis for more detailed competitive analysis. This challenging area will no doubt require further attention if and as the dominance of newly-emergent incumbents becomes entrenched.

### **THE MEDIA AND EXTRINSIC CHALLENGES FOR COMPETITION LAW**

Just as the media sector has been in a state of flux, recent decades have seen competition regimes almost everywhere realigned so as better to emphasis the protection and promotion of consumer welfare as the primary objective of the law. The political sensitivity of some decisions has meant that in few industry sectors has the emergence of competition law as a key tool in the regulation of markets become quite so visible. At the same time, sui generis regulatory systems have also changed significantly in recent years so as to emulate competition law.<sup>13</sup>

This 'economic turn' has generated discontent on at least three fronts. Commentators have lamented that competition law remains somewhat *dirigiste* in practice; that, on the contrary, competition law precludes necessary intervention in media markets on wider, public interest grounds, and finally that the development of online services poses new, previously unnoticed, public policy concerns. The first of these critiques rests on the perception that competition law, in practice, does not live up to its realigned promise; that the ostensibly economic focus of competition policy occasionally gives way to a more regulatory or industrial policy concern with the fomenting of emerging markets. Certainly, decisions can be identified that elicit such a tendency.<sup>14</sup> The last of the concerns is prompted by the emergence of online service providers and their capacity

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<sup>13</sup> An obvious example is the fact that in UK merger law the default position following the Communications Act 2003 is that mergers in the media sector are treated in exactly the same manner as transactions in any other sector. Only when the Secretary of State determines that intervention is necessary on public interest grounds will a sui generis process be initiated - see generally, Scott, Hviid and Lyons, *Merger Control in the United Kingdom* (Oxford University Press, 2006), ch 21.

<sup>14</sup> Consider, for example, the concern for emergent 3G mobile content markets reflected in the *UEFA Champions League decision* (2003) OJ L291/25 and Commission, *Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks*, September 2005 - available at: [WWW] [http://ec.europa.eu/competition/sectors/media/inquiries/3G\\_archive.html](http://ec.europa.eu/competition/sectors/media/inquiries/3G_archive.html) (accessed December 2012). See generally, Geradin, 'Access to Content by New Media Platforms: A Review of the Competition Law Problems' (2005) *European Law Review*, 30(1), 68-94.

to aggregate a vast array of personal data has also occasioned the incipience in the context of competition law of issues that might formerly have been left to the domain of privacy law and data protection.<sup>15</sup> This theme is addressed in the second part of Zingales' paper in this issue. It has also been noted by Commissioner Almunia in recent months, and seems set to confront competition authorities more often over time.<sup>16</sup>

The second criticism - that concerning the exclusion of media plurality sensibility from competition law - is hardly new,<sup>17</sup> but it has perhaps been afforded a new valency by a seeming willingness on the part of the national and European level politicians to address perceived failings in extant regimes.<sup>18</sup> This interface comprises the focus of the final paper in this issue. In 'European merger control in the broadcasting sector: does media pluralism fit?', Konstantina Bania notes that the effects of a concentration, agreement or practice on content diversity have been abundantly ignored in European competition decision-making so that media pluralism has been catered for only coincidentally. She contends, however, that taking cognisance of such media policy concerns is not only legitimate, but also something that the Commission is duty-bound to undertake by both primary and secondary European Union law. Bania maintains that European competition law does not operate in a vacuum, but rather serves as one apparatus by which the 'European project' might be realised. It may be that this is an idea ripe for the emerging post-crisis policy agenda. Each of the three disparate papers in this issue is warmly commended to the readership of the *Competition Law Review*.

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<sup>15</sup> See Franken, 'How privacy has become an antitrust issue' (2012) *Huffington Post*, 30 March; Tucker and Goldfarb, 'Is privacy an antitrust problem?' (2012) *Digitopoly*, 2 April; Davies, 'Europe's Antitrust authority begins gearing up to privacy' (2012) *The Privacy Surgeon*, 28 November.

<sup>16</sup> Almunia, 'Competition and personal data protection' (2012) Speech delivered at the European Parliament, Brussels, SPEECH/12/860, 26 November.

<sup>17</sup> See, for example, Nitsche, *Broadcasting in the European Union: The Role of Public Interest in Competition Analysis* (Den Haag: Asser Press, 2001); Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Oxford: Hart Publishing, 2006).

<sup>18</sup> For instance, in October 2011 European Commission Vice-President Neelie Kroes convened the first meeting of a new High Level Group on Media Freedom and Pluralism to advise and provide recommendations for the respect, protection, support and promotion of media freedom and pluralism in Europe.