The Application of EC Competition Policy to the Media Industry

This article examines whether EC competition policy and merger control provisions can prevent excessive market power and safeguard open access and consumer choice in the European media and communications industry. The study looks at the structure of the media industry and points to the amalgamation of corporate power. It assesses whether EC competition law and merger provisions can effectively address the dangers of ownership concentration and safeguard diversity of sources. A number of merger cases either blocked or allowed by the EC are reviewed in order to establish the level of competition. The article suggests that a more rigorous competition policy is required to guarantee competition and prevent domination in merger activity.

The Structure of the European Media and Communications Industry

The global media and communications industry is characterised by consolidation, i.e. the formation of industrial alliances between players. The result of this procedure is the creation of larger and fewer powerful media groups controlled by fewer hands. As noted by Bagdikian (2000), in 1983 fifty corporations dominated[1] the media field and the biggest media merger in history was a $340 million deal. In 1990 the fifty firms had shrunk to twenty-three, whereas in 1997 the biggest companies numbered ten and involved the $19 billion Disney-ABC deal, at the time the biggest media merger ever. The 2000 AOL-Time Warner's $135 billion merged corporation was more than 500 times larger than the deal of 1983.

Concentration of capital and control of information flow in an ever smaller number of multinational conglomerates is also evident in Europe (Murdoch, 2000; Iosifidis, Steemers & Wheeler, 2005). There were just seven major companies operating in the continent in 2004: Germany's media conglomerate Bertelsmann - a powerhouse of integrated communication, media and entertainment in numerous countries, Italy's Fininvest - owned by the Berlusconi family, France's Lagardere Media, John Malone's Liberty Media - controlling the United Pan-Europe Communications (UPC - Europe's largest cable operator) and part of cable network Telewest, Murdoch's News Corporation - its media holdings extend to the US, Europe, Australia, Latin America and Asia, Luxembourg's SBS Broadcasting, and NBC-Universal - owner of television network NBC and Universal studios which were acquired from French company Vivendi in 2003 (Kevin, D., Ader, T., Fueg, O., Pertzinidou, E., & Schoenthal, M., 2004, pp. 242-243).

The media business has been seen to lend itself to consolidation, as there are enormous economies of scale and scope that come from enlarging their footprint both at a national and international levels as the greater the proportion of the population that can be reached by a production, the greater the efficiency that can be consequently made. This increased commercial activity also stems from the high costs involved in keeping up with new technologies. Companies often decide to ally or merge with their competitors in order to share the high cost (and risk) in taking new initiatives. Such alliances may have negative effects on relevant markets and raise competition concerns as they result in increased concentration or foreclosure agreements (see below). Competition law intervenes (or should intervene) to ensure that the market is contestable and open for competing operators.

EC Competition Law and Market Definition

The European Union's competition policy framework lies in Articles 81 and 82 of the Treaty. Competition policy is concerned firstly with preventing agreements between undertakings which reduce the effectiveness of the competitive process, secondly with controlling mergers which increase the probability of exercising excessive market power, and thirdly with anti-competitive behavior which enables firms either to acquire excessive market power or to increase barriers to entry for newcomers. The main objectives of competition rules are first to foster technological innovation and price competition, and second to guarantee consumer choice. As a former European Commissioner for Competition Policy has asserted, this is achieved by ensuring that companies compete rather than collude, that market power is not abused and that efficiencies are passed on to final consumers (Monti, 2001).

Competition rules apply equally to all parts of the economy, but intervention in the media and telecommunications cases has in recent years become more frequent than in other sectors. This is both due to the size of the transactions and because the media and telecommunications companies have developed a complex web of commercial interrelationships and agreements with partners that require investigation (see below). However, in order to determine the acceptable levels of consolidation and the effects this phenomenon may have on company performance and the diversity of opinion and democracy, one has to define the relevant market for which market shares would be calculated. A concept of the market is necessary to make use of levels of concentration. Frazer (1992, pp. 13-16) argued that in order to assess whether monopolistic situations exist, one must define both the geographical scope of the market and the product market. The geographical dimension of market definition determines the scope of the market that is, whether markets are defined as being local, regional, national, or even international. The issue of the relevant geographic market being examined is particularly important, as the adaptation of either narrow or wide market definitions may lead to different results in measuring levels of concentration (Iosifidis, 1997). Some suppliers may operate nationally offering programming of national interest, so that a broad market definition is needed to cover the entire country in question. However, the growing internationalisation of broadcasting and telecommunications may mean that some relevant markets are larger than individual countries.

Markets also need to be defined by reference to specific, well-defined products if they are to be useful in assessing competition. In the past, the definition of media product markets was relatively easy, as consumers were exposed to a small range of homogeneous media services that were clearly distinguished from one another. The difference, for example, between a TV service and a telecommunications service was obvious and this led to broad, loosely-defined markets such as ‘television’ and ‘telecommunications’. However, new broadcast delivery methods such as cable and satellite as well as the development of new programme services have increased the substitutes available for any particular service and have complicated the definition of product markets. The convergence of technologies has added to the confusion. As the distinction between both electronic and non-electronic media and terrestrial broadcast TV and telecommunications services becomes blurred, so does the definition of the relevant product market. It is now extremely difficult to determine which products or services are sufficiently close substitutes to be in the same product market.

For example, is pay-TV a substitute for free-to-air television? The European Commission (EC) has in various decisions[2] defined pay-TV as a separate market. For example, in the MSG case the EC argued that:

> Pay TV constitutes a relevant product market that is separate from commercial advertising-financed television and from public television financed through fees and partly through advertising. While in the case of advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship only between the programme supplier and the viewer as subscriber (Commission decision IV/M.469 – MSG Media Service, paragraph 32; see also the Commission decision IV/M.410 Kirch/Richmond/Telepiu).

Pay-TV is clearly different from free-to-view television insofar as there is a direct pecuniary exchange between a pay-TV operator and the viewer (subscriber). Nonetheless, this does not constitute grounds for placing the two in separate markets. A report by

Europe Economics (2002) rejects the idea that pay-TV is necessarily in a separate market simply because viewers pay the broadcaster, and suggests that there may be cases in which the supply of pay-TV package would be defined within the same market as the supply of free-to-air content.

In MSG, the Commission observed that pay-TV and free access, advertising-funded programmes differ in content, the former leaning more towards specialist, and that pay-TV channels would not generally show advertising, but according to Europe Economics (2002) it is not clear how there arguments constitute an analysis of substitutability between pay-television and free-to-view television. After all, the two types of broadcasting could conceivably compete for viewers' attention. Furthermore, pay-TV can be a substitute for free-to-air television because every subscriber of pay-TV already has access to free-to-air television. Finally, the distinction between the two markets becomes blurred in the case of pay-TV programmes that are financed from a mixture of sources (e.g. subscription fees and advertising). However, Europe Economics argued that there may well be a specific demand for premium content (e.g. live football games), in which case there would be grounds for defining the supply of the premium pay-TV package in a separate market from free-to-air television.

Still, the EC's decision that a pay-TV operator always competes in a separate market from free-to-air broadcasters may be incorrect. In fact, analysis is required to assess whether the viewing patterns available to a consumer with access to both a pay-TV package and free-to-air television are good substitutes for the viewing patterns available to a consumer with access to free-to-air television only. But how does the EC's decision affect the investigation of merger cases? As it will be shown below, in the merger between Vivendi, Canal Plus and Seagram[3] the pay-TV operator Canal Plus was allowed to have first-window rights access to Universal's films (following some concessions on behalf of the operator) as it was thought that its activities in pay-TV would not adversely affect free-to-view channels. This covered the territories Canal Plus was active (i.e. France, Belgium, Italy, the Netherlands, Spain and the Nordic countries).

Merger Control

In addition to competition rules, a Regulation on the Control of Concentrations between Undertakings was adopted by the Council of the European Economic Community in 1989 and became effective on 21 September 1990. The Merger Regulation (Council Regulation (EEC) No. 4064/89) was intended to complement the European Commission's anti-trust powers conferred by Articles 81 and 82 (then Articles 85 and 86 of the Rome Treaty) and also give the Commission pre-emptive powers to deal with mergers. Until 1989 the EC had powers to act against anti-competitive mergers and acquisitions only after they have taken effect and a restrictive practice or dominant position is established or strengthened. For many years the EC had argued that it should have new, pre-emptive powers that would remove the uncertainty of retrospective action for the parties involved. In fact, competition rules that intervene after a problem of imbalance has arisen (for example, an anticompetitive practice has been established or a dominant position has already been created) may not be able to remedy the situation. The

Merger Regulation was intended to deal with that problem. This is becoming more important today because, in order to gain maximum benefit from the information society, ‘gate-keeping’[4] issues require a more direct anticipation in competition law.

In December 2003 the EC adopted a package of merger control guidelines on the appraisal of mergers between competing firms (Horizontal Guidelines). The guidelines describe in detail the analytical approach the EC takes when assessing the likely impact on competition of mergers between competing firms. In particular the guidelines make it clear that mergers and acquisitions will be challenged only if they enhance the marker power of companies in a manner which is likely to have adverse consequences for consumers, notably in the form of higher prices, poorer quality products, or reduced choice. The guidelines complement the new wording of Article 2 of the Merger Regulation with respect to the substantive test that underpins merger reviews. In this context, the guidelines intend to ensure that the Commission’s application of the Merger Regulation “is firmly grounded in sound economics” (Levy, 2005, p. 99). The new Regulation, which received the political backing of the Competitiveness Council on 27 November 2003, provides for intervention in relation to any merger which “would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position” (EC, 2003). The new Merger Regulation and the Horizontal Guidelines entered into force on 1 May 2004.

The Effectiveness of the Merger Regulation

Under the Merger Regulation, the EC has exclusive jurisdiction for mergers between firms with an aggregate turnover of at least 5 billion Euros and a turnover within the European Economic Area of more than 250 million Euros for each of them. It becomes clear that the Regulation covers only large mergers that affect competition in the market in question. As a result it has allowed many mergers to proceed as they fell outside its scope (Iosifidis, 1996; Just & Latzer, 2000). In fact, the Merger Regulation has vetted over 2,300 cases since September 1990 and cleared the vast majority of them (over 90 per cent) after a routine one-month investigation. It has prohibited just 18 mergers in total, while a further 14 have been withdrawn when it became clear that regulators would veto them. Six of those cases were in the wider media and telecommunications sectors. The six cases were: MSG Media Service in 1994, Nordic Satellite Distribution in 1995, RTL/Veronica/Endemol (Case No IV/M.553 – RTL / Veronica / Endemol, OJ L 134/32, 5.6.1996), Deutsche Telekom/Beta Research in 1998, Bertelsmann/Kirch/Premiere in 1998 (MSG II), and WorldCom/Sprint in 2000. The AOL/Time Warner intended merger with EMI in 2000 withdrew after it became clear that the EC would prohibit it.

Let us consider these merger cases blocked by the EC in some more detail in order to establish a clearer picture of the way the merger regulation is put into practice. A notable example is the blockage of the MSG Media Services case in 1994, a joint venture of the German giants Bertelsmann AG, Taurus of the (now bankrupt) Kirch Group and Deutsche Telekom - DT (then the monopoly provider of telephone service in Germany and owner of nearly all German broadband cable networks), aiming at supplying administrative and technical services to pay-TV operators. It was prohibited on the grounds that it would have created a dominant position in three relevant markets - the administrative and technical services market, the pay-TV and the cable TV market. The Commission ruled that the monopoly position of the venture would not have been temporary, in particular because of: (a) all potential competing pay-TV providers' dependence on DT's cable network; (b) the parties' substantial existing customer bases (in cable network and analogue pay-TV) and distribution bases (store-front network for DT, book clubs for Bertelsmann); and (c) the parties' complementary strengths, in technology for DT and programming for Bertelsmann and Kirch (paragraphs 61-63).

In May 1998 the EC decided to prohibit the so-called MSG II case, a proposed alliance involving once again Bertelsmann, Kirch, digital TV channel Premiere and Deutsche Telekom. All companies were to share control of Beta Research, a Kirch owned technical services outlet providing conditional access and subscriber management. The EC's veto was prompted by two concerns: first, that the merger between Bertelsmann, Kirch and Premiere would have an adverse impact on the market for pay-TV; second, that Beta Research would dominate the conditional access system through the proprietary nature of Beta-owned D-Box (Levy, 1999).

A third example was the veto of the £75 billion deal between US telecommunications operators WorldCom and Sprint in June 2000. EC competition authorities considered at the time that the deal would have created a company with so much power over transmitting data on the Internet that it could have dictated prices and let to a raw deal for consumers. A merger without divestiture of its Internet business by either WorldCom or

MCI would have created a cooperative standard, with the subsequent dangers for consumers of Internet services. Concerns of this sort led the EC to insist on divestiture by WorldCom of its Internet business as a precondition for allowing the merger to go ahead. This case, involving two US companies, actually raised the EC's profile in antitrust investigations and mergers.[5]

A fourth case was the blockage of the AOL/Time Warner merger with the British music group EMI in late 1999, on the grounds that a dominant position would arise in the music industry, including the distribution of music via the Internet. EC competition officials were concerned that the tie-up between EMI and Time Warner's music subsidiary could have placed 80 per cent of Europe's recorded music business in the hands of just four global giants – Vivendi's Universal Music, Bertelsmann's BMG Entertainment and Sony Music were the three other main players. The completion of the merger, according to the EC, would have resulted in price increases without the loss of market shares, thereby forcing competitors to exit the market and prohibiting access to newcomers. In fact, AOL/Time Warner and EMI withdrew their intention to merge after it became clear that the EC would block the $20 billion deal. EMI's withdrawal meant that the EC could clear the much bigger ($135 billion) merger between the Internet company AOL and giant entertainment conglomerate Time Warner. AOL/Time Warner was also forced to cut its links with the German conglomerate Bertelsmann, whose interests in music, publishing and broadcasting libraries would have created a concentration over content.

However, it does not appear that European regulators follow a consistent approach when addressing market imbalances in the music industry, for in July 2004 the EC approved the merger of Sony and BMG's respective music units. Whereas keeping AOL/Time Warner from swallowing EMI Music actually limited the immediate size of the combined company, and was therefore a plausible approach to ensure competition, sadly the EC competition authorities adopted a different approach four year later and allowed an equally big merger to proceed. The new firm, which is owned equally by Bertelsmann and Sony, brings together the two companies' huge record labels and music production. According to Nielsen SoundScan, the new firm accounts for 23 per cent of worldwide music sales, and one in three new releases in the US.[6] It is clear that the deal strengthens a position of collective dominance, since it leaves 80 per cent of the market in the hands of a few giants – Sony/BMG, EMI and Warner Music Group, despite the Commission's determination that there was insufficient evidence to establish it.

As already mentioned, the Merger Regulation has provided obstacles to just a few merger cases in the media and telecommunications sectors since its inception. The prohibitions of the merger cases listed above are the exception, rather than the rule. The process of industry convergence, resulting in numerous strategic alliances between previously separated companies, is seen quite favourably by the European Commission as this will lead to the creation of strong European companies capable of competing globally. Such activity was once looked upon with alarm by the Commission. Companies which have control of numerous assets also have the power to seize out any potential competitors with the result of distorting the economy with monopolistic controls over prices. But over the years the EC has developed a more light-handed approach towards industry consolidation as demonstrated by the Sony/BMG case.

This id also evidenced by the introduction of the new regulatory framework for electronic communications, which was adopted in 2002 and applied in July 2003.[7] The very essence of the framework is that regulation must not separate markets, but must allow for their convergence; and that only minimum regulation should apply to the media and telecommunications markets to encourage investment. The new framework does not apply to content. The Framework Directive sets forth the new definition of “significant market power” (SMP). Under the old directives, the notion of SMP was tied to 25 per cent market share. This old market share test falls short of the traditional competition law threshold for “dominant position”. The new Framework Directive aligns the definition of SMP with the competition law definition of dominant position (generally market share exceeding 40-50 per cent).

Under the new definition, an operator has significant market power if “either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers”. The other controversial issue in the Framework Directive is the requirement that national regulatory authorities inform the EC and other national regulators ahead of time of proposed measures. The Commission insisted on maintaining some kind of control over national decisions, since under the new framework national regulators will have added freedom and there is consequently a risk of diverging rules emerging throughout Europe. National decisions will be circulated among regulators in other European countries before being finally adopted, and other regulators, as well as the Commission, would have an opportunity to comment.

Towards Vertically Integrated Empires

In recent years merger cases have become more complex and entail increased competition concerns. The complexity of mergers is a result of a shift in the nature of industry concentration, from one based on horizontal mergers to those involving vertical integration, as operators sought out alliances which would enable them to acquire the broad set of skills needed to address new markets. Merger and other alliances can be horizontal, that is, between enterprises involved in the same sector, or vertical, involving firms operating in different sectors.[8] The motives of such movements range from increasing market power and sharing the high cost of digital technologies (especially regarding horizontal mergers), to gaining access to know-how and acquiring contents (the case in vertical mergers). The common aim of those alliances is to address the (potential) opportunities offered by technological convergence (Iosifidis, 2002). However, the most common activity today is vertical integration, notably distribution companies seeking alliances with content providers and vice versa.

Vertical integration is the extension of the functional boundaries of a company. Vertically integrated entities are mainly large firms, which have united several stages of the production and distribution processes under common ownership. Vertical integration may intervene “upstream”, either to reduce costs (for example, control of the paper-making and printing industry by publishers) or to ensure priority in access to programmes (for example, control of audio-visual production by TV broadcasters), or “downstream” (for example, integration of advertising sales agencies by press groups or broadcasters). Vertical integration can enable a firm to gain monopolistic advantages through the creation of a barrier to entry. The vertical relationship will result in exclusion that may harm competition and may even increase or exploit market power. As McChesney (1999) put it, “vertical integration is a part of a business strategy that serves to enhance market power, by allowing cross-promotion and cross-selling media properties or ‘brands’ across numerous, different sectors of the media” (p. 22).

The next section looks at the competitive concerns arising from vertical mergers in the media and telecommunications markets and offers examples of merger cases reviewed (and allowed) by the European Commission to illustrate the points put forward.

Competitive Assessment

Vertical mergers in the media and telecommunications markets raise specific competitive concerns, not least because of the structure of these markets, which is multidimensional and complex. Different players such as content providers, right holders, content distributors, operate in the value chain from the production of content such as films, pay-TV programming, and music, to its delivery via theatres, pay-TV channels or Internet portals. Second, as newly liberalised markets, the structure of media and telecommunications is fairly unstable, with large incumbent operators often retaining dominant positions and forming oligopolies in new services. For most of its history the media and telecommunications sector has been run as a state-owned regulated monopoly, but markets opened up to competition throughout the 1980s and 1990s. Accompanying these trends was a process of deregulation, leaving competitive market forces to determine the shape of the sector. The debate around mergers and acquisitions and competition policy is very much related to this.

A third element is the pace of innovation and technological changes that continuously affect the scope of relevant markets (new innovative services, technological convergence). Digital technology, in particular, has transformed the sector because it lowers the barriers to entry and greatly extends the scope of services that a service provider can offer. This allows new entrants to differentiate their products, segment the market and target specific audience segments. One example from the telecommunications industry is the introduction of the cellular mobile phone, widely regarded today as a close substitute for a fixed line telephone in markets where the latter is costly or difficult to access. Another example from the broadcasting industry is the launch of pay-TV services, but as already explained, it is not straightforward whether these services are a substitute for free-to-air television.

Based on these characteristics we can identify the following main competitive concerns. The first is the combination of market power evidenced by high market shares and reinforced by vertical links. The $135 billion, all-stock AOL/Time Warner deal gave

AOL, the world's largest online access company, a new broadband distribution platform for its services, as well as new subscribers through New York-based Time Warner's media outlets. The merged entity has a very significant presence in the markets for Internet service and cable television that would leave consumers with higher prices and fewer choices. Another vertical merger that resulted in significant market power occurred in October 2003, when Vivendi agreed to merge Vivendi Universal Entertainment with the US television network NBC, a unit of General Electric, in a 43 billion Euro transaction to create a new entertainment industry giant. The deal brought together assets including Vivendi’s Universal Pictures with NBC’s broadcast network and cable channels CNBC and Bravo. General Electric now owns 80 per cent of the merged company while Vivendi holds 20 per cent.[9]

A second concern arises where a distribution firm controls a “gateway” access to which is essential in order for upstream producers to be able to supply their content on downstream markets. This may be perceived as a bottleneck. A bottleneck facility or technology can be described as “a technology without access to which it would be difficult for a third party to provide a service to consumers” (Cowie & Marsden 1999, p. 55). Although bottleneck facilities are not new in the communications industries, the transition to digital television and impending convergence introduces the potential for new series of bottlenecks related to set-top boxes, Application Programme Interfaces and Electronic Programme Guides (Cave & Cowie 1996, p. 119).

This is illustrated by the 2000 merger between the French media and telecommunications company Vivendi with the Canadian company Seagram. The $34 billion deal combined Seagram's sizable entertainment assets, which included Hollywood's Universal Studios and the Universal Music Group, with Vivendi's various distribution channels, most notably its subsidiary pay-TV operator Canal Plus. The EC was originally concerned that the deal would strengthen Vivendi/Canal Plus's position in pay-TV as well Internet markets (mostly by pooling of Seagram's Universal music arm in Vivendi's multi-access Internet portal Vizzavi), but allowed the merger following a package of commitments on behalf of the company. In particular, Vivendi divested its stake in British Sky Broadcasting (BSkyB) and gave rival pay-TV operators partial access to Universal's films. It also offered to provide access to rival portals to Universal's online music content for a period of five years. As a result of those concessions the EC declared the merger compatible with the common market (Case No COMP/M.2050).

The merging parties belonged to three different categories of players. In terms of content, the merging parties had the world's second largest film library, the second largest library of TV programming in Europe, and a substantial part of theme channels production in France, Germany, Italy and Spain. Furthermore, the merged entity was the first acquirer of output deals signed with the US studios. With regard to music content, the merged entity was number one in recorded music. In terms of distribution, the parties were the leading pay-TV operators in a number of countries and became a leading player on Internet distribution via the multi-access portal Vizzavi. Vertical issues arose through the interaction of content providers and delivery operators such as pay-TV operators and multi-access portals such as Vizzavi. Consequently, there were three markets which were vertically affected by the transaction: the pay-TV market, the emerging market for portals and the emerging market for online music.

For simplicity and space saving reasons we focus on the pay-TV market. Following the vertical integration with Universal Studios transaction, Canal Plus's presence in a number of pay-TV markets was actually strengthened rather than reduced. At that time the major pay television company operated in eight countries and had about 14 million subscribers.[10] Despite Vivendi/Canal Plus's concessions, the placement of Universal Studios under the company's control strengthened the pay-TV operator's position in pay-TV and enhanced the pay-TV window for movies. This is because the television platform provider was already dominant in the market for providing TV channels with access to consumers and acted as a wholesaler of television programmes, purchasing programme rights and offering consumers a choice of packages together with the basic platform infrastructure. Even if multiple operators compete in a market for supplying pay-TV subscriptions to households, Canal Plus's set-top box proprietary technology can be seen as "closed" insofar as a subscriber can only be reached through an access service purchased from the subscriber's operator.

Access to the subscriber-base on Canal Plus's platform cannot be perceived as a substitute for access to the subscriber-base on another platform simply because each provides access to a different set of potential customers. The provision of particular upstream content by Canal Plus (e.g. movies, football rights) affected the resultant downstream subscriber-bases and it was a very important driver of subscriber numbers. Thus the concessions made on behalf of Vivendi/Canal Plus, as well as the competition from other pay-TV consortia, did not adversely affect Canal Plus's position in pay-TV markets. The situation would change radically with the imposition of a regulatory constraint that would require the platform operator to offer non-discriminatory access, but this was not pursued by the European Commission. Furthermore, it should be noted that Canal Plus's position was strengthened not only in the pay-TV market but also in relation to the free-to-view television. We previously rejected the idea that pay-TV is necessarily in a separate market from free-access television. This is partly because both types of broadcasting compete for viewers' attention.

A third concern is the creation or the strengthening of dominant position by increase in market share (through product or geographical business overlaps). This concern is illustrated via the merger of CLT-UFA, Pearson TV and Audiofina, which created the RTL Group, Europe's leading radio, television and content group, with a consolidated net profit of 67 million Euros in the year 2000. This merger was the result of the strategy pursued by Audiofina to broaden its activities by increasing its holdings in existing private television channels, developing its content operations and accessing new national markets. The acquisition of Pearson Television provided the new group with a majority stake in the UK's television channel Five and broadened its position in the content sector. The EC decided not to oppose the merger and declared it compatible with the common market (Case No COMP/M.1958 – Bertelsmann / GBL / Pearson TV, 29.06.2000, OJ L-2985). This is because the Commission has taken the view that TV broadcasting still generally takes place on national markets. As outlined in several decisions of the Commission,[11] the national character of TV broadcasting is mainly due to different regulatory frameworks, existing language barriers and cultural factors. Although we do not contest that TV markets are mainly national, the markets for sale of TV productions may be broader and comprise a particular language region. Similarly, the demand for content rights (sports or film rights) may be EC-wide or even world-wide. It follows that the relevant geographical market cannot always be limited to national borders.

Discussion and Conclusion

The role of competition policy is crucial in order to guarantee a “level playing field”, preserve open access and prevent the formation of dominant positions in the media market. However, the established relationship between communications networks and owners of content has reduced its effectiveness in the field. Focusing on the volume and complexity of corporate alliances, this article showed that EC competition law and merger provisions cannot always effectively address the dangers of ownership concentration. Proponents of liberalisation argue that economic efficiency can often be improved, and innovation stimulated through well-designed mergers and acquisitions. Proof that a merger will be damaging to competition, the argument follows, should rest on the market outcome, and regulators should take a light-handed approach until evidence to the contrary arises. However, the paper showed that mergers and acquisitions can result in market imbalances in the form of anticompetitive practices and dominant positions.

This article suggests that a more rigorous competition policy is required to tackle consolidation trends in the media and communications markets. The EC should strengthen its role as central actor and take steps to establish appropriate alternative schemes in order to prevent the media industry from being dominated by gigantic media concerns only interested in profit maximization. The purpose of competition law is to secure an effective use of society's resources by creating conditions for real competition. However, an analysis of some past competition decisions in the media sector reveals, first, that the EC has become sympathetic to the formation of large corporations and second, that the EC does not follow a consistent competition approach. The practical problems that appear to have been encountered in dealing with market definition have added to the confusion. Still, competition legislation should apply equally and in a systematic way to all merger cases involving anti-competitive concerns. There is also a necessity to re-evaluate some of its fundamental concepts, as well as to expand the scope of the analysis to incorporate new economic models (i.e. vertical integration, convergence).

The EC should build on the process of strengthening the economic approach in competition law to make the system more effective. Undoubtedly the Merger Regulation has transformed the use of economics in the EU and provided a sound analytical framework that is firmly grounded in economics. This is evidenced by the creation of a new position of Chief Economist in order to provide an independent economic opinion. As Levy (2005) reminds us, the Commission appointed its first Chief Economist in July

2003, to provide methodological guidance on economic policy, general guidance in individual cases, and detailed guidance in complex cases that require quantitative analysis (p. 124). Levy also argues that during the Commissioner Monti's tenure (1999-2004) "the Commission became more systematic and exacting with respect to the scope, implementation, and detail of remedies" (p. 126). Although this might be true, we believe that the EC has become more lenient in practicing its merger control in the media and communications field as demonstrated by the merger cases we studied. We appreciate that the EC has to maintain a delicate balance between the economic/industry argument of allowing European companies to become bigger and stronger in order to be able to compete globally, and the need to promote contestable markets and open competition. The protection of individual investors, in particular, stimulates economic investment, increases capital formation and plays a vital part in the development of newly invented products. This may justify the EC's emerging light-handed approach towards consolidated ownership. However, this approach has the potential to harm competition when high-profile cartel cases are at stake.

In fact the market, left to weak and inconsistent competition scrutiny, favors concentration of media ownership, partly due to the high basic costs of access to the media, and partly due to the ability of powerful enterprises to penetrate any market. According to Graham and Davis (1997), high quality multimedia content is expensive to produce in the first place but, once created, relatively cheap to edit or to change and even cheaper to reproduce. Put it another way, it has high fixed costs and low marginal costs - the natural creators of monopolies. High quality material can still be produced and yet cost very little per unit provided that it reaches a large number of people (exploiting economies of scale) and/or provided that it is used in a wide variety of different formats (exploiting economies of scope), but the exploitation of these economies of scale and scope imply concentration of ownership. Given the inexorable industry tendency towards further consolidation as well as the increased complexity of mergers in the age of digital convergence, we believe that a rigorous application of the competition law should be at the forefront of EC policy. Competition rules should be strong enough to prevent concentration of media power into the hands of a fewer and fewer media magnates, as demonstrated by the grand convergence of the previously disparate cultural industries.

Of course one needs to study carefully how much competition a given market can sustain. There have been studies which emphasise that a too competitive market is equally harmful to diversity as a too concentrated market. For example, Van der Wurff and Jan van Cuilenburg (2001) analysed how competition in Dutch television broadcasting influences diversity of programme supply and concluded that moderate competition improves diversity, while ruinous competition produces excessive sameness. In addition, and as noted above, intense price competition in the high-fixed-cost and low-marginal-cost broadcasting and telecommunications may lead some networks to exit the market. However, the broadcasting and telecommunications industries are by nature prone to monopolisation, and are thus a big concern for competition authorities. We have presented the relevance of the competition framework for a number of merger cases and shown that in some cases mergers were allowed to go ahead to the detriment of open competition. We feel that many more cases are to come and argued that competition law needs to apply more vigorously to address the counter effects to market imbalances.

Additionally, competition policy should recognise the specific cultural and democratic significance of the media industries as opposed to other industries when investigating mergers and acquisitions. Due to the specific nature of this form of economic activity, the application of competition rules to the media industry cannot always safeguard other values and objectives such as plurality of sources and diversity of content threatened by excessive market concentration. Recognising that competition legislation is insufficient to secure media pluralism and diversity, a number of countries have introduced measures to protect these social concerns. These measures include content regulation, encompassing the preservation of public service broadcasting, as well as media and cross-media ownership rules. The analysis of such measures falls outside the scope of this paper, but further research should assess the effectiveness of competition policy to meet wider social objectives such as pluralism and diversity.

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Endnotes

[1] A company is said to be in a dominant position when it has control of the total process, from raw material to distribution to sales. This situation implies power to seize out potential competitors and distorts the economy with monopolistic control over prices.

[2] See decisions in cases:

- IV/M.410 – *Kirch/Richmond/Telepiu*
- IV/M.469 – *MSG Media Service*
- COMP/M.1574 – *Kirch/Mediaset*
- COMP/JV.37 – *BskyB/Kirch Pay-TV.*

[3] Case No COMP/M.2050-Vivendi/Canal Plus/Seagram, Brussels 13.10.2000.

[4] A firm may play a gate-keeper role if it possesses a certain technology, know-how or technical standard that allows it to exert a significant degree of control in respect of the access to a given market.

[5] It is worth noting that the deal had already secured approval in the US from the Federal Trade Commission.

[6] Retrieved January 2, 2005, from http://www.theregister.co.uk/2004/07/20/sony_merger_approve

[7] The package includes the following elements: a directive on the common regulatory framework for electronic communications networks and services (framework directive); an authorisation directive; an access and interconnection directive; a directive on universal service and users' rights relating to electronic communications networks and services; and a decision on a regulatory framework for radio spectrum policy.

[8] Merger deals are also diversification ones. Diversification is the move of a business into other areas of businesses. It can be product extension (adding a product to an existing product line) or geographical extension and normally involves operations concerning different product markets. In this respect there is some confusion over the terms of diversification and vertical integration. However, the two processes are distinguishable, for they are driven by different management logic. Diversification means the entry into new different markets which are not likely to be infected by a particular economic trend that affects the market therein (the market may have reached saturation, for example). On the contrary, vertical integration is about integrating a market (Auerbach, 1988, pp. 231-233).

[9] A more recent intended merger that confirms the trend towards combining distribution with content was the $54 billion bid by the largest US cable operator Comcast to takeover Walt Disney Co. However, in April 2004 Comcast withdrew its offer after Disney executives expressed no interest in the takeover.

[10] Canal Plus since has sold nearly all of its international operations except those in Poland, cutting a major source of losses.

[11] For example, see Case No IV/M.553 – RTL / Veronica / Endemol, OJ L 134/32, 5.6.1996, paragraphs 24, 89, 90.