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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Competition Issues in Television and Broadcasting held by the Global Forum on Competition in February 2013.

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

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

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la télévision et la radiodiffusion qui s'est tenue en février 2013 dans le cadre du Forum mondial sur la concurrence.

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

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

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## EXECUTIVE SUMMARY

*By the Secretariat*

Considering the discussion at the roundtable, the background paper as well as the delegates' and experts' written submissions, several key points emerge:

- (1) *The television and broadcasting sector has been undergoing significant technological and structural changes, which have given consumers access to a great variety of communications and media services. Convergence is changing the way in which consumers use communication services and consume content, as it is available on new platforms and on various wireless portable devices. At the same time, technological change has impacted on regulation and conditions of competition.*

The penetration of new technologies and the dynamic effects of convergence are changing the way that consumers access and view audiovisual content. Nowadays, it can be provided via multiple platforms: analogue or digital terrestrial broadcasts, satellite, cable or Internet Protocol (IP) and Over-the-Top (OTT) television.

A fundamental change affecting traditional broadcasting stems from the migration of networks to IP data transmission. Combined with significant broadband penetration, increases in bandwidth and the proliferation of digital devices, this has enabled different devices to use the same networks and has facilitated the ability of the communication industry to offer new and bundled services. This allows consumers to receive and decode video services across a variety of fixed and mobile devices.

Technological developments affect the conditions of competition as they alter: the range and quality of services; the underlying costs; the extent of barriers to entry (new technologies provide new means by which the market is contested); the ability of customers to switch suppliers; and pricing mechanisms (technological developments allow for provision of pay per view services). Therefore, digitisation generally reduces barriers to entry.

One implication of convergence is the need to ensure a technology neutral approach in the design of regulation. Furthermore, NCAs have to be aware of network neutrality issues and focus on potential forms of network traffic discrimination that may be anticompetitive in specific circumstances: introduction of a 'fast lane' for some services, degradation in the quality of some services or the method chosen to count video consumption towards data cap. Certain countries (Chile, the Netherlands and Slovenia) have developed regulations that reflect a stricter approach towards respecting network neutrality. It can affect competition in TV markets, which is found in a number of cases: KT/Samsung in Korea (2012), Free/Google in France (2013) or Comcast/NBCU in the United States (2009). Further, the substantial competitive pressure coming from online video distributors (OVD) is reflected in certain decisions of some NCAs: Comcast/NBCU (2009), Project Kangaroo (2009) and Newscorp/BSkyB (2012). Therefore, in the future, NCAs should pay a great deal of attention to discrimination in video markets, especially regarding OVDs.

Convergence has added further uncertainty to business planning, in particular concerning future demand, the deployment of new technologies, the choice of a profitable business model or potential sources of competitive products. These uncertainties also create dilemmas for competition regulators. On the one hand, when market circumstances are difficult to assess, intervention may rule out an otherwise desirable market development. On the other hand, the potential for innovation means that it is crucial to keep opportunities open for future competition to develop. For regulators this represents a reason to be cautious, because regulatory ignorance is considerable in the presence of uncertainty generated by the current forms of convergence. However, some regulatory risks are unavoidable and a policy of non-intervention can lead to the rapid emergence of new forms of market power. Professor Fels suggested that the paradigm of sequential innovation might serve as a source of guidance in shaping the regulatory policy, with a high priority going to ensuring that new generations of supply can displace the existing generation.

Finally, convergence has led to a realignment of the boundaries between telecommunication and broadcasting sectors. Since converging services use the same access infrastructures, it might also be necessary to combine the legal framework so as to promote efficient decision-making and minimise possibilities for arbitrage and forum shopping. Some countries plan to integrate the dual broadcasting regulations into a single comprehensive act on broadcasting and telecommunications (e.g. Korea).

- (2) *While technological evolution and the emergence of new products and services have rendered media markets more competitive, some developments in the television and broadcasting market create challenges for competition policy.*

Product market definition in television and broadcasting has become a serious challenge due to technological changes and convergence. To properly define the relevant market, NCAs must have a clear understanding of demand and supply side substitutions along the entire value chain. The market analysis must also take into account the different variables specific to audiovisual products and service markets, like high fixed costs, low marginal costs, bundling, non-price competition, two-sided or multi-sided nature of markets, vertical integration or rapid technological development. Convergence has led to situations of triple play, with telecommunications, cable TV and the Internet, or even quadruple play, with telecommunications, cable TV, Internet and mobile industry. Although market definitions will likely differ across jurisdictions and among individual markets, on a general level a wholesale market for content, a wholesale access market to the infrastructure and a retail market can be identified. A narrower market definition can be based on the type of: broadcaster, platform, pay TV services or premium content. Historically, different types of media (TV, radio, Internet or press) were viewed as separate product markets, but convergence has forced a number of NCAs to adopt a broader market definition (e.g. CME/Balkan News Corporation and TV Europe in Bulgaria). Similarly, representatives of the industry favour the adoption of a more inclusive product market definition.

Even though convergence and technological changes have lowered barriers to entry, there are still significant challenges that may restrict market access. The doctrine gives a non-exhaustive list of examples: governmental policy, the presence of dominant broadcasters, access to content, audience behaviour, consumer costs or capital requirements.

Governmental policy (e.g. regulation or administrative practices) may restrict market access. Regulatory protectionism takes various forms and may be based on economic, social, cultural or technical premises. An example of this would be the granting of a broadcasting license with a

limited radius (*e.g.* Zambia). Hence, the regulation of market access should be clear, transparent and non-discriminatory. Moreover, in many markets the state is directly involved in TV broadcasting through ownership or funding of TV stations. Such state-owned channels can significantly distort competition, erect barriers to entry or harm private operators. The presence of public operators can also provide incentives for regulators to discriminate against private parties to protect the interest of the former. In many jurisdictions, free-to-air and pay TV services are direct competitors. Therefore, the dominance or expansion of public free-to-air broadcasters might increase barriers to entry for pay TV operators.

Access to transmission facilities can still pose a challenge. Although digitalisation has significantly reduced barriers in access to transmission facilities, competition concerns have not ceased to exist. For instance, a regulatory decision to limit the distribution of DTT signal to only one technology may prevent TV broadcasters from changing network operators or making use of other transmission technologies, and deprive third party network operators of opportunities that the digital switchover provides (*e.g.* Astra/Abertis in Spain).

Access to premium content is a serious bottleneck and a source of market power. In particular, premium sport events (*e.g.* Olympic Games or football matches) and new releases of movies, which have no substitutes, are essential to the successful functioning of pay TV providers. Barriers to accessing content can arise from the integration of content owners and broadcasters, exclusive contractual arrangements or from vertical foreclosures by a dominant firm. Premium content may also have an impact on competition in other non-TV markets. For instance, in triple or quadruple play markets, content can increase the attractiveness of the package. Market structure analysis is essential for NCAs to address challenges relating to access to content. A key issue is that a downstream broadcasting service provider may be able to leverage its market position to gain power in an upstream market for content. This upstream buyer's power would enable the exercise of additional market power in the downstream market. In the scenario of a competitive downstream market, the structure of the upstream market has an important impact on market outcomes. NCAs may be most concerned when a merger between a downstream broadcaster and a provider of premium content threatens the availability of that content to competing broadcasters. This depends on the elasticity of supply of competing content. The analysis undertaken by Professor Fels shows that competition concerns in content markets cannot be ruled out, but any assessment of the likelihood of those issues arising depends on a complex, and often counterintuitive, analysis of market structure and conduct in both the upstream and downstream market.

Moreover, the exclusive content strategy can lead to its fragmentation across platforms. To address this problem, some countries (*e.g.* Singapore) have imposed on subscription TV licensees a statutory obligation to cross-carry the exclusive content on the other subscription TV licensee's platform in its entirety and in an unmodified and unedited form. Specific challenges can be also identified for acquiring content by non-linear TV services (*e.g.* CanalSat/TPS in France). Finally, in some countries (*e.g.* Egypt) piracy has decreased the value of the premium content.

Vertical integration across the functions necessary to provide retail pay TV services has also been of significant concern to regulators and NCAs (*e.g.* Comcast/NBCU). Competition issues potentially arising from vertical integration include: refusals to supply essential inputs to rival downstream firms, margin squeezes, raising rivals' costs, exclusivity deals or monopsony in content acquisition.



- (3) *Competition authorities have become more active in launching policy interventions in television and broadcasting markets. In some cases these also involved a consideration of public interest criteria other than competition concerns. Economic and non-economic objectives are often intertwined. This raises questions regarding division of competences between NCAs and sectoral authorities, as well as the model for their cooperation.*

Rapid technological changes and convergence enable the provision of triple or quadruple play services, which increases risks of overlapping regulatory jurisdictions. In particular, competition analysis in the TV and broadcasting sector may involve sectoral regulators, like telecommunications regulator, that often subsume competition issues into a broader analysis of public interests. On the other hand, NCAs may be instructed to look beyond competition policy and consider non-economic factors, which increases potential for poor quality decisions. That is why NCAs should not introduce non-competition concerns in reviewing TV broadcasting operations. Such public interests should be addressed by a sectoral authority. Likewise, sectoral authorities should not take the lead in conducting a competition analysis. The simultaneous application to the same transaction of a competition paradigm and public interest concerns by separate agencies can lead to contradictory or overly complex outcomes. Further, this deprives businesses of clear guidance. Submissions to the roundtable provided examples of good practices on institutional cooperation in this area (*e.g.* decision in Comcast/ NBCU). Moreover, some countries have adopted more or less formal agreements, which prescribe cooperation procedures.

## BACKGROUND NOTE

*By the Secretariat \**

### 1. Introduction

The broadcasting landscape all over the world has been undergoing significant technological and structural changes. These transformations have given consumers access to a greater variety of communications and media services than ever before. For example, in the past television content could be accessed by the viewer at a specific point in time and only at a fixed location. However, convergence is changing the way in which consumers use communications services and consume content as broadcasting content is increasingly available over the Internet and on various wireless portable devices.

While the technological evolution and the emergence of new products and services have rendered media markets more competitive overall, thereby directly benefitting consumers, some market developments raise competition problems, especially in the area related to content. Accordingly, the purpose of this Background Note is to examine competition issues that arise in the provision of television broadcasting to viewers and the extent to which these changes are making television broadcasting more competitive. The topic is of timely importance from the perspective of the Global Competition Forum as broadcasting, both through radio and television services, forms an important part of the information and communications technologies (ICTs) and ensuring widespread access to broadcasting services may not only reduce the digital divide, but it may also help foster development and alleviate poverty.

Ensuring widespread access to radio and television broadcasting is important for a number of economic and non-economic reasons both in the OECD as well as in non-OECD economies. Economically speaking, broadcasting is a significant economic sector in its own, and it can produce significant spill-over benefits in many related markets. Moreover, while radio and television broadcasting continues to be the major source of information in general, it constitutes “a principal source of information for illiterate segments of the population”, which becomes particularly important in times of emergencies.<sup>1</sup>

Although the broadcasting sector has undoubtedly become more competitive over the course of the last decade, competition authorities throughout the globe have become more active in launching policy interventions. In some cases these also involved a consideration of public interest criteria other than competition concerns. Social and cultural objectives pursued by regulatory policy in the broadcasting sector generally fall beyond the scope of this paper. However, it must be borne in mind that economic and non-economic objectives are often intertwined, and with one intervention the authorities may simultaneously pursue both goals.

In response to challenges brought by convergence as well as a growing number of competition concerns many countries decided to carefully scrutinise their media markets, or at least some segments of it. In March 2012, for example, Australian Government released the Final Report on Convergence Review,

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\* This Background Note was written by Anna Pisarkiewicz, Competition Policy Expert, and Gregory Bounds, Acting Head Global Relations, in the Competition Division of the OECD.

<sup>1</sup> ITU (2010), World Telecommunication/ICT Development Report 2010: Monitoring the WSIS targets, 9th Edition, available at: [http://www.itu.int/dms\\_pub/itu-d/opb/ind/D-IND-WTDR-2010-PDF-E.pdf](http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-WTDR-2010-PDF-E.pdf)

which presented its findings on the operation of media and communications regulation in Australia, and assessed its effectiveness in achieving policy objectives in the converged environment.<sup>2</sup> In 2011, ICASA, the South African regulatory authority, launched a Discussion Document to review and analyse a number of aspects related to the broadcasting transmission market.<sup>3</sup> In 2009, New Zealand released a Report which assessed competition concerns in the television broadcasting market, and in particular whether there is a need for sector-specific regulation,<sup>4</sup> while in Hong Kong the Legislative Council conducted a hearing to scrutinize allegation of potentially anti-competitive conduct by the dominant terrestrial broadcaster, TVB. The Competition Commission in the UK, on the other hand, upon the referral from the regulatory authority, Ofcom, examined the state of competition in the pay-TV market.<sup>5</sup>

Market studies and investigations are only one of many steps countries can take to ensure that their respective national broadcasting markets function effectively. Most, but not all, of the OECD countries take a pro-active approach to regulate their national broadcasting markets. Policy interventions usually rely on *ex post* application of general competition law as well as *ex ante* sector-specific regulations. While traditionally regulation relied on technological factors such as spectrum scarcity as well as high costs of encryption and decryption systems, these assumptions have been gradually eroded by significant technological developments. However, while the traditional rationales for broadcasting regulation may no longer apply in most countries, new and challenging competition concerns have arisen.

In many non-OECD economies, some of which have only recently liberalised the broadcasting sector,<sup>6</sup> broadcasting continues to face serious problems. Eltzroth points out that while “the structure and regulation of other key economic sectors have been transformed since the early 1990s, in many states there is comparatively little evolution in broadcasting with respect to critical issues on content, advertising, relationship with content creators, cross-border transmissions, treatment of infrastructure and new infrastructure elements, competition rules, independence of regulators, licensing, independence of the press and news gathering, rules on defamation, and intellectual property rights”.<sup>7</sup>

<sup>2</sup> The Review examined in particular the issue of media ownership laws, media content standards, the production and distribution of Australian and local content as well as the allocation of radiocommunications spectrum. The Final Report is available at: [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/147733/Convergence\\_Review\\_Final\\_Report.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf)

<sup>3</sup> ICASA (2011), Regulatory Framework for Broadcasting Transmission Services, Discussion Paper for Comment, Notice 346 of 2011, available at: <https://www.icasa.org.za/Portals/0/Regulations/Working%20Docuements/Broadcasting%20Transmission%20Services/Draft/Discussion%20Document%20on%20Broadcasting%20Transmission%20Services%20%2034371.pdf>

<sup>4</sup> The Ministry of Economic Development and the Ministry of Culture and Heritage of New Zealand (2009), Television Broadcasting: Competition Issues, Report to the Minister of Broadcasting and the Minister for Communications and Information Technology, available at: <http://www.beehive.govt.nz/sites/all/files/Departmental%20Analysis%20of%20Competition%20in%20Broadcasting.pdf>

<sup>5</sup> Competition Commission (2012), Movies on pay TV market investigation, A report on the supply and acquisition of subscription pay-TV movie rights and services, available at: [http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

<sup>6</sup> In Africa, for example, according to the [www.balancingact-africa.com](http://www.balancingact-africa.com) portal, “35% of countries in Africa now have TV stations other than a sole Government broadcaster: others are joining this list but far too slowly”, ‘Open or closed broadcasting markets: will all of Africa step up to the plate in 2012?’, available at: <http://www.balancingact-africa.com/news/broadcast/issue-no120-0/top-story/open-or-closed-broad/bc>

<sup>7</sup> Eltzroth, C. (2006), ‘Broadcasting in Developing Countries: Elements of a Conceptual Framework for Reform’, The Massachusetts Institute of Technology, *Information Technologies and International Development*, vol. 3, no. 1, pp. 19-37.

While the challenges that the OECD and non-OECD economies will face may differ to some extent, and some of them may be income related, pursuit of competitive markets is worth the resources it requires. As the ITU noted in its report “In countries where there is a single government broadcaster and multichannel alternatives are either non-existent or prohibitively expensive or illegal, there is not much demand for television. On the other hand, where governments have adopted a liberal attitude towards broadcasting, content is more varied and households find ways to get around income or electricity constraints”.<sup>8</sup>

## **2. An overview of technological and regulatory developments in broadcasting**

### **2.1 Description of broadcasting**

The penetration of new technologies and the dynamic effects of convergence are changing the way that consumers access and view audio-visual content. As broadcasting services are continuously evolving, it is no longer possible to provide a uniform, all-encompassing definition of ‘broadcasting’ that is adequate to capture all the particular features of the market for broadcasting services. There is a plethora of audio and video services provided via different media that escape the traditional boundaries of broadcasting. YouTube, which initially started operating as a peer video upload website, today offers viewers access to content posted by some of mainstream broadcasters, such as the UK’s BBC. However, at a general level, the term broadcasting has been defined as “the business of producing interactive information content and distributing it via telecommunications services.”<sup>9</sup>

This topic is specifically focused *on television and broadcasting* and the matters that competition authorities should be concerned with to ensure that consumers are able to derive maximum benefit from television broadcasting services. However, the implications of technological convergence make drawing a bright line around what does, and does not, constitute television broadcasting increasingly complicated and challenging.

In 1998, when the Competition Committee of the OECD last considered the issues of Competition in Broadcasting, it was alert to the potential disruptive effect new technologies could have on the sector. Even then the primary focus was on how changes in technology and consumer demand were altering the operation of broadcasting and removing the traditional rationales for broadcasting regulation. The trend towards the convergence of networks, services, firms, and devices within the information and communications industries was identified, and the Committee foresaw that this would facilitate a dramatic change in the broadcasting industry. The transformation was characterised as a change from the old analogue to the new digital model. In the former, a limited amount of information was transmitted one way across a limited bandwidth to a mass audience. In the latter, a potentially unlimited amount of information can be transmitted interactively to a fragmented audience over a wide range of broadband telecommunications paths.

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<sup>8</sup> ITU (2010).

<sup>9</sup> OECD (1998), Regulation and Competition Issues in Broadcasting in the Light of Convergence, DAF/COMP/GF(99)1.

Today, it is clear that the disruptive potential from convergence is being realised in the broadcasting industry and as such the industry cannot easily be defined according to discrete characteristics of transmission, audience or even modes of viewing. As a consequence, many of the traditional rationales for broadcasting regulation have been removed and new competition concerns have arisen. Fundamental changes have occurred through a realignment of the boundaries between telecommunications and broadcasting sectors. These include:

- fixed and mobile broadband networks that are capable of carrying a diversity of voice and video content;
- the internet that has blurred the distinction between private (telecoms) and public (broadcasting) communications;
- distinctions between the character of the message whether data, voice, or audio visual images are obsolete, and
- the equipment used to record, transmit and or receive messages is no longer relevant in distinguishing telecoms and broadcasting services.

In particular, the immediate impact of convergence is that the market for television viewing is no longer exclusively concerned with whether video services are viewed on a dedicated television or another device capable of projecting images. The distinction between television and video services is rapidly narrowing, particularly with respect to recorded programming.

As a source of interactive content delivery, the broadcasting industry competes at one level with the delivery of entertainment and news services via other industries including print media, movie releases in cinemas and recorded media via DVDs. However, broadcasting has few substitutes when the timeliness of the information is critical, such as in times of emergencies and for the currency of news and information. And in particular, for the immediate delivery of the play by play results from the outcome of sporting events, it appears that broadcasting (and possibly traditional television broadcasting) has no substitutes, despite technological developments. Accordingly, competition problems continue to arise at the points in the value chain for the development and delivery of broadcasting products and services where broadcasters may be able to exercise significant market power, either through controlling the supply of specific content, or as a bottleneck in the provision of distribution/delivery services.

### *2.1.1 The stages of production – content production and distribution*

The broadcasting industry includes firms that are active in the vertically related stages of content production and/or content distribution. The stages of production for content principally concern production and development. Content delivery and its “carriage” can meld when the content is packaged into brands, or organised into channels to be delivered to consumers. Delivery of the content through retail services requires that the content be translated into a form that can be decoded by terminal equipment at the point of viewing by the customer. Retailing also involves managing associated accounting and client services. Content distribution depends upon the provision of broadcasting infrastructure which provides communication to and from the wholesale service provider and at the retail level. Finally, terminal vending provides the necessary equipment to decode or translate the signal into receivable audio visual messages.

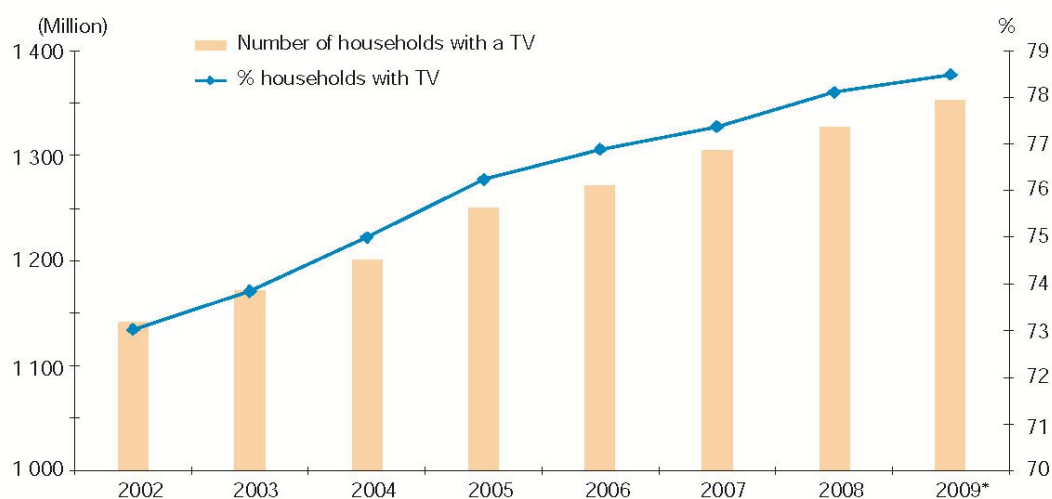
**Table 1. The Multimedia Value Chain**

Stage	Example
Content production and development	Hollywood studios, television studios, production houses, web publishers.
Content aggregation and packaging into channels (like products)	Free to air broadcasters, major cable channels (CNN, HBO)
Retail Service provision (transmission, decoding and customer accounting)	Local cable providers, satellite providers, internet service providers
Infrastructure Provision	Telecoms, satellite broadcasters, other transmission
Terminal vending	Manufacturers of televisions, set top boxes and devices capable of accessing the internet.

### 2.1.2 Delivering television broadcasts: multiple platforms

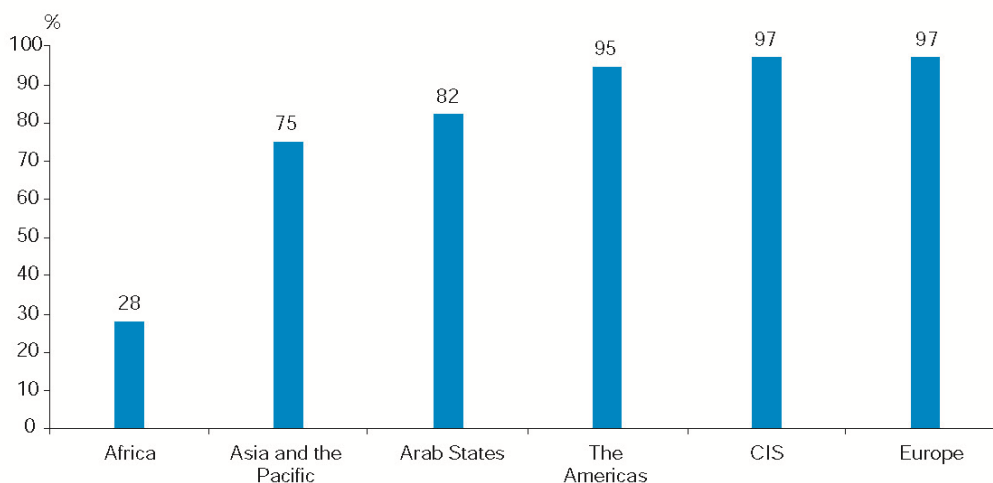
The term broadcasting platforms refers to the types of networks that are used to carry the television signal to the viewer. Today, television is usually provided via one of the following modes: i) analogue terrestrial broadcast; ii) digital terrestrial broadcast; iii) direct-to-home satellite broadcast; iv) cable, and v) Internet Protocol and Over-the-top television (OTT), and as can be seen from the graph below its global coverage is continuously increasing.

**Figure 1. Proportion of households with a TV, 2002-2009 (around the world)\***



Note: \*Estimate.

Source: ITU World Telecommunication/ICT Indicators database

**Figure 2. Proportion of households with a TV, by region, 2009\***

Note: \*Estimate.

Source: ITU World Telecommunication/ICT Indicators database.

1. *Analogue terrestrial broadcast*: it has been the traditional method used to broadcast television signals essentially since the inception of television. The signals are sent by radio waves from a national network of masts and antennae and are received by viewers through an aerial. However, countries around the world are now in the process of abandoning traditional analogue terrestrial television broadcasting and moving towards digital television broadcasting.<sup>10</sup> In some countries, such as United States, France or Ireland, there are no longer any analogue television broadcasters.<sup>11</sup> Kenya planned to be among the first African countries to implement digital broadcasting with switchover initially planned for 2012. However, in accordance with a ruling issued by the High Court in Kenya in a case lodged by a consumer group, the switchover process is to be delayed as the cost of acquiring set-top boxes necessary to access digital signal would leave large portion of the population without access to television services.<sup>12</sup>
2. *Digital terrestrial broadcast*: like standard analogue television, digital terrestrial television (DTT) is transmitted by radio frequencies. The difference lies in the use of multiplex transmitters which allow the reception of multiple channels in the same space as has been previously occupied by just one analogue channel. The viewer receives the signal via a digital set-top box, or another integrated receiving device capable of decoding the signal received by a standard aerial antenna.
3. *Direct-to-home satellite broadcast*: satellite television is delivered to the viewer via communications satellites. The signal is received by satellite dishes and set-top boxes. In many areas of the world, and in particular those that are not covered by terrestrial or cable providers, satellite television has the potential of providing a wide range of channels and services.

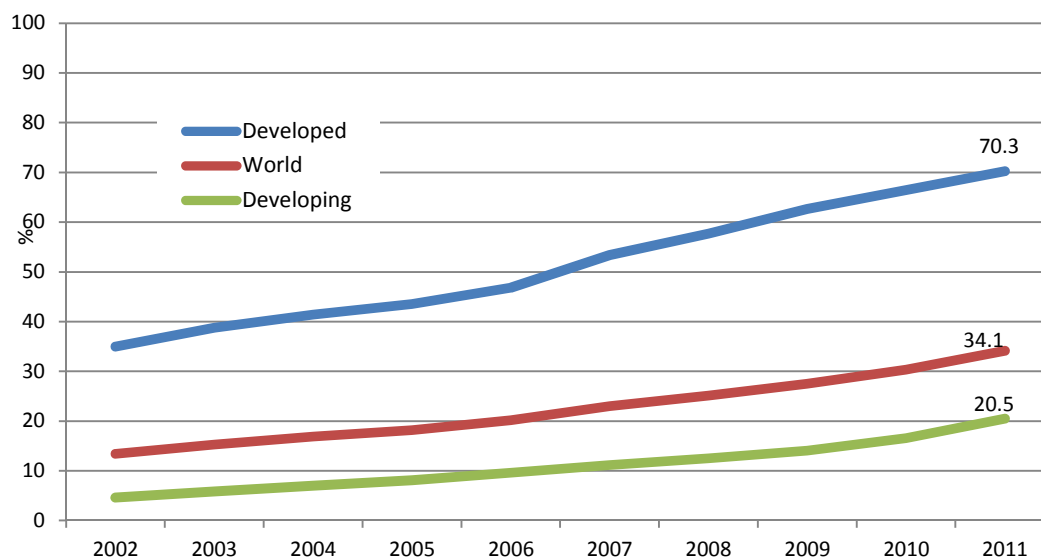
<sup>10</sup> For example, European, African and Middle Eastern countries signed in 2006 at the ITU Regional Radiocommunication Conference a treaty whereby they agreed to phase-in digital broadcasting until 2015, when analogue broadcasts would cease to be provided.

<sup>11</sup> In the US, analogue terrestrial broadcasting ceased to exist on 12th June 2009. In Ireland, the analogue terrestrial television service was completely switched off on 24th October 2012, while in France in the night from 28th to 29th November 2009.

<sup>12</sup> Source Article 19 (2013), 'Kenya: Digital switchover must protect the right to freedom of expression', available at: <http://www.article19.org/resources.php/resource/3583/en/kenya:-digital-switchover-must-protect-the-right-to-freedom-of-expression>

4. *Cable television*: the television signal is delivered via optical fibre and/or fixed coaxial cables, which allows the provider to avoid the traditional system of radio broadcasting antennae. This technology has been deployed extensively predominantly in the Americas, Asia and the Pacific and Europe regions. It is, however, virtually non-existent in the Arab States and Africa, where DTH satellite TV has been successful and where the cost of deploying cable television would be extremely high.
5. *Internet Protocol and Over-the-top television (OTT)*: IPTV is yet another option for multichannel television. It is delivered by broadband operators via high-speed ADSL or fibre-optic connection. In addition, viewers can also resort to OTT TV, the most recent and potentially disruptive development in the broadcasting industry. The difference between IPTV and OTT TV is that the former is generally offered by telecommunication operators (i.e. Orange TV in France or AT&T U-Verse in the US) over managed network with guaranteed quality of service, while the latter is provided by content owners (such as BBC in the UK, Hulu in the US), or dedicated start-up players (such as Netflix in the UK and US, or Roku) without the internet service provider (ISP) or network operator being involved either in the control of the content or its access by viewers. Characteristic of OTT TV is that it is accessible on multiple devices that access the internet - including connected televisions that permit one-one transactions, whereby the viewer can select the broadcast that they wish to view.<sup>13</sup> Because of its recent entry, there is some difficulty obtaining reliable data, but there appears to be few technical constraints to the increasing penetration of OTT in markets where broadband capacity is adequate and devices readily available. Consumer devices for viewing OTT include a wide variety of internet enabled devices, and even cable broadcasters are also migrating to IP-based protocols to allow for the delivery of more interactive media.

**Figure 3. Percentage of households with Internet access by level of development, 2002-2010**



The developed/developing country classifications are based on the UN M49, see: <http://www.itu.int/ITU-D/ict/definitions/regions/index.html>  
 Source: ITU World Telecommunication /ICT Indicators database

<sup>13</sup>

In Canada, for example, it is identified as only coming into existence with the launch of Netflix in September 2010. Miller, P. H. and R. Rudniski (2012), Market Impact and Indicators of Over the Top Television in Canada, Report prepared for the Canadian Radio-television and Telecommunications Commission (CRTC), p. 2, available at: <http://www.crtc.gc.ca/eng/publications/reports/rp120330.htm>



Today, all the platforms compete and struggle to increase their appeal in order to gain wider audiences. Of course, the popularity and market share of each platform will vary throughout the world.<sup>14</sup> While the provision of television services via new technologies (i.e. Internet Protocol, fixed and wireless broadband) will complement terrestrial broadcasting, the European Broadcasting Union (EBU) is of the view that the terrestrial broadcast platform will continue to play a major role at least for the next 5-10 years as new technologies may not provide a viable alternative for distribution to a mass audience, in particular in the sparsely populated areas.<sup>15</sup>

### 2.1.3 *Changes affecting the provision of traditional broadcasting*

Free-to-air TV broadcasting has the qualities of a public good, in that it is non-excludable (anyone with a TV receiver can access it) and non-rivalrous (an unlimited number of receivers can pick up the signal). As the history of the soap opera illustrates, private TV networks originally developed programs as a means to package advertising. Revenue streams from subscription services were facilitated by the transmission of encrypted signals across cable and satellite networks and the development of proprietary terminal decoders, or “set top boxes” which substantially changed the market for TV broadcasting.

Another fundamental change affecting traditional broadcasting is due to the migration of networks to Internet Protocol (IP) packet switching data transmission. Combined with significant broadband penetration and increases in computing power that have significantly increased bandwidth and the proliferation of digital devices this has enabled different devices and applications to use the same networks, and facilitated the ability of the communication industry to offer new and bundled services. This allows consumers to receive and decode video services across a variety of fixed and mobile devices, including computers, game terminals phones and tablets.

In this environment, asymmetric regulation across services can have the effect of creating a competitive advantage for incumbents and potentially limiting the opportunities available for consumers. According to the World Bank, the overarching implication of the effects of convergence for regulation is the need to have a technology neutral approach in the design of regulation and its administration by regulatory institutions. “As converging services travel over the same access infrastructures, it might be necessary to converge regulators and the legal framework as well, in order to promote efficient regulatory decision making, and minimise possibilities for arbitrage and forum shopping.”<sup>16</sup>

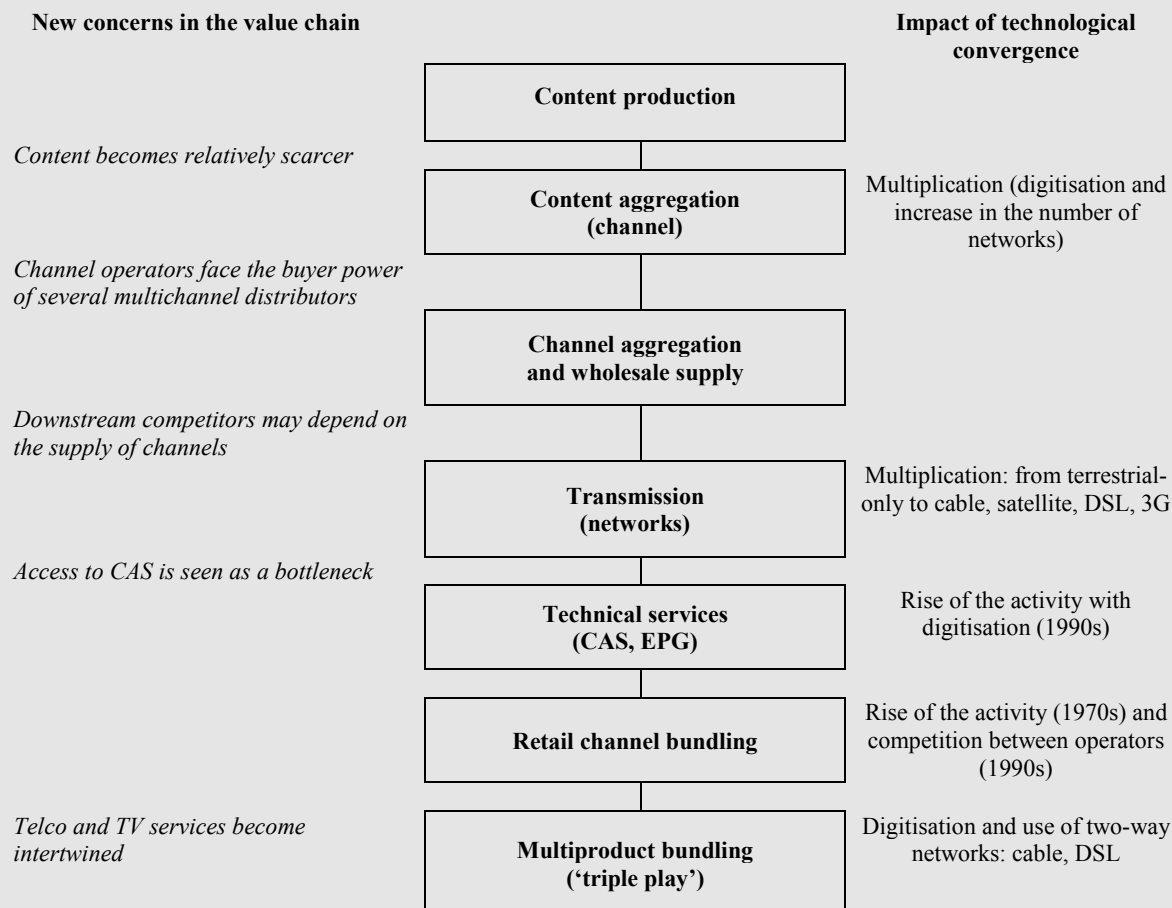
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<sup>14</sup> See for example OECD (2012), Communications Outlook: Chapter 6, Broadcasting and Audiovisual Content, DSTI/ICCP/CISP(2012)9/CHAP6.

<sup>15</sup> EBU (2011), The Future of Terrestrial Broadcasting, Technical Report 013, available at: <https://tech.ebu.ch/docs/techreports/tr013.pdf>

<sup>16</sup> World Bank (2007), Regulatory trends in Service Convergence, Policy Division, Global Information and Communications Technologies Department, Washington, D.C, p. 11.

### Box 1: Impact of Technological Convergence on the Television Value Chain



Source: Pablo Ibañez Colomo<sup>17</sup>

The table illustrates reductions in entry barriers due to the effect of digital compression technologies and the development of new networks, but also the areas of new concern for competition in the value chain. The multiplication of networks and increases in transmission capacity has allowed multichannel distributors to bundle together television channels at the wholesale level for delivery in different retail combinations, including on a subscription-free basis through terrestrial networks. The focus of new concerns becomes access to content which becomes relatively scarcer in the context of a multiplication of networks. The development of technical services for digital television is also a potential bottleneck as it created a new level of the value chain, whereby encrypted TV signals could be restricted to paying customers through a Conditional Access System (CAS), and end user navigation assisted by means of an Electronic Programme Guide (EPG). These systems may be configured to restrict access to certain distribution networks. The development of multichannel bundles combining triple or quadruple play offers, with telecommunication services, such as voice telephony and the internet may also create opportunities for exclusion.

<sup>17</sup>

Ibañez Colomo, P. (2012), *European Communications Law and Technological Convergence: Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications*, Volume 79 of European Monographs, Wolters Kluwer Law & Business.

#### 2.1.4 Interconnection

Network regulation is concerned with ensuring that access to essential facilities is open to new entrants on fair and reasonable terms and that network operators do not abuse their dominant market position to exclude competitors in upstream and downstream markets. Interconnection and the use of networks become complex, particularly in the transition period to increasing convergence, when interconnection must be managed effectively for competition to take hold. Interconnection regulation may be further complicated as convergence alters the profiles of interconnecting parties, for example mixing broadcasters and telecom operators, or entirely new entrants. In such an environment, existing interconnection agreements and regulatory arrangements may not be adequate for the range of new and different services that can travel across the same facilities.

Traditionally, the Internet model for network infrastructure has relied on voluntary interconnection and regulators have not normally imposed special obligations for internet backbone interconnection, except in merger cases. However, OECD (2012) identifies a potential regulatory role in the private interconnection arrangements between Internet service providers (ISPs) for the carriage of data on the internet backbone networks.<sup>18</sup>

*The rise of digital content distribution will bring backbone practices into the regulatory foreground. Whether a relationship is considered peering (settlement-free) or transit (one party pays the other for transport) has major economic consequences. For example, in late 2010, Level 3, the largest United States backbone provider, accused Comcast of unreasonably imposing a recurring monthly fee on traffic it delivered to the broadband provider.<sup>19</sup>*

*Under the parties' prior contract, Comcast actually paid Level 3 for transit. However, after Level 3 became the primary delivery network for Netflix, it began sending substantially more downstream traffic to Comcast customers than it was receiving. Comcast claimed the fee was necessary to recover its additional costs to handle the new traffic, whereas Level 3 saw an anticompetitive move to disadvantage a competitor to Comcast's cable television service. The FCC declined to become involved, stating that this was a commercial dispute rather than a network neutrality issue. A similar battle may be brewing in Europe, where several major carriers are seeking supplemental payments from Internet-based content providers.<sup>20</sup>*

#### 2.1.5 Content regulation: Must-carry and must-list program guides

Content regulations, including “must carry” requirements, are generally applied to broadcasters as a condition of licensing and are typically directed at local, regional or public service channels. Their purpose is to ensure that the broadcaster includes in its schedule a minimum level of programming content that meets certain requirements. These usually require locally produced content or are intended to address particular audience characteristics, for example programs in a particular language or dealing with specific subject matter such as children’s programmes.

<sup>18</sup> OECD (2012), The Development and Diffusion of Digital Content, OECD Digital Economy Papers, No.213, p. 34, available at: <http://dx.doi.org/10.1787/5k8x6kv51z0n-en>.

<sup>19</sup> Stelter, B. Netflix Partner Says Comcast “Toll” Threatens Online Delivery, N.Y. TIMES MEDIA DECODER, November 29, 2010, at <http://mediadecoder.blogs.nytimes.com/2010/11/29/netflix-partner-sayscomcast-toll-threatensonline-video-delivery>; Golding, D. The Real Story Behind the Comcast-Level 3 Battle, GIGAOM, December 1, 2010, at <http://gigaom.com/2010/12/01/comcast-level-3-battle>.

<sup>20</sup> Parker, A. and T. Bradshaw (2011), EU Telecoms Groups Seek Charging Shake-Up, FT.COM, July 12, 2011, at [www.ft.com/intl/cms/s/0/cce9b8b0-abcf-11e0-945a-00144feabdc0.html#axzz1Ro7wOyD4](http://www.ft.com/intl/cms/s/0/cce9b8b0-abcf-11e0-945a-00144feabdc0.html#axzz1Ro7wOyD4).

In a converged environment, content formerly dedicated to a specific network can be readily made available on different infrastructures and platforms, leading to different standards for content regulation. This creates particular challenges for ensuring that broadcasting services achieve the social objectives of promoting and protecting cultural traditions, or protecting citizens from exposure to potentially harmful material.

Regulation requiring a minimum level of domestic content is typically a feature of broadcasting licensing requirements. However, the requirements of must carry legislation for broadcasters may not be required from IPTV providers. Similarly, IPTV may not be required to provide supported services such as closed captioning to make television more accessible to segments of society. In contrast to traditional broadcasting platforms, countries have fewer opportunities to regulate internet content, and therefore apply fewer standards, and if the principles of net neutrality are pursued, countries will likely have less opportunity to do so in the future.

### 3. Challenges for competition policy

In the aftermath of the technological changes that took place, incumbent broadcasters were forced to compete with cable and satellite television providers, on the one hand, as these started to gain foothold in the market, and with telecommunications providers, on the other, as these expanded the scope of their activities. Although in the course of the last decade there has been an overall increase in the number of competing television operators throughout the world, competition in television broadcasting continues to be restricted in a number of countries.

#### 3.1 *Market access and barriers to entry*

Convergence has allowed new firms to enter previously protected markets, creating competition among a number of players in areas that formerly constituted separate markets, including: cable operators, providers of television services delivered via the internet (IPTV), telecom operators, and terrestrial broadcasters. Even if, overall, the broadcasting sector is becoming increasingly competitive, a number of issues relating to barriers to entry arise as a consequence of convergence, which, in turn, has implications for competition policy.

Barriers to entry (and exit) are important to the extent that only in their presence market power is likely to be sustainable over time. Therefore, to determine whether a given merger or behaviour of a dominant firm is anti-competitive, competition authorities are expected to carefully examine entry and exit conditions in a given market.

Depending on the definition, barriers to entry may refer to the established firm's ability to earn supra-competitive profits (Bain)<sup>21</sup> or to "a cost of producing (at some or every rate of output) that must be borne by a firm which seeks to enter the industry but is not borne by firms already in the industry" (Stigler).<sup>22</sup> Entry barriers can arise from governmental policies, capital requirements, economies of scale or product differentiation. While they exist to varying degrees in all media industries,<sup>23</sup> it is often considered that the

<sup>21</sup> Bain, J.S. (1954), 'Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries', *American Economic Review*, vol. 44, no. 1, pp. 15-39.

<sup>22</sup> Stigler, G. J. (1968), *The Organisation of Industry*, Homewood, IL: Richard D. Irwin. See also Baumol, W. J. and R. D. Willig (1981), 'Fixed Costs, Sunk Costs, Entry Barriers and Sustainability of Monopoly', *Quarterly Journal of Economics*, vol. 96, no. 3, pp. 405-431.

<sup>23</sup> Picard, R. G. (2002), *The economics and financing of media companies*, New York, Fordham University Press.

broadcasting industry is one of the most difficult to enter. According to Picard and Chon, new entrants planning to enter into broadcasting markets typically face six critical barriers:<sup>24</sup>

- *Governmental policy:* Barriers to entry of that type may be regulatory or administrative in nature. Competent authorities take into account economic as well as cultural and social factors when issuing broadcasting licenses. This may lead to distortions of competition. For example, in Zambia, radio or TV licenses included conditions which allowed only for short broadcasting radius. This restriction was apparently justified by the need to ensure a community nature of the broadcasting operators.<sup>25</sup> Generally, the governmental ability to control entry and affect the levels of competition in the market tends to be higher with respect to terrestrial rather than satellite television. Because the promotion of competition in the broadcasting sector requires that regulatory barriers be lowered as far as possible, rules governing market entry should be clear, transparent and non-discriminatory.
- *The presence of existing dominant broadcasters:* Such broadcasters usually have a long-established relationship with the viewers and most likely also with advertisers, which has to be challenged by new entrants.
- *Availability of suitable programming:* Successful entry into television broadcasting markets requires access at reasonable prices to desirable programming. Access to such programming refers both to its production and/or acquisition from third parties. Acquisition of some of the content, which may turn out to be critical to attract viewers, is likely to constitute a significant cost to new market players.
- *Audience behaviour:* In the presence of established dominant broadcasters, new entrants have to come up with offers sufficiently attractive to convince viewers to alter their existing patterns of viewing and channel choice. Commercial broadcasters, whose operations are financed through advertising fees, need to establish within a rather short period of time an audience base that will attract a sufficient number of advertisers.
- *Consumer costs:* Most likely, new entrants will offer their television broadcasting services using cable, satellite or digital terrestrial technologies, all of which require viewers to incur hardware-related costs. Difficulties and costs that viewers may encounter when switching between different television broadcasters has the potential of discouraging them from altering their established patterns of viewing altogether. For example, consumers who switch from one satellite television operator to another generally have to incur costs related to the rental or purchase of adequate equipment, such as set-top boxes. However, where different platforms, i.e. satellite, cable, IPTV, are effectively competing against one another, one could expect the switching costs to be low as individual platforms would be likely to charge low or no fees at all for installation and necessary equipment in order to convince subscribers of the other platforms and/or television operators to switch.<sup>26</sup>
- *Capital requirements:* Where the level of capital required is prohibitively high, it may constitute a significant barrier to entry. However, broadcasters may resort to joint ventures and other agreements that would render capital requirements less strenuous.

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<sup>24</sup> Picard, R. G. and B. S. Chon (2004), 'Managing Competition Through Barriers to Entry and Channel Availability in the Changing Regulatory Environment', *The International Journal on Media Management*, vol. 6, no. 3&4, pp. 168-175.

<sup>25</sup> See contribution from Zambia, DAF/COMP/GF/WD(2013)21.

<sup>26</sup> For example, in the UK Sky has an offer which includes free Sky and HD Box.

Naturally, as the television broadcasting industry continues to evolve some of the above mentioned features may cease to constitute a barrier to entry. Moreover, some features may act like a barrier to entry in one country, but not in another. For example, in Singapore content fragmentation created a significant barrier to entry for new entrants as all the top multi-national channel-producing companies sold their channels exclusively to subscription TV licensees.<sup>27</sup> In comparison, in some other countries, less than 15 per cent of top ten channel-producing companies sold their channels exclusively to pay-TV licensees. Competition authorities should therefore regularly assess the features of their respective national markets and potential for new entry.

### 3.1.1 *From transmission to exclusive premium content as bottleneck and source of market power*

The provision of TV broadcasting services requires that new entrants obtain access to transmission (telecommunications) services as well as access to content. In the era of analogue broadcasting, legacy television regulatory models have typically considered transmission capacity to constitute a major barrier to entry since given the capacity constraints of the radio spectrum it was believed that the number of television channels would remain limited. Moreover, if just one or a small number of broadcasters controlled the already limited transmission capacity, one could rationally expect that competition would not flourish.

However, as Seabright and Weeds point out: “with digital transmission [...], spectrum constraints on the number of channels are effectively removed and scarcity rents are eliminated. Existing transmission capacity is sufficient to meet demands (at current and anticipated future levels) and there is a strong incentive to utilise spare capacity that militates against using access to transmission as a barrier to entry”.<sup>28</sup> In other words, digitalisation, which led to a substantial increase in transmission capacity by compressing television signals and the decreasing cost of reproducing and transmitting information, is considered to have significantly reduced some of the entry barriers in the broadcasting sector.

In the EU, assessment of high and non-transitory barriers to entry forms part of the three-criteria test which, if fulfilled, leads to the imposition of *ex ante* regulation.<sup>29</sup> In fact, the Commission Recommendation of 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation included in the list the market for broadcasting transmission services to deliver broadcast content to end users (ex market 18).<sup>30</sup> However, under the 2007 Recommendation, which replaced the former, the market is no longer regulated.<sup>31</sup> In the Commission’s

<sup>27</sup> See contribution from Singapore (2013), DAF/COMP/GF/WD(2013)33.

<sup>28</sup> Seabright, P. and H. Weeds (2007), ‘Competition and market power in broadcasting: where are the rents?’ in Seabright, P. and J. von Hagen (eds.), *The Economic Regulation of Broadcasting Markets*, Cambridge University Press.

<sup>29</sup> In the EU, national regulatory authorities impose sector-specific obligations when the three-criterion test is fulfilled. Under this test, the authorities examine whether i) there exist ‘high and non-transitory’ barriers to entry, ii) whether the market structure does not tend towards effective competition in a relevant time horizon, and iii) whether the application of competition law alone would not adequately address the market failure(s) concerned.

<sup>30</sup> Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, O.J. [2003] L 114/45.

<sup>31</sup> Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, O.J. [2007] L 344/65.

view and on the basis of the comments received from national regulatory authorities, while some entry barriers may still exist in the market, the market dynamics are such that effective competition can be expected within the relevant time horizon. The second criterion of the three-criterion test is therefore no longer satisfied as “there is evidence of greater platform competition as the transition from analogue to digital delivery platforms occurs”.<sup>32</sup>

However, despite greater platform competition and apparently sufficient transmission capacity to satisfy both current and future needs, competition concerns have not ceased to exist. Their source has simply shifted to other related areas. Some of the transmission assets, for example, such as terrestrial transmission sites, are simply too expensive to be duplicated. Regulatory authorities concerned about potential exploitation of control over such assets may choose to regulate conditions under which access to them is to be granted.<sup>33</sup> Moreover, when such assets are controlled by a dominant firm, there is a risk that such a firm may unilaterally engage in anti-competitive behaviour. The *Astra/Abertis* case from the Spanish competition authority, concerning abuse of dominant position, clearly illustrates that access to transmission facilities may still raise serious competition concerns, even if generally it is considered that transmission no longer creates barriers to entry.<sup>34</sup>

The success of entry into television broadcasting is moreover determined by the ability of new broadcasters to gain access to the content that consumers demand, and to differentiate their offering from that of incumbent broadcasters. Whereas technological convergence, and digitisation in particular, have gradually resolved the problem of spectrum and channel scarcity, convergence has not, as a matter of fact, had any direct impact on the provision of content. As there are only a few blockbusters and a limited number of premium sport events every year, content has consequently become scarcer, and has effectively become a new bottleneck in the broadcasting market.

Within premium content one should distinguish in particular sport events and blockbuster Hollywood movies.<sup>35</sup> While both types of content are traditionally considered to be a key element driving the demand for pay-TV subscription, they tend to display different features. The problem of bottleneck is most acute for content that is time critical, and therefore for which broadcasting has no adequate substitutes, and also content demanded by a mass audience, for which traditional broadcasting technologies have a competitive advantage. Major professional sporting events fit all these criteria.<sup>36</sup>

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<sup>32</sup> European Commission, Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SEC(2007) 1483/2.

<sup>33</sup> Comreg (2012), Market Review: Broadcasting Transmission Services in Ireland, Consultation Paper and Draft Decision, Document No. 12/77, Available at: [http://www.comreg.ie/\\_fileupload/publications/ComReg1277.pdf](http://www.comreg.ie/_fileupload/publications/ComReg1277.pdf)

<sup>34</sup> See the summary of the case in Section 4 of the Background Note.

<sup>35</sup> For example, Ofcom defines premium film rights as the rights from the main six Hollywood studios in the period 12 months following their theatrical release.

<sup>36</sup> In the second half of the twentieth century television revolutionised the way millions of people around the world experience sport. Because of television, millions of people could simultaneously share the experience of watching such major events as the FIFA World Cup or the opening ceremony of the Olympic Games. Not surprisingly, the demand for the sports broadcasting rights has grown substantially during the last decades. This growth has been mostly driven by an increasing number of broadcasters operating in the market and expanding market share of commercial broadcasting. Initially, when the provision of television was dominated by public networks, fees for rights to broadcast sport events used to be relatively small as public broadcasters were monopolists. However, as commercial television gained more audience and started to compete with incumbent broadcasters, the fees for sports television rights have increased

While the pay-TV market does not seem to exhibit natural monopoly features, (exclusive) access to premium content is generally considered to be of essential importance for the functioning of pay-TV markets.<sup>37</sup> Such a view has been expressed around the world by competition authorities as well as market players. For example, the European Commission in its decision concerning merger transaction between NewsCorp and Telepiù, expressly stated that “access to premium contents, mainly recent films and football events but also other sport events, is vital to the successful operation of a pay-TV”.<sup>38</sup> In South Africa, MultiChoice, created out of the subscriber-management branch of M-Net, and M-Net, which for the last two decades has been the only licensed pay-TV provider, jointly submitted that “for subscription broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers”.<sup>39</sup> However, as the Ministry of Economic Development and the Ministry of Culture and Heritage of New Zealand point out in the report issued jointly on competition issues in television broadcasting “any broadcaster that can ‘lock up’ long-term rights to all or most premium content potentially has the capacity to dominate the retail market and exercise market power”.<sup>40</sup>

Barriers to accessing content and related competition concerns can arise from various sources, such as for example the integration of content owners and transmission providers, or existing contractual arrangements. Traditional broadcasting companies that transmit via cable, terrestrial, and/or satellite may all have legacy relationships providing privileged access to specific content that create obstacles for new entrants. Telecommunications companies may also create “walled gardens” only allowing access to content providers with which they have arrangements.

### 3.1.2 *Scarcity of spectrum and lack of effective management*

The move from analogue to the more efficient digital spectrum has significantly reduced the scarcity of frequency capacity allowing more channels to be carried across fewer airwaves.<sup>41</sup> This removes a number of the potential monopoly arguments for licensing a limited number of broadcasters and allows for the operation of a wide range of new services, and the evolution of existing services. However, as service licensing has moved towards technology and service neutrality, the allocation and management of spectrum has to provide the opportunities for different portions of spectrum that can host new services and technologies.

Also, even though the problem of spectrum scarcity has to some extent been reduced, anti-competitive behaviour in the spectrum market can still arise, in particular when spectrum holders seek to establish a strong position in the provision of downstream services. The scope for such behaviour is greater when

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exponentially,<sup>36</sup> while the broadcasting of sport events has shifted from public to commercial pay-TV television. For example, for the right to broadcast 2006 and 2008 Olympics, NBC paid \$1.508 billion, whereas for the 2010 and 2012 events, it paid \$2.201 billion, a boost of 33 per cent. The skyrocketing costs of acquiring sports broadcasting rights can be explained by i) the strategy usually pursued by pay-TV operators who require exclusivity, which in turn facilitates their strategies to foreclose the market, on the one hand, and ii) the strategy pursued by the right holders, on the other, who seek to extract maximum rents from the sale of their content.

<sup>37</sup> According to Spence and Owen, the content for which demand is rather inelastic will rather be provided to the viewer under subscription than on advertising-based television. Spence, M. and B. Owen (1977), ‘Television Programming, Monopolistic Competition, and Welfare’, *Quarterly Journal of Economics*, vol. 91, no. 1, pp. 103-126.

<sup>38</sup> European Commission [2003], Case No COMP/M.2876, *NewsCorp/Telepiù*.

<sup>39</sup> ICASA (2005), *Subscription Broadcasting Services: Position Paper*.

<sup>40</sup> The Ministry of Economic Development and the Ministry of Culture and Heritage of New Zealand (2009).

<sup>41</sup> It has been identified in some cases as six times more efficient.



spectrum allocated for a particular use is scarce. Scarcity may directly result from the regulation that can explicitly pre-empt some spectrum. For example, Cave (2010) points out that “40 per cent of the spectrum below 1 GHz is used for terrestrial broadcasting, and a TV station, for instance, may not be allowed unilaterally to stop broadcasting and instead use its assigned frequencies to transmit cellular phone calls”.<sup>42</sup> Also, assignment of frequencies may be based on anti-competitive criteria. Recently, the European Commission has launched proceedings against Bulgaria’s government alleging that in 2009 the Bulgarian government assigned five digital frequencies to only two broadcasters – Latvia’s Hannu and Slovakia’s Towercom – by “limiting without justification the number of companies that could potentially enter the market”.<sup>43</sup>

Accordingly, the risk of anti-competitive behaviour in spectrum markets can be limited with the introduction of appropriate tools in the spectrum regulation itself. However, it must be pointed out that concerns arising with respect to spectrum management in low- and middle-income countries may be quite different than those that arise in high-income countries. The World Bank notes that “developing countries may have a shortage of spectrum demand rather than of supply”, and that “all small markets with potential for fast growth, large areas without service, incomplete infrastructures, administrative restriction on entry, and capital shortages all denote spectrum underutilization”.<sup>44</sup>

When regulatory measures turn out to be insufficient to prevent the risk of anti-competitive behaviour, individual anti-competitive practices in the spectrum market can be addressed by general competition law. For example, when a given merger involves transfer of spectrum, and there is a risk that such a transaction may have an adverse impact on competition, competition authorities may approve merger, however subject to remedies affecting control over spectrum.

### 3.1.3 *Ownership controls*

One of the impacts technological developments and convergence have on the media market is the increased attractiveness of joint ventures and mergers both at national as well as global level. High concentration in media markets may pose different and greater concerns than in other industries. In particular, it may have a negative effect on diversity and plurality, which is of fundamental importance in media industries.

In most industries, market failure and anti-competitive behaviour or practices lead to higher prices. However, in information-heavy media markets, where market players provide so-called ‘credence goods’, higher concentration, and less competition may diminish the quality of reporting.<sup>45</sup> While competition law

<sup>42</sup> Cave, M. (2010), ‘Anti-competitive behaviour in spectrum markets: Analysis and response’, *Telecommunications Policy*, vol. 34, pp. 251-261.

<sup>43</sup> Berra, S. (2013), ‘DG COMP sues Bulgaria over digital TV’, 28 January 2013, available at: <http://www.globalcompetitionreview.com/news/article/32968/dg-comp-sues-bulgaria-digital-tv/>

<sup>44</sup> World Bank (2008), ‘Managing the Radio Spectrum: Framework for Reform in Developing Countries’, Policy Research Working Paper WPS 4549.

<sup>45</sup> Stucke and Grunes quote in their article as an example media’s response to comments made by then Senator Obama during the 2008 presidential campaign. In response to a question posed at a campaign stop in Oregon, then Senator Obama stated that he would seek to enforce the antitrust laws more strongly, if elected, and pointed out that media consolidation raised in that regard particular concerns. The authors point out that “none of the twenty prominent newspapers surveyed by the American Antitrust Institute independently reported the comments”. Some of the major newspaper, such as The Washington Post and The New York Times, discussed the response from the U.S. legal community to the comments made by the Senator, however, without mentioning concerns of media consolidation that were singled out. Stucke, M E. and A. P. Grunes (2009), ‘Toward a Better Competition Policy for the Media: The Challenge of

can address the issue of concentration and choice, it can by no means guarantee that ownership will be dispersed and that new entry will occur. Given that competition law and policy pursues economic objectives, such as efficiency and consumer welfare, it cannot provide adequate protection for diversity and plurality of media. It is for that reason that many jurisdictions across the world have adopted special rules on the maximum level of ownership within particular media platforms (concentration limits) and/or across different media platforms (cross-ownership limits). Such rules, however, may also seek to promote competition.

In the United Kingdom, for example, Ofcom has a statutory duty to review the media ownership rules regularly and make recommendations for any change to the Secretary of State.<sup>46</sup> In the US, the Federal Communications Commission (FCC) is required under Section 202(h) of the Telecommunications Act of 1996 to review its media ownership rules every four years to determine whether they are in the public interest as the result of competition, and when necessary to modify or repeal any existing regulation that no longer meet the criteria. The last Quadrennial Regulatory Review took place in 2010, and in December 2011 the FCC adopted and released a Notice of Proposed Rulemaking.<sup>47</sup> Currently, the FCC has in place:

- Local television ownership rule
- Local radio ownership rule
- Newspaper/Broadcast cross-ownership rule,
- Radio/television cross-ownership rule, and
- Dual network rule.

According to the FCC, the dual network rule is necessary to promote both competition and localism. While the rule permits common ownership of multiple broadcast networks, it prohibits a merger between the “top four” networks: ABC, CBS, Fox and NBC. Such prohibition, according to the Commission, is justified by the fact that given “the level of vertical integration of each of the top four networks, as well as their continued operation as a “strategic group” in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming”.<sup>48</sup> The dual network rule was also upheld by the U.S. Court of Appeals for the Third Circuit, which found that it was justified given vertical integration as well as the ability of the top four broadcast networks to reach a larger audience than other networks.<sup>49</sup>

While ownership control rules are imposed with a view to ensure diversity and plurality of views, the role of competition in that regard is of enormous importance. Generally, assessing the quality and veracity of information is a difficult task, and even more so when the quality of information would have to be determined in isolation. Competition, on the one hand, allows “consumers to judge quality more accurately

Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy’, *Connecticut Law Review*, vol. 42, no. 1, pp. 101-146.

<sup>46</sup> Last revision took place in November 2012, and Ofcom recommended no changes to the existing rules. See contribution from the UK, DAF/COMP/GF/WD(2013)39. See also: <http://stakeholders.ofcom.org.uk/market-data-research/other/media-ownership-research/rulesreport2012/>.

<sup>47</sup> FCC (2011), Notice of Proposed Rulemaking in the matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-186A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-186A1.pdf)

<sup>48</sup> FCC (2011), para. 136.

<sup>49</sup> *Prometheus Radio Project v. Federal Communications Commission* (2011), 652 F.3d 431 at 464.

because they can benchmark one firm's reporting against the other",<sup>50</sup> while on the other, it can lower supply-driven bias.<sup>51</sup>

It must be pointed out that while ownership control may help ensure diversity and pluralism, the efficacy of such rules from a competition policy perspective depends on how broadcasting and media services are defined. Precise distinctions become less feasible in the context of 'multiple-play' services that blur the boundaries between audio-visual transmissions across different platforms. For example, it may be relevant to ask whether video content provided to mobile devices constitutes a broadcasting service.

Similarly, in this dynamic environment taking account of how technological developments are redefining the telecommunications and media sectors, it can be complicated to identify how the acquisition of firms might hamper the development of competition and potentially create opportunities for the control of media "pipes" to be used to stymie competition in downstream media markets.

#### 3.1.4 *Television channel numbering*

Channel numbers can have significant local recall among consumers, giving established television stations a competitive advantage. This is a matter to be managed in the allocation of the digital spectrum and the migration of analogue channels. It may also arise with respect to the delivery of IPTV across different platforms, because the channels come from different geographic locations and so the aggregation of channels may lead to overlapping channel numbering. In the US, for example, the Federal Communications Commission (FCC) proposed during the process of switch-over from analogue to digital to implement a channel election process to allow station licensees to choose which channel they prefer.

#### 3.1.5 *The impact of disruptive technologies*

Clearly, the television sector is currently in turmoil. From a one-way medium it has been continuously evolving into a two-way medium where viewers no longer need to access a given programme at a specific point in time as was the case under the static distribution models offered by traditional terrestrial broadcasting. The traditional TV business model based on proprietary and vertically-integrated distribution networks is being challenged by more personalised programming. Where viewers can access content on multiple platforms, broadcasters can establish a more direct relationship with the viewer, thereby leading to a long-term fragmentation of the audience, which splits the time they devote to media among a plethora of channels and platforms.

One of the latest developments affecting the television broadcasting industry is the so-called 'Over-the-top' television or services (OTT). As it has been already explained, this essentially refers to the delivery of video bit-streams over broadband transmission networks rather than via traditional cable, satellite and other traditional broadcast means, in addition to other services typically provided via Internet. However, the relevance of OTT TV or IPTV should not be discussed merely from the perspective of delivering digital television over the Internet. It is argued that OTT TV is likely to lead to the reinvention of the way in which we experience television.<sup>52</sup>

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<sup>50</sup> Gentzkow, M. and J. M. Shapiro (2008), Competition and Truth in the Market for News, *Journal of Economic Perspectives*, vol. 22, no. 2, pp. 133-154.

<sup>51</sup> See Stucke and Grunes (2009) for the overview of studies that showed how competition among alternative sources of media reduces supply driven-bias, which refers to distortive, self-censored, or biased news coverage and reporting.

<sup>52</sup> For the description of potential modifications in the consumption of television content see for example Meyer, L. (2006), 'Three scenarios for TV in 2015', *Communications & Strategies*, no. 62, pp. 93-108.

Increasing competition from converged market players who provide TV, telecommunications and internet services, and altering structure of the television broadcasting industry<sup>53</sup> leaves competition authorities in front of unparalleled levels of complexity. Given that technological changes are rapid and most of the time unpredictable, one cannot rationally expect competition and regulatory authorities to correctly predict either the outcome of the current changes or the exact nature of the new challenges. Nonetheless, since governments continue to play an important role in the design of media policy, which covers television broadcasting, competition and regulatory authorities should at least attempt to conduct their ongoing investigations bearing in mind the potential of technological changes to completely alter currently existing market structures, which in turn may render some of the current competition concerns obsolete. While it is not possible to predict what the television consumption pattern will look like in five or ten years from now, it is safe to assume that television broadcasting will continue to evolve towards a broadcasting model whereby viewers consume content in a more interactive, personal and mobile manner. Where competition authorities have the powers to do so, they may consider carrying out market studies or investigations to assess altering patterns of television consumption, and corresponding changes in market structures. In the absence of such powers, when investigating individual cases competition authorities should carefully examine the dynamic aspect of the market, and the impact it may have on the growth of competition.

### 3.1.6 *Overlapping regulatory jurisdictions*

In an increasingly globalised economy, where it is a common practice for converged players in the communications markets to offer triple- or quadruple-play services, the risk of jurisdictional conflicts between various authorities and the need for a close co-operation between them becomes more acute. At the moment, the most pertinent issue concerns conflicts arising at the national level, and in particular between different potentially competent regulatory authorities, and between regulatory and competition authorities.

- *Telecommunications and broadcasting regulatory authorities:* Bearing in mind convergence that has taken place in the technological and economic conditions underlying the provision of telecommunications and audiovisual services, an increasing number of scholars assert that a similar convergence, at least at a minimum level, should take place in relation to the respective regulatory regimes.<sup>54</sup> The key question is whether current national legal frameworks provide stability and long-term direction to the communications industry, and at the same time allow service providers and users the flexibility to deploy and use services provided over new technologies.

In practice, the market failures, or policy issues concerning the quality of, or access to content are distinguishable from the issues concerning ensuring access to carriage of data, so separating the regulatory functions for content and carriage should not pose particular problems. Standards for a certain level of broadcasting service have not traditionally had to distinguish their usage. In a converged environment, where not all content is under the control of the regulatory jurisdiction, the implications of establishing standards for only a restricted range of services may have to be evaluated.

There is however an issue with treating like services in a like manner and ensuring that similar services are treated the same way under the law. The arguments for distinguishing access to

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<sup>53</sup> In the US, for example, AT&T and Verizon Communications, like many other telecommunications providers around the world, now rely on proprietary fibre networks to compete directly with traditional cable and digital satellite broadcasters.

<sup>54</sup> For a discussion on the impact of convergence on sector-specific regulation, see for example Yoo, C. S. (2009), 'The Convergence of Broadcasting and Telephony: Legal and Regulatory Implications', *Communications & Convergence Review*, vol. 1, no. 1, pp. 44-55.

telecommunications and broadcasting may no longer apply, when both services carry the same products. However, in jurisdictions where there is a separate regulatory authority for telecoms and broadcasting, one regulator may assert that their rule overwhelms the other. This creates potential opportunities and incentives for forum shopping or regulatory arbitrage, which undermines the efficiency of regulation and raises the costs for service providers.

Joint regulation advocated for by some scholars also calls for a single converged regulatory authority. This has already been adopted in some OECD countries such as the UK (Ofcom) and Italy (Agcom). There are also a number of examples from the non-OECD economies where individual countries have decided to set up a converged regulator in response to challenges brought by convergence “to eliminate obsolete rules that were hampering investment and slowing competition in the ICT sector”.<sup>55</sup> This is, for example, the case of South Africa and India, where a converged regulator was established with a view to capture the converging nature of the ICTs.<sup>56</sup>

- *Regulatory and competition authorities:* As convergence has led to the erosion of natural monopolies and created the scope for intermodal competition, some commentators argue that consequentially there will be less scope for sector-specific regulation, and more for conventional antitrust law.<sup>57</sup> Irrespective of whether this is the case, potential conflicts may also arise when regulatory and competition authorities issue conflicting decisions concerning the same matter. To decrease the risk of jurisdictional conflicts and divergent decisions, some countries have adopted less or more formal agreements, or memorandums of understanding, which prescribe specific co-operation procedures.

In addition to conflicts that may arise at the national level, the risk of international overlaps between competing jurisdictions is becoming more pronounced as more content shifts to the Internet. One of the findings of the Media Convergence Review Panel in Singapore was that local media licensees are increasingly vulnerable to “online competition from overseas media service providers who are not subject to local regulatory regimes”.<sup>58</sup> To address this unlevel playing field, the Panel proposed that “Singapore’s broadcast licensing framework should cover both local and foreign broadcasting services delivered over the Internet and receivable by the Singapore public”, while acknowledging the difficulties of putting such a solution into practice.<sup>59</sup>

### 3.2 *Market definition*

Market definition is, beyond doubt, one of the most important analytical tools that competition authorities use to examine and evaluate competition problems. This is so because competition analysis cannot in general be carried out independently from market definition.<sup>60</sup>

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<sup>55</sup> García-Murillo, M.A. (2005), Regulatory responses to convergence: Experiences from four countries, *Info*, vol. 7, no. 1, pp. 20-40.

<sup>56</sup> The Independent Communications Authority of South Africa (ICASA) was created in the aftermath of a merger of two separate regulatory authorities: the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA).

<sup>57</sup> Geradin, D. and M. Kerf (2003), *Controlling market power in telecommunications: Antitrust v. sector-specific regulation*, Oxford, England: Oxford University Press.

<sup>58</sup> Contribution from Singapore, DAF/COMP/GF/WD(2013)33.

<sup>59</sup> Ibid.

<sup>60</sup> On the importance and developments in the area of market definition, see OECD (2012), Market Definition, DAF/COMP(2012)19.

Market definition in television broadcasting is likely to be challenging given that the broadcasting sector comprises a multitude of relationships. To properly define the relevant market, and identify potential competition concerns, competition authorities must, in the first place, have a clear understanding of both demand- and supply-side substitutions all the way along the value chain. Since the broadcasting of television involves a multitude of players, analysis of substitution must take into account all of them, including advertisers, viewers, broadcasters, infrastructure/network operators, or content rights-holders.

Furthermore, the market definition exercise will be complicated even further by the presence of a number of features which are frequently found in audio-visual product and service markets, such as the presence of high fixed and low marginal costs, bundling, non-price competition, two-sided nature of markets, vertical integration in the production and distribution process, and rapid and often unpredictable technological development.

With the migration towards Internet Protocol traffic and increasing reliance on Internet-based products and services, where television programming can be accessed via multiple devices, the process of defining the relevant market is likely to become more complex. However, as the Report prepared for the Canadian regulator, CRTC, points out “this additional level of complexity does not mean, that established tools and methodologies are outdated. The core objective, and so the core tools, of determining the boundaries of a market – to help identify market power, that is, the ability of a firm or a group of firms to profitably maintain prices above the competitive level for a non-transitory period of time – remain relevant”.<sup>61</sup>

The exact delineation of the relevant market will be determined by a number of factors. The nature of the relationships and the extent to which the broadcasting sector in a given country is integrated is one of them. While market definitions are likely to vary among individual broadcasting markets and across jurisdictions, on a general level one can differentiate between i) a wholesale market for ‘raw content’, ii) a wholesale access market to the infrastructure, and iii) a retail market.

Furthermore, competition authorities may identify markets more narrowly on the basis of:

- the type of broadcaster (i.e. commercial vs. public), and in particular the provision of pay-TV as opposed to free-to-air television;<sup>62</sup>
- the type of platform that is used for transmitting the television broadcasting (i.e. cable, satellite, digital terrestrial, etc);
- the type of pay-TV services (pay-per channel, pay-per view, video-on-demand, digital interactive broadcasting),<sup>63</sup> and
- the type of premium content that is provided, in particular premium sport channels and premium film channels.<sup>64</sup>

<sup>61</sup> Csorgo, L. and I. Munro (2011), Market Definition Issues for Audio and Audio-Visual Distribution Products and Services in a Digital Environment, Report prepared for the Canadian Radio-television and Telecommunications Commission (CRTC), available at <http://www.crtc.gc.ca/eng/publications/reports/rp110215.htm>

<sup>62</sup> For example, in the 2003 News Corp/Telepiù merger, the European Commission held that “there is a clear distinction, from the viewpoint of both customers and suppliers, between free-to-air TV and pay-TV”, (*News Corp / Telepiù*, para. 19). In this case, no distinction was made with respect to the means of transmission of the relevant content. In a more recent acquisition of the remaining 60.9% of the British Sky Broadcasting Group PLC (Sky) by News Corp, the Commission again found that the retail supply for pay-TV and free-to-air TV constituted separate markets. Case M.5932, *News Corp / BSkyB*, 21 December 2010.

<sup>63</sup> In *News Corp/ BSkyB* (2010), the European Commission found that “within the pay-TV market, the retail supply of non-linear services”, such as DVDs, pay-per-view and video-on-demand, and “linear channels belong to two separate markets”, paras. 106-107.

Defining the relevant market in highly dynamic sectors with highly differentiated products and services will often require competition and regulatory authorities to rely on a robust set of data and information. While market definition from prior cases may be helpful, competent authorities will have to rigorously define the relevant market in the context of each case in order to capture dynamic and evolving competition between new television broadcasting services.

### 3.3 *Platform competition*

Where television broadcasting is provided over different platforms one has to examine the degree of potential substitution between them to understand the extent to which a given market is competitive. In some countries, deployment of cable networks that reached near-universal penetration has gradually marginalised terrestrial technologies, as was for example the case of the Benelux countries in the 1980s. Other countries, on the other hand, such as the UK, France, Spain or Italy continued to rely predominantly on the terrestrial platforms.

Certainly, the provision of television services via new technologies (i.e. Internet Protocol, fixed and wireless broadband) will complement terrestrial broadcasting, and render provision of television broadcasting more competitive. However, these new technologies may not be a perfect substitute for traditional broadcasting. For example, Internet Protocol and fixed or wireless broadband are unlikely to provide a viable alternative for distribution to a mass audience, in particular in the sparsely populated areas. Moreover, in terms of substitutability with other modes of transmission, it is often argued that the quality offered by the IPTV tends to be lower than the one enjoyed by the viewer via other digital TV networks. However, IPTV operators are continuously introducing changes, which are meant not only to improve their coverage, but also to bring the level and reliability of their TV services closer to the quality offered by the traditional digital TV operators.

Given the potential of new technologies, and in particular of IPTV and OTT to completely redesign the way in which viewers experience television, thereby upsetting existing market structures, it is not surprising that established television operators may seek to hamper the entry and/or expansion of the new players. The ‘cable only’ cartel case from South Korea illustrates how cable operators sought to prevent the entry of IPTV operators.

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In Europe, following the migration of broadcasting rights to pay TV, competition authorities have consistently adopted a narrow market definition regarding whether forms of content other than the specific sport are substitutes and whether platforms other than pay TV offer suitable programming. This is largely based on the large differences between the prices that are paid for premium sports content and premium sports channels and any alternatives.

**Box 2: ‘Cable only’ cartel between five multiple system operators (MSO), (South Korea, 2011)<sup>65</sup>**

In May 2011 the South Korean competition authority, KFTC, issued a cease and desist order and imposed on 24 system operators active in the pay-TV market a total fine of approximately 6.7 million Euros. According to the authority, from November 2008 until May or July 2010 the operators participated in the cartel agreement whose objective was to hamper the development of IPTV as a new competing platform.

*The background of the South Korean pay-TV market*

In South Korea, television industry consists of free-to-air and pay-TV broadcasting markets. The following group of players operate within the pay-TV market:

- *System Operators (SOs)*: they operate more than seventy broadcasting channels in each regional area. Their revenues come from subscription and installation fees, as well as fees from renting set-top boxes to consumers. There are one hundred system operators in seventy-seven regional broadcasting areas.
- *Multiple System Operators (MSOs)*: are the SOs who operate their business in at least two regional areas and have many affiliated SOs. There were eight MSOs in 2009, and 78 of 100 SOs belonged to one of the eight MSOs. The top three MSOs have 63.4% market share in the system operator market.
- *Satellite Broadcasters (SBs)*: they transmit their broadcasting service to consumers on a national wide basis. There are two Satellite Broadcasters.
- *Internet Protocol TV (IPTV)*: they transmit their broadcasting service to consumers on a national wide basis. Since IPTV was permitted in February 2009, three IPTV broadcasters entered into the pay-TV market.
- *Program providers (PPs)*: they contract with System Operators (or Satellite Broadcaster, or IPTV) and provide their content. Their revenues come from both SOs (or SBs or IPTV) in exchange for the supply of the broadcasting content and from advertisement fees in return for releasing advertisement during the showing of the content. There are one hundred eighty-four PPs undertakings the in pay-TV market.

In 2008, the imbalance between SOs and PPs was increasing. Even though there are many SOs in the pay-TV market, most of them are affiliated with one of 8 MSOs. Therefore, MSOs have a power to decide which channel will be granted to individual PPs. In particular, the top three MSOs, who have 63.4% market share, have strengthened their position in the SO market. On the other hand, there are also many PPs (about 184), and each PP really wants to contract with MSOs to acquire a low and most preferred channel number,<sup>66</sup> as such channels can attract more viewers, which in turn can bring more advertising revenues.

<sup>65</sup> KFTC (2011), Case Number, 2010서감2951, KFTC Decision number: 2011-153.

<sup>66</sup> Most preferred channels are usually near the channel of public broadcasters (MBC - 11, KBS - 9, SBS - 6) or near the channel of the popular home shopping.



Given the above features of the pay-TV market, there is an imbalance between numerous PPs and a just a few MSOs with respect to supply and demand of broadcasting channels. As a result, PPs become more structurally dependent on MSOs than before with respect to contracts concerning channel assignment. At the same time, MSOs are in the position to engage in a number of unfair practices that can affect the PPs, such as i) unilateral changing of the channel number, ii) unilateral refusal to renew contracts, iii) requiring the PPs not to supply its popular contents (movie, sports) to their competitor (SBs or IPTV) by threatening them that unless they accept such a constraint, MSOs will either stop contracting altogether or will give the less attractive channel number.

*The cartel 'cable-only' agreement*

Since the Multimedia Broadcasting Business Act was enacted in January 2008, it was expected that new IPTV operators would enter the pay-TV market as competitors. However, five MSOs<sup>67</sup> reached an agreement in order to ensure that PPs would provide content only to them. Such policy sought to prevent the IPTV operators from successfully entering the market. Still, one of the PPs, One Media<sup>68</sup> decided to provide its content to IPTV in October 2008. The five MSOs were concerned that many other PPs may follow One Media's policy. Therefore, together with their affiliates, the five MSOs<sup>69</sup> concluded on 14 October 2008 an agreement, called "cable only". First, under this agreement, the MSOs decided to punish One Media by decreasing the number of One Media's channels transmitted through their broadcasting facilities. Second, the MSOs collected together money and offered another PP, CJ Media<sup>70</sup> who was planning to contract with IPTV, financial support (approximately 25 million dollar) on the condition that it would not provide its contents to IPTV.

*The effect of the cartel agreement: Substantial lessening of competition*

After the agreement, the five MSOs together with their nineteen affiliates decreased the number of channels of One Media by 19%~28% when they renewed the contracts in 2009, so that One Media would no longer be able to supply its content to the decreased channels. CJ Media, encouraged by the financial support it received from the cartel participants decided not to provide its contents to IPTV. The action directed at One Media brought a threat and signalled to other PPs that they would be better off not supplying their programs to IPTV. As a result, many other PPs chose not to provide their contents to IPTV operators. Since IPTV operators could not secure any good and popular contents from many other PPs as well as from the top two PPs -CJ Media and One Media – they could not succeed in winning consumers and increasing their market share in the pay-TV market. In other words, IPTV providers could not compete effectively with the established cable TV broadcasters. Overall, the cartel among the five MSOs i) hindered the commercial freedom of PPs, ii) allowed the MSOs involved to strengthen their monopoly or oligopoly market position in their regional areas, iii) restricted the substantial competition in the pay-TV market, and iv) decreased consumers' right to choose among various channels.

<sup>67</sup> Each multiple system operator has many affiliates which operate their business with monopoly or oligopoly in their regional areas. The 5 MSOs are: Tbroad (Korea's largest MSO with 29 per cent market share in 2009), CJ Hellovision (19.3 per cent market share in 2009), C&M (the third market share of 18 per cent in 2009), Hyundai HCN (the fourth market share of 8.5 per cent in 2009), and Curix (which in 2009 after merged with Tbroad)

<sup>68</sup> One Media is a program provider (PP) which in 2008 had the second market share of 17.9%. It makes movies and animations, etc, and is the most popular PP between movie PPs.

<sup>69</sup> Total examinees was 24 undertakings because 7 affiliates of Tbroad, 6 affiliates of Hyundai HCN, 6 affiliates of Curix engaged in the cartel in each their region area.

<sup>70</sup> CJ Media is also a program provider (PP) with the market share of 19.6% (in 2008) in the program provider market.

### 3.4 *Vertical integration and downstream foreclosure*

Over the years, one can observe a widespread trend of firms trying to increase as far as possible the degree to which they are vertically integrated.<sup>71</sup> In fact, growing trends towards vertical integration in the broadcasting industry have raised concerns among both regulatory as well as competition authorities, some of which decided to launch public consultation to examine those concerns.<sup>72</sup>

While vertical integration has some advantages, as it may, for example, reduce costs, it also increases the ability of a firm, which increases its presence in an increasing number of markets along the value chain, to foreclose entry into one or more of the related markets where the company is already dominant. In such circumstances, vertical integration may in itself constitute a barrier to entry. The OECD 1998 paper distinguished between five different representative industry structures. Convergence generally has been found to have the effect of making the actual market structure of the broadcasting sector more disintegrated.

- *The “fully-integrated” structure* – under this structure the roles of content provider, infrastructure provider, “packager” and terminal equipment provider are integrated. It is a closed system in which different vertically integrated service providers are incompatible. This is characteristic of pay and satellite TV where the terminal equipment is dedicated to the service provider and consumers incur costs to have multiple service providers. Under this structure entry costs are high and must cover all levels. Where the number of broadcasters is limited, they may be able to exert market power on both advertisers and consumers.
- *The “Liberalised Terminal Market” Structure* – Under this structure, the customer’s terminal equipment is capable of receiving signals from different broadcasters, and customers can switch without incurring new terminal costs. This is characteristic of free to air television, and Internet TV which can be viewed on multiple devices.
- *Partially Disintegrated Structure: I* – This reflects a structure in which content providers are separate from the infrastructure providers/packagers, which can purchase the content they offer. This reduces the barriers to entry in the content business, unless there are vertical exclusive arrangements between content and infrastructure providers.
- *Partially Disintegrated Structure: II* – When no content or infrastructure packager/providers have market power, a market structure may emerge under which consumers can access all content through any infrastructure provider. Under this structure content providers can market their content directly to consumers.
- *Fully Disintegrated Structure* – Under this structure the consumer can purchase each of the components of broadcasting market separately. The consumer has a large choice of terminal equipment and the means by which to access a range of packagers. This describes the structure that is facilitated by the delivery of audio-visual services over the Internet. As the different segments of the industry are completely separated, entry is open and a bottleneck in one segment such as infrastructure cannot easily be extended to control over content, or vice versa.

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<sup>71</sup> See for example Groupe d’analyse, Ltée (2012), ‘Vertical Integration in TV Broadcasting and Distribution in G8 Countries and Certain Other Countries’.

<sup>72</sup> “The broadcasting industry is changing very quickly through the consolidation of ownership and the widespread adoption of new media platforms. Major transactions have produced vertical integration: the ownership by one entity of both programming and distribution properties, of both production and programming properties, or of all three – production, programming, and distribution properties”. Chair of the Canadian regulatory authority, CRTC, Konrad von Fickenstein, November 2010.

#### 4. Competition policy concerns in the decisional practice of national competition authorities (NCAs) and courts

In recent years, many jurisdictions all over the world have witnessed significant competition policy interventions in the television broadcasting sector. Investigations carried out by competition authorities involved potential restrictions of competition through abuse of a dominant position or monopolization, mergers as well as anti-competitive horizontal and vertical agreements. Competition authorities were most often concerned about foreclosure resulting from lack of access to premium content or to transmission facilities. In Europe, access to premium content has already been examined by competition as well as regulatory authorities competent in the field of broadcasting in Austria, France, Italy, the Netherlands, Spain, and the UK under abuse of dominance and/or merger provisions. Investigations concerning abuse of a dominant position with respect to broadcasting transmission have been carried out in France, Hungary and Spain.

##### 4.1 Access to and exclusivity over premium content: potential for anti-competitive behaviour

As it was already pointed out in the 1998 OECD Background Note on Regulation and Competition Issues in Broadcasting: “[I]n general, barriers to entry into the market for content production are low [...] as there are a myriad of small and large audio-visual content producers in all OECD countries”.<sup>73</sup> However, they are not low for all types of content. As economic theory reveals, both rights holders and broadcasters have incentives to contract with each other on an exclusive basis with respect to premium content. Given that content is a highly-differentiated product, television operators seek to acquire premium content as a means to differentiate their offerings from that of their rivals in order to compete effectively for a wider audience. They are particularly interested in acquiring it on an exclusive basis as they want to strengthen their position in the market and constrain competition from other market players.<sup>74</sup> As for the rights holders of premium content, i.e. major Hollywood studios and sports organizations, it comes as no surprise that they tend to sell their rights on an exclusive basis within a given territory given that they seek to extract maximum rent for their content.

Exclusivity mixed together with the scarcity of premium-content,<sup>75</sup> accompanied by very intense competition among pay-TV operators has led to skyrocketing prices for broadcasting rights,<sup>76</sup> while premium content, which is considered to be one of the main drivers for demand for pay-TV services has to a great extent migrated towards pay-TV.<sup>77</sup> Whereas Hollywood blockbuster movies and sports are both considered premium content, the competitive situation in the provision of such content may differ, as is illustrated by the findings of the UK Competition Appeal Tribunal and Competition Commission.

<sup>73</sup> OECD (1998), Regulation and Competition Issues in Broadcasting, DAF/COMP/GF(98)1, available at: <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/1920359.pdf>

<sup>74</sup> While the extent of exclusivity may vary among industries, in broadcasting it has been generally considered to be vital for the successful entry in the pay-TV market. In contrast, in the market for videogames, games of all major producers can be acquired for each console, i.e. Microsoft Xbox, Nintendo Wii and Sony PlayStation.

<sup>75</sup> As it has been pointed out earlier, premium content is now considered to be the new bottleneck in the broadcasting industry. See, for example, Geradin, D. (2005), ‘Access to Content by New Media Platforms: A Review of the Competition Law Problems’, *European Law Review*, vol. 30, no. 1, pp. 68-94.

<sup>76</sup> Wachtmeister asserted that acquisition prices for broadcasters are higher as are the returns for the rights holders when competition on the demand-side is more intense, see Wachtmeister, A-M. (1998), ‘Broadcasting of sports events and competition law’, *Competition Policy Newsletter*, no.2, pp. 18-28.

<sup>77</sup> For example, investigation carried out by Ofcom in the pay-TV market revealed that for the fifty seven per cent of adults that subscribe to pay TV services, content drives purchasing decisions. Eighty-seven per cent of consumers surveyed cited content as a “must have” element of their TV choices, in particular the sports rights and premium films that are not available via free to air transmission.

### Box 3: Access to content and pay-TV markets (UK, Competition Commission)

In March 2007, in response to submissions received from BT, Setanta, Top Up TV and Virgin Media, Ofcom launched an investigation into the pay-TV market. Having carried out extensive analysis and three public consultations, it:

- released its findings concerning the pay-TV market, which led to the imposition of a wholesale must offer remedy for Sky Sports 1 and 2, and
- it referred for market investigation to the Competition Commission (CC) two related markets: i) the market for the rights to broadcast movies from the major Hollywood studios in the first subscription pay-TV window (FSPTW), and ii) the market for the wholesale supply of pay-TV packages, including core premium movie channels.

The Ofcom Pay TV market review concluded that the pay TV market in the UK is not effectively competitive due to the restricted distribution by Sky of its premium sports and movies channels.<sup>78</sup> With respect to the broadcasting of movies, Ofcom considered that both markets displayed features which had an adverse effect on competition as the way in which these movies are sold and distributed created a situation in which Sky had the incentive and ability to distort competition. The outcome of such a situation was less choice, less innovation and higher prices, which were detrimental to consumer welfare.

In August 2012, the Competition Commission released its final report, in which it disagreed with some of the assumptions accepted by Ofcom. In particular, the CC found that Sky's position in the acquisition and distribution of movies in the FSPTW has not adversely affected competition in the pay-TV retail market. On the basis of evidence it gathered, the CC concluded that the availability of the most recent movies was significant to the subscription decisions of only a relatively small minority of pay-TV subscribers, and that consumers attach more weight to other service attributes, like price or having a broad range of content. It also found that since the launch of new and improved OTT services, such as LoveFilm and Netflix, competition and consumer choice have increased.

Around the same time that the Competition Commission found the pay-TV market for movies to be more competitive than alleged by Ofcom, the Competition Appeal Tribunal cancelled the wholesale must offer (WMO) remedy imposed by Ofcom on Sky. In accordance with the remedy, which was imposed in March 2010, Sky was required to offer Sky Sports 1 and 2 at regulated, significantly reduced, wholesale prices to retailers on other platforms.

To ensure access to the premium content, competition authorities may intervene at different levels of the value chain, and in particular in acquisition and exploitation markets.

- *Acquisition markets* involve contracting between right holders and channel operators.
- *Exploitation markets*, on the other hand, involve dealings between television operators and multichannel distributors).

In acquisition markets, right holders prefer to deal on an exclusive basis, which renders acquisition markets similar to a 'pure' bidding market where television operators compete 'for' and not 'in' the market

<sup>78</sup> Some fifty nine percent of consumers who regularly watch sport on TV cited football matches as "must-have" content with a particular focus on FA Premier League matches.

The intervention of competition authorities with exclusive licensing agreements is generally driven by three different types of concern: i) horizontal restriction of competition, ii) vertical restriction of competition, and iii) other concerns, such as cross-platform bundling of television rights.<sup>79</sup>

With respect to horizontal restriction of competition, one of the main issues in broadcasting is the collective selling of media rights on behalf of member sporting clubs.<sup>80</sup> The benefits of collective selling are taken to be promoting a sporting league as a whole, rather than individual games, and the attraction of higher revenues that can be redistributed among the less competitive clubs and reinvested in the sport (players and facilities), ultimately benefiting the public which follows the sport. It is also proposed that, as exclusive rights make an overall programme more attractive, it encourages broadcasters to compete by developing their own facilities in order to win any auction. Against this, collective selling can also limit supply through restrictive agreements not to broadcast all the matches in a fixture, or concentration of market power among a few broadcasters who may attempt to foreclose the broadcast market.

Different national courts in Europe have reached different decisions on collective selling.<sup>81</sup> Cases in Europe have focussed on the necessity of joint selling to the promotion of the league, and the impact of joint selling on the downstream broadcast market. Italy and the Netherlands have prohibited collective selling on the basis that the redistributive aims could be achieved by less restrictive sharing agreements, while in France the national federation is granted by law the right to exploit all broadcasting rights.<sup>82</sup> There has also been a tendency for broadcasting rights to be sold in Europe on an exclusive basis. The Commission has accepted that exclusivity could benefit the public by giving broadcasters the incentive to invest in delivering a high quality product, but that deals involving periods longer than one year would be scrutinised for their potential to limit competition in broadcast markets.

Overall, the approach of competition authorities towards the assessment of exclusive contracts concerning access to premium content has evolved over time. In the 90s, competition authorities in the EU Member States used to agree with the dominant broadcaster's view that exclusive access to content was necessary for the effective functioning of the pay-tv market. Moreover, in the EU, the European Court of Justice (ECJ) considered in the landmark *Coditel II* case that the grant of exclusive broadcasting licenses by film producers fell within a lawful exercise of copyright under Article 101(1) TFEU.<sup>83</sup>

The formulation of remedies in more recent cases, however, clearly indicates that competition authorities have changed their policy approach, which now seeks to ensure that competing broadcasters have can access to premium content on a non-discriminatory basis.

Agreements granting exclusive access to premium content are rather common in the broadcasting industry. However, as they have turned the pay-TV industry into a 'competition for the market' model, where similarly to a pure bidding market the winner takes all, competition authorities have become concerned about potential anti-competitive effects of such exclusive contracts. The extent to which they may lead to foreclosure of rival firms depends to a great extent on the investment undertaken as well as the

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<sup>79</sup> Ibañez Colomo (2012).

<sup>80</sup> Potentially anti-competitive practices in the context of joint selling may in particular arise from price-fixing or output restrictions.

<sup>81</sup> For an overview of competition issues related to collective selling and sport broadcasting, see OECD (2010), *Competition and Sport*, DAF/COMP(2010)23.

<sup>82</sup> Articles 17 and 18 of the Law No. 84-610 of 16 July 1984 (Loi du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives).

<sup>83</sup> Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, e.a. v. Ciné-Vog Films SA e.a.* [1982], ECR I-3381.

length of the exclusivity period. Posner, for example, acknowledged that exclusivity is unlikely to pose competition problems when it is granted for a short period, and there are efficiencies arising from it. However, negative effects are possible when exclusivity is granted for a longer period of time.<sup>84</sup>

Where competition authorities are concerned that exclusive contracts for premium content may have an adverse impact on competition, they tend to impose behavioural remedies relating to access to content, for example, as a condition to merger clearance.<sup>85</sup> In the *News Corp/Telepiù* decision, the European Commission, for example, having found that the length of the exclusive contract would have hampered new entry, agreed to clear the merger subject to conditions. Those conditions effectively sought to reduce the length of exclusivity to a maximum period of three years for movies and two years for football rights. A similar approach has been followed by the Spanish Council of Ministers in *Sogecable/Canal Satellite Digital/Via Digital* merger<sup>86</sup> and in France in the *Canal Plus/TPS* merger.<sup>87</sup> Certainly, content-related remedies imposed by competition authorities may help new media platforms to gain access to premium content. However, some commentators assert that such remedies in themselves are insufficient to create a level-playing field in the market for the acquisition of such content.<sup>88</sup>

Moreover, the exclusive licensing strategy and the following grant of broadcasting rights to the highest bidder may not necessarily be the most optimal strategy either for the rights holders or for the broadcasters. As a matter of fact, some rights holders, in particular in the sport industry, are exploring potential benefits of shared access and non-exclusive contracting with different multimedia platforms. Evens (2010) points to the example of Eredivisie Live, which is the digital channel broadcasting games of the football's top-tier league in the Netherlands. Evens explains that rather than selling broadcasting rights exclusively to the highest-bidding platform, the Dutch soccer league signed distribution contracts with all platform operators (i.e. cable, satellite, terrestrial, xDSL), but ceded control of pricing to the platforms.<sup>89</sup>

Finally, as attempts by competition authorities to force sharing of the premium content may fail, countries may choose to introduce principles laid down by the agencies or the courts in the relevant national legislation. This was, for example, the case in France. When the attempt of the French NCA did

<sup>84</sup> Posner, R. A. (1974), 'Exclusionary Practices and Antitrust Laws', *The University of Chicago Law Review*, vol. 41, no. 3, pp. 506-535. The overview of a sample antitrust literature on exclusive dealings indicates that competition scholars take different positions with respect to the impact such dealings may have on competition. For example, according to Weeds, exclusive distribution benefits consumers because it intensifies price competition. According to Armstrong or Harbord and Ottaviani, on the other hand, downstream competition would intensify if exclusive dealings were banned. Weeds, H. (2007), 'TV Wars: Exclusive Content and Platform Competition in Pay TV', 5th International Workshop on Media Economics, Bologna, Italy; Armstrong, M. (1999), 'Competition in the Pay-TV Market', *Journal of the Japanese and International Economies*, vol. 13, no. 4, pp. 257-280; Harbord, D. and M. Ottaviani (2001), 'Contracts and competition in the pay-TV market', London Business School Working Paper.

<sup>85</sup> For example, in *Vivendi/Canal+/ Seagram*, the European Commission concerned about the strengthening of the dominant position by Canal+, required the merged entity to provide at least 50 per cent of its rights to a competing multichannel operator in France. Commission Decision [2000], Case No COMP/M.2050, *Vivendi/Canal+/Seagram*.

<sup>86</sup> Decision of the Council of Ministers of 29 November 2002, *Sogecable/Canal Satellite Digital/Via Digital*, BOE (2003), 12/1707.

<sup>87</sup> Autorité de la Concurrence (2006), La décision du 30 août 2006 autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Canal Plus.

<sup>88</sup> See in particular Geradin, D. (2005).

<sup>89</sup> Evens, T. (2010), 'Challenging content exclusivity in network industries: the case of digital broadcasting', 21st European Regional ITS Conference, Copenhagen.

not produce desirable results in terms of sharing of the premium content in TPS case,<sup>90</sup> the French legislator decided to issue a Decree<sup>91</sup> which established the three-year limit on exclusivity following the principles laid down in the *UEFA Champions League* case. To resolve the problem of providing access to important sport events various other countries, such as for example Australia, the US, the UK, or Ireland, have adopted socially- and culturally-motivated anti-siphoning legislations.

#### **4.2 *Unilateral exclusionary behaviour: downstream foreclosure and leveraging of dominant position***

There remains considerable scope for unilateral exclusionary behaviour in the television broadcasting sector. Despite significant increases in transmission capacity facilitated by digitalisation, lack of access to transmission infrastructure may still raise competition concerns.

**Box 4: Abuse of dominant position in the markets for wholesale services of access to broadcasting centres for transmission of DTT signals and for the retail services of transporting DTT signals (Spain, CNC, 2012)<sup>92</sup>**

In April 2010, following a complaint lodged by SES Astra Ibérica S.A. (Astra), the Spanish Competition Authority (CNC) launched an infringement proceeding against Abertis Telecom S.A.U. (Abertis). Astra is the main provider of satellite services for the Digital+ pay-TV platform in Spain, whereas Abertis owns a nationwide transport and broadcasting network for audiovisual services. Transmission centres forming part of the Abertis' national network cannot be replicated, which renders access to them essential for the provision of the DTT signal transport for national and regional operators.

The CNC examined whether wholesale prices Abertis charged for the collocation of equipment at its DTT signal broadcast transmission centres in combination with retail prices it charged in contracts with national and some of the regional television operators amounted to an abuse of dominant position. Upon the conclusion of its investigation, the CNC found that an abuse of dominant position has effectively occurred in the market for wholesale services of access to broadcasting centres for transmissions of DTT signals and for the retail services of transporting DTT signals in Spain. The abuse took form of a margin squeeze between the wholesale and retail prices, and the company was consequently fined with nearly 14 million euro fine. According to the CNC, given the fact that entry was technically viable and economically possible, the absence of genuine competitors could only have resulted from the anti-competitive behaviour of Abertis, which had effectively blocked entry by alternative operators.

Moreover, in light of the growing trend towards vertical integration in the broadcasting industry, the conditions under which a vertically-integrated firm supplies its channels at the downstream or retail levels may also be found to fall foul of the national provisions concerning monopolisation or abuse of dominant position. Anti-competitive behaviour may in particular arise out of refusal to deal, margin squeeze, discrimination, tying and bundling. The last two may become more relevant with the emergence of triple- and quadruple-play services.

<sup>90</sup> See Decision of the Conseil de la Concurrence (2003), Case 03-MC-01, Interim Measures requested by TPS.

<sup>91</sup> Decree n. 2004-699 of 15 July 2004 implementing Article 18-1 of Law n. 84-610 of 16 July 1984 on the exploitation by sports leagues of television rights for competition and sports events, Journal Officiel n. 163 of 16 July 2004.

<sup>92</sup> CNC (Spain), Resolución, Expte. S/0207/09 Transporte Televisión.

### 4.3 Remedies in individual cases

Increasingly, decisions issued by the competition authorities in the area of television broadcasting are related to access to premium content. With a view to ensure a level-playing field in the television broadcasting regulatory and competition authorities have available to them a number of ways to remove the problem of exclusivity through the imposition of *ex ante* or *ex post* measures. Regulatory authorities may, for example, impose wholesale access obligations as was the case with Sky in the UK, while competition authorities may clear mergers subject to access remedies.

It appears that nowadays merger transactions in the television broadcasting market are rarely prohibited. Increasingly often competition authorities clear merger transactions, even if they create a “near-monopoly” position, focusing instead their efforts on the imposition of appropriate commitments and *ex post* control of the market. For example, in 2006 the Spanish competition authority cleared the merger between Audiovisual Sport (AVS) and the biggest player in the Spanish pay-TV market, Sogecable SA, only on the condition that AVS would guarantee third party access to football content on fair, transparent and non-discriminatory basis.

In the 2011 merger of Comcast, the largest cable operator in the US, and the broadcasting company NBC Universal, the Department of Justice required Comcast to make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors, and to offer an OVD broadcast, cable and film content that is similar to, or better than, the content the distributor receives from any of the joint venture’s programming peers. The settlement also prohibited Comcast from retaliating against any broadcast network (or its affiliate), cable programmer, production studio or content licensee for licensing content to a Comcast/NBC competitor, or for raising concerns with the Federal Communication Commission or Department of Justice. Additionally, Comcast was required to give other firms’ content equal treatment under any of its broadband offerings that involve usage-based pricing. Comcast was not allowed to impose licensing terms on programmers or video distributors that seek to limit online distributors’ access to content.

However, as there is a risk that merging firms may fail to comply with imposed commitments, competition authorities may also want to review *ex post* whether competition in the affected market is working effectively. An interesting example of *ex post* review comes from the French competition authority, Autorité de la Concurrence.



**Box 5: Withdrawal of the decision authorising acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus Groupe (France, 2011)<sup>93</sup>**

In 2006, the Autorité de la concurrence authorised the acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus Group. As the merger between two main operators on the French pay-TV market led to the creation of a monopoly in channel publishing and the distribution of premium pay-TV offerings (as the new entity would hold a 75 per cent share of the downstream market), and consequently it carried significant anti-competitive risks, the Authority imposed a set of 59 commitments as a condition for merger clearance. In particular, according to the final decision adopted by the Minister, the new entity had to (i) provide, on an unbundled basis, at the wholesale level a premium film channel and few other channels, and (ii) offer the leading premium television bundle in competing multichannel bundles.

In September 2011, the authority issued a decision in which it i) withdrew the 2006 decision authorizing the merger, and ii) imposed a fine of 30 million Euros. The Authority held that 10 out of 59 commitments were breached. Although Canal Plus Group put forward, as a mitigating circumstance, the fact that the company complied with more than 80% of the imposed commitments, the Authority stressed that the commitments varied significantly both in terms of the nature and scope, and consequently it was not possible to simply consider the proportion of the commitments that the new entity has complied with.

It is the first decision in which the Authority has cancelled the previously cleared merger on the grounds that the new entity failed to comply with the commitments.

Canal Plus appealed the Authority's decision before the French Constitutional Court arguing that the Authority has acted beyond its constitutional mandate.

## 5. Conclusions

For the timely transmission of interactive audio-visual content, television broadcasting has few substitutes. Effective competition in television broadcasting is necessary to ensure diversity in products and services, providing a range of outlets for political and social expression, to lower prices and to promote and share the benefits of the information economy.

However, television broadcasting is no longer simple to define. Technological convergence is blurring the modes of transmission and expanding the range of devices for viewing audio-visual content. An increasing range of audio visual content is increasingly becoming available to be viewed on multiple devices and delivered across multiple broadcasting platforms, and this is fundamentally changing the nature of markets for television broadcasting, rendering the process of defining relevant markets much more complex.

Even as television broadcasting has become more competitive, opportunities for exercising market power will continue to arise where there are barriers to entry in the carriage of broadcasting signals and in the control of audio-visual content. Increasing access to high-speed broadband networks and the transition to digital transmission is reducing the market power of some traditional broadcasting platforms. However,

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<sup>93</sup> Autorité de la Concurrence (2011), Décision no. 11-D-12 du 20 septembre 2011 relative au respect des engagements figurant dans la décision autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus. Decision (in French) available at: <http://www.autoritedelaconcurrence.fr/pdf/avis/11d12.pdf>. See Press Release in English, available at: [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=389&id\\_article=1697](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1697)

in an environment of multiple broadcasting platforms, access to the supply of high value content is becoming relatively scarcer for providers.

Globally, the market for pay-TV is growing as is the market for OTT broadcasting services. However, in geographical markets where internet penetration is low, traditional modes of broadcasting remain dominant. Moreover, for content where timely delivery to a mass audience is demanded, such as sports and to a lesser extent, theatrical movie releases, traditional modes of broadcasting still retain a competitive advantage over new modes of broadcasting.

With respect to remedies imposed in individual cases, there is a growing body of practice among competition authorities to constrain the licensing terms for the use of content to address the problem of exclusivity. These include, for example, requirements on the market players to charge fees on a per subscriber basis or limiting the duration of exclusive contracts. However, any specific remedy may be feasible in one, but not in another case.

The traditional economic rationales for regulation of content and carriage are based on barriers to market entry and rely on the effective control of distinct models of broadcast service delivery. As a consequence of convergence, in some areas the original rationale for regulation may no longer exist. In other cases there may be arguments for changes to regulation to ensure that there is a level playing field across different modes of transmission. This could lead to convergence of the roles of broadcasting and telecommunications regulators, which in turn could reduce the potential for conflicting decisions or opportunities for forum shopping and regulatory arbitrage. Furthermore, a reduced reliance on *ex ante* regulation will place more demands on competition law to ensure diversity in products and services.

The creation of increased opportunities for competition in the market for the provision of television broadcasting services clearly has the potential to improve broadcasting services and to produce positive effects in many other sectors that rely on the timely flow of information. This is true both in OECD and non-OECD countries, irrespective of the existing technological differences and monetary constraints. As the ITU reports, “It would be erroneous to assume that the broadcasting digital divide is due purely to income. Though income is a barrier, particularly for the poorest of households (even in middle-income nations), data suggest that electricity is an even greater barrier and that content, though difficult to quantify, also seems to play a major role”<sup>94</sup>. Accordingly, even in countries where access to electricity is constrained, when content is available consumers can find the means to still receive television broadcasting. Interventions by competition authorities that successfully remove bottlenecks on the provision of content, or those that arise in related sectors (such as electricity), and allow for the adoption of technical alternatives in broadcasting models can unlock significant potential in the broadcasting sector.

Barriers to entry are likely to continue to arise through access to transmission platforms, coming from the behaviour of the firm as well as technical limitations. The dynamic nature of the sector at this time would in many cases be expected to reward a review by competition agencies to identify the opportunities for competition in the market for the delivery of television broadcasting services. This applies to both OECD and non-OECD countries where the developments associated with convergence create diversity in the market for television broadcasting services. Such a review should consider developments in other related sectors, such as telecommunications, or other emerging platforms for carriage, that may have an impact on the development of the television broadcasting sector. This will assist with defining the market, identifying risks associated with vertical integration and any limitations on access to premium content that should be removed. Thus equipped, competition agencies should be better placed to facilitate development of a level-playing field for competition in the sector.

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<sup>94</sup> ITU (2010).

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## BULGARIA

### 1. Sector regulation

Two main legal acts regulate the TV and Broadcasting industry in Bulgaria – the Law on Radio and Television and the Law on Electronic Communications. The Law on Radio and Television regulates the provision of audio-visual media services (TV and Radio). It provides for the licensing and registration procedures for the performance of media services. The Law for the Radio and Television is implemented by the Council for Electronic Media. The Law on Electronic Communications regulates the provision of electronic communication services. The act provides for the licensing and registration procedures for the operation of electronic communication services. The Law on Electronic Communications is implemented by The Communication Regulation Commission.

### 2. CPC enforcement practice

Taking into consideration the abovementioned legal framework, the Bulgarian Commission on Protection of Competition (CPC) has investigated in particular cases the distribution chain of TV content focusing on two market levels, namely those of the TV Channel broadcasters (the wholesale market) and the TV Channel platform distributors (the retail market). The cases of the CPC encompass all the prohibited decisions and concerted practices (art. 15, Law on Protection of Competition - LPC), abuse of dominance (art. 21, LPC) and merger control (art. 22, LPC).

The cases in the broadcasting industry that the CPC investigated so far would suggest that there is considerable concentration at the level of the TV Channel broadcasters. On the other hand the market of TV Channel distribution seems to be very competitive and diverse in terms of the variety of the bundled services offered and increased convergence between telecommunications, broadcasting and IT services. There are developed cable networks and satellite platforms and also new terrestrial multiplexes in progress. It is also envisaged that the planned digitalization of the terrestrial transmission<sup>1</sup> will increase even more the competition on the market. CPC observes that some of the TV Channel distributors have started to manage their own content databases (movies, sports, etc.) and develop pay-per-view platforms on the internet or TV.

The recent merger cases notified to the CPC are indicative of the continuous structural horizontal consolidation on the market. They confirm as well that at present it could not be considered that there is significant vertical integration. Furthermore the CPC observes that there are new entrants on the markets – telecommunication undertakings entering the market which leads to increased content and bundle competition as well as technological innovations.

The CPC has not conducted sector inquiries relevant to the television and broadcasting sector. However the above mentioned sector regulators publish periodical studies, including annual reports, containing pertinent data on the markets. As CPC customarily takes into consideration such analysis when

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<sup>1</sup> Until 1<sup>st</sup> September 2013 all free-to-air broadcasters are obliged to transfer their broadcast technology from analogue to digital multiplexes.

investigating particular cases it would be appropriate to proceed with an overview of the main cases investigated by CPC and then draw some conclusions as per the given points for considerations.

## **2.1 Prohibited agreements and abuse of dominant position cases**

### *2.1.1 Decision № 362/2007 (Diema Vision-abuse of dominant position)*

The procedure before the CPC was initiated following a complaint by two regional TV platform distributors against a TV program producer regarding two of its programs. The complaints claimed that the TV producer abused its dominant position by suspending the existing contracts or by refusing to enter into new ones, the alleged infringement in the form of objectively unjustified refusal to deal.

In its decision the CPC defined two vertically related markets: creation of TV programs and distribution of TV programs. The CPC determined that the two programs produced by Diema Vision have broad program content including news, entertainment programs, TV series, movies and live sport events. The most important asset of these two TV channels were however the exclusive sport broadcasting rights. It was estimated that there is a consumer group with specific and permanent interest in those live sport events and therefore the viewers' demand in general is not very elastic. Those characteristics of the two TV channels in question gave a specific image, uniqueness and distinction that renders the TV channel producer the freedom to have an independent commercial policy concerning its competitors – the producers of TV programs, the TV programs distributors and the consumers. On these grounds CPC defined a dominant position for the producer.

For the assessment of the alleged abusive behaviour CPC used the criteria contained in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743 ('*Magill*'), namely (1) are the contracts an absolute precondition for entering the market; (2) does the behaviour impede the appearance of a new product on the market; (3) is the refusal objectively justified; (4) the likelihood of competition on the market of TV channels distribution being excluded. The Commission determined that the particular contracts were not an absolute precondition for entering the market as the complaining distributors continue to provide service. The alleged abusive behaviour did not impede the appearance of a new product on the market because there were distributors, other than the claimants, which provided that service (distribution of TV channels by cable). The CPC found also that as regards one of the plaintiffs the refusal to deal was objectively justified.

On the above grounds CPC concluded that there was no abusive behaviour in this case.

### *2.1.2 Decision № 472/2012 (TV+ case - prohibited decisions and concerted practices under art. 15, CPA and abuse of dominance under art. 21, CPA)*

The procedure before the Commission on Protection of Competition was initiated following a complaint by the traditional (incumbent) telecom operator against a TV channel producer regarding its TV program named TV +. The complaints claimed that the TV producer abused its dominant position by refusing to deal with the operator (acting as a platform distributor) for the supply of its channel. TV + channel was accessible only within the network of one platform operator who is competitor of the complainant on the distribution market.

CPC analysed the markets in the light of the abovementioned decision. The challenge before the authority was the verification of a dominant position for a TV Channel broadcaster based on the possession of some exclusive sport broadcasting rights. Furthermore CPC effectuated analysis of a possible vertical agreement between the broadcaster and the exclusive distributor of the channel. The analysis was based on indirect evidence (market behaviour).

Eventually CPC ruled that there are no infringements because the TV broadcaster does not enjoy dominant position on the market. Furthermore it was found that the prohibited agreement between the broadcaster and the platform operator fell under the block exemption rules as neither of the parties has a market share above 30 % on the relevant market. The decision is currently under appeal.

## 2.2 *Merger cases*

It is worth analysing in greater detail two main merger cases focused primarily on the definition of the upstream level of the market.

### 2.2.1 *Decision № 769/2009 (MTG Broadcasting acquisition of Diema Vision)*

The CPC analysed the market of TV content which is divided in two submarkets: the submarket of acquisition and licensing of TV rights for production of TV programs and the submarket of exploitation of rights of television programs. The TV operators create programmes for in-house or captive use, which they broadcast or use the programme of other operators or others independent national or international broadcasters. The submarket of acquisition and licensing of TV rights for production of TV programs covers the rights to television programme to broadcast films, events or other programs. The CPC outlined that “premium” content (films and sport events) could be analysed as separate licensing submarket, which is different from the licensing of non-premium TV programmes.

### 2.2.2 *Decision No 385/08.04.2010 (CME acquisition of Balkan News Corporation and TV Europe)*

As part of the investigation the CPC defined the following product markets: TV distribution market and audio-visual content market.

The European Commission case law<sup>2</sup> separates the TV content market into: 1) production of content for captive use and content for non-captive use and 2) distribution (licensing) of rights or acquisition of distribution rights (audio-visual content)<sup>3</sup>. This distinction is mainly based on the existence of two independent markets for free-to-air and pay-TV as part of the TV broadcasting market. The particular characteristics of Bulgarian TV industry however led CPC to consider that such an approach was not entirely applicable to Bulgarian market as most of the TV channels distributed by the Bulgarian cable and satellite operators do not fulfil the definition of the term pay-TV in the light of the European Commission case law. The market definitions of the European Commission and of Bulgarian CPC do not however contradict each other, but rather express the main mechanisms for ensuring TV program content. As regards the production of content for captive and non-captive use, or the submarket of production and exploitation of TV program rights, the product portfolio could be examined broadly-from the point of view of the TV production as a whole, or, in a narrow sense, the non-captive content could be separated. In the broad sense the term "production of TV content" should include the whole content, created by the TV operators – the captive use content created for being broadcasted by the TV and the non-captive content - sold on a market where the TV operators compete directly with the independent producers as external content creators. At the same time the analysis of the competition in the TV content market requires that the corresponding productions are object of market supply. In this respect the EU case law<sup>4</sup> is in the sense that as far as the captive use content is not for sale, the market should include only the non-captive use content, which is produced to be offered for broadcasting for payment.

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2 Case COMP/M.4353 – *Permira / All3Media Group*.

3 Case COMP/M.5121 – *NewsCorp / Premiere*.

4 Case COMP/M.4353 – *Permira / All3Media Group*.



CPC noted that in Bulgaria the platform for broadcasting the TV signal as such does not provide for the distinction between free-to-air and pay-TV as manifested by the EU case law. This conclusion was supported by the thesis that the distinctions drawn between the free-to-air TV and pay-TV in the case of other European media markets were not applicable to the situation in Bulgarian media market at that moment, both as regards the specific content (program profile) and the model of financing (including integration), which in the final analysis did not allow to treat these markets as separate ones. Therefore, in Bulgaria the free-to-air TV channels and the TV channels, broadcast by satellite or by cable, could not be separated into different and independent product markets for the purposes of the merger analysis. Thus, the free-to-air TV operators were considered by the CPC to be direct competitors to the TV operators distributing their program by cable, satellite, etc., with the two groups of media belonging to the same relevant market of TV distribution. Based on the above, the CPC defined the relevant product market as the market of audio-visual content, comprising all productions (incl. films, sports, news, etc.), which could be broadcasted by the TV operators both as content creators and as licensed rights holders.

Based on the characteristics of TV industry and on the opinions of the other TV operators and of the independent producers, CPC concluded that the merger might have the following aspects: participation of the new media group as content producer (content for captive use); possibilities for the new group to exercise "buyer power" in acquiring licensing rights; danger of excessive growth, having in mind the financial ability of the new group to acquire "premium" content, thus attracting more viewers.

### **3. Challenges for competition policy in TV and broadcasting sector**

The experience of the CPC so far suggests that the TV and Broadcasting sector and the relevant markets as analysed in the abovementioned cases are diversified. However, there are a number of challenges in defining markets in highly differentiated sectors such as the TV market. The boundaries between different markets are not very clear, and products/bundles (TV, telephony, internet) apparently outside a particular market can exert a constraint on it.

We would expect that undertakings which are traditional participant on different markets such as the provision of mobile telephony services, on the one hand, and platforms operators, on the other hand, will try to use their market positions to attract consumers on the less developed hand of their business i.e. a telecoms operator will attract clients of the platform operator by providing TV content. On the other hand, one of the major platform operators in Bulgaria has been granted license for the provision of telecommunication services. This process may lead to the implementation of practices which are not in compliance with the applicable competition rules. For the CPC the prime objective is to keep the attractiveness of the markets and their potential to allure new entrants and investments and to introduce innovations.

## CHILE\*

### 1. Overview of television industry in Chile, developments in technology and regulation

The first continuous television (TV) transmissions in Chile date back to the end of the 1950s. During that time, three major TV stations were established and operated by leading universities,<sup>1</sup> though TV became a mass media only in 1962 when the soccer World Cup took place in Chile. In 1969, a State-owned TV station was launched (Televisión Nacional de Chile or TVN). For a long time, it was the only broadcaster with a national scope.

The original legal framework<sup>2</sup> established a public television system in which the State and universities would be the only broadcasters. However, the system in fact was never solely public, mainly because university operated TV stations rapidly adopted a commercial approach, funding their production and distribution facilities mainly through advertising. Thus, the system in practice was a hybrid that included general interest TV stations operated by universities with commercial funding, and a State-owned TV station with mixed funding between advertisement and public funding.<sup>3</sup>

Even though major market oriented reforms started relatively soon after the 1973 coup d'état, it was not until 1989, by the end of Pinochet's regime, that TV broadcasting regulations were amended to allow private ownership and operation of TV broadcasters. Under the new regime, 25-year concessions were granted (in the previous regime, concessions lasted indefinitely) and resulted in the development of new private broadcasters such as Megavisión (1990) and La Red (1991). Rock&Pop station broadcasted TV for about four years between 1995 and 1999, and in 2005, Telecanal entered the market. There has been no other significant entry or exit of players of a national scope in this market, but some developments of regional and local TV stations have taken place.

As to technology, over-the-air TV broadcasting initially operated on VHF frequencies. With the introduction of cable TV by the end of the 1980s, some UHF frequencies began to be assigned for local transmission. In the 1990s, satellite TV was introduced in Chile, and by 2007, Internet Protocol television (IPTV). Testing of digital TV transmissions began in 2009 and will involve major technological changes. However, until current regulations are amended, full advantages of digital TV are unable to be achieved.

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\* Contribution submitted by FNE and TDLC.

<sup>1</sup> “UCV Televisión” (1957), under Pontificia Universidad Católica de Valparaíso; “Canal 13” (1959), under Pontificia Universidad Católica de Chile; and “Canal 9 or RTU” (1960), under Universidad de Chile.

<sup>2</sup> The first broad framework for TV broadcasting was Act No. 17.377 enacted in 1970. It regulated rights, concessions and administration: the State, through TVN, and universities (mostly public bodies at that time) were the only authorized persons allowed to operate TV broadcasting concessions. In the case of universities, the scope of their broadcasting initially was limited to the city where their main studio was located, but further reforms allowed them to broaden the scope. This Act also established the *Consejo Nacional de Televisión* which is today a constitutionally autonomous public body which duties include to ensure an appropriate performance of the Chilean television from the point of view of the contents disseminated, technological developments and socio-cultural changes in a context of globalization. Details concerning this body are available here: [www.cntv.cl](http://www.cntv.cl)

<sup>3</sup> TVN received public funds between 1970 and 1990.

This transition is one of the major technological and regulatory challenges the industry faces and will continue to face in the coming years. We will return to this below.

A major amendment to the Media Law was introduced in 2001, giving competition authorities the duty of performing ex-ante reviews of media concession transactions, which were mandatory for companies owning concessions subject to the concessions regime (i.e., radio broadcasting and TV broadcasting). With some amendments introduced in 2009, these regulations are still in force and are the main grounds for competition authorities' involvement in radio & TV broadcasting transactions.<sup>4</sup>

Technological developments in the telecommunications industry have had an impact on TV broadcasting as well. Technological convergence has meant that networks would no longer be associated with a specific kind of service (voice, images or data) as a network originally created for providing a specific service could be used for providing others. Today, telecommunications are broadly associated with transmission of data. And it is no longer possible to associate telecommunication services with a specific device, since today it is possible to talk 'by phone' through a computer or to watch a TV signal through a smart phone.

Finally, two recent trends in the media industry in Chile are worth mentioning. The first is the development of multi-media conglomerates (parent companies integrating participations in TV broadcasting, radio broadcasting, newspapers and other written periodicals). The second is the entry into media markets of major business groups that are also some of the largest advertisers in TV industry. The following sections will detail the competitive implications of these trends.

## **2. Competition in the production of audiovisual content and in TV broadcasting markets**

### **2.1 Competition in the production of audiovisual content**

Competition authorities have had very few opportunities to conduct in-depth reviews of the market for the production of audiovisual content.

In a few cases, the control (by ownership or otherwise) of a premium content has given rise to competitive issues regarding TV rights associated, for instance, with soccer matches (transmission of soccer goal scorings, national league championship matches, and matches of the Chilean national team).<sup>5</sup> In addition, some over-the-air channels have claimed, in proceedings before the Competition Tribunal, that

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<sup>4</sup> Article 38 of the Media Act, according to its original wording, stated that, in the case of media subject to the concessions regime granted by the State, transactions or other relevant contracts must obtain, prior to their closing, a report issued by the corresponding Comisión Preventiva [predecessor of the Competition Tribunal] with respect to their impact on the media market ["mercado informativo"]. Under the 2009 amendments, the report is to be issued by the FNE (and no longer by the TDLC) with respect to the transaction's effect on competition (and no longer on the ambiguous 'mercado informativo'). In the case of an unfavorable report by the FNE, the TDLC reviews the report in a non-adversarial proceeding. In a 2012 TDLC's decision (detailed *infra* as 'Radiodifusión SPA/Horizonte'), the FNE claimed that risks associated with the lack of information diversity and pluralism had an impact on another relevant competitive variable: service quality and variety, however the TDLC concluded that the 2009 amendment eliminated from the functions of competition authorities any direct judgment regarding information pluralism and diversity. Nevertheless, the TDLC also noted that these values may be protected or promoted indirectly by means of defending or promoting economic competition in media industries.

<sup>5</sup> In the note by Chile to the Roundtable on Competition and Sports, the control of broadcasting rights of soccer matches by "Canal del Fútbol" is identified as an entry barrier to the market of broadcasting soccer matches. OECD, 2010, DAF/COMP/WD(2010)59.

providers of paid TV must pay them for including their open signal in the packages of channels offered to paid TV subscribers.<sup>6</sup>

When the Competition Tribunal approved a merger between the two major cable TV operators, some of the conditions imposed were aimed at mitigating the risks of upstream vertical integration of the merged entity with companies producing audiovisual content.<sup>7</sup>

Finally, the recent trend of entry into media markets by major business groups, which are also important advertisers in the TV industry, may raise questions on how this entry may affect the market for the production of audiovisual content.

## 2.2 *Competition in TV broadcasting*

Today, the TV broadcasting market in Chile can be divided in two main areas: over-the-air free TV, and paid TV (ADSL cable, coaxial cable, fiber optic cable, satellite).

Currently, no TV stations receive governmental subsidies. Even the State-owned station (TVN) must be self-funded, usually via advertising space sales.<sup>8</sup>

Market shares in TV broadcasting market usually are measured using 2 different indicators: audience ratings and advertising space sales. Since this is a two-sided market—advertisers and audience, these indicators reflect participation in each one of these sides.

The following table shows average audience ratings for the main over-the-air TV channels in the 5 years between 2007 and 2011:

**Table 1. Average audience ratings for the main over-the-air TV channels between 2007 and 2011**

Year	2007	2008	2009	2010	2011
La Red	3.4	2.4	1.8	2.0	2.1
TVN	9.8	8.4	9.1	9.1	7.8
Mega	9.0	9.3	8.6	8.3	7.7
CHV	6.9	7.5	7.8	8.3	8.7
C13	8.1	7.9	8.2	6.3	7.7

Source: Time Ibope

<sup>6</sup> *Vid. infra* ‘Canal 13 et al. vs. VTR et al’, in which the parties reached a settlement.

<sup>7</sup> Relevant merger remedies for these purposes included: The merged entity is forbidden to use buying market power unduly against suppliers selling signals or paid TV productions by means of refusing to deal with them or by offering excessively low prices. It is also forbidden for the merged entity to participate as agent or distributor of thematic stations produced domestically or abroad. The merged entity would not be allowed to agree exclusivity terms with respect to broadcasting rights on movies, thematic stations or other domestic or foreign channels, but is allowed to reach such exclusivity agreements for broadcasting specific and isolated events. *Vid. infra* ‘VTR/Metropolis’.

<sup>8</sup> Nevertheless, the State funds specific culturally relevant content productions, via annual public contests.

The following table shows participation in years 2007 to 2011, in terms of advertising sales of TV stations:

**Table 2. Advertising sales of TV stations: Participation from 2007 to 2011**

Year	2007	2008	2009	2010	2011
CHV	16%	19%	19%	25%	27%
TVN	32%	30%	33%	33%	30%
C13	31%	30%	28%	21%	24%
Mega	16%	17%	17%	18%	15%
La Red	5%	4%	3%	3%	4%
Total	100%	100%	100%	100%	100%
HHI	2.522	2.457	2.557	2.474	2.446

Source: TDLC on the basis of an economic report submitted by Canal 13 in '*Radiodifusión SPA/Horizonte*'.<sup>9</sup>

Regarding entry in over-the-air TV, the main barrier faced by potential new TV stations is the limited spectrum availability. Even though this might be alleviated once digital TV is fully implemented,<sup>10</sup> the need of a policy determination on which category of broadcasting actor should frequency allocations favor will remain.

Another characteristic of the Chilean over-the-air TV market is a certain degree of cross-ownership with other media platforms; specifically, radios and newspapers. Three TV stations are part of multi-media conglomerates, as can be seen in the following table:

**Table 3. Multi-media conglomerates**

Conglomerate	TV channels	Radios	Newspapers
Copesa-Dial	Station 22	Paula, Duna, Carolina, Disney, Zero, Beethoven	La Tercera, Pulso, La Cuarta, La Hora
Luksic-Canal 13	Station 13	Play, Sonar, Horizonte, Oasis	-
Bethia	Station 9	Candela	-
El Mercurio	-	Digital, Positiva	El Mercurio, La Segunda, Las Últimas Noticias, several regional newspapers

Source: TDLC, '*Radiodifusión SPA/Horizonte*'.

<sup>9</sup> The FNE submitted an equivalent chart assigning a higher share to Canal 13. For the TDLC, the difference between the information provided by the FNE and the media conglomerate Canal 13 was explained by a different methodology used, and the Competition Tribunal relied more on the information provided by the company since the market shares on advertisement correlated closely with the information on audience ratings.

<sup>10</sup> A bill providing a framework for digital TV has been discussed for more than three years in Congress (Boletín 6190-19).

No claims on competition grounds have been raised so far due to the development of these multi-media conglomerates.

Chileans have, on average, 2.7 television sets per household, and 63% of households have access to paid TV.

In the cable TV market, two coaxial cable-based companies, VTR and Metrópolis-Intercom used to compete in the Greater Santiago area. Both companies merged in 2004 (becoming VTR) and subsequently reached almost 90% of the market. This merger was approved—subject to conditions—by the Competition Tribunal, which relied on the development of alternative platforms that could be used by competitors to offer paid TV without the need to extend a second cable network.

As the following table shows, VTR's market share has declined since 2007 in the face of competition by companies that operate in alternative cable TV platforms. In Chile, both Movistar and DirecTV provide satellite TV services, and Movistar is beginning to move to a FTTH (optical fiber to the home) platform.

**Table 4. Cable TV market**

<b>Year</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Cable Central	1,9%	1,4%	1,0%	0,7%	0,6%
DirecTV Chile Ltda.	7,9%	7,8%	8,0%	9,7%	10,9%
Pacífico Cable S.A.	-	-	-	2,0%	2,5%
Telefónica del Sur	-	-	1,2%	1,6%	2,1%
Movistar (Telefónica Multimedia)	14,6%	17,6%	17,2%	17,1%	18,2%
Telmex Chile Telephony S.A.	-	-	0,7%	2,5%	-
Telmex TV S.A.	3,6%	9,9%	14,6%	9,3%	-
Claro Comunicaciones S.A.	-	-	-	6,6%	19,9%
TU VES S.A.	-	-	-	1,2%	1,0%
VTR Telefónica S.A.	72,0%	63,2%	57,3%	49,3%	44,8%

Source: Subsecretaría de Telecomunicaciones (Telecom Regulator), Chile

The main difficulties a potential entrant may face in this market are the costs of deploying a network, contracts with content providers, and the need to achieve a critical mass of clients.

Consumers may have more than one option for paid cable TV in some areas and also access to satellite TV if feasible (e.g., there is no interference between the dish and satellite from the surrounding hills). Consumers who live in apartment buildings usually may face fewer options than those who live in houses, because of co-owners' restrictions to installing satellite dishes, exclusivity contracts for cabling a particular apartment building, or mere lack of interest of other companies to cable the building.<sup>11</sup>

<sup>11</sup> A 2009 survey on customers' satisfaction with telecommunication services supports the statement that the number of alternatives among mobile services is higher than the limited number of alternatives in case of landline services. Considering all the respondents which had intended to switch the supplier during 2009 almost 45% could not implement the change because it was too difficult in case of paid TV; as to internet connection, the share of customers that was not able to switch supplier raised to 72% approx.; and in the case of landline telephony the share reached 61% approx. On the contrary, considering mobile internet services, where switching costs are lower than in fixed services, following the same survey, none customer responded that he or she could not implement the switch of supplier due to the lack of alternatives or the

Regarding vertical integration of content providers and transmission, over-the-air TV networks are integrated in the sense that they produce their own content, but they also purchase outsourced and imported programs. In paid TV, VTR participates in the ownership of a news TV station, CNN Chile.

Regarding bundling of telecommunications services, it is common in Chile for companies to offer *triple play* bundles of cable TV, fixed telephone services and Internet connectivity.<sup>12</sup> In recent months, *quadruple play* packs including mobile telephonic services have started to emerge. There is only one nation-wide company (DirecTV) that offers solely paid TV (satellite) services.

As for IPTV, even though there are no independent national over-internet broadcasters, it is worth considering that it might potentially compete with the traditional over-the-air and cable TV standards in the future as broadband Internet access is becoming widespread. Regarding home access to the Internet, in 2011, 39.3% of homes had broadband access, rising slowly but steadily (11% growth in the period 2010-2011). On the other hand, 3G mobile Internet access has experienced explosive growth, starting in 2009 with 3.8% of residents with access and increasing to 17.1% in 2011. Mobile TV over 3G on certain mobile handsets recently started to be offered by one of the major cell phone service providers.

### **3. Major current and future challenges in TV broadcasting**

#### **3.1 Multi-media conglomerates**

As described above, the development of multi-media conglomerates is a recent trend in the industry.<sup>13</sup>

The major concern for competition policy is the potential extension of market power already possessed in one kind of media (e.g., TV broadcasting) to other (e.g., radio broadcasting) through exclusionary practices such as tying, bundling, arbitrary discrimination, cross-subsidies, etc.<sup>14</sup>

In '*Radiodifusión SPA/Horizonte*,' a recent transaction involving the acquisition of radio broadcasting concessions by a conglomerate that already had a small market share in radio broadcasting and at least some market power in the TV broadcasting market, the competition authorities assessed these risks. The FNE raised the point of portfolio effects and identified the following unilateral effects in the case: exclusionary advertising services bundling, exclusionary cross-subsidies and arbitrary discrimination against rival radio broadcasters, and the entry deterrence effect of a non-compete covenant. The FNE also claimed that risks associated with the lack of information diversity and pluralism had an impact on another relevant competitive variable: service quality and variety.<sup>15</sup> Undertakings assumed by the companies

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difficulties of the switching process. Data cover solely the Metropolitan Region of Santiago. (*Encuesta de satisfacción de usuarios de servicios de telecomunicaciones 2009*). The survey is available here: [http://www.subtel.gob.cl/index.php?option=com\\_content&view=article&id=1817&Itemid=743&lang=es](http://www.subtel.gob.cl/index.php?option=com_content&view=article&id=1817&Itemid=743&lang=es)

<sup>12</sup> Separated services are also offered by companies but the price of the bundle is regularly more convenient for the customer than the price of the sum of each separated service. Some companies have regulatory and/or judicial-duties of offering separated services.

<sup>13</sup> Even though Copesa is a group that started in the media business long ago (in the 1950s and revamped by the end of 1980s), this is not the case of Luksic and Bethia business groups, which have entered into the media market, in 2010 and 2012 respectively.

<sup>14</sup> At the same time it is well acknowledged that technological convergence can bring improvements in quality and content. However, if these improvements depend on multi-media conglomerates possessing market power in related markets, this structure may deter entry and expansion of smaller competitors operating in only one of these media platforms.

<sup>15</sup> FNE's submission in this case is available in Spanish here: [http://www.fne.gob.cl/wp-content/uploads/2012/04/requ\\_tdlc\\_88\\_2012.pdf](http://www.fne.gob.cl/wp-content/uploads/2012/04/requ_tdlc_88_2012.pdf)

involved in the case included an explicit prohibition of tying and arbitrary discriminations and conditioned bundling, among others. The *'Radiodifusión SPA/Horizonte'* case is detailed below.

### **3.2 *Business groups and major advertisers entering into TV broadcasting and media markets***

Business groups ranked among the major ten groups in Chile have increased their participation in the media industry. Such ventures are entirely new for some of these groups, which are strong in other industries such as banking, mining, and retail but had never entered before into the media business.

This participation of major business groups in the media industry, today comprised for the most part by multi-media conglomerates, may add some concerns regarding the diversity of TV contents to the portfolio risks of conglomerates. Indeed, these groups are major advertisers, and will have an increased power not only to potentially exclude rival advertisers but also to decide whether or not to support specific audiovisual productions or content.

The FNE has recently claimed that risks associated with the lack of information diversity and pluralism has an impact on another relevant competitive variable: service quality and variety. However the TDLC has held that competition authorities have no direct role regarding information pluralism and diversity. Nevertheless, the TDLC has also noted that these values may be protected or promoted indirectly by means of defending or promoting economic competition in media industries.

### **3.3 *Are caps limiting participation a reasonable answer to these challenges?***

Some jurisdictions have adopted regulated solutions fixing caps limiting the participation a business group can reach in media industries. There are no current caps limiting the participation in media industries.

In discussions regarding digital TV legislation, the Congress is considering the introduction of some form of limitations or caps to avoid excessive media concentration.<sup>16</sup>

### **3.4 *Digital TV and a limited advertisement pie***

When digital TV was introduced in Chile in 2009, the first long debate related to the definition of the transmission standard. Once concluded, the Japanese standard as adopted by Brazil (i.e. ISDB-Tb) was adopted for digital TV in Chile. The telecom regulator (SUBTEL) issued a regulation defining the adoption of this standard.

Shortly after this technical definition, digital TV legislation was submitted to Congress with the purpose of adopting major definitions and regulating concessions for TV broadcasting. However, the discussion on the project has taken more than three years, and because of the pace of technological progress, there is risk that the contents of the original bill may become obsolete. In any event, the government is actively promoting the development of digital TV, and SUBTEL recently launched a banner on its web site dedicated exclusively to digital TV.<sup>17</sup>

A practical issue regarding the development of new TV broadcasters (due to digital TV improvements) is that the total amount of TV advertising investments is limited, so it is likely that, in spite

<sup>16</sup> The bill providing a framework for digital TV has been discussed for more than three years in Congress (Boletín 6190-19).

<sup>17</sup> <http://www.tvd.cl>



of technological developments, the number of broadcasters looking to fund their activities mostly through advertisement will not increase significantly.<sup>18</sup>

### 3.5 *Public funds for production and broadcasting*

The TV broadcasting developments described above suggest that the availability of public funds for production and broadcasting may be needed in order to ensure diversity and content quality, particularly in an environment in which TV funding is mostly market/advertisement oriented.<sup>19 20</sup>

## 4. Competition Law enforcement in television and broadcasting markets

### 4.1 *Cartel cases*

No cartel cases have directly involved TV broadcasting companies so far. However, a bid rigging case involving tenders for allocating radio broadcasting spectrum, and another bid rigging case involving advertisement agencies and their trade association, may be indirectly linked to TV broadcasting industry. In the first case, the defendants were sanctioned by the TDLC and the ruling upheld by the Supreme Court.<sup>21</sup> The second case is still pending before the TDLC.<sup>22</sup>

### 4.2 *Mergers & other Transactions*

As mentioned above, according to Media Law, transfers of TV broadcast concessions require a favorable report by the FNE prior to conclusion. Thus, mergers and other transactions in the TV broadcasting market – unlike in other markets – are subject to a mandatory pre-notification procedure before the FNE. If the FNE's report is not favorable, a second stage of review, -a non-adversarial procedure- is initiated before the TDLC in order to decide whether to block or approve the transaction, with or without conditions.

- **VTR/Metropolis: a merger case in the paid TV market (2004).**<sup>23</sup> The Competition Tribunal approved a horizontal merger, subject to conditions, between VTR and Metropolis, the two major

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<sup>18</sup> According to Megatime, for 2011 the share of advertisement investments through over-the-air free TV was 67% which has been the highest share since 2008. FNE's submission *supra*, footnote 12.

<sup>19</sup> An overview on the funds currently available in Chile for promoting audiovisual productions and TV broadcasting could be obtained in Spanish, here: <http://chileaudiovisual.cultura.gob.cl/>; and here: [http://www.cntv.cl/prontus\\_cntv/site/edic/base/port/fondo.html](http://www.cntv.cl/prontus_cntv/site/edic/base/port/fondo.html).

<sup>20</sup> The bill currently in Congress on digital TV considers additional funds for supporting audiovisual productions and TV broadcasting. Another initiative proposed during the digital TV bill debate which also aimed at protecting TV broadcasting from the risks of an exclusively market/advertisement funding system was the banning of people meter on-line systems. However, this proposal was considered unconstitutional by a 6/4 divided decision of the Constitutional Tribunal on January 9<sup>th</sup>, 2013, Docket No. 2358-12, available here: <http://www.tribunalconstitucional.cl/wp/sentencia-del-tribunal-constitucional-recaida-en-el-requerimiento-presentado-por-un-grupo-de-diputados-respecto-de-la-inconstitucionalidad-del-n%c2%b0-9-del-articulo-unico-del-proyecto-de-ley-que-perm>

<sup>21</sup> Details on this case (*Radios*) were provided in the Annual Reports submitted by Chile to the Competition Committee in October 2011 and October 2012.

<sup>22</sup> The e-docket of this case is available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1759&GUID=>

<sup>23</sup> TDLC and Supreme Court decisions on this case are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=915&GUID=>

cable TV operators. In its decision, the TDLC held that this merger could be positive for the national telecommunications market because it would reduce investment costs of providing three services at the same time: broadband Internet, landline telephony, and cable television. Therefore, with the merger, expanded availability of these services to a significant number of homes in Chile would be feasible. The TDLC considered that the enhanced competition in these services, which were essential to the nation's development, would generate benefits that would outweigh the costs of having, for some time, a company with a clear dominant position in the cable TV market. While entry of new firms with diverse technologies was expected in this market, nevertheless, given that the merger would generate high concentration levels in the cable TV service in the short run, the TDLC imposed several conditions on the merged companies. Among others, the TDLC imposed remedies aimed at preventing horizontal integration with other paid TV suppliers,<sup>24</sup> upstream vertical integration with content suppliers, or exclusionary practices against them.<sup>25</sup> The TDLC also imposed remedies directly favoring consumers in the short term, ensuring no price increases or no reductions in quality or number of available channels for three years.

- **Radiodifusión SPA/Horizonte: conglomerate effects in the media market (2012).**<sup>26</sup> The TDLC decided to authorize the acquisition and rent by Radiodifusión SpA (related to TV broadcasting company Canal 13) of some of Comunicaciones Horizonte's radio broadcasting concessions, through which the radio stations "Oasis" and "Horizonte" were currently broadcasted. Although the TDLC deemed that the transaction's effects on the radio broadcasting market would be immaterial, it nevertheless identified portfolio competition risks, given the purchaser's significant participation in the TV broadcasting market. Regarding those portfolio risks, some of the mitigation measures recommended by the FNE were regarded as adequate by the TDLC, and were thus accepted by the parties. Those included:
  - (a) The prohibition of tying publicity sales in radio and television, and the prohibition of free quoting in their radio stations;
  - (b) Regulation of bundling of publicity space in different platforms or media, allowing the acquisition of publicity spaces separately;
  - (c) The prohibition of anticompetitive arbitrary discrimination –including crossed subsidies;
  - (d) The separation of radio and television businesses in independent companies;
  - (e) The reduction of the length of non-compete covenants to two years.<sup>27</sup>

Since 2009, the FNE has reviewed other TV broadcast concession transactions in accordance with Article 38 of the Media Act and has reported them as not posing significant risks to competition (and hence they were not submitted for additional review by the TDLC). The following transactions are worth mentioning:

<sup>24</sup> In fact, a remedy related with this was infringed and the FNE prosecuted the violation, which resulted in the TDLC's Ruling 117/2012, available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2974&GUID=>

<sup>25</sup> These were detailed supra in footnote 7.

<sup>26</sup> TDLC's decision is available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=3894&GUID=>

<sup>27</sup> TDLC's decision was adopted with the dissent of Judge Domper who was for authorizing the transaction without the mentioned conditions a) and b).

- (a) In 2010, the CHV TV and Time Warner Inc./Turner Broadcasting transaction was notified. The FNE concluded that the transaction would not change the market structure. Even though some risks associated with vertical integration (TV broadcasting – audiovisual contents production) were identified, they were considered not significant enough to make a submission before the TDLC; nevertheless, the FNE stated that it will duly monitor that these risks will not turn into actual competitive harms;<sup>28</sup>
- (b) In 2011, the Luksic business group took over (67% of) Canal 13 TV station previously owned by Catholic University which remained holding shares and some rights on management. The FNE concluded that the transaction would neither change the market structure nor affect competition variables. The Luksic business group had no other participation in other media belonging to the same relevant markets considered in the analysis. (over-the-air TV broadcasting and FM radio broadcasting). Nevertheless, considering the competitive dynamics of this sector and, to the extent that the media companies reviewed attain a dominant position, the FNE stated that it will duly monitor business group’s advertisement purchases and sales policies, in order to prevent potential anticompetitive conducts against competitors of the Luksic business group;<sup>29</sup>
- (c) In 2012, the retail business group Bethia took over 100% of concessions and other assets of over-the-air TV network Mega, which previously belonged to the business group Claro. The FNE concluded that the transaction would not change the market structure. Even though Bethia participated in AM radio broadcasting and telemarketing channels, it had not participated (over-the-air TV broadcasting and FM radio broadcasting).<sup>30</sup>

Additionally, an investigation was initiated by the FNE in 2010 when the controller of multi-media business group Copesa/Saieh acquired 20% of VTR shares, a major cable TV operator. The FNE analyzed the transaction as a conglomerate merger, and considered its competitive effects on different markets such as paid TV channel packages, advertisement through over-the-air-free TV and through paid TV, and the advertisement market by and large. The acquisition was considered insufficient to allow the shareholder to control or competitively influence VTR, and thus the competitive risks were dismissed. Nevertheless, the FNE stated that it will duly monitor the evolution of the aforementioned markets, particularly if Copesa/Saieh group directly or indirectly increases its shareholdings in VTR, in order to timely detect competitive harms and adopt consistent actions.<sup>31</sup>

### 4.3 Abuse of Dominance

- **Canal 13 et al. vs. VTR et al.: settlement approval on an alleged abuse of dominance (2011).**<sup>32</sup> In this case, the plaintiffs were two open air national TV networks operators (Canal 13 and Chilevisión) who alleged that the defendant, VTR Chile and its parent company VTR GlobalCom, wrongfully including the plaintiffs’ TV signals into the paid TV offerings of VTR,

<sup>28</sup> FNE’s Investigations Division report is available, in Spanish, here: [http://www.fne.gob.cl/wp-content/uploads/2011/03/ilpr\\_0036\\_2010\\_01.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/ilpr_0036_2010_01.pdf)

<sup>29</sup> FNE’s Investigations Division report is available, in Spanish, here: [http://www.fne.gob.cl/wp-content/uploads/2011/03/ilpr\\_0059\\_2010\\_01.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/03/ilpr_0059_2010_01.pdf); the FNE’s Resolution on the case is available here: [http://www.fne.gob.cl/wp-content/uploads/2011/05/arch\\_0002\\_2011.pdf](http://www.fne.gob.cl/wp-content/uploads/2011/05/arch_0002_2011.pdf)

<sup>30</sup> FNE’s Investigations Division report February 16, 2012. Docket No. ILP 249-12 FNE

<sup>31</sup> FNE’s August 9, 2012, Resolution filing the case without further action Investigation Docket No. 1644-10 FNE; available here: [http://www.fne.gob.cl/wp-content/uploads/2012/09/arch\\_017\\_2012.pdf](http://www.fne.gob.cl/wp-content/uploads/2012/09/arch_017_2012.pdf)

<sup>32</sup> TDLC’s decisions approving the corresponding settlements are available here: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2771&GUID=>

without permission or the payment received by other TV channels. A settlement reached in July 2009 between Canal 13 and VTR provided, *inter alia*, that VTR would include the open Canal 13 signal in a proper location in its channel offerings and that Canal 13 would provide VTR a dedicated connection to receive transmissions. Regarding another close signal -Canal 13Cable- a payment to Canal 13 holding company was established. Months later, Chilevisión and VTR settled as well. The settlement provided that VTR would pay for a signal that Chilevisión was interested in having included in VTR's program offerings, according to terms that would be negotiated within five years of the date of the settlement and to a most favored-nation principle. Both settlements were approved by the TDLC.

#### **4.4 General regulation No. 2/2012 'on-net/off-net differentiation' and bundled services**

On December 2012 the TDLC issued a General Regulation regarding the competitive effects of the on-net/off-net price difference of public telephone services and the joint selling packages of telecommunications services (e.g. Triple play).<sup>33</sup>

Concerning the joint selling of telecommunications services, the TDLC analyzed its competitive advantages and disadvantages in a context of technological convergence and rapid developments.

The TDLC concluded that, whereas bundling has clear efficiencies when it includes services provided through the same network, it is competitively risky because it might reduce competitive intensity between telecommunications firms and exclude those companies with more narrow offerings.

Therefore, the TDLC established that the joint selling of telecommunications services should fulfill the following conditions to prevent such risks:

- (a) Discounts or any kind of more favorable conditions should not be provided to customers for services provided by different kind of networks (fixed and mobile). This condition is applicable only to natural persons;
- (b) Discounts provided to customers for services provided by the same network, either fixed or mobile, should not exceed the following rule: The price of the joint offer should be higher than the price of the bundled service with the highest price. When three or more services are included in a joint offer, the price should be higher than the sum of the prices of each of the bundled services, excluding the service with the lowest price;
- (c) Customers should be able to buy separately the services included in a joint offer, without being forced to buy other services;

These conditions will be in force until 4G telecommunications services are provided in all the geographic areas defined in the respective concessions decrees, or before if mobile networks reasonably compete with fixed networks in the broadband access service.

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<sup>33</sup> TDLC's Regulation is available here:  
[http://www.tdlc.cl/DocumentosMultiples/Instruccion\\_General\\_02\\_2012\\_Enmendado.pdf](http://www.tdlc.cl/DocumentosMultiples/Instruccion_General_02_2012_Enmendado.pdf)



## COLOMBIA

This contribution contains two relevant and recent topics related to Colombian Broadcast markets from a competition policy and antitrust enforcement point of view. Firstly, we are going to mention general remarks regarding a decision taken by the Council of State in 2012 in which the principle of free competition was protected during the Third Television (TV) Channel Bidding Process. Secondly, we will explain the main features of the IBOPE Case of 2011. The latter probably constitutes the most important precedent on the application of competition law upon broadcast and advertisement markets in the country.

### 1. Council of state judicial ruling on the bidding process of the third channel in Colombia

The Plenary of the Council of State, through judgment of February 14, 2012, annulled the possibility of continuing with the bidding of the third TV channel in Colombia. The action for annulment was brought against the administrative act issued by the National TV Commission, which ordered the public bid opening No. 002, 2010, contained in Resolution 2010-380-000481-4 of May 7th, 2010, and in the statements terms of the Public Bid No. 002/2010, for the grant of the operation and use of a third TV private channel of national coverage.

The Council of State ruled that there was a violation of the principle of plurality, which indicates that several bidders are required to hold an auction, where bidding can take place. It was based on the breach of the provision contained in Article 72 of Law 1341/2009, legislation which addresses that the use and exploitation of the electromagnetic spectrum is founded on considerations of free competition, attendance, pluralism, participatory democracy and transparency.

In accordance to this, the application of Article 72 of Law 1341/2009, must be conducted under the guiding principles set out in Article 2 of the mentioned Act, as provided by Article 7 of Law 1341/2009, regarding the criteria of interpretation of the law in order to ensure the development of its guiding principles, *"with an emphasis on promoting and ensuring free and fair competition and the protection of users' rights"*. In other words, the rules established in Article 72 of Law 1341/2009 for spectrum allocation processes with multi-stakeholder, are legally understandable only under considerations of free and fair economic competition.

The Council also stated that the principle of free competition market with a plurality of stakeholders, seeks, above all, to emphasize and determine procurement processes under real competition trails in order to obtain, through the presence of plural interested bidders interacting, an adequate supply to the market and, therefore, optimal for public contracting.

The attendance through the plurality, turns, for the concept of free economic competition, in its legal determinant on the basis of all its foundation. Without it, would be impossible to fulfill the purposes of the constitutional principles as well as the market interaction.

The conclusion of the Council was that the selection processes, should be guided by the principle of equality. The absence of a plurality of bidders in the auction breaks with the principle of equality, in means of adopting covert forms of discrimination substantially disruptive of the purposes defined in Article 72 of the 1341 Act for the auction. For the economic competition, the purpose of equality cannot be other than promoting effective competition through identical treatment within comparable situations involving market participants.

## 2. IBOPE Case

In March 2009, private operating channels, RCN Television Corporation (hereinafter, RCN) and Caracol Televisión Corporation (hereinafter CARACOL), along with the Association of Advertising Companies *Unión Colombiana de Empresas Publicitarias* (hereinafter UCEP), signed a contract with IBOPE Colombia - Simplified Corporation (hereinafter IBOPE), under which the latter would conduct studies of TV audience measurement (also known as INFOMETER<sup>1</sup>) and advertising competition (also known as INFOPAUTA<sup>2</sup>). The agreement between these agents established that CARACOL, RCN and UCEP (contracting entities) were the owners of the studies and the products derived from the TV audience measurement made by IBOPE (contractor).

### 2.1 *Administrative proceedings*

The origin of the proceedings was a formal memorandum sent by the Minister of Technologies of Information and Communications to the Superintendency of Industry and Commerce<sup>3</sup> (hereinafter SIC). The said contract drew the attention of the Deputy for the Protection of Competition of the Superintendency because: a) it had exclusionary clauses related with access conditions for third parties; and b) it empowered the contracting entities to arbitrate studies costs with the imposition of tariffs to their competitors. The investigation was formally opened by the Administrative Resolution No. 20065 of 2010.

The evidence collected by the Deputy during the investigation included testimonies, interrogatories and down raids. Once the administrative investigation stage finished, the Deputy submitted to the Office of the Superintendent of Industry and Commerce the Final Report, in which in general terms the following was concluded:

- A third party interested in the product offered by IBOPE could not access to the results of the research without having prior authorization from CARACOL, RCN and UCEP to do so.
- International channels (which are competitors of CARACOL and RCN) did not have access to the study for a period of nearly eight months, despite the fact that such information is considered as a necessary element for decision-making within the market of trade of advertising spots.
- The contracting parties settled the costs of the studies to their competitors within the market of advertising in TV, through taxation and increased fees that became effective in September, 2009. These increases were in the range of 20% - 120%. The rate increase led some of the customers of IBOPE to stop purchasing the study.
- The contracting parties and IBOPE, because of the privileged/representative position that they held within the market of studies of audiences' measurement and studies of advertising spots in TV, obtained from their competitors an unlawful competitive advantage derived from the signing of the contract.

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<sup>1</sup> The concept refers to the electronic measurement of TV audience in Colombia.

<sup>2</sup> The concept refers to the monitoring of media regarding advertising spots.

<sup>3</sup> Colombian authority for the protection of competition.

As a consequence of the above, the Deputy considered that the agreement breached Colombian Competition Law. In his opinion, it caused vertical anticompetitive effects in the market of TV audience measurement, and horizontal anticompetitive effects in the market of trade of advertising spots in TV. Therefore the recommendation was to sanction for the violation of the following provisions:

- Article 1, Act 155/1959: This provision prohibits, in a general way, the conclusion of agreements or arrangements which directly or indirectly *"aim to restrict the production, supply, distribution or consumption of domestic or foreign raw materials, products, goods or services, and in general, all the practices, procedures or systems designed to limit competition and maintain or determine unfair prices (...)"*.
- Paragraph 5, Article 47, Decree 2153/1992: This provision establishes as contrary to free competition, among others, all agreements that *"have as object or effect the allocation, distribution or limitation of sources of supply of productive inputs"*.
- Paragraph 10, Article 47, Decree 2153/1992: This provision establishes as contrary to free competition, among others, all agreements that *"have as object or effect the prevention of third parties to access markets or merchandising channels"*.

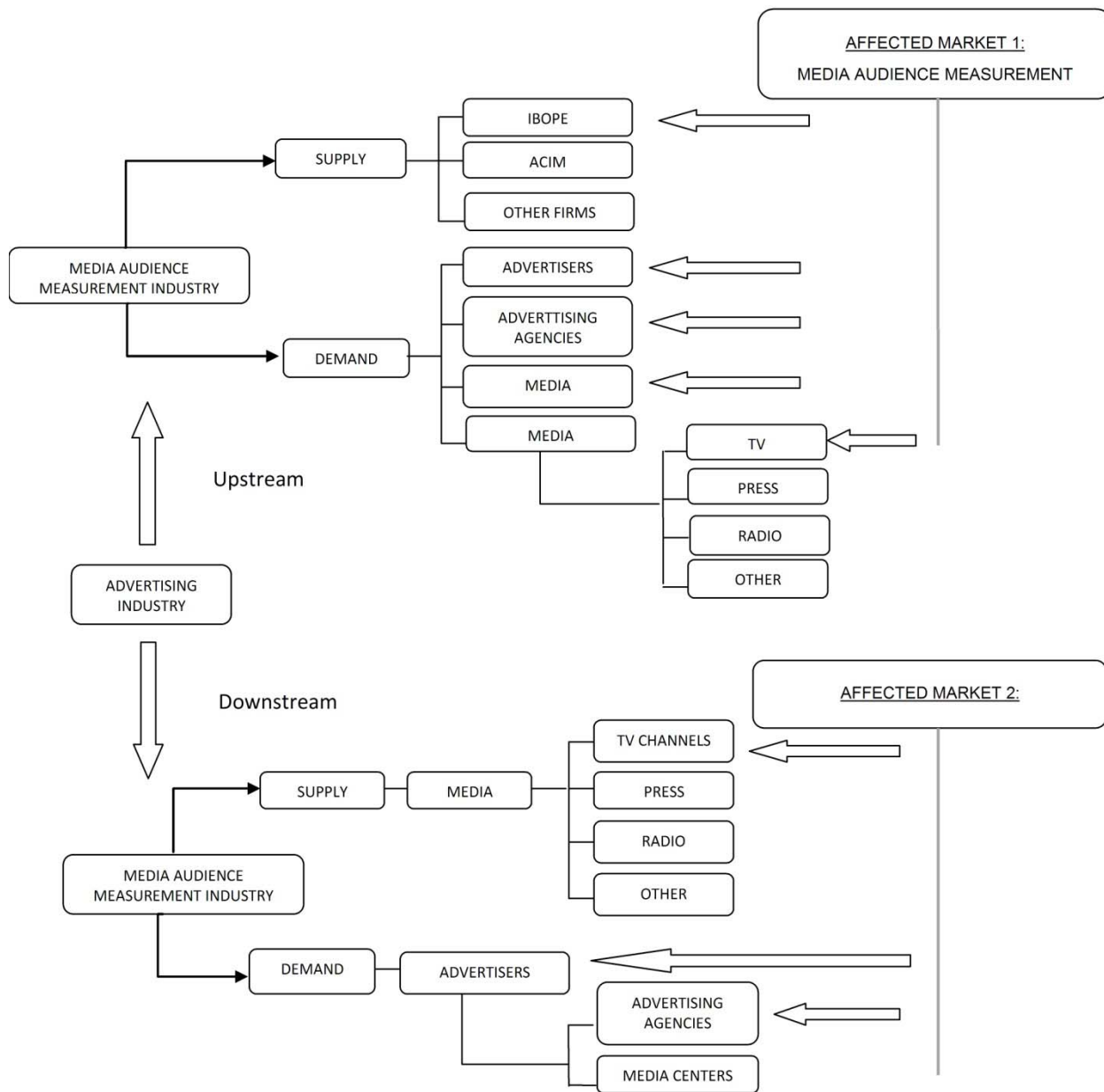
The Deputy also recommended the maximum fine to all representatives involved in the conduct based on paragraph 16, Article 4, of the Decree 2153/1992, by which the competition authority can be entitled to sanction any individual person that collaborates, helps, authorizes, executes or tolerates behaviors in violation of the competition protection regime.

The Superintendent of Industry and Commerce, by Resolution No. 23890 of 2011, embraced most of the arguments made by the Deputy and ordered all entities involved in the agreement (and their respective legal representatives) to pay pecuniary sanctions. To explain the scope of the conduct, the Superintendent and his team of advisors relied on the market research that exposed the Deputy for the Protection of Competition in its Final Report. That research identified the markets that were affected by the agreement held between CARACOL, RCN, the UCEP and IBOPE, and outlined the main elements that characterized the functioning of these industries and their dynamic interaction.

According to the report, the markets that were affected by the agreement were: (i) the market of trade of the information that results from studies of TV audience measurement; and (ii) the market of trade of advertising spots in TV. These two markets are strongly linked. The diagram below summarizes the dynamic between the industries of information related with media audience and advertising spots, and highlights the two relevant markets and their participants:



**Structure of the advertising industry**



Source: SIC

About the first market mentioned, the report said that the ratings measurement in media and broadcast market is essential to the industry of advertising spots due to the impact on investment and purchase decisions. Such measurements provide quantitative indicators of audience needed by the industry to take decisions on the TV programs and schedules.

Regarding the market of advertising spots in TV, it was noted by the report that advertisers, advertising agencies and media centers, estimated information related with ratings and advertising investment in TV as basics materials. The appreciation relies on the fact that this information allows them to allocate efficiently their resources, through the proper selection of TV channels and advertising spots. In other words, the study allows that the choice of these factors, generate economic benefits.

At this point, the report emphasized in the privileged position that the investigated agents held in the market of advertising spots in TV. To do this, the Superintendent's advisory team compared the income that the national private channels (CARACOL and RCN) received for sales of advertising spots, to the income that other channels received for doing the same thing. By virtue of the comparison above, it was found that, in the first semester of 2009, national private channels participated together with 81% of the investment in advertising spots that was made by advertisers, advertising agencies and TV media centers.

The market report also took into account the investment in advertising spots on TV channels that the advertising agencies and media centers belonging to the UCEP made with respect to their competitors. In this regard, it was found that the 15 agencies that belonged to that association, participated with 88% of the total of advertising investment that was made by all advertising agencies on Colombian TV channels. The report also established that the 9 media centers that also were part of the UCEP, participated with 72% of the total of advertising investment that was made by all media centers in Colombia.

Given the above, the Superintendent considered that those who signed the agreement were agents that, all together, boasted a significant share in the market for advertising in TV, and that this combined "*market power*" also affected the market of information of TV audience measurement. The extension of the effects happens because the price to pay the study is based on the share that the agent who has interest on it, has in the market of advertising in TV. By virtue of the foregoing, the private national channels (CARACOL and RCN), the advertising agencies, and the companies belonging to the UCEP were responsible for financing the IBOPE' studies; from here derives their strong bargaining power and influence in the two affected markets.

The SIC concluded that the contract questioned was anticompetitive because of its object and its effect. The reproached conduct generated collusive effects in the market that resulted in distortions for TV channels (competitors) to access the market of advertising. That distortion was given for the importance that have measuring studies for the setting of rates of advertising spots and for the marketing process with advertising agencies, media agencies and the advertisers. The share in the market of TV audience measurement was restricted by the anticompetitive advantage of the parties of the contract. The same situation occurred with those advertising agencies and media centers that were not part of the UCEP, because with the reproached conduct they faced barriers to entry the market of purchasing advertising spots, since the studio rates for non-members was substantially higher.

## **2.2 Judicial review**

Once the administrative ruling became enforceable, the agents that were sanctioned filed a suit against it before the Administrative Tribunal of Cundinamarca. Through this resource, they requested the annulment of the resolution by which the sanction was imposed, and, as a restoration of their rights, claimed for the refund of the money paid. Among the different considerations that the Tribunal made in its judgment, it is worth noting the following:

- There is no need to prove the impact that the performance of a contract have effectively generated to qualify a conduct as an anticompetitive practice. In this particular case, it was clear that the channels that signed the contract had dominant position compared to the others channels that did not do it. It was also clear that IBOPE was dominant in the market. Besides, the other channels were needed to acquire the only study available on the subject, at the prices determined by the companies under investigation.
- In Colombia, by virtue of Article 1602 of the Civil Code, the contract is law for the parties involved. Because of this provision, the effects of the contracts should only extend to the parties who sign it; there not should be adversely effects extensible to third parties. However, the clauses of this contract, generated commercial consequences that affected the freedom of competition of persons that did not sign it.

- In terms of violation of the protection of competition regime, the liability is strict, because the intention the investigated person had when the sanctioned conduct was committed, does not matter, but the impact that it generates or that is likely to generate in the market, does.

It is also important to point out that the plaintiffs claimed that the copyrights held from the study (because they ordered its elaboration) and the economic rights derived from its funding, were not recognized, since the free disposal of the study had been restricted. On this matter, the Tribunal argued that the sanction imposed by the administrative act issued by the Superintendent of Industry and Commerce did not restricted or limited the exclusive powers of the holders of copyrights. The Tribunal recognized that the plaintiffs, because of the funding of the study, were creditors of the economic rights that derived from it, but also recalled that the clauses of any particular contract cannot go against the protection of competition regime established in the Colombian law.

The Tribunal also considered that the parties must have foreseen that the clauses they agreed upon to improve their interests were against free competition and constituted restrictive practices. As the study was the only one on the subject in Colombia, and as it gave them a condition of dominant position in the monopolistic market of rating studies and advertising spots, they should have paid special attention to avoid harm the interests of the other channels, causing a negative effect in the market. Economic rights and copyrights have a particular nature, but their protection must be in harmony with the protection of the market. This represents a control for the arrangement of that kind of rights, because their exercise can not violate the common welfare or the provisions that protect public interests.

The Tribunal denied the plaintiffs' claims in accordance with the provisions set on the administrative ruling issued by the Superintendent of Industry and Commerce.

**CONGO\***

-- *Version française* --

**1. Contexte général de la concurrence**

La République du Congo s'était engagée résolument à pratiquer les règles de l'économie du marché en 1990 après trente ans d'économie dirigée. A cet effet, un dispositif législatif avait été mis en place à travers la loi 6-94 du 1<sup>er</sup> juin 1994 portant réglementation des prix, des normes commerciales, constatation et répression des fraudes. Celle-ci aborde de manière succincte entre autres la transparence du marché et les pratiques anticoncurrentielles.

Par décret 2010-40 du 28 janvier 2010, le Gouvernement Congolais a mis en place une institution chargée de la concurrence et de la répression des fraudes commerciales. Il s'agit d'un organe technique qui assiste le Ministre du Commerce et des Approvisionnements en la matière. Ce qui conforte l'engagement du gouvernement congolais dans la politique nationale de la concurrence.

Par ailleurs, avec l'assistance de la CNUCED et l'appui de l'Union Européenne par le projet Renforcement des Capacités Commerciales et Entrepreneuriales, le Ministère du commerce et des approvisionnements a élaboré deux projets de loi, l'un sur la concurrence et l'autre sur la protection du consommateur, qui sont soumis à l'examen des institutions nationales. Le projet de loi sur la concurrence prévoit la création d'une « Autorité Nationale de la Concurrence » et le deuxième projet prévoit la création d'un « Comité National de la Protection du Consommateur ».

Dans cette orientation, l'Autorité Nationale de la Concurrence sera un organe décisionnel alors que le Comité National de la Protection du Consommateur sera un organe consultatif. L'Autorité Nationale de la Concurrence travaillera en collaboration avec la Direction générale de la concurrence et de répression des fraudes, et les agences de régulation sectorielle de la concurrence.

En dépit de l'inexistence d'une loi-cadre sur la concurrence, on note actuellement l'existence des agences de régulation de la concurrence dans les secteurs de télécommunications, de l'énergie, des marchés publics et des parapétroliers.

**2. Concurrence dans le secteur de la télévision et la radio diffusion**

S'agissant des questions de concurrence relatives au secteur de la télévision et de la radiodiffusion en République du Congo, celles-ci ont été abordées dans la loi 30-96 du 02 juillet 1996 sur la liberté de la presse dont les modalités d'application ont été fixées par le décret 96-347 du 31 juillet 1996.

Ce dispositif législatif, relatif au secteur de la télévision et de la radiodiffusion, a évolué en 2001 avec la promulgation de la loi 8-2001 du 12 novembre 2001 sur la liberté de l'information et de la communication qui, constitue actuellement le cadre juridique de référence en ce domaine.

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\* Contribution soumise par M. Philippe NSONDE-MONDZIE, Directeur Général de la Concurrence et de la Répression des Fraudes Commerciales, République du Congo.

En effet, la loi 8-2001 du 12 novembre 2001 consacre le régime de libre entreprise et interdit toute forme de concentration d'entreprises sous l'autorité d'une personne physique ou morale de droit privé. Elle institue un Conseil Supérieur de la Liberté de Communication comme organe de régulation, doté d'un pouvoir de décision sur l'attribution et le retrait des fréquences radio et télévision, sur la suspension ou l'arrêt d'un programme audiovisuel ou d'une publication non conforme aux dispositions du cahier des charges.

Cependant, ce nouveau cadre législatif énonce la libre concurrence sans traiter les questions des pratiques anticoncurrentielles dans ce domaine spécifique de la télédiffusion et de la radiodiffusion.

Pour mémoire, on peut noter qu'au cours des années 90, on comptait à peine une (1) chaîne de radiodiffusion (Radio Congo), chaîne publique, et un projet de Radio rurale en phase expérimentale qui émettait à partir des localités de Brazzaville, de Pointe Noire et de Nkayi. Quant à la télévisuelle, seule la Télé Congo, chaîne nationale, existait et couvrait tout le pays.

Depuis 2001, avec la promulgation de la nouvelle loi, on a constaté un accroissement considérable du nombre des chaînes de télévision et de stations de radiodiffusion privées, notamment dans les deux principales villes :

- Douze (12) chaînes de télévision, dont six (6) dans chacune d'entre elles ;
- Quatorze (14) stations de radiodiffusion réparties dans les mêmes proportions.

Le reste du pays compte sept (7) stations de radiodiffusion et trois (3) chaînes de télévision privées.

En dépit de la prolifération des chaînes de radiodiffusion et de télévision sur l'ensemble du territoire national, il est important de retenir qu'à l'exception de la chaîne de télévision DRTV, aucune autre chaîne privée ne réalise une couverture nationale et internationale. Toutes les chaînes privées émettent leurs ondes sur des rayons relativement restreints. Elles ne bénéficient pas des subventions de l'État, tant bien même que la loi lui reconnaît la possibilité d'assistance directe ou indirecte des entreprises publiques ou privées d'information et de communication.

Il sied d'indiquer que toutes les chaînes n'ont pas une vocation commerciale. D'autres par exemple ont un caractère religieux ou associatif et peuvent exercer un pouvoir d'écoute dominant sur le marché pour des raisons essentiellement subjectives, qui ne tiennent pas compte de la qualité de prestation de leurs services.

Il a été constaté, à l'issue d'une collecte d'informations dans le Département de Brazzaville, une tarification libre et diversifiée selon les chaînes pour un service identique. A titre illustratif, concernant la télédiffusion, les tarifs varient de :

- 40.000FCFA (**60,98 €**) à 150.000 FCFA (**216,6€**) pour un montage de publicité ;
- 15.000 FCFA (**22,87€**) à 75.000FCFA (**114,32€**) pour un communiqué d'ordre commercial ;
- 50.000FCFA (**72,20€**) à 100.000FCFA (**152,40€**) pour un placement au journal.

S'agissant de la radiodiffusion, les variations suivantes sont observées :

- 10.000FCFA (**15,53€**) à 15.000FCFA (**22,86€**) pour le montage publicitaire ;
- 3.500 FCFA (**5,33€**) à 7.500 FCFA (**11,43€**) pour le communiqué à caractère commercial ;
- 100.000FCFA (**152,43€**) à 150.000FCFA (**228,65€**) pour une page spéciale.

La tarification de l'attribution des fréquences relevée sur le terrain est également variée d'un client à un autre. Elle varie entre 500.000 FCFA (762,189€) et 5.000.000 FCFA (7621,95 €).

Les disparités observées laissent entrevoir les indices d'une concurrence dont la qualification dépendra d'un examen minutieux du fonctionnement de ce marché, dans le but d'éviter éventuellement des distorsions dans l'exercice du libre jeu de la concurrence.

### **3. Défis actuels et futures de la politique de la concurrence à l'égard de la télédiffusion et radiodiffusion**

Pour remédier aux multiples difficultés auxquelles sont confrontées le secteur de télédiffusion et radiodiffusion, entre autres : inexistence des structures techniques adéquates surtout en milieu rural, incapacité de couvrir le territoire national, forte pression des médias étrangères, interférences des fréquences causées par la proximité des villes de Brazzaville et Kinshasa, il est envisageable de :

- consolider le cadre juridique de la concurrence par l'adoption des lois sur la concurrence et la protection du consommateur;
- mettre en place l'Autorité Nationale de la Concurrence ;
- élaborer un cadre réglementaire d'appui aux entreprises de radio et télédiffusion par les pouvoirs publics tel que prévu par la loi 8-2001 du 12 novembre 2001 en son article 8.
- arrimer ce secteur aux Nouvelles Technologies de l'Information et de la Communication (NTIC) ;
- mettre en place un programme de renforcement des capacités des animateurs des médias privées ;
- promouvoir la connexion à la Fibre optique dès qu'elle sera opérationnelle ;
- détaxer les équipements de l'information et de la communication pour faciliter, à tous, l'acquisition des équipements d'exploitation performants.

### **4. Expérience de l'application du droit de la concurrence dans le domaine de la radiodiffusion et télévision**

En attendant l'adoption et la promulgation des textes législatifs concernant la concurrence et la protection du consommateur, l'évaluation de la mise en application du droit de la concurrence au Congo paraît difficile.

Les aspects concernant l'intégration verticale des fournisseurs et les problèmes découlant des participations croisées entre les groupes de médias seront clarifiés dans les textes réglementaires.

Notre participation aux présentes assises constitue d'une part, une occasion de s'imprégner des expériences des autres pays et institutions internationales dans le domaine de la concurrence et d'autre part, de poser le problème d'appui multiforme au renforcement ou au développement des compétences dans la mise en œuvre de la politique nationale de la concurrence dans un marché en pleine expansion dans différents secteurs de l'activité économique.



**CONGO\***

-- English version --

**1. General background to competition**

In 1990, after 30 years of centrally planned economy, the Republic of Congo made a firm commitment to apply market economy rules. A legislative regime to that effect was introduced through the enactment of Law 6-94 of 1 June 1994 on price regulation, trading standards and fraud detection and prevention. This Law also succinctly provides, *inter alia*, for market transparency and anti-competitive practices.

Under Decree 2010-40 of 28 January 2010, the Congolese government set up a body tasked with overseeing competition and combating commercial fraud. This is a technical body which assists the Ministry of Trade and Procurement in this area and thereby supports the Congolese government's commitment to national competition policy.

Moreover, with the assistance of UNCTAD and support from the European Union through the Commercial and Entrepreneurial Capacity-Building Project (PRCCE), the Ministry of Trade and Procurement has drawn up two draft bills, one on competition and the other on consumer protection, which have been submitted to national institutions for review. The draft bill on *competition* provides for creation of a "National Competition Authority", and the second for creation of a "National Consumer Protection Board".

Under this legislation the National Competition Authority will be a decision-making body, while the National Consumer Protection Board will be an advisory body. The National Competition Authority will work in collaboration with the General Directorate of Competition and Fraud Prevention, as well as with sectoral competition regulation agencies.

Despite the lack of a framework law on competition, there are nonetheless competition regulation agencies in the telecommunication, energy, public procurement and oil services sectors.

**2. Competition in the television and broadcasting sector**

Competition issues relating to the television and broadcasting sector in the Republic of Congo were addressed in Law No. 30-96 of 2 July 1996 on the freedom of the press and the procedures for application set out in Decree No. 96-347 of 31 July 1996.

This legislative regime relating to the television and broadcasting sector was further developed in 2001 with the enactment of Law No. 8-2001 of 12 November 2001 on the freedom of information and communication, which currently serves as the reference legal framework in this area.

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\* Contribution submitted by Mr. Philippe Nsonde-Mondzie, Director-General of Competition and Anti-Fraud and Commercial Crimes, Republic of the Congo.



Law No. 8-2001 of 12 November 2001 enshrines the free enterprise regime and prohibits any form of concentration of enterprises under the authority of a legal or natural person under private law. It creates a Higher Council for the Freedom of Communication as the regulatory authority, providing it with decision-making power over the award and withdrawal of radio and television frequencies and over the suspension or closure of an audiovisual programme or publication that fails to comply with the provisions of the specifications.

However, this new legislative framework sets out the conditions for free competition without addressing anti-competitive practices in the specific area of television and radio broadcasting.

For the record, it may be noted that in the 1990s the Republic of Congo had only one (1) radio broadcasting channel (Radio Congo), a public channel, and a rural radio project broadcasting on a trial basis from transmitters located in Brazzaville, Pointe Noire and Nkayi. As for television broadcasting, only Télé Congo, a national channel, was in operation, providing coverage over the entire country.

Since the enactment of the new Law in 2001, there has been a significant increase in the number of private television and radio broadcasting channels, particularly in the two main cities:

- Twelve (12) television channels, of which six (6) in each city;
- Fourteen (14) radio stations distributed equally between the two cities.

The rest of the country provide a further seven (7) private radio stations and three (3) private television channels.

Despite the emergence of large numbers of radio and television broadcasting stations throughout the country, it is worth noting that, apart from DRTV, no other private channel provides both national and international coverage. All private channels broadcast over relatively limited ranges. They receive no State subsidies, even though the legislation provides for the possibility of direct or indirect aid to public or private information and communication enterprises.

It needs to be said that not all of these channels are commercial channels. For example, some channels broadcast religious or charity programmes and can capture a dominant market share of the listening audience for what are primarily subjective reasons which take no account of the quality of the services they supply.

A survey in the Brazzaville *département* revealed a free and diversified set of tariffs charged by channels for the same type of service. By way of illustration, tariffs for television broadcasting vary from:

- FCFA 40 000 (**€60.98**) to 150 000 FCFA (**€216.6**) for an advertising spot;
- FCFA 15 000 (**€22.87**) to 75 000FCFA (**€114.32**) for a commercial announcement;
- FCFA 50 000 (**€72.20**) to 100 000FCFA (**€152.40**) for advertising space in a news programme

The following spread was noted in the case of radio broadcasting:

- FCFA 10 000 (**€15.53**) to FCFA 15 000 (**€22.86**) for an advertising spot;
- FCFA 3 500 (**€5.33**) to FCFA 7 500 (**€11.43**) for a trade announcement;
- FCFA 100 000 (**€152.43**) to FCFA 150 000 (**€228.65**) for a special feature.

The rates charged and frequency allocations observed on the ground also vary from one client to another. They vary from FCFA 500 000 (€762.189) to FCFA 5 000 000 (€7621.95).

The disparities observed provide an indication of competition whose description will require a methodical examination of market operation, in order to avoid, should it prove necessary, any distortions in the free play of competition.

### **3. Current and future challenges to competition policy with regard to television and radio broadcasting**

To remedy the multiple difficulties facing the television and radio broadcasting sector such as, *inter alia*, the lack of adequate technical infrastructure, particularly in rural areas, the inability to cover the entire national territory, strong pressure from foreign media, frequency interference caused by the proximity of the Brazzaville to Kinshasa, possible measures might include action to:

- consolidate the legal framework for competition by enacting legislation on competition and consumer protection;
- put in place the National Competition Authority;
- establish a regulatory framework in which the authorities can provide support to radio and television enterprises, as provided for under Article 8 of Law No. 8-2001 of 12 November 2001;
- ground this sector in New Information and Communication Technologies (NICT) ;
- put in place a capacity-building programme for private media presenters;
- promote fibre-optic networks as soon as they are operational;
- remove taxes on information and communication equipment to facilitate purchases of high-quality operating systems by all parties.

### **4. Experience with competition law and its application in the area of radio and television broadcasting**

Pending the introduction and enactment of legislation on competition and consumer protection, it would not seem possible to assess the application of competition law in the Republic of Congo.

Details regarding the vertical integration of suppliers and problems arising from cross-holdings between media groups will be clarified in the regulatory texts.

Our participation in the current meetings is an opportunity, firstly, to learn about the experiences of other countries and international institutions in the area of competition and, secondly, to examine the many-sided problem of support for the strengthening and development of skills in the implementation of national competition policy in a strongly expanding market in different sectors of economic activity.



## CROATIA<sup>\*</sup>

### 1. Introduction

The television and media sector (furthermore: the Media sector; Sector) is one of the fastest growing economic sectors and its significance encompasses not only the economic and profit generating characteristics of the sectors, but also other important values for the development of human rights and therefore spreading the ideas of transparency, democracy and pluralism.

The important role of the Sector should be envisaged also as its role in promoting benefits which can derive from the open media and information society. The interaction of the economic and non-economic values in this sector indicate that there should be created and carefully organized a network of laws and bylaws to regulate the said sector. The purely regulatory aspects implemented by the Law on Media and the Law on Electronic Media, as well as the Electronic Communications Act, should be supplemented by the competition rules in order to safeguard and protect the free competition on the market, because necessity of the enforcement of competition law in respect of the media sector can arise in all areas covered by the protection of the free competition, such as assessment of mergers and acquisitions (M&A), abuse of dominance and agreements, as well as it could be a subject to the competition advocacy activities. In further parts would be elaborated in more detail some specific issues that are covered by the competition legislation in media sector on the national market of the Republic of Croatia.

### 2. The state of competition in the media and electronic media sector in the national jurisdiction

#### 2.1 *The legal framework*

The legal framework which regulates the media Sector in the Republic of Croatia is mainly built through three capital laws, i.e., the Law on Media (2011), the Law on Electronic Media (2011) and the Electronic Communications Act (2012), beside other bylaws for the implementation of the said laws, such as Bylaws on minimum conditions for performing of the audio and audio-visual media services (2010), Bylaws on content and procedure of the public tender for granting the concessions for performing of the media services of TV and radio (2010), Bylaws on register of the undertakings licensed for performing of media services(2010), and other bylaws.

#### 2.2 *The Law on Media (2011)*

The Law on Media<sup>1</sup> (furthermore: LM) establishes, among others the precognitions for the achievement of the media freedom, the freedom to report and the principles of availability to all of public information, the transparency of the ownership over the media, the rights to publish the corrections and

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<sup>\*</sup> Contribution submitted by Dr. Sc. Mirna Pavletic-Zupic, Member of the Croatian Competition Council, Croatian Competition Agency, email: [mirna.pavletic-zupic@aztn.hr](mailto:mirna.pavletic-zupic@aztn.hr).

<sup>1</sup> The Law on Media (Narodne Novine – Official Gazette of the Republic Of Croatia, No. 59/2004 and 84/2011).

answers, as well as the ways of protection of the free competition<sup>2</sup>. According to the Law, the Media means, inter alia, all written publications and other press, radio and television programs, electronic publications, teletext and other means of daily and periodical information of program contents by the transmission of scripts, voice, sound or picture<sup>3</sup>.

### **2.3 The Law on Electronic Media (2011)**

The Law on Electronic Media<sup>4</sup> (furthermore: LEM) regulates the rights, obligations and responsibilities of the legal and natural persons who perform the activities of providing of the audio and audio-visual media services and the services of electronic publications by using the electronic communications networks, by which the notion of the electronic media encompass the audiovisual programs, radio programs and electronic publications<sup>5</sup>.

### **2.4 The Electronic Communications Act (2012)**

The Electronic Communications Act<sup>6</sup> (furthermore: ECA) regulates the field of electronic communications, including the use of electronic communications networks and the provision of electronic communications services, the provision of universal services and the protection of rights of users of services, construction, installation, maintenance and use of electronic communications infrastructure and associated facilities, competition conditions and rights and obligations of participants in the market of electronic communications networks and services, addressing, numbering and management of the radio frequency spectrum, digital broadcasting, data protection and security in electronic communications and the performance of inspection and expert supervision and control in electronic communications, as well as the establishment of a national regulatory authority for electronic communications and postal services and its organisation, scope and competence, including the decision-making procedure and resolution of disputes concerning electronic communications<sup>7</sup>.

Regarding the relations of the ECA to the competition statutes, it is worth mentioning that the application of provisions of the ECA shall not influence the scope and competence of the competition protection authority established in accordance with a special law, and in the implementation of the ECA the competent authorities shall cooperate with the competition protection authority, namely the Croatian Competition Agency, in such a manner that it requests the opinion of this authority or proposes the institution of proceedings before this authority in all cases of prevention, restriction or distortion of competition, in accordance with a special law regulating competition protection, namely the CL, and where appropriate and possible to provide adequate expert and technical assistance and conclude the appropriate mutual cooperation agreements<sup>8</sup>.

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<sup>2</sup> LM, Art. 1(1).

<sup>3</sup> LM, Art. 2(1).

<sup>4</sup> The Law on Electronic Media (Narodne Novine – Official Gazette of the Republic of Croatia, No. 153/2009 and 84/2011).

<sup>5</sup> LM, Art. 1. and 2.

<sup>6</sup> The Electronic Communications Act (Narodne Novine – Official Gazette of the Republic of Croatia, No. 73/2008, 90/2011 and 133/2012).

<sup>7</sup> ECA, Art. 1.

<sup>8</sup> ECA, Art. 6.

## 2.5 *The interaction with the Competition Law (2009)*

The Croatian Competition Law<sup>9</sup> (furthermore: CL), prescribes the competition rules and establishes the competition regime, regulates the powers, duties, internal organisation and proceedings carried out by the competent authority entrusted with the enforcement of the Law, and it applies to all forms of prevention, restriction or distortion of competition by undertakings within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia<sup>10</sup>.

The prescriptions of the Section 4 of the Law on Media, in Articles 35-37, provides for the protection of competition, and prescribes that to the publishers, legal persons who perform the activities in relation to the distribution of media, as well as to other legal persons who perform the activities in connection to the media, shall also be applied the competition statutes. It particularly means that the named persons are obliged to notify the concentration before the Croatian Competition Agency, in a form prescribed by the provisions of the CL, whether or not are fulfilled the conditions prescribed in the Art. 22 (4) of the CL, which establishes the threshold for the obligatory notification of the concentration. Such notification would be appraised from the side of the CCA, based on the general competition rules from the CL. Furthermore, the LM prescribes that it shall be banned the concentration of the undertakings in the market of daily and/or weekly press aimed for general information, if the market share after its enforcement would exceed 40% of the total market share on the product market.

The Section V. of the LEM, particularly in Articles 52 through 62, provides the definition of concentration in the media sector, and prescribes some special conditions in relation to the allowed market share for the publishers of media on state and municipal level, which market share shall not be exceeded for the concentration to be allowed, as well as prescribes the conditions in relation to the ownership structure in media in a way that cross ownership and financing shall be banned. The scrutiny of the conditions prescribed in the mentioned section of LEM performs the Council for Electronic Media, and Croatian Competition Agency concurrently, each authority from the aspects of the specific law.

Finally, the Competition Agency decides in cases which relate to the assessment of the state aid, according to the provisions of the State Aid Act (2005).<sup>11</sup> One of the most recent decisions of the Agency concerned the authorisation of the state aid to the Croatian audiovisual centre, because it was compatible with the Law.<sup>12</sup>

## 3. **The aspects of the Competition Law enforcement relating to Media Sector**

Most frequent activities of the CCA concerning the media sector, including the electronic communications and the broadcasting in the past several years related to the assessment of concentrations, namely M&A (Mergers and Acquisitions) and/or the changes in the ownership structure. The notion of

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<sup>9</sup> The Croatian Competition Law (Narodne Novine – Official Gazette of the Republic of Croatia, No. 79/2009).

<sup>10</sup> CL, Art. 1 and 2.

<sup>11</sup> The State Aid Act (Official Gazette, No 140/2005 and 49/2011). Ref. No. UP/I 430-01/2012-02/004, State aid to Croatian audiovisual centre; Decision published in the Official Gazette No. 131/2012 of 20.11.2012.

<sup>12</sup> Ref. No. UP/I 430-01/2012-02/004, State aid to Croatian audiovisual centre; Decision published in the Official Gazette No. 131/2012 of 20.11.2012.

concentration is defined based on the CL, in a way that it resembles to the EU *acquis communautaire*, and the EC Merger Regulation<sup>13</sup>.

### **3.1 *The concept of the concentration***

The concept of the concentration, i.e. M&A, based on the CL is established in a way that a concentration between undertakings shall be deemed to arise where a change of control on a lasting basis results from: merger association of two or more independent undertakings or parts thereof, or by acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) acquisition of the majority of shares or share capital; (ii) obtaining the majority of voting rights; or (iii) in any other way in compliance with the provisions of the Company Law and other rules, whereas the acquisition of control pursuant to the CL may be effected through transfer of rights, contracts or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis. However, the creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity shall also constitute a concentration within the meaning of the CL.

At the contrary, a concentration shall not be deemed to arise within the meaning of the CL, where: (i) credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking. The 12 month period may be extended by the Agency upon request, where such institutions or companies can show that the disposal was not reasonably possible within the period set; (ii) acquisition of shares or interest which is the result of internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (iii) a control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the national Bankruptcy Law and the Companies Act. Furthermore, a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity where such a joint venture has as its object or effect coordination of the competitive behaviour of the undertakings that remain independent which leads to significant impediment to competition shall not constitute a concentration and shall therefore be appraised as an agreement among undertakings within the scope of the CL<sup>14</sup>.

Furthermore, a concentration of undertakings which would significantly impede effective competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible with competition rules and therefore prohibited<sup>15</sup>.

The CL also entails the rules for the obligatory notification of concentration and turnover thresholds<sup>16</sup>. Namely, in order to assess the compatibility of concentration, the parties to the concentration

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<sup>13</sup> COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

<sup>14</sup> CL, Art. 15.

<sup>15</sup> CL, Art. 16.

<sup>16</sup> CL, Art. 17.

are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

1. the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and
2. the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements.

But, where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure. However, the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to above. Finally, where the concentration involves association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the turnover within the meaning of the CL shall only include the relevant turnover of the parts which are subject to the concentration, whereas, two or more financial transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction.

The CL prescribes the obligation for prior notification of concentration, so that any concentration between undertakings based on the CL, shall be pre-notified to the Agency by the parties to concentration subject to the criteria set out in the Law, whereas in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking, and in all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification. However, the prior notification of concentration shall be submitted to the Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender, but the parties to the concentration may submit the prior notification of concentration to the Agency even before the conclusion of the contract or publication of the invitation to tender, if they, *bona fide*, provide evidence of the proposed conclusion of the contract or announce the invitation to tender.

Finally, it is important to mention that the Agency may, in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time period required by the CL, whereas, in deciding on the request, the Agency would take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be caused to the parties to the concentration or to the third parties, and the overall effects on the state of competition of the concentration concerned<sup>17</sup>.

### **3.2 The assessment of compatibility of concentration**

The Agency shall initiate a compatibility assessment proceeding immediately upon the receipt of the complete notification of the concentration in question, whereas it would take into account its effects on

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<sup>17</sup> CL, Art. 19.



competition and possible limitations on market access, particularly where the proposed concentration creates or strengthens a dominant position of the undertakings concerned<sup>18</sup>. Particularly, in the course of assessment of a concentration the Agency would in particular define as follows:

1. the structure of the relevant market, actual and potential future competitors in the relevant market within the territory of the Republic of Croatia or outside this territory, supply and demand structure in the relevant market and its trends, costs, risks, economic, legal and other barriers to entry to or withdrawal from the market;
2. the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness of the undertakings and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the buyers resulting from the implementation of the concentration concerned;
3. the effects of the concentration on other undertakings, and especially relating to the consumer benefit, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specializing in production, technological innovation and other benefits directly deriving from the implementation of the concentration.

### **3.3 *Decision on concentration***

The Agency would issue a decision on clearing the concentration in question, if it, on the basis of valid data and documents submitted along with the notification of a concentration, or on the basis of other available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited within the meaning of the Law, and unless it takes a procedural order on the initiation of the assessment proceedings within 30 days following the receipt of the complete notification of concentration, the concentration concerned shall be deemed to be compatible with the Law<sup>19</sup>.

### **3.4 *Suspension of concentration***

The Agency shall, *ex officio*, by means of a separate decision, propose all necessary measures, whether behavioural or structural, aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases:

1. where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible and therefore prohibited within the meaning of the CL; or
2. where the concentration concerned has been implemented without the obligatory prior notification of concentration to the Agency, based on the CL.

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<sup>18</sup> CL; Art. 21.

<sup>19</sup> CL; Art. 22.

Based on the decision of the Agency, it could be imposed to the parties to the concentration, in particular:

1. an order for the shares or interest acquired to be transferred or divested;
2. the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, to be prohibited or restricted, as well as an order for the joint venture or any other form of control by which a banned concentration has been put into effect to be removed.

The respective decision from the side of the Agency can also contain the imposed fine prescribed by the CL for the committed infringements.

The most recent cases of the decisions in relation to the assessment of concentration in media sector concern the concentrations in relating to radio stations. First one concern Irikon, Koprivnica and Radio Drava Koprivnica, where the concentration was cleared in phase 1, and the second one concerned the concentration between the Express radio, Zagreb and Janus, Osijek and Otočni radio Kornati, where the concentration was also cleared in Phase 1<sup>20</sup>.

#### **4. Conclusion or the most significant current and future challenges for the competition law and policy in the Media Sector**

The telecommunications and media sector is highly regulated, and many rules are consisted in sector laws and bylaws, whereas the implementing authorities are the sector ministry and agencies. However, the Competition Agency frequently interacts with the said authorities by issuing the expert opinions and using other tools of the competition advocacy. The legal background for providing the opinions within the scope of competition advocacy is provided in the CL.

##### **4.1 Expert opinions of the Agency**

The Agency issues expert opinions at the request of the Croatian Parliament, the Government of the Republic of Croatia, central administration authorities, public authorities in compliance with separate rules and local and regional self-government units, regarding the compliance with this Act of draft proposals for laws and other legislation, as well as other related issues raising competition concerns<sup>21</sup>.

The central administration authorities or other state authorities may be requested to communicate to the Agency draft proposals for laws and other legislation for the purpose of assessment and issuing expert opinions on their compliance with the CL, if it finds that they may raise competition concerns.

Furthermore, the Agency shall issue expert opinions assessing the compliance of the existing laws and other legal acts with the CL, opinions promoting competition culture and enhancing advocacy and raising awareness of competition law and policy and give opinions and statements relating to the development of the comparative practice and case law in the area of competition law and policy to the authorities mentioned herewith above.

<sup>20</sup> Case No. UP/I 034-03/2012-02/003; Irikon d.o.o., Koprivnica / Radio Drava d.o.o., Koprivnica of 24.01.2013.; Clearance of concentration – Phase I.; and Case No. UP/I 030-02/2011-02/002; Expres radio d.o.o., Zagreb / Janus d.o.o., Osijek and Otočni radio Kornati d.o.o., Murter of 27.12. 2012 ; Clearance of concentration – Phase I.;

<sup>21</sup> CL; Art. 25.

#### **4.2 *List of the most recent cases***

The Competition Agency has issued expert opinions in relation to the compatibility with the competition rules which are aimed for the competition advocacy and raising of the competition awareness in many cases, such as:

- Case No. 011-01/2012-02/013, of 08.11.2012., to the Ministry of Culture, Opinion in relating to the draft Law on amendments to the Electronic Media Act;
- Case No. 034-08/2012-01/073 of the 17.09.2012 of 17.09.2012. to the HAKOM – Regulatory Agency for Telecommunications and Postal services; Opinion in relation to the Three criteria test relating to access to the market for operators providing premium rate telephone services;
- Case No. 011-01/2012-02/009 Opinion on Draft proposal of Electronic Media Act with Final proposal;
- Case No. 034-08/2012-01/022 of 31.05.2012; HAKOM – CCA opinion on harmonization the retail price of special rate services ;
- Case No. [UP/I 430-01/2012-03/001](#) of 17.05.2012.; Aid scheme of the Fund for the Promotion and variety of electronic media ; Authorisation of the aid scheme, published in the Official Gazette No. 59/2012;
- Case No. [034-08/2012-01/014](#) of 12.03.2012; HAKOM – CCA opinion on regulatory framework in the relevant IPTV market.

## EGYPT

### Introduction

The broadcasting industry witnessed an exponential growth throughout the past decade. This was due primarily to the ongoing technological changes that have affected both market size and consumer preferences. Such industry has a significant impact over the whole economy.

In Egypt, the television broadcasting industry<sup>1</sup> is, seemingly, the oldest in the region.

Created in early 1960's, the state-owned channels are holding a monopoly over the terrestrial TV as yet.

In the late 1990's Egypt entered into the satellite broadcasting industry by launching the first satellite in the African continent.

In this Paper, the Egyptian Competition Authority ("ECA") would like to share its views as to the challenges that face the growth of TV broadcasting market in Egypt taking into account its very limited experience in the field.

We will first present the entry conditions by TV broadcasters; then we will discuss the level of competition that exists among TV broadcasters and the hurdles that may jeopardize the future of this key industry.

### 1. Entry conditions

The conditions to enter television broadcasting market, especially for a content packager (known as TV channel or TV broadcaster), differ dramatically whether the said entry will take place in the terrestrial TV market (or free-to-air television) or satellite TV market.

#### 1.1 *Entry in terrestrial TV market*

The Free-to-air television falls entirely under the Government's supervision. In this scope, the Law No.13 in 1979 established the Radio and television Union ("RTU") and entrusted it with the mission of managing and operating all aspects related to broadcasting on free-to-air television.

This legislation was amended ten years later<sup>2</sup> to grant RTU statutory monopoly over the acquisition and management of TV and Radio stations in Egypt<sup>3</sup>.

Hence, entry by private TV broadcasters in the terrestrial TV is prohibited *ab initio*.<sup>4</sup>

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<sup>1</sup> It should be noted that free-to-air television and satellite television are the only television broadcasting means in Egypt, as neither Cable TV nor paid-to-air television are operating yet.

<sup>2</sup> Law No.223/1989 – official journal No.28 (17 July 1989).

<sup>3</sup> It is worth mentioning that article 215 of the new Constitution provides that the National Council for Communications will run the audiovisual related matters and will be responsible, *inter alia*, of ensuring the freedom of communications, pluralism and of preventing monopoly and concentration in the audiovisual sector.

## 1.2 *Entry in satellite television market*

As mentioned hereabove, Egypt entered into the satellite broadcasting in the late 1990's. The entry conditions may vary depending on the TV broadcaster is governed by the Egyptian investment Law<sup>5</sup> or otherwise. Also, such conditions may differ between free TV channels and Pay TV channels.

We will opt, for the purpose of this section, to the free/pay TV classification and we will refer to the other type of classification whenever it is appropriate.

### 1.2.1 *Entry of free TV broadcaster*

In order to enter the satellite market, the TV broadcaster has to meet some licensing requirements. Afterwards, he has to have access to spectrum and to studio broadcasting.

- Licensing requirements

In order to evade the afore-mentioned restrictions stipulated in the law No.13/1979, a cabinet Decree on the 24<sup>th</sup> of February 2000 created the media free zone ("MFZ") in accordance with article 29 of the Investment Law.

As such, all entities operating inside the free zone are considered to carry on business "outside" Egypt. Therefore, the law No.13/1979 is not applicable on the MFZ.

The TV broadcaster must approach the General Authority for Investment and Free Zone ("GAFI"), regulator responsible for enforcing the said Investment Law, to get a license to be incorporated under the Investment Law. The newly established entity should take the legal form of Joint Stock Company or Limited Liability Company. In addition, the company's capital must be proportional to the capital investment needed to operate in the market. This latter condition is subjective and judgmental and in contradiction with the statutory minimum capital requirements set out by the Companies Law. Furthermore, the Applicant should abide by MFZ internal regulations especially the broadcasting code of ethics (e.g. protecting the interests of the nation; objectivity; protecting the IP rights of third parties etc...).

Furthermore, the GAFI requires that the TV broadcaster provides a proof of preliminary approval from both the spectrum provider as well as the studio provider to warranting that the TV broadcaster will have access to the key facilities needed to operate in the market.

It is worthwhile noting that the incorporation decision is issued by GAFI. As for the license to carry on business, it is emanated from MFZ Chairman (art. 31 of Investment Law)<sup>6</sup>. The said license is effective till the end of the contracts concluded by and between the TV broadcaster one the one hand and Spectrum/Studio providers on the other.

As regards the timeliness factor, ECA has indications that some TV broadcasters entered the market within one year.

Relatedly, once established, the TV broadcaster will enjoy from the guarantees stipulated in the Investment Law (articles 8-11). As such, the TV broadcaster cannot be nationalized, confiscated, sequestrated administratively, or to be subject to any kind of price regulation.

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<sup>4</sup> It is possible, though, to circumvent the entry ban imposed by the Law No.223/1989 by the use of concession agreements. Such agreements are already introduced in the radio broadcasting market. The government seems to be reluctant to recouring to such agreements in the terrestrial television broadcasting.

<sup>5</sup> Law no. 8 for the year 1997 with regard to guaranties and incentives to investment.

<sup>6</sup> It is worth mentioning that MFZ Board is appointed by GAFI (article 29 of the Investment Law).

On the other hand, in the event that the Investor breaches GAFI's regulations (including the above mentioned code of ethics), the latter will have the right to notify the investor to rectify the causes of such breach within a specific period. In case he did not abide by such notice, GAFI will have the right to suspend the activity of his project.<sup>7</sup>

- Access to spectrum

As previously mentioned, the TV broadcaster operating in satellite television must have access to a spectrum.

Viewers in Egypt (Consumers of the broadcasting market) have access to several satellites, inter alia, the Nile Sat, Arab Sat, El Noor Sat, Hotbird (...). The most viewed satellite in Egypt is the Nile Sat with 42 million viewers. This large viewer share results from the fact that the Nile Sat provides a broad array of broadcasting services (news, sports, music, movies etc...) targeting the Egyptian viewer in particular and the Arabic viewer in general.

The Nile Sat Company is partially owned by the RTU (40% of shares), State Owned Enterprises (SOEs) have a shareholding of 40%; and the remainder share (20%) is listed in the stock exchange. The Nile Sat Board of directors is composed of 11 members, where 5 of them are representatives of the RTU.

The Nile Sat company provides the TV broadcaster with one spectrum or a package of spectrums provided he obtains the GAFI license and fulfills his contractual obligations (ex: paying the spectrum rental fee).

It should be noted that there is no restrictions as to the nationality of broadcasters to get broadcasting signal.

It is, also, possible to have access to the Nile Sat spectrum from outside Egypt provided that the applicant obtains a license to operate as a TV broadcaster from the Country he will broadcast from.

Accordingly, among 700 TV broadcasters owning a spectrum on the Nile Sat, only 13% are present and have studios in Egypt. One of the reasons explaining this low percentage is due – as purported by some market players – to the ambiguity and duration of the procedure inside GAFI. Consequently, the TV broadcaster can form his company and lease broadcasting studio outside Egypt; then he can obtain the broadcasting signal from the Nile Sat.

- Access to broadcasting studio

The MFZ comprises the "Egyptian Media Production City" ("EMPC") which embodies various forms of broadcasting studios.

All TV broadcasters who desire to broadcast from "Egypt" must do so from within EMPC. Accordingly, EMPC Company is the only studio supplier in Egypt for satellite television.

The EMPC Company is also partially owned by RTU who owns 43% of shares, 37% are owned by SOEs and 20% are listed in Stock Exchange.

As for studio allocation, EMPC Company leases its studios for a renewable duration of 5 years. The leasing contract is standardized to all lessees and the rent depends on the size of the studio

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<sup>7</sup> Article 63 of law No. 8/1997: *"The administrative bodies, in case the project is in breach of any provision of the laws, regulations and decrees, shall notify the investor together with a copy of such notice to the Authority, to rectify the causes of the breach within a period to be defined in the notice in light of the extent and nature of such breach, in case such period lapses without rectification of the breach, the Authority shall issue a justified decision to suspend the activity of the project."*

and its specs. Moreover, EMPC Company offers the option to lease all or part of the equipment needed for all stages of production and packaging.

Along with its role of studio provider, EMPC Company is also a content provider as it takes part in producing television serials and series each year.

Albeit the fact that both Nile Sat and EMPC companies are partially owned by RTU, and although that EMPC company is vertically integrated (content provider & Studio provider), conditions to access to any of the key facilities (spectrum- studio) are standardized to all TV broadcasters and are available on a "first come, first served" basis.

### *1.2.2 Entry of pay TV broadcaster*

The Pay TV broadcaster is subject to the same rules and licensing and contractual conditions mentioned hereabove.

However, he should, further, get the prior Government's approval to encrypt his content. Afterwards, he needs to contract with an Encryption/Decryption Company to broadcast his services against a subscription fee.

Summing up, the entry into the terrestrial TV broadcasting market is blocked. As for the satellite TV broadcasting, the entry is to some extent regulated. However, ECA does believe that the main competition concerns lie beyond the entry barriers, as it will be illustrated later.

## **2. Anatomy of competition in the television broadcasting market**

In this section, we will touch on the parameters of competition in the TV broadcasting market; then we will shed light on the challenges of competition by tackling two types of content broadcasting markets.

### *2.1 Parameters of competition in tv broadcasting market*

Competition in the TV broadcasting is subject to various categorizations. In Egypt, the main categorizations can be outlined as follows:

- Terrestrial TV vs. Satellite TV;
- Free TV vs. Pay TV; and
- Types of Content (Sports events- Movies- Serials- General Entertainment- Youth etc..).

#### *2.1.1 Competition between terrestrial TV market and satellite TV market*

As mentioned earlier, the terrestrial TV is legally protected from any competition on the free to air level. Further, the terrestrial TV is not subject to antitrust scrutiny for the reason that it is run directly by RTU.<sup>8</sup>

Nonetheless, it is facing fierce competition from satellite TV especially after January 25 Revolution.

In effect, free to air television has reached the point where it is nearly unable to compete with TV broadcasters on satellite (mainly Nile Sat), except for the short period of the holy month of Ramadan.<sup>9</sup>

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<sup>8</sup> As per Article 9 para. 1 of the Competition Law public utilities (in this case terrestrial TV) managed by the State (in this case RTU since it is a public juristic person) are not subject to antitrust law.

<sup>9</sup> Many market players, including RTU, assert that the month of Ramadan constitutes a distinct market.

RTU admits facing nowadays, especially after the revolution, a true managerial and financial crisis at its peak. Due to these, RTU is unable to produce or acquire any good or innovative content that would attract advertisers and consequently add to its profits. It even tried to decrease its advertising prices but this had no significant impact on the number of advertisers.

As such, many reputable presenters and experienced technicians switched away from the RTU and contracted with satellite TV broadcasters.

It should be noted that one of the reasons that contributed to extending the scope of competition in this category is TV coverage of the revolution itself. RTU was accused of lack of transparency and impartiality at a time where private TV broadcasters were competing on timeliness in delivering the most accurate and complete information, which automatically drove a considerable stake of the audience away from the national TV to the benefit of private channels on Nile Sat.

It is worth mentioning that despite the fact that satellite TV broadcasters are considered as if they are operating outside Egypt, their anticompetitive practices, if any can be caught by the Egyptian Competition Law ("ECL") due to its extra-territorial reach.<sup>10</sup>

### 2.1.2 *Competition between free TV market and pay TV market*

Usually, Pay TV should be regarded as a distinct market from Free TV.

In Pay TV market, the TV broadcasters endeavor to acquire exclusive content, target specific segments with specific income and draw on heavily on the subscription fee.

As regards free TV market, the TV broadcasters strive to attract as many as viewers to attract advertisers. In this case, broadcasters rely on the profits realized from selling the spots advertising.

Nevertheless, and especially after the revolution, Pay TV market is threatened by free TV market in many sub-markets (eg. Talk shows- serials- Arabic and foreign movies etc...) for several reasons. Chief among these reasons is the presence of large informal sector, as will be discussed later.

Basically, the two main sub-markets that Pay TV can be regarded as distinct markets are major sports events and first release of foreign movies.

### 2.1.3 *Competition among different types of content*

Two observations can be put forward in this sub-section:

- First, since the revolution and due to the hot political events, the political talk shows programs attracted a considerable stake of audience to the extent that specialized TV broadcasters (for instance movie channels) regard "General Entertainment" channels as their "direct" competitors.
- Second, competition in content broadcasting market is two sided where the TV broadcasters deal with two groups of customers, viewers and advertisers. The profits advertisers make from the platform (TV channel) increase in parallel with the increase of number of viewers on the other side of the market. The more viewers multiply, the greater the success of a channel grows and accordingly, advertisers multiply. When there is an increase of amount of advertising, the viewers

<sup>10</sup> Article 5 of ECL provides that “acts committed abroad should these acts result into the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under this Law (ECL).”



tend to switch to another platform. Hence, TV broadcasters compete to find new and exclusive content.

It should be noted that, sometimes, media agencies buy the exclusive content for the platform (with which they have exclusive agreements and therefore own all the spots advertising on the platform) to enhance its content and attract more viewers, thus attracting more advertisers.

The best example to describe the relativity between content and advertising is the RTU case. As mentioned earlier, after the 25 Jan revolution, RTU encountered financial difficulties which resulted in its inability to buy broadcasting rights for content. Now, the lack of advertising on its channels is very apparent to the viewers.

As for making a balance between the spots advertising and the number of viewers, TV broadcasters tend to produce or buy new and exclusive content to create a new peak hour in order to attract new viewers and to lessen the density of advertising in other peak hours.

As such, competition in the market is mostly based on accessing to the most exclusive and newest content.

## **2.2 *Competition in the content broadcasting market: Case study and challenges***

Usually, TV broadcasters, in their attempt to attract the larger viewer share, compete by trying to access to the newest and most exclusive content. This section will focus on two content broadcasting markets: First release of Arabic movies and football events.

### **2.2.1 *First release of arabic movies***

Usually film producers, when considering the distribution of their products, approach first the pay-TV; the latter redistributes such movies to other TV broadcasters (usually free TV).

Hence, free TV broadcasters used to buy the right to broadcast first release of Arabic movies from the pay TV. Nonetheless, with the rise of the informal sector (discussed below), especially after the 25 Jan revolution, free TV broadcasters compete nowadays in acquiring exclusively the right to broadcast first release of Arabic movies directly from the producer (direct TV) and then redistribute it to other pay TV or free TV broadcasters. Consequently, both pay TV and free TV compete in the direct TV market.<sup>11</sup>

The duration of the contract between the free TV broadcasters and the content provider is usually three years; but the exclusivity of the first run can lapse up to six months. Afterwards, the content is forwarded to other competitors (free TV or pay TV), which is called the "second run of distribution." In the redistribution phase, the owner of the broadcasting rights abstains from broadcasting the content on his platform for a period of one month to give the competitor the chance to create his advertising campaign for the new content.

It is noteworthy to mention that the broadcasting rights given by the producer to any market player are limited to a specific number of movie runs throughout the year. This limitation aims to protect the value of the content. If the movie was seen so many times by the viewers, they will lose interest in the movie. Thus, the bargaining power of the producer will be weakened when renewing his contract with the distributor. In addition, the TV broadcaster will not have the ability to attract as many advertisers as with a more valued content, therefore his willingness to reacquire the right to broadcast the content will depend, this time, more on the price than the quality.

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<sup>11</sup> It should be noted that competition in Direct-TV market is very costly; therefore, not all free TV broadcasters have the ability to enter such market.

The competition in first release movie market faces several constraints because of the emergence of the informal sector and piracy. Such constraints can be divided, as follows:

- First, pirate decryption: As illustrated above, pay TV had, most of the time, the priority in accessing to premium content. However, the widespread of pirate decryption resulted in the "unduly" increase of the number of pay TV viewers. Hence, decreasing the value of the premium content. Such piracy drove free TV broadcasters to compete in the direct TV market. It should also be noted that such piracy compelled one of encrypting companies in Egypt to exit the market. Today, only one company in Egypt (it is an SOE) is responsible of encrypting the pay TV content.<sup>12</sup>
- Second, broadcasting piracy through the breach of contractual obligations: All TV broadcasters, where buying broadcasting rights, are limited to a specific number of runs. Currently, such contractual obligation is breached by several TV broadcasters, which resulted in the decrease of the value of the content. Such practice could be avoided by imposing a monitoring system and a robust enforcement to detect IP rights' breach.
- Third, broadcasting piracy on non-Nile TV broadcasters: It should be noted that several satellites are circling on the same orbit of Nile Sat. As such, numerous TV broadcasters having spectrums on those satellites are able to broadcast without a license on the Nile Sat. This kind of free riding broadcasting is accidental, accordingly, it is not considered illegal.

Nevertheless, some of the TV broadcasters are broadcasting illegally acquired first release movies on their platforms. This piracy has the effect of disrupting the marketing process of broadcasters who legally acquired the broadcasting rights. The latter has no longer the ability to describe the content by "*exclusive*". Such piracy also affects the value of the content *vis-a-vis* the viewers.

The TV broadcasters on Nile Sat complain of the lack of IP and competition enforcement to fighting such type of "unfair" competition. In effect, the remedy to crack down such illegal practices is a vigorous international cooperation.

Relatedly, TV broadcasters of movies contend that internet piracy does not significantly affect the market in comparison to the broadcasting piracy. The reasoning behind this is that the Egyptian population is family oriented, they prefer to watch movies in family or groups, which is easily achieved via television. Further, watching movies on the television is much less costly than watching them over the internet where the viewer needs access to a computer/tablet as well as a high-speed internet connection.

### 2.2.2 *Football events*

The sport broadcasting market is one of the most important markets in the broadcasting business. This is due to the popularity of sports (especially football Leagues and Cups) and to its timeliness factor, as sporting event are preferably seen live.

In Egypt, Football events market is divided into national, continental and international leagues/cups.

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<sup>12</sup> Originally, three undertakings operated in the TV encryption market. Two of those undertakings exited the market. The first exited the market because of its failure in protecting its encryption from the informal sector. The other exited the market because of the merger of two pay TV.

Today the only operating undertaking in the encryption market is fully owned by the State. It should be noted that a regulatory barrier exists preventing other undertakings to enter the encryption market: The Prime Ministerial Decree no. 1702 for the year 1995 provides that "the reception and distribution of Satellite Pay TV Channels are subject to the prior approval of the Cabinet of ministers." In Egypt, TV encryption companies are the ones responsible of "receiving and distributing satellite Pay-TV channels".

Concerning national leagues, the broadcasting rights are awarded through yearly bids and several free TV broadcasters could acquire those rights simultaneously. Hence, there are no major competition constraints in this national market. Besides, there is a Decree imposing the broadcast of the national football league, for free, on the terrestrial TV. The Government perceives national league as a "Public Good".

As regards the continental and international leagues/cups, ECA conducted a study on the football championships broadcasting market according to the Prime Minister decree issued in meeting (81) on 10/1/2010 to form a committee made up of the Ministry of Information, the Ministry of Trade and Industry (Egyptian Competition Authority), the National Sports Council, and other concerned bodies. The committee is entrusted with the mission of studying the monopolization of broadcasting African football championships and other championships.

It should be noted that before 2002, the Arab States Broadcasting Union used to buy, on behalf of the Arab RTUs, the broadcasting rights of sporting events to be distributed to each Arab RTU afterwards. However, the media agency of a pay TV bid on the 2002 World Cup as well as the African Cup of Nations and was awarded exclusively the broadcasting rights. The African Cup was awarded for the duration of 6 years (2010 – 2016). Those rights were then resold to a competitor who already had exclusive rights of other regional leagues. Therefore, the latter owns all exclusive broadcasting rights of regional and international leagues including the World Cup and the African Cup of Nations.

ECA has focused its study on the African Cup of Nations and concluded that those long term exclusive contracts (6 years) may have created a barrier to entry due to the fact that each contract covered several championships (African Champions League).

ECA, however, encountered immense difficulties to get the requested documents and data from the Pay TV that is located outside Egypt. Hence, the lack of international co-operation in competition matters was a distinctive feature of this study.

Another distinctive feature of the study is the presence of tremendous pirate decryption; of 12 million viewers, there were 100 thousands subscribers only!

Accordingly, ECA Board issued several recommendations to be considered in the local market when concluding any future contracts:

- Concerning annual leagues; the duration of the contract should not exceed three years;
- Concerning periodical championships; the contract should be for one season; and
- The contract should not include several championships simultaneously.

Those recommendations aim to minimize the harmful effect rising from the exclusive dealing.

In light of the above, one of the main competition constraints that occurred in the TV broadcasting market has extraterritorial dimension. Thus, international cooperation in enforcement activities is key and pivotal to enhance competition and to fight any malpractice in the broadcasting market.

### **3. Conclusion**

The TV broadcasting industry in Egypt is promising and can have a significant impact on economic development alongside the non-economic goals.

Despite the fact that ECA did not delve into the economics of this market, one can pinpoint the main competition concerns that may halt its growth, namely, large informal sector, piracy and lack of international enforcement cooperation in competition and IP related matters.

## EUROPEAN UNION \*

### 1. Introduction

The media sector (including, notably, television and broadcasting) is a significant contributor to the EU economy. Nonetheless, the Treaty on the Functioning of the European Union (TFEU) only refers to the media (audiovisual) policy in the context of artistic and literary creation, or cultural or linguistic diversity. The only binding EU act in the media sector (the Audiovisual Media Services Directive) was adopted to facilitate the freedom of establishment and operating across Europe. As opposed to, e.g. the telecoms sector, we have not seen the far-reaching harmonisation of rules applicable to television and broadcasting. Thus, today, the relevant policy, including media consolidation, ownership and plurality, remains largely a national matter<sup>1</sup>.

That said, the EU competition rules have been applied to the media sector, as has been the case with all economic activities, from the outset of the European Communities. The European Commission and the European Courts have addressed a wide variety of competition issues regarding television and broadcasting and the following sections will provide an overview of the main issues and enforcement activities under the anti-trust, merger control and State aid rules.

### 2. Access to premium content

Premium sports and premium films are one of the key sales drivers for media operators, both due to their economic relevance and to their likely impact on development and innovation in the media/broadcasting sectors. The appeal of premium films and top international sports tournaments goes beyond the territory of any single Member State.

#### 2.1 *Joint selling and right acquisition of sports content*

With respect to premium sports, in a large number of Member States football rights qualify as must have content for media operators (although in some countries other sports, such as ice hockey or basketball may be more important, depending on the national taste). While there are some differences between selling systems in various countries, generally the leagues prefer to sell media rights on an exclusive basis. As a consequence, exclusivity is one of the most important issues as regards joint selling and acquisition of media rights. In this field, the Commission adopted three decisions involving UEFA Champions League, the German football league and the English football league which have set policy in this area and ensured better access to premium sport rights content<sup>2</sup>.

In these decisions, the Commission took the view that joint selling constitutes a horizontal restriction of competition contrary to Article 101(1) of the TFEU, since it prevents clubs from marketing their rights

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\* Contribution submitted by the services of the European Commission, Directorate-General for Competition.

<sup>1</sup> The impact of the Charter of Fundamental rights, which now requires respecting the freedom and pluralism of the media is yet to be seen and assessed.

<sup>2</sup> Case 37398, *UEFA Champions League* of 23 July 2003, OJ 2003 L 291/25 - Case 37214, *Bundesliga* of 19 January 2005, OJ 2005 L 134/46 – Case 38173, *FA Premier League* of 22 March 2006, OJ 2008 C 7/18.

individually and may therefore hinder competition between clubs in terms of prices, innovation, services and products offered to fans. However, joint selling also creates efficiencies as it reduces transaction costs for media operators and clubs, responds to broadcasters' demands and may bring about marketing advantages, such as branding of uniform league products and services. Joint selling was consequently accepted by the Commission under Article 101(3) of the TFEU, with certain case-by-case remedies. In particular, the Commission required certain modifications and commitments involving e.g. a short duration and a limited scope for exclusive rights, a transparent bidding procedure, retention of sales of certain media rights by the clubs, and a return of unsold rights to the clubs. In addition to the above modifications, in the FA Premier League case, the "no single buyer" rule was introduced, whereby no single purchaser was allowed to acquire all the exclusive live rights packages.

The above Commission decisions served as a model for the National Competition Authorities, which have been adopting an increasing number of decisions in this area in recent years (approximately 30 between 2004 and 2010). For example, the German National Competition Authority adopted in January 2012 a decision accepting the German League's marketing plans. In line with the Commission's precedents, the commitments offered by the League ensured a fair, transparent and non-discriminatory awards procedure. The League also undertook to offer several unbundled packages for the live broadcasting of games (via various platforms) and to provide free-to-air highlights coverage.

## **2.2 Territorial exclusivity for premium content**

While very often the technologies used by broadcasters are inherently meant for cross-border use (e.g. satellite, internet) throughout the EU, broadcasters (especially pay-TV retailers) restrict access to TV services to the country of a subscriber's residence. This is because, in the EU, premium content is licensed to broadcasters on a territorially exclusive basis and licensees are granted absolute territorial protection regarding the licensed rights. Absolute territorial protection means that the licensees are prohibited from not only selling actively into other licensees' territories but also passively, i.e. responding to unsolicited demands from customers located in other countries). In principle, under EU competition law, territorial restrictions fragmenting the EU internal market, such as absolute territorial protection, restrict competition by their very object (without the need to prove their effects). However, the jurisprudence and decisional practice concerning territorial exclusivity in the agreements between right holders (owners of premium content rights) and broadcasters has so far been limited and interpreted as allowing such absolute territorial protection.

In October 2011, the European Court of Justice in the Premier League/Murphy judgment<sup>3</sup> stated that the mere granting of a territorially exclusive license is not in itself anti-competitive. However, Premier League/Murphy also clarified that an exclusive licensing agreement imposing absolute territorial protection is deemed to have as its object a restriction of competition and can be in breach of EU competition rules. In a situation involving provisions granting absolute territorial protection, the burden of proof to justify that such provisions are pro-competitive so that the licensing agreement could benefit from an individual exemption lies with the right holders (in Premier League/Murphy, the right holders were unable to meet this burden). Notably, the Premier League/Murphy judgment concerned distribution of premium sports content via satellite and left open the question whether it could be applied to the distribution of premium films, or to distribution of either type of content via the Internet.

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<sup>3</sup> Judgment of the Court of Justice of 4 October 2012, *Football Association Premier League Ltd v Karen Murphy*, joined Cases C-403/08 and C-429/08.

### 3. Access to spectrum and transmission facilities

The transition from analogue terrestrial broadcasting to digital broadcasting (DTT) by 2012 constitutes one of the EU's policy objectives<sup>4</sup>. This change creates the opportunity to ensure a more efficient use of radio frequencies and to re-arrange a significant proportion of the spectrum for new services ('the digital dividend').

EU Member States are bound by the principles set out in the Competition<sup>5</sup>, Authorisation<sup>6</sup> and Framework<sup>7</sup> Directives when assigning DTT spectrum. The rules relating to the assignment of spectrum set out in the three Directives ensure that the assignment process leads to the entry of new players capable of enlivening competition in the market and expanding viewer choice. These rules require among others that spectrum is allocated on the basis of open, transparent, objective, non-discriminatory and proportionate criteria, without prejudice to specific criteria and procedures aimed at pursuing general interest objectives. The Authorisation Directive moreover mandates the use of open procedures.

On the basis of these provisions, the Commission monitors in particular that the electronic communications infrastructure markets are open and competitive so as to facilitate entry of new players or the expansion of smaller players.

The Commission has received several complaints against Member States that decided to assign the 'digital dividend' to incumbent broadcasters, potentially in breach of the requirements of the Competition Directive, including non-discriminatory assignment procedures.

In 2006, the Commission opened infringement proceedings against Italy regarding the assignment of spectrum for DTT broadcasting. In particular, the Italian legislation allowed the incumbent analogue broadcasters to obtain the majority of DTT spectrum (multiplexes) otherwise than in an open, transparent and non-discriminatory manner. In order to address the competitive distortions, Italy launched a tender (beauty contest) for new multiplexes in 2011. While the beauty contest was cancelled in 2012, a new procedure (auction) is expected to take place in 2013.

In November 2010, the Commission launched infringement proceedings against France regarding the criteria used to award certain digital broadcasting spectrum to the incumbent commercial broadcasters. The latter were to be automatically assigned additional spectrum as a compensation for the quicker analogue switch-off. Following the Commission's intervention, in 2012 the French regulator assigned the digital broadcast spectrum concerned on the basis of an open procedure without favouring the former analogue TV channels.

In May 2011, the Commission launched infringement proceedings against Bulgaria regarding the assignment of DTT spectrum. The Commission considered that, in 2009, Bulgaria assigned spectrum via contest procedures which were disproportionately restrictive as they prevented from participating all applicants that had links with content providers (TV channels operators), including operators active only

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<sup>4</sup> Communication of 24 May 2005 on accelerating the transition from analogue to digital broadcasting COM(2005) 204 final.

<sup>5</sup> Directive 2002/77/EC on competition in the markets for electronic communications networks, OJ L 249, 17.9.2002, p. 21.

<sup>6</sup> Directive 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, OJ L 108, 24.4.2002, p. 21–32.

<sup>7</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33–50.

outside Bulgaria, or with broadcasting network operators. As the measures proposed by Bulgaria to address distortions resulting from the contests were unlikely to enable new entry, the Commission has recently referred Bulgaria to the European Court of Justice.

In parallel, national regulatory authorities (NRAs) continue to monitor, under the Framework Directive, competition on national markets for digital television broadcasting services delivering broadcast content to end users. In several Member States (e.g. France, Estonia) access to broadcasting towers which cannot be replicated is mandated. A consistent application of sector specific regulations and competition law is ensured through the notification procedure provided for in Article 7 of the Framework Directive. Under this provision, NRAs must notify the Commission of their market assessment and any envisaged remedies before their implementation.

#### **4. Convergence of broadcasting and telecoms: Bundling and triple play**

Over the last few years the telecommunications sector has experienced the development of bundled offers, notably triple-play offers (including internet access, fixed telephony and TV) and quadruple play offers (which tend to include fixed voice, fixed broadband, TV and mobile services). These bundled offers now coexist alongside the separate offers for each of these products. The development of these bundled offers varies significantly between Member States.

In its decisional practice the Commission has delineated separate national broadband retail markets and voice telephony markets. The Commission has also subdivided the latter into a market for mobile phone contracts and a market for fixed line contracts. However the Commission has left open the question of whether a separate market for "triple play" or "multiple play" products exists<sup>8</sup>.

Some National Competition Authorities (NCAs) have already examined this issue because of the strong development of these bundled offers within their jurisdictions. In France for instance the triple play offers were present as early as 1998 and the first quadruple play offer was launched in 2005. Bundled offers appear to have had an impact on fixed markets in France, where according to the French NCA the rate of France Telecom's broadband market share gains decreased dramatically in 2009 following the multiplication of these offers<sup>9</sup>. The French NCA has recognised the existence of a distinct retail market for multiple-play offers, in the context of *ex ante*<sup>10</sup> as well as *ex post*<sup>11</sup> analyses. The French NCA has also stated that there is a trend in France towards a "universal operator model" (a single operator providing fixed telephony, Internet, TV and mobile services)<sup>12</sup>.

In 2010 the Portuguese NCA had to address this issue as well, in the context of two antitrust cases. During its market investigation the NCA notably recognised the increasing number of households which preferred purchasing bundled offers as opposed to the separate products. The NCA carried out every version of the SSNIP test and came to the conclusion that there was a relevant market for triple play products. It should be noted that the development of these bundled offers could have a locking-in effect for entire households which would need to be assessed on a case by case basis. It seems that the development of bundled offers in the telecommunications sector is a growing trend in the EU and it is necessary for competition authorities to take account of the impact it may have on telecommunication markets.

<sup>8</sup> See for instance Commission Decision in Case COMP/M.5900 - LGI / KBW, paragraph 186.

<sup>9</sup> See Opinion 10-A-13.

<sup>10</sup> In merger cases; see notably Letters of the minister in cases C2004-4 and C2007-181. This is also the case in *ex ante* regulation; see Opinions 05-A-03 and 11-A-05.

<sup>11</sup> See notably Decision 08-D-10.

<sup>12</sup> See Opinion 10-A-13.

## 5. EU merger control rules and media plurality

Article 21(1) and (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation")<sup>13</sup> grants the Commission exclusive jurisdiction to review under the EU merger control rules transactions, which constitute concentrations within the meaning of Article 3 of the Merger Regulation, and which meet the turnover thresholds provided for in Article 1(2) or (3) of the Merger Regulation (and therefore have a Union dimension). As a corollary, Article 21(3) of the Merger Regulation provides that Member States are prevented from applying their national laws on competition to concentrations with a Union dimension.

Article 21(4) of the Merger Regulation allows, however, at certain conditions, Member States to review concentrations with a Union dimension based on their national legislation on grounds other than competition, provided such grounds constitute legitimate interests that are compatible with the general principles and other provisions of EU law. The same provision then goes on to identify media plurality (together with public security and prudential rules) as grounds that are to be considered as legitimate interests.

Based on the above provisions, whenever the Commission receives a notification of a proposed concentration with a Union dimension, which may have an impact on media plurality in one or more Member States, it is for the Commission, and only for the Commission, to review the proposed concentration on competition grounds under the EU merger control rules. However, and also due to the absence of a centralised system of media plurality review at the EU level, Member States retain the ability to review the same proposed concentration under the applicable national procedural and substantive rules on media plurality. This, in turn, means that, in this scenario, the same transaction could be subject to parallel regulatory reviews by the Commission on competition grounds and by the competent national authorities on media plurality grounds.

The purpose and procedure of the two regulatory reviews are very different, although there may be some convergence.

For example, it is likely that, if the Commission were to take the view that a proposed concentration is likely to have anti-competitive effects on one or more media markets, for example due to the reduction of the number of players, these findings would likely be equally relevant in the parallel media plurality review carried out by the competent national authorities.

Conversely, it is also possible that a proposed transaction, which does not raise concerns on competition grounds, may lead to a reduction in the plurality of media, which may be incompatible with applicable national laws. This may be the case, for example, where a proposed concentration increases the concentration across media (e.g., television and newspapers), which, from a competition viewpoint, constitute separate product markets.

Further, the Commission is also to ensure that the review carried out by the national authority is strictly confined to media plurality issues and does not constitute a disguised attempt by the Member State to review the transaction on competition grounds and/or to protect national interests other than media plurality, which may not be considered as legitimate grounds to intervene within the meaning of Article 21(4) of the Merger Regulation.

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<sup>13</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004.



The recent News Corp/BskyB case<sup>14</sup> is the main example of such parallel review of a proposed concentration by the Commission and the competent national authorities<sup>15</sup>. The transaction consisted of the proposed acquisition of sole control by News Corporation ("News Corp") of pay-TV broadcaster BskyB in the United Kingdom. The proposed transaction constituted a concentration with an EU dimension. It was therefore notified to the Commission and unconditionally approved in phase I by the Commission under the Merger Regulation. In other words, the Commission concluded that the proposed transaction did not raise any concerns on competition grounds. In its decision approving the proposed transaction, the Commission, however, made it clear that its conclusions as to the lack of impact of the proposed transaction on competition were without prejudice to the separate media plurality assessment carried out by the UK authorities.

As explained by the Commission in the decision, the UK media plurality assessment had a different scope than its competition assessment and focussed on issues beyond a competition assessment. The media plurality covered issues such as (i) the need for there to be a sufficient plurality of persons with control of media enterprises in relation to every different audience in the United Kingdom or a particular area of the United Kingdom, (ii) the need for the availability throughout the UK of a wide range of broadcasting which is both of high quality and calculated to appeal to a wide variety of tastes and interests, and (iii) the need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment in relation to broadcasting to the attainment of standards such as due impartiality of news, taste and decency.

In the case at hand, the proposed transaction would have allowed News Corp, which already controlled a number of popular newspapers in the UK to also acquire control over BskyB's popular news channel in the UK. While the combination of these activities did not raise concerns from a competition perspective (mainly due to the fact that newspapers and TV channels belong to separate product markets and conglomerate issues were unlikely to arise), the same combination might have led to issues from a media plurality perspective, as it might have led to the elimination of an independent voice from the media landscape.

While the transaction was ultimately abandoned by News Corp and the UK authorities did not therefore need to conclude their media plurality review, the case constitutes a good illustration of how EU merger control rules and national media plurality laws interplay in practice. It should also be noted that, while the two different levels of review (the Commission at the EU level on competition grounds and national authorities at the national level on media plurality grounds) are a specificity of the EU legal system, a parallel review of the same transaction on competition and media plurality grounds by different authorities based on different procedural and substantive rules, may well happen also within a Member State. Indeed, it is well possible that, also at the national level, different authorities be in charge of the enforcement of each of competition and media plurality rules based on different procedural and substantive framework.

The experience in the News Corp/BskyB case may provide useful guidance to other competition authorities around the world faced with similar issues in the future.

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<sup>14</sup> Case No COMP/M.5932 - *News Corp/BskyB*, Decision of 21 December 2010.

<sup>15</sup> Case COMP/M.423 - *Newspaper Publishing*, decision of 14 March 1994, constitutes another example of parallel review conducted by the Commission and national authorities (also the UK authorities in this case).

## 6. State aid control in broadcasting and digital switchover

### 6.1 *Broadcasting*

State aid to public service broadcasting is a sensitive topic in all Member States. The Amsterdam Protocol<sup>16</sup> attributed special status to this sector due to its importance for the democratic debate, the social needs of society and the paramount goal of maintaining media pluralism. The Commission's rules on State aid to public broadcasting, set out in the Broadcasting Communication<sup>17</sup>, describe the conditions under which Member States may finance public service broadcasting. These rules were necessary to limit public financial intervention in a market which was traditionally State run and/or financed, but which has become increasingly covered by the services of private, commercially run broadcasters. These rules ensure that the financing of public broadcasting is justified by the added value it brings to society in terms of its democratic, social and cultural needs.

The Communication's approach is based on Article 106 (2) TFEU, which applies to all services of general economic interest and requires the following conditions to be satisfied:

- There must be a true service of general economic interest, which is clearly defined as such, and
- The undertaking carrying out this service must be clearly entrusted with that task, and
- There is no overcompensation.

The Broadcasting Communication affords the Member States broad discretion to define the concept of public service. In principle, broadcasters may, within the remit of their public service activity, provide audiovisual services on new distribution platforms, aside from classical radio and TV broadcasts. These new media services must, however, satisfy the democratic, social and cultural needs of society in order to qualify as a public service. To that end, the Communication requires a prior evaluation procedure (called the Amsterdam test) to be conducted at the national level, in order to assess i) the new service's added value to society in terms of democratic, social and cultural needs, ii) the potential impact of the new service on the market, and iii) whether there is a balance between these two considerations. The test must be carried out by a body which is independent from the public service broadcaster, and all stakeholders must have the opportunity to make their views known.

Moreover, the Communication stipulates that public service compensation should not exceed the net costs of the public service. All revenues derived from the public service (including those resulting from commercial activities connected to the public service) should be calculated in order to ensure that the need for public financing is as low as possible. An independent body should monitor the execution of the service and the use of public funding.

### 6.2 *Digital switchover*

#### 6.2.1 *The criteria applied by the Commission*

A number of Member States are providing public funding to encourage broadcasters and consumers to facilitate the switchover from analogue to digital terrestrial broadcasting. The Commission monitors that such aid complies with the following principles: Member States must demonstrate that the aid is a

<sup>16</sup> Protocol on the system of public service broadcasting in the Member States, OJ C 340, 10 November 1997 in which Member States reiterate that the definition of the public service remit lies with them.

<sup>17</sup> Communication from the Commission on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257 of 27.10.2009, p.1

necessary and appropriate instrument, that is limited to the minimum necessary, and that it does not unduly distort competition. In this context, the Commission lays particular importance on technological neutrality. The aim is to ensure a level playing field between different transmission platforms, such as terrestrial, cable and satellite. This policy has been upheld by the Court which confirmed two negative decisions of the Commission (Berlin Brandenburg DVBT<sup>18</sup> and Italy digital decoders<sup>19</sup>).

### 6.2.2 *Initiatives of the Commission*

In 2012, the Commission continued to apply the approach adopted in earlier decisions concerning State funding in support of digital switchover. For instance, it approved a Hungarian support scheme<sup>20</sup> for the acquisition of digital decoders by persons with low income. It has adopted a positive decision on aid to build a new local digital television multiplex (local DTT)<sup>21</sup> that will carry newly created local digital television broadcast services (local TV services) covering certain cities in the UK. The Commission also opened an in-depth investigation on a Spanish plan to compensate digital terrestrial broadcasters for the extra costs of parallel broadcasting while services are re-allocated to another frequency in order to free the digital dividend<sup>22</sup>. There were doubts as to the proportionality, necessity and technological neutrality of the measure.

### 6.2.3 *Outlook for 2013*

The Commission will continue to apply its established policy concerning State aid for digital switchover. As most Member States have completed the switching from analogue to digital broadcasting, there will likely be fewer notifications of initiatives to facilitate the switchover. The Commission's assessment of these measures will place special emphasis on technological neutrality and the ultimate objective of ensuring wide consumer access to digital broadcasting.

## 7. **Conclusion**

The last two decades the television and broadcasting sectors have undergone significant changes partly due to changes in technology leading to more and better choice for consumers. The changes, such as digitisation, convergence and the rapid growth of pay-TV give rise to new challenges and put pressure on past business models. The evolving practices and behaviour of market operators continue to require close monitoring under merger control, State aid and antitrust rules to ensure that anti-competitive practices do not hamper innovation or prevent consumers from benefitting from the rich variety of available services at the best possible conditions. The Commission, as the EU competition agency, closely follows emerging paradigm shifts and challenges in television and broadcasting. Our enforcement experience may provide useful guidance to other competition authorities around the world faced with similar issues in the future.

<sup>18</sup> C 25/04 Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg, 9 November 2005 (OJ L 200, 22.7.2006, p. 14), T-8/06 FAB Fernsehen aus Berlin GmbH v Commission, judgment of the General Court (then the Court of First Instance) of 6 October 2009 and C-544/09 P Germany v Commission, judgment of the Court of 15 September 2011.

<sup>19</sup> C 52/05 *Subsidy to digital decoders*, 24 January 2007 (OJ L 147, 8.6.2007, p. 1), T-177/07 *Mediaset v Commission*, judgment of the General Court of 15 June 2010 and C-403/10 P *Mediaset SpA v Commission*, judgment of the Court of 28 July 2011.

<sup>20</sup> SA.34901 *Digital television decoders to socially disadvantaged households*, 6 December 2012, not yet published.

<sup>21</sup> SA.33980 *Local television in the UK*, 5 December 2012, not yet published.

<sup>22</sup> SA. 32619 *Compensation of damages for the liberation of digital dividend*, 25 April 2012, (OJ C 213, 19.7.2012, p. 41).

## FRANCE

-- Version française --

### Introduction

La France souhaite, en préalable à la présentation du secteur de la radiodiffusion télévisuelle, sous l'angle du droit de la concurrence, rappeler ce qui est au fondement de sa politique audiovisuelle et ce qui inspire la réglementation générale mise en place dans ce secteur au niveau national comme européen.

La radiodiffusion télévisuelle ne saurait être appréhendée uniquement sous l'angle du droit de la concurrence. L'organisation du paysage audiovisuel, en ce qu'elle participe de principes essentiels à la démocratie et à la cohésion sociale, répond à des objectifs d'intérêt général de garantie du pluralisme des médias, de respect de la liberté de communication et de diversité culturelle reconnus par le traité sur l'Union européenne<sup>1</sup> et la Charte des droits fondamentaux de l'Union européenne<sup>2</sup>. En France, la Constitution fait de la sauvegarde du pluralisme des médias et de l'expression des courants de pensée ainsi que du respect de la liberté de communication des principes à valeur constitutionnelle dont la mise en œuvre est confiée au législateur.

Dans ces conditions, malgré des débats récurrents, il a été régulièrement confirmé au sein de l'Union européenne que la sauvegarde du pluralisme et de la diversité culturelle, relevaient de la compétence des États membres et que ces principes ne sauraient être subordonnés à des réglementations techniques relatives à la concurrence.

Au-delà du plein respect des impératifs d'intérêt général précédemment rappelés, qui ne bénéficient pas seulement aux consommateurs mais plus généralement aux citoyens, les activités culturelles ne sauraient être réduites à des activités de consommation, dans la mesure où les biens culturels ne sont pas des marchandises comme les autres. La double nature économique et culturelle des biens et services culturels, y compris audiovisuels, est reconnue par la Convention de l'UNESCO sur la protection et la promotion de la diversité des expressions culturelles de 2005 ; laquelle consacre le droit légitime des États à développer et mettre en œuvre des politiques et mesures de soutien à la promotion de la diversité culturelle.

À ce titre, bien que le développement des technologies numériques modifie les modes de diffusion des œuvres audiovisuelles, il ne s'agit pas de se focaliser sur la seule problématique de l'accès des

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<sup>1</sup> Article 2 du traité sur l'Union européenne : « L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes. » Article 3 (3) du traité sur l'Union européenne : « Elle respecte la richesse de sa diversité culturelle et linguistique, et veille à la sauvegarde et au développement du patrimoine culturel européen. »

<sup>2</sup> Article 11 (2) de la charte des droits fondamentaux de l'Union européenne : « La liberté des médias et leur pluralisme sont respectés. »

consommateurs aux œuvres<sup>3</sup>. Il est également indispensable de soutenir la création et la production d'œuvres audiovisuelles européennes, pour garantir la pluralité de l'offre culturelle et faire face à la position dominante de certains acteurs mondiaux, qui disposent de moyens sans commune mesure avec ceux d'autres acteurs. Il en va de la protection et de la promotion de la diversité des expressions culturelles, préoccupation qui rejoint l'intérêt du consommateur à avoir accès à une offre diversifiée de contenus et s'avère pleinement compatible avec des objectifs de lutte contre la concentration excessive du marché ou l'abus de position dominante.

En conséquence, il est nécessaire d'avoir une approche globale du secteur audiovisuel : il s'agit de donner les moyens aux acteurs européens de rivaliser dans la distribution et la promotion des œuvres audiovisuelles et ainsi de mettre en place une politique forte en matière de soutien à la création à travers des dispositifs innovants et adaptés à l'ère numérique.

## **1. La réglementation audiovisuelle française répond aux objectifs de pluralisme et de diversité culturelle**

Le marché français est caractérisé par la prédominance de la diffusion hertzienne terrestre parmi les modes de réception de la télévision. Ainsi, la télévision hertzienne terrestre constitue le vecteur privilégié de la diffusion des chaînes de télévision, puisqu'elle représente le moyen principal de réception pour la population. Dans ce contexte, afin de permettre à l'ensemble de la population de bénéficier d'une offre pluraliste, le législateur a posé un cadre juridique qui structure le paysage audiovisuel français.

L'attribution des autorisations d'utilisation de la ressource radioélectrique pour l'audiovisuel est confiée à une autorité de régulation indépendante, le Conseil supérieur de l'audiovisuel (CSA). La législation française a défini des impératifs prioritaires que sont la sauvegarde du pluralisme des courants d'expression socioculturels et la diversification des opérateurs. Elle a également fixé pour objectif au CSA de favoriser le libre exercice de la concurrence<sup>4</sup> dans l'exercice de son pouvoir de régulation et notamment en saisissant, le cas échéant, l'Autorité de la concurrence si des pratiques anticoncurrentielles sont suspectées. En outre, le législateur a fixé des critères de nature culturelle (politique du « mieux-disant culturel ») : ces engagements portent sur la production et la diffusion d'œuvres audiovisuelles et cinématographiques françaises et européennes, mais également sur la garantie du caractère pluraliste de l'expression des courants de pensées et d'opinion, et de l'honnêteté de l'information. »

L'attribution des autorisations d'utilisation de la ressource radioélectrique est confiée à une autorité de régulation indépendante, le Conseil supérieur de l'audiovisuel (CSA). La législation française a défini des impératifs prioritaires que sont la sauvegarde du pluralisme des courants d'expression socioculturels la diversification des opérateurs. Elle a également fixé pour objectif au CSA de favoriser le libre exercice de la concurrence dans l'exercice de son pouvoir de régulation, en saisissant le cas échéant, l'Autorité de la concurrence si des pratiques anticoncurrentielles sont suspectées.

L'objectif fixé par le législateur est donc la mise en place d'une offre de services diversifiée et pluraliste.

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<sup>3</sup> Le document d'appel à contribution de l'OCDE indique que la Session « étudiera les sujets sur lesquels les autorités de la concurrence devraient se pencher pour veiller à ce que les consommateurs tirent le meilleur parti des services de radiodiffusion. »

<sup>4</sup> Article 3-1 de la loi du 30 septembre 1986 : " il veille à favoriser la libre concurrence et l'établissement de relations non discriminatoires entre éditeurs et distributeurs de services, quel que soit le réseau de communications électroniques utilisé par ces derniers, conformément au principe de neutralité technologique".

De surcroît, la procédure d'autorisation des services de radiodiffusion télévisuelle s'effectue par chaîne, ce qui permet au CSA d'attribuer une même fréquence à plusieurs éditeurs de chaînes. Afin de favoriser le pluralisme et la concurrence, la loi française ne prévoit donc pas l'octroi d'un multiplexe complet à un même éditeur des services.

## 2. Un marché de la radiodiffusion diversifié et pluraliste

C'est sur la base de ce dispositif précédemment rappelé que le CSA a progressivement composé le paysage audiovisuel français actuel, pluraliste et diversifié. À l'issue de l'adoption du cadre juridique permettant la mise en place de la télévision numérique hertzienne terrestre (TNT)<sup>5</sup>, la France est ainsi l'un des pays européens qui a, par le biais de procédures ouvertes et transparentes d'appels à candidatures à de nouveaux entrants, le plus renforcé le pluralisme et ouvert son secteur audiovisuel à la concurrence. Compte tenu de la libération de certaines fréquences audiovisuelles, ce sont aujourd'hui 29 canaux qui sont utilisés pour la télévision numérique terrestre en clair<sup>6</sup>.

La partie 1 de la présente note présente plus en détail la nature des différents acteurs ainsi que le pouvoir de marché dont ils disposent, en se fondant sur des analyses récentes de l'Autorité de la concurrence.

Comme le note l'Observatoire européen de l'audiovisuel à partir de la base de données MAVISE créée pour la Direction générale de la communication de la Commission européenne<sup>7</sup>, à l'instar de plusieurs autres marchés audiovisuels de taille importante (Allemagne, Espagne, Italie et Royaume-Uni), l'offre française de la TNT propose un nombre important de chaînes nationales et régionales éditées notamment par des nouveaux opérateurs qui étaient absents du paysage terrestre analogique.

Par delà l'organisation du marché de la diffusion hertzienne terrestre, il convient de souligner que depuis les années 1990 les offres de services de communication audiovisuelle distribués sur les autres réseaux de communications électroniques (câble, satellite, ADSL, Internet, etc.) ont connu un essor important. Ce développement concerne principalement les services de télévision distribués sur les réseaux n'utilisant pas de fréquences assignées par le CSA (câble, satellite, ADSL, mobile, internet). Ainsi, au 31 décembre 2011, 141 chaînes étaient conventionnées auprès du CSA. Les thèmes du sport et du cinéma dominent l'offre, suivis de la musique puis du documentaire.

On n'omettra pas enfin la richesse de l'offre de service public télévisuelle qui comprend (outre l'audiovisuel extérieur de la France<sup>8</sup>) les chaînes de France Télévisions<sup>9</sup>, ARTE et La Chaîne parlementaire.

## 3. Une régulation spécialisée faisant intervenir trois autorités administratives indépendantes

En France, les règles du droit commun de la concurrence s'appliquent en matière audiovisuelle. Dès lors, c'est l'Autorité de la concurrence qui, par application des dispositions du code de commerce, assure le contrôle des opérations de concentration et des pratiques anticoncurrentielles qui concernent le secteur audiovisuel.

<sup>5</sup> Dans la loi n° 2000-719 du 1<sup>er</sup> août 2000 modifiant la loi du 30 septembre 1986 précitée.

<sup>6</sup> On n'omettra pas de préciser que 8 canaux sont utilisés pour la diffusion de chaînes de TNT payantes.

<sup>7</sup> <http://mavise.obs.coe.int/>

<sup>8</sup> Avec France 24, Monte Carlo Doualiya et Radio France internationale.

<sup>9</sup> France 2, France 3, France 5, France 4 et France O.

Dans ce premier champ de compétence, l'Autorité sollicite l'avis des deux régulateurs sectoriels spécialisés, l'Autorité de régulation des communications électroniques et des postes – ARCEP et le Conseil supérieur de l'Audiovisuel – CSA avant de rendre ses décisions si elle a déclenché un examen approfondi. Les décisions de l'Autorité de la concurrence dont le contenu est développé dans la partie 3 de cette note ont pris en compte les avis des deux régulateurs.

Dans le second champ de compétences, l'Autorité de la concurrence communique aux régulateurs les saisines relatives à des opérateurs les concernant, afin qu'ils puissent le cas échéant lui adresser un avis.

L'Autorité de la concurrence dispose également de compétences consultatives. Elle peut rendre des avis à la demande des deux régulateurs sectoriels spécialisés, l'Autorité de régulation des communications électroniques et des postes – ARCEP et le Conseil supérieur de l'audiovisuel -CSA, du Gouvernement ou de sa propre initiative.

L'autorité indépendante de régulation du secteur audiovisuel, le Conseil supérieur de l'audiovisuel, dispose en outre d'un pouvoir de recommandation en matière de développement de la concurrence dans le secteur audiovisuel : la réglementation audiovisuelle<sup>10</sup> prévoit ainsi que le CSA adresse des recommandations au Gouvernement pour le développement de la concurrence dans les activités de radio et de télévision. A cette fin, la loi habilite le Conseil à saisir les autorités administratives ou judiciaires compétentes pour connaître des pratiques restrictives de la concurrence et des concentrations économiques. Lorsqu'il délivre les autorisations d'usage de la ressource radioélectrique, il doit en outre veiller à « la nécessité d'éviter les abus de position dominante ainsi que les pratiques entravant le libre exercice de la concurrence ».

Par ailleurs, la loi n° 86-1067 du 30 septembre 1986 fixe un ensemble de règles anti-concentration spécifiques au secteur audiovisuel rendu nécessaire par la sauvegarde du pluralisme des courants d'expression socioculturels<sup>11</sup>. C'est le CSA qui est chargé de veiller au respect de ce dispositif anti-concentration, et, d'une manière générale, qui est tenu d'assurer le respect du pluralisme, lors de ses décisions d'attribution de fréquences par exemple. Il dispose à cet effet d'un pouvoir d'enquête et d'information.

Enfin, il incombe à l'Autorité de Régulation des communications électroniques et des postes (ARCEP), d'étudier la nécessité d'une régulation *ex ante* du marché des « réseaux assurant la diffusion ou utilisés pour la distribution de services de communication audiovisuelle », soumis aux dispositions du code des postes et des communications électroniques, afin de favoriser l'apparition et le développement de nouveaux acteurs sur ce marché<sup>12</sup>.

#### **4. Présentation des secteurs de la radiodiffusion et de la télévision en France**

Le secteur de la diffusion est composé d'acteurs, opérateurs de communications électroniques, qui assurent le transport de contenu audiovisuel mis à disposition par un fournisseur de contenu jusqu'aux terminaux des utilisateurs, grâce à des technologies hertziennes terrestres, satellitaires ou filaires. La radiodiffusion, et notamment la radiodiffusion télévisuelle, désigne plus particulièrement la diffusion de contenu audiovisuel via des technologies hertziennes.

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<sup>10</sup> Article 17 de la loi du 30 septembre 1986

<sup>11</sup> Décision du Conseil constitutionnel n°86-217 DC du 18 septembre 1986, portant sur la conformité à la Constitution de la loi relative à la liberté de communication.

<sup>12</sup> Article L 32 et suivants du Code des Postes et des Communications Electroniques

S'agissant de la télévision, deux activités coexistent au sein du secteur en France, à savoir la télévision payante et la télévision gratuite (ou « en clair »).

Le secteur de la télévision payante est organisé de la façon suivante : les éditeurs de chaînes payantes définissent la thématique et la ligne éditoriale de leurs chaînes et, sur cette base, produisent en interne leurs propres programmes ou acquièrent auprès de tiers des droits de diffusion sur les marchés situés en amont. Les éditeurs proposent ensuite à la vente le droit de commercialiser leurs chaînes aux différents distributeurs. Ces derniers se chargent de constituer une offre de télévision payante sous forme de bouquets de chaînes, accessibles par abonnement ou « à la carte ». Le distributeur doit enfin assurer la commercialisation de son offre et la gestion de la relation avec l'abonné.

Le secteur de la télévision gratuite est organisé de manière différente. Les distributeurs de bouquets de télévision ne rémunèrent pas les éditeurs de chaînes. Alors que les activités correspondantes dans le secteur de la télévision payante tirent l'essentiel de leurs revenus des abonnements payés par les consommateurs finals, l'édition et la distribution de chaînes gratuites sont presque entièrement rémunérées par les recettes générées par la publicité télévisuelle et, dans une moindre mesure, de la redevance acquittée par les personnes équipées de récepteurs audiovisuels.

#### **4.1 Situation concurrentielle du secteur de la radiodiffusion**

L'Autorité de régulation des communications électroniques et des postes (« ARCEP ») a adopté une décision en date du 11 septembre 2012 portant sur la définition du marché pertinent de gros des services de diffusion hertzienne terrestre de programmes télévisuels en mode numérique, sur la désignation d'un opérateur exerçant une influence significative sur ce marché et sur les obligations imposées à cet opérateur sur ce marché. La décision adoptée est conforme aux avis adressés à l'ARCEP par l'Autorité de la concurrence (voir ci-dessous) et le Conseil supérieur de l'audiovisuel (« CSA ») et tient également le plus grand compte des commentaires adressés par la Commission européenne. Elle retient plusieurs obligations concernant l'accès, la transparence, la non-discrimination, et précisant les niveaux tarifaires imposés à l'opérateur puissant, TDF.

Cette régulation vise à compenser plusieurs barrières à l'entrée sur le marché dont notamment :

- la difficulté de répliquer des sites de diffusion de l'opérateur historique [pour des raisons économiques, techniques, géographiques mais aussi à cause de contraintes réglementaires qui nécessitent une grande proximité entre site alternatif et site historique ;
- la préexistence d'un réseau national de l'opérateur historique couvrant l'ensemble des 1 600 zones définies par le CSA ;
- la difficulté pour les opérateurs alternatifs de gagner des parts de marché compte-tenu de la durée traditionnelle des contrats de diffusion des chaînes sur chaque site (5 ans).

L'Autorité de la concurrence, a rendu deux avis à l'ARCEP sur des projets de régulation sectorielle<sup>13</sup>. Dans le second avis, elle avait constaté que la concurrence sur le marché français s'était affaiblie à la suite

<sup>13</sup>

Avis n° 06-A-01 du 18 janvier 2006 relatif à une demande d'avis de l'Autorité de régulation des télécommunications en application de l'article L. 37-1 du code des postes et communications électroniques, portant sur l'analyse des marchés de gros des services de diffusion audiovisuelle et Avis n° 09-A-09 du 17 avril 2009 relatif à une demande d'avis de l'Autorité de régulation des communications électroniques et des postes en application de l'article L. 37-1 du code des postes et communications électroniques, portant sur l'analyse des marchés de gros des services de diffusion audiovisuelle



du rachat par TDF de deux de ses concurrents les plus actifs, Antalis et Emettel, que subsistaient d'importantes barrières à l'entrée, et elle a estimé que l'ARCEP pouvait légitimement recourir à certains remèdes ex ante pour mettre en place, à titre transitoire, les conditions de marché aptes à faciliter le maintien d'une concurrence effective. Elle s'était déclarée favorable à la régulation envisagée qui visait à améliorer l'accès des concurrents aux 113 sites identifiés comme non répliquables par la mise en place d'une orientation vers les coûts, tout en incitant les concurrents de TDF à construire des sites alternatifs lorsque cela est a priori possible.

Au titre de ses missions de lutte contre les pratiques anticoncurrentielles, l'Autorité de la concurrence a été saisie de plaintes alléguant l'érection d'obstacles artificiels à la concurrence par les infrastructures par la construction de sites de diffusion alternatifs, et à la concurrence du fait de pratiques tarifaires de ciseaux tarifaires dans des offres de gros en matière d'hébergement sur les sites de diffusion de l'opérateur historique. Les demandes de mesures conservatoires ont été accueillies s'agissant des pratiques tarifaires et rejetées s'agissant du premier type de pratiques. Dans les deux cas, il a été décidé de poursuivre l'examen au fond des pratiques, dont l'instruction est toujours en cours.

En outre, il est utile, dans le secteur de la radiodiffusion, d'opérer des distinctions au niveau des métiers, plus qu'en fonction des technologies utilisées pour la diffusion des contenus audiovisuels. Loin d'opposer les différentes technologies de diffusion, il s'agit de distinguer les métiers et de reconnaître le rôle singulier de l'éditeur de service audiovisuel, alors que le document d'appel à contribution de l'OCDE indique que « *Quoi qu'il en soit, avec les progrès fulgurants de la technologie et la convergence croissante entre les services de télécommunications, de radiodiffusion et informatiques, un modèle de réglementation ne tenant pas compte des liens entre les télécommunications et la radiodiffusion ne reflète plus la réalité. Il est nécessaire d'adopter une approche qui réponde à la nature dynamique du secteur.* ». Depuis 2007, date d'adoption de l'actuelle directive Services de médias audiovisuels, de nouveaux modèles d'entreprise ont été lancés et nombre de nouveaux acteurs qui, initialement, ne faisaient qu'héberger des contenus produits par des utilisateurs, ont engagé (à l'instar de *Youtube* et de *DailyMotion*) des discussions avec les ayants-droit pour distribuer leur contenu sur leurs plate-formes. Le positionnement au sein de la chaîne de valeur, de ces acteurs, aujourd'hui en dehors du champ de la réglementation audiovisuelle, alors même que leur poids sur le marché se développe corollairement à l'extension des services en ligne, pose la question de la concurrence sur le secteur de l'audiovisuel.

## **4.2 Évolutions récentes et situation concurrentielle du secteur de la télévision gratuite**

### **4.2.1 Présentation des marchés de la télévision gratuite et évolutions récentes**

L'Autorité de la concurrence française a relevé le caractère fortement évolutif des marchés relevant du secteur de la télévision gratuite, bouleversés par la révolution numérique qui a parallèlement multiplié les modes de diffusion des contenus audiovisuels et les chaînes disponibles, et fragmenté les audiences correspondantes.

En effet, l'évolution récente du secteur de la télévision gratuite en France est caractérisée par l'augmentation significative du nombre des chaînes disponibles sur la télévision gratuite. Aux chaînes gratuites dites « historiques » se sont ajoutées 11 nouvelles chaînes gratuites numériques lors du lancement de la télévision numérique terrestre (« TNT ») en mars 2005. Les chaînes historiques comptent six chaînes privées et publiques : TF1, France 2, France 3, France 5, Arte et M6. Les « nouvelles chaînes de la TNT » incluaient Direct 8, W9, TMC, NT1, NRJ12, LCP-Public Sénat, France 4, BFM TV, iTélé, Gulli, France 5 et France Ô. Depuis la fin de l'année 2012, six nouvelles chaînes privées gratuites sélectionnées par le CSA ont commencé à émettre.

Par ailleurs, le marché de la publicité télévisuelle, sur lequel les chaînes de télévision gratuites tirent leurs ressources, est un marché mature, sur lequel les volumes achetés progressent peu. Les recettes publicitaires télévisuelles ont accusé une baisse durant les années 2008 à 2010 pour atteindre un montant global de 3,5 milliards d'euros en 2011, chiffre en légère progression par rapport à 2005, alors que les recettes avaient cru deux fois plus rapidement durant la période 2000-2005. La multiplication des chaînes gratuites financées par la publicité s'est donc traduite par une concurrence plus forte pour le financement, tout accroissement de l'audience et des recettes publicitaires d'une chaîne se faisant au détriment des autres.

L'Autorité de la concurrence a également constaté le caractère biface de ces marchés. En effet, la demande de publicité télévisuelle est fonction de l'audience des chaînes, elle-même fortement tributaire des contenus audiovisuels acquis par les éditeurs de chaînes de télévision. Inversement, la puissance d'achat des chaînes gratuites sur les marchés de droits est essentiellement fonction de leurs recettes sur le marché de la publicité télévisuelle. Afin d'évaluer de manière pertinente les effets de la présente opération sur la concurrence, il est donc indispensable de tenir compte du caractère interdépendant de ces marchés.

Enfin, l'audience totale de la télévision ne cesse de croître depuis les années 1990, pour atteindre 3h47 de visionnage quotidien par individu en 2011.

#### 4.2.2 *Situation concurrentielle des marchés de la télévision gratuite*

Le secteur de la télévision gratuite recouvre plusieurs activités :

- à l'amont, les détenteurs de droits de diffusion de contenus audiovisuels (tels que les films de catalogue, les événements sportifs, les séries télévisées, etc.) commercialisent ceux-ci auprès des éditeurs de chaînes de télévision ;
- à l'aval, le marché de la publicité télévisuelle qui met en relation les chaînes de télévision avec les annonceurs (ou les agences média) pour la vente d'espaces publicitaires télévisés.

Plusieurs acteurs coexistent dans le secteur de la télévision gratuite. Avec le lancement de la TNT en 2005, le nombre de chaînes gratuites en France est passé de sept à dix-huit. Les chaînes « historiques » comptent TF1, M6, France 2 et France 3 qui sont des généralistes, les deux premières au titre de leur convention CSA et les autres au titre de leur cahier des charges, auxquelles il faut ajouter la partie en clair de Canal+ et Arte<sup>14</sup>.

Parmi les nouvelles chaînes de la TNT, on distingue également les « généralistes », les thématiques à tendance généralistes (ou semi-généralistes) et les thématiques pures en fonction de leur convention CSA.

Les généralistes sont celles qui ont la plus grande liberté de programmation et celles qui peuvent présenter les programmes les plus fédérateurs. Il s'agit de TMC, NT1 et D8. Les semi-généralistes sont en partie tenues de respecter une thématique. Celle-ci est musicale pour W9, filiale de M6, et pour NRJ 12. La première doit en particulier assurer la diffusion de 52 spectacles vivants par an et consacrer au moins 20 % de sa programmation à de nouveaux talents de la chanson d'expression française. France 4 est quant à elle destinée à promouvoir le spectacle vivant notamment ainsi que l'offre culturelle et artistique en général.

<sup>14</sup> ARTE présente la particularité de n'avoir pas signé de convention avec le CSA et d'être soumise à la surveillance et au contrôle des seuls sociétaires, La Sept-Arte pour la France et Arte Deutschland pour l'Allemagne, à l'exclusion de toute intervention d'autorité publique.

France 5 est, par application du cahier des charges de France Télévisions, chargée de concevoir et de programmer des émissions de télévision à caractère éducatif et favorisant l'accès au savoir, à la connaissance, à la formation et à l'emploi. La programmation de D17 se compose aux trois quarts de programmes musicaux. Elle est également tenue de favoriser la chanson d'expression française et ses nouveaux talents. La Chaîne parlementaire a une mission de service public d'information et de formation des citoyens à la vie publique par des programmes parlementaires, éducatifs et civiques. La chaîne Gulli est éditée par Jeunesse TV, société détenue conjointement par le groupe Lagardère et France Télévisions. Gulli est destinée prioritairement aux enfants de 6 à 14 ans. La programmation s'adresse également aux parents et vise à favoriser le lien social. Enfin, I-Télé et BFM TV sont des chaînes d'information en continu.

TF1 a pris le contrôle des chaînes TMC et NT1 par le groupe TF1 en 2010. A cette occasion, l'Autorité a constaté les fortes positions de TF1 sur différents marchés d'acquisition de droits, en particulier en matière de films américains de catalogue et de séries américaines, et de films d'expression originale française de catalogue. Sur ces marchés, les premiers concurrents de TF1 sont les groupes M6 et France Télévisions.

L'Autorité a également considéré que TF1 disposait d'une position dominante sur le marché de la publicité, avec une part de marché comprise entre 40 et 50 %, soit plus du double de son principal concurrent, le groupe M6. L'Autorité a constaté que le groupe TF1 jouissait à cet égard d'une position remarquablement stable dans le temps, relevant qu'en 1996-1997, la part de marché de TF1 dans la publicité télévisuelle était déjà de l'ordre de 50 %. Le pouvoir de marché du groupe TF1 était par ailleurs étayé par sa capacité à pratiquer des prix plus élevés que ceux de ses concurrents et le maintien d'un taux d'utilisation de ses capacités très élevé et supérieur à celui de ses concurrents.

#### **4.3 *Évolutions récentes et situation concurrentielle du secteur de la télévision payante***

Le secteur de la télévision payante recouvre plusieurs activités à différents stades de la chaîne de valeur :

- à l'amont, les détenteurs de droits de diffusion de contenus audiovisuels (tels que les œuvres cinématographiques, les événements sportifs, les séries télévisées, *etc.*) commercialisent ceux-ci auprès des éditeurs de chaînes de télévision ou de services de télévision non linéaires (tels que la vidéo à la demande) ;
- au stade intermédiaire, les éditeurs commercialisent les chaînes qu'ils ont constituées à partir de programmes produits en interne ou acquis sur le marché amont des droits de diffusion. La rémunération des éditeurs provient de la publicité, des redevances versées par les distributeurs et des abonnements ;
- en aval, les distributeurs commercialisent des offres de télévision payante auprès des téléspectateurs sous forme de chaînes, vendues en bouquets ou à la carte, ou de services non linéaires ;
- enfin, le transport consiste dans l'acheminement du signal d'une chaîne jusqu'au téléspectateur, qui peut être assuré par différents modes de transmission (câble, satellite, internet haut débit/très haut débit, télévision numérique terrestre).

Le secteur de la télévision payante est caractérisé par la coexistence d'offres de télévision traditionnelle linéaire et d'offres de télévision non linéaire.

#### 4.3.1 *Le secteur des services de télévision payante linéaire*

Le secteur de la télévision payante était historiquement structuré en France autour des deux opérateurs du satellite, TPS et le Groupe Canal Plus (« GCP », détenu par le groupe Vivendi), verticalement intégrés sur l'ensemble de la chaîne de valeur. Ces deux acteurs ont fusionné en 2006 avec la reprise de TPS par GCP. D'autres opérateurs ont émergé, utilisant de nouveaux modes de diffusion et de distribution des contenus audiovisuels, à savoir l'internet haut débit (ADSL), la télévision numérique terrestre (« TNT »), la télévision sur terminaux mobiles ou encore la vidéo à la demande (« VàD »). À ce jour, certains fournisseurs d'accès à internet (« FAI ») et câblo-opérateurs interviennent également sur les différents marchés de la télévision payante, avec des degrés d'intégration verticale variable selon les acteurs.

Depuis 2006, le développement de l'ADSL s'est confirmé, puisqu'il est devenu le premier mode de réception des offres de télévision payante, représentant 52 % des foyers recevant une offre payante de télévision en mode numérique au premier semestre 2011. Les consommateurs disposent donc d'un choix entre différentes plate-formes de diffusion, à savoir le satellite, l'ADSL, la fibre, le câble et l'hertzien. Sur chacune de ces plate-formes plusieurs bouquets payants concurrents sont offerts aux consommateurs, à l'exception de l'hertzien et du satellite sur lesquels seules les offres de GCP sont présentes.

En aval, la concurrence est intra plate-formes. Les offres de GCP sont offertes sur toutes les plate-formes de diffusion. Les opérateurs tiers, principalement FAI et câblo-opérateurs, transportent et commercialisent les offres de GCP sur leur propre plate-forme. GCP conserve néanmoins la relation directe avec ses abonnés (on parle d'« auto-distribution »), les diffuseurs concurrents réalisant pour son compte des prestations techniques et commerciales. À côté des offres de GCP, chaque opérateur propriétaire de plate-formes techniques de diffusion propose ses propres bouquets de télévision payante. La concurrence intra plate-forme est donc asymétrique puisque les offres de GCP sont auto-distribuées sur l'ensemble des plate-formes alors que les bouquets concurrents ne sont proposés aux consommateurs que sur chaque plate-forme concernée.

GCP demeure dominant sur la plupart des marchés de la télévision payante. En 2012, l'Autorité de la concurrence a constaté que ce groupe disposait de très fortes positions en amont, détenant en particulier la grande majorité des droits de diffusion en télévision payante de contenus cinématographiques, en éditant la seule chaîne premium multithématiques et les principales chaînes de cinéma du marché ainsi que d'autres chaînes thématiques, en assurant la distribution exclusive d'un grand nombre de chaînes éditées par des opérateurs tiers et en commercialisant les principales offres de télévision payante aux consommateurs finals. Sur le marché des abonnements aux offres de télévision payante de GCP et de ses concurrents (hors composante télévisuelle de base des abonnements multi-services d'internet, téléphonie et télévision auprès des fournisseurs d'accès à internet (« FAI »), dits « *triple play* »), GCP représentait en 2011 entre 70 et 80 % des abonnements et entre 90 et 100 % du chiffre d'affaires du marché.

#### 4.3.2 *Le secteur de la télévision payante non linéaire*

Les marchés de la télévision à péage sont caractérisés par l'émergence de nouvelles formes de consommation de contenus, principalement cinématographiques et audiovisuels. À la différence des services de télévision traditionnels, ces nouvelles formes de consommation ne sont pas linéaires, ce qui signifie que le consommateur ne dépend pas d'une grille de programme établie par un fournisseur de services de télévision, mais choisit dans un catalogue les programmes qu'il souhaite visionner, au moment de son choix.

L'émergence de ces nouvelles formes de consommation est permise par plusieurs changements technologiques : l'accroissement du visionnage de contenus par le biais de réseaux IP ou fibrés, sur

ordinateur ou sur téléviseurs connectés à internet (on parle de « télévision connectée »<sup>15</sup>). Les offres aux consommateurs finals peuvent prendre la forme de Pay-Per-View (marché en déclin en France) ou de vidéo à la demande (« V&D »).

Le marché de la vidéo à la demande payante comprend trois types de modèles tarifaires : la location à l'acte (en flux continu, plus généralement appelé « *streaming* », ou en téléchargement temporaire), location par abonnement (vidéo à la demande par abonnement, « V&DA ») et achat à l'acte (téléchargement définitif). En France, le principe de mise à disposition des œuvres cinématographiques sur un service de vidéo à la demande à l'acte est fixé à 4 mois (ou 3 mois pour certains films) à compter de la date de sortie en salle par l'accord du 6 juillet 2009 pour le réaménagement de la chronologie des médias. Cet accord, qui a fait l'objet d'un arrêté d'extension du ministre de la culture et de la communication, a également fixé la possibilité d'exploiter des films en vidéo à la demande par abonnement à compter du 36<sup>ème</sup> mois suivant la sortie en salle. Il s'ensuit que les éditeurs de vidéo à la demande par abonnement ne peuvent acquérir de droits relatifs aux films récents. Les éditeurs de vidéo à la demande à l'acte comme à l'abonnement sont en revanche actifs sur les marchés de l'achat de droits relatifs aux films de catalogue, aux séries récentes et non récentes.

La consommation de vidéo à la demande demeure marginale lorsqu'on compare le chiffre d'affaires qu'elle a généré en 2011 (230 millions d'euros) à celui de la télévision payante linéaire (plus de 6 milliards d'euros). D'après le baromètre NPA-GfK, le marché de la vidéo à la demande payante représentait en 2011 environ 220 M€, en augmentation de 44 % par rapport à 2010. Plus de 90 % du chiffre d'affaires provient des paiements à l'acte (37,5 millions de transactions effectuées selon cette modalité en 2011, soit une augmentation de plus de 20 % par rapport à 2010). Près de 42 000 vidéos ont été visionnées au moins une fois en 2011, soit une augmentation d'environ 8 % par rapport à 2010 : 50,4 % de ces vidéos sont des programmes audiovisuels, 27,8 % des programmes pour adultes et 21,8 % des films.

La consommation de vidéo à la demande se fait en grande majorité dans le cadre d'offres de télévision payante, alors que le visionnage direct sur internet ne représentait sur les dix premiers mois de l'année 2011 qu'environ 15 % du chiffre d'affaires. Il s'agit essentiellement de locations<sup>16</sup> même si le téléchargement définitif est également possible.

La vidéo à la demande est caractérisée par l'existence d'un grand nombre d'offres en France : selon le Centre national de la cinématographie et de l'image animée, 68 éditeurs sont actifs sur ce marché<sup>17</sup>.

L'acquisition des droits de diffusion en vidéo à la demande se fait pour le moment sur un mode non exclusif et les mêmes programmes sont disponibles sur plusieurs plate-formes. Au total, 5 094 films de cinéma étaient proposés en juin 2010. Plusieurs catégories d'acteurs sont présents sur ce marché : les chaînes, les FAI, des « *pure players* » dont le seul métier est la vidéo à la demande, les éditeurs de vidéos, les détenteurs de droits, les distributeurs physiques et les plate-formes Internet. Le marché est toutefois relativement concentré puisque cinq acteurs réalisent l'essentiel du chiffre d'affaires du marché.

<sup>15</sup> La « télévision connectée » consiste dans des téléviseurs connectables directement à la connexion internet du foyer, sans boîtiers ni abonnement supplémentaire, et qui permettent l'affichage sur le téléviseur de contenus puisés sur internet.

<sup>16</sup> 99 % de la consommation de vidéo à la demande en 2010 correspond à une utilisation locative selon le rapport de l'étude de l'IDATE sur les modèles économiques des services de médias audiovisuels à la demande actifs sur le marché français de juin 2011, mais ce chiffre est appelé à diminuer puisque avant 2011, le téléchargement définitif n'était pas possible sur les offres V&D sur télévision payante.

<sup>17</sup> Hors hébergeurs de services de vidéos à la demande, éditeurs de service de télévision de rattrapage et éditeurs de services de vidéos spécialisés dans les programmes pour adultes

La vidéo à la demande par abonnement est restée jusqu'à présent marginale (de l'ordre de 15 millions d'euros de chiffres d'affaires à fin juin 2011). Cette évolution est atypique en Europe puisque la Commission européenne constatait dans un rapport de 2010 qu'au niveau européen le modèle d'abonnement croissait plus vite que la vidéo à la demande à l'acte<sup>18</sup>. Le développement de la télévision connectée ainsi que le phénomène de visionnage sur les tablettes connectées pourrait faire évoluer cette situation dans la mesure où elle donnera accès aux offres qui ne sont accessibles que sur internet avec le confort visuel des téléviseurs ou des tablettes.

## **5. Principaux défis de politique de concurrence à l'égard de la radiodiffusion**

### **5.1 La détention de fortes positions établies par certains opérateurs de télévision**

L'évolution des marchés de la télévision montre que la détention de positions établies, voire de positions dominantes, tend à structurer les marchés de la télévision tant gratuite (2.1.1) que payante (2.1.2) en limitant la capacité d'entrée et de développement de nouveaux opérateurs.

#### *5.1.1 L'existence de positions dominantes et de barrières à l'entrée sur les marchés de la télévision gratuite*

Comme indiqué ci-dessus, l'Autorité de la concurrence a constaté, en 2010, que le groupe TF1 jouit d'une position dominante sur le marché de la publicité télévisuelle. Le groupe TF1 était par ailleurs, en 2010, le premier acheteur de droits de diffusion de films américains de catalogue, de séries américaines et le deuxième acheteur de films d'expression originale française.

Lors de l'acquisition des chaînes du groupe AB, TMC et NT1 par le groupe TF1, l'Autorité a constaté qu'en s'adjoignant deux chaînes supplémentaires, le groupe TF1 s'est donné la possibilité de rentabiliser les droits acquis par le groupe TF1 sur trois chaînes en clair au lieu d'une seule constitue un avantage concurrentiel par rapport à l'ensemble de ses concurrents. Cet avantage est accru par le fait que les chaînes concernées sont toutes généralistes et ne rencontrent quasiment pas d'obstacles liés au respect d'une thématique, ce qui leur permet de diffuser les programmes les plus fédérateurs et donc les plus générateurs d'audience, et de bénéficier de la circulation entre elles des œuvres et programmes. Les opérateurs les moins avantagés sont les nouvelles chaînes de la TNT qui ne peuvent s'appuyer sur le réseau de chaînes et la puissance d'achat d'un groupe historique.

Ces positions sont de plus détenues sur des marchés caractérisés par de fortes barrières à l'entrée. La première est liée à la rareté des fréquences hertziennes. En effet, en matière de diffusion hertzienne, l'édition d'une chaîne dépend d'une part de l'existence de fréquences disponibles, et d'autre part de l'attribution de ces fréquences par le Conseil supérieur de l'audiovisuel (« CSA »).

Au-delà de la contrainte liée à la rareté de la ressource hertzienne, l'édition de chaînes de télévision gratuite suppose des coûts de diffusion très élevés. Enfin, la maturité du marché de la publicité télévisuelle constitue, pour les chaînes gratuites, une autre barrière à l'entrée.

En ce qui concerne la diffusion de chaînes de télévision par satellite, par câble, par ADSL ou fibre optique, ces contraintes sont moindres. Néanmoins, l'édition d'une nouvelle chaîne pour ce type de diffusion reste confrontée aux difficultés d'approvisionnement sur les marchés des droits et à celles liées à sa distribution. En tout état de cause, la pression concurrentielle que ces chaînes sont susceptibles d'exercer

<sup>18</sup> Rapport sur les licences multi-territoriales des œuvres audiovisuelles dans l'Union européenne, élaboré pour la Commission européenne, DG Société de l'Information et des médias, octobre 2010.

sur la marché de la publicité télévisuelle est très limitée, compte tenu de leur faible taux d'audience et du fait que la publicité ne joue qu'un rôle marginal dans leur financement.

### 5.1.2 *L'existence de positions dominantes et de barrières à l'entrée sur les marchés de la télévision payante*

La détention par GCP de positions dominantes sur plusieurs marchés ressortant du secteur de la télévision payante a été constatée par le ministre de l'économie à l'occasion de l'acquisition de TPS par GCP et le groupe Vivendi en 2006<sup>19</sup> et par l'Autorité de la concurrence à l'occasion d'un nouveau contrôle de cette opération en 2012<sup>20</sup>. Les constats décrits ci-dessous résultent de l'analyse effectuée par l'Autorité de la concurrence dans cette dernière affaire.

L'acquisition de TPS a conféré à GCP, filiale du groupe Vivendi, le contrôle des deux plate-formes satellitaires françaises intégrant l'ensemble des métiers de la chaîne de valeur de l'audiovisuel payant, de la maîtrise des contenus jusqu'à l'accès aux téléspectateurs. L'acquisition a apporté à GCP les chaînes éditées et commercialisées par TPS et CanalSat ainsi que leurs activités de distribution et de commercialisation de bouquets de chaînes. L'opération a donc significativement renforcé les bouquets de chaînes de GCP et sa base d'abonnés.

L'opération avait notamment pour effet de conférer à GCP : (i) une puissance d'achat considérable, en éliminant son concurrent le plus significatif pour l'acquisition des contenus ; (ii) un monopole en matière d'édition de chaîne premium ; (iii) une position dominante en matière d'édition de chaînes de cinéma ; (iv) une position de nature à entraîner un risque d'assèchement de l'accès aux chaînes cinéma, sportives et jeunesse pour les distributeurs concurrents ; et (v) une position incontournable pour la distribution de chaînes thématiques étant donné le renforcement de la base d'abonnés de CanalSat.

La pérennité de ces constats a été confirmée par l'Autorité de la concurrence lors du nouveau contrôle de l'opération en 2012, les fortes positions de GCP expliquant en partie les difficultés qu'éprouvent de nouveaux opérateurs à entrer sur le marché, tant en matière d'édition et de commercialisation de chaînes (a) que sur le marché de la distribution de chaînes thématiques payantes (b).

#### a. Barrières à l'entrée sur le marché de l'édition et de la commercialisation de chaînes

Depuis 2006, plusieurs tentatives d'entrées sur le marché ont placé les opérateurs concurrents de GCP en difficulté, voire dans une relation de dépendance vis-à-vis du groupe. A la suite de l'acquisition de TPS par GCP, ce dernier a intégré la base d'abonnés de TPS, consolidant ainsi la première base d'abonnés du marché. En 2011, GCP représente entre 70 et 80 % de l'ensemble des abonnements à la télévision payante en France<sup>21</sup>. Cet opérateur, premier acquéreur de droits de diffusion en télévision payante, notamment en matière cinématographique et sportive, est donc en mesure d'adosser ses activités d'édition sur le premier parc du marché. Aucun éditeur concurrent n'a accès à un parc comparable, sauf à être distribué au sein de l'offre CanalSat de GCP.

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<sup>19</sup> Lettre n° C2006-02 du ministre de l'économie, des finances et de l'industrie du 30 août 2006 aux conseils de la société Vivendi Universal, relative à une concentration dans le secteur de la télévision payante, BOCCRF n° 7 bis du 15 septembre 2006.

<sup>20</sup> Décision de l'Autorité de la concurrence n° 12-DCC-100 du 23 juillet 2012 relative à la prise de contrôle exclusif de TPS et CanalSatellite par Vivendi et Groupe Canal Plus.

<sup>21</sup> Sur un marché composé des abonnements aux offres de GCP et aux offres des autres distributeurs, à l'exclusion des abonnements aux seules offres basiques triple play des FAI.

Les activités d'édition de GCP lui confèrent donc une position très importante sur différents marchés d'édition et de commercialisation de chaînes. GCP édite notamment la seule chaîne premium multithématiques (proposant à la fois des contenus sportifs et cinématographiques) du marché français, la chaîne Canal+ et ses déclinaisons, le groupe ayant cessé de diffuser la chaîne TPS Star, acquise en 2006 et qui proposait les mêmes types de contenus que la chaîne Canal+.

France Télécom-Orange, opérateur historique de télécommunications en France, a lancé en 2008 deux bouquets de chaînes adossés aux acquisitions de contenus assurées par Orange. L'un de ces bouquets, Orange Cinéma Séries (« OCS ») relève de la thématique cinématographique ; l'autre, Orange Sport, relevait de la thématique sportive. Tous deux comportaient des contenus dits « premium », c'est-à-dire capables de motiver des abonnements et qui correspondent, en France, aux films de cinéma récents en première fenêtre de télévision payante et aux matches de football de Ligue 1, de la Ligue des Champions et de compétitions étrangères particulièrement attractives. Le choix de l'opérateur de s'approvisionner directement sur le marché de l'acquisition des droits, et non de distribuer des chaînes existantes, s'explique en partie par l'offre insuffisante de chaînes disponibles à la distribution sur le marché intermédiaire. Pour alimenter ses chaînes en contenus, Orange a ainsi conclu des contrats-cadres d'acquisition de droits de diffusion de films récents en télévision payante avec plusieurs studios américains, des préachats de films d'expression originale française et des acquisitions de droits de diffusion de matches de football de Ligue 1 et du championnat allemand.

Orange, qui n'a initialement commercialisé ses bouquets de chaînes qu'à ses abonnés multiservices, n'a pas pu rentabiliser l'investissement consenti. L'opérateur est sorti des marchés de l'acquisition de droits et de l'édition de chaînes sportives à l'issue d'un seul cycle de droits. Orange a en effet éprouvé de grandes difficultés à amortir le coût d'acquisition des droits sur une faible base d'abonnés, le taux de souscription des abonnés ADSL à l'offre Orange Sport étant trop limité pour assurer une perspective de rentabilité suffisante. Orange a donc renoncé à se porter candidat pour l'acquisition des lots linéaires dans le cadre de l'appel d'offres organisé par la Ligue de Football Professionnel en juin 2011 pour la période 2012-2016. La chaîne Orange Sport a par ailleurs cessé d'être diffusée à la fin du mois de juin 2012.

Orange a également rencontré des difficultés à développer une activité rentable en matière de cinéma. L'opération a donc choisi de conclure un partenariat conférant à GCP une participation au capital et le contrôle conjoint d'OCS en avril 2012.

D'autres exemples illustrent les difficultés d'entrée sur le marché des chaînes de sport, dominé par Canal+. La chaîne CFoot, éditée par la LFP, a diffusé un lot de Ligue 2 pour la saison 2011-2012. Faute d'atteindre un équilibre économique viable la LFP a arrêté la diffusion de la chaîne CFoot en 2012.

Ces échecs illustrent les difficultés pour les nouveaux entrants sur le marché des chaînes d'y maintenir une offre pérenne. Ces difficultés sont liées à la conjonction de plusieurs barrières à l'entrée qui s'ajoutent à la difficulté d'accéder aux droits premium et à les rentabiliser dans la durée. L'opérateur qatari Al Jazeera est très récemment entré sur le marché, ce qui explique que le retour d'expérience est encore limité. L'entrée de cet opérateur s'est néanmoins traduite par une concurrence réelle à GCP sur le marché de l'acquisition des droits. Elle a cependant suscité des difficultés tenant à ses conditions de distribution et qui renvoient aux problématiques liées à l'intégration verticale de GCP (voir ci-dessous).

- b. Situation concurrentielle du marché de la distribution et barrières à l'émergence d'une concurrence significative

GCP exerce des activités de distribution de chaînes thématiques sous la marque CanalSat. Dans le cadre de cette activité, GCP achète à des éditeurs de chaînes le droit de commercialiser auprès du public les chaînes qu'ils éditent. La distribution des chaînes s'effectue soit individuellement (« à la carte »), soit, le



plus souvent, sous la forme d'un bouquet ou pack agrégeant plusieurs chaînes. Les concurrents de CanalSat sur le marché de la distribution de chaînes thématiques sont principalement les FAI avec leur offre de second niveau et un câblo-opérateur Numericable.

GCP est le premier distributeur du marché et les redevances qu'il verse aux chaînes indépendantes (c'est-à-dire à l'exclusion des chaînes éditées par GCP) au titre de cette activité représentent entre 50 et 60 % de leur chiffre d'affaires total. Cette position n'a pas évolué depuis 2006, ce qui illustre à la fois le caractère incontournable de CanalSat pour la distribution de chaînes thématiques et la puissance d'achat dont bénéficie GCP vis-à-vis de ses fournisseurs éditeurs de chaînes.

Comme indiqué, en aval, GCP représente entre 70 et 80 % des abonnements à la télévision payante<sup>22</sup>. En valeur, GCP représente entre 90 et 100 % du chiffre d'affaires des offres de télévision payante hors offres *triple play* et, selon les estimations, entre 50 et 70 % du chiffre d'affaires des offres de télévision payante incluant la composante télévisuelle des offres *triple play* des FAI. Les concurrents de GCP sur le marché de la distribution de chaînes thématiques ne représentent donc qu'une portion minoritaire, voire marginale du marché.

Plusieurs facteurs freinent les capacités concurrentielles des autres distributeurs de télévision payante, parmi lesquels l'absence d'alternatives suffisantes de distribution pour les chaînes (i), les conditions contractuelles entourant les exclusivités de distribution détenues par GCP (ii) et la détention de nombreuses exclusivités par GCP (iii).

i. Sur les distributeurs alternatifs à GCP

La forte pénétration de l'ADSL en France confère aux FAI un parc important d'abonnés (plus de 11,3 millions d'abonnés en 2011). Ce parc correspond aux abonnés aux offres de premier niveau des FAI, ne sont pas pertinents pour analyser la pression concurrentielle exercée par les FAI sur GCP. L'enquête menée par l'Autorité de la concurrence auprès des opérateurs ADSL a montré que ces derniers ne considéraient pas que leurs bouquets de premier niveau étaient en concurrence avec les offres de second niveau du fait des différences significatives d'attractivité des chaînes. De la même manière, les éditeurs de chaînes estiment unanimement que les FAI n'exercent pas une réelle pression concurrentielle sur GCP dans la distribution de chaînes thématiques, y compris en second niveau de service, pour des raisons liées à leur poids relatif par rapport à GCP et à leur positionnement stratégique.

De fait, les offres de premier niveau diffèrent des offres de second niveau ainsi que celles de GCP tant dans leurs contenus, focalisé sur la quantité des chaînes, que dans leur mode de financement, s'agissant de chaînes dont le chiffre d'affaires émane uniquement ou principalement de leurs revenus publicitaires.

En revanche, les offres de second niveau auxquels les abonnés de l'offre de premier niveau peuvent avoir accès en souscrivant un abonnement complémentaire, sont pour leur part en concurrence directe avec les bouquets de GCP. Les FAI comptent globalement 2,3 millions d'abonnés à leurs offres de second niveau, soit moins du quart du nombre d'abonnés aux offres de base *triple play* et entre 50 et 60 % du nombre des abonnés à CanalSat seule.

Il ressort de l'enquête de l'Autorité que les chaînes thématiques payantes ne considèrent donc pas qu'une distribution par les FAI constitue une alternative suffisante à la distribution par CanalSat. Les éditeurs de chaînes constatent ainsi que les bouquets de second niveau sont moins chers et moins riches que le bouquet CanalSat et s'adressent ainsi à une fraction des téléspectateurs faisant preuve de moins

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<sup>22</sup> Hors abonnés *triple play* ne souscrivant pas d'abonnement spécifique pour un bouquet de chaînes.

d'appétence pour la télévision payante, les foyers manifestant un intérêt plus important ayant souvent déjà souscrit aux offres de GCP.

ii. Les exclusivités détenues par GCP

Les exclusivités conclues entre GCP et les éditeurs de chaînes thématiques limitent la taille du marché de gros et réduisent l'éventail de chaînes que les FAI peuvent distribuer. En effet, ces exclusivités, qui concernaient initialement la seule plate-forme satellite, se sont étendues également aux plate-formes ADSL, selon un schéma d'auto-distribution.

Or la détention par un distributeur d'une gamme de chaînes attractives dans l'ensemble des thématiques est un élément essentiel de compétitivité. La pratique décisionnelle des autorités de concurrence relève que, pour être compétitive, une offre de bouquet de chaînes payante doit comporter des chaînes offrant des contenus premium, sportifs et cinématographiques, un ensemble de chaînes dans les thématiques de cinéma, sport, information et jeunesse ainsi qu'un complément de chaînes thématiques à plus faible attractivité.

L'Autorité de la concurrence a ainsi constaté que GCP, par la détention d'exclusivités de distribution, se réservait la distribution des chaînes parmi les plus attractives du marché et représentant, en 2012, la majorité de l'audience mesurée des thématiques cinéma, sport et jeunesse.

iii. Sur les conditions des contrats de distribution exclusive de GCP

Les exclusivités sur le marché de gros des chaînes thématiques permettent au distributeur de différencier son offre de bouquets de celles de ses concurrents, en particulier lorsque l'exclusivité porte sur des chaînes dont le contenu est peu ou pas substituable. Toutefois, la distribution exclusive d'une chaîne sur CanalSat présente la particularité de concerner la quasi-totalité des plate-formes techniques de diffusion (satellite, ADSL), puisque CanalSat est auto-distribuée sur l'ensemble de ces plate-formes (à l'exception du câble). En contrepartie de cette forme d'exclusivité, que seule GCP est capable de proposer, les éditeurs perçoivent une « prime d'exclusivité », qui représente un montant de redevance perçu auprès de GCP supérieur au cumul des redevances perçues de GCP et de l'ensemble des FAI en distribution non exclusive. Les éditeurs doivent donc arbitrer, en l'état des pratiques contractuelles de GCP, entre une distribution exclusive multi-plate-formes par CanalSat, et bénéficier de la prime d'exclusivité au risque de se retrouver dans une situation de dépendance vis-à-vis de GCP, ou la signature d'un contrat non exclusif, ce qui les prive de la prime d'exclusivité et risque de mettre en cause la viabilité financière des chaînes.

Le passage d'un modèle de distribution exclusive à une distribution non exclusive sur CanalSat s'accompagne ainsi d'une décote de redevance, pouvant représenter, selon les cas, la majorité voire l'essentiel de la redevance des chaînes en exclusivité. L'Autorité de la concurrence a ainsi pu constater que la « prime » d'exclusivité versée par CanalSat est d'un montant suffisamment élevé pour que la distribution exclusive sur CanalSat soit recherchée par la plupart des éditeurs, moins par choix délibéré que du fait de l'impossibilité d'obtenir une rémunération équivalente en distribution non exclusive. Dans ce contexte, la rémunération exclusive installe les chaînes dans une situation de dépendance dont les chaînes sont peu incitées à sortir.

Enfin, l'arbitrage des éditeurs de chaînes entre les deux modèles de distribution était jusqu'en 2012 contraint par l'opacité des offres de distribution émanant de GCP. En effet, l'exclusivité multi-plate-formes vendue par les éditeurs ne faisait pas l'objet d'une valorisation transparente, étant rémunérée par une redevance globale dont les différentes composantes étaient opaques, sans distinction de la valeur attribuée par GCP à l'exclusivité sur chaque plate-forme de diffusion. Ainsi, la valeur de l'exclusivité obtenue par GCP pour la distribution de chaînes sur les réseaux ADSL des distributeurs concurrents ne faisait pas

l'objet d'une valorisation spécifique. La conséquence de cette opacité était que les éditeurs ignoraient quelle proportion de la rémunération que leur versait GCP correspondait à la distribution sur le satellite et quelle proportion correspondait à la distribution sur chaque plate-forme ADSL.

A la différence de GCP, les distributeurs tiers, essentiellement les FAI, ne peuvent en effet proposer leurs propres bouquets que sur leurs seules plateformes propriétaires. Ils ne peuvent donc, individuellement, concurrencer les offres de distribution multi plateformes proposées par GCP aux chaînes. L'absence de valorisation séparée des exclusivités sur chaque plate-forme dans les contrats de distribution de GCP, en déconnectant de manière opaque la rémunération de l'exclusivité de la valeur qu'elle représente sur chacune d'entre elles, restreignait la capacité des concurrents de GCP à proposer des offres de distribution compétitives.

Cette pratique permettait donc à GCP de proposer des offres de distribution difficilement contournables pour les chaînes indépendantes les plus attractives et non répliquables par les distributeurs concurrents, empêchant ces derniers d'animer la concurrence sur le marché de la distribution.

## **5.2 Aspects liés à l'intégration verticale**

L'acquisition de TPS a permis à GCP d'intégrer son principal concurrent en tant que demandeur et offreur sur les marchés intermédiaires de la distribution de chaînes thématiques. L'opération a donc renforcé l'intégration verticale de GCP, qui intervient à la fois sur le marché de la distribution de chaînes, par l'intermédiaire de CanalSat, et sur le marché de l'édition de chaînes thématiques, en concurrence directe avec des chaînes indépendantes qu'il distribue. Cette situation, associée notamment à la position dominante de GCP sur le marché de la distribution, confère au groupe les incitations pour exploiter son intégration verticale en verrouillant l'accès de ses concurrents sur le marché de l'édition de chaînes à la clientèle.

La concentration a eu pour effet d'augmenter significativement le nombre d'abonnés et d'abonnements du parc de GCP. En 2011, GCP contrôle un parc plus de cinq fois supérieur à celui de son concurrent immédiat et très supérieur aux parcs d'abonnements de second niveau de tous les FAI et câblo-opérateurs réunis.

L'accès au parc d'abonnements de CanalSat est donc indispensable pour les éditeurs, dans la mesure où elle est la plus importante du marché et où elle constitue la seule offre à être à la fois présente sur les plateformes satellite (sa base historique), ADSL et TNT. Bien qu'en déclin, la proportion du parc recevant l'offre via la plate-forme satellite reste très largement majoritaire : à fin 2011, 70 à 80 % des abonnements étaient reçus via le satellite, 10 à 20 % via l'ADSL et 10 à 20 % via la TNT<sup>23</sup>. Ainsi, la distribution d'une chaîne sur les seules plateformes ADSL des fournisseurs d'accès à internet ne peut être considérée comme une alternative suffisante à une distribution sur CanalSat. La faiblesse des bases d'abonnements cumulées aux offres de second niveau de service des FAI en comparaison celle de CanalSat permet de constater que GCP maîtrise l'accès à la grande majorité de la clientèle des offres payantes.

L'Autorité a ainsi constaté que GCP disposait d'une capacité considérable de verrouillage de l'accès des éditeurs de chaînes à la grande majorité de la clientèle aux offres de télévision payante. L'Autorité a ainsi constaté que la distribution adéquate des chaînes d'Al Jazeera, nouvel entrant en matière de contenu sportif premium, était crucial pour la capacité de cet opérateur à demeurer sur le marché français et à animer la concurrence tant en amont qu'en aval. L'incitation de GCP à ne pas distribuer ou à imposer des conditions inadéquates de distribution pour un tel éditeur, placé en concurrence frontale avec lui sur les marchés des droits sportifs, est donc forte, compte tenu de la concurrence que se livrent ensuite leurs

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<sup>23</sup> Voir les données de reporting de GCP au groupe Lagardère.

chaînes respectives dans l'édition de programmes sportifs premium. En effet, la distribution d'une offre concurrente sur la portion la plus attractive du marché (les droits premium) présente plusieurs inconvénients pour les parties notifiantes: elle accroît la pénétration de la chaîne concurrente, augmente sa notoriété, renforce sa base d'abonnés et par conséquent ses revenus, ce qui renforce en retour les capacités financières du nouvel entrant et l'incitation de ce dernier à se porter candidat aux futurs appels d'offres afin de continuer à alimenter sa chaîne en droits premium. Au contraire, en refusant de distribuer ou en distribuant de manière inadéquate les offres d'un nouvel entrant concurrentes de sa propre offre premium, GCP peut affaiblir cet opérateur et diminuer ses capacités financières et sa motivation à s'implanter durablement sur le marché.

Par ailleurs, l'intégration verticale de GCP et son contrôle de la première plate-forme de distribution pourrait permettre au groupe d'être informé de l'identité de ses futurs concurrents sur le marché amont de l'acquisition des droits et de leurs intentions avant le lancement des appels d'offres. Or, le succès des appels d'offres dépend des incitations de chaque candidat à déposer la meilleure offre possible, incitations qui découlent notamment de leur incertitude relative à l'identité des autres candidats et l'intensité de leur propension à payer. Mais en l'état du marché, les conditions de déroulement des futurs appels d'offres pourraient être faussées du fait de la connaissance par le principal candidat, GCP, d'informations privilégiées sur l'identité de ses concurrents, leur surface financière, voire leurs projets de programmation. Cette situation d'asymétrie d'information est susceptible de permettre à GCP d'ajuster son comportement en conséquence au bénéfice de ses propres activités d'édition.

L'intégration verticale de GCP l'incite également à verrouiller l'accès à la clientèle de chaînes thématiques ne diffusant pas de contenus premium. En effet, le cumul des activités d'éditeur et de distributeur confère à GCP un avantage concurrentiel sur les marchés de l'édition, avantage d'autant plus important qu'il détient des positions prépondérantes sur les deux marchés. Ainsi, GCP a intérêt à favoriser l'acquisition de droits de diffusion attractifs en exclusivité pour les chaînes qu'il édite au détriment des autres chaînes et ensuite, en tant que distributeur, tirer argument de l'absence de ces droits à l'antenne des chaînes concurrentes pour baisser leur niveau de redevances. Inversement, il lui est possible de refuser de distribuer une chaîne thématique ou de lui proposer un faible niveau de rémunération, l'affaiblissant de cette manière par rapport à d'autres chaînes concurrentes, dont les chaînes éditées par GCP, en particulier pour l'achat de droits.

Le cumul des activités d'édition et de distribution permet également à GCP de disposer d'informations confidentielles sur les chaînes qu'il distribue et d'être en mesure de réajuster son offre (comme éditeur ou comme distributeur) en conséquence.

### **5.3 *Le développement de nouvelles formes de télédiffusion***

La consommation de services de médias audiovisuels à la demande est en forte croissance. La pression concurrentielle que ces nouveaux modes de consommation sont en mesure d'exercer, principalement sur les offres de télévision payante linéaire, reste cependant limitée à ce jour. Ceci s'explique par l'existence de barrières au développement des services de médias audiovisuels à la demande (2.3.1) et par la faible substituabilité des services de vidéo à la demande avec les offres de télévision payante linéaire (2.3.2).

### 5.3.1 Environnement juridique du développement des services de télévision non linéaires

#### a. Réglementation

L'Autorité a pris en compte, dans ses décisions de concentration (voir ci-après) le cadre juridique assurant la contribution des éditeurs et distributeurs au financement de la création cinématographique française et au pluralisme des médias, en tant qu'ils structurent la dynamique concurrentielle de ce marché.

Ce cadre a conduit à aménager des fenêtres d'exploitation de la vidéo à la demande tout en préservant celles des autres modes de diffusion des œuvres, dont les offres de télévision payante linéaires. L'accord du 6 juillet 2009 pour le réaménagement de la chronologie des médias ouvre une première fenêtre d'exploitation exclusive pour la vidéo à la demande à l'acte commune à celle des vidéos sur supports physiques (DVD et Blu-Ray) entre 4 et 10 mois après la sortie des films en salle.

Quant à la vidéo à la demande par abonnement, l'accord de 2009, récemment reconduit, ne l'autorise que pour les films sortis en salle depuis plus de 36 mois.

A la chronologie des médias, s'ajoutent des obligations de contribution au financement de la production cinématographique. Le décret du 12 novembre 2010 impose ainsi des obligations aux services de médias audiovisuels à la demande en matière de contribution au développement de la production d'œuvres audiovisuelles et cinématographiques. Cette contribution est fixée pour la vidéo à la demande à l'acte comme par abonnement à 15 % du chiffre d'affaires en faveur des œuvres européennes et à 12 % en faveur des œuvres françaises.

De plus, un quota d'exposition de 60 % pour les œuvres européennes et de 40 % pour les œuvres d'expression originale française est imposé à l'ensemble du catalogue<sup>24</sup>.

#### b. Comportements des acteurs

Les dispositions de l'accord du 6 juillet 2009 pour le réaménagement de la chronologie des médias permettent l'exploitation en vidéo à la demande à l'acte sous forme locative pendant les fenêtres d'exploitation des chaînes de télévision payantes (entre 10 et 22 mois après la sortie en salles) puis gratuites (entre 22 et 36 mois).

Toutefois, les conditions de préachat de films prévoient systématiquement le retrait des œuvres des offres locatives de vidéo à la demande après 10 ou 12 mois.

Le gel des fenêtres de diffusion se poursuit pour les fenêtres gratuites à l'initiative des chaînes ayant contribué au préfinancement de l'œuvre. De ce fait, de nombreux films, et notamment les plus attractifs, ne sont pas disponibles pour une location en vidéo à la demande dans l'intervalle existant entre le dixième et le trentième mois après leur sortie en salle (voire encore plus tard, en fonction des dispositions contractuelles) ou le trente-sixième mois. Cette chronologie des médias est spécifique au marché national. En dehors de la France, les grands acteurs internationaux de la vidéo à la demande par abonnement peuvent négocier avec les studios américains des droits de première ou deuxième fenêtres payante et donc de proposer des films en vidéo à la demande par abonnement quelques mois après leur sortie en salles, et ce sans que ces films ne soient retirés de l'offre quelques mois après.

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<sup>24</sup> Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande.

c. Autres éléments

D'autres obstacles au développement des offres de vidéo à la demande à l'acte, analysés dans le rapport Hubac et l'étude de l'IDATE, sont de nature à relativiser la perspective d'un bouleversement des marchés concernés à court terme :

- des difficultés d'accès des services de vidéo à la demande aux offres audiovisuelles des FAI ;
- un partage de la valeur ajoutée défavorable à l'éditeur du service, en particulier lorsque celui-ci est hébergé par un FAI ;
- l'existence d'un minimum garanti de rémunération des ayants droit par acte de location qui freine les offres promotionnelles.

5.3.2 *La faible substituabilité des services de vidéo à la demande avec les offres de télévision payante linéaire*

L'analyse de l'Autorité de la concurrence aboutit au constat que la substituabilité des offres de vidéo à la demande à l'acte avec les services de télévision payante linéaire est très imparfaite. En application de la chronologie des médias, l'offre de vidéo à la demande à l'acte peut concerner des films récents (3 mois ou 4 mois après leur sortie en salle) mais pour un prix relativement élevé. Il en découle que l'achat de 8 films récents équivaut au prix d'un mois d'abonnement au bouquet des chaînes Canal+, ce dernier offrant 30 films inédits par mois ainsi que de nombreux autres programmes.

Du point de vue du consommateur final, le service offert est différent : les services de télévision payante linéaire sont caractérisés par l'agrégation de divers programmes ou de diverses chaînes thématiques qui ont fait l'objet d'une sélection par l'éditeur, tandis que le consommateur de vidéo à la demande doit se repérer et choisir au sein de catalogues de plusieurs milliers de références et entre les offres de plusieurs éditeurs de services<sup>25</sup>. La vidéo à la demande offre la liberté de choix, la maîtrise des horaires, la possibilité de suspendre la diffusion, de revenir en arrière ou d'accélérer la lecture, ces derniers avantages étant cependant relativisés par le nombre de rediffusions et les offres de télévision de rattrapage des services linéaires.

De fait, à ce jour, la consommation de vidéo à la demande en France s'est surtout développée en substitution de la demande de vidéo en support physique, en location ou à l'achat, le chiffre d'affaire global généré par l'ensemble des produits vidéo restant globalement inchangé.

La substituabilité devrait bien davantage en revanche se manifester à l'avenir entre la vidéo à la demande par abonnement et la télévision payante linéaire. Les prix des offres par abonnement qui donnent accès à un nombre illimité de films sont beaucoup plus attractifs que ceux de la vidéo à l'acte et l'offre d'abondance renouvelée chaque mois donne de réelles possibilités d'éditorialisation et d'adaptation aux préférences des internautes.

Cependant, ces tarifs ne donnent actuellement accès qu'à des films de catalogue, les films récents étant bloqués en l'état actuel de la chronologie des médias par le délai de 36 mois. Par rapport à la

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Le rapport Hubac notait d'ailleurs que l'offre de vidéo à la demande « était insuffisamment éditorialisée et promue » et « difficilement accessible ou trop peu ergonomique pour ceux qui ne sont pas abonnés à une offre triple play et doivent s'en remettre, sur leur ordinateur, à une navigation largement à l'aveugle sur Internet pour voir des films ou des œuvres audiovisuelles » (p. 9).

fraicheur des films offerts en première et seconde fenêtre payante, la concurrence n'est donc encore que virtuelle.

On peut encore noter que l'offre de vidéo à la demande n'apparaît à ce jour pas avoir affecté le niveau des abonnements aux offres de GCP, le taux de *churn* des offres de GCP en France métropolitaine étant en constante diminution depuis 2008 et les recrutements ayant connu une augmentation en 2010.

Il s'ensuit que la pression concurrentielle exercée par les offres délinéarisées sur la télévision payante linéaire reste, à ce jour, limitée.

## **6. Expérience de l'application du droit de la concurrence dans le domaine de la radiodiffusion télévisuelle**

L'essentiel de la pratique décisionnelle de l'Autorité de la concurrence, en dehors des affaires relatives au sport déjà exposées lors de la table ronde de l'OCDE de juin 2010<sup>26</sup>, résulte de l'exercice du contrôle des concentrations tant dans le secteur de la télévision gratuite (3.1) que celui de la télévision payante (3.2).

### **6.1 Contrôle des concentrations dans le secteur de la télévision gratuite**

Dans sa décision n° 10-DCC-11 du 26 janvier 2010 relative à la prise de contrôle exclusif par le groupe TF1 de la société NT1 et Monte-Carlo Participations (groupe AB), l'Autorité a examiné, de manière très détaillée, les marchés des acquisitions de droits de différents contenus audiovisuels en fonction du mode de diffusion et du type de contenu concernés tant du point de vue de l'analyse des marchés pertinents (segmentation en fonction des modes de diffusion, en fonction du contenu sportif) que de l'analyse concurrentielle proprement dite. Il a déjà été relevé que l'Autorité avait ainsi constaté la forte position de TF1 en matière d'achat de films américains de catalogue, sa position prééminente en matière d'acquisition de séries américaines et sa forte position en matière de préachat de films de catalogue d'expression originale française. En matière de droits sportifs, l'Autorité a constaté que le nouvel ensemble TF1/TMC/NT1, auquel il convient d'ajouter les chaînes payantes du groupe TF1 Eurosport et Eurosport 2, disposerait d'une situation unique en matière d'exploitation de tels droits. L'Autorité a conclu que l'opération envisagée était de nature à renforcer le pouvoir d'achat du groupe TF1, compte tenu de la possibilité qu'il aurait désormais de rentabiliser ses acquisitions sur trois chaînes généralistes en clair.

Par ailleurs, l'Autorité de la concurrence a constaté la position dominante du groupe TF1 sur le marché de la publicité télévisuelle. L'impact de l'opération a été apprécié sur la base d'un scénario d'éviction dynamique propre au secteur de la télévision gratuite, appelé « effet de spirale ». Ce scénario, qui procède des interdépendances qui existent entre le marché de la publicité télévisée, les marchés des droits et l'audience des chaînes, peut conduire à plus ou moins long terme au renforcement d'une position dominante et à l'affaiblissement voire l'exclusion des opérateurs concurrents.

La télévision gratuite est en effet un marché biface mettant en relation des annonceurs et des téléspectateurs. Une chaîne de télévision gratuite fournit aux téléspectateurs des programmes dont la qualité conditionne l'audience. A son tour, l'audience conditionne la valeur des espaces publicitaires de la chaîne et donc les revenus avec lesquels cette dernière pourra acquérir des programmes attractifs.

Dans un tel contexte, l'Autorité a considéré que le renforcement du pouvoir de marché du groupe TF1 en matière d'acquisition de droits de diffusion serait susceptible de se transmettre sur le marché de la

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<sup>26</sup> Note de la délégation de la France, 7 juin 2010, table ronde sur la concurrence et le sport, DAF/COMP/WD(2010)46, [http://www.autoritedelaconcurrence.fr/doc/ocde\\_cp\\_06\\_2010.pdf](http://www.autoritedelaconcurrence.fr/doc/ocde_cp_06_2010.pdf)

publicité télévisuelle, dans la mesure où l'accroissement de l'attractivité de ses programmes lui donne les moyens d'obtenir des recettes publicitaires plus élevées, puis à nouveau sur les marchés des droits, les revenus publicitaires soutenant la qualité des contenus diffusés et avec eux l'audience et la demande des annonceurs. L'Autorité a également constaté que cet effet prendrait place dans un contexte de marché dans lequel la capacité des chaînes concurrentes de la TNT à investir dans des programmes plus attractifs pour accroître leur audience et lutter contre cette dynamique était très limitée.

Afin de lever les préoccupations de l'Autorité, le groupe TF1 s'est engagé à faciliter la circulation des droits de diffusion au bénéfice des chaînes concurrentes, en levant l'application de clauses susceptibles de restreindre l'accès de ses concurrentes aux œuvres audiovisuelles et cinématographiques ou de geler les droits de diffusion. Le groupe TF1 s'est également engagé à limiter la rediffusion de programmes sur ses chaînes, de manière à limiter l'impact du renforcement du pouvoir d'achat du groupe et favoriser la libération des droits. Enfin, pour remédier aux effets de l'opération sur le marché de la publicité, le groupe TF1 s'est engagé à ne pratiquer aucune forme de couplage ou de subordination liant les ventes d'espaces publicitaires sur la chaîne TF1 à la vente d'espaces sur TMC et NT1. La commercialisation des espaces publicitaires des nouvelles chaînes de TF1 sera également assurée par une société autonome de la régie de TF1.

Dans sa décision n° 12-DCC-101 du 23 juillet 2012 relative à la prise de contrôle exclusif des chaînes Direct 8 et Direct Star par Vivendi et GCP, l'Autorité a examiné les effets de l'acquisition de chaînes généraliste et musicale en clair par le premier opérateur de télévision payante.

L'Autorité a constaté que l'opération entraînait des effets congloméraux, dans la mesure où GCP sera capable d'utiliser sa position dominante dans l'acquisition de droits cinématographiques américains et d'expression originale française en télévision payante comme un levier pour obtenir des ayants droits des droits de diffusion de contenus incontournables pour la télévision gratuite, à savoir les séries américaines et les films d'expression originale française. Compte tenu de la rareté de ces types de contenus, l'Autorité a considéré que l'exercice d'un effet de levier était susceptible d'atteindre un volume d'acquisition tel qu'il exercerait un effet d'éviction sur les autres chaînes gratuites.

L'Autorité a également constaté que l'opération entraînait des effets verticaux. GCP contrôle en effet, via StudioCanal, le premier portefeuille de droits de diffusion de films de catalogue du marché français, et serait incité, à l'issue de l'opération, à favoriser l'approvisionnement de ses chaînes gratuites au détriment de ses concurrents. Par ailleurs, GCP étant susceptible de détenir des droits de diffusion d'évènements sportifs d'importance majeure, l'opération entraîne le risque que le groupe favorise l'accès de ses chaînes gratuites à ces droits.

GCP a levé les préoccupations de l'Autorité de la concurrence en s'engageant à plusieurs mesures contraignant à la fois ses acquisitions de droits de diffusion en télévision en clair et l'auto-alimentation de ses chaînes au détriment des chaînes concurrentes. Pour remédier aux effets de levier, le groupe s'est tout d'abord engagé à ne pas acquérir auprès de plus d'un studio *major* américain les droits en clair et en télévision payante de films et de séries par le biais de contrats cadres. GCP s'est également engagé à ne pas cumuler les droits en clair et en télévision payante de plus de 20 films d'expression originale française par an, et à ne pas focaliser ses investissements sur les films à plus gros budget.

Par ailleurs, pour remédier aux effets verticaux de l'opération, GCP s'est engagé à maintenir les acquisitions de ses chaînes gratuites en films de catalogue auprès de StudioCanal à un niveau équivalent à celui constaté avant l'opération. Le groupe s'est également engagé à céder ses droits de diffusion d'évènements sportifs d'importance majeure dans le cadre d'un appel d'offres organisé par le mandataire chargé du suivi de la mise en œuvre des engagements.



## 6.2 *Contrôle des concentrations dans le secteur de la télévision payante*

La principale opération de concentration dans le secteur de la télévision payante dont a eu à connaître l'Autorité de la concurrence concerne l'acquisition de TPS et CanalSatellite par le groupe Vivendi et GCP. Cette opération, qui consiste dans le regroupement des activités de télévision payante de TPS et du groupe Canal Plus (« GCP »), c'est-à-dire les deux bouquets satellitaires CanalSat et TPS, la chaîne Canal+ et les chaînes thématiques de Multithématiques, au sein de la société Canal+ France, a été autorisée par décision du ministre de l'économie du 30 août 2006, après avis du Conseil de la concurrence n° 06-A-13 du 13 juillet 2006.

Cette opération a conféré à GCP le contrôle des deux plate-formes satellitaires françaises intégrant l'ensemble des métiers de la chaîne de valeur de l'audiovisuel payant, de la maîtrise des contenus jusqu'à l'accès aux téléspectateurs. L'acquisition a apporté à GCP les chaînes éditées et commercialisées par TPS et CanalSat ainsi que leurs activités de distribution et de commercialisation de bouquets de chaînes. L'opération a donc significativement renforcé les bouquets de chaînes de GCP et sa base d'abonnés.

En 2006, le ministre de l'économie a considéré que l'opération entraînait des effets anticoncurrentiels significatifs sur les marchés amont d'acquisition de droits audiovisuels, sur les marchés intermédiaires d'édition et de commercialisation de chaînes thématiques payantes, ainsi que le renforcement significatif de GCP sur le marché aval de la distribution de télévision payante.

Afin de remédier à ces problèmes de concurrence, l'autorisation a été délivrée sous condition de la mise en œuvre de cinquante-neuf engagements souscrits par le groupe Vivendi et GCP le 24 août 2006. Pour remédier au monopole de la nouvelle entité dans l'édition et la commercialisation de chaînes premium, et permettre à des opérateurs tiers de distribuer de telles chaînes, GCP s'était notamment engagé à mettre la chaîne TPS Star à disposition de distributeurs concurrents et à en maintenir la qualité. De la même manière, pour éviter que la nouvelle entité n'évince ses concurrents en asséchant le marché des chaînes thématiques, GCP s'était engagé à mettre à disposition de distributeurs tiers trois chaînes de cinéma (Cinéstar, Cinéculte et Cinétoile), une chaîne de sport (Sport+) et deux chaînes destinées à la jeunesse (Piwi et Télétoon), en garantissant également le maintien de leur qualité. De plus, pour remédier au risque de dépendance des chaînes vis-à-vis de GCP, celui-ci s'était engagé à définir des conditions de distribution transparentes, objectives et non-discriminatoires, notamment en matière de rémunération. Enfin, GCP s'était engagé à conclure des contrats séparés pour la distribution commerciale et les prestations de transport des services de télévision payante.

Par décision n° 11-D-12 du 20 septembre 2011, l'Autorité de la concurrence a constaté l'inexécution, par le groupe Vivendi et GCP, de dix des engagements souscrits en 2006, relatifs notamment à la mise à disposition de chaînes auprès de distributeurs tiers, à la garantie du maintien de la qualité de celles-ci, et aux conditions de distribution des chaînes indépendantes. L'Autorité a relevé que les engagements inexécutés par GCP étaient déterminants et se trouvaient au cœur du dispositif destiné à remédier aux restrictions de concurrence résultant de l'opération de concentration. Les manquements constatés étaient donc susceptibles de faire échec aux objectifs poursuivis par la décision d'autorisation, à savoir le rétablissement et le maintien d'une concurrence suffisante sur le marché de la télévision payante.

L'Autorité a par conséquent retiré, sur le fondement des dispositions du IV de l'article L. 430-8 du code de commerce, l'autorisation de concentration délivrée en 2006 et ordonné aux parties, à moins de revenir à l'état antérieur à la concentration, de notifier à nouveau l'opération dans un délai d'un mois à compter de la date de la notification de la décision de retrait.

C'est dans ces circonstances, et sur la base d'une nouvelle notification de l'opération, que l'Autorité a adopté sa décision n° 12-DCC-100 relative à la prise de contrôle exclusif de TPS et CanalSatellite par

Vivendi et Groupe Canal Plus. Par cette décision, l'Autorité constate la prégnance d'effets anticoncurrentiels de nature horizontale, conglomérale et verticale dont il a été fait été ci-dessus.

Afin d'y remédier, et compte tenu de l'insuffisance des engagements proposés par les parties notifiantes, l'Autorité a enjoint au groupe Vivendi et GCP de mettre en œuvre plusieurs séries de mesures poursuivant trois objectifs.

En premier lieu, l'Autorité n'a pas souhaité déstabiliser le système du financement du cinéma français, structuré autour d'un acteur à l'intégration verticale forte et d'une chaîne premium qui est le principal contributeur en faveur de la création française. En effet, l'abondance et la qualité de cette production bénéficient au consommateur final et il convenait donc de ne pas fragiliser le modèle économique d'une chaîne qui préexistait à l'opération contrôlée. L'Autorité a constaté que ce modèle reposait sur un investissement élevé dans des contenus de qualité dont le risque pourrait difficilement être assumé sans une visibilité minimale sur les perspectives d'exposition de cette chaîne, qui passe par une maîtrise de la relation entre l'éditeur de la chaîne et l'abonné.

En deuxième lieu, l'Autorité a défini des remèdes visant à favoriser la diversité des acteurs du secteur de la télévision payante, afin que puisse émerger une offre certes moins riche que celle de GCP, mais également moins onéreuse, et, par conséquent, plus accessible pour les consommateurs. Face à cet objectif, l'Autorité a constaté que le marché français des services de télévision sur internet via les plate-formes des FAI devrait continuer de croître pour deux raisons. La première tient aux évolutions des technologies xDSL qui devraient améliorer les performances des plate-formes utilisant le réseau historique en cuivre de France Télécom pour la transmission de signaux numériques à haut débit. La seconde résulte du déploiement de la fibre optique, réseau présentant des avantages techniques importants pour les services de télévision payante tant en termes de qualité du signal qu'en débit, et qui devraient permettre aux consommateurs de bénéficier de services d'accès à internet et d'offres audiovisuelles de meilleure qualité et innovantes (interactivité, services à la demande, accès à la haute définition et aux contenus en 3D).

Cette perspective n'est pas différente de celle qui était envisagée par le ministre de l'économie en 2006. Mais l'effet à la fois des manquements aux engagements souscrits par GCP a justement été de retirer aux fournisseurs d'accès à internet la maîtrise de la plate-forme technique sur laquelle ils sont actifs. L'accès des fournisseurs d'accès à internet à un marché de gros de chaînes de télévision payantes attractives demeure dans cette perspective un objectif principal. A cet effet, l'encadrement des exclusivités de distribution proposées par GCP aux chaînes indépendantes et le dégroupage des chaînes de cinéma éditées par GCP devraient permettre de sécuriser l'approvisionnement du marché de gros.

Enfin, en troisième lieu, l'Autorité a considéré que les remèdes devaient préserver l'avenir des marchés concernés en évitant la préemption par GCP des nouvelles formes de consommation des contenus que représentent la vidéo à la demande ou la télévision connectée. Les modes de consommation non linéaires de services audiovisuels offrent en effet une perspective significative d'évolution concurrentielle du secteur de la télévision payante. C'est particulièrement le cas des services de vidéo à la demande par abonnement dont le développement est pour le moment embryonnaire. La place particulière du cinéma national en France et la spécificité de son mode de financement, sont des spécificités par rapport aux autres pays, dans lesquels une croissance importante des offres non linéaires d'acteurs de l'Internet a été constatée.

Cependant, la position de GCP sur les marchés de l'acquisition de droits et l'importance de sa base d'abonnés sont de nature à lui donner un avantage considérable si le modèle non exclusif d'acquisition des droits était remis en cause. L'Autorité a donc veillé, par des remèdes adaptés, à ce que l'entité issue de la fusion de 2006 ne neutralise pas le potentiel d'animation concurrentielle que créent ces nouveaux modes de consommation.

Suivant ces principes, les injonctions adoptées par l'Autorité de la concurrence comportent les remèdes suivants :

- a. l'Autorité a adopté plusieurs mesures d'encadrement en matière d'acquisition de contenus cinématographiques, portant sur la durée des contrats, les négociations et de traitement des ayants droits de manière à remédier au pouvoir d'achat de GCP ;
- b. l'Autorité s'est également attachée à limiter l'influence exercée par GCP sur OCS à la suite de sa prise de participation lui conférant le contrôle conjoint du bouquet de chaînes cinéma d'Orange. L'Autorité a donc imposé à GCP de renoncer à se voir communiquer des informations stratégiques sur le bouquet, de renoncer à une clause plafonnant les acquisitions d'OCS et d'assurer sa représentation au sein du conseil de la société Orange Cinéma Série-OCS par des administrateurs indépendants ;
- c. l'Autorité a remédié à la dépendance économique des éditeurs indépendants vis-à-vis de GCP en imposant au groupe de reprendre une proportion minimale de chaînes indépendantes dans son propre bouquet de chaînes thématiques à des conditions objectives transparentes et non-discriminatoires, formalisées dans une « offre de référence », qui devra être communiquée à tout éditeur qui en ferait la demande ;
- d. de la même manière, l'Autorité a spécifiquement imposé à GCP d'assurer la distribution de toute chaîne sur le marché français proposant des contenus cinématographiques ou sportifs premium, à des conditions techniques et tarifaires transparentes, objectives et non-discriminatoires ;
- e. l'Autorité a remédié aux effets de l'opération en matière de distribution de chaînes en imposant à GCP de ne pas coupler la distribution des chaînes sur les différentes plate-formes de diffusion. A cet effet, il a été enjoint à GCP de valoriser de manière transparente et distincte la distribution des chaînes sur chaque plate-forme propriétaire desservant plus de 500 000 abonnés, en identifiant précisément la valeur de l'exclusivité attribuée à la distribution sur chaque plate-forme, sans que GCP puisse lier cette valeur à l'obtention d'une exclusivité sur d'autres plateformes propriétaires ;
- f. par ailleurs, l'Autorité a enjoint à GCP de mettre à disposition des distributeurs concurrents toutes les chaînes cinéma qu'il édite, à des conditions transparentes, objectives et non-discriminatoires n'emportant, en particulier, aucun effet de ciseau tarifaire ;
- g. enfin, l'Autorité a préservé le potentiel concurrentiel des marchés de la vidéo à la demande en interdisant à GCP de s'y réserver des droits de diffusion à titre exclusif et à restreindre l'accès d'offres concurrentes de vidéo à la demande sur les plate-formes des FAI.

Cette décision, et l'intégralité des mesures adoptées ont été confirmées par le Conseil d'Etat par une décision du 21 décembre 2012.

Au-delà de la décision de l'Autorité de la concurrence, le ministère de l'économie et le ministère de la culture et de la communication réfléchissent à des adaptations éventuelles du cadre réglementaire s'imposant, d'une part, aux acteurs établis en France, et, d'autre part, aux nouveaux opérateurs susceptibles de développer une offre de télévision connectée, lorsque ceux-ci ne sont pas établis en France. Si le développement de ces nouveaux modes d'accès aux contenus audiovisuels pourrait ouvrir un accès beaucoup plus large aux contenus diffusés directement sur Internet et permettre l'entrée sur le marché des acteurs globaux du monde de l'Internet tels que Google, Apple ou Amazon, il convient de relever que ces derniers acteurs ne sont pas soumis aux mêmes règles, en particulier aux obligations qui visent à

promouvoir la diversité de contenus et le pluralisme de l'information, ce qui soulève des questions de distorsion de concurrence et d'équité dans l'application de ces obligations.

Enfin, l'évolution des technologies et des pratiques entraîne plusieurs transformations qui peuvent impacter fortement l'organisation du secteur comme le développement de la télévision sur réseaux IP, la délinéarisation des contenus, la multiplication des terminaux ou encore l'apparition d'acteurs de l'internet dans le jeu concurrentiel autrefois réservé aux chaînes de télévision. Depuis 2007, date d'adoption de l'actuelle directive Services de médias audiovisuels, de nouveaux modèles d'entreprise ont été lancés et nombre de nouveaux acteurs qui, initialement, ne faisaient qu'héberger des contenus produits par des utilisateurs, ont engagé (à l'instar de Youtube et de DailyMotion) des discussions avec les ayants-droit pour distribuer leur contenu sur leurs plate-formes. Le positionnement au sein de la chaîne de valeur, de ces acteurs, aujourd'hui en dehors du champ de la réglementation audiovisuelle, alors même que leur poids sur le marché se développe corollairement à l'extension des services en ligne, pose la question de la concurrence sur le secteur de l'audiovisuel.

Ces évolutions touchent non seulement les éditeurs et diffuseurs de programmes télévisuels, mais également les opérateurs et fournisseurs d'accès à l'internet (FAI), qui constatent de fortes augmentations du trafic sur leur réseau. De leur côté, les chaînes de télévision craignent en particulier le non-respect de l'intégrité de leur signal par les nouveaux services de diffusion et les environnements des terminaux.

La rencontre d'acteurs soumis à des cadres juridiques différents et ayant des pratiques divergentes, ainsi que les modifications intervenant sur la chaîne de valeurs, peuvent exiger une vigilance accrue de la part des régulateurs, même si les cadres sectoriels et concurrentiels permettent déjà de traiter certaines situations. Ainsi, bien que ces évolutions semblent a priori impacter principalement la régulation des contenus audiovisuels actuellement mise en place par le CSA en France, l'ARCEP étudie les nouveaux rapports de force entre acteurs du marché, notamment à travers ses travaux sur la neutralité de l'internet, tant au niveau national qu'au niveau européen.



## FRANCE

-- English version --

## Introduction

France wishes, prior to the presentation of the television broadcasting sector from the point of view of competition law, to provide a reminder of the basis for its audiovisual policy and what inspires the general regulations introduced into the sector at both the national and European level.

Television broadcasting cannot be viewed solely from the point of view of competition law. The organisation of the audiovisual landscape, insofar that it plays a role in the essential principles of democracy and social cohesion, is a response to the objectives of general interest in guaranteeing pluralism in the media, respect for freedom of communication and cultural diversity recognised by the European Union Treaty<sup>1</sup> and the European Union's Human Rights Charter<sup>2</sup>. In France, the French Constitution safeguards pluralism of the media and expression of currents of thought as well as respect for freedom of communication of principles of constitutional value for which the implementation has been assigned to the legislator.

Under such conditions, despite recurring discussions, there has been regular confirmation within the European Union that safeguarding pluralism and cultural diversity fell within the remit of the member states and that these principles could not be subordinated to technical regulations governing competition.

Over and above complete respect for the imperatives of general interest as stated above, that are of benefit not only to consumers but to citizens in general, cultural activities cannot be reduced to mere consumption, since cultural assets are not saleable items like any other. The dual economic and cultural nature of cultural goods and services, including audiovisual services, is recognised by the 2005 UNESCO Convention for the Protection and Promotion of Diversity of Cultural Expression which enshrines the legitimate right of sovereign states to develop and implement policies and measures of support to promote cultural diversity.

Consequently, although the development of digital technology has changed broadcasting techniques for audiovisual work, it is not a matter of focusing solely on the problem of enabling consumer access to the works in question<sup>3</sup>. It is also indispensable to support the creation and production of European

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<sup>1</sup> Article 2 of the European Union Treaty states: "*The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including minority rights. These values are shared by the member states in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men*". Article 3 (3) of the European Union Treaty: "*It respects the richness of its cultural and linguistic diversity, and ensures that the European cultural heritage is safeguarded and developed*".

<sup>2</sup> Article 11 (2) of the European Union's Charter of Fundamental Human Rights states: "Freedom of the media and its pluralism shall be respected".

<sup>3</sup> The document calling for contributions to the OECD indicates that the Session "will study subjects on which the competition authorities need to concentrate in order to ensure that consumers derive the greatest benefit from broadcasting services".

audiovisual productions to guarantee the plurality of the cultural offer and challenge the dominance of certain world players, who have resources that are incomparably greater than those of the other participants. The protection and promotion of the diversity of cultural expressions is at stake; a preoccupation that coincides with the consumer interest in accessing a diversified range of content and proves fully compatible with the objectives of combating excessive concentration of the market or abuse of a dominant position.

Consequently, a global approach must be taken to the audiovisual sector. European players need to be given the resources to rival others in the distribution and promotion of audiovisual productions and thus institute a strong policy aimed at supporting creativity through innovative measures that are well-adapted to the digital age.

## **1. French audiovisual regulations meet the objectives of pluralism and cultural diversity**

The French market is typified by the predominance of terrestrial television stations as the means of television reception. Consequently, terrestrial stations are the favourite vector for television network broadcasting, since this represents the main channel for television reception for the general public. In this context, to enable the public to benefit from a pluralist offering, the legislator imposed a legal framework upon which the French audiovisual landscape is structured.

The granting of permits to use the air waves for audiovisual purposes is restricted to an independent regulatory body, the *Conseil supérieur de l'audiovisuel* (CSA). French legislation has defined the priorities designed to safeguard pluralism in the socio-cultural currents of expression and the diversification of operators. It also determined that the aim of the CSA should be to favour the free exercise of competition<sup>4</sup> when exercising its regulatory powers and especially, where appropriate, to inform the Autorité de la concurrence where anti-competitive practices are suspected. The legislator also fixed criteria of a cultural nature (the policy of “the cultural highest bidder”). These commitments apply to the production and distribution of French and European audiovisual and cinematographic productions, as well as to the guarantee of the pluralist nature of expression of currents of thought and opinion and the honesty of information”.

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The objective set by the legislator is thus to introduce a diversified and pluralistic offer of service.

Moreover, the authorisation to provide television broadcasting services is granted per channel, thus enabling the CSA to allocate the same frequency to several network broadcasters. The French law, in its attempt to promote pluralism and competition, does not allow for the granting a complete multiplex to a single broadcaster of services.

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<sup>4</sup> Article 3-1 of the Law of 30 September 1986 states: "It attempts to promote free competition and the establishment of a non-discriminatory relationship between broadcasters and distributors of services, regardless of the electronic communications network they use, in accordance with the principle of technological neutrality".

## 2. A diversified and pluralist broadcasting market

It is on the basis of the above arrangement that the CSA progressively created the French audiovisual landscape which is pluralistic and diversified. After the adoption of a legal framework making it possible to offer digital terrestrial television (TNT)<sup>5</sup>, France is thus one of the European countries which, through open and transparent tendering procedures for candidates from among new entrants in the field, has reinforced pluralism and has opened the audiovisual sector to competition. On account of the release of certain audiovisual frequencies, there are currently 29 channels being used for free-to-air terrestrial digital television<sup>6</sup>.

Part I of this note details the nature of the various entities involved together with their market, based on recent analyses performed by the Autorité de la concurrence.

As the European Audiovisual Observatory noted on the basis of the MAVISE database created for the General Communications Directorate of the European Commission<sup>7</sup>, as with other sizeable audiovisual markets (Germany, Spain, Italy and the United Kingdom), French TNT offers a significant number of national and regional networks mostly produced by new broadcasters who were not involved in analogue ground station broadcasting.

Over and above the organisation of terrestrial station television broadcasting, there is reason to highlight the fact that since the 1990s there has been considerable growth in audiovisual communication services distributed through other electronic communications networks (cable, satellite, ADSL, Internet, etc.). This development mainly concerns television broadcasts transmitted on networks that do not use frequencies assigned by the CSA (cable, satellite, ADSL, mobile, internet). Thus, as of 31 December 2011, 141 networks had agreements with the CSA. Sports and film offerings dominate, followed by music and then documentaries.

Finally, mention should be made of the richness of the public service television offer which includes (in addition to broadcasts outside France<sup>8</sup>) France's television networks<sup>9</sup>, ARTE and La Chaîne parlementaire [parliamentary broadcasts].

## 3. Specialist regulation involving three independent administrative authorities

In France, case law relating to competition applies to all audiovisual material. Consequently, the Autorité de la concurrence, in application of the provisions of the Code of Commerce, is responsible for concentration operations and anti-competitive practices in the audiovisual sector.

In this initial field of competence, the Autorité seeks advice from the two specialist regulators for the sector, the *Autorité de régulation des communications électroniques et des postes* (ARCEP) and the *Conseil supérieur de l'Audiovisuel* (CSA), before rendering decisions if it has triggered a thorough examination of the issue. Decisions taken by the Autorité de la concurrence, the content of which will be developed in Part III of this note, take the viewpoints of the two regulators into account.

<sup>5</sup> In law no. 2000-719 of 1 August 2000 amending the aforementioned law of 30 September 1986.

<sup>6</sup> It should be specified that eight channels are used for the transmission of paid TNT broadcasts.

<sup>7</sup> <http://mavise.obs.coe.int/>

<sup>8</sup> With France 24, Monte Carlo Doualiya and Radio France Internationale.

<sup>9</sup> France 2, France 3, France 5, France 4 and France O.



In the second field of competence, the *Autorité de la concurrence* informs the regulators of information it has received concerning the relevant operators, so that they may send it an opinion, as appropriate.

The *Autorité de la concurrence* also has a consultative status. It may render opinions at the request of the two specialist regulators for the sector, the *Autorité de régulation des communications électroniques et des postes* (ARCEP) and the *Conseil supérieur de l'audiovisuel* (CSA), as well as from the government or on its own initiative.

The independent regulatory body for the audiovisual sector, the *Conseil supérieur de l'audiovisuel*, also has the power to offer recommendations with respect to the development of competition in the audiovisual sector. Audiovisual regulations<sup>10</sup> thus provide for the CSA to send its recommendations to the Government for the development of competition in radio and television transmissions. For this purpose, the law entitles the Conseil to instruct the administrative or judicial authorities to investigate restrictive practices that prevent competition and economic concentrations. When it issues permits for using the air waves, it is also required to monitor “the need to avoid abuse of a dominant position as well as practices that might interfere with the free exercise of competition”.

Furthermore, law no. 86-1067 of 30 September 1986 stipulates a set of specific anti-concentration rules for the audiovisual sector required for the purpose of safeguarding the pluralism of socio-cultural currents of expression<sup>11</sup>. The CSA is responsible for compliance with this anti-concentration provision, and that is required, in general, to ensure compliance with pluralism, when it decides to allocate frequencies, for example. For this purpose it has the powers of investigation and information.

Finally, it is up to the *Autorité de Régulation des communications électroniques et des postes* (ARCEP), to study the need for the upstream market regulation of “broadcasting networks or those used for the distribution of audiovisual communication services”, subject to the provisions of the Posts and Electronic Communications Code, so as to promote the emergence and development of new entrants into this market<sup>12</sup>.

#### **4. Presentation of the broadcasting and television sectors in France**

The broadcasting sector comprises key players and operators of electronic communications carrying audiovisual content made available by a content-provider to user terminals, using terrestrial stations, satellite or cable technology. Broadcasting and television broadcasting in particular, refers more specifically to the distribution of audiovisual content via terrestrial station technology.

In television, two activities co-exist in the sector in France – pay TV and free (or "free to air") TV.

The pay TV sector is organised in such way that pay channel broadcasters define the themes and editorial line of their channels and, on this basis, internally produce their own programs or acquire distribution rights to upstream markets from third parties. Publishers then sell the right to market their channels to different distributors, who develop a pay TV offer in the form of bundles of channels, accessible by subscription or “à la carte”. Finally, the distributor must market its offer and manage relationships with the subscriber.

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<sup>10</sup> Article 17 of the law of 30 September 1986

<sup>11</sup> Decision no. 86-217 DC of the Conseil Constitutionnel dated 18 September 1986, concerning compliance with the Constitution of the law concerning freedom of communication.

<sup>12</sup> Article L 32 ff. of the Posts and Electronic Communications Code.

The free television sector is organised differently. Distributors of channel bundles do not remunerate channel publishers. While the corresponding activities in the pay TV sector derive most of their revenue from subscriptions paid by final consumers, the publication and distribution of free channels is almost entirely remunerated by revenue generated by television advertising and, to a lesser extent, fees paid by persons equipped with audiovisual receivers.

#### **4.1 *The competition situation in the broadcasting sector***

On 11 September 2012, the Telecommunications and Posts Regulator (“ARCEP”) adopted a decision dated 11 September 2012 bearing on the definition of the wholesale market for the terrestrial station transmission of television programs in digital mode, on the designation of an operator exerting significant influence on this market, and on the obligations imposed on this operator in this market. The decision adopted complies with the opinions addressed to the ARCEP by the Autorité de la concurrence (see above) and the Conseil supérieur de l’audiovisuel (“CSA”), the Audiovisual Council, and takes fully into account the comments made by the European Commission. It upholds several obligations concerning access, transparency and non-discrimination, and specifies the tariff levels imposed on the powerful operator, TDF.

This regulation seeks to mitigate several barriers to market entrance, notably:

- the difficulty of replicating broadcast sites of the historic operator [for economic, technical and geographical reasons, but also due to regulatory constraints which require the proximity of the alternative site and the historic site];
- the pre-existence of a national network of the historic operator covering all of the 1,600 zones defined by the CSA;
- the difficulty for alternative operators of winning market share, bearing in mind the traditional length of channel distribution contracts at each site (5 years).

The Autorité de la concurrence has issued two opinions to the ARCEP on sectoral regulation plans<sup>13</sup>. In the second opinion, it found that competition in the French market had weakened following the buyout by TDF of two of its most active competitors, Antalis and Emettel, and that there were significant barriers to entry, and it considered that the ARCEP could legitimately resort to certain ex ante remedies to temporarily implement market conditions suitable for facilitating continued effective competition. It declared itself in favour of the envisaged regulation which sought to improve access by the competition to the 113 sites identified as non replicable through an approach focused on costs, while encouraging competitors of TDF to construct alternative sites when a priori possible.

In the context of its fight against anti-competitive practices, claims were brought before the Autorité de la concurrence alleging the erection of artificial barriers to competition by infrastructures, through the construction of alternative broadcast sites, and competition due to price squeezing practices in wholesale offers relating to hosting on the historic operator's broadcast sites. Requests for interim measures were upheld in respect of pricing practices, and rejected in respect of the first type of practices. In both cases, it was decided to examine the substance of the practices, the investigation of which is still under way.

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<sup>13</sup> Opinion n. 06-A-01 of 18 January 2006 relating to a request for opinion from the Telecom Regulatory Authority pursuant to article L. 37-1 of the Post and Electronic Communications Code, on the analysis of wholesale audiovisual broadcast markets and Opinion n. 09-A-09 of 17 April 2009 relating to a request for an Opinion by the Telecom Regulatory Authority pursuant to article L. 37-1 of the Post and electronic Communications Code, on the analysis of wholesale audiovisual broadcast markets.

Furthermore, it is useful to operate distinctions, in the broadcasting sector, between the various businesses, rather than on the basis of the technology used to transmit audiovisual content. Far from opposing the various broadcasting technologies, it is a question of distinguishing the various businesses and recognising the special role played by the audiovisual broadcaster, while the OECD appeal for contributions document indicates that *“Whatever the case, with the lightening speed of technological progress and the increasing convergence between telecommunications, broadcasting and computing, a regulatory model that does not take account of the links between telecommunications and broadcasting no longer reflects reality. It is necessary to adopt an approach that can respond to the dynamic nature of the sector”*. Since 2007, the date of adoption of the current Audiovisual Media Services Directive, new corporate models have been launched and a number of new entrants who initially merely hosted content produced by users have now entered into discussions (taking the examples of *Youtube* and *DailyMotion*) into discussions with rights-owners to distribute their content on these platforms. The positioning of these players within the value chain is currently outside the field of audiovisual regulation, even though their importance in the market is developing as a corollary to the expansion of online services, thus raising the question of competition in the audiovisual sector.

## **4.2 Recent changes and the competition situation in the free television sector**

### *4.2.1 Presentation of the free television markets and recent changes*

The French Autorité de la concurrence has revealed the highly evolutionary nature of markets in the free television sector, severely impacted by the digital revolution, which, at the same time, has multiplied the different means of broadcasting audiovisual content and the channels available, as well as fragmenting the corresponding audiences.

In fact, the recent development of the free television sector in France is characterised by the significant increase in the number of channels available on free TV. In March 2005, 11 new free digital channels were added with the launch of terrestrial digital television (“TNT”). The historic channels comprise six private and public channels: TF1, France 2, France 3, France 5, Arte and M6. The “new TNT channels” include Direct 8, W9, TMC, NT1, NRJ12, LCP-Public Sénat, France 4, BFM TV, iTélé, Gulli, France 5 and France Ô. Since the end of 2012, six new free private channels have been chosen by the CSA and have begun broadcasting.

Furthermore, the television advertising market, from which free television channels derive their revenue, is a mature market, in which volumes purchased show little growth. Television advertising revenue saw a decline between 2008 and 2010, to reach a total amount of 3.5 billion Euros in 2011, a figure slightly up on 2005, while revenue grew twice as quickly during the 2000-2005 period. The multiplication of free channels financed by advertising therefore resulted in stronger competition for financing, with any increase in the audience and advertising revenue of a channel being to the detriment of the others.

The Autorité de la concurrence also noted the two-sided nature of markets. In fact, demand for television advertising depends on the audience figures of channels, this in turn being highly dependent on the audiovisual content acquired by publishers of television channels. Inversely, the purchasing power of free channels in the rights market basically depends on their revenue in the television advertising market. In order to carry out a relevant analysis of the effects of this operation on competition, it is therefore necessary to take the inter-dependant nature of these markets into account.

Finally, overall television audience figures have continuously increased since the 1990s, to reach 3 hrs 47 mins of daily viewing per person in 2011.

#### 4.2.2 *The competition situation in the free television markets*

The free television sector encompasses several activities:

- a. upstream, holders of audiovisual content distribution rights (such as catalogue films, sporting events and televised series) market them to TV channel publishers;
- b. downstream, the TV advertising market, which connects TV channels with advertisers (or media agencies) for the sale of televised advertising spots.

Several key players co-exist in the free television sector. With the launch of TNT in 2005, the number of free channels in France increased from seven to eighteen. “Historic” channels include TF1, M6, France 2 and France 3, which are non-specialist, the first two in accordance with their CSA agreement, and the others in accordance with their terms and conditions, and to which should be added the freeview part of Canal+ and Arte<sup>14</sup>.

Among the new TNT channels, there is also a distinction between “general content” channels, special focus channels that also cover more general topics (or semi-specialist) and purely thematic channels, according to their CSA agreement.

Non-specialist channels are those that have the greatest programming freedom and those that can present programs with the greatest mass appeal. These are TMC, NT1 and D8. Semi-specialists have a partial obligation to follow a theme. This is music for W9, a subsidiary of M6, and NRJ 12. The first must broadcast 52 live shows a year and dedicate at least 20% of its programming to new French singing talent. France 4 is tasked with promoting live shows in particular, as well as cultural and artistic offers in general.

France 5, in application of the France Télévisions terms and conditions, is entrusted with designing and programming educational TV broadcasts and encouraging access to know-how, knowledge, training and employment. D17’s programming is three-quarters musical programs. It also has a duty to promote French singing and new talents. The Parliamentary channel has a public duty to inform and educate citizens about public life through parliamentary, educational and civic programs. Gulli channel is published by Jeunesse TV, a company jointly held by the Lagardère group and France Télévisions. Gulli is mainly aimed at children from 6 to 14 years of age. Programming is also aimed at parents and seeks to encourage social links. Finally, I-Télé and BFM TV are rolling information channels.

TF1 took control of the TMC and NT1 channels in 2010. On this occasion, the Autorité noted TF1’s strong positions in the different rights acquisition markets, in particular American catalogue films and American series, and original French catalogue films. In these markets, TF1’s main competitors are the M6 and France Télévisions groups.

Generally, the Autorité also found that TF1 held a dominant position in the advertising market, with a market share of between 40 and 50 %, more than double that of its main competitor, the M6 group. The Autorité found that the TF1 group benefitted in this respect from a position that has remained remarkably stable over time, finding that in 1996-1997, TF1’s market share in television advertising was already around 50%. The market power of the TF1 group was also underpinned by its ability to charge higher prices than those of its competitors, and to maintain a very high rate of capacity usage, higher than that of its competitors.

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<sup>14</sup> ARTE is unusual in not having signed an agreement with the CSA, and is subject only to the oversight and control of its members, Sept-Arte for France and Arte Deutschland for Germany, to the exclusion of any intervention by the public authorities.

### 4.3 *Recent changes and the competition situation in the pay TV sector*

The pay TV sector encompasses several activities at different stages of the value chain:

- upstream, holders of audiovisual content distribution rights (such as cinematographic works, sporting events and televised series), marketing them to publishers of TV channels or non linear television services (such as video on demand);
- at the intermediate stage, publishers market the channels they have set up on the basis of programs produced internally or acquired on the upstream distribution rights market. Publishers receive their remuneration from advertising, royalties paid by distributors and subscriptions;
- downstream, distributors market pay TV television offers to viewers in the form of channels sold as a bundle or à la carte, or non linear services;
- finally, transport involves routing a channel's signal to the viewer, by a variety of transmission methods (cable, satellite, broadband/ very fast broadband, digital terrestrial TV).

The pay TV sector is characterised by the co-existence of traditional linear television offers and non linear television offers.

#### 4.3.1 *The linear pay TV sector*

The pay TV sector was historically structured in France around two satellite operators, TPS and the Canal Plus Group (“GCP”, owned by the Vivendi group), vertically integrated into the value chain. These two players merged in 2006 with the takeover of TPS by GCP. Other operators emerged, using new methods of broadcasting and distributing audiovisual content, namely via broadband Internet (ADSL), digital terrestrial TV (“TNT”), television on mobile handsets and video-on-demand (“VOD”). Today, some Internet Service Providers (“ISP”) and cable operators also operate in the different pay TV markets, with variable degrees of vertical integration depending on the company.

Since 2006, the development of ADSL has been confirmed, becoming the main method of receiving pay TV television, representing 52% of homes receiving digital pay TV in H1 2011. Consumers therefore have a choice between different broadcast platforms, that is to say satellite, ADSL, fibre optic, cable and terrestrial station. On each of these platforms, several competing channel bundles are offered to consumers, with the exception of terrestrial station and satellite, for which only GCP offers are present.

Downstream, competition is intra-platform. GCP offers are available on all broadcast platforms. Third party operators, mainly ISP and cable operators, transport and market GCP offers on their own platform. GCP nevertheless preserves a direct relationship with its subscribers (known as “self-distribution”); competing distributors provide technical and commercial services on its behalf. Alongside GCP offers, each operator that owns technical transmission platforms offers its own pay TV bundles. Intra-platform competition is therefore asymmetric as GCP offers are self-distributed to all platforms, while competing bundles are offered to consumers on each platform concerned.

GCP remains dominant in most pay TV markets. In 2012, the Autorité de la concurrence found that this group had very strong positions upstream, in particular holding the vast majority of broadcast rights for cinematographic content on pay TV, publishing the only multi-topic premium channel and the main movie channels on the market, as well as other thematic channels, carrying out the exclusive distribution of a large number of channels published by third party operators, as well as marketing the main pay TV offers to final consumers. In the market of pay TV offers from GCP and its competitors (excluding the basic

television component of multiple service subscriptions to Internet, telephone and television from Internet service providers (“ISP”), called “triple play”), in 2011 GCP represented between 70 and 80% of subscriptions and between 90 and 100% of market turnover.

#### 4.3.2 *The non linear pay TV sector*

The toll TV markets are characterised by the emergence of new ways of consuming content, mainly cinematographic and audiovisual. Unlike traditional television services, these new consumption methods are not linear, meaning that consumers do not depend on a programming grid drawn up by a television service provider but rather choose the programs they wish to view from a catalogue, at the time of their choice.

The emergence of these new consumption methods has been enabled by several technological changes, including the increased viewing of content through IP or fibre optic networks on computers or televisions connected to the Internet (“smart TV”<sup>15</sup>). Offers to final consumers may take the form of Pay-Per-View (market in decline in France) or video-on-demand (“VoD”).

The paying video-on-demand sector comprises three pricing models: one-off film rental (via streaming, or as a temporary download), rental by subscription (video-on-demand by subscription, “VoDs”) and one-off purchase (definitive download). In France, the first date that movies can be rented through an on-demand video service is 4 months (or 3 months for certain films) from the cinema release date, pursuant to an agreement of 6 July 2009 on changes to media chronologies. This agreement, which was the subject of an extension decree from the Minister for Culture, also established the possibility of operating movies on demand by subscription from the 38<sup>th</sup> month following cinema releases. It follows therefrom that publishers of video-on-demand by subscription cannot acquire rights relating to recent films. Publishers of both video-on-demand and by subscription are, on the other hand, active in the market of the purchase of rights relating to catalogue films and recent and non-recent series.

Consumption of video-on-demand remains marginal when the turnover it generated in 2011 (230 million Euros) is compared with that of linear pay TV (over 6 billion Euros). According to the NPA-GtK barometer, in 2011 the paid video-on-demand market represented about €220 million, a 44% increase in comparison with 2010. More than 90% of turnover came from on-the-spot payments (37.5 million transactions performed in this way in 2011, up 20% on 2010). Nearly 42,000 videos were viewed at least once in 2011, an increase of about 8% in comparison with 2010. Of these videos, 50.4% were audiovisual programmes, 27.8% adult content and 21.8% films.

Consumption of video-on-demand takes place largely within the framework of pay TV offers, while direct viewing online only represented, for the first ten months of 2011, around 15% of turnover. This mainly involves rentals,<sup>16</sup> although definitive download is also possible.

Video-on-demand is typified by the existence of a large number of providers in France. According to the report by the *Centre national de cinématographie et l’image animée*, 68 content producers are active in this market<sup>17</sup>.

<sup>15</sup> “Smart TV” consists of televisions directly connectable to the home Internet connection, without any additional subscription or digiboxes, enabling online content to be displayed on TV sets.

<sup>16</sup> 99% of video-on-demand consumption in 2010 was for rental according to the IDATE report on economic models for audiovisual media on demand active in the French market of June 2011, but this figure should fall, as before 2011 definitive download was not possible on VoD offers on pay TV.

The acquisition of broadcast rights in video-on-demand is, for the moment, carried out non-exclusively, and the same programs are available on several platforms. In total, 5,094 movies were offered in June 2010. Several categories of operators are present in this market: the channels, ISP, “pure players” whose sole speciality is video on demand, video publishers, holders of rights, physical distributors and Internet platforms. The market is nevertheless relatively highly concentrated as five key players share the majority of the market turnover.

To date, video-on-demand by subscription has remained marginal (turnover of around 15 million Euros at end of June 2011). This evolution is atypical in Europe as, in a 2010 report, the European Commission found that the subscription model is growing more quickly at European level than video on demand<sup>18</sup>. The development of smart TV as well as the trend of viewing on Wi-Fi tablets may change this situation insofar as it gives access to offers which are only accessible online, such as iTunes, with the visual comfort of televisions or tablets.

## **5. The main challenges facing competition policy in the broadcast sector**

### **5.1 *The holding of strong positions established by certain television providers***

The development of television markets shows that the holding of established positions, indeed dominant positions, tends to structure both the free (2.1.1) and pay (2.1.2) television markets, limiting the entrance and development capacity of new operators.

#### *5.1.1 The existence of dominant positions and barriers to entry in the free television markets*

As indicated above, the Autorité de la concurrence found, in 2010, that the TF1 group enjoyed a dominant position in the TV advertising market. In 2010, the TF1 group was also the leading purchaser of distribution rights to American catalogue movies and American series, and the second-largest purchaser of original French films.

When the TF1 group acquired the AB, TMC and NT1 channels, the Autorité found that by adding two additional channels, the TF1 group gave itself the possibility of increasing profits on the rights acquired by the TF1 group to three freeview channels instead of just one and that this constitutes a competitive advantage over all of its competitors. This advantage was increased by the fact that the channels concerned are all non-specialist and face almost no theme-related obstacles, meaning they can broadcast the most popular and therefore most audience-generating programmes, and benefit from exchanging productions and programmes. The operators which benefit least are the new TNT channels which cannot rely on the network of channels and purchasing power of a historic group.

Furthermore, these positions are held in markets characterised by strong barriers to entrance. The first is linked to the rarity of terrestrial station frequencies. In fact, in terms of terrestrial station distribution, the publication of a channel depends partly on the existence of available frequencies, and partly on the assignment of these frequencies by the Conseil supérieur de l’audiovisuel (“CSA”).

Beyond the constraint linked to the scarcity of terrestrial station resources, the publication of free television channels implies very high distribution costs. Finally, the maturity of the television advertising market is another entry barrier for free-to-air channels.

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<sup>17</sup> Excluding hosts of video-on-demand services, editors of Replay television services, and editors of video services specialising in adult programming.

<sup>18</sup> Report on Multi-Territory Licensing of Audiovisual Works in the European Union, prepared for the European Commission, DG Information Society and Media, October 2010.

There are fewer constraints on the distribution of television channels by satellite, cable, ADSL or fibre optic. Nevertheless, the publication of a new channel for this type of distribution remains subject to delivery problems in rights and distribution markets. In any event, the competitive pressure that these channels may exercise in the television advertising market is very limited, bearing in mind their low audience figures and the fact that advertising only plays a marginal role in their financing.

### 5.1.2 *The existence of dominant positions and barriers to entry in the pay television markets*

The GCP holding of dominant positions in markets related to the pay TV sector was pointed out by the Minister of the Economy at the time of the acquisition of TPS by GCP and the Vivendi group in 2006<sup>19</sup> and by the Autorité de la concurrence when again inspecting this operation in 2012<sup>20</sup>. The findings described below result from the analysis carried out by the Autorité de la concurrence in the latter case.

The acquisition of TPS gives GCP, a subsidiary of the Vivendi group, control of the two French satellite platforms integrating all businesses in the paid audiovisual value chain, from content control to access by viewers. The acquisition added the channels published and marketed by TPS and CanalSat to GCP, as well as their activities of channel bundle distribution and marketing activities. The operation therefore significantly strengthened GCP channel bundles and its subscription data base.

The main effect of the operation was to give GCP (i) considerable purchasing power, eliminating its most significant competitor for the acquisition of content; (ii) a monopoly in the publication of premium channels; (iii) a dominant position in the publication of cinema channels; (iv) a position that may lead to a drying up of access to cinema, sports and children's channels for competing distributors; and (v) an unbeatable position for the distribution of thematic channels, given the strengthening of the CanalSat subscriber base.

The durability of these findings was confirmed by the Autorité de la concurrence when inspecting the operation again in 2012, the strong positions of GCP partly explaining the difficulties encountered by new operators when joining the market, both in respect of the publication and marketing of channels (a) and in the market of distribution of thematic pay channels (b).

#### a. Barriers to entry into the broadcasting market and marketing networks

Since 2006, several attempts to enter the market have placed competitors of GCP in difficulty, indeed in a relationship of dependency vis a vis the group. Following the acquisition of TPS by GCP, the latter integrated TPS's database, thus consolidating the first subscriber base in the market. In 2011, GCP represented between 70 and 80% of all pay TV subscriptions in France<sup>21</sup>. This operator, the leading acquirer of pay TV broadcast rights, in particular in film and sporting matters, is therefore able to compete with the best with its publication activities. No competing publishers have access to a comparable audience unless distributed as part of the GCP's CanalSat offer.

<sup>19</sup> Letter n° C2006-02 from the Minister of the Economy, Finance and Industry of 30 August 2006 to the counsel of the company Vivendi Universal, on concentration in the pay television sector, BOCCRF n. 7 bis of 15 September 2006.

<sup>20</sup> Decision from the Autorité de la concurrence no. 12-DCC-100 of 23 July 2012 relating to the exclusive taking of control of TPS and CanalSatellite by Vivendi and the Canal Plus Group.

<sup>21</sup> In a market comprising subscriptions to GCP offers and offers of other distributors, to the exclusion of subscriptions to the basic triple play offers of ISP.



GCP's publication activities thus give it a very important position in different channel publication and marketing markets. In particular, GCP publishes the sole multi-thematic premium channel (offering both sporting and cinema content) in the French market, Canal+ and its off-shoots, the group having ceased broadcasting the channel TPS Star, acquired in 2006, and which offered the same type of content as Canal+.

In 2008, France Télécom-Orange, the historic telecom provider in France, launched two bundles of channels backed by the acquisition of content by Orange. One of these bundles, the Orange Cinéma Séries ("OCS") is a movie channel, while the other, Orange Sport, is a sports channel. Both of them have so-called "premium" content, that is to say capable of bringing in subscriptions, which in France means recent cinema films newly released on pay TV, League 1 and Champions League football matches, together with especially popular foreign competitions. The choice of the operator to purchase directly from the rights acquisition market, and not to distribute existing channels, can partly be explained by the inadequate offer of channels available for distribution on the intermediate market. To supply its channels with content, Orange thus concluded framework contracts for the acquisition of distribution rights to recent movies on pay TV with several American studios, pre-purchased original French films and acquired rights to distribute football matches from League 1 and the German championship.

Orange, which initially only marketed its channel bundles to its multi-service subscribers, was unable to profit from the investment made. The operator left the rights acquisition and publication of sports channels market after a single rights cycle. Orange in fact encountered significant difficulties amortizing the cost of acquiring rights in a limited database, the subscription rate of ADSL subscribers to Orange Sport being too limited to ensure an adequate profit forecast. Orange therefore withdrew its application for the acquisition of linear lots within the framework of the invitation to tender organised by the French Football League (LFP) in June 2011 for the 2012-2016 period. Moreover, the Orange Sport channel ceased broadcasting at the end of June 2012.

Likewise, Orange experienced difficulties in developing a profitable movie activity. The operation therefore chose to conclude a partnership, conferring on GCP a share in capital and joint control of OCS in April 2012.

Other examples illustrate the difficulties in entering the sports channel market dominated by Canal+. The channel CFoot, published by the LFP, broadcast a League 2 lot for the 2011-2012 season. Unable to achieve an economically viable balance, the LFP ceased broadcasting the CFoot channel in 2012.

These failures illustrate the difficulties for newcomers to the channel market to maintain a sustainable offer. These difficulties are linked to the conjunction of several barriers to entrance, which are added to the difficulty of accessing premium rights and profiting from them over time. The Qatari operator Al Jazeera is a very recent newcomer to the market and feedback is thus limited. The entrance of this operator nevertheless resulted in real competition for the GCP in the rights acquisition market. It has however raised difficulties relating to its distribution terms that refer back to the issues of vertical integration of GCP (see below).

- b. The competitive position of the distribution market and barriers to the emergence of significant competition

GCP distributes thematic channels under the CanalSat brand. Within the framework of this activity, GCP purchases from channel publishers the right to market the channels they publish to the public. Channels are distributed either individually ("à la carte") or, most commonly, in the form of a bundle or pack comprising several channels. Competitors of CanalSat in the thematic channel distribution market are mainly ISP with their second level offer, and a cable operator, Numericable.

GCP is the leading distributor in the market, and the royalties it pays to independent channels (excluding channels published by GCP) in respect of this activity represent between 50 and 60% of their total turnover. This position has not changed since 2006, illustrating both the unbeatable nature of CanalSat's position in the distribution of thematic channels, and the purchasing power GCP enjoys in relation to its providers of channels.

As indicated subsequently, GCP represents between 70 and 80% of pay TV subscriptions<sup>22</sup>. In value, GCP represents between 90 and 100% of turnover from pay TV offers during *triple play* offers and, according to estimates, between 50 and 70% of turnover from pay TV offers including the television component of *triple play* offers from ISP. Competitors of GCP in the thematic channel distribution market therefore on represent a minority, indeed marginal, market share.

Several factors act as a curb on the competitive capacity of other pay TV distributors, including the absence of sufficient distribution alternatives for channels (i), the contractual conditions surrounding the distribution exclusivity held by GCP (ii) and the holding of numerous exclusivity agreements by GCP (iii).

i. Alternative distributors to GCP

France's high level of ADSL take-up gives ISP a significant pool of subscribers (over 11.3 million subscribers in 2011). This pool corresponds to subscribers of first level ISP offers, not relevant to analysing the competitive pressure exerted by ISP on GCP. The investigation carried out by the Autorité de la concurrence into ADSL operators showed that the latter do not consider their first level bundles to be in competition with second level operators due to significant differences in the attractiveness of channels. In the same way, channel publishers unanimously find that ISP do not exert real competitive pressure on GCP in the distribution of thematic channels, including at the second level of service, for reasons linked to their relative weighting compared with GCP and their strategic positioning.

Accordingly, first level offers differ from second level offers as well as those of GCP both in terms of content, focused on the quantity of channels, and their financing method, these being channels whose turnover comes solely or mainly from their advertising revenue.

On the other hand, second level offers to which subscribers of the first level offer may have access by taking out an additional subscription are, for their part, in direct competition with GCP bundles. ISP overall have 2.3 million subscribers to their second level offers, that is to say less than a quarter of the number of subscribers to basic *triple play* offers, and between 50 and 60% of the number of subscribers to CanalSat alone.

82. The Autorité's investigation reveals that thematic pay channels do not consider distribution by ISP to constitute an adequate alternative to distribution by CanalSat. Channel publishers thus find second level bundles cheaper and less varied than the CanalSat bundle, and are thus aimed at a fraction of television viewers who show less appetite for pay TV, homes showing the greatest interest often having already subscribed to GCP offers.

ii. Exclusivity owned by GCP

The exclusive arrangement between GCP and publishers of thematic channels limits the size of the wholesale market and reduces the range of channels that ISP can distribute. In fact, these exclusivities, which initially concerned solely the platform satellite, have also been extended to ADSL platforms according to a self distribution system.

<sup>22</sup> Excluding triple play subscribers not purchasing any specific subscription for a bundle of channels.

However, the holding by a distributor of a range of attractive channels in all themes is an essential element of competitiveness. The decision making practice of competition authorities holds that, to be competitive, an offer of pay TV bundles must include channels offering premium content, sporting and cinema, a range of channels covering the themes of cinema, sport, information and children's programmes, as well as other less attractive thematic channels.

The Autorité de la concurrence thus found that GCP, through the holding of exclusive distribution rights, reserved the distribution of the most attractive channels for itself and in 2012 represented the majority of the measured audience of cinema, sport and children's programmes.

iii. The conditions contained in GCP's exclusive distribution contracts

Exclusivity in the thematic channel wholesale market enables the distributor to differentiate its offer of bundles from those of its competitors, in particular when the exclusivity involves channels whose content is difficult or impossible to substitute. Nevertheless, the exclusive distribution of a channel on CanalSat stands out as it concerns almost all technical distribution platforms (satellite, ADSL), as CanalSat is self-distributed on all of these platforms (with the exception of cable). In return for this type of exclusivity, which only GCP is able to offer, publishers receive an "exclusivity bonus", which represents a royalty amount received from GCP greater than the cumulative royalties received from GCP and all ISP in non-exclusive distribution. Publishers must thus decide, given current contractual practices of GCP, between exclusive multi-platform distribution by CanalSat, and the benefit of the exclusivity bonus at the risk of again finding itself in a risk of dependency vis a vis GCP, or the signing of a non-exclusive contract, depriving them of the exclusivity bonus and risking calling into question the financial viability of channels.

The switch from an exclusive distribution model to non-exclusive distribution on CanalSat thus marks a fall in royalties, representing, depending on the case, the majority, indeed almost all, the royalties of exclusive channels. The Autorité de la concurrence thus found that the exclusivity "bonus" paid by CanalSat is sufficiently high to ensure that exclusive distribution by CanalSat is sought by most publishers, less by deliberate choice than the impossibility of obtaining equivalent remuneration in non-exclusive distribution. In this context, exclusive remuneration places channels in a situation of dependency, from which there is little encouragement for channels to leave.

Finally, the decision by channel publishers between the two distribution models was, in 2012, restricted by the opaqueness of distribution offers from GCP. In fact, the multi-platform exclusivity sold by publishers was not subject to a transparent valuation, being remunerated by a general royalty whose different components were opaque, without distinguishing the value assigned by GCP to exclusivity on each distribution platform. Thus, the value of the exclusivity obtained by GCP for the distribution of channels on the ADSL networks of competing distributors was not subject to a specific valuation. The consequence of this opaqueness was that publishers were unaware of which proportion of the remuneration that they were paid by GCP corresponded to distribution via satellite, and which proportion corresponded to distribution on each ADSL platform.

Unlike GCP, third party distributors, essentially ISP, can in fact only offer their own bundles in their proprietary platforms. They cannot therefore individually compete with the multi-platform distribution offers proposed by GCP to channels. The absence of a separate valuation of the exclusivities on each platform in GCP distribution contracts, opaquely disconnecting remuneration of exclusivity from the value it represents on each of them, restricting the capacity of GCP competitors to offer competitive distribution offers.

This practice thus enabled GCP to make distribution offers difficult to avoid for the most attractive independent channels, and not replicable by competitor distributors, preventing the latter from competing properly in the distribution market.

## 5.2 *Aspects linked to vertical integration*

The acquisition of TPS enabled GCP to integrate its main competitor as provider and customer on intermediate thematic channel distribution markets. The operation thus improved the vertical integration of GCP, which operates both in the channel distribution market, through CanalSat, and the thematic channel distribution market, in direct competition with the independent channels it distributes. This situation, associated in particular with the dominant position of GCP in the distribution market, gives the group the impetus to exploit its vertical integration, locking access to its competitors in the channel publication market.

Concentration had the effect of significantly increasing the number of subscriptions and subscribers in the GCP pool. In 2011, GCP controlled a pool five times greater than its immediate competitor, and much higher than the second level subscribers of all ISP and cable operators together.

Access to CanalSat subscribers is thus vital for all publishers, insofar as it is the most important on the market, and is the only offer presented on satellite platforms (its historic base), ADSL and TNT<sup>23</sup>. Although in decline, the proportion receiving the offer via the satellite platforms makes up a large majority: at the end of 2011, 70 to 80% of subscriptions were received by satellite, 10 to 20% via ADSL and 10 to 20% via TNT<sup>35</sup>. Distribution of a channel only on the ADSL platforms of Internet service providers cannot therefore be considered an adequate alternative to distribution on CanalSat. The weakness of subscriber data bases in second level service offers by ISP compared with that of CanalSat indicates that GCP controls access to the vast majority of pay TV customers.

The Autorité thus found that GCP boasted considerable capacity to lock access to pay TV by channel publishers to the vast majority of customers. The Autorité thus found that the adequate distribution of channels from Al Jazeera, a newcomer in premium sporting content, was crucial to this operator's capacity to remain in the French market and boost both upstream and downstream competition. GCP's incentive not to distribute or impose inadequate distribution terms for such a publisher, positioned in direct competition with it in sporting rights markets, is therefore significant, bearing in mind the competition which then deliver their respective channels in the publication of premium sporting programs. In fact, distribution of a competing offer in the most attractive portion of the market (premium rights) presents several disadvantages for notifying parties: it increases the penetration of the competing channel, improves its recognition, strengthens its subscriber base and consequently its revenue, in return strengthening the financial capacities of the newcomer and encouraging the latter to stand as a candidate in future invitations to tender and to supply its channel with premium rights. Conversely, by refusing to distribute, or inadequately distributing, the offers of a competing newcomer, GCP may weaken this operator and reduce its financial capacities and motivation to make a lasting impact on the market.

Furthermore, the vertical integration of GCP and its control of the first distribution platform could enable the group to be informed of the identity of its future competitors in the upstream rights acquisition market and their intentions before the launch of the invitation to tender. However, the success of the invitation to tender depends on the incentive for each candidate to file the best possible offer, an incentive that results largely from their uncertainty as to the identity of other candidates and the intensity of their willingness to pay. But given the state of the market, the conditions for future invitations to tender may be distorted due to knowledge by the main candidate, GCP, of privileged information on the identity of its

<sup>23</sup> See the GCP reporting data at Lagardère group.

competitors, their financial surface and even their programming plans. This situation of asymmetric information may allow GCP to adjust its behaviour in consequence, to the benefit of its own publishing activities.

The vertical integration of GCP also encourages it to lock access to customers of thematic channels not distributing premium content. In fact, the cumulative activities of publisher and distributor give the GCP a competitive advantage in the publication markets, especially given that it holds leading positions in both markets. Thus, GCP has an interest in favouring the acquisition of attractive distribution rights exclusively for the channels it publishes, to the detriment of other channels and then, as a distributor, relying on the absence of these airtime rights by competing channels to reduce their royalty levels. Inversely, it may refuse to distribute a thematic channel or provide it with low remuneration, thus weakening it in relation to other competing channels, including channels published by GCP, in particular for the purchase of rights.

The combination of publication and distribution activities also enables GCP to provide confidential information on the channels it distributes and be able to adjust its offer (as publisher or distributor) accordingly.

### **5.3 *The development of new forms of broadcasting***

Consumption of on-demand audiovisual media services is growing rapidly. The competitive pressure that these new consumption methods can exert, mainly on linear pay TV offers, nevertheless remains limited to date. This is explained by the existence of barriers to the development of on demand audiovisual media services (2.3.1) and by the difficulty in substituting on demand video services with linear pay TV offers (2.3.2).

#### *5.3.1 The legal environment of the development of non linear television services*

##### **a. Regulation**

In its decisions on concentration in the market (see below), the Autorité took into account the legal framework enabling publishers and distributors to contribute to financing the French film industry and plurality of media, in that they structure the competitive dynamics of this market.

This framework has led to the development of video-on-demand operating slots, while preserving those of other distribution methods, including linear pay TV offers. The agreement of 6 July 2009 on restructuring media chronology opened up a first operating slot exclusive to video on demand, similar to that applicable to videos in physical formats (DVD and Blu-Ray) between 4 and 10 months after the cinema release of films.

As for video-on-demand by subscription, the recently renewed 2009 agreement only authorises this for films released in the cinema more than 36 months previously.

In addition to issues of media chronology, there are obligations to contribute to financing film production. The decree of 12 November 2010 thus imposes obligations upon on-demand audiovisual media services relating to contributions to the development of audiovisual and cinematographic works. This contribution is fixed for video-on-demand and subscription at 15% of turnover in favour of European works, and 12% in favour of French works.

Furthermore, a broadcast quota of 60% for European works and 40% for original French works is imposed on the whole catalogue<sup>24</sup>.

b. The conduct of broadcasters

The provisions of the agreement of 6 July 2009 on changes to media chronology enable the exploitation of on-demand video in rental form during the operating slots of pay TV channels (between 10 and 22 months after the cinema release) then free (between 22 and 36 months).

Nevertheless, pre-purchase conditions for films systematically provide for the withdrawal of video on-demand products after 10 to 12 months.

The freezing of broadcast slots continues for free slots on the initiative of channels that contributed to the pre-financing of the work. Accordingly, numerous films, in particular the most attractive, are not available for on-demand video hire in the interval between the tenth and the thirtieth month after their cinema release (or even later, depending on contractual provisions) or the thirty-sixth month. This media chronology is specific to the national market. Outside France, key international players in the video-on-demand by subscription sector may negotiate rights to the first or second pay TV slot with American studios, and therefore offer video-on-demand by subscription several months after cinema release, without these films being withdrawn several months later. The rigidity caused by the current media chronology therefore acts as an effective brake on video-on-demand in France.

c. Other factors

Other obstacles to the development of video on demand, analysed in the Hubac report and the IDATE study, are such as to put the short term outlook for an upheaval to the markets concerned into context:

- difficulties in accessing video-on-demand services by ISP;
- sharing the added value to the detriment of the publisher of the service, in particular when hosted by an ISP;
- the existence of a guaranteed minimum remuneration to beneficiaries by rental agreements, hindering promotional offers.

### 5.3.2 *The difficulty of substituting video-on-demand services for linear pay tv*

The analysis of the Autorité de la concurrence finds that the substitutability of video-on-demand offers with linear pay TV is still far from perfect. In accordance with media chronology, video-on-demand may concern recent films (3 or 4 months after their cinema release), but at a relatively high price. Subsequently, the purchase of 8 recent films is equivalent to the price of one month's subscription to the Canal+ channel bundle, which offers 30 new films a month as well as numerous other programs.

From the viewpoint of the final consumer, the service offered is different: linear pay TV services are characterised by the aggregation of various programs or thematic channels selected by the publisher, while consumers of video-on-demand must browse and choose from catalogues with several thousand listings,

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<sup>24</sup> Decree n° 2010-1379 of 12 November 2010 relating to on-demand audiovisual media services.

and among offers from several service providers<sup>25</sup>. Video on demand offers freedom of choice, control of schedules, the option of pausing the broadcast, rewinding or fast forwarding, these latter advantages being put into context by the number of repeats and linear catch-up services.

Accordingly, the consumption of video-on-demand in France has mainly developed to the detriment of video in physical format, rental or purchase, with the overall turnover generated by all video products remaining changed overall.

Substitutability should however become more apparent in the future between video-on-demand by subscription and linear pay TV. The price of subscription offers that give access to an unlimited number of films is much more attractive than that of video on demand, and the wide range, renewed on a monthly basis, gives real possibilities of adapting editorial content to the preferences of Internet users.

However, these prices only currently give access to catalogue films, with recent films being blocked under current media chronology by the 38 month deadline. Compared with the age of films offered in the first and second pay window, competition is still only virtual.

We can further note that supply of video-on-demand appears so far not to have affected the level of subscriptions to GCP offers, as the “churn” rate of GCP offers in mainland France has been in constant decline since 2008, and new sign-ups have increased in 2010.

It follows therefrom that the competitive pressure exerted by non linear offers in the linear pay TV sector so far remains limited.

## **6. Experience of the application of competition law in the television broadcast field**

Most decisions taken by the Autorité de la concurrence, other than the cases relating to sport already presented at the of the OECD round table in June 2010<sup>26</sup> result from controls on concentration, both in the free television (3.1) and pay television sector (3.2).

### **6.1 Control of concentration in the free television sector**

In its decision n. 10-DCC-11 of 26 January 2010 relating to the exclusive takeover by the TF1 group of the company NT1 and Monte-Carlo Participations (group AB), the Autorité examined in great detail the markets for the acquisition of rights to different audiovisual content, according to the broadcast method and the type of content concerned, both from the point of view of analysing the relevant markets (segmentation according to broadcast methods, depending on sporting content) and actual competitive analysis. It has already been stated that the Autorité thus noted the strong position of TF1 in the purchase of American catalogue films, its pre-eminent position in the acquisition of American series and its strong position in the pre-purchase of original French catalogue films. In terms of sporting rights, the Autorité found that the new grouping of TF1/TMC/NT1, in addition to the pay channels of the TF1 group, Eurosport and Eurosport 2, had a unique position in terms of the exploitation of such rights. The Autorité concluded that the operation envisaged was such as to strengthen the purchasing power of the TF1 group, bearing in mind the possibility it would then have of profiting from its acquisition of three free to view non-specialist channels.

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<sup>25</sup> The Hubac report also notes that the offer of video-on-demand “was insufficiently editorialised and promoted”, and “difficult to access or with poor ergonomics for those not subscribing to a triple play who need, on their computer, to browse blindly online to watch films or audiovisual works” (p. 9).

<sup>26</sup> Note by the delegation of France, 7 June 2010, Roundtable on Competition and Sports, DAF/COMP/WD(2010)46, [http://www.autoritedelaconcurrence.fr/doc/ocde\\_cp\\_06\\_2010.pdf](http://www.autoritedelaconcurrence.fr/doc/ocde_cp_06_2010.pdf)

Furthermore, the Autorité de la concurrence noted the dominant position of the TF1 group in the television advertising market. The impact of the operation was assessed on the basis of a dynamic eviction scenario inherent to the free television sector, called the “spiral effect”. This scenario, which results from the interdependence existing between the television advertising market, the rights market and the audience for channels, can lead in the longer or medium term to a strengthening of a dominant position and the weakening, indeed exclusion, of competing operators.

Free television is in fact a two-sided market connecting advertisers and viewers. A free television channel provides viewers with programs, and its audience figures depend on their quality. In turn, the value of the channel’s advertising spots depends on the audience, and therefore the revenue with which the channel can acquire attractive programs.

In such a context, the Autorité found that the strengthening of the market power of the TF1 group in the acquisition of broadcast rights could be passed onto the television advertising market, insofar as the increased attractiveness of its programs gives it the means of getting higher advertising revenue, then again in the rights market, advertising revenue supporting the quality of the content broadcast, and with them the audience figures and demand by advertisers. The Autorité also found that this effect would take place in a market context in which the capacity of TNT competitor channels to invest in more attractive programs to increase their audience and fight this dynamic was very limited.

To remove the concerns of the Autorité, the TF1 group undertook to facilitate the circulation of broadcast rights in favour of competing channels, ceasing the application of clauses that could restrict access by its competitors to audiovisual and cinematographic works or freeze broadcasting rights. The TF1 group also undertook to limit the rebroadcasting of programs on its channels, such as to limit the impact of the group’s increased purchasing power, and encourage the freeing up of rights. Finally, to remedy the effects of the operation on the advertising market, the TF1 group undertook not to carry out any form of coupling or subordination linking advertising spots on channel TF1 with the sale of spots on TMC and NT1. The marketing of the advertising spaces of new TF1 channels will also be carried out by a PLC reporting to TF1.

In its decision n. 12-DCC-101 of 23 July 2012 relating to the exclusive control of the channels Direct 8 and Direct Star by Vivendi and GCP, the Autorité examined the effects of the acquisition of free non-specialist and musical channels by the leading pay TV operator.

The Autorité found that the operation had conglomerate effects, insofar as GCP was capable of using its dominant position in the acquisition of American and French film rights in pay TV as a lever to obtaining unmissable content for free TV from rights holders, that is to say American series and original French films. Bearing in mind the rarity of this type of content, the Autorité considered that the execution of a lever effect could reach an acquisition volume such as to produce an eviction effect on the other free channels.

The Autorité also found that the operation had vertical effects. Via StudioCanal, GCP in effect controls, the leading portfolio of catalogue film distribution rights in the French market, and may have an incentive, following the operation, to favour delivery of its free channels to the detriment of its competitors. Also, with GCP able to hold rights to broadcast major sporting events, the operation brings with it the risk that the group will favour access to these rights by its free channels.

GCP responded to the concerns of the Autorité de la concurrence by undertaking several measures restricting both its acquisition of freeview television broadcast rights and the self-provision of its channels to the detriment of competing channels. To remedy the lever effect, the group firstly undertook not to acquire freeview and pay TV rights to films and series through framework contracts from more than one



major American studio. GCP also undertakes not to cumulate freeview and pay TV rights to over 20 original French films a year, and not to focus its investments on big budget movies.

Furthermore, to remedy the vertical effects of the operation, GCP undertook to maintain acquisitions by its free channels of catalogue films from StudioCanal at a level equivalent to that recorded before the operation. The group also undertook to transfer its broadcast rights to major sporting events within the framework of an invitation to tender organised by the representative entrusted with monitoring the implementation of commitments.

## **6.2 Control of concentration in the pay television sector**

The main concentration in the pay television sector brought to the attention of the Autorité de la concurrence concerns the acquisition of TPS and CanalSatellite by the Vivendi group and GCP. This operation, which involves the grouping of the pay television activities of TPS and the Canal Plus Group (“GCP”), in other words the two satellite bundles CanalSat and TPS, Canal+ and the thematic channels of Multithématiques, within the company Canal+ France, was authorised by a decision of the Minister of the Economy on 30 August 2006, after opinion from the Competition Council no. 06-A-13 of 13 July 2006.

This operation gave GCP control of the two French satellite platforms integrating all businesses in the paying audiovisual value chain, from content control to access by viewers. The acquisition added the channels published and marketed by TPS and CanalSat to GCP, as well as their activities of channel bundle distribution and marketing activities. The operation therefore significantly strengthened GCP channel bundles and its subscription data base.

In 2006, the Minister of the Economy found that the operation involved significant anti-competitive effects on the upstream audiovisual rights acquisition markets, intermediate markets for the publication and marketing of pay TV channels, as well as the significant strengthening of GCP on the downstream pay TV distribution market.

To remedy these competition problems, the authorisation was issued subject to the condition of the implementation of fifty-nine undertakings signed by the Vivendi group and GCP on 24 August 2006. To resolve the monopoly of the new entity in the publication and marketing of premium channels, and allow third party operators to distribute such channels, GCP undertook to make the TPS Star channel available to competitor distributors and to maintain quality. Likewise, to avoid the new channel ousting its competitors by drying up the thematic channel market, GCP undertook to provide distributors with three cinema channels (Cinéstar, Cinéculte and Cinétoile), a sports channel (Sport+) and two children’s channels (Piwi and Télétoon), also guaranteeing to maintain their quality. Furthermore, to remedy the risk of dependency of channels vis a vis GCP, it undertook to define transparent, objective and non discriminatory conditions, in particular in terms of remuneration. Finally, GCP undertook to conclude separate contracts for commercial distribution and transport of pay TV services.

By decision no. 11-D-12 of 20 September 2011, the Autorité de la concurrence found that there had been a breach by the Vivendi and GCP group of ten undertakings signed in 2006, relating in particular to the provision of channels to third party distributors, the guarantee to maintain their quality and the distribution conditions of independent channels. The Autorité found that the undertakings breached by GCP were determinant and lay at the heart of the approach aimed at remedying the competition restrictions resulting from the concentration operation. The breaches recorded could therefore hinder the objectives sought by the authorisation decision, namely the restoration and maintenance of sufficient competition in the pay TV market.

Consequently the Autorité withdrew, on the grounds of section IV of article L. 430-8 of the Code of Commerce, the merger authorisation issued in 2006, and ordered the parties to at least return to their status prior to the merger, and to again notify the operation within one month of the notification date of the withdrawal decision.

It is under these circumstances and on the basis of a new notification of the operation, that the Autorité adopted its decision no. 12-DCC-100 of 23 July 2012 relating to the exclusive taking of control of TPS and CanalSatellite by Vivendi and the Canal Plus Group. By this decision, the Autorité found that there was a significant impact by the horizontal, conglomerate and vertical anti-competitive effects referred to above.

To remedy this, and bearing in mind the inadequacies of the undertakings proposed by the notifying parties, the Autorité asked the Vivendi group and GCP to implement three series of measures seeking three objectives.

Firstly, the Autorité did not wish to destabilise the financing system for French cinema, structured around a strong vertically integrated operator and a premium channel which is the main contributor to French creation. In fact, the abundance and quality of this production benefit the final consumer, and it is appropriate therefore not to weaken the economic model of a channel existing prior to the controlled operation. The Autorité found that this model was based on high levels of investment in quality content, the risk of which could be difficult to assume without minimum visibility on the outlook for the exposure of this channel, which involves control of the relationship between the publisher of the channel and the subscriber.

Secondly, the Autorité defined remedies seeking to favour the diversity of operators in the pay TV sector, to enable the emergence of an offer which is admittedly not as rich as that of GCP but cheaper and, consequently, more accessible to consumers. Faced with this objective, the Autorité found that the market of French Internet TV service via ISP platforms should continue to grow for two reasons. The first relates to changing xDSL technologies which should improve the performances of platforms using France Télécom's traditional copper network for broadband digital signals. The second results from the roll-out of fibre optic cable, a network with significant technical benefits for pay TV services both in terms of the quality of the signal and bandwidth and which should allow consumers to benefit from Internet access and better quality and innovative audiovisual content (interactivity, on-demand services, access to HD and 3D content).

This outlook is no different from that envisaged by the Minister of the Economy in 2006. But the effect of both the breaches of undertakings agreed by GCP has been to remove access providers' control over the technical platform on which they are active. Access by Internet service providers to a wholesale market of attractive pay TV channels remains a key objective in this context. To this end, management of the distribution exclusivities offered by GCP to independent channels and the unbundling of movie channels published by GCP should make it possible to secure supply of the wholesale market.

Thirdly and finally, the Autorité found that remedies should preserve the future of the markets concerned, avoiding the pre-emption by GCP of the new forms of content consumption, namely video-on-demand or smart TV. Non linear means of consuming audiovisual content offer significant opportunities for the growth in competition in the pay TV sector. This is particularly the case with video-on-demand by subscription, where development is still at an embryonic stage. The special place of domestic cinema in France and the specific details of its financing method differentiate it from other countries, in which a significant fall in non linear service by Internet operators has been recorded.

However, GCP's position in the rights acquisition markets and the size of its database, are such as to give it a considerable advantage if the non exclusive model for the acquisition of rights is called into question. The Autorité therefore ensured, using suitable remedies, that the entity resulting from the merger of 2006 does not neutralise the competitive potential created by these new consumption methods.

According to these principles, the injunctions adopted by the Autorité de la concurrence include the following remedies:

- the Autorité adopted several measures to manage the acquisition of cinematographic content, involving the duration of contracts, negotiation and the treatment of beneficiaries, in order to remedy the purchasing power of GCP;
- the Autorité also sought to limit the influence exerted by GCP on OCS after taking a holding giving it joint control over the Orange movie package. The Autorité therefore required GCP to waive its right to be provided with strategic information on the bundle, to waive a clause capping acquisitions of OCS and to ensure its representation on the board of the company Orange Cinéma Série-OCS by independent directors;
- the Autorité remedied the economic dependency of independent publishers vis-a-vis GCP, imposing an obligation on the group to take on a minimum proportion of independent channels in its own bundle of thematic channels, with transparent and non discriminatory objective conditions, formalised in a "reference offer", which should be communicated to any publisher that so requests;
- likewise, the Autorité specifically imposed an obligation on GCP to distribute any channel on the French market offering premium movie or sports content, under transparent, objective and non discriminatory technical and pricing conditions;
- the Autorité remedied the effects of the operation on channel distribution, imposing an obligation on GCP not to couple the distribution of channels on different broadcast platforms. To this end, GCP was asked to assess, transparently and distinctly, the distribution of channels to each proprietary platform serving over 500,000 subscribers, precisely identifying the value of the exclusivity attributed for distribution on each platform, without the GCP having a right to link this value with obtaining exclusivity on other proprietary platforms;
- furthermore, the Autorité asked GCP to make all the movie channels it publishes available to competitor distributors, under transparent, objective and non discriminatory conditions having, in particular, no price squeezing effects;
- finally, the Autorité preserved the competitive potential of video-on-demand markets, prohibiting GCP from reserving exclusive distribution rights and restricting the access of competing video-on-demand offers on ISP platforms.

This decision and all of the measures adopted were confirmed by the Council of State by decision of 21 December 2012.

Over and above the decision by the Autorité de la concurrence, the Ministry of the Economy and the Ministry of Culture and Communications considered the possible adaptations of the regulatory framework to be applied, on the one hand, to broadcasters established in France and, on the other hand, to new operators liable to develop a smart TV product even though they were not established in France. Even though the development of these new modes of access to audiovisual content could open up much wider

access to content directly transmitted over the internet and enable market entry to worldwide internet operators such as Google, Apple and Amazon, it should be noted that these operators are not subject to the same rules, and especially the obligations designed to promote diversity of content and pluralism of information, raising questions of distortion of competition and fairness in the application of these obligations.

Finally, the development of technologies and practices involve several major changes that could have a serious impact on the way the sector is organised, such as the development of television over IP networks, the delinearisation of content, the multiplication of terminals and the emergence of the internet operators into the competition stakes that were once reserved for television networks. Since 2007, when the current Audiovisual Media Services Directive was adopted, new corporate models have been launched and the number of broadcasters who initially merely hosted content produced by users have now become involved (in the same way as Youtube and DailyMotion) in discussions with rights-holders to distribute their content on their platforms. The positioning of these operators, who are currently outside the field of audiovisual regulation, within the value chain, while their weight in the market is developing as a corollary to their online services, poses the question of competition in the audiovisual sector.

These developments affect not only the broadcasters and transmitters of television programmes, but also the operators and suppliers of Internet access who have witnessed a considerable increase in traffic on their networks. For their part, the television networks are particularly afraid of failure to comply with the integrity of their signal by the new transmission services and terminal environments.

A meeting with those who are subject to different legal frameworks and whose practices diverge, as well as changes that have occurred to the value chain, could require increased vigilance on the part of the regulators, even if the sectoral and competition contexts already make it possible to deal with certain situations. Thus, although these changes seem, at first glance, to mainly impact the regulation of audiovisual content currently set up by the CSA in France, the ARCEP is studying the new balance of power between those active in the marketplace, especially through its studies of the neutrality of the internet, both on a national and a European level.



## GREECE

### 1. What is the state of competition in the television broadcasting sector in your jurisdiction?

#### 1.1 Product markets and level of concentration

Through its judgments the HCC has distinguished several product submarkets of the Greek television market:

- Production and acquisition of TV content (in general) and acquisition of rights of other TV channels (specifically) are considered upstream markets to that of content broadcasting (free-to-air channels). Retransmission of content to consumers/viewers via pay per view platform and provision of technical equipment are considered to be downstream markets to that of content broadcasting. Acquisition of Greek TV channels' broadcasting rights by Pay TV platform providers is considered a separate relevant product market. In judgment 399/V/2008 concerning the agreement between Greece's national broadcaster (ERT) and UEFA for the exclusive broadcasting rights of UEFA's EURO 2008 competition the HCC viewed "*the TV broadcasting rights of events concerning football national teams that take place every four years*" as a separate product market.

Another major distinction in the Greek TV broadcasting market is that between the submarkets of free-to-air TV and pay-TV:

- Free-to-air TV market includes all free-to-air TV channels (both public service broadcasters and commercial advertising channels) that broadcast in national and regional range.

Currently active in the Greek free-to-air broadcasting market are: the national broadcaster (ERT S.A.) transmitting three separate digital bouquets: a. BOYAH, BBC World News, Deutsche Welle, PIKSat, b. NET, ET-1, ET-3, ERT HD and c. (in collaboration with NOVA) Euronews, TV5 Monde, as well as 6 major national private television networks (Mega, Antenna, Star, Alpha, Skai, Makedonia TV) transmitting on a national level. In addition, there exist approximately 150 local and regional television stations broadcasting across the country.

Regarding the alternative broadcasting transmission methods of free-to-air TV market, those are:

- Analogue Terrestrial: this is the most popular means of broadcasting in Greece. Basically it includes all free-to-air TV channels, both of national and regional range. However, by means of the Geneva 2006 Regional Agreement signed by Greece (in June 2006) in the framework of the International Telecommunication Union (ITU), the state ("Region 1" of the agreement) undertook the obligation to fully transition from analogue terrestrial to digital broadcasting by 2015. Furthermore, the European Commission communication "*on accelerating the transition from analogue to digital broadcasting*" considers the the end of 2012 to be the optimum timeframe for switchover of all member-states from analogue to digital (DBV-T) broadcasting. An extension of the above timeframe is possible taking into account the state of development of digital TV in each state. In Greece, switchover from analogue to digital with (temporary) simultaneous analogue and digital broadcasting officially commenced in 2009.

- Digital Terrestrial: In January 2006, ERT launched free-to-air Digital Terrestrial Television (DVB-T) with three "pilot" channels called Prisma+, Cine+ and Sport+, collectively branded as ERT Digital. The first channel, Prisma+, was targeted at disabled persons, Cine+ broadcasts movies, and Sport+ broadcasts a sports program. A fourth channel, the Cypriot national channel's satellite program RIK sat, is retransmitted on digital together with the three ERT Digital channels on the same frequency. As of September 2009, some private television stations in Greece (Alpha, Mega Channel, ANT1, Star, Alter, Makedonia TV, SKAI TV) have started broadcasting on a digital terrestrial signal through the DIGEA platform. DIGEA (established by the TV stations Alpha, Mega Channel, ANT1, Star, Alter, Makedonia TV, SKAI TV), has undertaken digital broadcasting of TV programs for private stations of national range, as well as any other stations choosing to use its services. Apart from DIGEA, a company called Digital Union undertakes digital broadcasting for private stations of regional range.
- Digital Satellite: A small number of Greek free-to-air TV channels transmit their signal through digital satellite transmission (ERT Sat).
- Pay-TV services were initially offered in Greece by Filmnet (provided by the company NetMed, which is now acquired by the Forthnet Group of Companies). This service broadcasted using the analogue terrestrial method and still exists, although it has been overshadowed by the same company's digital satellite platform (brand name: NOVA). At present, Hellenic Telecommunications Organization (OTE S.A.) also offers Pay-TV services (OTE TV).

Regarding the technical means of Pay-TV transmission, those are:

- Analogue Terrestrial: The channels NOVASPORTS 1 and NOVACINEMA 1 can be received by using a decoder and aerial antenna.
- Digital Satellite: NOVA and OTE TV via Satellite use digital satellite transmission for broadcasting of their content.
- Cable TV: There is currently no cable television system in Greece.
- Internet Protocol TV (IPTV): In 2006, two companies launched television service via IPTV: Vivodi Telecom and On Telecoms. In 2011, On Telecoms acquired Vivodi. ON Telecoms offers its television service bundled with High-speed Internet & Telephony services, transmitting both Greek and international TV stations, but not producing its own content. In 2009, OTE S.A. (the former state-owned incumbent in telecommunications) launched an IPTV service called OTE TV via Conn-x TV. Conn-X offers some Greek channels, International TV stations and some own production TV channels, namely Conn-X TV Sports. In March 2009, Greek broadband provider Hellas On-Line (HOL) also launched an IPTV platform called HOL TV, offering a few Greek networks and some International channels. It is also the first provider in Greece to offer HDTV as well as Video on demand.
- Mobile TV: All the mobile operators in Greece (Cosmote, Vodafone and WIND) offer mobile TV services to its customers. They basically offer access to specific TV content of some free-to-air Greek nationwide channels of which they have acquired mobile TV broadcasting rights. Vodafone also offers access to the pay-tv channels NovaSports 1, 2, 3 which are made available to subscribers via an agreement with Greek DTH provider NOVA.

The new Digital Terrestrial Broadcasting Frequency Allocation Chart was recently released by the Ministry of State and the Ministry of Development, Competitiveness & Shipping (Joint Ministerial Decision no. 42800/2012 published in the Government Gazette issue B' 2704/5-10-12). The above Decision designates the 156 transmission centers in the Greek territory. The timeframe of complete

switchover from analogue to digital broadcasting shall be announced in due course according to the provisions of Law no. 4038/2012 Art. 8 par. 3 and Law no. 4053/2012 Art. 37.

Regarding vertical integration:

- Free-to-air TV channels are partly vertically integrated. Apart from offering their content, nationwide free-to-air TV channels use a joint-venture non Pay-TV platform (DIGEA) in order to transmit their signal to consumers.
- NOVA and Conn-X TV are vertically integrated since they both offer channels of own production NOVACINEMA, NOVASPORTS and OTE Cinema, OTE Sports, respectively, whereas at the same time they also offer Pay-TV platform services. Further, they offer the additional technical equipment used to receive their signal.
- HOL and On Telecoms (IPTV providers) are not fully vertically integrated. They exclusively broadcast other TV channels through their platforms (see «Pay-TV Platform» above), but do offer the additional technical equipment used to receive their signal.

**Table 1. 2011 - TV Market (Content) Market Shares**

<b>TV Channel - Platform</b>	<b>Market Share** (falls within range indicated below)</b>
NOVA* (Multichoice)	[...]%
MEGA	[...]%
ANT1	[...]%
STAR	[...]%
ALPHA TV	[...]%
SKAI TV	[...]%
NET	[...]%
ET1	[...]%
ET3	[...]%
902 TV	[...]%
OTE TV	[...]%

(\* includes NOVA and Filmnet

(\*\*) market shares' Calculation was based on advertising expenditure and revenue from domestic program sales (law 3592/2007).

## **1.2 Legal framework**

Recent developments in the Greek competition law framework concerning the Media sector involve concentrations of Media undertakings, particularly conditions for their clearance with competition law.

Taking into account the significant, from a national economy point of view, role Media undertakings perform and the effect media mergers have on pluralism of information in a democratic society, Law no.



3592/2007<sup>1</sup> (“Concentration and Licensing of Media Undertakings and other provisions”) was issued as *lex specialis* for mergers and acquisitions as well as for abuse of dominant position and concerted practices of Media undertakings, complementary to the Greek Competition Law (no. 3959/2011). The competent authority for the application and enforcement of the said provisions is the Hellenic Competition Commission (hereinafter the “HCC”). A special department “for the Control of the Media Market” was established within the HCC pursuant to the above Law in 2008.

Law 3592/2007 provides for a single market (the Media market), which can be further analyzed into four relevant product submarkets, each medium formulating a separate one (TV, Radio, Newspapers, Magazines) without allowing for any further definition of a narrower relevant market within each media sector. As far as geographic markets are concerned, the Law makes a distinction between nation-wide and regional range for all four relevant product markets.

As mentioned above, it was considered that the control of Media concentrations merited a special legal framework, due to the sector’s significant impact on formulating public opinion through controlling information outlets and the danger of quality deterioration in media programs. The Law’s targeting becomes apparent from the notion of “concentration” in its context not being defined by means of economic parameters but based on the percentage to which the public is affected by the relevant media, in combination with ownership or participation in media undertakings of any type (television, radio, newspapers and periodicals) in the relevant market, where such undertakings are active. Any natural or legal entity is deemed dominant if active (a) in media undertakings of the same type, when it has obtained at least a 35% market share in the relevant market of the range of each medium; (b) in media undertakings of different types, when it has obtained either at least a 35% market share in the relevant market of the range of each medium or at least 32% market share in the aggregate of two markets, when active in two different media undertaking types of the same range; at least 28% market share in the aggregate of three markets, when active in three different media undertaking types of the same range; at least 25% market share in the aggregate of four markets, when active in four different media undertaking types of the same range<sup>2</sup>.

The above definition of “media concentration” falling within the scope of Law 3592/2007 (dictated by the said concentration’s possible effect on public opinion and based on advertising expenses and revenue from sale of programs and publications) leads to the conclusion that not all media concentrations are part of the special Law’s subject-matter. Conversely, its provisions cover solely those concentrations that affect the relevant markets of television and radio broadcasting and the market for circulation and sale of publications for newspapers and magazines. On the other hand, concentrations affecting the content market, which relate not only to the quality but also to the type of effect that media exert on public opinion, as well as the pluralism in broadcasts, are exempt from the Law’s provisions and fall within the general provisions of Competition Law.

## **2. What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

The television and broadcasting sectors in Greece are subject to a strict licensing procedure of free-to-air and pay-TV media stations (licence granted by the Minister for Press and Media upon opinion by the competent independent authority -National Council for Radio and Television (NRCTV)- after a review of conditions creating barriers to entry for new undertakings). Television transmission frequencies have

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<sup>1</sup> Entry into force 19 July 2007; transposing European Council Directives 2002/19 EC, 2002/20 EC, 2002/21 EC, 2002/22 EC and 2002/77 EC.

<sup>2</sup> The percentages listed are computed in reference to the relevant product market corresponding to the type of medium in question.

traditionally been considered a public good in the Greek legal order; subsequently, also due to scarcity of frequencies for terrestrial transmission, public interest considerations are taken into account regarding the licensing procedure. Factors reviewed by the NRCTV in the licensing process, apart from technical details and the quality of programs (obligation of providing programs of high quality and objective information devoid of discrimination), mostly concern the set up, financing and ownership of media undertakings, given that the legal framework aims at restricting concentration in the relevant sector.

As far as free-to-air television is concerned, Law no. 2328/1995 sets the criteria for licensing private commercial TV stations. Inter alia, during the licensing process, the NCRTV reviews ownership of the station at issue with the aim of restricting concentration in the media sector. Thus, a joint stock company can obtain only one license for a television station and/or one license for a radio station. Ownership of more than one electronic information medium of the same kind is not permitted, and every physical or legal person can take part in just one company. The same rule applies to relatives (up to the fourth degree) of natural persons. As regards cross media ownership, a single company or individual cannot participate in more than two media categories. Holding a position in public administration or in a legal entity of the wider public sector which carries out works or supplies or provides services is deemed incompatible with being the owner, the partner, the main shareholder or the managing executive of an information media company. All types of related persons, such as spouses, relatives, financially dependent persons or companies, are also included in the said prohibition.

Law no. 2644/1998 constitutes the corresponding regulatory framework for private commercial Pay-TV stations. The said legislation regulates the provision of pay-radio and TV services through analogue or digital means, either terrestrially or via cable or satellite. For terrestrial transmission there is a competitive licensing procedure, due to scarcity of frequencies. At the same time, licenses for satellite transmission are submitted to the NCRTV. Licenses are granted only to limited companies (S.A.) the shares of which should be registered. In an effort to avoid the creation of dominant positions, the law limits the number of licenses allowed to be held by one party (i. e. an interested party can only take part in one company providing pay-services by the same means of distribution, and in one additional service using different means of distribution). Moreover, as another means of restricting concentration in the media sector, Art. 5 of Law 3592/2007 (“Concentration and Licensing of Media Undertakings and other provisions”) prohibits the acquiring of control of more than one electronic medium of the same type; this is considered to create a presumption of decrease in plurality and impartiality of information.

As far as technological advancements and developments in the broadcasting field are concerned, digital terrestrial transmission has replaced (spectrum-consuming) analogue transmission to a great extent, offering more efficient broadcasting of a higher quality. It is also considered as a means of restricting or limiting frequency hacking.

Another positive development as far as effective competition is concerned, is the entry of a second undertaking (OTE-TV) in the Pay-TV broadcasting market.

In its first judgment concerning access to TV content (see *infra* OTE/Forthnet case) the HCC set standards for compliance with competition rules, ordering Forthnet/Multichoice to waive exclusivity clauses in its contracts with Greek free-to-air TV stations for content acquiring; this constitutes a crucial condition for guaranteeing unrestricted access of competitive media platforms to the Pay-TV market. Additionally, a new (formerly non-existent in the Greek geographic market) IPTV market has developed (see *supra* I, i).

To recapitulate, given the economic and non-economic significance of the sector, social objectives and the specificities of the value chain for the development and delivery of broadcasting services, as well as the potential for exercise of market power, the most significant challenges competition policy has to face

is opening up markets so that an effective competition process is safeguarded, keeping barriers to entry to a minimum extent necessary, coping with the scarcity of resources, and balancing public interest considerations with competition policy.

### **3. What has been your relevant experience in competition law enforcement relating to television and broadcasting?**

A relatively small number of competition cases relating to the television and broadcasting sectors have arisen in the course of HCC enforcement.

Recent relevant cases are the OTE/FORTHNET case and the UEFA/ERT case, discussed below:

#### **3.1 Commitments accepted in the OTE/FORTHNET case**

Regarding the Greek Pay-TV broadcasting market, a Statement of Objections (SO) issued upon a complaint filed by the Hellenic Telecommunications Organization (OTE) regarding alleged infringements of Articles 1 and/or 2 of Law 703/1977 and 101 and 102 TFEU, by MULTICHOICE HELLAS S.A and FORTHNET S.A., which offer the digital satellite Pay-TV platform under the “NOVA” brand name, was submitted in October 2011 following an investigation undertaken by the Directorate General for Competition (hereinafter the “DGC”) of the HCC.

The complaint alleged that the contracts and in particular the exclusivity clauses concluded between Forthnet, its subsidiary Multichoice and all major private free-to-air Greek nationwide-broadcasting TV channels, in order for the latter to broadcast their content via its pay-TV platform «NOVA», constituted an infringement of Article 1 and/or Article 2 of Law 703/77 and Articles 101 and/or 102 TFEU. The aforementioned exclusivity refers only to digital satellite Pay TV transmission, and does not include all other transmission methods (i.e. analogue terrestrial, digital terrestrial, IPTV etc). The complainant maintained that the agreements in question resulted in the creation of barriers for undertakings wishing to enter the satellite Pay TV market, where NOVA operates, as any potential subscriber is more likely, *ceteris paribus*, to choose the NOVA pay-TV platform which offers access to private free-to-air Greek TV channels. Recent developments have indicated that -for the same reason- the agreements in question raised barriers to the creation of a level playing field for existing competitors within the Greek Pay TV market.

According to the statement of objections (SO) issued by the HCC in January 2011, the exclusivity clause for satellite retransmission of the private free-to-air TV stations via its NOVA platform secured in practice an advantage for Forthnet over its potential and actual competitors in the market for the provision of satellite pay TV platform, thus artificially raising barriers to entry.

In its reply to the SO, and prior to the oral hearing before the Grand Chamber of the HCC, Forthnet offered commitments to meet the concerns raised in the SO. On 26 March 2011, the HCC decided, by a majority vote, to accept a revised version of the proposed commitments, whereby Forthnet and its subsidiary Multichoice agreed to: (1) Waive the aforementioned exclusivity clause and amend the respective agreements accordingly, with immediate effect (as of 27 March 2012), (2) Maintain the rest of the terms of the agreements in question, as currently in force, and (3) Commit to refrain from seeking the aforementioned exclusivity for an indefinite period. The said commitments were made binding on Forthnet and Multichoice by virtue of the HCC’s decision. They were regarded as a way to immediately ensure more effective access of competitors to the relevant market. In the event of non-compliance, the HCC may impose a fine up to 10% of their aggregate turnover of the financial year preceding the decision in question.

### 3.2 *Judgment 399/V/2008 (ERT/UEFA)*

On 1.3.2006, the Greek national (public) broadcaster GREEK RADIO & TELEVISION S.A. (“ERT”) notified to the HCC its licensing agreement with UNION DES ASSOCIATIONS EUROPEENNES DE FOOTBALL (“UEFA”) regarding rights to radio and television broadcasting of matches pertaining to the final round of the 2008 UEFA European Football Championship (EURO 2008) with a view to receive a negative clearance under Art. 11 of the previous Competition Law no. 703/1977).

The HCC granted the said clearance after a thorough assessment of the aforementioned agreement on the following grounds:

a. Regarding Price-fixing:

UEFA followed the necessary legal procedure of inviting all private and public radio and television undertakings to submit their offers and ERT was the highest bidder. Therefore, no procedure of price-fixing took place that would imply a violation or distortion of competition between participants.

b. Regarding limiting or controlling production, technical development, or investment:

No such restriction of competition could be affirmed. The licensing of broadcast rights to a sole entity guarantees the product’s consistency and homogeneity of quality.

c. Regarding sharing markets or sources of supply:

No violation of competition could be attributed to the fact that UEFA chose to make contracts with each national broadcaster separately. Due to language and cultural differences between European countries, distribution of broadcasting rights on a territorial basis (to domestic companies) was considered more advantageous for the transmission of football matches.

d. Regarding discriminatory conditions (refusal to supply):

Due to UEFA following a procedure of inviting all private and public broadcasting entities to submit offers and making a contract with the highest bidder, no competition infringement could be detected.

Finally, in recent years (2008-2012) the HCC has employed the above-mentioned criteria regarding concentrations in the media sector in a number of notified media merger cases [e.g. cases 415/V/2008 (Kontominas/ALPHA), 535/VI/2012 (ALPHA media group/SIXOMEN), 422/V/2008 (RTL/Wakerock), 409/V/2008 (Forthnet/Myriad)]. The Commission approved all the above mergers, which were found not to create dominant positions or materially restrict competition in the relevant markets.



## INDIA\*

## 1. Regulatory institutions and key regulations

Media regulation in India is currently under significant government regulation with multiple agencies involved in governing different aspects of drafting, implementing and enforcing policies and legislations.

## 1.1 Key regulatory institutions

- **Ministry of Information & Broadcasting (MIB)** is the apex body responsible for formulation and administration of the rules and regulations and laws relating to information, broadcasting, the press and films. MIB's ambit governs mass communication channels - radio, television, films, the press, publications, advertising and traditional mode of dance and drama. It plays a significant part in helping the people to have access to free flow of information. It also caters to the dissemination of knowledge and entertainment to all sections of society, striking a careful balance between public interest and commercial needs. MIB is a nodal agency responsible for international co-operation in the field of mass media, films and broadcasting and interacts with its foreign counterparts on behalf of Government of India. In case of any violations of programme and advertisement codes, an Inter-Ministerial Committee (IMC) constituted by the MIB looks into the complaints.
- **Ministry of Communications & Information Technology (MCIT)** has the responsibility for licensing transmission equipment, satellites, Internet Protocol Television (IPTV).
- **Telecom Regulatory Authority of India (TRAI)** was established under the Telecom Regulatory Authority of India Act, 1997. TRAI regulates telecom services, including fixation/revision of tariffs for telecom services, earlier vested in the Central Government. One of the main objectives of TRAI is to provide a fair and transparent policy environment, which promotes a level playing field and facilitates fair competition. From January 2004, broadcasting and cable services have been brought under the ambit of telecommunication services under section 2(k) of the TRAI Act. It also entrusts TRAI to make recommendations regarding terms and conditions on which the "Addressable Systems" shall be provided to the customers and the parameters for regulating maximum time for advertisements in pay channels as well as other channels. TRAI periodically reviews the tariff structure of the television channels including analog and digital cable TV services, DTH services, IPTV services and HITS.
- **Telecom Disputes Settlement & Appellate Tribunal (TDSAT)** adjudicates disputes arising from TRAI's orders, and disposes appeals with a view to protect the interests of service providers and consumers and to promote and ensure orderly growth of the sector.
- **Competition Commission of India (CCI)** established by the Competition Act, 2002 is responsible for ensuring fair and healthy competition in markets in India including TV and

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\* The views expressed in the document have been researched and analyzed by the officers of the Competition Commission of India and do not necessarily represent the views of Government of India.

broadcasting market. It also aims to develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.

## 1.2 *Key regulations*

- **Prasar Bharati (Broadcasting Corporation of India) Act, 1990** enacted to provide for the establishment of Broadcasting Corporation for India, known as Prasar Bharati. The Act defines the composition, functions and powers of this body.
- **Cable Television Networks (Regulation) Act, 1995** (amended in 2011) passed to regulate the operation of cable television networks in the country. It is the government's first attempt to regulate private broadcast media, primarily concentrated on cable operators. The Cable Television Networks Rules specifies a programming code that imposes restrictions on the content of both programmes and advertisements shown on cable television.
- Other Acts and regulations :
  - Information Technology Act, 2000
  - The Copyright Act, 1957
  - Consumer Protection Act, 1986
  - Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012
  - Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007 (Amended in 2009)
  - Register of Interconnect Agreements (Broadcasting and Cable Services) Regulation 2004 (Third Amendment in 2006)
  - Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012
  - Standards of Quality of Service (Digital Addressable Cable TV Systems) Regulations, 2012
  - The Standards of Quality of Service (Broadcasting and Cable Services) (Cable Television – Non-CAS Areas) Regulations, 2009
  - Consumers Complaint Redressal (Digital Addressable Cable TV Systems) Regulations, 2012
  - Regulation on the Standards of Quality of Service (Broadcasting and Cable services) (Cable Television - CAS Areas) Regulation, 2006

## 2. **Sector overview**

The Media and Entertainment Industry in India is one of the fastest growing sectors of the economy and is expected to grow at an average annual rate of 13.2 per cent to reach Rs. 1.19 trillion (USD 22.1

billion)<sup>1</sup> in 2015.<sup>2</sup> Some of the salient features of digitisation are enhanced number of channels and private stakeholder, momentum in crossover movies and crossover audience, increase in global presence of Indian channels and creation of domestic demand for animation and special effects.

The Broadcasting Sector consists of Television (including analog and digital cable TV services, DTH services, IPTV services, HITS and terrestrial TV services) and Radio services. The sector has shown significant growth over the years spanning last two decades. Television and Radio are projected to grow at compound annual growth rate (CAGR) of 14.5 per cent and 19.2 per cent respectively by 2015.<sup>3</sup>

Today, India is the third largest Television market after China and USA.<sup>4</sup> The television subscriber base has grown at over 34 per cent per year for the last 20 years and the service providers have also increased to commensurate this growth.<sup>5</sup> In 2003, DTH services were introduced and operators are adding various innovative offerings such as value added services (VAS), interactive services including movie on demand, gaming, shopping etc. Increase in the number of conventional TV channels and increase in the offerings by service providers indicates a healthy competition in the sector.

- The sector comprises of 800 plus satellite TV channels, 100 multi system operators (MSO), 26 pay broadcasters, 60000 local cable operators (LCO), 6000 independent cable operators, seven pay DTH operators, several IPTV service providers and public service broadcaster – Doordarshan (DD).<sup>6</sup>
- DD is the world’s largest terrestrial broadcaster with over 1400 terrestrial TV transmitters. DD covers 88 per cent of India’s geographical areas and provides coverage to about 92 per cent population of the country.<sup>7</sup>
- During 2011-12, TV households in India grew at 4.66 per cent to 150 million.<sup>8</sup> Direct to Home (DTH) services grew at 30.06 per cent to 46.25 million<sup>9</sup> and is expected to reach a subscriber base of 70 million by 2015.<sup>10</sup> DTH is leading the digital distribution as it accounts for more than 80 per cent<sup>11</sup> of all digital TV subscribers in India. Total cable TV subscribers were 94 million including 0.91 million subscribers in notified CAS areas.<sup>12</sup> Registered TV channels grew at 28.04 per cent at 831.<sup>13</sup>

<sup>1</sup> Exchange Rate of Rs. /USD, as on January 28, 2013, as per Reserve Bank of India. 1USD=Rs.53.8515

<sup>2</sup> Twelfth Five Year Plan (2012-2017) Economic Sectors Vol. II, Planning Commission, Government of India. Available at <http://planningcommission.gov.in/plans/planrel/12thplan/welcome.html>

<sup>3</sup> Ibid.

<sup>4</sup> TRAI Annual Report 2011-12. Available at [http://www.traai.gov.in/Content/Annual\\_Reports.aspx](http://www.traai.gov.in/Content/Annual_Reports.aspx)

<sup>5</sup> Ibid.

<sup>6</sup> Twelfth Five Year Plan (2012-2017) Economic Sectors Vol. II, Planning Commission, Government of India

<sup>7</sup> Ibid.

<sup>8</sup> TRAI Annual Report 2011-12

<sup>9</sup> Ibid.

<sup>10</sup> Twelfth Five Year Plan (2012-2017) Economic Sectors Vol. II, Planning Commission, Government of India

<sup>11</sup> Ernst and Young (2011), “Spotlight on India’s Entertainment Economy”, EYGM Limited. Available at <<http://www.ey.com/IN/en/Industries/Media---Entertainment/Spotlight-on-India-entertainment-economy>>

<sup>12</sup> TRAI Annual Report 2011-12

<sup>13</sup> Ibid.



Radio is one of the most popular and affordable means for mass communication in India. Radio provides coverage to 99.18 per cent of the population and 91.85 per cent of the country.<sup>14</sup> The radio sector consists of 245 private radio stations and a public service broadcaster – All India Radio (AIR).<sup>15</sup> FM radio market registered a robust growth of over 15 per cent during the year 2011 making it a Rs. 1150 crore (USD 213.6 million) industry.<sup>16</sup> Further, as on March 2012, of the 167 community radio station licenses issued, 130 were operational.<sup>17</sup> The phase III of FM radio licensing, yet-to-be-implemented, is likely to further boost the sector. This policy will extend FM radio services to about 227 new cities with a total of 839 new FM radio channels in 294 cities. A total of 216 cities and towns, with a population of one lakh, will get private FM radio stations for the first time. Also 67 of the 86 cities and towns, already have private FM Radio channels, will get additional channels.<sup>18</sup>

The growth potential of the broadcasting sector is fuelled by convergence of technologies. Since 1990s there has been a transformation in the role of the Government from being the major services provider in this sector to that of a facilitator. However, there is a need to maintain the momentum of growth and promote development and employment generation within the sector. There is also a need to ensure free flow of information, safeguard freedom of speech and expression as well as enhance the reach of broadcasting to the inaccessible areas within the country.

### 3. Trends and key issues

At present subscribers in India can view television content through three main modes, given below. Of these, only the first link has analog mode of transmission.

- Cable Television - Presently both analog/ non-digital and digital
- Direct to Home (DTH) - Digital
- Internet Protocol Television (IPTV) – Digital

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<sup>14</sup> Ibid.

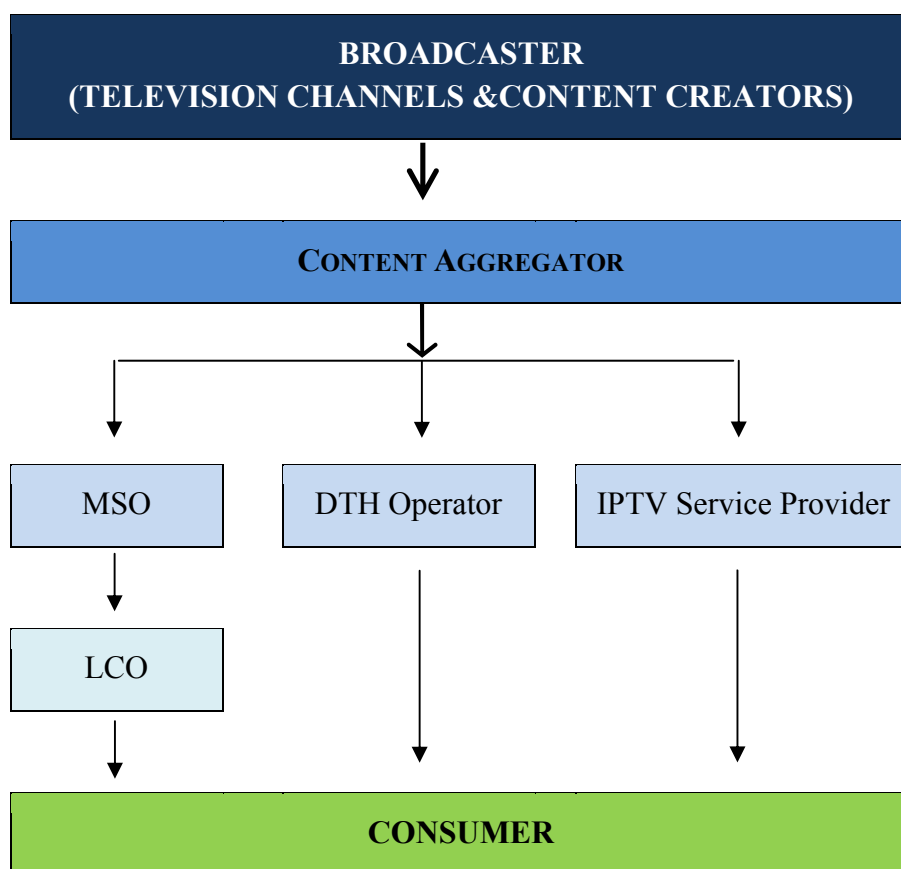
<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Indiantelelevision.com, Fresh cabinet nod for FM Phase III auction in few weeks, August 16, 2012. Available at <<http://www.indiantelelevision.com/headlines/y2k12/aug/aug128.php>> Accessed on January 18, 2012

The schemata of television transmission through these three modes can be represented as follows:



### 3.1 *Digital Addressable System (DAS) in the cable TV sector*

The distribution of subscribers in analog and digital mode of transmission is roughly 65:35. MIB has decided to introduce digitisation in the country through Conditional Access System (CAS) and TRAI is implementing this process. Digitisation is favoured to address the shortcomings inherent in the analog networks and to increase the number of channels by genre, increase the competition in television broadcasting and improve revenue-sharing models. The implementation of DAS is being carried out in a phased manner. In Phase I, four metropolitan cities have switched to digital system in 2012. In phase II, cities having population over one million will switch over by March 2013. All other urban areas will switch over in phase III by November 2014 and the rest of India in Phase IV by March 2015.<sup>19</sup>

It is expected that implementation of DAS will be a game changer and will benefit all stakeholders. The advantages of digitisation include efficient utilization of bandwidth and a more transparent subscriber base for the broadcasters for assessment of subscriber revenue, thereby generating a potential for possible levy of service tax. It also will enable a more robust audience viewership rating, thereby reducing/eliminating abuse or manipulation by rating agencies. It will also provide support to niche genres through

<sup>19</sup> Cybermedia India Online Limited, Digitisation of Cable TV: What You Didn't Know, November 01, 2012. Available at <<http://archive.ciol.com/News/News-Reports/Digitisation-of-cable-TV-What-you-didnt-know/166511/0/>> Accessed on January 15, 2013

access to targeted audience at lower carriage fee. The broadcast of such channels is economically unviable at the current carriage fee being charged by analog distributors due to lower viewership.

### **3.2 *Headend in the Sky (HITS)***

It is anticipated that HITS would provide greater channel capacity and may lower the investments thereby enabling deeper penetration of required cable services, particularly into rural areas. However, availability of transponder capacities for HITS services is a constraint. Policy makers foresee that the implementation of DAS in the cable TV sector would help resolve certain issues and positively impact HITS services. The Government is committed to digitise cable TV as per its deadline and to achieve this it has issued permission to two companies to operate HITS services in 2003 for fast implementation of CAS. Guidelines for operating HITS services have also been formulated by MIB.

### **3.3 *Internet Protocol Television (IPTV) service***

IPTV platform is at the intersection of broadcasting and telecommunication technology. It provides superior quality, interactive services, delivery of more content and functionality. However, its reach is limited by accessibility to broadband connections. Current broadband penetration in India is extremely low. Once the penetration of broadband services improves, the growth in demand for IPTV services will see a rise. With the introduction of 4G services and the growing techno savvy population, IPTV has a potential to become a huge success in India.

### **3.4 *Content generation and regulation***

Digitisation is expected to increase focus on quality of content and provide greater choice for viewers. There is an increasing need for differentiated content due to the increase in the number of channels. Most television channels in India produce their content in-house. However, the sector is also witnessing a growth in quality content creators who sell television content to channels.

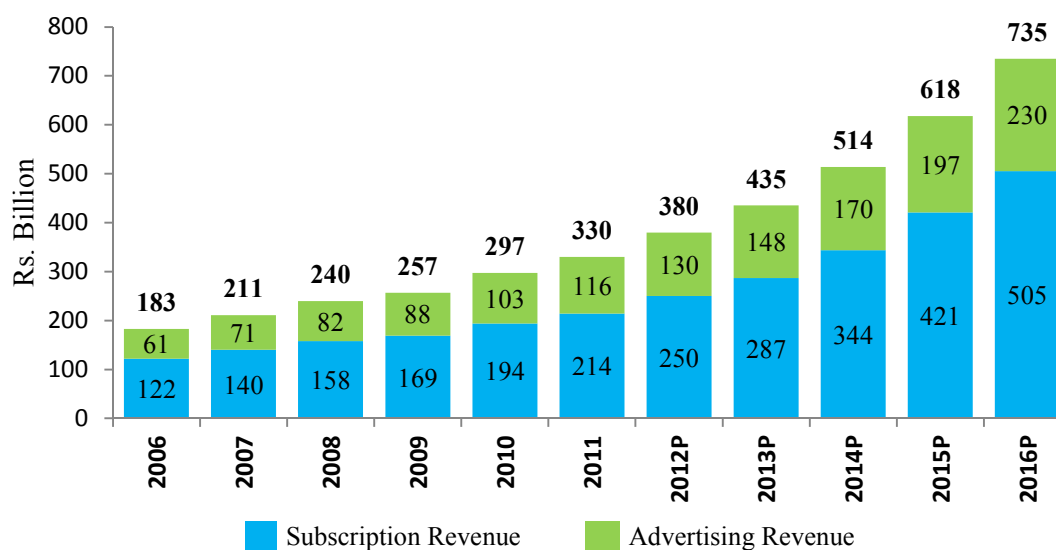
Self-regulation is viewed as the best way to regulate the content. Industry experts feel that introducing a measure to regulate content is not desirable and will not solve any purpose. It is also not possible for the Government to monitor such vast volume and diverse content. Direct control and micro-management may also be considered violation of the fundamental right of freedom of speech and expression enshrined in the Constitution. As self-regulation is considered effective mechanism for content regulation it is already institutionalised by private broadcasters, in both news and non-news channels. The Indian Broadcasting Foundation (IBF) has laid down Content Code and Certification Rules, 2011 covering a content-related principles and criterion for television broadcast.

### **3.5 *High Definition Television (HDTV)***

Channels that are transmitted through HD technology requires special set-top-box to view them in DTH mode. At present, the HDTV market is a very small fraction and is accessible only to the affluent class. Being in a nascent stage, the market is out of the purview of TRAI's regulation but the regulator would regulate the market at an appropriate time. The competition amongst broadcasters will increase with the government approving more licenses for launch of new HD channels.

### 3.6 Pricing system and revenue generation

Revenue is generated for the broadcasters from advertisement and subscription.



Source: KPMG & FICCI (2012), “Digital Dawn – Indian Media and Entertainment Industry Report”, KPMG. <[https://www.in.kpmg.com/Securedata/FICCI/Reports/FICCI-KPMG\\_Report\\_2012.pdf](https://www.in.kpmg.com/Securedata/FICCI/Reports/FICCI-KPMG_Report_2012.pdf)>

From the above figure, it is suggestive that the overall television industry is expected to grow at a CAGR of 17 per cent over 2011-16 to reach Rs.735 billion (USD 13.6 billion) in 2016 and the share of subscription is expected to increase from 65 per cent in 2011 to 69 per cent in 2016.

Subscription amount for pay channels is at present regulated by TRAI’s guidelines. Consumers are given the choice to pay per channel they subscribe (a-la carte) or subscribe to channels as a bouquet.

## 4. Competition issues in television and broadcasting sector

Although the television and broadcasting sector witnessed the entry of private broadcasters over two decades back, it is still an emerging sector. New regulations are being implemented to address the changing markets and multiple regulators are governing various different aspects. The three main competition issues that are surfacing include scarcity of spectrum, abuse of dominance in television viewership ratings and the information asymmetry in the subscriber base in the analog mode.

### 4.1 Scarcity of spectrum/capacity constraints

In January 2010, the Government temporarily suspended giving permission to new channels in India on the grounds of reviewing the transmission of existing channels, assessing the net worth of the channels and checking the availability of spectrum. TRAI was directed to give recommendations on whether the number of television channels in India should be capped and new entrants should be restrained because of the surge in the number of players in the industry. TRAI recommended that there should not be a cap on the total number of satellite based channels, but the eligibility criteria for registration should be revised. In May 2011, MIB cleared 75 new channels from among 150 applications received during the interim period of two years either seeking permission to start new channels or replicate the existing ones in HD.<sup>20</sup> The net

<sup>20</sup> ICRA (2011), “Indian Television Broadcasting Industry: Recent Developments”, ICRA Limited. Available at <[http://www.icra.in/Files/ticker/Media\\_Quarterly%20Note,%20July%202011.pdf](http://www.icra.in/Files/ticker/Media_Quarterly%20Note,%20July%202011.pdf)>

worth criteria for uplinking of non-news and current affairs and downlinking of foreign channels is revised to Rs. 5 crore (USD 0.9 million) from Rs. 1.5 crore (USD 0.3 million) for the first channel and Rs. 2.5 crore (USD 0.5 million) for each additional channel. For news and current affairs channels, it is increased to Rs. 20 crore (USD 3.7 million) from Rs. 3 crore (USD 0.6 million) for the first channel and Rs. 5 crore (USD 0.9 million) for each additional channel.<sup>21</sup> While this policy seems to have been adopted to make efficient use of the limited spectrum, it may restrict the entry of new players also.

#### **4.2 Television viewership ratings**

At present, television viewership ratings in India are published by TAM Media Research (TAM) and Audience Measurement and Analytics Limited (aMap). While TAM publishes its viewership data twice a week, aMap publishes its data every day. All television channels in the industry are focused on obtaining high ratings to increase their advertising revenues as these ratings are used by media planners to devise advertising strategies. As the broadcasters are closely monitored and frequently rated, competition amongst them is intensified owing to the dependence of the advertising revenues on these ratings. Transparency, accountability and objectivity of the ratings are of prime importance as false and misleading ratings can harm the broadcasters, advertisers and viewers. Hence, ratings have a major impact on the programming content of television channels. Since there are only two rating agencies, the competition for television ratings is limited, thereby leading to a possibility of abuse of dominance and the ratings published can also be biased.

In 2010, MIB constituted a committee chaired by Dr. Amit Mitra to review the existing ratings measurement system. In November 2010, the committee recommended a roadmap for improving the existing system. One of the critical recommendations was increasing the number of 'People meters' from a small sample base of 8,000 to 15,000 in two years and further to 30,000 in next three years covering the entire nation.<sup>22</sup>

#### **4.3 Information asymmetry on subscriber base**

Television subscriber base in India is at present opaque owing to non-availability of reliable information. The distribution of subscribers is heavily skewed in favour of analog mode, which is characterized by low channel carrying capacity and little addressability. About 78.5 per cent are connected through analog cable, which provides a near monopoly power to the analog cable in terms of last mile connectivity.<sup>23</sup> There exists a bone of contention in the supply chain of television broadcasting in the analog mode between the content aggregator and MSO and between the MSO and LCO regarding the subscriber base owing to its under declaration, which affects the revenue mobilised per channel, per consumer. LCOs do not reveal the exact number of households serviced by them as they directly cater to the consumers and have the last mile advantage. Owing to this, there have been many disputes between the pay channels and MSOs & LCOs. The ongoing implementation of digitisation will lead to a more transparent assessment of the subscriber base of the country. Due to improvement in transparency of

<sup>21</sup> Press Information Bureau, Government of India, Proposal for amendment In Policy Guidelines for Uplinking/Downlinking of TV channels approved, October 7, 2011. Available at <<http://pib.nic.in/newsite/erelease.aspx?relid=76506>> Accessed on January 18, 2013

<sup>22</sup> Press Information Bureau, Government of India, Committee Provides Roadmap to Look Into the TRP Issues - Smt. Soni: Committee Submits Its Report to I&B Minister, January 10, 2011. Available at <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=68958>> Accessed on January 9, 2013

<sup>23</sup> ICRA (2011), "Indian Television Broadcasting Industry: Recent Developments", ICRA Limited. Available at <<http://www.icra.in/Files/ticker/Media.Quarterly%20Note.%20July%202011.pdf>>

subscriber base, broadcasters and MSOs are anticipated to have better bargaining power over LCOs thereby enabling them to earn higher subscription revenue.

Further, in many areas LCOs and small MCOs enjoy a local monopoly status leading to non-standard pricing for the consumers. A market study commissioned by TRAI observed a wide dispersion in the monthly cable bill from Rs. 149 (USD 2.8) in Kochi (Kerala) to Rs. 322 (USD 6) in Shillong (Meghalaya) for similar services.<sup>24</sup> Further, the LCOs arbitrarily increase their tariffs in their locality and in most localities alternate cable operators are absent. Thus, owing to this monopoly status, LCOs restrict competition and prevent free market forces from operating thereby keeping prices under check.

Such anti-competitive practices prevalent in the analog mode may encourage broadcasters to form distribution alliances or joint ventures to strengthen their ability to negotiate with the MCOs/LCOs, improve their bargaining power in negotiating the carriage fees and minimize their losses in subscription revenues due to underreporting.

## 5. Competition enforcement in India

Section 3 & 4 pertaining to anti-competitive practices and abuse of dominance respectively came into effect from May 2009. Section 5 & 6 and other regulations regarding combinations were notified and merger review came into effect from June 1, 2011. Section 5 & 6 regulates mergers and acquisitions above a specified threshold.

### 5.1 Interoperability of DTH Set-Top-Boxes (STBs)

Currently there are seven DTH service providers in the country. There is an issue of interoperability of the STBs. Allowing technical interoperability may benefit the subscribers by enabling them to shift from one operator to another without having to buy a new STB. This may lead to increased competition in the market and possibly lower prices. In *Consumer Online Foundation vs. Tata Sky Limited & Ors.*, the Commission concluded that the STBs were not interoperable because all the DTH operators (Tata Sky, Reliance Big TV, ZEE's DishTV and Bharti's Airtel) were using different technologies and standards for signal transmission. CCI had closed the case against DTH operators ruling out any violation of either Section 3 (anti-competitive agreement) or Section 4 (abuse of dominant market position) of the Competition Act 2002. Not allowing interoperability was not abuse of dominance but valid on grounds of techno-economic feasibility. No tacit agreement or action in concert was found and it was observed that the DTH market was fairly competitive.

### 5.2 Abuse of dominance in television viewership ratings

TAM, a 50:50 joint venture between Nielsen (India) Private Limited and Kantar Market Research, measures TV Viewership and monitors advertising expenditure across television channels, radio and print. Public sector broadcaster Prasar Bharati moved CCI alleging that TAM agency is abusing its dominant position by not carrying out audience measurement in a fair manner.<sup>25</sup> It is alleged that TAM was 'limiting the provisions of audience measurement services' and is abusing its monopoly position in India by manipulating ratings data in favour of broadcasters who paid money. Also, the news broadcaster NDTV filed, in July 2012, a law suit against Nielsen and Kantar Media for manipulation of viewership data.

<sup>24</sup> CMS Media Lab and Assocham India (2012), "Background Paper on Digitizing Indian Broadcasting", Assocham. Available at <<http://www.assochem.org/arb/general/CMS-Final-Background-paper.pdf>>

<sup>25</sup> Business Standard, PrasarBharati alleges TAM rating anti-competitive, November 19, 2012. Available at <<http://www.business-standard.com/india/news/prasar-bharati-alleges-tam-rating-anti-competitive/492893/>> Accessed on January 7, 2013

NDTV has demanded USD 810 million as compensation for the loss in revenues it has suffered over the years and USD 580 million in penalty for negligence by Nielsen and Kantar officials.<sup>26</sup> The reported issue is under investigation of CCI.

### 5.3 *Consolidation and alliances amongst broadcasters*

A large number of channels indicate high level of fragmentation. But some broadcasters are consolidating to increase their bargaining power with distributors with regard to the push for digitisation. Consolidation is also likely to be favoured due to large investments required in content and distribution. In 2010, Sun Network and Network18 entered into a strategic alliance to form “Sun18 Media Services”. Sun18 distributes more than 30 channels across all platforms in India via all networks including cable, DTH, IPTV and HITS.<sup>27</sup> In 2011, Star Den Media Services Private Limited and Zee Turner Limited formed a 50:50 joint venture called “Pro Media Enterprise” to jointly aggregate and distribute television content.<sup>28</sup> The broadcasting industry has already witnessed the initial steps towards consolidation with NDTV Imagine being acquired by Turner Asia Pacific Ventures in 2009 and 9X by Zee Entertainment Enterprises Limited in 2010.<sup>29</sup>

### 5.4 *Intra-group corporate restructuring*

CCI approved the merger of Wireless Broadband Business Service (Delhi) Pvt. Ltd. (WBBS Delhi), Wireless Broadband Business Service (Kerala) Pvt. Ltd. (WBBS Kerala) and Wireless Broadband Business Service (Haryana) Pvt. Ltd. (WBBS Haryana) into Wireless Business Services Private Limited (WBSPL). 51 per cent and 49 per cent of equity shares in each of these parties are held by Qualcomm Incorporated and BhartiAirtel Limited respectively. It was observed that the shareholding pattern in each of the party before combination and shareholding pattern of WBSPL, the surviving entity, after the combination would be the same. Therefore, the proposed combination does not give rise to any appreciable adverse effects on competition in India.

### 5.5 *Others*

CCI approved the acquisition of 27.5 per cent equity shares of Living Media India Limited (LMI) by IGH Holdings Private Limited (IGH). LMI is a private company and is the holding company of India Today Group, which is involved in broadcasting through TV and radio, print media, publication and distribution of music etc. IGH is also a private limited company and is an investment company in Aditya Birla Group (ABG). ABG has diversified business interests in various sectors including telecommunications, IT, IT enabled services etc. ABG places advertisements in various media, which are owned and operated by ITG but the advertising revenue generated by ITG from ABG is negligible in total

<sup>26</sup> IBN Live, NDTV sues Nielsen over TAM rating ‘manipulation’, July 31, 2012. Available at <<http://ibnlive.in.com/news/ndtv-sues-nielsen-over-tam-rating-manipulation/276822-44-124.html>> Accessed on January 7, 2013

<sup>27</sup> Money Control, Network18, Sun Network form distribution venture Sun18, July 13, 2010. Available at <<http://www.moneycontrol.com/news/business/network18-sun-network-form-distribution-venture-sun18-469702.html>> Accessed on January 28, 2013

<sup>28</sup> Business Standard, Star Zee join hands for TV distribution venture, May 26, 2011. Available at <<http://www.business-standard.com/india/news/star-zee-join-hands-for-tv-distribution-venture/136496/on>> Accessed on January 28, 2013

<sup>29</sup> Line Mint, NDTV sells stake in NDTV Imagine to Turner Asia, Available at <<http://www.livemint.com/Companies/JkNbxGr03DK6VxhHZp5rl/NDTV-sells-stake-in-NDTV-Imagine-to-Turner-Asia.html>> Accessed on January 28, 2013



market of advertising. Further, ABG through Idea Cellular is engaged in telecommunications and internet services and ITG provides content for mobile value added services to be used by telecom companies. However, revenue generated by ITG through provision of such content is also a very small percentage of the total revenue generated by ITG. Hence, the proposed combination is not likely to have any appreciable adverse effects on competition in India.

A notice was filed by Independent Media Trust relating to a series of inter-connected and inter-dependent acquisitions intended to acquire control over Network18 Group companies by Reliance Industries Limited. The Commission assessed the effect of the combination on the businesses for supply of television channels, event management services and broadband internet services using 4G technologies and content accessible through such services. It was concluded that the combination was not likely to give rise to any appreciable adverse effect on competition and was cleared.

## 6. Conclusion

India is the third largest television market after China and USA. Television along with radio constitutes the most popular mediums of public broadcast with a wide coverage across the spectrum of population. These sectors would continue to grow at a double-digit rate due to higher penetration into smaller markets.

Digitisation is expected to be the major game changer in the television industry. Not only will it lead to emergence of more channels, but it will also minimize the capacity constraints in analog cable television distribution platform. It will also improve the quality of viewing and evolve more transparent revenue-sharing models.

The market structure in broadcasting varies from a highly-competitive in content creation to concentrated in content aggregation. While market structure with respect to distribution to consumers in cable platform is fragmented, in DTH and IPTV it is limited to few players. The skewed nature of market structure in the different nodes of television broadcasting has given rise to certain competitive concerns. The industry has witnessed consolidation in the form of acquisitions and strategic alliances amongst various broadcasters, content aggregators and distributors, which may enhance the revenue base for the upstream players.

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## INDONESIA\*

### Introduction

Indonesian television broadcasting industry divided into two clusters, namely public and private broadcasting; and free and paid subscription. From the two clusters, combination of private broadcaster with paid subscription is the most competitively dynamic. However, their market share is remained low (under five percent) from overall market for broadcasting industry. Therefore, the focus for this written contribution is limited to private broadcaster with free to air subscription.

Private broadcaster with free to air subscription (hereafter refer to “LPS”) in Indonesia consists of ten private companies with nationwide coverage frequency and content. Most of them are affiliated under certain group/holding. Below is LPSs together with their groups.

- RCTI, MNC TV, and Global TV are under MNC Group;
- TRANS TV and TRANS 7 own by PARA Group;
- AN TV and TV ONE by BAKRIE Group;
- SCTV owns by EMTEK Group;
- IVM with Salim Group; and
- METRO TV owns by Media Group.

In addition to national LPSs, in some regions the existence of Local LPSs is also acknowledged and competes head to head with national LPSs. Their coverage is limited to regional spectrum, and the content mostly focuses on local with little national content.

### 1. The consumer

The consumer for LPS is mostly public. In addition, there are other two groups of consumer for LPS. First is the advertiser who willing to promote their product to the public. The advertiser will make a contract with preferable advertising company (agent) to provide portfolio of mass communication, including TV commercials. In Indonesia, advertising company will act on behalf of advertiser to actively negotiate with LPSs on their placement. Negotiations are made by considering aimed target or segment that suit the launched product.

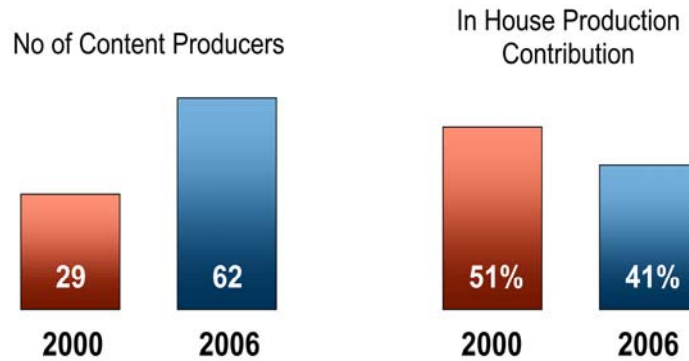
The sales value of TV commercial is affected by the content of broadcasting. In this matter, LPS will connect with the second group of consumer, namely content producer and or production house. Generally,

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\* This paper is a written contribution prepared by Foreign Cooperation Division of Indonesian Competition Commission (KPPU) for the purpose of OECD Competition Committee related meetings conducted in February 2013 in Paris, France. Quotation is acceptable as reference by mentioning the source. Should you have further queries, please contact us at [international@kppu.go.id](mailto:international@kppu.go.id) or visit our website at <http://eng.kppu.go.id>. Acknowledgement goes to Mr. Taufik Ariyanto, Head of Research Bureau, who jointly assist us in preparing this contribution.

LPS will use internal production network or purchase content from external producer. But, most of LPS does have their own subsidiary in content provider to assist them in producing their own. These are the proportion of number of content producer and portion by external producer by LPS in Indonesia.

**Chart 1. Market Share based on Group  
Year 2004 – June 2011**



Source: AC Nielsen Feb 2000 & Feb 2006 Reports

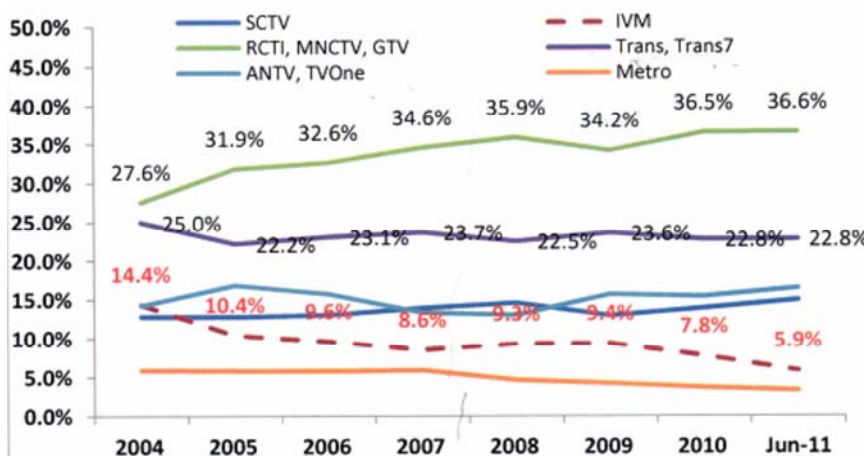
The chart shows the increase of number of external content producer and decrease percentage of the use of internal production house. These certainly indicate that the competition and business in production house is growing.

**2. The competition issues**

Competition between LPSs occurs in (internal) content production or procurement of content from external production house. Competition also occurs in obtaining exclusive right for live events, such sport, concert, and other. Content with highest interest from subscribers will be places in the prime time (between 5pm to 9 pm), where most of subscriber spending their time watching TV. Consequently, sales price for commercial during the prime time is much higher than those not.

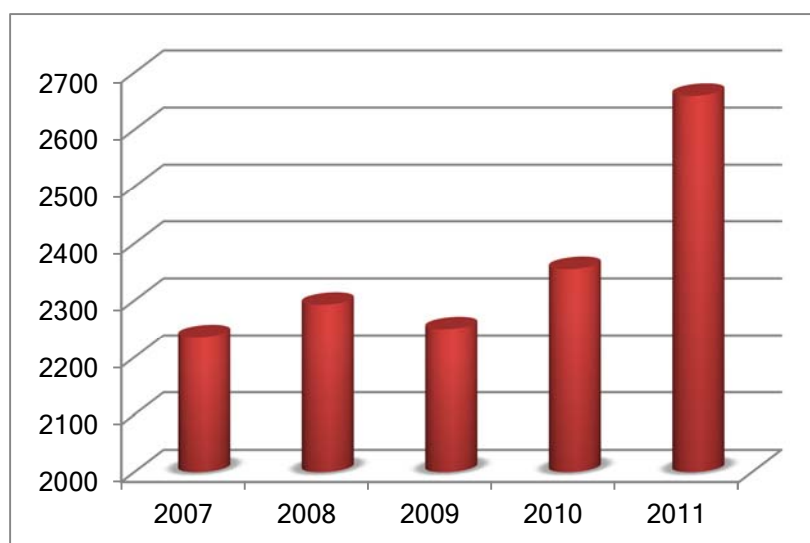
Market structure for national LPSs (along with their affiliation) based on income from commercials can be shown as follows.

**Chart 2. Market Share based on Group  
Year 2004 – June 2011**



The HHI value for national LPSs is as follow.

**Chart 3. HHI Value based on Income from Commercials  
Year 2007 – June 2011**



In general, market structure for LPS is concentrated, which take form of two factors, namely (i) limitation of spectrum for broadcast frequency with national coverage; and (ii) affiliation between LPSs under certain group. Apart from the market concentration, there is no anti-competitive behaviors can be identified. This is because the consumer can enjoy broadcasting freely by free-to-air TV, and commercial's agency can mix their commercial's portfolio and not depending on the TV commercial, but also other tools including sign board, billboard, newspaper, and joint sponsorship in many live events. Policy on convergence for information technology (IT) and communication where consumer or commercial's agency can take benefit of the convergences of telecommunication, broadcasting, and IT network to obtain and or disseminate necessary information.

With the contribution of above factors, it is difficult for LPSs or group of LPSs to conduct an abuse on their market power. Meanwhile, the potency for horizontal anti competitive behavior may occur on allocation of content or price fixing of commercial's slot (allocation). However to date, there is no strong indication to conclude such behavior.

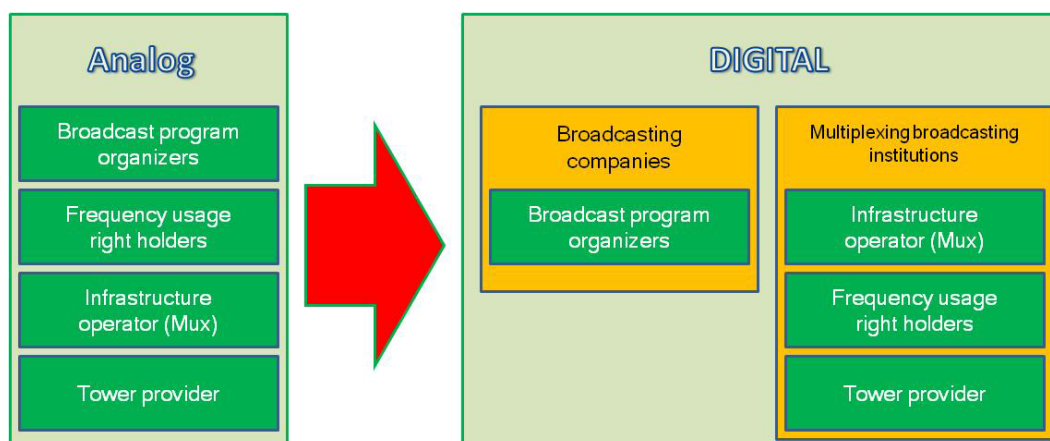
The potency for anti-competitive behavior also may occur on vertical integration that is between internal and external production house. The LPSs have own consideration to make sure the quality and consistency of content toward consumer's preference. To secure such, LPSs tend to establish their own production house or enter into binding commitment (agreement) on exclusive content with external production houses. Direct ownership or exclusive content agreement between LPS and integrated content provider can be a tool to limit opportunity or discriminate independent content provider.

In addition to vertical integration, KPPU also experienced issue on cross-ownership between media network. Media Group with Metro TV, Bakrie Group with TV One and AN TV, MNC Group with RCTI, TPI, and Global TV; are those of business groups which have and operate other form of media (network) such radio station and newspaper. Moreover, PARA Group (who owns TRANS TV and TRANS 7) even has a leading web portal for information in Indonesia. Indonesian broadcasting regulation is explicitly banned or limited cross-ownership in media network. Their concern is mostly related to control of vital information to the public. In term of competition, the main concern is less option to consumer and or advertiser on information provider. Indonesian Competition Commission (KPPU) is continuously monitor number of content provider in Indonesia to anticipate the existence of anti competitive behavior, specifically those related to vertical integration and cross ownership.

### 3. The future challenge

Spectrum (frequency) limitation is one of the potencies for entry barrier in TV broadcasting industry. With current ten national LPSs, potentially there is no national frequency available to new entrant. This is expected can be solved by moving to digital system, where one spectrum (frequency) can be divided to six or eight frequency for TV broadcast, which much better quality from analog system. Now, Indonesia is moving toward the digital system which will demand institutional changes in broadcasting industry.

**Chart 4. Transformation from Analog to Digital System**



In an analog system, LPS concurrently are organizing several functions, namely broadcast, broadcast rights holders, infrastructure providers such as transmitters and relay stations and towers provider. In digital system, breaking of function is exist, where broadcasters only be a broadcaster while a new institution calls Multiplexing (MUX) should be established. MUX will be the provider for infrastructure, facilities and simultaneously a frequency owner. By regulation, MUX should be an institution that can issue broadcasting license, and will be determined through a bidding process organized by the government/regulator. In the said institutional settings, the LPS will hire the channels broadcasting frequency to MUX as the holder of the rights of broadcasting frequencies.

With the existence of MUX, several competition issues should be anticipated. First, the competition model should be competition for the market to each MUX operators. Meanwhile for LPS, market structure will change to oligopoly for each broadcasting zone, because one frequency can be distributed to six or eight LPSs where represent number of spectrum on each zone. Second, the MUX operator will have dominant position in each broadcasting zone. LPS then may pay excessive usage fee or force to accept terms which reduce incentive to broadcasters. Third, abuse of dominant position also can occur in condition where LPS is an affiliation of MUX. Potential discriminatory practices are those relevant to this situation.

To anticipate the issue of unfair competition based on the relevant regulations, control of frequency by certain LPS must not allowed. By considering these conditions, LPS and its affiliates can not be mastered Multiplex in the same zone. In addition, Multiplex organizers must provide the open frequency to non-affiliated LPS in a transparent and non-discriminatory way. Until now, the bidding process for some zones has been completed. KPPU will continue to monitor the development of competition associated with the implementation of the digital broadcasting system.

### 4. The case example (merger)

KPPU received a merger notification that involved two enterprises, EMTEK Group and Prima Vista. The activity was involving the acquisition of Prima Vista's share in Indosiar TV (one of Indonesian LPSs). Meanwhile, EMTEK Group is the righteous owner of SCTV (one of Indonesian LPSs). During the

assessment, KPPU put market structure as first order priority. It was defined that the relevant market for this merger was a free to air TV broadcast. The value of commercial generate income is treated as main indicator for market share. Based on the analysis, it was calculated that the estimated concentration (by HHI) in this industry for year 2010 is as follow.

**Individual HHI**

Before Merger	After Merger	Changes in HHI
1,110.98	1,326.99	216.01

It was commonly known that LPS often affiliated with certain group of business. Considering this circumstances, assessment also conducted by include the cross ownership. The result is as follow.

**Group HHI**

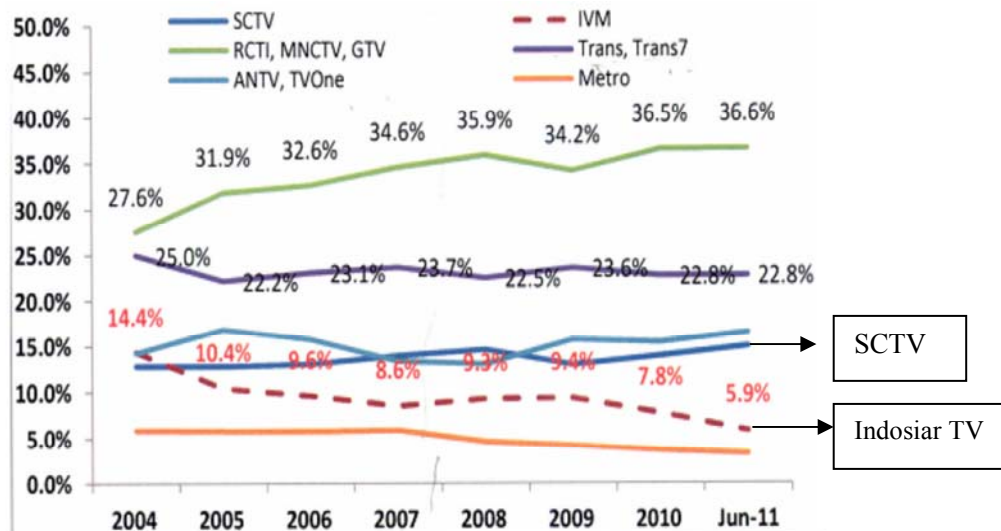
Before Merger	After Merger	Changes in HHI
2,355.26	2,571.27	216.01

The HHI after the merger in term of cross-ownership did preceding the threshold (more than 1,800). The change is also relatively high (i.e. 216) and preceding the threshold of 150. Using this indicator, KPPU valued the need of overall assessment on the merger. The criteria will involve many factors including efficiency, entry barrier, and anti competitive practices.

From the entry barrier, the main factor to consider is the licensing and limitation of broadcasting frequency. Broadcasting licensing process is relatively transparent and publicly available, while the limitation of frequency is still a major obstacle. After the invited experts to comment on the industry, especially in technical areas of broadcasting, KPPU saw opportunities for new entrant when digital broadcasting system is introduced. With the adoption of digital system, each frequency can be divided into multiple channels that can be use by existing LPS or new entrants to enter and take part in the broadcast industry. Therefore, it was foreseen that the entry barriers were most likely in-significant in the assessment.

The second aspect is efficiency. Indonesia TV as a LPS for the last four years had shown continuous downturn in both financial and operational.

**Chart 5. Market Share based on Group  
Year 2004 – June 2011**



Some excellent programs that had gained good ratings were terminated or move to other LPS. While as LPS, Indosiar have a competitive advantage in terms of hardware and broadcasting technologies, including the number towers and relay stations throughout Indonesia. This is foretold as the main motive for the acquisition. It is expected sharing broadcasting production facilities can be implemented to increase efficiency for both companies.

The third aspect was the potential anti competitive practice after the acquisition of Indosiar TV by EMTEK Group. Both LPSs have different segments of audiences. SCTV mostly correlated to movie, while Indosiar TV focused on mini series. The potency for competition infringement is insignificant, due to the internal production house; other national or local LPSs are available to bring outer perspective for the broadcaster. In addition, both LPSs have their commitment to develop cooperation with external production house as the business allocation to external production house is widely available.

The potential barrier for horizontal competition is yet to be significant. It was highlighted by the advertising companies that competition in having commercial slot (time allocation) is severe. Advertising companies can relocate commercials to find suitable slot in line with feature demanded the client. The selling price of commercials is varying between LPSs and between peak and non peak hour. Other than TV commercial, the advertising company also has options to relocate commercial expenditures to other media, including online media.

Therefore based on the aforementioned considerations, KPPU approved the merger and let Indosiar TV indirectly acquired by SCTV.

## **5. Conclusion**

Indonesian broadcasting industry tends to be oligopolistic and control by several groups of company. There is no group of company meet the market share threshold as a monopoly. Currently, no new entrant is allowed due to limitation of frequency (spectrum). Competition occurs in both at vertical and horizontal level, namely between broadcasters in obtaining contents and between advertisers (or advertising company) in obtaining TV slot for commercials, specifically for a prime time. Cross ownership or price fixing are those of behaviors that likely arise in the industry. Therefore, KPPU is continuously monitor the industry to anticipate the said anti competitive behavior.

Broadcasting industry in Indonesia is in the middle of transition from analog to digital broadcasting system. It is expected that digital system will increase number of enterprises and thus competition in the market. The transition is not easy, as it will demand some changes in the institutional setting.

## IRELAND

In Ireland, there have been two main issues regarding the application of competition rules in television and broadcasting. The first issue relates to a case dealt with by the Irish Competition Authority (the “Authority”) regarding the scheme operated by the main public service television broadcaster, Raidió Teilifís Éireann (“RTÉ”), for the sale of television advertising airtime. The second issue relates to a State aid decision of the European Commission in respect of aids granted to the Irish public service broadcasters RTÉ and Teilifís na Gaeilge (“TG4”)<sup>1</sup>.

### 1. Loyalty rebates for the sale of television advertising airtime

#### 1.1 *Introduction and summary*

On 7 October 2011, the Authority entered into an Agreement and Undertakings with RTÉ following an investigation conducted by the Authority into the scheme operated by RTÉ for the sale of television advertising airtime. The Authority’s investigation focused, in particular, on the discounts granted by RTÉ to individual advertisers which depended, among other factors, on the percentage (or share) of each advertiser’s total television advertising budget committed to RTÉ. The scheme is hereinafter referred to as the “Share Deal”.

The Authority’s investigation was prompted by concerns that the Share Deal could amount to a breach of section 5 of the Competition Act, 2002 (the “Act”) and/or Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).

Section 5 of the Act and Article 102 TFEU prohibit an abuse by one or more undertakings of a dominant position. Conditional rebates with loyalty-inducing effects granted by a dominant undertaking may amount to an abuse of a dominant position in breach of section 5 of the Act and/or Article 102 TFEU. The Authority’s investigation was initiated with the aim of forming a view on the following issues: (i) the relevant market, (ii) whether RTÉ held a dominant position in the relevant market, and (iii) whether the Share Deal amounted to an abuse of a dominant position.

Based on the information gathered during its investigation, the Authority was concerned that, given RTÉ’s market position, the Share Deal could amount to a conditional rebate likely to have loyalty-inducing effects and hence could be anti-competitive. The Authority communicated its preliminary concerns to RTÉ and, in response, RTÉ offered undertakings to the Authority. In the proposed undertakings, RTÉ agreed to commence immediately the process for implementing a new trading scheme which would exclude the share of budget element as of the date of formal acceptance of the undertakings by the Authority (with the new trading scheme being introduced no later than 1 July 2012)<sup>2</sup> As the undertakings offered by RTÉ addressed the Authority’s concerns, it signed the Agreement and Undertakings with RTÉ and closed its file

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<sup>1</sup> E 4/2005 (ex NN 99/1999).

<sup>2</sup> RTÉ also informed the Authority that it had intended to review how it sold television advertising airtime and the possibility of introducing a new scheme designed, inter alia, to improve efficiencies.



without reaching a final view on the application of section 5 and/or Article 102 to the Share Deal. The text of the Agreement and Undertakings is set out in the Annex to this submission.

This submission, first, deals with the Share Deal case, i.e. it (i) describes the main features of the Share Deal, (ii) summarises the procedural steps followed during the Authority's investigation, (iii) outlines the legal context relevant to this case, (iv) explains the Authority's preliminary legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU and (v) summarises the proposal submitted by RTÉ to address the Authority's concerns regarding the competition implications of the Share Deal. Second, this submission deals with the State aid decision of the European Commission in respect of the Irish public service broadcasters RTÉ and TG4 and the commitments offered by the Irish Government to ensure the compatibility of public funding with State aid rules.

## **1.2 The issues**

### *1.2.1 The complaint*

On 20 March 2009, TV3 Television Network Limited ("TV3"), a private television broadcaster, submitted a complaint to the Authority alleging that RTÉ had engaged in anticompetitive behaviour in breach of Irish and European competition law. In its complaint, TV3 raised a number of issues concerning the alleged anticompetitive behaviour of RTÉ. The Authority's investigation focused on TV3's allegation concerning the Share Deal.

### *1.2.2 The parties*

RTÉ is a State-owned television and radio broadcaster in the State. RTÉ currently owns and operates two free-to-air national television channels (RTÉ One and RTÉ Two). RTÉ is financed from a combination of commercial and non-commercial revenues. Commercial revenues accrue from advertising, sponsorship, transmission fees and merchandising fees. Non-commercial revenue comes from TV licence fees which must be paid by all owners of television receiving sets.

TV3 is a private TV broadcaster in the State. TV3 owns and operates the national free-to-air channel TV3 and the pay-TV channel 3e. It also handles advertising sales for other TV channels - Living TV and Bubble Bits. TV3 is funded from a mixture of advertising sales, sponsorship and other sales.

### *1.2.3 The practice concerned*

As indicated above, the object of the Authority's investigation was the Share Deal, i.e., a scheme under which the discounts granted to individual advertisers depended on, among other factors, the percentage (or share) of each advertiser's total television advertising budget committed to RTÉ.

Typically, contracts for the sale of television advertising airtime are negotiated between broadcasters and advertising agencies on an annual basis. Negotiations usually begin in the autumn prior to the start of each new advertising year in January. Apart from annual deals, RTÉ also offers special event deals, late bookings, and airtime special offers.

The share of the total television advertising budget that advertisers would commit to RTÉ was a central factor in the negotiations between RTÉ and advertisers/advertising agencies.

In simple terms, everything else being equal, the higher the share of total television advertising budget that an advertiser committed to RTÉ, the larger the discount RTÉ would typically offer to that advertiser. In some cases, if the share of budget committed was very low, the advertiser might have received no discount at all, or might even have had to pay a premium. RTÉ used what it called the "reference share" of

[60-70]%<sup>3</sup> as a benchmark for negotiations. However, the Authority understands that RTÉ also negotiated deals below the “reference share”. Moreover, the Authority understands from its investigation that RTÉ sometimes offered a larger discount to a customer with a lower budget share commitment than to a customer with a higher budget share commitment. In other words, as well as the link with advertiser’s total budget, there were discriminatory elements in the way the discounts were calculated for different advertisers.

### 1.3 *Legal context*

This section briefly outlines the relevant legal framework for the Authority’s assessment of RTÉ’s Share Deal.

At the point in its investigation when RTÉ offered a proposal to address the Authority’s concerns, the Authority was of the preliminary view that the Share Deal could amount to an infringement of section 5 of the Act and/or Article 102 TFEU.

Section 5 of the Act prohibits an abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.

To establish an infringement of Article 102 TFEU, it is therefore necessary to prove that the abuse “*may affect trade between Member States*”. According to settled case law, it is sufficient that the abuse is *capable* of affecting trade for Article 102 TFEU to apply<sup>4</sup>. Abuses that have an impact on the competitive structure in more than one Member State are by their very nature capable of affecting trade between Member States<sup>5</sup>. The effect on trade of the abuse must be appreciable. This will mainly be assessed by reference to the position of the undertaking(s) on the market for the product concerned<sup>6</sup>.

As many television broadcasters (actual and potential competitors of RTÉ) and many advertisers (actual and potential customers of RTÉ) are based outside the State<sup>7</sup>, the Authority was of the opinion that RTÉ’s Share Deal was capable of having a potential effect on the competitive structure of the market for television advertising in more than one Member State and therefore on trade between Member States. Based on the size of the market concerned and RTÉ’s position on that market, the Authority was of the preliminary view that the effect on trade would be appreciable.

Accordingly, the Authority was of the view that if the Share Deal amounted to an abuse of dominance by RTÉ, then this would involve an infringement of both Article 102 TFEU and section 5 of the Act.

### 1.4 *Economic and legal analysis conducted by the Authority*

#### 1.4.1 *Introduction*

This section outlines the Authority’s legal and economic analysis of the Share Deal under section 5 of the Act and/or Article 102 TFEU.

<sup>3</sup> Range only provided here for confidentiality reasons.

<sup>4</sup> Joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* [1995] ECR I-743, paragraph 69.

<sup>5</sup> Joined Cases 6 and 7/73 *Commercial Solvents v Commission*, [1974] ECR 223; Case 6/72 *Continental Can* [1973] ECR 215.

<sup>6</sup> Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

<sup>7</sup> *I.e.*, The Republic of Ireland.

Section 5 of the Act and Article 102 TFEU apply only to dominant undertakings. Normally, a finding of dominance involves a two step procedure. The first step is to determine the relevant market. The second step is to assess the firm's position on the relevant market.

If a firm has a dominant position in the relevant market, it is then necessary to consider whether the firm's conduct amounts to an abuse of its dominant position. In the RTÉ case, this involved assessing the likely exclusionary effect of the conduct, as well as any plausible objective justifications.

#### 1.4.2 *Relevant market*

For the purposes of assessing RTÉ's Share Deal, the Authority considered that the relevant market was likely to be the *market for television advertising airtime in the State*. The Authority did not reach a definitive view on the relevant market and took the view that further investigation and analysis of RTÉ's competitive constraints would have been required in order to do so.

In the Authority's preliminary view, the relevant product market was likely to be the *market for television advertising airtime*. The Authority considered the possibility of a wider product market definition (to include other media advertising) but did not find sufficient evidence during the course of its investigation to support the existence of a wider market. This preliminary view was supported by previous decisions of the Authority in the market for radio advertising<sup>8</sup>, and decisions of the European Commission (the "Commission")<sup>9</sup>, the UK Competition Commission<sup>10</sup>, the Bundeskartellamt<sup>11</sup>, and OFCOM<sup>12</sup>.

The Authority found that there was a degree of product differentiation within the market for television advertising airtime. However, the Authority also recognised there was a degree of substitution between impacts on different audience groups<sup>13</sup> and impacts at different times of the day within each audience group. On balance the Authority, during the course of its investigation, did not consider there to be sufficient evidence to suggest that it should adopt a narrower product market definition.

In the Authority's preliminary view, the relevant geographic market was likely to be the State. However, the Authority recognised that advertisements broadcast on television channels outside the State are also viewed in the State. This is known as the "spill-over" effect. On balance, the Authority was of the preliminary view that the spill-over effect was unlikely to materially affect the definition of the relevant geographic market.

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<sup>8</sup> See for example, M/07/040 – Communicorp/Scottish Radio Holding and M/07/069 – UTV/FM104.

<sup>9</sup> See for example, case M553 - RTL/Veronica/Endemol.

<sup>10</sup> Competition Commission's final decision on ITV's CRR obligations issued on 19 January 2010 ([www.competition-commission.org.uk/inquiries/ref2009/itv/provisional\\_decision\\_remedy.htm](http://www.competition-commission.org.uk/inquiries/ref2009/itv/provisional_decision_remedy.htm).)

<sup>11</sup> [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10\\_endg.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf)

<sup>12</sup> Competition issues in the UK TV advertising airtime trading mechanism, OFCOM. See [http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV\\_advertising\\_MIR.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/tv-advertising-investigation/summary/TV_advertising_MIR.pdf)

<sup>13</sup> For instance, an advert for a beer product aimed at Men 18-34 may be placed at a programme that mainly delivers to the Men 18-34 audience category, or may be placed at a programme that delivers to the All Men audience category. There is a certain degree of inter-changeability between the All Men and Men 18-34 categories.

### 1.4.3 Dominance

The Authority was of the preliminary view that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the State.

The concept of dominance has been defined by the Court of Justice as a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”<sup>14</sup>.

The Authority was of the preliminary view that it was likely that RTÉ was capable, to an appreciable extent, of acting independently of its competitors in the market for television advertising airtime in the State. In support of this, the Authority had regard to RTÉ’s substantial share of the relevant market, and other factors such as barriers to expansion, mainly resulting from RTÉ’s “unavoidable trading partner” status, insufficient countervailing buying power and possibly RTÉ’s dual-funded<sup>15</sup> status.

As already mentioned, RTÉ disagreed with the Authority’s preliminary view on dominance. However, as the matter was settled when the Authority and RTÉ entered into the Agreement and Undertakings, the Authority did not have to reach a definitive view on this issue.

### 1.4.4 Abuse of dominance

#### 1.4.4.1 Overview of loyalty rebates

The granting of rebates and discounts<sup>16</sup> is a common way in which suppliers compete on price and try to attract customers to themselves and away from competitors. However, according to the case law of the European Courts, the decisions of the Commission and the communication from the Commission entitled “*Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*”<sup>17</sup> (the “Guidance Paper on Article 102”), loyalty discounts and rebates can be anti-competitive in certain circumstances. Specifically, conditional rebates with loyalty-inducing effects by a dominant undertaking may infringe Article 102 TFEU unless they are objectively justified.

Rebates are generally of a conditional nature since they are aimed at rewarding customers for a particular purchasing behaviour. The Guidance Paper on Article 102 identifies target rebates as the usual type of a conditional rebate<sup>18</sup>. Target rebates are discounts conditional on the customer reaching or exceeding a *purchasing target* during a certain period (known as the “reference period”). The purchasing target may take different forms, such as a certain quantity or a percentage share of the customer’s requirements.

Target rebates with loyalty-inducing effects when applied by a dominant undertaking are likely to amount to a breach of Article 102 TFEU. Case law has deemed the following factors to be of particular importance in determining whether a given system of target rebates is likely to have loyalty-inducing effects: (a) whether or not the target rebate is an “all-units” rebate - all-units rebates (also known as

<sup>14</sup> United Brands v. Commission, [1978] ECR 207, paragraph 65.

<sup>15</sup> i.e., from both advertising revenue and licence fees payable by TV set owners.

<sup>16</sup> In this Enforcement Decision, the terms rebates and discounts are used interchangeably.

<sup>17</sup> OJ 2009/C45/02.

<sup>18</sup> Paragraph 37.

“retroactive” or “rollback” rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s); (b) the progressive nature of the rebate and the magnitude of the level of discounts; (c) the individualised nature of the purchasing target; (d) the duration of the reference period; (e) the market shares of the competitors of the dominant undertaking; and, (f) the economic analysis of the potential foreclosure effect. Each of these factors will be examined below. It is important to note that it is not necessary that all of these factors are present for a target rebate scheme to have loyalty-inducing effects. But the likelihood of loyalty-inducing effects is higher where multiple factors are present.

The reason why rebates with loyalty-inducing effects have been found to infringe Article 102 TFEU is because they seek to tie customers to the dominant undertaking and, therefore, they are capable of foreclosing competitors. The case law has based the finding of abuse on the capability of loyalty rebates to induce incremental purchases by customers of the dominant undertaking and, therefore foreclose competitors<sup>19</sup>. It is not necessary to analyse any actual foreclosure effects of a loyalty rebate in the market for Article 102 to apply. In the recent *Tomra* case<sup>20</sup>, the General Court confirmed existing case law and rejected the need to analyse any actual foreclosure effects, provided that the conduct in question is *capable* of foreclosing competition.

Paragraph 38 of the Guidance Paper on Article 102 also suggests this approach when stating that:

*“[...] the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, be part of the Commission’s enforcement priorities” (Emphasis added).*

#### 1.4.4.2 *The loyalty-inducing effects of the share deal*

The Authority’s preliminary view was that the Share Deal was likely to be a target rebate scheme with loyalty-inducing effects and therefore capable of foreclosing RTÉ’s competitors. The Share Deal could be classified as a target rebate because discounts were conditional on advertisers committing a specific share of their total television advertising budget with RTÉ (the “purchasing target”) during a reference period, which was normally of one year. The Authority was of the view that the Share Deal may have had loyalty-inducing effects and, therefore, may have been capable of foreclosing RTÉ’s competitors. The Authority’s view was supported by the factors relied upon by the European Courts and the European Commission to establish potential loyalty-inducing effects. However, as it proved unnecessary to pursue the investigation further, the Authority did not draw any final conclusions on whether the Share Deal was in fact loyalty-inducing and detrimental to competition.

During the investigation, RTÉ argued that the Authority’s application of the factors below to the Share Deal did not demonstrate a loyalty-inducing effect to the legal standard required by the case law.

- All-units rebate

The Authority was of the preliminary view that the Share Deal was an all-units rebate scheme. At the point of the annual negotiation, an advertiser committed a given percentage share of its total television advertising budget with RTÉ for the relevant year. This was done on the understanding that the particular level of discount corresponding to that share of budget commitment would apply to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. A different (lower or higher) share of budget commitment would attract a

<sup>19</sup> See, for example, Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331 (paragraph 68).

<sup>20</sup> Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010.

different (lower or higher) level of discount applying to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. In the Authority's preliminary view, the Share Deal was likely to make it less attractive for advertisers to switch even small amounts of demand for television advertising airtime to RTÉ's competitors at the negotiation stage because of the 'pull' effect of RTÉ's discounts on all the purchases of television advertising airtime made from RTÉ. In addition, it was likely that television broadcasters, in order to compete effectively with RTÉ, would have had to compensate advertisers for the reduced discounts that would then be available from RTÉ.

- The progressive nature and the magnitude of the level of discounts

While the Authority acknowledged that the level of the final discount given to an advertiser under the Share Deal did not exclusively depend on the level of share of budget committed to RTÉ, the investigation showed that it was a very important factor in establishing the final discount granted to an advertiser. In general terms, the larger the share of budget committed to RTÉ, the larger the level of discount RTÉ would offer.

Under the Share Deal, the discounts corresponding to high budget commitments were substantial. The Authority's investigation showed that the Share Deal was designed to work most effectively for shares of budget commitments ranging between 50% and 70%, which, according to RTÉ, is a realistic negotiated share range. RTÉ tried to negotiate the largest share of budget possible and used a "supporting share" of [60-70]% as a benchmark for negotiations with advertisers. In 2008 and 2009, advertisers on average met the "supporting share" commitment and received a [20-30]% discount.

During the course of the Authority's investigation, advertising customers of RTÉ suggested to the Authority that committing a substantial share of budget to RTÉ was, in some instances, necessary to make placing an advertisement with RTÉ economically viable. A reduction of the share of budget committed to RTÉ could lead to a substantial reduction of the level of discount to the extent that, in some instances, low levels of budget commitment made placing the advertisement prohibitively expensive. Advertisers were thus encouraged to commit a substantial share of budget with RTÉ in order to benefit from a "decent"<sup>21</sup> level of discount.

- The individualised nature of the target

The Authority was of the preliminary view that the Share Deal was likely to be an individualised rebate scheme. As indicated above, RTÉ's contracts with advertisers are on a line-by-line basis. In other words, RTÉ negotiates with advertising agencies (or directly with advertisers) specific terms of the contracts for each individual advertiser. Despite being an important factor, the share commitment was not the only factor to determine the total discount given to the advertisers. Other factors such as volume, deal history, target audience and optimisation potential also had a significant impact on the level of discount. All of these factors would be assessed by RTÉ during the course of the individual negotiations with the advertisers. Under the Share Deal, the final discount depended on the individual negotiations between RTÉ and each advertiser. This suggested that the Share Deal may have amounted to an individualised rebate system liable to have foreclosing effects in the market.

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<sup>21</sup>

This is the term used by some of the advertisers contacted by the Authority.

- The duration of the reference period

The Authority was of the preliminary view that the length of the reference period under which the Share Deal operated (i.e., one year) was substantial and thus likely to have a loyalty-inducing effect.

RTÉ disputed the Authority's apparent assumption that the length of the contract was driven by loyalty-inducing desires pointing to contextual factors such as (a) RTÉ's programme planning and commissioning, which is a long term process (6-9 months) and (b) TV advertisers planning of their spending by reference to their fiscal year.

- The market shares of competitors

The information obtained during the Authority's investigation suggested that RTÉ held a much larger market share than its competitors. The Authority was of the preliminary view that the position of RTÉ in the market enhanced the likely loyalty-inducing effects of the Share Deal. As already noted, RTÉ disputed the Authority's preliminary views on the relevant market and its position in that market<sup>22</sup>.

- Economic analysis of the potential foreclosure effect

The Guidance Paper on Article 102<sup>23</sup> outlines an additional factor or test which may indicate that a conditional rebate is capable of foreclosing competition. In relation to the assessment of price-based exclusionary conduct, such as conditional rebate schemes, the Guidance Paper on Article 102, outlines an "as efficient competitor test"<sup>24</sup>.

With price-based exclusionary conduct, an "as efficient competitor test" attempts to establish whether a hypothetical competitor, as efficient as the dominant firm, could effectively compete, given the pricing conduct of the dominant firm. This is done by comparing "the price" charged by the dominant firm with an appropriate measure of cost. The lower the price, the more likely it is that the conduct has a foreclosing effect.

The Authority did not carry out an "as efficient competitor test" in this case. However, as suggested in the Guidance Paper on Article 102, the Authority did attempt to make a comparison between the effective price and the average price. The estimation of the effective price conducted by the Authority was based on what a competitor would have to offer to attract 1% of an advertiser's budget away from RTÉ. The Authority found evidence that the effective price was low relative to the average price. In the Authority's preliminary view, the Share Deal, therefore, could amount to a conditional rebate scheme with a loyalty-inducing effect.

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<sup>22</sup> In particular, RTÉ argued that the available market share data did not reflect the recent increase in advertising minutage for RTÉ's competitors (an increase from 10 to 12 minutes per hour).

<sup>23</sup> OJ 2009/C45/02.

<sup>24</sup> Paragraphs 41 to 45.

#### 1.4.5 Objective justification

In the enforcement of section 5 of the Act and/or Article 102 TFEU, the Authority will also take into account submissions made by a dominant undertaking that its conduct is justified<sup>25</sup>. According to the Guidance Paper on Article 102, a dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers<sup>26</sup>. In this context, it is necessary to assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

The question as to whether the conduct is objectively necessary must be determined on the basis of factors external to the dominant undertaking (such as health and safety reasons)<sup>27</sup>. In order to determine whether the conduct results in substantial efficiencies that outweigh any anticompetitive effects requires evidence that the following cumulative conditions are fulfilled: (i) the efficiencies have been, or are likely to be, realised as a result of the conduct; (ii) the conduct is indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare; and, (iv) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition<sup>28</sup>.

It is incumbent upon the dominant undertaking to prove any objective justification and to support it with arguments and evidence. In this regard, it is not sufficient for the dominant undertaking to put forward “*vague, general and theoretical arguments*” in support of its objective justification<sup>29</sup>.

During the investigation, RTÉ submitted that the Share Deal was objectively justified mainly for the following reasons:

1. The Share Deal is required to sell advertising airtime in an efficient manner.
2. Discounts based on volume would not be appropriate.
3. The annual reference period under the Share Deal ensures efficient negotiations from the perspective of both RTÉ and advertisers.

The Authority took the preliminary view that RTÉ did not present full and precise evidence of any objective justification or substantial efficiencies that would outweigh any anticompetitive effects with the precision required by the Guidance Paper on Article 102. However, as stated earlier, at the point when the investigation was closed, the Authority had not come to a final view as to whether the Share Deal amounted to an abuse of a dominant position. Consequently, the Authority did not require RTÉ to substantiate any objective justification or efficiencies that would outweigh any anticompetitive effects.

<sup>25</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 184; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261, paragraph 27; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraphs 102 to 119; Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 136 and 207; Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraphs 69 and 86.

<sup>26</sup> The Guidance Paper on Article 102, paragraph 27.

<sup>27</sup> The Guidance Paper on Article 102, paragraph 29.

<sup>28</sup> The Guidance Paper on Article 102, paragraph 30.

<sup>29</sup> Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-000, paragraph 698.



#### *1.4.6 Conclusion on abuse of dominance*

At the time that RTÉ entered into the Agreement and Undertakings with the Authority, the Authority was of the preliminary view that the operation of the Share Deal was likely to have loyalty-inducing effects which could amount to unlawful conduct by RTÉ in the market for television advertising airtime in the State contrary to section 5 of the Act and/or Article 102 TFEU.

#### **1.5 The proposal**

On 26 August 2011, RTÉ submitted a proposal to the Authority. In its proposal, RTÉ undertook to modify its conduct in respect of the sale of television advertising airtime. In particular, RTÉ proposed that “... it will continue to trade using share of TV revenue as a component up until the 30th of June 2012 only. RTÉ proposes that after this period the revenue share deal component will be abolished and will no longer feature as a component of selling airtime”. In effect, RTÉ proposed to abolish the Share Deal from 1 July 2012.

RTÉ’s proposal forms the basis of the Agreement and Undertakings included as an Annex to this submission.

## **2. State aid**

On 27 February 2008, the European Commission issued a decision concerning the State financing of RTÉ and Teilifís na Gaeilge (“TG4”).

### **2.1 Background**

According to the Wireless Telegraphy Act 1926, every person or undertaking that has television equipment capable of receiving a television signal must pay a television license fee. Each year, the Irish Government allocates almost the totality of revenues from the license fee to RTÉ. The license fee is intended to finance the activities of RTÉ and TG4 as public service broadcasters, a service in the general interest.

In March 1999, the Irish television broadcaster TV3 Television Network Limited (“TV3”) submitted a complaint to the European Commission alleging the incompatibility of the licence fee financing of RTÉ with State Aid rules. According to TV3, RTÉ is not properly entrusted with public service obligations and the use of public funds lacks the transparency needed to verify that the public funds are proportionate and not used for other than public service activities.

### **2.2 State aid under Article 87(1)**

For a measure to be characterised as State aid within the meaning of Article 87(1), the following conditions must be fulfilled: (a) there must be a transfer of State resources; (b) the measure in question must involve an economic advantage to the recipient and (c) the measure must distort, or threaten to distort competition and affect trade between Member States.

The Commission was of the view that the license fee revenue used to finance public service broadcasting in Ireland constituted State resources within the meaning of Article 87(1). The Commission also was of the view that the financing from license fee revenue reduced the operating costs that RTÉ and TG4 would normally have to bear and provided RTÉ and TG4 with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only. Finally, the Commission was of the view that the financial advantages granted to RTÉ and TG4 distorted competition and affected trade between Member States within the meaning of Article 87(1).

### **2.3 *Compatibility of the aid under Article 86(2) TFEU***

The compatibility of State aid measures has to be assessed under Article 86(2) TFEU. In accordance with the case law, the following conditions must be fulfilled in order for an aid to be declared compatible with Article 86(2): (i) the service in question must be a service of general economic interest clearly defined as such by the Member State; (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service; and (iii) it must be clear that the application of the competition rules of the Treaty must obstruct the performance of the particular tasks assigned to the undertaking and that the exemption from such rules does not affect the development of trade to an extent that would be contrary to the interests of the European Union.

In light of the above, in this case the Commission had to assess whether: (i) RTÉ and TG4's public service broadcasting activities were clearly and precisely defined by the Irish State as a service of general economic interest; (ii) RTÉ and TG4 were explicitly entrusted by the Member State with the provision of that service and subject to supervision as to the fulfilment of its tasks; and (iii) the funding was proportionate to the net cost of providing the public service.

The Commission was of the view that the legal provisions existing at the time did not clearly and precisely define the scope of activities other than broadcasting (comprising activities such as publication of magazines, books or papers, or recorded aural and visual material with or without charge), and which of those activities could, as part of the public service tasks of RTÉ, be financed through the licence fee. . Consequently, there was a risk that purely commercial activities would ultimately benefit from State aid. The Commission was also of the view that there was no satisfactory and independent ex-post control mechanisms to verify whether State funding exceeded the net public service cost (overcompensation) or whether commercial activities had been unduly benefited from licence fee revenues (cross-subsidisation) or whether RTÉ's commercial activities were in line with market principles (market-conform behaviour).

### **2.4 *Appropriate measures to ensure compatibility of the financing regime***

To address the concerns identified above, the Commission recommended appropriate measures to ensure the compatibility of the financing regime with State aid rules. Some of these measures included amendments to the draft Broadcasting Act (the "Draft Act"). With the submission of commitments, Ireland agreed to implement these measures so as to ensure future compatibility of the Irish regime with the State aid rules. The commitments provided by the Irish Government are summarised below.

The Irish Government committed to determine the scope of the public service remits of RTÉ and TG4 by enumerating their respective objects and duties in broadcasting legislation and to limit the use of public funding by RTÉ and TG4 to the achievement of such public service objectives and duties. The Draft Act included provisions laying down the exact scope of the public service broadcaster's remit.

The Irish Government committed to the establishment of a new independent content regulator, the Broadcasting Authority of Ireland (BAI), which would assist and advise the Minister in the monitoring of RTÉ and TG4's performance against their public service remits. The Draft Act provided for the establishment of the BAI as an independent body which would ensure that broadcasting services meet the needs of the people of Ireland.

The Irish Government committed to introduce a requirement for the public service broadcasters to distinguish in their accounts between transactions and arrangements entered into in pursuit of public service objects and those entered into in pursuit of commercial opportunities. RTÉ and TG4 were required to prepare statements of revenues and costs distinguishing between their respective public service and commercial activities

The Irish Government committed that the public funds would only be granted in relation to public service tasks to ensure that the compensation granted to the public service broadcasters would not exceed what is necessary for the fulfilment of the public service tasks (i.e. limited to the net public service costs).

The Irish Government committed to introduce a requirement for the public service broadcasters to report to the BAI on an annual basis on the use they have made of the public funding they had received, based on separate accounts for their public service and commercial activities.

The Irish Government committed to introduce a number of mechanisms to ensure that arm's length principles apply in respect of transactions as between public service objects and the exploitation of commercial opportunities object in relation to RTÉ and TG4. Such measures include: (i) a statutory requirement for transactions and arrangements entered into by public service broadcasters to distinguish, on an arms-length basis between, on the one hand, the public service objects and activities, and on the other hand, the pursuit of commercial opportunities; (ii) a requirement that public service broadcasters report on the use they have made of the public funding they have received and to distinguish between transactions and arrangements entered into in pursuit of public service objects and the pursuit of the object to exploit such commercial opportunities and (iii) a requirement that commercial transactions shall be carried out at an arm's length, that they are operated in an efficient manner so as to maximize revenues, and that any profits arising from such commercial activities shall be utilised to subsidise public service broadcasting activities.

The Irish Government implemented the above commitments through the enactment of the Broadcasting Act 2009.

**ANNEX - AGREEMENT AND UNDERTAKINGS****The Competition Authority****-and-****Raidió Teilifís Éireann****AGREEMENT AND UNDERTAKINGS**

This Agreement and Undertakings is made by and between the Competition Authority (the “Authority”) and Raidió Teilifís Éireann (“RTÉ”) on the date set forth below. The Authority and RTÉ are referred to collectively herein as the “Parties”.

**WHEREAS:**

1. The Authority has been investigating allegations that RTÉ was operating an anticompetitive discount scheme (share deal) contrary to section 5 of the Competition Act 2002 (the ‘Act’). RTÉ cooperated fully with the Authority’s investigation and responded to all queries arising from the aforementioned allegations.
2. Section 5 of the Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State.
3. The Authority’s investigation identified concerns that the Authority has in respect of certain types of arrangements used by RTÉ for trading television advertising airtime. In particular, the Authority was concerned that RTÉ’s scheme for the sale of television advertising airtime under which the discounts given to advertisers depend, among other things, on the percentage (i.e. share) of the advertiser’s total television advertising budget committed with RTÉ may give rise to an infringement of section 5 of the Act.
4. The Authority notes that RTÉ indicated to it that quite separate to the concerns raised by the Authority that RTÉ intended a fundamental review of how it sells airtime along with the planned introduction of a new scheme in order to *inter alia* improve efficiencies within RTÉ.
5. The Authority informed RTÉ that this Agreement and Undertakings resolves the concerns of the Authority.

**Undertakings**

6. RTÉ undertakes that, from 1 July 2012, the share of budget element of their scheme for the sale of television advertising airtime shall be discontinued and abolished and shall no longer feature as a component of RTÉ’s trading scheme. Under the new trading scheme, discounts given to advertisers shall not depend on the share of the advertiser’s total television advertising budget committed with RTÉ.
7. RTÉ undertakes that it shall start the process for implementing the new trading scheme (excluding the share of budget element) as at the date of formal acceptance of the Undertakings by the Authority, such new trading scheme to be implemented no later than 1 July 2012.

8. On the execution of this Agreement and Undertakings, the Authority undertakes that it shall conclude its investigation in this matter and shall refrain from instituting proceedings against RTÉ in relation to the operation of the share deal scheme for so long as RTÉ remains in compliance with the undertakings set out in paragraphs 6 and 7 above.
9. This Agreement and Undertakings shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by the Parties by an action in any court of competent jurisdiction in the State.
10. This Agreement and Undertakings shall be binding on both RTÉ and on any organisation which in the future carries on business which is the same or materially similar to the business of RTÉ.

## ISRAEL

### Position paper regarding joint purchasing of television airtime: Introduction

Four TV channels operate in Israeli commercial television broadcasts. Most of the television channels' revenues come from selling airtime to advertisers.

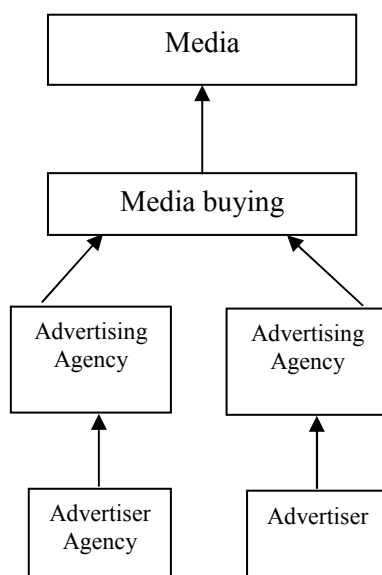
Television channels are characterized by high fixed costs, which are relatively constant, at least in the short term, and are unaffected by the number of viewers or by the amount of airtime sold. Consequently, loss of revenue from ads cannot be compensated by a similar reduction in expenditure.

The maximum amount of broadcasting minutes designated for advertisement is set by a market-specific regulator. Hence television channels cannot increase the number of advertising minutes per day.<sup>1</sup> In contrast, they may – and indeed do – sell fewer advertising minutes than the maximum set by the regulator in order to keep advertising prices high.

#### 1. The advertising field

The advertising field is comprised of four segments: advertisers, advertising agencies, media buying and planning companies and the media.

Following is a graphic representation of the link between the different segments of the advertising field:



<sup>1</sup> For example, the total advertising time in prime time cannot exceed 32 minutes.

### **1.1 Advertisers**

An advertiser is an entity that uses media channels to promote awareness to its products or to enhance its branding.

### **1.2 Advertising agencies**

The advertising agency is in charge of the planning, the strategy and the creative aspects (for simplicity we will call these activities “the creative field”).

At the first stage, the advertising message is planned. During that time the data regarding the advertised product or service as well as relevant worldwide trends are collected. At the end of this process the advertising strategy, i.e. the advertising message to be conveyed through the commercial, is formulated. In the second stage, the advertising strategy is translated into a creative idea, and eventually the advertisement is produced as a video clip.

The creative field in Israel is characterized by a multiplicity of competitors. Alongside the ten leading advertising agencies, which constitute over 40% of the market, there are dozens of small advertising agencies whose market shares do not exceed 1 percent. The financial investment required to enter the market is relatively low, but an agency has to acquire a strong reputation to attract advertisers, particularly if these advertisers are large.

### **1.3 Media buying and planning**

Media buying and planning companies (for simplicity we shall call them: “media buying companies”) are involved in planning and buying media space or airtime, for the purpose of increasing exposure to the target audience of the advertisement.

The process of media buying includes three main stages: At the first stage, the media buying company recommends to the advertiser the best media channels for the campaign. Usually two main media channels are selected. At the second stage, the advertising mix among the media channels is selected and the commercial’s location in each of the media channels is chosen (e.g., broadcasting timeslots or specific shows) for the purpose of reaching the highest possible exposure rates among the target audience for a given budget. At the final stage, the media buying company purchases advertisement space or airtime from the different media channels (e.g., airtime on television or radio, a page in a newspaper or billboard space). The goal of a media buying company is to plan and purchase media in an optimal way, so that the advertising message will reach the largest number of viewers or listeners within the target audience, subject to the advertisement budget.

Larger media buying company enjoy improved bargaining power in negotiations with media channels over commercial prices and locations.

Another size-related advantage stems from the media buying company’s ability to offer the advertiser more flexible planning. In particular, a large media buying company is typically able to offer attractive media locations on short notice because it can manage internally the slots allocated to its advertisers.

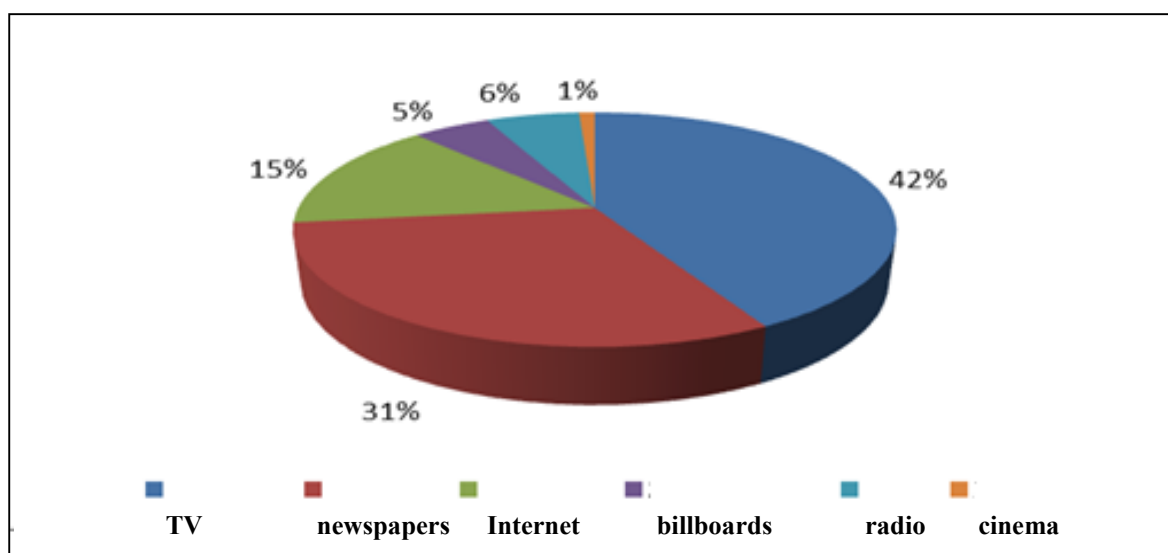
Concentrating several media buying activities under one purchasing company can also save on transaction costs. Instead of every advertising agency hiring its own staff to handle the planning, negotiations and purchasing, several agencies can use a joint buyer of media in order to save on these costs. This particular advantage is reached, however, even with a relatively modest size of the media purchasing company.

## 1.4 Media

Media channels are the different communication channels used to convey information to the public. The media channels that serve as advertising platforms are television, radio, newspapers, billboards, cinema and the Internet. Different advertisers can view them as substitutes or as complements, depending on the type of commercial, the target audience, the scope of the investment in the advertising campaign, etc.

As illustrated in the following diagram, television advertisement has the largest scope, with about 42% of the total advertisement field. The second largest media, newspapers, comprises of approximately 31% market share, and in third place is the Internet, with approximately 15%. The advertising scope of the rest of the media channels is only a few percentage points.

**The rate of the financial advertising scope of different media channels from the total amount of advertising in the year 2011**



## 2. The structure of the media buying field

The media buying field is characterized by far fewer competitors compared to the number of advertising agencies. In this field there are six companies that purchase media from all of the media channels: a large company with a market share of over 30%, three medium-sized companies with market shares between 14% - 18%, and a small company with a market share of a few percentage points. In addition, there are a few advertisers or advertising agencies that purchase media directly from the media channels, without the assistance of media buying companies.

As described in what follows, each media buying company, except for one, is vertically integrated with large advertising agencies. Typically, such vertically integrated media companies serve their affiliated advertising agencies as well as other advertising agencies. Accordingly, there are three models of media buying companies:

- A media buying company affiliated with a single advertising agency that purchases media for this agency as well as for a number of other advertising agencies that are not affiliated with the media buying company.



- A media buying company affiliated with several advertising agencies that purchases media for them and for other agencies.
- A media buying company that purchases media for advertisers and advertising agencies and is not affiliated with an advertising agency.

As stated above, most of the media buying companies in Israel operate based on the first or second models.

Most advertisers buy both creative services and media buying services from the same entity. An advertiser typically selects the advertising agency that offers him the best combination of creative services and media prices. In practice, only a small number of clients split the creative and media buying services between two different entities, and these are mostly either advertisers with extremely large advertising budgets or international companies. In addition, there is evidence that often an advertising agency will refuse to provide creative services to clients who do not buy media through them.

Media buying companies aspire to increase the scope of their purchasing in order to enhance their bargaining power and purchase media for reduced prices. As a result, a few requests to approve joint media buying by different companies were submitted to the Israel Antitrust Authority (“IAA”).

### **3. Television media buying**

The field of television media buying is distinguished from media buying in other media channels, for at least two reasons:

- First, television is a popular medium to expose ads to consumers and allows the advertiser to present an audio-visual commercial to a large target audience.
- Second, some of the public consumes information solely through television and does not use other forms of media, such as radio and newspapers. For this reason, advertisers interested in conveying an advertising message to the general public are typically encouraged to use television in addition to other forms of media.

In the media buying field, television channels usually reward the media buying companies for large purchases: They pay commissions to the media buying companies for reaching yearly purchasing targets. The size of these commissions, and the price per rating point paid by the media buying company to the television channel in general, is unknown to the advertisers, and commissions or discounts are not fully passed through to advertisers.

### **4. Past decisions in the media buying field and challenges ahead**

Several proposed partnerships among media buying companies have been submitted to the IAA over the years.

Starting in the year 2000, several of these requests were approved by the IAA. The grounds for approval, inter alia, were that the media buying market was not concentrated enough at the time to raise concerns.

In 2008, the IAA refused to extend its approval of one of these partnerships. A careful examination of the relevant markets demonstrated a reasonable probability for accumulation of market power by media buying companies. The partnership under consideration had a relatively high market share of

approximately 40%. The examination revealed an increase in the media purchasing market concentration and in the commissions paid by the television channels. Specifically, the large media buying partnerships had become larger and a few small media buying companies had exited the market.

Currently, the IAA is faced with another request for cooperation between two media buying partnerships, which jointly purchased approximately 22% of television air time in 2011. Because many distinguishable advertisers are unable to purchase airtime directly from the media (particularly due to the discounts and commissions a media buying company can get from television channels but also due to advantages in planning and monitoring of campaigns), airtime purchasing through a media buying company can be defined as a distinct market. Under this market definition, the market share of the joint project in 2011 was approximately 29%.

This request, which is still pending, raises a few important issues that the IAA needs to consider. Most importantly, higher concentration in the media buying market is expected to raise the companies' market power vis a vis television channels.

This concern is magnified due to the television channels' cost structure. As mentioned, television channels are characterized by an inflexible cost function, which cannot change in the short term, even when the income of the television channel is substantially decreased. Therefore, large media buying companies have the ability of diverting advertisements from one television channel to the other in a manner that can pose a real threat to the channel.

Since the media buying partnerships also jointly sell airtime to advertisers and unaffiliated advertising agencies, a concentrated media buying market can also translate into increased market power vis a vis advertisers and advertising agencies. The likely outcome of such market power is that discounts and commissions received by large media purchasing companies are unlikely to be passed through to advertisers and unaffiliated advertising agencies.

Due to the vertical integration between the large media buying partnerships and their affiliated advertising agencies, it is also important to examine whether unaffiliated advertising agencies may be harmed by the increased market power of the media buying partnerships.

Additionally, expansion of media buying companies through partnerships allows them to increase their bargaining power without needing to compete over unaffiliated advertising agencies in order to expand. This may weaken their incentives to compete with each other on serving unaffiliated advertising agencies. The result is that less discounts and commissions are expected to be passed on to unaffiliated advertising agencies, and ultimately, to advertisers.



## JAPAN

### 1. Issues involving competition in the television/broadcasting industry: Introduction

There have been significant changes in the market structure of the broadcasting industry in general, and the television sector in particular, because of the advancement of technology that altered the status of competition among broadcasters and telecommunications providers. In order to reorganize and streamline the system in response to the progress of digitalization, for the purpose of consolidation of systems regarding each type of broadcasting and improvement of the system regarding broadcasting, radio and telecommunications, broadcasting laws were revised in 2010 for the first time in 60 years to create a new regulatory framework. The Act Concerning Broadcast on Telecommunications Services, the Cable Television Broadcast Act, and the Act Concerning the Regulation of the Operation of the Cable Sound Broadcasting Service, were merged into the Broadcast Act. As a result, systems have been streamlined, consolidated and more flexible in granting market access to new entrants.<sup>1</sup>

Considering the market change and regulation by the government under the new regulatory framework, the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) needs to rigorously enforce the Antimonopoly Act and seek to prevent any anticompetitive activities and mergers in the broadcasting industry. This report will examine proposed mergers that have been reviewed by the JFTC and discuss issues that must be addressed in analyzing the status of competition.

### 2. Application of the Antimonopoly Act to television broadcasters

The Antimonopoly Act prohibits unreasonable restraint of trade, private monopolization, unfair trade practices, and mergers that might be to substantially restrain the competition. Because the Antimonopoly Act is applied to all industries, television operators and broadcasters are subject to this act similarly. Any activities that fall under the above types of violation are illegal and subject to cease-and-desist orders or surcharge payment orders. Mergers in the television and broadcasting market are also subject to review by

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<sup>1</sup> (1) Regarding broadcasting, a distinction has been made between “basic” and “general” broadcasting. Basic broadcasting means that the broadcasting using radio waves of frequencies allocated either exclusively or preferentially to radio stations broadcasting. Broadcasting that are not basic broadcasting are called general broadcasting.

(2) Regarding basic broadcasting, the system has been changed for enterprises which prefer to separate their operations into (i) establishing and managing radio station (hardware) and (ii) conducting broadcasting (software). Hence, under the new system, the authorizing process has been separated into “license” of radio station and “approval” of conducting broadcasting. In addition, the new system has co-existed with the current system where operators are required to obtain only single license in order to conduct broadcasting, for specified terrestrial basic broadcasters who prefer to keep single license for both hardware and software.

(3) The government has integrated the system for enterprises to enter into general broadcasting including cable television broadcasting, cable radio broadcasting and broadcasting on telecommunications. Under the new system, enterprises can enter into the above areas with only registration of their businesses. (Meanwhile, cable radio broadcasters are not required to register their businesses; they only have to notify the authorities of a plan to enter the market.)

the JFTC. Meanwhile, the Broadcast Act imposes restrictions on the ownership of basic broadcaster<sup>2</sup> which operates basic broadcasting operations such as television broadcasting under the “principle of eliminating media concentration.” (Article 93, paragraph 1, item 4, and paragraph 2)

The 2006 merger between SKY Perfect Communications Inc. and JSAT Corporation is an example worth studying, even though it took place before the Broadcast Act was revised.<sup>3</sup>

It should be noted that this study may not accurately describe the current situation, since it is based on a review released on June 19, 2007.

## **2.1 *Outline of the case***

This case relates to the plan formulated by SKY Perfect Communications Inc. (hereinafter referred to as SKP), which has a platform business related to broadcasting using communication satellites (hereinafter referred to as “CS broadcasting”) and JASAT Corporation (hereinafter referred to as JSAT), which has a transmission business using communication satellites, to merge to form a 100% subsidiary company of a holding corporation.

The relevant legislative provisions for this case are contained in Section 10 of the Antimonopoly Act.

## **2.2 *Particular field of trade***

### **2.2.1 *Outline of broadcasting and communications***

The provision of contents in Japan includes broadcasting and communications.

Broadcasting includes, for example, satellite broadcasting, cablecast (hereinafter referred to as CATV), and terrestrial broadcasting; and communications include, for example, Internet and telephone. Furthermore, broadcasting and communications are divided into two fields: one whereby contents are provided to customers free of charge and one whereby contents are provided to customers with a charge. The main source of revenue for the former is advertising income and viewing fees for the latter.

In broadcasting, after digital broadcasting using CS began in 1996, all the broadcasting and communication enterprises have undergone (or are making) the transition from analog form (a method in which images are transmitted by analog modulation) to digital form (a method in which images are transmitted by digital signals) whereas CS broadcasting using analog signals does not presently exist and analog broadcasting using broadcasting satellites (hereinafter referred to as “BS broadcasting”) is scheduled to be fully introduced by 2011. With countrywide broadbandization scheduled for completion in 2010 and the complete transition from terrestrial analog broadcasting to terrestrial digital broadcasting by July 24 of the following year, digitization is being vigorously promoted at the present time. In the area of communications, communication services similar to broadcasting are being realized as a result of broadbandization of the Internet Network and the development and dissemination of one-segment broadcasting so that the boundaries between broadcasting and communications are being blurred. In this document, communication services similar to broadcasting are included when “broadcasting business” is referred to.

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<sup>2</sup> Basic broadcaster means “approved basic broadcaster” defined under the Broadcast Act or “specified terrestrial basic broadcaster” defined under the Radio Act. (The Broadcast Act, Article 2, item 23)

<sup>3</sup> Another case worth examining would be the JFTC recommendation decision issued on Oct. 13, 2004, against USEN Broad Net Works and another company.

### 2.2.2 *CS digital broadcasting*

#### 1. The working structure

The parties concerned are involved in a business related to CS digital broadcasting. The digital broadcasting business in Japan consists of “commissioning broadcaster<sup>4</sup>,” which provides programs, and “commissioned broadcaster<sup>5</sup>,” which delivers the programs from the communication satellite using radio waves, and the “platform company.” Among the three parties, the commissioning company pays the fees for the use of a transponder (a repeater installed on a satellite) and the fees for the commissioning of digitization of broadcasting signals to the platform company. The commissioned broadcasting company pays the fees for commissioning the operations from the multiplexing of the digitized broadcasting signals to the uplink to the platform company. SKP is the only platform company that exists at present, and there are two commissioned broadcasting companies including JSAT. Multichannel broadcasts are being provided by SKP using the communications satellites, “SKY PerfecTV!,” which are located at longitude 124 degrees east and longitude 128 degrees east, respectively, and are owned by JSAT, and the communication satellite, “SKY PerfecTV! 110<sup>6</sup>,” which is located at longitude 110 degrees east and co-owned by two companies including JSAT.

#### 2. Flow of reception and transmission

In CS digital broadcasting, broadcast programs are provided by program providers as in the case of terrestrial broadcasting. However, since most programs that are broadcast are transmitted using analog signals, it is necessary to digitize the analog signals in order to broadcast via the communication satellites. The digitized broadcast signals are further multiplexed (this is where multiple analog message signals or digital data streams are combined into one signal), and the multiplexed signals are modulated to high-frequency signals that can be transmitted to the satellite and sent to the stationary communication satellite located at an altitude of 36,000 km using a large-scale satellite antenna dish (this process is called “uplink”). The communication satellite receives the broadcast signals transmits the broadcast signals using the installed transponder to the ground (this process is called “downlink”). These signals are received by the small-scale satellite antenna dish installed at each home and the programs are viewed on a conventional TV through a dedicated receiving apparatus.

### 2.2.3 *Pay-broadcasting digital delivery business*

#### A. Outline of the pay-broadcasting digital delivery business

The CS digital broadcasting service provided by the parties concerned is a type of digital pay-broadcasting. In digital pay-broadcasting, in addition to CS digital broadcasting, there are BS digital broadcasting, CATV and IP broadcasting (multi-channel broadcasts are provided using the exclusive IP network on broadband circuits and programs are viewed on the TV receiver connected through dedicated equipment).

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<sup>4</sup> A name according to the Broadcast Law. Although the name according to the Law Concerning Broadcast on Telecommunication Services is a broadcasting company on telecommunication services, such a company is collectively referred to as a “program provider” in this document.

<sup>5</sup> A name according to the Broadcast Law. Although the name according to the Telecommunications Business Law is a telecommunication company, such a company is collectively referred to as a “transmission company” in this document.

<sup>6</sup> The name was changed to “e2 by SKY PerfecTV !” in February 2007.

## B. Market trends

The number of subscribers to “Sky PerfecTV!” and “Sky PerfecTV ! 110” for CS digital broadcasting has increased each year for the past five years, with an additional 1 million subscribers compared with five years ago. On the other hand, CATV and IP broadcasting are promoting differentiation from CS digital broadcasting by providing a unit price system for “triple play” that includes video distribution, high-speed Internet, and telephone. As a result of the fierce competition for market share among the three businesses, the average viewing fees per subscriber are decreasing year by year.

## C. Efforts to attract subscribers

In view of the full transition to terrestrial digital broadcasting in 2011, all the broadcasting companies are taking a range of measures to increase the number of subscribers. Satellite broadcasting companies are trying to increase the number of subscribers for the device common to three bands that enables terrestrial digital broadcasting, BS broadcasting, and 110-degree CS broadcasting to be viewed using only one receiver; and CATV companies are endeavoring to enhance multi-channel broadcasting and community broadcasting. IP broadcasting companies are increasing the number of channels while implementing a free trial campaign for a limited time.

Some of the CATV companies are changing the transmission route from satellites, which have the disadvantage of “rainfall attenuation” (distortion of images caused by bad weather) to terrestrial optical circuits.

In IP broadcasting, there is a trend where companies which started with VOD (a system in which the subscriber can view desired images when they want to view) are now entering the multi-channel broadcasting business.

### 2.2.4 *Defining the particular field of trade*

CS digital broadcasting, which is the business of the parties concerned, is a type of digital pay-broadcasting. From the viewpoint of subscribers, there is little difference in the contents and image quality among the types of broadcasting because functions and utility are similar, and the pay-broadcasting companies are competing for new subscribers. Therefore, the digital pay-broadcasting delivery business is the target of the investigation in this document.

In the digital pay-broadcasting business, the program providers provide the platform companies with programs, then the platform companies carry out digital processing, and the programs are finally delivered to the subscribers through the transmission companies, which transmit programs using satellites or terrestrial optical circuits. Of the parties concerned, SKP conducts the platform business and JSAT conducts the transmission business. Therefore, the business combination of both companies corresponds to vertical business integration and the particular fields of trade are defined by referring to the platform business as the upstream market and the transmission business as the downstream market.

Since these business fields cover the entire country and there are no special conditions, the geographical region is defined “nationwide”.

## 3. **Investigation of the effects of the business combination on competition**

### 3.1 *Changes in the number of subscribers and market size for pay-broadcasting*

The number of the subscribers to pay-broadcasting, which is the only data available, has increased each year for the past five years resulting in slightly fewer than 25 million subscribers in 2005. The

transition from analog to digital is being rapidly implemented and a battle for market share is being fought among CS digital broadcasting, CATV, and IP broadcasting, and this is expected to expand demand in the future.

### 3.2 *Platform business*

#### A. Platform business

The basic functions carried out by a platform company in digital pay-broadcasting delivery include: digital processing, contents delivery, EPG (electronic program guide) data delivery, and access control. All of these are indispensable for digital delivery.

#### B. Market share/HHI

Market share (based on the number of subscribers) of each company in the platform business is as shown in the table below. HHI is approximately 3,400.

**Platform Business: Company Market Share**

Rank Order	Company	Market Share
1	SKP	Approx. 45%
2	Company A	Approx. 35%
3	Company B	Approx. 15%
4	Company C	Approx. 5%
5	Others	0 – 5 %
	<b>Total</b>	<b>100%</b>

Note: Number of subscribers as of the time of examination

#### C. Existence of competitors

There are multiple competitors whose market share is 10% or more.

#### D. Existence of a large number of program providers

There are as many as about 100 program providers and they provide all-round programs to any of the platform companies since they desire to acquire as many as subscribers as possible. For example, popular programs to which many people subscribe, such as hit animated cartoons, classic animated cartoons, and sports programs, are delivered to multiple platform companies.



E. Ability to change partner company

As can be seen from the fact that some CATV companies have replaced SKP with other platform companies, it is easy for CATV companies to change platform companies.

F. New market entry arising from the expansion of IP broadcasting

As a result of the increase in the number of subscribers to FTTH, new entrants into the market are expected due to the expansion of IP broadcasting.

**3.3 Transmission business**

A. Transmission business

The transmission business is one in which digitized contents are transmitted to subscribers using satellites or terrestrial optical circuits.

It is said that the transmission cost using terrestrial optical circuits is lower than that using satellites.

The transmission routes differ depending on the platform company, and SKP delivers contents through JSAT.

B. Market share

Market share (based on the number of subscribers) of each company in the transmission business is as shown in the table below.

**Transmission Business: Company Market Share**

<b>Rank order</b>	<b>Company</b>	<b>Market share</b>
1	JSAT	Approx. 50%
2	Company F	Approx. 10%
3	Company G	Approx. 10%
	Total of the companies using terrestrial optical circuits	Approx. 30%
	<b>Grand Total</b>	<b>100%</b>

Note: Number of subscribers as of the time of examination.

C. Existence of competitors

There are competitors whose market share is 10% or more.

D. Ability to change partner company

In some cases, when the platform company is changed, there is an automatic change in the transmission company.

E. Superiority of terrestrial optical circuits

Terrestrial optical circuits enable program delivery at lower costs because the transmission cost is lower than that of satellites.

#### **4. Review in terms of the Antimonopoly Law**

##### **4.1 *Review of independent action that may interfere with free competition***

- A. JSAT's rejection of accepting the commissioning of transmission business from companies other than SKP

Since major competitors other than JSAT exist and transmission using terrestrial optical circuits is superior to transmission using satellites in terms of cost, it is unlikely that the business of companies other than SKP will be jeopardized even if JSAT refuses the commissioning of transmission business. Therefore, independent action of the parties concerned will not substantially restrict competition in the platform business.

- B. SKP's rejection of the commissioning of transmission business to companies other than JSAT

Since there are major competitors which are provided with programs from companies other than the parties concerned and new entrants into the platform business are expected due to the expansion of IP broadcasting, it is unlikely that the business of companies other than JSAT will become more difficult even if SKP refuses the commissioning of transmission business to companies other than JSAT. Therefore, independent action of the parties concerned will not substantially restrict competition in the platform business.

##### **4.2 *Review of concerted action that may interfere with free competition***

Since new entrants are expected in the platform business, which is the upstream market, due to the expansion of IP broadcasting, competition is active in the market. In the transmission business, which is the downstream market, competition is also active between satellites and terrestrial optical circuits because terrestrial optical circuits are superior to satellites in terms of cost. Therefore, cooperative action of the parties concerned with other competitors will not substantially restrict competition in either the upstream business or the downstream business.

#### **5. Conclusion**

The analysis above suggests that this case does not actually interfere with free competition in the market concerned.



## KOREA

### 1. TV/Broadcasting competition in Korea

#### 1.1 *Overview*

Korean consumers can choose from a pool of TV/broadcasting choices offered by 5-6 pay-TV service operators, including cable TV operators, satellite broadcasters and IPTV operators. Previously, when only cable system operators (SOs) provided services, the market in the country was not very competitive. However, with the launch of satellite broadcasting in 2000 and IPTV in 2008, Korean consumers are now able to benefit from a true choice in the market. Currently, in each region of the country, people can choose from the services of at least 5 to 6 different providers, including one cable TV operator, three IPTV operators, and one satellite broadcaster.

Price competition in the Korean TV/broadcasting market is therefore vigorous in terms of pay-TV subscription fees and advertisement charges to increase membership, deterring excessively high prices. However, low-cost competition means a decrease in providers' profitability, and thus a potential decline in the quality of services and less resources for innovation and investment.

Due to the socio-cultural influences of the media, each broadcasting operator must receive government approval to operate. Market entry regulations may exist in some broadcasting areas where permission is required to launch a business such as news media, home-shopping, terrestrial broadcasting, and SOs, whereas in other areas, such as the case of programme providers, no such regulations exist. Korea has been deemed to have fewer competition-restrictive aspects in its TV/broadcasting entrance regulations and in its consumers' rights to choose services.

#### 1.2 *Effectiveness of current regulations*

Korea's current legal system recognizes each type of broadcasting service separately when imposing regulations. This has resulted in potential problems in terms of disproportionate regulations between services and a lack of room for the adoption of new converged services. The country's inequality in intra-industrial relationships also holds back industry growth to some extent. In response to this phenomenon, Korea is exploring ways to improve broadcasting programme production and distribution as a means of strengthening the broadcasting market. It is also in the process of setting up an institutional framework capable of remedying unfair and unreasonable practices.

### 2. Main TV/broadcasting competition issues

#### 2.1 *New technology & environmental change*

Korea's broadcasting industry has been undergoing transformational changes—internet and TV service convergence, and a shift from the traditional TV business model based on a vertically-integrated distribution network to a more individualized programing-based model. In line with the combination of conventional services and the emergence of new services, Korea has become increasingly aware of the growing need to reform its legal infrastructure in order to ensure fair competition. Korea therefore plans to

integrate the dual broadcasting regulations of the country so as to establish a single comprehensive act for broadcasting and telecommunications, while continuing with its competition enforcement.

## **2.2 Corporate vertical integration**

Media companies' (platform) vertical integration has raised more competition issues. Media companies are allowed to own a programme provider, and in some cases have demanded to ease ownership-related regulations. However, some vertical combination cases tend to impede other non-vertically-tied normal programme providers from entering the market. Examples are when a multiple SO unites with a programme provider or a terrestrial broadcaster's affiliate joins the pay-TV market. There are also many channels that programme providers are obliged to air, such as public channels, which poses another difficulty for individual small programme providers when entering the market.

Cross ownership among media companies has also become an issue. Although system operators, satellite broadcasters, and IPTV operators are competing in the same market, they have to face different sets of regulations—the Broadcasting Act for SOs and satellite broadcasters; and the IPTV Act for IPTV operators—which results in fairness issues. The Broadcasting Act, for instance, limits cross-shareholding between broadcasters at 33% or lower but the IPTV Act has no such limit. The Media Act, approved in 2012, allowed newspaper companies to launch broadcasting services, and in the same year, newspaper company-owned channels began providing services. This has raised potential competition issues among existing programme providers.

## **2.3 Content access & efficient frequency allocation**

In order to take its first steps into the broadcasting market, an enterprise first needs to ensure access to its communication services and programme content. However, since exclusive rights to content are at the heart of its business model, this can also undermine competition. Currently, in Korea, business relations, such as channel transmission contracts between media platform operators like SOs and programme providers, are decided by the broadcasting market. For the moment, there is very little concern in Korea about exclusive contents that might interfere with platform success. Programme supply suspension or rejection and the restrictive imposition of conditions are subject to the Fair Trade Act or a broadcasting-related act's fair trade provisions.

In a situation where new technologies like IP-based media services, including IPTV, N-Screen, real-time streaming, and VoD, undermine the traditional TV broadcasting business model, frequency allocation has been proposed as a possible solution. Korea is now allocating frequencies by permission. While frequency allocation may improve the traditional TV broadcasting (terrestrial) service environment, new media services combining conventional TV broadcasting and new technologies rely on different networks (radio frequency [RF] and internet protocol [IP]). For this reason, it does not appear as if frequency allocation will help ease business model-related competition issues in any direct way.

# **3. Competition enforcement**

## **3.1 Legal framework**

Cartels or any abuse of market dominance are now subject to the Fair Trade Act in Korea. Boycotts, exclusive dealing contracts, and product bundling are regulated by the Fair Trade Act or Broadcasting Act, which both introduced provisions to ban such conduct in 2011. Therefore, both the Korea Fair Trade Commission (KFTC) and the Korea Communication Commission (KCC) have jurisdiction over overlapping unfair trading practices. If a certain broadcasting company tries to pursue a merger, it should obtain a license or permission for such a change from the KCC. Alternatively, it should register with the KCC, while at the same time undergoing a corporate merger review by the KFTC under the Fair trade Act.

Korea's broadcasting-related Acts, together with the Fair Trade Act, regulate the following unfair trading practices: boycotts in relation to channels and programmes, contract dealings based on restrictive conditions, unfair transaction coercion and transaction discrimination. Other regulated practices include sales bundling to sell products combining TV and internet broadcastings and telecommunication services; limitations on—or suspensions or rejections of—access to essential facilities for broadcasting service provisions; and changes to channel arrangements. Attempts to delay or deny profit sharing, hinder viewing of other broadcasters' channels, or obstruct service contracting with other broadcasters are also punishable through these Acts.

### **3.2 *Coordination of regulation overlap***

To prevent any overlap in punishment, if one of the two agencies imposes an action in relation to a specific unfair trading practice, the other agency cannot regulate the same case. If the KCC intends to impose a fine, the organisation must consult or inform the KFTC. When a broadcasting operator violates the Fair Trade Act, the KCC must also inform the KFTC.



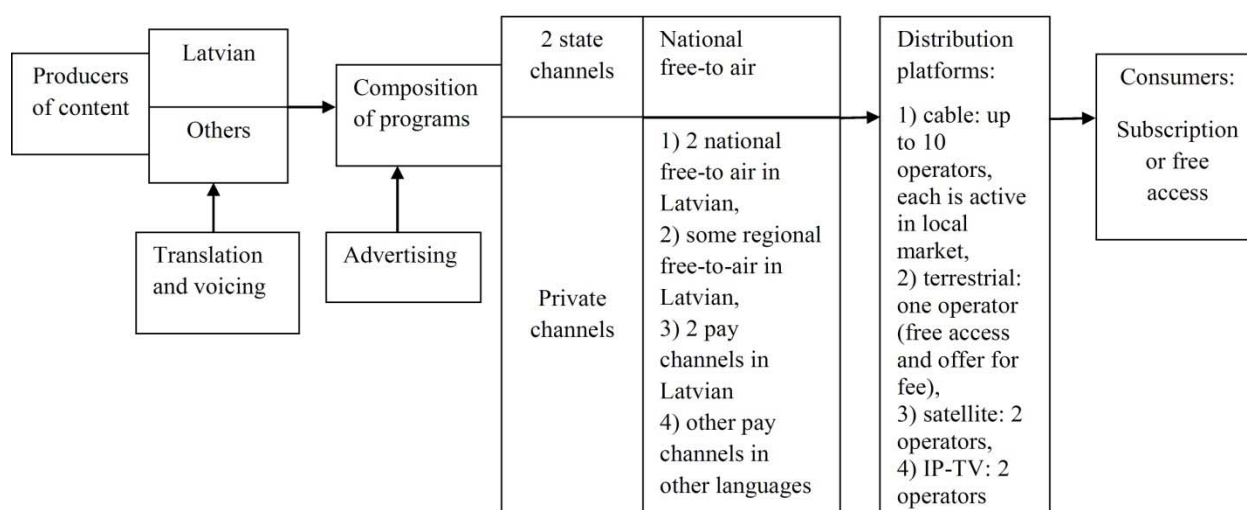
## LATVIA

## 1. What is the state of competition in the television broadcasting sector in your jurisdiction?

## 1.1 Supply chain

The market of television broadcasting in Latvia should be considered as highly regulated because of national specifics. The state policy for the support and protection of cultural values as language, traditions, often confronts with the competition policy. Small economy (market) does not allow many market participants to exist. Almost in all levels of the supply chain there is an oligopoly.

## Supply chain in TV broadcasting sector



In 2009, Latvia switched from the analogue terrestrial broadcasting to digital. This event vastly affected the situation in industry, including competition issues. The positive effect was that viewers were offered additional pay TV platform, which did not exist before, therefore, competition in pay TV market had increased; but free access TV market was affected negatively: payments for services of terrestrial infrastructure had increased more than twice. Due to the financial burden one private free-to-air channel left free TV market, but the other two private free-to-air channels were close to make the same decision, and finally they merged in 2012.<sup>1</sup>

In 2012, the amendments in sectoral law were initiated in order to correct the situation and provide more competition in the terrestrial pay TV market (now there is only one provider in Latvia). At the end of

<sup>1</sup> The decision to merge was the result of many unfavorable obstacles in industry, generally both companies were in very bad financial situation, due to the downfall in advertising market, must carry principle, state support of state channels, increased payments for terrestrial infrastructure.



December, 2012, draft amendments were adopted in the second reading in the Parliament, but so far it is not clear how the situation will develop and when the amendments will be finally adopted. Therefore, the situation in the sector is not stable and risks for competition exist.

## 1.2 *Competition constraints*

- Must carry principle, defined in sectoral law, will stay<sup>2</sup> in force till the end of March, 2013. It means that both state channels and both leading private channels are mandatory included in all TV packs and TV operators do not pay for these channels to their producers. So the demand-supply principle in this issue is deformed, nobody knows the real demand and the value of these products for consumers. The amendments in sectoral law will allow the national commercial channels to require a payment for transmission of their content in cable TV platforms from March 31, 2013.
- Competition between platforms. The uneven density of population in the country is the reason of specific competition levels. The density of population in rural areas is much lower than in urban areas, therefore the cable TV operators are active only in towns. TV viewers in towns are offered four alternatives of pay TV platforms: cable<sup>3</sup> (some operators), IP-TV (2 operators, one of which is the national telecom incumbent operator), satellite (2 operators, one of which is located abroad), terrestrial (1 operator – the national telecom incumbent operator). In rural areas, where it is economically unreasonable to build the cable infrastructure, there are only 2 alternatives: terrestrial and satellite.
- Competition in cable TV platform. For many years the Competition Council of Latvia (CCL) has received indications that cable TV operators might have agreed on territorial division, because they were not active enough in the development of cable network in the areas where other cable operators have built the networks. But there were also economical explanations for this behavior – insufficient return of investments. In recent years, the two largest cable operators have become more active in this issue, but now they have an intension to merge. So the development of competition in the cable TV platform is questionable now. Another problem is related to the residential property management sector. Some years ago CCL received many complaints about residential property management companies (especially those which were also real estate developers): they determined which TV and internet provider may be allowed to build the infrastructure in houses and operate it. The consumers often disagreed with these choices, the competitors were also not satisfied with the situation.
- State channels. There are two state owned channels in Latvia. They fulfill the basic demand of public and are designed as the main source of information of state significance. The system does not provide the possibility to fulfill the state order for private channels. The financing of state channels (from budget) is not enough, so state channels provide advertising also. The CCL has declared that this has negative effects on competition in the advertising market.
- Concentration. High concentration<sup>4</sup> in the market of TV channels and in the platforms means that both markets depend on each other, and very often they have long and difficult negotiations, trying also to involve the CCL in their private disputes.

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<sup>2</sup> Part of above mentioned amendments.

<sup>3</sup> In towns parallel (i.e. when viewer in its home can choose between at least two operators) cable infrastructures some years before were quite rare.

<sup>4</sup> Almost in each relevant market there is dominant undertaking.

- Regional and local television. The switch to digital format in 2009 deprived the regional TV companies of the possibility to broadcast independently, as they had not enough financial resources to afford it. Now the content of regional channels is placed in state channels in special „windows”. The same situation is with the local channels. Their activity has been suspended. The amendments in sectoral law which probably will come in force in 2014 might give an incentive to independent broadcasting of regional and local TV.
- Prices. In respect of pay TV the CCL considers that there is enough competition between TV platforms which provide differentiated offers (packs) and there are no indications that prices are excessive. An entrance of a new market participant in 2009 increased the competition pressure on the existing operators. There are no indications that private channels impose excessive price for their products to TV operators, although the negotiations may be very difficult. The TV operators tend to cooperate in common purchase for lower price. As to the fees charged to advertisers – prices reduced in the period of crisis (2008-2009) and, as market participants have indicated, in the beginning of 2012, the level of prices still did not achieve the level before the recession. The overall trend of the market suggests that prices for advertising in Latvia may continue to increase.
- Quality and service. Quality of TV production directly depends on financing of the production. Worse financial situation of the Latvian channels affected the quality of original television and reflected on the amount of original content. Imported television products, which are produced for very large audience (as Viasat channels, NatGeo, russian ORT, RTR, NTV) obviously were not affected so much by financial crisis and they gradually acquire the shares, definitely starting to compete in advertising market. But still the Latvian original channels are the highest ranked by the viewers<sup>5</sup>.
- Barriers to entry and expansion. Barriers to entry are different for different kinds of platforms. The free-to-air channels are broadcasted only in terrestrial platform. The fee for the services of free-to-air TV infrastructure is too high (free-to-air channels even considered the possibility to leave the free-to-air platform because of financial difficulties). The sectoral law does not provide the possibility for channels to broadcast, using their own technical resources and equipment in terrestrial platform: all the radio frequencies for terrestrial broadcasting were assigned to one operator until 31.12.2013. At the same time incomes from advertising are not enough. For pay TV channels barriers to entry are not so high. All the TV channels must obtain a permission of the National Electronic Mass Media Council. Specific requirements exist if a channel wants to operate as a *national* channel.
- Existing legal and regulatory framework and competition. Existing legal framework does not support effective competition. The draft amendments were elaborated and now await for the final reading in Parliament. In the first reading the draft amendments provided that instead of one terrestrial operator the model of two or several operators is offered. However, in the second reading Parliament supported the model with one terrestrial operator, which will be selected in a tender. During the legislation process of the draft the CCL prepared an analytical report on level of competition in both variants, establishing that the model with several operators could be more effective from competition point of view, if some conditions are fulfilled.
- Vertically integrated providers. The company Viasat is a provider for satellite TV (competes with other pay-TV platform operators) in Latvia and also is a holder of 6 important channels. But it has not raise competition concerns so far.
- Cross-ownership. No competition problems have been established.

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<sup>5</sup>

Data on spring 2012.

**2. What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

- Current and future challenges. Small market and its specific structure in Latvia require sometimes bizarre solutions in competition cases, related, for example, to relevant market definition and remedies for mergers. Also for the CCL the current and future challenge is that the CCL is involved in active work of drafting the amendments of the sectoral laws. After investigation of abuse of dominant position in the activity of terrestrial operator the CCL hardly has criticized the provisions of sectoral legal acts, therefore, the CCL was invited to participate in working groups that elaborates legal acts and provisions for public tender in broadcasting and electronic communication issues.

Looking at the tendencies in broadcasting it seems that the producers of channels will try to become more independent of the TV operators, i.e., more to use the internet for direct connection to the viewer, avoiding the services of TV retail operators. Also the producers of channels tie the advertising time in their channels. As advertising campaigns tend to be international, channels which operate in many countries may tie or bundle advertising time in different countries (for example, TV3, held by MTG, can provide advertising of L'Oreal in all the Baltic states within one agreement, but the channel which operates only in one state can offer advertising time only for auditory in one country). So the international channels are able to press small channels out of the advertising market. In this case competition concerns may arise (if the dominant position can be established) – the definition of relevant market of advertising time (channel, prime time/night/other, before/in time of/after relevant content and so on). In general, the CCL believes that competition concerns and challenges of competition policy will relate to dominant position issues.

The time frame in which these problems are expected are the nearest 3-6 years.

- Market studies. The CCL conducted pay-TV market study in 2009-2010 (analyzed period 2008-2010). The full text of report is available in Latvian<sup>6</sup>. The main findings were on barriers for entry and expansion in pay TV market (frequencies for terrestrial platform are given to one operator, the residential property managers limit the number of infrastructures in houses, long term agreements with viewers/penalties for termination before the term, financial barriers), on market development (dynamic, triple play is decisive for competitiveness, no expansion but modernization), on structure, on competition between players (competition is between platforms, but not inside the platforms, exchange of information between the players take place).
- Access to content. So far there were no problems with exclusive right to premium content.
- Efficient spectrum allocation. Limit on transmission spectrum in Latvia still is technical barrier to entry or expansion in television broadcasting, in respect of terrestrial platform. This barrier is justified by economies –to avoid using different frequencies for broadcasting one channel. Since the law provisions came into force (switch on digital terrestrial television in 2009), the entire TV spectrum was assigned to one operator, and there were no technical possibilities for channels to broadcast in terrestrial platform using their own infrastructure. After 12.31.2013. a new platform for television may be available – television in mobile broadband internet (4G). The use of this platform will allow channels to acquire viewers directly with no cable infrastructure and with no pay-TV operators. So the viewers would be offered with additional option of TV services.

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<sup>6</sup> <http://www.kp.gov.lv/documents/4af7295a17c7cd27a17da42c10b9efa1da07f0a0>

As to the spectrum licenses for 4G – there was a tender procedure. For the terrestrial platform – the system when spectrum for terrestrial platform is given to one infrastructure holder (undertaking Latvian State Radio and TV Center) will not be changed, but due to the new provisions in law competition situation will be improved.

### **3. What has been your relevant experience in competition law enforcement relating to television and broadcasting?**

#### **3.1 *Merger assessment***

In 2009, a merger was proposed between two leading cable operators. The merger was cleared with conditions, but companies, however, did not merge. Competition concerns were found in the local markets of retail of pay TV. As 2009 was a period when new platform started to work (digital terrestrial) in pay TV market, the CCL, additionally to the analysis of market shares, analyzed dynamics of how the subscribers switched from the cable platform to the terrestrial to understand, if the terrestrial operator is able to compete with the cable operators. In the decision the CCL recognized for the first time that the pay TV market has to be defined as one for all the platforms (satellite, terrestrial, cable IP-TV) from the demand side.

In 2012, a merger between Latvian leading TV channel groups (both were the biggest competitors in the TV advertising market and the closest competitors in TV market) took place. Competition concerns were found in the market of TV advertising, free-to-air general interest television and some other markets. The CCL cleared the merger with many behavioral remedies, limiting, among other, freedom to raise advertising price, tying the channels, size of discounts. The reason for clearance of a merger between close competitors was that it can give more efficiency for consumers because of more effective purchasing, production of content and allocation of it in the programs. Other factors, important in the evaluation of the merger, were that both channels worked with losses for some years, because of recession in the advertising market, must carry principle, huge payments for terrestrial broadcasting services (the target company was close to insolvency). The conditions also provide for a possibility that after 5 years, if competition situation develops unfavorably, the CCL can take a decision on structural remedies (reversal of the merger). Now the CCL monitors compliance with the remedies.

In December 2012, the CCL received a merger notification between the same two leading cable operators (the second attempt), that did not complete the merger proposed in 2009.

#### **3.2 *Abuse of dominance actions***

In 2007-2008 – a case on abuse of dominant position in the market of voice telephony and internet (double-play). A complaint was received on the national telecom incumbent operator Lattelecom. The essence of complaint – bundling of services and predatory price (offers included free call time). The CCL analyzed costs of bundled services and compared them with the same services offered unbundled. No predatory price was established. Lower prices were a likely result of lower costs due to the fact that Lattelecom operated with double-play offers in densely populated areas.

In 2008-2009 – a case on abuse of dominant position in the market of wholesale distribution of channel TV3 (tying with other channels). A complaint was received from the terrestrial operator Lattelecom. Relevant product was narrowly defined – channel TV3. Violation was established and a fine was imposed.

In 2010-2011 – a case on abuse in the market of distribution of TV channels in the terrestrial platform. The CCL received three complaints from the TV operators and one from a channel producer on the abuse of dominant position in the activity of terrestrial operator Lattelecom (cross-subsidization): excessive

prices for free-to-air broadcasting and predatory pricing in the pay TV market. The CCL analyzed the financial flow and costs of both services. During the investigation indications were established that predatory pricing has not taken place. The case was closed because during the investigation objective and well founded conclusions could not have been drawn unless the whole period of investments is analyzed, which would require future predictions on behalf the CCL without reliable information. The investigation should have covered a time period of 5 years, within which all amount of investments, financial flow should have to be taken into account. But the CCL had only two years (provision in the Competition Law) for investigation and adoption of the final decision. However, the discovered problems encouraged the development of legal acts in order to provide more competition and change the supply chain to make infrastructure services in the terrestrial platform more available and cheaper.

### **3.3 *Parallel application (NCA and NRA)***

The Latvian NRA does not take part in broadcasting content regulation. The authority responsible for broadcasting content issues is the National Electronic Mass Media Council. In the field of electronic communication the CCL and NRA cooperate well, consult each other and hold discussions. Each authority adopts decisions within its own competence; no inconsistent decisions have been adopted. There were only few cases with disputes between the NRA and CCL on which authority should deal with relevant competition concern. The provisions in the Law on Electronic Communications state (implemented the European Directive) that the NRA will consult with the CCL when regulated market analysis is conducted and ex-ante regulation measures are prescribed. Our cooperation is based on this provision.

## LITHUANIA

### **1. What is the state of competition in the television broadcasting sector in your jurisdiction?**

#### ***1.1 General market overview***

On 29 October, 2012 the analogue terrestrial broadcasting of television programs was completely replaced by digital broadcasting. The users, who previously watched free-of-charge analogue terrestrial television, wishing to keep the possibility to view television programs, had to purchase a digital signal coding television set-top box or a television set with an integrated digital signal coding box and, if necessary, the antenna or to become a subscriber of pay-TV services. A significant number of the television subscribers, who had prepared for the aforementioned market changes, chose pay-TV services thus the number of subscribers of pay-TV services increased.

In Lithuania the pay-TV services are provided over analogue and digital cable television (CTV), multichannel multipoint distribution system (MMDS), digital Internet Protocol Television (IPTV), digital terrestrial television (DVB-T) and digital satellite television networks.

#### ***1.2 Pay-Television and free-of-charge television***

In Lithuania there are both free-of-charge television and pay-TV. At the end of the third quarter of 2012, 681,4 thousand subscribers (i. e. 54,8% of all households) used pay television (pay-TV) services (including the services provided through cable TV and MMDS networks, TV services based on IP technologies (IPTV), digital terrestrial television (DVB-T) services and satellite TV).

At the moment there are 12 free-of-charge (not coded) digital television programs: 10 of them are broadcasted by Lithuanian broadcasters and 2 of them are re-broadcasted by foreign broadcasters.

#### ***1.3 Broadcasters***

In 2011 the television broadcasting activities were carried out by 45 television broadcasters, and 50 re-broadcasters. There is a tendency that the number of cable television re-broadcasters is decreasing. The main reasons are mergers and reorganizations of the re-broadcasters, decrease of the number of subscribers, etc.

#### ***1.4 Barriers to entry and expansion***

Assessing the barriers to entry into the television broadcasting sector in the Republic of Lithuania, it should be pointed out that television programme broadcasting or re-broadcasting activities are licensed.

According to the Law on the Provision of Information to the Public, persons who wish to engage in television programme broadcasting or re-broadcasting activities must obtain broadcasting or re-broadcasting licences. Broadcasting and re-broadcasting licences granting the right to set up and operate own electronic communications networks, the right to use own electronic communications networks for broadcasting or re-broadcasting television programmes or the right to use the transmission service provided by a third party are issued by the Radio and Television Commission of Lithuania.

Broadcasting and re-broadcasting licences are issued by tender, except the following cases: 1) to research and higher education institutions or educational establishments – for broadcasting educational and cultural television programmes by terrestrial television stations with a power level ranging up to 20 W; 2) for broadcasting or re-broadcasting television programmes by cable television and radio networks; 3) for broadcasting or re-broadcasting television programmes by electronic communications networks the main purpose of which is not the broadcasting or re-broadcasting of radio or television programmes; 4) for broadcasting or re-broadcasting programmes by an artificial Earth satellite (satellites); 5) for broadcasting television programmes pursued by the National Radio and Television of Lithuania; 6) and in other cases.

When issuing broadcasting and re-broadcasting licences, priority is given to persons who undertake to produce original cultural, informational and educational programmes, ensure accurate and impartial presentation of information, respect a person's dignity and right to privacy, protect minors from public information which might have a detrimental effect on their physical, mental and moral development as well as to persons who have undertaken to broadcast television programmes that are not yet broadcast by other broadcasters of television programmes within the designated reception zone.

Taking into account the above mentioned legal framework for obtaining broadcasting or re-broadcasting licences, it could be concluded that the regulatory barriers to entry in the television broadcasting sector exist, however, they are not too high.

The other factors that could be considered as the barriers to entry in the television broadcasting sector and which could influence the number of broadcasters are 1) capital requirements for entry and operations; 2) the behaviour of the audience and the necessity for entrants to overcome long-established uses of television and set patterns of viewing and channel choice; 3) consumer costs for hardware and service to receive the entrants' channels; 4) exclusive rights and others.

### **1.5 Regulatory institutions**

The main principles of fair competition in the television broadcasting sector is stated in the Law on the Provision of Information to the Public. According to the above mentioned act, it is forbidden for the state and municipal agencies as well as all types of other enterprises, agencies and organizations or natural persons to monopolize the media. It is stated as well, that the state shall create legal and economic conditions for fair competition among producers and disseminators of public information and that the state and municipal institutions shall exercise control with a view to upholding pluralism in the provision of information to the public and fair competition, avoiding the abuse of a dominant position by producers and/or disseminators of public information or in any separate segment of the media market.

In Lithuania *The Radio and Television Commission of Lithuania* (the Commission) is with powers of regulation and supervision of activities of radio and television broadcasters. Main functions of the Commission are related to the issuance of licenses to broadcasters and re-broadcasters. The Commission also participates in the formation of national audiovisual policy and it is an expert body for the Seimas and the Government on the issues of broadcasting and re-broadcasting television programmes and on-demand audiovisual media services.

Under the Law on Electronic Communications, one of the objectives of *The Communications Regulatory Authority of the Republic of Lithuania* (the Regulatory Authority) is to develop effective competition in the field of electronic communications. As an ex-ante electronic communications regulator, the Regulatory Authority shall seek to create conditions for effective competition and its development in the field of electronic communications as well as conditions to prevent the abuse of market power by undertakings. The Regulatory Authority implementing ex-ante regulation is within the right to determine

the obligations to the undertakings which are designated having significant power in the field of electronic communication sector.

*The Competition Council of the Republic of Lithuania* has responsibility for the implementation of competition law and policy in Lithuania. As it is related to electronic communications activities, the Competition Council shall exchange with the Regulatory Authority any information required for the performance of functions of the Competition Council and the Regulatory Authority, including confidential information, ensuring the protection of the information received, provide consultation to the Regulatory Authority on matters concerning the performance of its functions related to the supervision of competition in the field of electronic communications and cooperate with and consult the Regulatory Authority when exercising supervision of competition in the field of electronic communications in accordance with the Law on Competition. It should be noted that the Competition Council cooperates with the Regulatory Authority when it analyses cases related to the electronic communications sector, however, there is no particular mechanism of co-operation between these two institutions. Even though the problem of competences between the Competition Council and the Regulatory Authority sometimes arises, there were no cases where these two authorities reached or planned to reach inconsistent decisions.

**2. What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

The Competition Council has not conducted any market study relevant to the most significant current and future challenges for competition policy in the television broadcasting sector. However, the formal investigation into the issue has indicated that the necessity to harmonize the legal framework, which is currently sector-specific, and adjust the market definitions to the latest developments of new technologies and their integration, as well as the necessity to assess the treats made by the converged operators, usually offering a wide range of bundled services (telephony, television, internet) are the most significant challenges that the competition authorities may be facing in the near future.

**3. What has been your relevant experience in competition law enforcement relating to television and broadcasting?**

**3.1 Abuse of dominance actions**

In 2009, the Competition Council, having regard to the information supporting the suspicion of the existence of restrictive agreements and abuse of dominant position, initiated the investigation concerning the compliance of actions of the companies providing multichannel subscriber television and related services with the requirements of Article 101 of the Treaty and Article 5 of the Law on Competition (prohibiting restrictive agreements), and the compliance of actions of *Viasat AS* and *Viasat World Limited* with the requirements of Article 102 of the Treaty and Article 7 of the Law on Competition (prohibiting abuse of dominant position).

The investigation of possible restrictive agreements of undertakings providing multichannel subscriber television and related services was terminated in June 2011, based on the fact that no factual data that could prove the existence of restrictive agreements was found. The investigation concerning the compliance of actions of *Viasat AS* and *Viasat World Limited* with the requirements of Article 102 of the Treaty and Article 7 (prohibiting abuse of dominant position) of the Law on Competition was returned back for additional investigation.

It was established that *Viasat* company Group, holding exclusive rights to broadcast premium sport events in the Baltic States and Scandinavia, launched a new sports channel – *Viasat Sport Baltic* – in January 2009. Since then, *Viasat World Limited*, which distributes television channels produced by *Viasat*



company Group in the Central and Eastern Europe, had been offering different *Viasat Sport Baltic* channel distribution terms to several television services providers: *TEO LT, AB* and *UAB "Kavamedia"*, as compared to the other providers. *TEO LT, AB* and *UAB "Kavamedia"* were offered *Viasat Sport Baltic* channel only within the *Viasat* channel package "*Auksinis*", while other television service providers were offered a possibility to rebroadcast either different *Viasat* channel packages (including *Viasat Sport Baltic* channel), or *Viasat Sport Baltic* channel individually.

In its preliminary assessment the Competition Council has assessed that by establishing different *Viasat Sport Baltic* channel distribution terms to *TEO LT, AB* and *UAB "Kavamedia"* *Viasat World Limited* may have been abusing its dominant position.

Taking into account that the undertaking concerned has offered commitments to meet the concerns expressed by the Competition Council in its preliminary assessment, i. e. to offer non-discriminatory *Viasat Sport Baltic* channel acquisition terms to all undertakings providing television services, the Competition Council concluded that the investigation regarding possible infringement of Article 7 of the Law on Competition (prohibiting abuse of dominant position) should be terminated subject to these commitments. The Competition Council also concluded that these commitments should be made binding according to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.

In response to the complaint of the Lithuanian Cable Television Association (LCTA) received in 2010, the Competition Council initiated an investigation concerning compliance with the requirements of Article 7 of the Law on Competition (prohibiting abuse of dominant position) of the actions of *TEO LT, AB*. The LCTA indicated that *TEO LT, AB*, in the attempt to attract new clients, had placed a special offer whereby it was offering to new clients to use the services of digital television *GALA* and high-speed internet *ZEBRA* for the entire year without payment, provided that the clients undertook to use these services for a minimum period of three years and pay standard tariffs for services for two years of the three-year period.

It was established that the prices of services valid during the special offer of *TEO LT, AB*, which were lower than the usual tariffs, did cover the costs incurred in relation to provision of these services, and therefore those prices could not be considered to be too low ("predatory") and such pricing applied by *TEO LT, AB* did not infringe the requirements of the Law on Competition. Having assessed the circumstances established during the investigation, the Competition Council terminated the investigation concerning an alleged abuse of the dominant position by *TEO LT, AB* in applying "predatory" prices.

### **3.2 Merger assessments**

Having examined the notification on the intended concentration filed in 2007 by the incumbent telecom operator *TEO LT, AB* by acquiring a 100 holding in the digital TV company *UAB Nacionalinė skaitmeninė televizija*, the Competition Council resolved to authorise the concentration subject to certain obligation. *TEO LT, AB* was obligated within one month to introduce and ensure the separate accounting of the digital television services.

Having assessed that the anticipated concentration deal in the first place is related to the intention of *TEO LT, AB* to develop the digital ground TV rebroadcasting business, the Competition Council assessed the deal as the vertical and horizontal concentration in the relevant Lithuanian market for the retail pay-TV services. In terms of the nature of the services provided this market is closely related to the wholesale TV signal transmission market in Lithuania. Although the degree of concentration in the relevant retail pay-TV services market is being changed to just a negligent extent, the Competition Council took into account the outlook of the development of the TV services. Having considered that *TEO LT, AB* is currently operating

a well developed fixed telephone network and the fixed data transmission infrastructure with the Lithuania-wide coverage, that the company is dominant in the broad band access and the leased line service market and that *TEO LT, AB*, in cooperation with other associated undertakings is developing the alternative internet access and data transmission technologies, it was concluded that following the concentration the company will potentially cover a more significant share of the relevant market for the retail pay-TV services market. Furthermore, while developing the new digital television services and networks, *TEO LT, AB* with associated undertakings has a potential to strengthen its position in certain telecommunications and information technologies services markets.

Seeking to prevent cross-subsidising of services and abuse in fixing the price for the services, including the digital television services to be provided, and considering that after the concentration *TEO LT, AB* will avail itself to the potential to strengthen its position in certain markets, also that the company will be operating as both the TV signal transmitter and the TV program re-broadcaster the Competition Council established that the operations related to the digital television service provision need to be strictly separated. With that in view the retail terrestrial television services need to be retained managing its segregated revenue and cost accounts. Furthermore, the company was obliged to ensure a segregated revenue and cost accounting of all other digital television services including the wholesale terrestrial television broadcasting and the IPTV services.

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## MEXICO

### 1. What is the state of competition in the television broadcasting sector in your jurisdiction?

The Television market in Mexico has traditionally been highly concentrated and allows seldom foreign participation. Also, the television industry is characterized by a highly concentrated open TV with national scope and a pay TV network with several participants and incipient signs of emerging competition.

Until 1994, a quasi-monopoly in the open TV market existed under the control of Grupo Televisa (Televisa). However, with the privatization of the once publicly-owned telecommunications network, a national competitor, TV Azteca, emerged. Grupo Televisa and TV Azteca are the only two companies that provide open TV services with national coverage and they hold 70 and 30 percent market share respectively.<sup>1</sup> It is worth noting that 17 local stations with partial coverage exist and operate mainly in the northeast and center part of Mexico.<sup>2</sup>

Both companies, Grupo Televisa and TV Azteca, are vertically integrated, that is, their content production, storage and transmission processes are carried out by themselves. Vertical integration avoids double marginalization, but decreases the alternatives in the content production market (for both integrated and independent producers), raises entry barriers in the open TV market and diminishes channel choices for consumers.<sup>3</sup> Competition restraints are reinforced by the fact that Televisa is the world leader in Spanish language program's production.

Furthermore, Grupo Televisa and TV Azteca together enjoyed high levels of concentration in infrastructure, audience and publicity. For example, in 2010, Grupo Televisa and TV Azteca accumulated 70 percent of the TV audience (reaching up to 99 percent of the open TV spectators). It is generally understood, that there is a clear relation between advertising investments and audience levels; therefore, the revenues derived from this concept show signs of market concentration. In this respect, Grupo Televisa and TV Azteca seized around 57 percent of the total investment in advertising (almost US\$ 3 billion dollars) including pay TV, internet and billboards, while open TV remained the preferred platform for advertising companies.<sup>4</sup>

On the contrary, pay TV has strengthened its position in the last decade. Pay TV has gained popularity within the Mexican audience and represents, up to date, 20 percent of the audience.<sup>5</sup> While the former

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<sup>1</sup> Eduardo Perez Motta, *Televisión digital terrestre: Oportunidades de Competencia*, Mayo 2011. Presentación disponible en <http://www.cfc.gob.mx/images/stories/Noticias/Presentaciones/2011/tvdigitalterrestre.pdf>.

<sup>2</sup> Local stations operate mainly in Monterrey, Torreón, Tampico, León and Mexico City. COFETEL, *Estudio sobre el mercado de servicios de televisión abierta en México*, p. 5. September 2011. <http://www.cft.gob.mx:8080/portal/wp-content/uploads/2012/06/Reporte-CIDE-CM-201112-publico.pdf>.

<sup>3</sup> *Ibid*, p. 1.

<sup>4</sup> *Ibid*, p. 8.

<sup>5</sup> See note 2, *Estudio sobre el mercado de servicios de televisión abierta en México*, page 37.

represents a significant progress, audience penetration levels, network infrastructure and prices for consumers must improve, so that pay TV becomes a relevant open TV competitor.

There is a greater number of participants in the pay TV market, some provide their services through satellite signal (Dish and Sky) and others through cable (Cablevisión, Cablemás, TVI and Megacable). It is worth noting that Televisa also participates in the pay TV market with its companies (Cablevisión, Cablemás, TVI and Sky) and represents up to 50 percent of the pay TV market.<sup>6</sup>

Advertising investments in the pay TV market grew 30 percent from 2005 to 2010, yet this represents just 6 percent of the total advertising investments.<sup>7</sup> However, the upward trend in the past years indicates that the total share of pay TV advertising investments will continue to grow in the next years.

The growing demand for pay TV, coupled with a less restrictive regulation to operate in this market (as discussed below), allowed for the emergence of new competitors, fostering competition and diminishing the price of pay TV by 31.6 percent in the past four years.

There are significant differences in terms of competition between open and pay TV markets. The underlying circumstances to explain the different evolution in these two markets might be found in: (i) different regulatory frameworks and (ii) consumer preferences.

### **1.1 Regulatory framework**

The first and foremost entry barrier that open TV providers must overcome is to obtain radio electric spectrum (through a concession) to transmit a TV signal. Under the Federal Telecommunications Law (*Ley Federal de Telecomunicaciones*) to use a frequency band or to operate a telecommunications network, it is necessary to obtain a government concession through a public tender.<sup>8</sup>

The problem is that the last concession for open TV was granted to TV Azteca in 1994 and no open TV concession has been tendered every since. One of the top priorities for the incoming Mexican government is to tender available radio electric spectrum for the creation of two new open TV channels and to foster competition in this market.

As mentioned before, obtaining pay TV concessions is easier. As such, until May 7, 2012, the Communications and Transport Ministry had granted 1 thousand 518 pay TV concessions.<sup>9</sup> The last application for satellite concession to provide pay TV services received approval from the Telecommunications Federal Commission (Cofetel for its acronym in Spanish) on November 7, 2012.<sup>10</sup>

It is worth mentioning that to guarantee competitive procedures to allocate spectrum, the CFC has been granted with powers to issue binding opinions on processes of structural separation of public assets and entities, as well as, on procedures for granting concessions and permits implemented by offices of the

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<sup>6</sup> See note 2, *Estudio sobre el mercado de servicios de televisión abierta en México*, page 6.

<sup>7</sup> See note 2, *Estudio sobre el mercado de servicios de televisión abierta en México*, pages 8 and 35.

<sup>8</sup> Articles 10 to 14.

<sup>9</sup> Communications and Transport Ministry.  
([http://dgpt.sct.gob.mx/fileadmin/concesiones/comunicaciones/servicios\\_television\\_restringida.pdf](http://dgpt.sct.gob.mx/fileadmin/concesiones/comunicaciones/servicios_television_restringida.pdf))

<sup>10</sup> Cofetel press release, Pleno de Cofetel emite opiniones a la SCT respecto al otorgamiento de una concesión satelital y de asignaciones de frecuencias de uso oficial. November 7th 2012  
(<http://www.cft.gob.mx:8080/portal/wp-content/uploads/2012/11/Comunicado-48-Pleno-de-la-Cofetel-emite-opiniones-a-SCT-nov-07-2012.pdf>)

federal Government. In this regard, the CFC has the power to resolve on the competition conditions put forward in the statutory documents related to public tenders or auctions. Moreover, the CFC can authorize or reject the application of interested parties in these processes, to ensure a level playing field for applicants.<sup>11</sup>

The second barrier is the legal restraints to foreign direct investment in the open TV sector. Under the Federal Radio and Television Law, radio and TV broadcasting companies must be owned by Mexicans (0 percent foreign participation). Foreigners are not allowed to participate under any investment forms (trusts, financial agreements, or other)<sup>12</sup>, which entitles them with control rights. This restraint not only applies to content programming and production companies, but to transmitting companies. On the contrary, the pay TV regulatory framework allows for up to 49 percent of foreign ownership in companies.

Thus, current legislation allows for foreign participation in the pay TV market in Mexico but limits it considerably in the open TV market (foreign direct participation in the open TV market is only possible through neutral investment, that is, without acquiring the property rights).<sup>13</sup>

The CFC has advocated for several years to eliminate these restrictions and to allow foreign participation in the telecommunication markets (up to 100% ownership). Should the CFC's proposals be accepted, they would translate into greater financing options, lower capital costs and lower barriers to entry.<sup>14</sup>

The third barrier to entry is economic. A company wishing to compete against Televisa and TV Azteca must incur a substantial financial effort. According to the Telecommunications Regulator, the installation cost of an open TV station to reach 80 and 93 percent of the population is between 70 to 292 million dollars and 153 to 637 million dollars, respectively.<sup>15</sup> Additionally, the production costs of a national channel can add several billion pesos a year. Finally, we should add the problems arising from the vertical integration of the two dominant firms and the high concentration of audience and advertising.

Another significant barrier relates to open TV contents. According to Mexican legislation a substantial percent of transmitted materials must be in Spanish, favor national content, reinforce national identity, promote creativity, local and national values among other.<sup>16</sup> The CFC has also proposed to remove this requirement given the benefits granted to national producers in detriment of foreign producers and because it limits an efficient and competitive programming supply.

On the contrary, this requisite does not operate in pay TV services. The former along with the greater foreign investment margin in the sector, allows foreign producing and transmitting companies to enter in pay TV markets.

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<sup>11</sup> Article 24, 57 paragraph XVI and III respectively and Article 59 of the FLEC.

<sup>12</sup> Article 6 of the Law of Foreign Investment.

<sup>13</sup> To date, the different attempts made by foreign companies to participate in the open TV market have been unsuccessful because, among some other reasons, of the deterring behaviour by incumbents.

<sup>14</sup> CFC Power Point Presentation.  
(<http://www.cfc.gob.mx/images/stories/Noticias/Presentaciones/2011/aspectosdecompetenciaparalaleydetelcom.pdf>)

<sup>15</sup> Cofetel (2011). Documento de Referencia a la Consulta Pública para la Licitación de Frecuencias para Televisión Abierta.  
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<sup>16</sup> Articles 21-A and 73 *Ley Federal de Radio y Television* (Federal Radio and Television Act).

## 1.2 *Consumer preferences*

The demand for pay TV has increased considerably in recent years, reaching growth rates of 50 percent between 2008 and 2010.<sup>17</sup> Pay TV penetration in Mexican households reached 40 percent in 2012. While this figure seems low compared to 95 percent penetration of the open TV it represents an increase of 26 percent with respect to 2010.<sup>18</sup>

The underlying reasons for this increase are three: a) cultural factors, consumers seek greater content variety, b) economic factors, thanks to the entry of a "low cost" TV provider (Dish), the average price per subscription to pay TV services has dropped over 31 percent in the last three years allowing more households to enjoy this service, and c) regulatory factors, the CFC through several decisions and opinions has managed to strengthen competition in this sector.

In regard to the measures taken by the CFC, which will be discussed in the last part of this document, remedies imposed to the merger between Televisa and Televisión Internacional de Monterrey (TVI) must be highlighted. As part of the merger obligations it was agreed that Televisa, the acquirer, must offer open TV contents in non-discriminatory conditions to all pay TV companies which request so (must carry).<sup>19</sup>

Through these remedies the CFC assured that all pay TV suppliers could acquire and offer open TV channels at the same price. The former prevented discriminatory pricing by Televisa and favored price reductions in the contracting of Pay TV services.

## 1.3 *Consequences*

The lack of competition in the open TV markets adversely affects consumers since they are deprived of a plural content offer. Independent TV producers are affected since they must be vertically integrated with Televisa and TV Azteca in order to reach a wider audience. However, vertically integrated producers might also be subject to pressures from either Televisa or TV Azteca given the limited options for producers. Finally, advertisers are forced to pay high prices for each TV advertisement in Televisa and TV Azteca. Studies estimate an advertising rate 40 percent higher for the Mexican market in comparison to competitive market conditions.<sup>20</sup>

As a result of this situation, we have in Mexico an open TV market with reduced competition that still holds 70 percent of the audience. However, pay TV market shows clear signs of growth under competitive market conditions with expectations to erode the open TV market quota, terms of audience and advertising.

## 2. **What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

In light of that explained above, it is easy to observe that one of the main challenges is to foster competition in the open TV market. Other challenges worth mentioning which Mexico will face in the

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<sup>17</sup> See footnote 6.

<sup>18</sup> Latin American Multichannel Advertising Council. La TV de paga revoluciona los hábitos de consumo de medios de México. (<http://www.lamac.org/mexico/publicaciones/articulo/la-tv-de-paga-revoluciona-los-habitos-de-consumo-de-medios-en-mexico>)

<sup>19</sup> CFC press release, Deberá Televisa cumplir condiciones de la CFC para comprar red de TV por cable. (<http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2007/cfc02-2007.pdf>)

<sup>20</sup> See footnote 2, COFETEL, *Estudio sobre el mercado de servicios de televisión abierta en México*, page 47. These calculations are based on the EBITDAs available for different channels across the globe.

coming years are: the migration from analogue to digital terrestrial television (DTT) and the design of the interconnection terms among television and telephone operators to ensure a competitive market.

These challenges are also part of a comprehensive telecommunications strategy implemented by the CFC for several years with the aim to increase competition<sup>21</sup>, household penetration and to lower prices.

One of the priorities in the political agenda of the incoming president of Mexico, Enrique Peña Nieto is to encourage competition in the open TV market. All political parties have decided to include this matter in the Mexico Pact as part of the necessary goals to achieve in the near future.<sup>22</sup>

In particular, commitment number 43 of the Pact establishes that:

*More national open TV channels will be tendered, implementing operation rules consistent with best international practices, such as the obligation of cable systems to include free radio broadcasted signals (must carry); also the obligation for open TV providers to offer their signal to operators in a non discriminatory fashion with competitive prices to pay TV operators (must offer) will be included; thus, limiting market concentration to foster competitive conditions in the radio and television markets.*

The legal reforms necessary to carry out these tender will be presented on the first semester of 2013, and their implementation will begin on the second semester of the same year.

The radio electric spectrum that will be tendered will be enough to create two new channels with national coverage. Neither the rules nor the basis for the tender are defined, but the CFC is actively collaborating with other regulators and with the government to assure an efficient spectrum allocation and to avoid greater market concentration.<sup>23</sup>

By tendering the spectrum it is expected that new competitors will enter the Open TV market. If so, advertising prices will be reduced, TV channels would be guaranteed access to more transmission platforms and consumers will enjoy a greater plurality of information and contents.

The second challenge is the transition to digital terrestrial television. This objective is also framed within CFC's strategy to foster competition on the telecommunication sector.

According to the president of the telecommunications regulator, the transition to digital terrestrial television will cost around \$US1 billion dollars.<sup>24</sup> This investment will not only be necessary to offer a greater quality television, but also will help reduce entry barriers to the open TV market. Digital terrestrial television allows for the transmission of several signals through the same spectrum channel, which results in an increase in the use of spectrum and therefore an increase in the television signals supply.<sup>25</sup> In this

<sup>21</sup> CFC power point presentation.  
(<http://www.cfc.gob.mx/images/stories/Noticias/Presentaciones/2011/aspectosdecompetenciaparalaleydetelcom.pdf>)

<sup>22</sup> Mexico Pact is a document that outlines the commitments agreed by all political parties for the next six years and is on the top priorities of the Federal Government.

<sup>23</sup> CFC Power Point presentation.  
(<http://www.cfc.gob.mx/images/stories/Noticias/Presentaciones/2011/tvdigitalterrestre.pdf>)

<sup>24</sup> El Universal, Apagón analógico costará más de 13 mil mdp: Cofetel. 10 de enero de 2013.  
(<http://www.eluniversal.com.mx/finanzas/99856.html>)

<sup>25</sup> See note 2, p 12.



sense, technological change can help reduce or even eliminate a natural entry barrier, limited radio electric spectrum. To heighten the efficiency of this measure a tender for open TV concessions must be carried out.

Through these actions it is expected that new competitors offering open and pay TV services will emerge as it happened in Spain, United Kingdom and France. Also, a greater TV supply would reduce the audience of traditional open TV suppliers in favor of new open and pay TV companies, which would imply greater competition in the advertising markets.<sup>26</sup>

The third challenge would be to ensure technological convergence so that mobile operators can participate in the open and pay TV markets and vice versa.

In 2005 and 2006 the CFC issued two opinions with respect technological convergence and audiovisual contents. In these opinions the CFC stated the necessity to carry out regulatory reforms in the TV and mobile and fixed telephony markets to ensure a competitive environment for the transition. The aim of the proposed reforms is to advocate for the elimination of artificial barriers to entry and foster competition among interconnected fixed and mobile networks.

### **3. What has been your relevant experience in competition law enforcement relating to television and broadcasting?**

To enforce effectively the Federal Competition Law (herein after FLEC or Competition Law), the Commission has grouped several procedures into six areas: mergers; monopolistic practices; opinions on the granting of concessions and permits; consultations; requests for reconsideration and appeals, and declarations on effective competition conditions.<sup>27</sup>

These procedures have helped the CFC to strengthen competition in the telecommunication sector. The following section describes the recent CFC experience in the enforcement of Competition Law in the Television market.

#### **3.1 Merger assessments**

On April 2011, the Televisa/Iusacell<sup>28</sup> merger was notified to the CFC. This operation involved the acquisition of 50 per cent of the market share of GSF Telecom Holdings<sup>29</sup>, by Grupo Televisa, S.A.B (Grupo Televisa) and Corporativo Vasco de Quiroga.<sup>30</sup>

For its assessment, the CFC assessed the impact of three relevant markets: mobile telephony, open and pay TV.

In the mobile telephony market, the CFC considered that the operation would provide Iusacell with additional capital which would imply more vigorous competition in the mobile telephony market. On the contrary, for the open and pay TV markets, the CFC considered the operation anticompetitive since the merger could give both enterprises the incentives to coordinate their activities.

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<sup>26</sup> Ibid.

<sup>27</sup> Article 24 of the FLEC.

<sup>28</sup> File: CNT-031-2011 and RA-043-2011.

<sup>29</sup> GSF Telecom Holdings holds shares in Grupo Televisa and a Grupo Salinas subsidiary.

<sup>30</sup> Corporativo Vasco de Quiroga is a Grupo Salinas subsidiary.

Therefore, the CFC plenum challenged the merger on January 2012. Grupo Televisa and Grupo Salinas submitted commitments to solve the competition problems identified by the CFC in both markets.

In regards to the open TV market, the parties involved committed to dissolve the merger in case a public tender for a third concession for a TV network were not carried out in the 24 months following the operation. Also the new company resulting from the merger must provide advertising space in a non-discriminatory basis and ensure the independence of Iusacell board.

As for pay TV market, the parties committed to a non-discriminatory content sale, open and restricted signals unbundling, open signal content unbundling and the restriction for Total Play, enterprise involved in the triple-play service, (telephone, pay TV and Internet) to be part of Grupo Televisa, with the purpose of avoiding Televisa participation in Total Play market share.

Failing to observe the conditions established by the CFC would imply dissolution of the merger. Besides, pursuant to Articles 35 paragraph VIII and XI of the FLEC the CFC may sanction the group by imposing a fine of 10 percent of its annual income. Thus the CFC decided to accept the merger on June 2012.

Some similar cases assessed by the CFC in the pay TV market are Televisa/TVI<sup>31</sup>, Televisa/Cablemas<sup>32</sup>, Mega Cable/Acotel<sup>33</sup> and DISH Mexico Holdings/ EchoStar Mexico Holdings<sup>34</sup>.

The CFC was notified of the Televisa/TVI and Televisa/Cablemas mergers. The mergers were considered anticompetitive because Televisa would acquire control over necessary inputs for distribution and marketing of TV channels packages transmitted on pay TV. The Commission decision was against the approval of the merger. Taking the former into account, the parties presented similar conditions to those presented in the Televisa/Iusacell case (must offer, must carry, independent boards, signs unbundling).

Therefore the CFC approved the merger under the commitment to comply with those conditions. Some of these conditions have been met<sup>35</sup>, but the CFC just imposed the maximum fine to Grupo Televisa for failing to ensure the independence of the parties' boards. Nevertheless the Commission decided not to revoke the clearance for the merger.

### **3.2 Cartels and horizontal agreements**

On February 2006 the CFC started an investigation involving Productora y Comercializadora de Televisión, S.A. de C.V. (PCTV, for its acronym in Spanish) shareholders for incurring in absolute monopolistic practices.<sup>36</sup> The one hundred seventy five shareholders of PCTV agreed to keep for themselves segments of the pay TV market. The CFC ordered the suspension of such practice and imposed a fine to the PCTV shareholders.

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<sup>31</sup> File: CNT-048-2006.

<sup>32</sup> File: CNT-018-2007.

<sup>33</sup> File: CNT-084-2007.

<sup>34</sup> File: CNT-084-2007.

<sup>35</sup> File: RA-029-2006-I y RA-027-2007-III.

<sup>36</sup> File: DE-001-2006.

### **3.3 Abuse of dominant position**

Simultaneously, the CFC started an investigation for relative monopolistic practices in the pay TV Network wholesale trading market. The CFC claimed that PCTV<sup>37</sup> had substantial power in the relevant market and refused to trade their signals with one of the cable television network operators in the state of Veracruz.

In this regard, in March 2009, PCTV presented a series of commitments including the adequacy of its statutes to facilitate membership to PCTV. The CFC considered these commitments to increase competition in the pay TV market. Therefore, the CFC accepted the conditions and imposed a minimum fine to PCTV.

Furthermore, on September 2007, Tele Cable Centro Occidente (TCCO for its acronym in Spanish), a pay TV supplier in different areas of the country, filed a complaint against Grupo Televisa for withholding the delivery of its TV signals for its transmission over pay TV.<sup>38</sup>

In this case, the CFC claimed that Grupo Televisa had substantial power in the relevant market. To prove the former the CFC considered that Televisa's TV signals are essential inputs for pay TV operators willing to compete in the market. The CFC also found that Grupo Televisa repeatedly denied the use, distribution and dissemination of television signals to TCCO, and discriminated access to their television signals to favor its subsidiaries, in detriment of TCCO. In November 2009, CFC imposed a fine for almost \$US 4 million dollars.

### **3.4 Vertical restrictions**

In August 2006, Grupo de Telecomunicaciones Mexicanas (GTM) filed a complaint against Teléfonos de Mexico (Telmex) for alleged anticompetitive practices. In particular, Telmex stated that GTM tied the broadband internet service sale to the fixed local telephony service.<sup>39</sup>

The CFC defined the relevant market as fixed-line accesses to broadband internet. It also acknowledged that technological evolution and the reduction of regulatory barriers have allowed telecommunications service providers to provide triple play services (pay TV, telephone and broadband) to counterbalance Telmex's commercial strategy.

The CFC also identified economic agents that increased their transmission capacity, improved their network coverage and successfully provided bundle services (packages like "Yoo" supplied by Cablemás). Some of these economic agents offered price and quality conditions similar or even better to those provided by Telmex.

Therefore, the CFC found that Telmex practice did not prevent other agents to reach their minimum efficient scale to stay in the market. Thus, the CFC decided to close the file.

### **3.5 Competition advocacy in the sector**

The CFC is entitled to issue opinions on competition matters, regarding legislative bills, regulation, and administrative acts when the CFC considers that they may result in adverse effects to competition in a

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<sup>37</sup> PCTV is the main TV Network wholesale supplier for pay TV systems.

<sup>38</sup> File: DE-022-2007.

<sup>39</sup> File: DE-033-2007.

market. These opinions and general recommendations have been helpful in influencing the design of public policies and in ensuring that these incorporate competition principles, as well as, to encourage cooperation between the CFC, Cofetel and the Ministry of Communications and Transportation (SCT, for its acronym in Spanish).

In this regard, the CFC has adopted a permanent supervision of Congress bills and Executive's secondary regulation drafts, in order to analyze and identify projects that may introduce barriers to competition or jeopardize economic efficiency in markets.

For example, in February 2011, the CFC sent an opinion to Congress, SCT and Cofetel, which suggested a series of measures to foster competition in the telecommunications sector.<sup>40</sup> For the pay TV market, the CFC recommended the SCT and Cofetel the following:

6. *allow the main fixed telephony operator to supply pay TV service, once it is established that the interconnection supply is according to competitive terms.*
7. *to carry out a public tender for the radio spectrum concession over the third open TV network, with CFC's participation in order to prevent anticompetitive circumstances.*

The CFC considered these recommendations relevant for allowing new competitors in the pay TV market. This would benefit 3.8 million homes in the country by enhancing competition through a third open TV network. It also considered the access to means of delivery of audiovisual content, as well as, rights to use audiovisual content as essential inputs for transmission media.

In November 2012, the Mexican Congress requested the opinion of the CFC on a draft reform to the Federal Radio and Television Law. The CFC considered that the initiative posed no risks to competition and that it would force pay TV service providers to broadcast open TV signals and also force open TV service providers to support the distribution of their signals.

Other examples of CFC contribution for TV markets are the opinion issued in November 2006, in which the CFC ruled in favor of developing a consistent and neutral regulatory framework for the audiovisual content sector. Also in October 2011, an opinion was issued to claim that the transition to digital terrestrial television in Mexico will allow a more efficient use of radio spectrum, a better quality signal, a greater content variety and a supply of complementary services to viewers.

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<sup>40</sup> Resolution PRES-10-096-2011-033.



## NETHERLANDS

### 1. **Football broadcasting rights: Competition in television broadcasting vs. distribution platforms: Introduction**

In the Netherlands, competition in television broadcasting is relatively well-developed. Commercial and public broadcasting companies compete fiercely for viewers and advertisers and with the introduction of digital television, the number of available free-to-air as well as pay-TV channels has been growing steadily.<sup>1</sup> Historically, cable has been the main distribution platform for television signals, but the combined market share of cable companies has declined in recent years<sup>2</sup>, in favour of DVB-T, IPTV, satellite and other platforms. In this paper, we deal with a recent merger decision of the Netherlands Competition Authority (hereafter NMa) which shows a switch in emphasis from competition within distribution platforms (between broadcasting companies) to competition between platforms. The NMa focuses on the market with a higher risk of competition issues and a higher potential for technological developments.

At the end of August 2012, the NMa received a concentration notification for the proposed acquisition of Eredivisie Media and Marketing (hereafter: EMM) by Fox International Channels (hereafter: Fox), a subsidiary of News Corporation. EMM is a limited partnership founded by the clubs playing in the top Dutch football league (“Eredivisie”) for the joint marketing of their media rights. Fox operates several television channels in the Netherlands.<sup>3</sup> Worldwide, Fox is active in a broad range of media markets.

In addition to seeking an assessment of the proposed takeover, the parties involved also sought assurances from the NMa with regard to the compatibility of their plans to market the football rights, with the cartel prohibition and the prohibition on abuse of a dominant position (articles 6 and 24, respectively, of the Dutch Competition Act).

The NMa decided to issue an informal opinion on the compatibility of the marketing plans, separate from the formal decision on the concentration, once Fox committed to several concessions to ensure compliance of its future marketing agreements with competition law. These concessions intend to ensure undistorted competition in free-to-air TV broadcasting and (especially) competition between distribution platforms.

### 2. **Brief history of Dutch football broadcasting**

Following the example of the German Bundesliga and the English Premier League, the Dutch Eredivisie clubs started to offer the broadcasting rights to football matches as six packages from the season

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<sup>1</sup> More than 80% of households currently watches digital television.

<sup>2</sup> The combined market share of cable companies was more than 90% between 2000 and 2004. Estimations for 2012 range roughly between 60% and 70%.

<sup>3</sup> Currently, these are National Geographic, National Geographic Wild, Foxlife and 24Kitchen.

2005/2006.<sup>4</sup> The NMa stipulated that the tender procedure should be transparent and non-discriminatory and the method for assessing the various bids should be objective, transparent and verifiable.<sup>5</sup>

The TV rights to the highlights and one live match to be played on Friday evening were acquired by a new entrant in the free-to-air TV market Talpa. After Talpa discontinued, the rights were taken over by RTL. The TV rights for the live matches on Saturday and Sunday to be aired on pay-TV were acquired by Tele2. Both Talpa/RTL and Tele2 incurred considerable losses, as they could not generate sufficient income to cover fees paid to Eredivisie.

In the second tender, covering the rights for the 2008/2009 season, the bids for the rights to live matches were so low, that the Eredivisie clubs decided to set up their own pay-TV channel: Eredivisie Live. The Eredivisie Live channels were offered to all interested distribution platforms, i.e. cable, satellite, DVB-T, ADSL and fiber networks. The rights to the highlights were sold to the Dutch public channel (NOS).

At the end of 2012, EMM, which markets the Dutch football broadcasting rights, was taken over by Fox. Fox has committed to offering the Eredivisie Live channels to all platforms as before and intends to set up a new free-to-air TV channel, which will broadcast a programme featuring the highlights.

### 3. Television broadcasting markets

In a recent European Commission decision concerning the Dutch television market a distinction was made between the market for broadcasting rights to audiovisual content and the market for the transmission of television signals at the wholesale level.<sup>6</sup> Also, the market for television advertising is relevant, since television broadcasting markets are two-sided markets.

Markets for audiovisual content can be further subdivided according to the type of rights sold. Generally, a distinction is made between broadcasting rights for 'Video On Demand' or 'Pay Per View', broadcasting rights for Pay-TV and broadcasting rights for free-to-air TV.<sup>7</sup> In the case *HBO/Ziggo/HBO Nederland* the European Commission has considered the market for broadcasting rights to audiovisual content to be national in scope.<sup>8</sup>

Markets for audiovisual content can be further be distinguished by type of content. In previous decisions, the NMa and the European Commission have distinguished between the following markets:<sup>9</sup> (i) films; (ii) football events played regularly throughout the year in which national club teams participate;

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<sup>4</sup> The European Commission accepted joint selling of media rights by clubs in the Bundesliga and the Premier League, subject to commitments to ensure sufficient competition in the downstream broadcasting markets. See Cases COMP/C-2/37.214 and COMP/C-2/38.173.

<sup>5</sup> NMa case 4237/Eredivisie CV – Exploitatie uitzendrechten, page 6.

<sup>6</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 16.

<sup>7</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 18; NMa case 7185/Sanoma – SBS, paragraph 51; NMa case 6126/RTL NL – Radio 538, paragraph 30-33.

<sup>8</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 35.

<sup>9</sup> This is not to say that a further subdivision according to type of content is not possible. See NMa case 6126/RTL NL – Radio 538, paragraph 29.

(iii) football events not played regularly throughout the year in which national teams participate; (iv) other sports; (v) other television content.<sup>10</sup>

On the market for the transmission of television signals at the wholesale level, the European Commission and the NMa have, in the past, distinguished between the transmission of free-to-air TV and pay-TV.<sup>11</sup> The European Commission considers the market for the transmission of television signals at the wholesale level to be national in scope.<sup>12</sup>

The NMa and the European Commission have also delineated a market for television advertising, which can be separated from markets for advertising in printed media<sup>13</sup>, radio, or internet. This market has also been considered national in scope by both the NMa and the European Commission.<sup>14</sup>

#### **4. Concentration decision**

On the possible markets for audiovisual content, Fox and EMM had either no overlap or a very small market share. The same held for the possible markets for the transmission of television signals at the wholesale level. On the market for television advertising, the joint market share of Fox and EMM was very small. The most important positions in this market are taken by the free-to-air broadcasters RTL Netherlands (4 channels), SBS Netherlands (3 channels) and the Dutch public broadcasting company (3 channels), with a combined market share of 92%. Also, the possibility of vertical effects of input or customer foreclosure were considered unlikely, so the takeover was cleared after the first-phase investigation.

More interesting perhaps, from a competition perspective, are the considerations concerning the compatibility of Fox's plans for marketing the football rights, with the cartel prohibition and the prohibition on abuse of a dominant position, and this will be covered in the next section.

#### **5. Informal opinion**

To facilitate the takeover by Fox there will be a new agreement on the marketing of the football broadcasting rights, which will run until the summer of 2025, at the earliest. Parties requested an informal opinion from the NMa with respect to the compatibility of the proposed way of marketing these broadcasting rights with competition law.

##### **5.1 Live matches**

Parties have committed to offer the Eredivisie Live channels to all present and future distribution platforms in a verifiably non-discriminatory manner. In this context, non-discriminatory means, among other things, that prices (per subscription to Eredivisie Live) will not depend on the number of subscribers

<sup>10</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 18; NMa case 6126/RTL NL – Radio 538, paragraph 29-33.

<sup>11</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 22; decision of the European Commission, December 21, 2010, in Case COMP/M.5932 – News Corp/BSkyB, paragraph 85; NMa decision of 28 June 28, 2005, in Case 4490/UPC – Canal+, paragraphs 22 en 30.

<sup>12</sup> Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 39.

<sup>13</sup> Case COMP/M.5932 – News Corp/BSkyB, paragraph 262; NMa case 7185/Sanoma – SBS, paragraph 57; NMa case 6126/RTL NL – Radio 538, paragraph 27.

<sup>14</sup> Case COMP/M.5932 – News Corp/BSkyB, paragraph 270; NMa case 7185/Sanoma – SBS, paragraph 66; NMa case 6126/RTL NL – Radio 538, paragraph 37.



to the platform, and will not depend on the purchase of other Fox channels. In this way, competition between distribution platforms will not be distorted.

The takeover does have the effect that the rights to live matches will not be available to other broadcasters for a relatively long period of time. However, market developments do not indicate that these rights are necessary to be able to compete in the possible market for (premium) pay-TV. Furthermore, parties have asserted that the 2007 tender, when the live broadcasting rights were offered in several packages, resulted in bids that were so low that the clubs switched to an alternative way of exploitation (the Eredivisie Live channels).

In a number of other European countries, the rights to live matches are offered in different packages to pay-TV channels. Usually, (almost) all packages of live rights are acquired by a single pay-TV operator, which does not necessarily offer these channels to all distribution platforms.

An advantage of the exploitation of the Eredivisie Live channels is that they are offered to all distribution platforms. Moreover, this will be done on non-discriminatory terms, in a way that smaller platforms will not be at a disadvantage to larger platforms. In addition, the Eredivisie Live channels will also be offered to possible future distribution platforms, supporting possible technological developments in the distribution of audiovisual content.

## **5.2 *Highlights programme***

### **5.2.1 *Free-to-air Television broadcasting***

The broadcasting rights to the highlights of the national premier football league can be important to promote competition between free-to-air television broadcasters, and especially in facilitating entry of a new broadcasting company. An overview programme of highlights of the matches played over the weekend has the potential to draw a large group of viewers, which in turn can make the channel attractive to advertisers. Since the current free-to-air broadcasting companies are competing quite fiercely with ten main Dutch channels, a new entrant would need popular content such as football to be able to make a successful entry into the market.

Fox has indicated that it may start a new free-to-air channel which will air the highlights from the season 2014-2015. This may influence the competition between television channels. In principle, the entrance of a new channel will increase competition and result in a broader supply of television programmes for consumers. Parties have asserted that the exclusive exploitation of the broadcasting rights to the highlights is necessary to realise a successful entry into the market. Besides the football highlights, the new channel will broadcast other content.

In the NMa's opinion, the use of an excessively lengthy exclusive exploitation provision by Fox, may negatively affect competition between broadcasters. On the basis of financial prognoses in Fox's business plans, the NMa considers a term of six years as reasonable to make profitable exploitation of a new free-to-air television possible. Furthermore, the NMa states that it is important that broadcasters can bid for the highlights rights periodically. Such periodic bidding will make it possible for new television channels to enter the market with a football highlights programme, as parties themselves asserted to be necessary.

In view of these considerations, parties have made concessions to limit the licence period to six years, after which the broadcasting rights will become available to the market. At that point, the clubs will decide to whom the rights will be awarded (Fox will have no vote).

### 5.2.2 *Distribution platforms*

Fox and EMM have promised not to exclude any distribution platforms directly, but do reserve the right to develop commercial propositions with incentives to distribute combinations of the channel with the highlights programme with other Fox channels. For instance, Fox might offer a discount on Fox NL to a distribution platform that also purchases National Geographic, National Geographic Wild, Foxlife and/or 24Kitchen from Fox. Parties argue that such propositions can be important to obtain a position in the free-to-air television market. This means that the Fox NL channel may be offered to distribution channels under discriminatory conditions. If that leads to a significant distortion of competition between distribution platforms, it may be in breach of the cartel prohibition.

If it is established that the Fox channel, which airs the Eredivisie highlights programme, is ‘must have content’ for distribution platforms, i.e. distribution of the Fox NL channel is of major importance to compete with other platforms, there may also be a violation of the prohibition on abuse of a dominant position, even though Fox’s market share may not be very high.

The NMa is not convinced by the argument that combined offerings of the Fox NL channel with other Fox channels is necessary to obtain a position in the free-to-air television market. The general expectation is that distribution platforms will be more than willing to distribute the Fox NL channel, which features the popular football highlights programme. It is more likely that a channel such as Foxlife or 24Kitchen would profit from these combined offerings than that it would help Fox NL to enter the market.

## **6. Conclusion**

Both the free-to-air TV broadcasting market and the pay-TV broadcasting market in the Netherlands, appear to be fairly competitive. By ensuring the broadcasting rights to football highlights can be bid for periodically, entering the free-to-air television market with the help of these rights remains possible in the future. The NMa has now put the main emphasis on competition between distribution platforms, rather than within platforms (between broadcasters). This is an important step as the market in which distribution platforms operate runs a higher risk of restricted competition than the broadcasting markets in the Dutch context. If for instance, the football content were distributed exclusively by cable companies, this would impede competition and hamper technological progress from other types of distribution platforms.

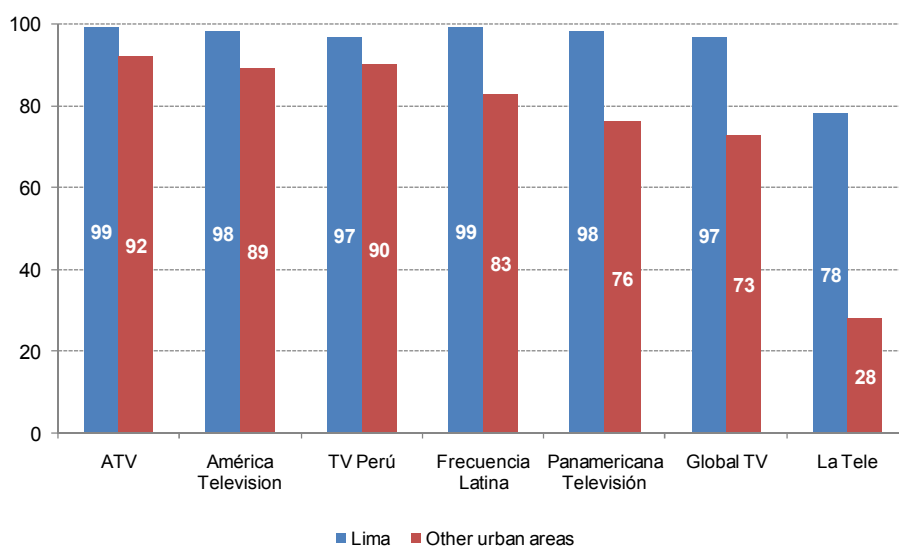


## PERU

### 1. What is the state of competition in the television broadcasting sector in your jurisdiction?

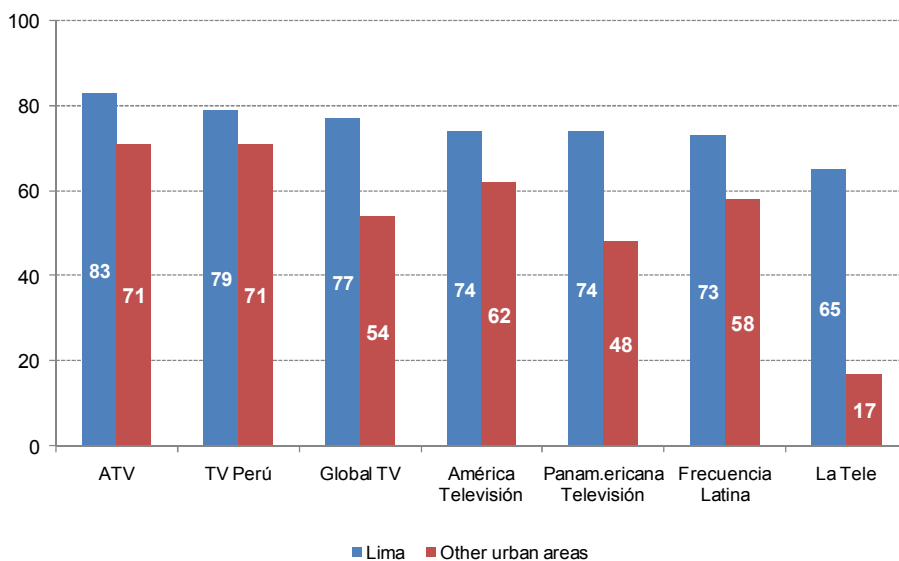
In the case of Peru, consumers can choose among national networks and pay television. There are seven national networks, whose coverage varies depending on the geographic zone. There is a higher coverage in Lima -the capital city- than in the rest of the country (see Graph 1).

**Graph 1. Peru: Coverage<sup>1/</sup> of National Networks, 2011 (%)**



1/ Percentage of homes which receive the signal of the network.  
 Source: COMPAÑÍA PERUANA DE ESTUDIOS DE MERCADO Y OPINIÓN PÚBLICA – CPI (2012). *Cobertura y calidad de imagen de canales de Televisión a nivel nacional urbano*. Market Report N° 4, 2012. Available in: [www.cpi.com.pe/boletin/impreso/archivos/MR201204-01.pdf](http://www.cpi.com.pe/boletin/impreso/archivos/MR201204-01.pdf)

Quality of the signal usually depends on the network and the geographic area in which the consumer is located. For instance, in Lima the percentage of homes with a good reception is 83% in the case of ATV and 73% in the case of Frecuencia Latina; however, in other urban areas these percentages drop to 71% and 58%, respectively (see Graph 2).

**Graph 2. Peru: Percentage of Homes with Good Reception of National Networks**

Source: COMPAÑÍA PERUANA DE ESTUDIOS DE MERCADO Y OPINIÓN PÚBLICA – CPI (2012). *Cobertura y calidad de imagen de canales de Televisión a nivel nacional urbano*. Market Report N° 4, 2012. Available in: [www.cpi.com.pe/boletin/impreso/archivos/MR201204-01.pdf](http://www.cpi.com.pe/boletin/impreso/archivos/MR201204-01.pdf)

Regarding pay television, it should be mentioned that according to Supreme Decree N° 020-2007-MTC<sup>1</sup>, broadcasting services by cable can be provided in three modes: wired or optical cable, multichannel multipoint distribution system (MMDS) and direct broadcast by satellite.<sup>2</sup> Of these three, the most used among concessionaires in Peru is broadcasting by wired or optical cable, because of its lower costs.<sup>3</sup>

Pay television is provided in all the country, however, the number of firms and subscribers varies depending on the geographic area under consideration. For instance, by September 2012 there were 1 196 815 subscribers in the country (36,50% of which are in the department of Lima) and 32 firms with active subscribers.<sup>4</sup>

It is important to mention that this market is characterized by the presence of one firm with a significant participation nationwide. In fact, Telefónica del Perú S.A.A., which is related to the firm that holds the concession of the fixed telephone service, concentrates 35,13% of subscribers in the country and 65,08% of subscribers in Lima.

<sup>1</sup> General Regulations of the Telecommunications Law, given on 3<sup>rd</sup> July, 2007.

<sup>2</sup> Article 94.

<sup>3</sup> Organismo Supervisor de la Inversión Privada en Telecomunicaciones - Osiptel (2009). *Informe que evalúa competencia en el mercado de distribución de radiodifusión por cable en Lima Metropolitana y Callao*. Report N° 007-GRE/2009. Available in:

[http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion\\_empresas/wfrm\\_Consulta\\_Informacion.aspx?INFCODIGO=2094&SCATCODIGO=316&TituloInformacion=Seguimiento%20de%20mercados%20y%20detecci%20de%20pr%20cticas%20anticompetitivas](http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion_empresas/wfrm_Consulta_Informacion.aspx?INFCODIGO=2094&SCATCODIGO=316&TituloInformacion=Seguimiento%20de%20mercados%20y%20detecci%20de%20pr%20cticas%20anticompetitivas)

<sup>4</sup> Other departments with a high number of subscribers are Arequipa (4,45%), La Libertad (2,85%), Piura (2,23%), Lambayeque (2,20%) and Cusco (2,15%). Source: Osiptel.

With respect to sector specific regulation, it should be mentioned that according to Law 28278<sup>5</sup>, broadcasting services cannot be monopolized, directly or indirectly by the State or by individuals. According to the above mentioned law, monopolization is interpreted as one person or firm owning more than 30% of the technically available frequencies, whether they are assigned or not, in the same frequency band within the same locality.

Law 28278 also states that access to broadcasting services is governed by principles of free competition, freedom of access, transparency, efficient use of spectrum and technological neutrality.<sup>6</sup> Furthermore, broadcasting services are provided according to what is established in the National Plan of Frequency Allocation, relevant technical standards and international treaties and agreements. In order to operate, firms must also apply for a license with the Ministry of Transport and Communications; this license lasts for 10 years and is renewed automatically, provided that all requirements set by law are fulfilled. Only people with Peruvian nationality or firms that are constituted and located in Peru can apply for a broadcasting license.

## **2. What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

According to a study of the Peruvian telecommunications regulator, Osiptel, legal and structural barriers can be identified in the pay television sector which, as stated before, is mainly provided by cable.<sup>7</sup> With respect to legal barriers, Osiptel found that in order for a firm to operate, it must have a distribution network that allows it to transmit its signal to subscribed homes. However, in some districts air cables are prohibited and this constitutes a significant legal barrier which may prevent the implementation of a network in the short run.

Structural barriers are associated with the existence of scale and density economies in the provision of cable television. The presence of scale economies implies a decrease in the average cost of the provision of the service when the number of subscribers is increased. This happens because there are important fixed costs associated to the lay-out of the cable network, the purchase of signal transmission rights and the acquisition of specialized equipment.

The presence of density economies is associated with the reduction of the distribution costs when the number of subscribers in a determined geographic area increases. In the case of Lima, Osiptel identifies a difference between two kinds of firms: the ones operating in the entire city and the ones operating only in certain districts. Density economies are probably more significant for the firms operating in the entire city, since the required investment in infrastructure is higher, which may constitute a barrier to entry.

The existence of exclusive content rights may also constitute a challenge for competition policy in the sector. In the case of Peru, Telefónica del Perú S.A.A.<sup>8</sup> has exclusive rights for the transmission of Media Networks Perú S.A.C. (both firms belong to the same economic group), so two phases in the television production chain (broadcasting and distribution of signal) are integrated. Osiptel (2009) analyzed whether this integration may constitute an effective advantage with respect to other competitors who cannot access the contents produced by Media Networks Perú S.A.C. and found that it depends on consumer preferences, related to their relative incomes and other socio economic considerations. The regulator found that people

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<sup>5</sup> Law on Radio and Television, given on 23rd June, 2004.

<sup>6</sup> Article 1.

<sup>7</sup> Osiptel (2009). Op. cit.

<sup>8</sup> Formerly, Telefónica Multimedia S.A.C.

with higher income have a higher valuation for channels produced by Media Networks Perú S.A.C.<sup>9</sup> which may be reflected in a lower elasticity to changes in prices. This, in turn, may contribute to the market power of the firm in this group.

We should also mention the studies prepared by the Peruvian telecommunications regulator, Osiptel, about competition in the cable broadcasting sector. In a 2008 study regarding product differentiation in the market of television by cable, Osiptel found evidence of the existence of an inverse relationship between market concentration and supply indicators in the sector. This is derived from the presence of higher prices and fewer channels in markets with a lower number of cable operators.<sup>10</sup>

Furthermore, in a report from 2009, Osiptel analyzes the competition conditions in the market for broadcasting distribution by cable in Lima. Some of the main conclusions of this study have been commented above, but we should add that this document also presents legal aspects of the sector and relevant information about the main operating firms.<sup>11</sup>

### **3. What has been your relevant experience in competition law enforcement relating to television and broadcasting?**

According to Peruvian legislation, Osiptel is in charge of the control of anticompetitive practices in the case of public telecommunication services, including telephony and pay television.<sup>12</sup>

Nonetheless, there has been a case which was analyzed by both agencies with different results. In 1999, a local cable company, Tele Cable S.A. (Tele Cable), filed a complaint against Telefónica Multimedia S.A.C. (TM)<sup>13</sup> and two cable content developers, Fox Latin American Channel Inc. (Fox) and Turner Broadcasting System Latin America Inc. (Turner) because of the celebration of exclusivity arrangements for the transmission of contents. Indecopi analyzed the complaint of Tele Cable against Fox and Turner, while Osiptel analyzed the complaint of Tele Cable against TM:

- According to the analysis of Indecopi, Fox and Turner did not have a dominant position in the relevant markets. Furthermore, even if they had a dominant position, Fox and Turner had reasonable justification for not wanting to sign an agreement with Tele Cable and there was no evidence that the lack of agreement among the parties was the main reason for the decrease in the number of customers of Tele Cable. Therefore, the complaint was dismissed.<sup>14</sup>

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<sup>9</sup> Media Networks Perú S.A.C. produces three channels: Plus TV, Canal N and CMD.

<sup>10</sup> Osiptel (2008). *Diferenciación de producto en el mercado de radiodifusión por cable*. Working paper N° 001-2008. Available in: [http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion\\_empresas/wfrm\\_Consulta\\_Informacion.aspx?INFCODIGO=14174&SCATCODIGO=316&TituloInformacion=Documentos%20de%20Trabajo](http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion_empresas/wfrm_Consulta_Informacion.aspx?INFCODIGO=14174&SCATCODIGO=316&TituloInformacion=Documentos%20de%20Trabajo)

<sup>11</sup> Osiptel (2009). Op. cit.

<sup>12</sup> Law 27336, given on 16th July, 2000.

<sup>13</sup> Today, Telefónica del Perú S.A.A.

<sup>14</sup> Resolution N° 005-2003-INDECOPI/CLC, given on 14<sup>th</sup> May, 2003. Available in: <http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2003/1-99/7/9/Resol005-2003.pdf>

- According to the analysis of Osiptel, TM had a dominant position in the relevant markets. Additionally, Osiptel found no evidence that the exclusivity agreements celebrated with Fox and Turner had positive effects on the welfare of consumers. On the contrary, Osiptel considered that the agreements had negative effects on competitors (such as Tele Cable) and raised entry barriers into the pay television market. Consequently, Osiptel ordered the annulment of the exclusivity agreements.<sup>15</sup>

Finally, we should mention that in the last ten years the Defense of Free Competition Commission of Indecopi has only dealt with two cases involving alleged anticompetitive practices relating to television and broadcasting:

In first one, Televisión Nacional Peruana S.A.C. (TNP) filed a complaint against TM for an alleged abuse of a dominant position in the form of unjustified refusal of treatment and application of dissimilar conditions to equivalent services because TM refused to include in its package of channels a signal transmitted by TNP through UHF channel 23. According to the analysis of the Commission, there were no reasonable grounds to affirm that TM had a dominant position in the relevant market. Furthermore, the Commission argued that there are sufficient grounds to justify the refusal of TM since it is a lawful and reasonable behavior from an economic point of view. Therefore, the complaint was dismissed.<sup>16</sup>

In the second case, Asociación Cultural Bethel (Bethel) filed a complaint against TM for allegedly abusing its dominant position when it refused to include in its package of channels a signal transmitted by Bethel through UHF channel 25. The Commission considered that TM did not have a dominant position in the relevant market and, therefore, the sanctioning administrative procedure was not initiated.<sup>17</sup>

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<sup>15</sup> Resolution N° 062-CCO-2000, given on 21st December, 2000 (available in: [http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion\\_empresas/wfrm\\_solucion\\_controversia.aspx](http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion_empresas/wfrm_solucion_controversia.aspx)).

<sup>16</sup> Resolution N° 073-2004-INDECOPI/CLC, given on 17<sup>th</sup> November, 2004 (available in: <http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2004/1-219/7/9/Res073-2004.pdf>).

<sup>17</sup> Resolution N° 047-2007-INDECOPI/CLC, given on 10th August, 2007 (available in: <http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2007/1-751/7/9/Res047-2007.pdf>) and Resolution N° 053-2007-INDECOPI/CLC, given on 21<sup>st</sup> September, 2007 (available in: <http://aplicaciones.indecopi.gob.pe/ArchivosPortal/publicaciones/5/2007/1-849/7/9/Res053-2007.pdf>).





## PHILIPPINES\*

### 1. The Philippine television broadcasting industry: Background

Broadcasting in the Philippines has significantly changed in the last three decades. During the dictatorship of President Marcos during the '80s, media ownership was limited to a section of the elite that openly collaborated with the regime.<sup>1</sup> In the same period, television and radio ownership and content is controlled by the government. When the Marcos regime ended in 1986, competition not only among local networks, but with cable and satellite television technology as well, began to take off.<sup>2</sup>

To date, there are more than 200 television stations serving the Philippines and most are owned by the “Big Three” television networks in the country<sup>3</sup>, namely, the Alto Broadcasting System-Chronicle Broadcasting Network (ABS-CBN); Global Media Arts Network, Inc. (GMA 7); and Associated Broadcasting Company (ABC Development Corporation/ABC 5). On the other hand, radio is dominated by seven large broadcasting groups, namely: Manila Broadcasting Company (MBC); ABS-CBN; Radyo Mindanao Network (RMN); BomboRadyo; Catholic Radio Network; GMA Network; and Philippine Broadcasting Service (PBS). Most of these radio broadcasting groups also have interests in television and they operate at least one national flagship radio station on FM and another on Medium Wave.<sup>4</sup>

The Philippines is currently using the American National Television System Committee (NTSC) standard for analog television. But plans for the transition to digital transmission have already been set in motion. On June 2010, the National Telecommunications Commission (NTC) officially announced that they shall be adopting the Digital Terrestrial Television (DTT) services that would utilize the Japanese Integrated System Digital Broadcasting Technology (ISDB-T) standard because of its capability to provide three (3) levels of categorized modulation (audio, video and data services) for the use of fixed, portable and handheld devices, without the necessity of installing any further supplementary facility. Japan’s ISDB-T platform is expected to provide more business opportunities because the bandwidth that will be assigned for digital TV can also be used to service mobile phones. The technology is also capable of sending emergency warning broadcasts to households.<sup>5</sup>

In line with the announcement to go digital, the NTC issued Memorandum Circular 02-06-2010<sup>6</sup> which provided for the standard for DTT broadcast service. The same circular also provided for the

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\* This paper is based on information gathered from the National Telecommunications Commission, news articles, and rules and regulations issued relating to broadcasting. The views expressed in the paper is that of the writer and it does not reflect the views of the Department of Justice Office for Competition.

<sup>1</sup> Coronel, Sheila S. “Media Ownership and Control in the Philippines”, seen in [http://archive.waccglobal.org/wacc/publications/media\\_development/archive/1998\\_4/media\\_ownership\\_and\\_control\\_in\\_the\\_philippines](http://archive.waccglobal.org/wacc/publications/media_development/archive/1998_4/media_ownership_and_control_in_the_philippines) (last visited 1/31/2013)

<sup>2</sup> *Ibid.*

<sup>3</sup> Accessed through <https://infoasaid.org/print/book/export/html/11368> (last visited 2/11/2013)

<sup>4</sup> Accessed through <http://infoasaid.org/guide/philippines/radio-overview> (last visited 2/11/2013)

<sup>5</sup> <http://www.abs-cbnnews.com/business/02/24/11/ntc-wants-digital-tv-service-launched-key-cities-2012>

<sup>6</sup> “Standard for Digital Terrestrial Television (DTT) Broadcast Service”, June 11, 2010.

creation of a technical working group (TWG) that will draft the implementing rules and regulations (IRR) as well as plan for the frequency for the implementation of the DTT service.

The transition from analog to digital technology is necessary in order to keep up with the developments in technology. DTT would ensure the competitiveness of the broadcast industry and at the same time, enable them to provide enhanced services to the viewing public.<sup>7</sup> To date, broadcasting networks have already started their transition to digital broadcasting.

## 2. Legal framework

The Philippines does not have a single comprehensive anti-trust law. On the contrary, the country has several different laws and statutes that, in whole or in part, deal with matters involving competition across varying industries and sectors. Nonetheless, here are some of the laws that cover the broadcasting industry:

- The 1987 Constitution provides that ownership and management of mass media is limited to citizens of the Philippines or to corporations, cooperatives or associations wholly-owned by Filipinos. The Constitution further provides that Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires and that combinations in restraint of trade or unfair competition shall not be allowed.
- Commonwealth Act. No. 146 (November 7, 1936) otherwise known as, “*The Public Service Law*”, while an old law, is the governing law that regulates all entities engaged in the servicing of public utilities, providing also for the rules in the regulation and supervision of the property rights, equipment, facilities and franchises of these public utility companies.
- Republic Act No. 3846, as amended (November 11, 1963) “*An Act Providing for the Regulation of Public and Radio Communications in the Philippines and for Other Purposes*” has made it mandatory for any person or entity to first secure a legislative franchise from the Philippine Congress prior to engaging in the construction, installation, establishment, or operation of a radio transmitting station, or a radio receiving station used for commercial purposes, or a radio broadcasting station.<sup>8</sup>
- Executive Order No. 546, series of 1979 (July 23, 1979) “*Creating a Ministry of Public Works and a Ministry of Transportation and Communications*”), created the National Telecommunications Commission and expressly granted it with the power, among others, to: issue Certificate of Public Convenience for the operation of communications utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, radio and television broadcasting system and other similar public utilities; establish, prescribe and regulate areas of operation of particular operators of public service communications; and grant permits for the use of radio frequencies for wireless telephone and telegraph systems and radio communication systems including amateur radio stations and radio and television broadcasting systems.
- Executive Order No. 205, series 1987 (June 30, 1987), entitled “*Regulating the Operation of Cable Antenna Television (CaTV) Systems in the Philippines, and for Other Purposes*”, provides that the operation of CaTV system in the Philippines shall be open to all citizens of the Philippines, or to corporations, cooperatives or associations wholly-owned and managed by such citizens.<sup>9</sup> The operation of CaTV is granted on a non-exclusive basis and for a period not to exceed fifteen (15) years.

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<sup>7</sup> M.C. 02-06-2010.

<sup>8</sup> Section 1, R.A. 3846, as amended.

<sup>9</sup> Section 1, Executive Order No. 205, series of 1987.

- Executive Order No. 45, series 2011 (June 9, 2011) entitled, “*Designating the Department of Justice as the Competition Authority*”. Through this E.O., the Office of Competition was created under the Department of Justice with the mandate to, among others, enforce competition laws and investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade.

### 3. Regulatory Bodies

There are several regulatory bodies with respect to the whole broadcasting industry in the Philippines, particularly: the Office for Competition (OFC), the National Telecommunications Commission (NTC), the Movie and Television Review and Classification Board (MTRCB), and the Kapisanan ng mga Broadcaster sa Pilipinas (Association of Broadcasters in the Philippines).

As the competition authority in the country, the OFC is working closely with the sector regulator to ensure that competition-related laws will be fully implemented. It also has the mandate to conduct investigations if there are reports of violations of competition-related laws in order to protect consumers from abusive, fraudulent or harmful business practices.

The NTC, an attached agency of the Office of the President,<sup>10</sup> is the regulatory and supervising body over radio, television broadcast stations, cable television (CaTV) and pay television. It is worthwhile to note that the NTC’s powers are limited only to the allocation of radio and TV frequencies and do not extend to supervision over the content. The Movie and Television Review and Classification Board (MTRCB) is the government agency that has the mandate to see to ensure quality movies and television programs, and its main purpose is to encourage production of globally competitive movies/exhibitions.

Another entity, albeit private, that acts as the regulatory body over radio is the Kapisanan ng mga Broadcaster sa Pilipinas (Association of Broadcasters in the Philippines). It is composed of the owners and/or operators of a majority of the radio and television stations in the country. It has its own set of rules and guidelines for news, public affairs and commentaries, political broadcasts, children’s shows, religious programming, and including advertising to be followed by and observed by its members.<sup>11</sup>

### 4. Procedure

Before one can engage as a TV, radio, cable or CaTV operator, an application for a certificate of public convenience or any form of authority is needed. It shall be commenced by the filing of the corresponding application and the payment of the required fees<sup>12</sup> before the Legal Department of the NTC. The NTC requires the applicant to prove its legal personality, financial capability to put up the project, financial feasibility of the project, economic viability of the service, and technical feasibility of the project. The application will be published in a newspaper of general circulation to give notice to interested persons. The application can be opposed on any of the following grounds: (1) overlapping in the area of service; (2) an existing franchise will be adversely affected by the application; or (3) the project as presented by the applicant is not financially feasible.

For broadcast and cable television services, the general rule is that only one company is entitled to operate as such in every municipality or city. As an exception to the said rule, a city or municipality with a big number of financially-capable residents may be allowed to have two (2) service providers within their

<sup>10</sup> Executive Order No. 47, series 2011, “Reorganizing, Renaming and Transferring the Commission on Information and Communications Technology and its Attached Agencies to the Department of Science and Technology, Directing the Implementation Thereof and for Other Purposes.”

<sup>11</sup> <http://www.kbp.org.ph/about-kbp>

<sup>12</sup> NTC Revised Rules of practice and Procedure (2006).

area. The basis of the NTC in providing for this one-operator-one city/municipality rule was to prevent “overbuilding”. As explained by the NTC, “overbuilding” occurs when there are two (2) or more cable television providers in one localized area that results in a costly price war and excessive attrition rate as subscribers transfer from one provider to another.

## **5. Challenges in the regulation of the broadcasting industry in the context of competition**

As stated above, the Public Service Act that regulates the broadcasting industry was enacted in 1936. Being an old law, it has several limitations insofar as effectively regulating the industry in this digital age. In addition, the amount of penalties, fines and sanctions provided under the said law are considered insignificant in this era, thereby limiting its effectiveness in mandating compliance with the provisions provided in the said law. Worse, the said law even failed to provide the regulatory body with comprehensive police and contempt powers, which severely limits its authority in the industry that it seeks to regulate.

Right now, there are three (3) major broadcasting networks in the country namely: ABS-CBN; GMA 7; and ABC 5. These are the biggest networks in terms of facilities, income and ratings. They have the resources to compete with each other in terms of home-grown talents and the kinds of shows that they produce. Competition among these three networks has become stiff, with one network trying to out-do what the other network does. Needless to say, the smaller networks are having a hard time catching up as they do not have their own pool of talents or resources to purchase rights to international shows thereby resulting to a very limited market for them. Some of the smaller networks have no other choice but to air religious documentaries, educational shows or re-runs of old movies.

Consolidations among existing companies across various industries seem to be the trend nowadays in an effort to look for new revenues insofar as the big businesses are concerned. For instance, the Philippine Long Distance Telephone (PLDT) Co. is eyeing to offer digital mobile broadcast TV, which is a combination of TV and mobile phone service. It has been reported that PLDT, through subsidiaries such as Smart Communications, Inc. is looking at offering various media content such as sports, breaking news, and other entertainment events.<sup>13</sup>

## **6. Conclusion**

The broadcasting industry in the Philippines is trying to keep up with the demands of the time. Technology plays an important role in the evolution of services to the public. It also enables the consumers to have a wider range of services to choose from. However, keeping up with developments would mean more capitalization requirements— both in terms of financial capacity as well infrastructure requirements - which could prove to be a big hindrance for those who would want to enter the television and broadcasting industry. In the context of competition, it may be argued that the citizenship limitation in the operation of a media company in the Philippines contributes to the inability of the broadcasting industry to truly grow. In fact, it can be said that the broadcasting industry is controlled by a few Filipino families -- who have the money and capital to make the broadcasting industry their personal playground.

There is also a need to revisit the existing laws, rules, and regulations and give the regulatory body more effective powers insofar as enforcing and implementing competition policy and law in the broadcasting sector.

It is imperative that the government take a hard look in the existing broadcasting industry. As consumers, Filipinos are entitled to the best services from the broadcasting companies that the present technology has to offer. In addition, Filipinos must have access to better, reliable, and unbiased information, news, and content, on the basis of the right to information by the people on matters of public concern as enshrined in the Philippine Constitution, which can only be achieved if more players can penetrate the broadcasting business.

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<sup>13</sup> [www.telecomasia.net/content/philippines-pay-tv-sector-consolidation-mode](http://www.telecomasia.net/content/philippines-pay-tv-sector-consolidation-mode) (last accessed 2/13/2013)

## POLAND

### 1. Background information

The history of television sector in Poland dates back to 1938 when the first experimental TV station was established in Warsaw. In the late 50s, Telewizja Polska (TVP), a public broadcaster started the transmission of a regular programme. The private television market has been evolving in Poland since the early 90's when the pioneering private local television stations started their operation. Polsat satellite TV came next as in 1994 it was granted a nationwide licence for terrestrial broadcasting. Gradually, other private broadcasters as well as satellite programmes started to appear. Moreover, since the mid 90's, there have been emerging first thematic channels of foreign broadcasters available in the Polish language.

Nowadays on the Polish television market there operate over 100 nationwide channels. In principle, particular channels belong to the leading media companies (groups) such as: Grupa ITI, Telewizja Polsat, Canal+ Cyfrowy. Very few channels are accessible by means of a non-coded satellite transmission. They are mostly accessible at a charge and by means of digital platforms operating on the Polish market as well as cable TV networks. Except for nationwide channels, there are also local television stations which usually broadcast their programme within the cable TV network.

For the last few years we have been facing a rapid development of new technologies which significantly affect the dynamic of changes in the TV access services sector. Activating the Internet TV service by telecommunications operators, or the digital terrestrial television – to name just a few examples of technological advancements on the market of media services. It is assumed that in the year 2014 the number of subscribers of pay TV in Poland will be 13.7 mln whereas the contribution of thematic channels (including the free access via the digital terrestrial television) may exceed even 90 percent. New generation networks are bound to expand and facilitate the development of new forms of consumption in the scope of television services.

The introduction of terrestrial digital television in Poland is an element of a world-wide process to convert from analogue signal transmission to digital transmission. Pursuant to the GE6 agreement concluded in Geneva in 2006 during the ITU Regional Radiocommunication Conference, Poland is obligated to cease analogue transmissions by 17 June 2015. The introduction of terrestrial digital television should be associated with the possibility of developing competition on the market for television broadcasts. The introduction of digital television will make it possible to improve the quality of transmission, and will facilitate transmitting additional data related to the programs (e.g. subtitles). What is more important, thanks to the increased efficiency in the use of the radio frequency spectrum, it will also allow more programs to be offered. An immediate result of the increased number of television stations will be more competition on the market for television advertisements. Furthermore, the implementation of terrestrial digital television will enable the development of additional services, such as EPG, pay-per-view, e-commerce. Digitisation will also facilitate the convergence of television with other digital technologies (e.g. GSM, UMTS, GPS). The termination of analogue broadcasts of television programs will take place no later than on 31 July 2013. By this time, access to digital television signal should be ensured throughout Poland.

## 2. Pay television market analysis

In the past few years, Office of Competition and Consumer Protection (hereinafter UOKiK) has been closely following developments in the television sector. In 2010-2011 pay television market in Poland has been a subject of careful analysis covering over 185 undertakings, both at the nationwide level and local markets (31 cities were examined). The collected data related primarily to years 2007-2009. The report also used exterior materials, including those of the Polish Chamber of Electronic Communication, the National Broadcasting Council and the Office of Electronic Communications.

The results of inquiry confirmed that the services of pay TV in Poland are provided by satellite digital platforms, cable operators and IPTV. The largest number of subscribers (over 6 million) belongs to the operators of digital satellite platforms – i.e. about 60 percent of pay TV users. A dynamic growth in the number of people using these services can be seen.

There are over 600 operators of cable TV. Cable television has slightly fewer subscribers - approximately 4.6 million people, making the Polish market the third largest in Europe. Cable networks registered a much smaller increase in the number of subscribers than satellite platforms primarily due to the high costs of building the network necessary to provide services. This limits the activity of cable networks mainly to urban areas and multi-family housing. Markets of large cities are already heavily penetrated, which cannot yet be said about the villages and small towns, where the digital platforms expand. In addition, one of the problems of development of cable television involves housing co-operatives refusing operators access to certain buildings. Such behaviour was already subject to numerous proceedings conducted by UOKiK.

The least widespread way of receiving pay TV is IPTV. In 2009, four local cable operators provided this type of service. According to surveyed entities, the reason for low popularity of these services include high costs of building the necessary infrastructure and strong saturation of the market by other means of broadcasting, as well as issues with program content security.

In 2009, the offer of most pay TV operators included the average of 56 Polish-language channels broadcast in analogue system. In the case of programs broadcast in a digital system there are significant differences between individual operators. Their number varies from several dozen to over 100. The range of channels broadcast in HD is also growing. As the first in Poland, in 2007, this standard was introduced by Television N. Multimedia Poland was a pioneer among the cable networks. Currently, the major market players offer at least some HD programs.

### 2.1 *Relevant market*

UOKiK takes the stance that as far as products are concerned, all pay TV operators build up one market. The provision of packages of TV programmes to final users performed by operators of satellite digital platforms, cable operators as well as operators using other modes of transmission [e.g. Direct-To-Home (DTH) satellite broadcasting, transmission of TV signal in broadband networks based on IP – IPTV(Internet Protocol Television)] should be classified as the same relevant market due to the fact that a consumer is provided with a similar service regardless of the applied technology.

However, it is much more difficult to determine the relevant geographic market. There are both satellite digital platforms (nationwide) and operators active within certain areas, which are limited by the infrastructure of their cable network – to set an example of asymmetry of substitutability. On the one hand, pay TV service provided by operators of satellite digital platforms serves as a substitute of the service rendered by cable operators, except these cases when there emerge some technical limitations in broadcast. On the other hand, due to certain limitations in providing cable services in many areas (necessity to have a

well-developed infrastructure), it should be assumed that local markets (*sensu largo* regarded as whole cities, and *sensu stricto* approached as given areas throughout cities) constitute the relevant market for cable operators.

### **3. Competition enforcement**

The President of the Office of Competition and Consumer Protection has recently delivered several significant merger as well as antitrust decisions in television sector.

#### **3.1 Merger control**

##### *3.1.1 Decision DKK- 101/11 of 5 September 2011- UPC Polska/Aster conditional clearance*

Information gathered by the Office in the abovementioned market analysis contributed to the conditional clearance of a transaction involving UPC Polska – the largest cable TV operator in Poland – taking over Aster, a cable TV provider with particularly strong presence in Warsaw and Cracow. UOKiK's analysis showed that the concentration would result in a significant restriction of competition in Warsaw and Cracow on the markets of pay television and stationary broadband Internet (combined market share of both companies ranging from 50 to 60 percent).

UPC Polska was allowed to take over Aster under the condition that within 18 months from the date of decision issuance it will sell its network, where it overlaps with that of Aster to the independent operator. The resale must cover the undertakings out of the capital group of the acquiring entity, after obtaining the acceptance of UOKiK.

Taking into consideration the technical aspects of the concentration and interests of consumers, the President of the Office additionally required UPC Polska to provide subscribers with services of the right quality and continuity before and during the acquisition of the part of Aster's network. Moreover, UPC was prevented from contractually hindering customers from the area where Aster's and UPC's networks overlap from changing providers. In particular, such customers were not to bear any costs of early contract termination.

##### *3.1.2 Decisions DKK-93/2012 and DKK-94/2013 of 14 September 2012*

In March 2012, as a result of a request of the undertakings subject to the concentration, the European Commission has referred a case with an European dimension to the consideration of the Polish Competition Authority. When assigning the case to UOKiK, the Commission took into account the fact that the transaction involved only the Polish market and that the Polish Competition Authority has had a significant experience in examining the TV and advertising sectors.

In connection with the notified transaction, since April 2012 UOKiK has conducted two proceedings in concentration cases. One concerned the takeover of N-Vision by Groupe Canal+, which is to be exercised jointly with ITI Holdings. The second – taking control by Groupe Canal+ and TVN over the entity created by merging Canal+ Cyfrowy and ITI Neovision, which will allow for joining the activity of satellite platforms.

Groupe Canal+ belongs to the international group Vivendi. It operates mainly in France, and deals with the production, distribution and marketing of tv channels and services provided by any types of media platforms. In Poland it operates under a company Canal+ Cyfrowy, providing pay tv services available via the satellite platform Cyfra+. Additionally, it is a distributor of over 100 tv and radio channels, including these broadcast by companies of Vivendi group, e.g. Canal+, Ale kino, or Mini Mini+.



TVN is a dependent undertaking of N-Vision, dealing inter alia with broadcasting general use channels and licensing the paid ones such as TVN24 and TVN Turbo. Moreover, it controls a number of companies, including ITI Neovision, the operator of satellite platform n. Both N-Vision and TVN constitute a part of ITI Holdings capital group.

Taking a joint control by Groupe Canal+ over N-Vision will take place as a result of acquiring the minority package of shares amounting to 40% and certain rights entitling to exercise joint control. As regards the second transaction, the assets of Canal+Cyfrowy, following its transformation into a joint stock company, will be transferred to ITI Neovision for the exchange of shares in the increased initial capital.

The inspection of UOKiK revealed that concentrations will most powerfully affect the domestic markets of granting licenses to pay TV channels as well as access services to pay TV and TV commercial. However, none of these markets will experience the significant restriction of competition. Therefore, the President of the Office has given her consent to both concentrations.

### **3.2 Antitrust cases**

Aside from the merger cases, UOKiK has triggered antimonopoly proceedings regarding competition-restricting agreements relating to television and broadcasting sector. The first one concerned the mobile television whereas the other broadcasting sports events.

#### *3.2.1 Decision DOK 8/2011 of 23 November 2011 – cartel of operators*

In 2009 the regulator - Office of Electronic Communications determined the bid result concerning the reservation of frequency which would enable inter alia the TV digital video broadcasting via a mobile phone (DVB-H). There were two entities participating in the procedure - Info-TV-FM and consortium Mobile TV, intentionally formed for this occasion by four mobile network operators (Polkomtel, Polska Telefonia Cyfrowa, PTK Centertel and P4). The reservation of frequency was granted to Info-TV-FM. However, the company was subsequently unable to gain support from the mobile operators. In order to offer services to individual consumers at a large scale the entity had to sign agreements with them. After the tender UOKiK observed disturbing signals of market behaviours among operators who failed to win it. Consequently, in September 2010 the President of UOKiK instituted the antimonopoly proceedings concerning the alleged unlawful agreement concluded between the four mobile operators.

As a result of conducted proceedings and the inspection with search performed in undertakings' premises, the Office managed to collect considerable evidence proving that the mobile operators who failed to win the tender for granting frequencies, concluded an unlawful agreement. Moreover, the Office examined the information placed by the operators inter alia in the media, on Internet portals and blogs. The Office determined that the participants of the consortium formed especially for the tender, agreed on their actions towards the bid winner right after failing to win the tender. The operators assessed in cooperation the financial and business conditions included in the selected offer. Furthermore, they agreed on PR actions aiming at questioning in public the validity and reliability of the Info-TV-FM bid. Such behaviours of competitors resulted in impeding the mechanism of effective competition. This unlawful agreement lasted over two and a half year and effectively hobbled the development of the DVB-H wholesale TV market and so prevented consumers from having access to mobile TV services. All participants of the cartel were ordered to cease the practice and imposed financial penalties exceeding in total PLN 113 mln.

### 3.2.2. *Broadcasting sport events*

Moreover, in November 2012 the Office of Competition and Consumer Protection initiated antitrust proceedings concerning the market of granting the right to broadcast sports events. The President analyses the way of fixing prices for broadcasting football elimination matches for the 2014 Football World Cup, played by the Polish team with Montenegro and Moldova. In fact the fans had a chance to follow the live transmission of the event on TV provided they paid PLN 20.00 to a selected supplier for watching the matches in the so- called pay-per-view (PPV) system<sup>1</sup>.

Sportfive, a company which enjoys the right to TV broadcasts of these events, granted the license to selected undertakings to provide their transmission via the pay-per-view system. The information collected by UOKiK clearly shows that when concluding contracts with eleven TV operators, Sportfive fixed the minimum price to be paid by viewers for the transmission in the amount of PLN 20.00. The proceeding is under way.

This is not the first case when broadcasting of sports events raised anticompetitive concerns. In 2006 the President of UOKiK imposed the penalties of almost PLN 8 million on the Polish Football Association (PZPN) and Canal+.

The Polish Football Association had an exclusive right to grant the license for the broadcast of football matches. Any TV station which wanted to broadcast the matches of the national 1st and 2nd league and the Polish Cup had to take part in a tender organised by the Association. What is important, the right for live broadcast of the league matches was granted by the PZPN as an exclusive license. It was granted to the broadcaster which submitted the best bid.

In 2000 PZPN signed a contract on the broadcast of football matches with Canal+. The contract was effective until 2004/2005 season. The Office of Competition and Consumer Protection established that there was a clause in the contract which granted Canal+ the priority to obtain the exclusive license for broadcasting the matches from 2005/06 to 2008/09. Pursuant to this provision the Association was obliged to inform the station about the conditions of the bids submitted by its competitors. According to the contract, Canal+ obtained the license automatically if within 30 days it presented the conditions equal to the bid considered to be the most favourable by the Association.

In the opinion of UOKiK the privileged position granted to Canal+ by PZPN which had monopoly for granting the license for the broadcast of club matches in Poland had an anticompetitive nature. On the basis of the contract the company did not have to undertake the market competition on the same rules as other TV stations. In order to have a chance to obtain the license, other bidders had to offer the amounts which would be large enough to guarantee that Canal+ will not be able to pay them. In its initial bid Canal+ could offer the conditions much worse than other broadcasters, knowing that it may use the right of preemption and increase the amount it offered to the level determined by the competitor with the highest rating.

The privileged position of Canal + station deteriorated the situation of its competitors which could not enter the market on the same conditions. The agreement harmed not only the broadcasters but also the viewers who were not able to obtain a wider access to the broadcast of the PZPN football matches.

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<sup>1</sup> PPV is destined to provide specified contents. In most cases it provides live broadcasts of sports events – upon incurring the additional charge, not included in the subscription contract.

## **5. Conclusions**

Pay-TV market in Poland is going through a period of rapid and profound change. It is continually faced with technological change and innovation. Only just has digital cable TV been introduced - providing many additional services such as video on demand (VoD), the possibility to watch different channels at the same time using one decoder – when the television faced a new challenge - 3D TV. Apart from the digitalization, two other trends can be outlined: the bundling of services, both by cable operators, and digital platforms, and the accelerated consolidation of cable operators. Emergence of new methods of video transmission, media convergence, and further advances in technology will undoubtedly affect consumer preferences and alter the competitive dynamics of the broadcast television industry in the future.

## ROMANIA

### 1. The state of competition in the television broadcasting sector in Romania

#### 1.1 Overview

The analysis of certain criteria (number of competitors in the markets, variety of the technological platforms, the constant increase in the quality of services, the number of channels included in packages of programmes, the level of prices) indicates that in Romania the television broadcasting markets are competitive environments.

In this respect, regarding the distribution of TV programmes (TV retransmission services), consumers have real choice among providers of platforms<sup>1</sup> and alternative services which is a sign of a good level of competition in the market. Nevertheless, RCC received reports regarding the existence of tailored offers for TV services made by large cable operators in particular geographic areas. Subsequently, it received complaints from competitors related to alleged predation practices.

The number of broadcasters and the content that they provide also ensures a good level of competition in the market (especially from the perspective of consumer's choice). However, there are competition problems related to the access of broadcasters to the networks in order to distribute their TV services. These competition concerns were addressed by RCC, as it will be described in the dedicated section below.

It is worth mentioning that the only regulated<sup>2</sup> market is the market of retransmission services for TV programmes in analogue terrestrial system. This situation is due to the fact that state owned broadcaster is a separate entity from the state owned distributor. However, this service will disappear in July 2015 when the analogue to TV digital switchover process<sup>3</sup> will be over.

#### 1.2 Some considerations regarding barriers to entry and expansion

Broadcasting is mainly characterised by two key characteristics:

- Low/zero marginal costs of an additional viewer (which leads to very high economies of scale), created by high fixed costs and
- The co-existence of different forms of finance (advertising, subscription and pay-tv).

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<sup>1</sup> There is a choice for viewers among at least two of the three main platforms for terrestrial (only in analogue system), cable and satellite television broadcasting. Also, television broadcasting over IP platform is available (IP TV - transmission technologies are TV over DSL and TV over fiber-to-the-home).

<sup>2</sup> By the national telecom sector regulator (ANCOM).

<sup>3</sup> When digital terrestrial television will entirely replace the analogue terrestrial television.

In this respect, the main barriers to entry and expansion in broadcasting are structural (especially regarding distribution services which require network infrastructures). In fact, the following similarities between broadcasting and telecom services determine some commonalities regarding barriers to entry and expansion:

- Both transport signals using wired and wireless technologies;
- Technical common ground (ITU, CEPT, ETSI);
- Many telecoms operate broadcast transmission;
- Some operators venture into content;
- Broadcasting services are combined in “multi-play” offers (bundle of services).

Taking into consideration that broadcasting is the *simultaneous* distribution of rich content to a scattered audience, unlike telecom, broadcasting is not characterized by a strong network effect. Moreover, there are differences between broadcasting and telecom especially regarding the type of externalities. Unlike telecom services (especially voice services), broadcasting may be characterized by negative externalities due to the business model. In this respect, unlike telecom services which are paid by users, the traditional broadcasting services are mainly paid by third parties (i.e. private radio or television stations often interrupt their programmes to broadcast advertisement).

### ***1.3 The regulatory regime in broadcasting sector***

Even though there are some (but not critical) differences in points of view between the RCC and the national regulator in broadcasting sector regarding the regulatory regime (as it was showed above), the existing legal and regulatory framework in Romania is effective in supporting a robust competition policy for the broadcasting sector.

In fact, the convergence between telecommunications and the IT industry on the one hand, and the broadcasting industry with radio and television on the other hand, was recognised in the new regulatory framework for electronic communications. The framework was extended to include the transmission of broadcasting content because it was expected that increasingly all networks would be capable of carrying any type of traffic. Regulating all networks through the same regulatory framework should ensure a fair and consistent framework for all.

In order to avoid the overlap between two regulatory regimes (broadcasting regulation and the regime for electronic communications), a delineation of competences was drawn: the national broadcasting regulations are focused on the content (including must-carry regulations) and policy aspects of broadcasting, while the conveyance aspects of television and radio signals (access to networks and associated facilities - defined as conditional access systems, application programme interfaces and electronic programme guides - and rights of use for spectrum for providers of radio and television broadcast content) are covered by the framework for electronic communications. In this respect, there are two separate authorisations, one relating to operation of the network infrastructure and the transmission of broadcast signals (provided by the national regulator in telecom sector), and the other concerned with the content of broadcast transmissions (provided by the national regulator in broadcasting sector).

## 2. Current and future challenges for competition policy in television broadcasting

### 2.1 *Barriers to entry*

There are a number of barriers to entry and expansion in television broadcasting:

- Because broadcasting produces nonphysical, public goods, generally economies of scale are not a significant entry barrier in radio and television. However, large established broadcasting firms can achieve economies of scale in the cost of purchasing supplies and programming, technical operations, and administration that provide them competitive advantages not available to competitors. This is especially true in the operation of multiple channels under single ownership. Also it must be mentioned that the economies of scope are achieved by supplying bundle of services (multi-play services that include TV services) along with economies of density.
- Limited access to distribution channels creates barriers that keep undertakings from distributing their product or service. This type of barrier occurs when channel capacity is not high enough to make space available for additional channels or when a vertical integrated undertaking (a company that own distribution facilities) chooses not to make space available to a company that offers competing channels to its own;
- Access to content - Access to and reasonable prices for desirable programming are necessary for successful entry. These critical resources can be controlled by competitors through various rights and licensing arrangements, contracts, or capacity utilization of scarce facilities.
- The advantage of the first entrant - in the market the better known will be likely to have more success because it already has recognition. But this barrier is more significant when the existing undertaking is dominant. For example, dominant broadcasters usually have significant experience in the market and established relationships with audiences and advertisers that must be challenged by entrants and are difficult to overcome.

However there are a number of aspects on the demand side that can be also considered as barriers to entry and expansion. Loyalties create barriers to entry that are difficult for a new firm to overcome. Switching costs make it more difficult for another operator to compete or for providers of new communication technologies that offer substantially the same benefits as existing technologies to enter markets. Switching costs can also be psychological barriers as well as financial because there is some psychological discomfort when changing products with which one is familiar, and many consumers tend to show inertia when new products become available.

### 2.2 *New technologies and future challenges*

The constant increase of bandwidth supported by telecommunication networks (due to the fibre networks roll-out and spectrum made available for commercial applications including mobile TV) creates huge capacity that may be used for various services (content distribution) including broadcasting. The development of IP technology and the Internet, with its many different forms of content, allows any end-user to access specific content whenever it is needed. The traditional broadcasting is increasingly meeting competition from other types of media and video content. It is expected that changes brought by the new technologies will raise some challenges regarding market definition (i.e. novel wholesale input markets) and assessment of market power (i.e. possibly network specific access input markets<sup>4</sup>, applicability of

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<sup>4</sup> The problem is whether access to one network is or not substitutable for access to another network.

two/multi-sided market concepts). In this respect, the issues regarding net neutrality will become more relevant.

### **2.3 Efficient spectrum allocation**

Romania has a transparent procedure for granting spectrum licenses which generally follows the EU legal framework. As a part of national procedure, RCC was extensively involved in the spectrum allocation procedure, by issuing a number of opinions and recommendations. For example, at the end of 2012 RCC issued a recommendation to the Ministry of Communication in order to ensure that the legal framework for digital switchover will not create any advantage to the state owned company which provides retransmission (distribution) services to broadcasters but will ensure a level playing field for all undertakings which will acquire spectrum for digital terrestrial television.

On the other hand, due to reorganisation of spectrum and the transition from analogue terrestrial television to digital terrestrial television, a considerable amount of spectrum was (and will be) made available in Romania. In this respect, RCC is aware that this situation may diminish the impact of legal procedures for spectrum allocation on competition. In fact, after the auction held in 2012 for the allocation of most important spectrum frequencies<sup>5</sup> the conditions for mobile television were created. In conclusion it is foreseeable that new technologies will undermine rapidly the traditional television broadcasting business model.

Nevertheless, RCC is aware that the absence of tradable spectrum rights can raise barriers to entry, contributes to inefficient use of spectrum and therefore can lead to a reduction in competition. In this respect, RCC stressed in all its interventions that the spectrum must be allocated in a manner that, on one hand avoids anticompetitive accumulation of frequencies, and on the other hand satisfies operators' need for bandwidth. It is true that the national regulator has the possibility to redraw licenses for spectrum which is proved to be in excess. However this administrative intervention is not as efficient as a market mechanism would be. As it was already stressed in the previous OECD discussions<sup>6</sup>, the lack of a market value for spectrum may lead to spectrum being used inefficiently (e.g., in extending coverage of terrestrial broadcasters) rather than allowing new entrants into the market.

## **3. Experience in competition law enforcement relating to television and broadcasting**

### **3.1 Overview of significant competition law enforcement matters**

RCC identified some constraints on competition in the value chain of television broadcasting especially regarding: (i) the distribution services to consumers (viewers) and (ii) the access of broadcasters to the distribution services.

Regarding the first type of competition problems, currently there is no evidence of excessive prices in the television broadcasting markets. But in the past (2006), RCC has found that a cable operator abused its dominant position by practicing unfair prices for distribution of TV signals (TV content) to its subscribers (for more detail, please see following sections). Also RCC investigated and sanctioned the collusion between two cable operators that harmed consumers by artificially eliminating any possibility of choice between the services provided by the operators in question (for details of the case, please see the following sections).

<sup>5</sup> 790-862 MHz, 880-915 MHz/925-960 MHz, 1710-1785 MHz/1805-1880 MHz and 2500-2690 MHz.

<sup>6</sup> *Regulation and Competition Issues in Broadcasting in the light of Convergence*, OECD, Edition 1998, page 11.

Regarding merger assessments, until now there was no major merger operation that required an extensive analysis of the cases brought to RCC's attention or raised particular competitive concerns. Therefore this aspect will not be addressed in this written contribution.

Except cartel cases, in all other types of cases a key issue has been and still is the market definition. Over time, RCC changed the market definition for the audiovisual services (TV programmes) due to the degree of substitution between services provided by various technological platforms (cable, DTH, mobile and IP platforms) and market conditions. Another issue is possibility to include all types of offers in the same market ("mono-play", "double play", "basic offers of triple-play" "triple-play"). The traditional approach is to define separate markets. However, it must be taken into account that the level of development of multiple-pay services increased constantly over time. Therefore the possibility to define a retail market for multiple play offers must be analysed. In this respect, the following must be assessed:

- The possibility to include all types of offers in the same market due to the substitution chain, taking into account also the cost of entry and exit for the end-user;
- From the supply side, the high investment costs regarding the audiovisual services (particular fibre roll-out and rights).

### 3.1.1 *Abuse of dominant position in Bucharest on the market of CATV services*

The investigation started as a result of the consumers' complaints regarding very high tariff of UPC for CATV services.

The relevant product market was assessed for two periods:

1. 2002-2004 and
2. 2005 (a new technology was developing - DTH).

Seven elements have been taken into account when assessing the potential substitution between the two technologies (CATV and DTH):

1. Number of subscribers - for CATV services that number increased continuously;
2. Tariffs' assessment – There was a substantial difference between the prices for services that used CATV and DTH. Nevertheless, the tariffs for the CATV services have increased during the examined period, but this fact did not affect in a negative manner the number of subscribers for the CATV services.
3. Differences /similarities between the provisions of two services in relation with the number of TV sets in a household – cost assessment from consumers perspective. There were certain differences favoring CATV technology:
  - a. The consumer paid one fee and received the service on all the TV sets in the household (CATV);
  - b. The consumer paid as many fees as the number of TV sets if the consumer wanted to receive the service for all the TV's in the household (DTH);
4. Integrated services - CATV technology provided, on demand, supplementary services – fixed telephony and internet access; this feature was not present in the case of DTH technology;



5. Penetration rate for DTH - At the level of the year 2005 - DTH represented nearly 4% of the number of CATV subscribers; this penetration has been mostly realized in the areas where no CATV services were provided, where the CATV services were of low quality (rural areas) or in the areas where the costs of adding a new customer to CATV network were too high;
6. Switching costs - These costs were important taking into account the relatively long period of time needed in order to recuperate them;
7. The competitive advantage of the first comer - CATV operators benefit from this advantage (we also include here consumers' inertia regarding the switch between technologies but mostly between suppliers).

This 7 steps analysis concluded that the two services were not substitutes from the consumer point of view. So the relevant product market was defined as the market of retransmission of TV channels through cable TV technology (2002-2005).

Relevant geographical market was defined as:

- Areas covered by the network of a single operator and where the consumers were not in the position to make a choice and
- Areas covered by the network of a single operator and where the consumers were not in the position to make a choice.

In most areas of Bucharest the operators have been identified as being in a de facto monopoly position – the subscribers were not in a position to choose between competitors.

The contractual clauses stipulated that prices would increase only if the costs of the operators increased. However, the analysis of monthly subscription fees and the costs analysis over a 4 years period revealed that the contractual clauses were not respected by UPC (CATV services supplier in Bucharest). UPC increased tariffs that were not justified by a costs' increase. Actually, in many months, the tariffs have increased while the costs decreased. So the analysis revealed that UPC had a discretionary behaviour regarding its subscribers by imposing unfair prices. In this respect, RCC sanctioned UPC for abuse of dominant position by imposing unfair prices.

### *3.1.2 Cartels and horizontal agreements*

The investigation started as a result of consumers' complaints regarding CATV services. Two companies were involved (UPC and HIFI). It is very important to bear in mind that before August 2001 those two competitors' networks overlapped in some areas, but after August 2001 there was no overlapping of the respective networks.

In 2001 UPC and HIFI concluded a contract – UPC was supposed to buy some of the networks belonging to HIFI. Those companies claimed that the contract was not enforced. However, the declarations provided by the involved parties' representatives, declarations of the subscribers and the maps provided by one of the operators proved that both companies withdrew from some areas, leaving the other company in a monopoly situation. Here are some examples of statements: "HIFI cancelled the contracts with the subscribers located in the areas that were object of the transaction with UPC" (HIFI) and "if the subscribers had already paid the fees, the payments were considered to be valid by the new provider" (UPC)".

UPC claimed that its activity produced losses in those areas – the business strategy required an intensive development, concentrating the service on a more restricted area in order to modernize the

networks. Naturally, the competition authority recognizes companies' individual right to choose their own business development plan, however not under the form of a market sharing agreement.

The effect of the agreement was that subscribers didn't have the possibility to choose – if they were not satisfied with the services provided they could only renounce those services.

In conclusion, in 2006 both companies have been fined by RCC for sharing the market ().

### 3.1.3 *Vertical issues*

Regarding the vertical relations between broadcasters and distributors, it is worth mentioning that recently, certain complaints were submitted to RCC regarding the access to the network for distribution services. Also, as a result of the changes in the implementation of the must-carry obligations complaints were submitted to RCC regarding the rights of distribution of TV programmes over the DTH platforms. As a consequence, RCC opened investigations in both cases.

Even though the investigations are on-going, some highlights of the cases can be stressed.

In the first case, it is necessary to assess the vertical relation between the plaintiff (a content supplier) and the defendant (a network operator). A major point of investigation is the fact that the defendant is vertical integrated, being also a channel provider. In this stage of the investigation it cannot be excluded that both the defendant and the plaintiff compete in the same segment of the market.

In the second case, the investigation was opened against the national regulator<sup>7</sup> (National Audiovisual Council of Romania) as a result of its intervention in the market. The market affected by the National Audiovisual Council of Romania's decision is the market for services specific to audiovisual programmes retransmission regardless of the technology used (through electronic communication networks that use the digital platform Direct-to-Home and through the electronic communication networks that use coaxial cable/HFC). The other markets affected are the upstream markets of pay TV channels, of free TV channels and the market of advertising through television. In fact, the national regulator excluded the DTH platforms from must-carry obligations.

As a result, the distributors that use DTH platforms must pay to TV broadcasters the rights of distribution of the TV programmes, even though there are declared to be free-to-air and benefit from the must-carry obligation on wired (cable) platforms. So this intervention affected the vertical relations between TV broadcasters and network operators and might also affect consumers. The starting points of RCC's investigation are: (i) the basis of all must-carry regulation should rest in the Universal Service Directive and (ii) the must-carry obligation must respect the principle of technological neutrality. RCC will take into consideration the limitations of this principle. In this respect the limitation must be justified on objective grounds (i.e. capacity restriction).

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<sup>7</sup> RCC currently carries on an investigation having as object the possible infringement of art. 9 of the Romanian Competition Law by the National Audiovisual Council of Romania by issuing a decision that contains provisions which limit the commercial freedom of the undertakings and establish discriminatory conditions for their activities. These discriminatory conditions have as object the obligation to apply the must-carry principle for all the administrators of electronic communication networks, except those which use in order to retransmit audiovisual programmes electronic communications networks with satellite access (DTH).

### 3.1.4 Access to content

In 2009 RCC started an investigation concerning joint selling of the commercial rights regarding the broadcasting of the national league football matches.

The relevant market was defined as being the national market of selling commercial rights<sup>8</sup> over the football matches played within the events that take place regularly on each year<sup>9</sup>.

The FRF members decided to cede their commercial rights to the Federation in order to be jointly sold<sup>10</sup>. Within the same joint selling complex plan, the FRF members that belong to the 1<sup>st</sup> League competition level decided to jointly sell the radio-television rights, respectively the rights of direct broadcasting, of recording and retransmission, on full or highlights basis, by radio-television or by any audio-visual means of the football events organized within the professional football league (LPF).

The analysis of the regulations concerning the football activity in Romania enacted by the Romanian Federation of Football (FRF) revealed the existence of some provisions that could fall under the Competition Law. RCC considered that the collective selling threatened to limit the coverage area for the football matches broadcasting to the detriment of the consumers. The joint selling of commercial rights had a complex, unique and continuous character that may have as unique economic aim to prevent price competition amongst football clubs and may have as effect the foreclosure of the affected market.

Due to the changes<sup>11</sup> in the national competition law and following the initiatives of LPF and FRF to formulate commitments, RCC initiated the commitments procedure. The case was closed in 2011 because RCC accepted the commitments<sup>12</sup> proposed by the parties.

### 3.2 Issues regarding parallel application of competition law and the sector regulations

In fact, RCC and ANCOM (national regulator) supported each other actions in the markets.

In order to alleviate potential conflicts between the competition and the regulatory authority, regulation should be interpreted in light of competition policy principles.

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<sup>8</sup> Broadcasting rights including all of the transmission mediums: television, radio, internet and mobile phone; and the publicity and advertising rights: outdoor, image rights.

<sup>9</sup> The Romanian national championships, Romanian Cup, Romanian Supercup, UEFA Champions League and Europe League.

<sup>10</sup> The joint selling of the commercial rights over the football matches played within events that take place regularly in each year has begun in 1997 (the year when the Competition Law came into force) and continues in the present.

<sup>11</sup> The national competition law was amended by the “Emergency Government Ordinance no. 75 of 30 June, 2010 on subsequent amendments of the Competition Law no. 21/1996” and RCC was enabled to accept commitments from the parties in cases of anti-competitive practice. The amendments came into force on August 5, 2010.

<sup>12</sup> The commitments were assumed in order to restore competition on the market, potentially affected as a result of the way in which the commercial rights on football matches were sold, within the competitions organized by FRF and LPF (national cups, championships, super cup). Succinctly, FRF and LPF committed themselves on the following: (i) to sell the commercial rights separately from the broadcasting rights, (ii) the broadcasting rights will be sold only by public tender, in separate packages and also for separate media platforms - internet, mobile, radio and TV, (iii) the tender will be open, transparent and on non-discriminatory conditions, (iv) the broadcasting rights will be awarded for maximum 3 years without the possibility to extend their availability, (v) limitation of the number of packages that can be granted to the same buyer (vi) no ‘first option’ clause regarding the broadcasting rights over next editions.

Regulations/other actions of administrative bodies, at local or central level, which generate significant competitive distortions, are prohibited by competition law; therefore the competition authority may open an investigation and order the cessation of the unlawful conduct. These attributions have been enforced according to recent amendments to the competition law. Now RCC may impose heavy fines on any administrative body that does not cooperate during the procedures.

The protection and strengthening of the competition is mentioned as a primary goal by all laws regulating specific industries, including telecommunications.

Apart from the above-mentioned legal framework governing the interaction between competition authority and sector regulators or other administrative bodies which enact regulatory measures according to their attributions, cooperation mechanisms have been set by MoUs signed between the Romanian Competition Council and the main regulators, covering mainly the exchange of information between parties and the delineation of attributions and coordination of market interventions.

For example, the MoU concluded with the national regulatory authority in telecom sector (ANCOM) stipulates that RCC and ANCOM should cooperate whenever undertakings commit certain deeds or acts that may constitute, simultaneously, both an infringement of Competition Law and an infringement of the primary or secondary legislation in the field of electronic communications or postal services. The two parties should also cooperate in cases where either RCC or ANCOM already issued a decision, in order to avoid *contradictory measures or decisions, or the imposition of disproportionate sanctions or obligations as compared to the objectives of the two institutions*.

Therefore, under the cooperation protocol, where one of the parties finds that it has no competence provided by law to investigate or settle a certain dispute in the field of electronic communications or postal services, but considers that the respective dispute may fall under the other party's competence, the former shall transmit to the other party the relevant information on the respective case under investigation, and shall notify, as the case may be, the interested persons. Whenever a negative conflict of competences occurs, the parties should meet in order to clarify the issue and to agree on the measures that must be taken in that particular situation.

On the other hand, where one of the parties finds that it has the competence, according to the law, to investigate or solve a certain case in the field of electronic communications or postal services, but considers that the respective case could also involve the competence of the other party, the former shall inform the other party, for the purpose of identifying a potential positive conflict of competences.

In both types of cases, the party receiving the information shall make its stand on the case, whereas both parties shall inform each other regarding other aspects they may deem relevant.

If, during the parties' correspondence or meetings, it is revealed that one of the parties is not competent to investigate or to solve the respective case, the former shall decline competence.

If both parties decide to continue the investigations or the case settlement, they shall consult each other in order to ensure consistency of the decisions and proportionality of the sanctions and obligations imposed on the providers of electronic communications networks and services or on the postal service providers, taking into account the seriousness and the duration of the infringements, as well as their consequences on the competition. In those situations when either RCC or ANCOM has already issued a decision or imposed obligations in the same or similar case, the party that investigates must request an opinion from the other party, opinion which is non-binding. Also, during the procedures, the parties should meet and analyse the circumstances of the investigated deeds and the consistency of the decisions adopted by each party.



## RUSSIAN FEDERATION

### 1. Introduction

In the period of creation of information society by developed countries television broadcasting became the major mass media effecting the spiritual development of the society, economic growth, social stability and the development of civil society institutions.

The Russian Federation has implemented the Federal Target Program "Development of Broadcasting in the Russian Federation for 2009 - 2015" (approved by the resolution of the Government of the Russian Federation № 985 on 03.12.2009). The major objectives of the Program are development of the information space of the Russian Federation, provision of multi-channel broadcasting to citizens guaranteeing provision of mandatory TV and radio channels with given quality and increase of efficiency of broadcasting.

#### 1.1 Television

State of national television occupies a key position in the country's media system, and plays an important role in political communication and in the system of cultural institutions in Russia. Thus, despite of national specifics, development of Russian television in whole was broadly in line with global trends such as the increasing influence of modern technology on the structure of the industry, increase in segmentation of the audience, clearly exposed generational differences to the media; search by modern TV its identity as a public institution.

These trends, of course, disclose themselves differently in the national contexts depending on the technological and economic state of the television industry. Thus abroad they say more actively about appearance of post network television where the channel (broadcaster) and content (program) are not connected solidly, but co-exist separately. With the increase in the number of programs available to the audience, the expansion of viewers' freedom due to new platforms of access to the TV content (including user interfaces such as "cloud platform"), new interactive ways of TV watching are widely distributed (destroying the old ones). The media power is gradually shifting from channels as hierarchical structures towards self-organizing networks in non-mass auditorium, which creates a new infrastructure of the Internet interactions and new user communities. As a result, traditional models of the television industry are changing, not only blurring the traditional brands of broadcasters, but also challenging the principle of mass television, based on a passive TV watching.

Analysis of universal trends in the development of television in the Russian context gives a slightly different picture. However, their impact on the Russian TV landscape is already evident. No doubt that the most evident feature of the domestic media space is the digital inequality, which reduces the possibility of equal access to the Internet throughout the country. The problem is obvious when comparing the small towns and villages with the capitals and megacities, where modern information and communication infrastructure provides viewers a large number of digital programs available through both paid TV and broadband connections to the Internet. As a result, deeper beak-up within the Russian viewers is expected, reflecting not only different levels of technological equipment of households, but also generated new media different types of media consumption and - more broadly - the types of communication culture. Presently the question of existence of multiple clusters among Russian viewers is not accidental:

- the most numerous segment, which includes the middle-aged and older, who have enough free time and are committed to traditional forms of TV consumption;
- the most attractive for the modern advertiser, consisting of highly educated and well-paid professionals, with clear information and artistic requirements to TV programs;
- new segment, taking its roots from Internet comprising young citizens (so-called "born digital", "digital natives"), whose media behavior is unique and based on authority, views of their online friends or online communities.

Establishment of different (from each other) or even opposing media cultures in contemporary society is an important consequence of the digital revolution in the mass media, which is manifested in the process of digitalization of television and spreading of the Internet. For society it also means "splitting" of a single information agenda that in the twentieth century in all states the national broadcasters formed. This fact forces many countries to take a fresh look at the situation of public broadcasting. For example, the EU countries that have already completed the transition to digital television, the debate on the nature, mission, functions and journalistic standards of public television became more active in recent years.

Under the influence of the digital revolution and the market demands a lot of public service broadcasters in Western Europe are cutting investment in program production, narrow subject and genre features of the TV content, losing its positions to commercial broadcasters particularly in post-crisis conditions. Public television, according to researchers and policy makers loses the integrity of program strategies and attractiveness for the audience. And this is what makes to revise media policies of individual countries and the European Union as a whole – as towards the broadcasters themselves, so to the idea of public service broadcasting as an important social service of a democratic society. The last formulates its request for a socially significant and time adequate television content not to the individual broadcasters, but to the full range of television programs produced in the community, highlighting the challenge of achieving diversity and pluralism.

Debate on public television and general problems of global media sphere raise issues actual in our country. The most important issues among them are: understanding of television as a public good, the need to expand discussion in live broadcasting, and generally the need for development of principles of television accountability to the society as television broadcasting time due to technological and cultural reasons remains the core of Mass Communications System in Russia and an essential tool in the process of the national identity keeping.

## **1.2 Radio**

In 2015 Russia should switch to digital broadcasting and this transition is radical breaking established ideas on the organization of broadcasters. The largest issues appear in the area of radio broadcasting, where traditional business models are based primarily on the basis of advertising.

The previous period of radio industry development was characterized by active growth of radio broadcasting in the band FM-2. Demand for broadcasting in this band was stipulated by the possibility of good quality stereo broadcast and the fact that subscriber radios are widely used by the population.

Quality stereo broadcasting coverage in the bands FM-1 and FM-2 of the FM range is not more than 70% of the urban population in Russia.

Powerful broadcasting is a strategic tool to inform not only the urban and rural population, but also migratory settlements, marine, scientific and exploration missions, etc. It is an exceptional means of

notification and the only means of communication in case of technological or natural disasters, war, when the existing electricity, communications and mass communications infrastructure is destroyed.

The radio broadcasting industry needs to be modernized and transition to modern technologies and methods of broadcasting is absolutely necessary. The DRM format was chosen (digital broadcasting standard developed by Digital Radio Mondiale) as a national standard for Russia due to the conditions of radio broadcasting in Russia and the fact that it is the only digital standard developed for the bands below 30 MHz, i.e. for a range of long, medium and short waves.

The attractiveness of the transition to digital systems primarily is associated with the possibility of significant increase in the number of transmitted radio, video, multimedia and other information. For example in digital standard DRM+ (designed for Ultra short waves) one radio channel with a bandwidth of 250 kHz can transmit from 6 to 25 CD-quality stereo programs (depending on the parameters of coding and modulation).

It is advisably to carry out a step-by-step implementation of DRM network standard within the frameworks of the modernization program of powerful radio networks. It is necessary to conduct large-scale studies of the reception quality of digital broadcast signal, the size of the service areas and features of the broadcasting organization and construction of such networks.

The transition to digital format will result in a new ideology of broadcasting, avoiding stereotypes and technological schemes of analog broadcasting organizations, introduction of new principles of broadcast programming, creation of new formats.

A broad information campaign is necessary among the population about the transition to digital broadcasting, as only 44% of Russians are aware of the upcoming transition to digital broadcasting, and only 6% of Russians are aware of the issue and monitor the implementation of the program.

Russian radio stations use a wide range of sources of income. At the moment, more than forty of these sources are known which can be subdivided into "subsidized / non subsidized sources", "consumers / business sources" and "specialized / non-core sources". In contemporary Russian situation only five of the indicated sources of income are really important for most radio stations and provides the main inflow of funds. It is revenue from advertising (broadcast of commercials), sponsorship, advertising thematic programs, as well as subsidized funding in the form of direct revenues from the budget (subsidies) for public stations and subsidies from the holdings, if stations are in their structure.

## **2. The state of competition in broadcasting sector**

### **2.1 *Restrictions on competition***

A number of companies (hereinafter - the provider) operates in the territory of the Russian Federation, which offers both cable and satellite access to the World Wide Web, as well as to packages of TV channels freely available as well as to private (own production and formation) with technologies of access limitation.

Providers often offer potential users of services prepared complete sets of necessary equipment, which do not require any independent action on resupply, equipment selection and their parts depending on the technology restrict unauthorized access used by providers.

Equipment sets (deliberately selected and formed by the Provider) is a complete product that is sold by the Provider. Thus, along with the formation of price data service provider is able to set the price of the equipment set as one of the types of sold goods.



In this connection, a question arises on description of the provider's activity in pricing of completed equipment sets in relation to guaranteeing balance of consumers interests in the view of competition rules.

Besides, at present, the provider practices an approach in which the user is offered a choice of different value and completeness of equipment sets for the connection to the services of the Provider. These types of sets are sets of fully equipped with all necessary devices and to minimum required sets to gain access to services, namely the access card. In the latter case, the question arises for the user of services on the need to find equipment compatible in the technology of limitation of access and broadcasting signal with the technologies used by the Provider. In order to facilitate the search for compatible equipment, the Provider informs users in different ways on the using technologies of access restrictions and the list of equipment models for which compatibility has been verified by the Provider and they work correctly for receiving and processing signals - recommended models, which can also be purchased at the Provider or organization (s) with whom this provider cooperates.

Thus, this approach in its meaning is intended to indicate for the implementation of alternative freedom of possible selection of Connection Kit and models of equipment, however, may affect the interests of the manufacturers of the equipment by distinction between proven and recommended equipment and respectively equipment, which correctness of operation was not tested and verified, the potential user of the services of the Provider will acquire, relying on his knowledge and opportunities.

When considering this approach, the issue of determining the factors of the possible impact of the Provider (formation of consumer's interest in the equipment, including specific models of a particular manufacturer, the price for realized compatible equipment, etc.) in the model of relationships involving not only the providers and consumers of services but also the manufacturer of the equipment.

### **3. Challenges for competition policy in television broadcasting**

#### **3.1 Barriers to entry**

Among the factors (can be defined as a barrier to entry) which have a significant impact on the broadcasting market, it should be noted operators access to the infrastructure, which are using in the communication services, including location of the equipment issues, installation and operation of communication networks in residential buildings and premises. However, the solution of this problem does not only appeal to a competition law, because it affects questions of property and it is also regulated by the rules of civil and housing legislation, which requires the legislative and executive branches to increase cooperation on the issue.

Since 2010 with the new provisions of Article 14 of the Federal Law "On Advertising", which established the definition of the federal TV channels, a privileged position in the distribution of television advertising, as well as features of the contracts formation for provision of TV advertising for people occupying a privileged position in the distribution of television advertising, and federal TV channels, including state-owned (prohibiting federal TV channels to conclude agreements for distribution of television advertising with companies> occupying a privileged position - more than 35% in the distribution of television advertising) competition authority on the basis of information received from , Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications generates a list of federal TV channels and counts the share of federal television channels at national and regional advertising levels on the basis of information received from the CJSC "Group of Companies" Video International ", LLC RA "Alcazar ", LLC" Gazprom-Media "and federal channels. The list of federal TV channels and federal TV channels' advertising share calculation are available on the official website of the FAS of Russia in the "Internet".

Calculations, carried out by competition authorities, allow federal TV channels to orient on the market while the service contract for the dissemination of advertising formation, which is designed to prevent the domination of one person in this area, and violations of the law on advertising.

With the entry into force of the Federal Law dated 29.04.2008 № 57-FL "On Foreign Investments in Business Entities of Strategic Importance for National Defense and State Security" (hereinafter - the Law on Foreign Investments), which includes limits to foreign investors in contract formation to purchase shares of strategic business entities operating in the field of broadcasting, or to establish control over such companies. In handling the transactions which require prior approval in accordance with the Law on Protection of Competition, Antitrust authority has been working out qualification transactions involving companies which carry out business activities in the field of broadcasting (in accordance with Article 6 of the Law on Foreign Investment attributed to strategic activities) in accordance with the Law on Foreign Investment.

As a part of its activity the competition authority, with the participation of the federal executive authorities, is responsible for policy development and implementation of control and oversight in these areas - the Ministry of Communications of Russia, Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications actively work to improve the legislation in the sphere of mass media in order to ensure the country's defense and state security.

### **3.2 *New technologies and future challenges***

Recently, market of pay-TV is one of the fastest growing telecommunications markets in Russia. In future it will play the role of one of the main drivers of communication market growth.

In this connection, the competition in this market will increase through the development of new technologies and the provision of new TV services, such as satellite television and IPTV, convergence of networks and services, enhanced television infrastructure, and increase of public demand of these communication services.

### **3.3 *Access to content***

In Russia TV broadcasters and operators, who distribute these TV programs, mostly separated from each other and they are independent business entities that interact with each other in the framework of the contractual relationship.

In addition, broadcasters are not always the owners and producers of the content included in the broadcasting network. Often they acquire such a content from relevant producers, including the foreign ones.

It is no doubt that the content itself is not exclusive and it is not the object of the exclusive rights of intellectual activity. It means that its implementation does not fall under the Article 10 of The Law on Competition Protection in accordance with which actions (omissions) of a dominant entity, the result of which is or can be prevention, restriction or elimination of competition, are prohibited.

### **3.4 *Efficient spectrum allocation***

In recent years in Russia measures are implemented to increase the efficiency of use of the radio spectrum and the transparency of its release, including by expanding the practice of making generalized decisions and phase-out of personalized spectrum allocation, and move towards the distribution of radio spectrum on the results of tenders.

#### **4. Competition law enforcement relating to television and broadcasting**

In 2012 the FAS Russia considers a question about publication of Technical requirements for the main classes of set-top boxes, televisions, SAM-modules DVB-T/T2 standard, supporting an address management systems, defense and warning systems of ES and e-government by the Ministry of Communications of Russia and the Federal State Unitary Enterprise (FSUE) "RTRS" dated 12/30/2011. It was found out that set-top boxes, TVs, SAM-modules should maintain a unique set of keys from a specific producer. After that FSUE "RTRS" posted information that the only digital console GeneralSatellite TE-8714 is corresponding to the specified requirements.

The FAS Russia considered that the implementation of the requirements could lead to a restriction of competition in production and sales of digital set-top boxes and TV sets markets in Russia, which, undoubtedly, affects the availability of digital television for users.

Therefore, the FAS Russia considered the application of antitrust measures, in particular Articles 15 and 16 of the Law on Protection of Competition, to the Ministry of Communications of Russia and the FSUE "RTRS".

However, in the framework of cooperation with the Ministry of Communications of Russia, this issue was resolved by removal of these requirements from the official websites of the Ministry of Communications of Russia and the FSUE "RTRS", recommendatory requirements as well as the lack of access restrictions to watching TV through FSUE "RTRS" broadcast uncoded signal that can be received by any DVB-T2 standard TV receiver.

Recently, a large amount of transactions of assets is made in the field of the provision of television and radio programs (in 2010 - 15%, 2011 - 13%, 1 quarter of 2012 - 22%). It is partly due to the fact of high interest of major players in the expansion of the regional markets. However, the FAS Russia and its regional offices are monitoring the level of economic concentration in the television broadcasting market and are ready to take appropriate antitrust measures if it is necessary.

##### **4.1 Russian offices of «NBCU» Group transaction**

In 2011, the FAS Russia decided to satisfy the application of a private company with limited liability "Universal Studios International BV," about the acquisition of rights, allowing them to determine the conditions of doing business LLC "Universal Pictures Rus" LLC, "UPI" and LLC "Universal Pictures International Germany GmbH", which has an office in Russia.

As a result of this transaction "Comcast Corporation", as an ultimate parent company of the group, providing rights to Russian broadcasters to use the television program on channels «G4» and "E!». planned to establish control over Russian companies, belonging to the group of companies "NBC", an international group operating in the field of media and entertainment. Channels of "NBC" ("SayFay", "Universal Chanel") are broadcasting in Russian by satellite broadcasting systems and cable distribution.

The analysis of this transaction on the presence (absence) of features of restricted competition on the wholesale market of the technical data carriers and movies rent, the FAS Russia found out no evidence of restriction of competition (the share was acquired by the Company: LLC "Universal Pictures International" (movie rent) by mid-2010 year - 8% of the box office takings, the share of LLC "Universal Pictures Rus" (wholesale trade of technical data carriers) - 12%).

It concerns the fact that as a result of this transaction "Comcast Corporation" established control over the Russian companies (LLC "NBC Universal" and LLC "NBC Universal - 2" carry cable broadcasting)

which have a strategic importance for the national defense and security. This transaction was approved by the Government Commission on Monitoring of Foreign Investment in the Russian Federation.

#### **4.2 European Media Group transaction**

In the first half of 2012, FAS Russia decided to satisfy applications of LLC "SDS Mediaholding" to acquire shares in the amount of 97.28% of the share capital of "European Media Group" and 99.6429% of the voting shares of JSC "Media Plus."

Acquirer - LLC "SDS Mediaholding" Media Holding is the parent company to a group of companies which includes the following radio stations: "Russian Radio in Kemerovo», «DFM Kemerovo", "HIT FM in Kuzbass", "Retro FM Kemerovo," "Russian Radio Kuzbass" "Radio Chanson" ("Russian Radio two Novokuznetsk ") and "Radio Sport" (Moscow).

"European Media Group LLC " indirectly controls "Europe Plus CJSC ", "Radio Retro CJSC ", "SAC CJSC ", "RTS-Inform LLC ", "Ekbi LLC ", "Europe Plus St. Petersburg CJSC ", "MMT C JSC ", "Europe Plus Vyborg CJSC ", "Radio wave LLC", "Retro-Novosibirsk LLC ", "Radio Katyusha CJSC " and "Radio Region LLC ", which operate on the radio and have a license. Among these companies CJSC "Europe Plus", C JSC "Radio Retro", CJSC "SAC", LLC "RTS-Inform", LLC "Ekbi", CJSC "Europe Plus St. Petersburg", LLC "Retro-Novosibirsk", CJSC " Radio Katyusha "and LLC" Radio Region "are strategic companies.

As a result of this transaction CJSC HC "Siberian Business Union" took control over one of the largest radio holdings - European Media Group (Radio Europe Plus, Retro FM, Radio 7, Cake FM, Fresh Radio, Eldorado, Radio Record, the area of broadcasting is almost the whole country, including Moscow and St. Petersburg), and the sales House Media Plus, providing advertising on radio stations of holdings "European Media Group" and "Media Holding" and the Internet. In this case, as a result of the transaction, merger of the assets of two radio broadcast media holdings had place.

#### **5. Conclusion**

The FAS Russia actively promotes introduction of technologic neutrality principle of using the radio spectrum, which affects positively on the development of the communicational service market as a whole and on the television and radio broadcasting market in particular.



## SINGAPORE

This paper summarises how the introduction of competition in Singapore’s free-to-air (“FTA”) and subscription TV markets has panned out, and ends with a discussion on our regulatory response to media convergence, one of the most significant challenges facing regulators today, and particularly pertinent to Singapore, given its advanced info-communications infrastructure and tech-savvy citizenry.

### 1. Introduction: Competition regulation in Singapore’s media industry

The Media Development Authority (“MDA”) was set up in 2003 to promote and regulate the Singapore media industry, in face of the convergence of media, which demanded a consistent approach to regulating the different media to achieve social and economic development objectives. The formation of MDA enabled the various regulations and standards for TV, films, music, radio, publishing, video games and digital media to be handled by a single body in a holistic manner.

In April the same year, MDA released the Code of Practice for Market Conduct in the Provision of Mass Media Services (“the Media Competition Code”)<sup>1</sup>, which aims to fulfil the following objectives in Singapore’s media industry:

- a) enable and maintain fair market conduct and effective competition;
- b) ensure the availability of a comprehensive range of quality media services ;
- c) encourage industry self-regulation;
- d) foster further investment in, and the development of the media industry; and
- e) safeguard public interest.

### 2. State of competition in the Singapore broadcasting sector

The broadcasting sector in Singapore comprises three main nationwide licensees – Media Corporation of Singapore (“MediaCorp”), StarHub Cable Vision (“SCV”) and SingNet mio TV (“SingNet”).

- Terrestrial FTA TV market. MediaCorp is Singapore’s first television service and only terrestrial FTA TV licensee. As the only nationwide FTA TV licensee reaching out to nearly 90% of the population (aged 15 years and above) on a weekly basis<sup>2</sup> through its seven FTA TV channels in

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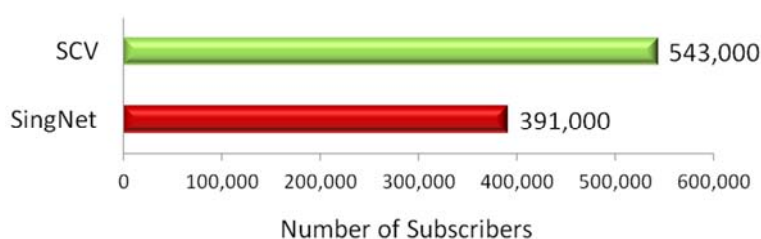
<sup>1</sup> The Media Competition Code can be found at <http://www.mda.gov.sg/Policies/PoliciesandContentGuidelines/Pages/Competition.aspx>.

<sup>2</sup> Source: Nielsen Media Index 2012.

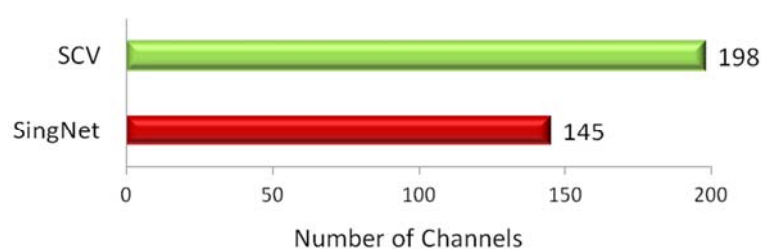
the four official languages of Singapore, MediaCorp has been classified as a dominant licensee in the FTA TV services market<sup>3</sup>.

- **Subscription TV market.** In Singapore's subscription TV market, two nationwide licensees and a handful of niche licensees compete for the attention of 1.15 million resident households<sup>4</sup>. SCV, which has been operating the only cable TV service in Singapore since 1995, is classified as a dominant licensee in the subscription TV market. The other nationwide subscription TV licensee is SingNet, which started its mio TV service over managed Internet Protocol TV ("IPTV")<sup>5</sup> in 2007. Collectively, the two nationwide licensees offer over 300 pay TV channels to more than 900,000 subscribers. [Figure 1](#) and [Figure 2](#) below show the number of subscribers and channels offered, by SCV and SingNet, as of September 2012.

**Figure 1. SCV and SingNet Subscribers**



**Figure 2. SCV and SingNet Channels**



To encourage growth and competition in the broadcasting sector, MDA introduced a tiered licensing framework in 2007, wherein niche TV licensees are subjected to a less stringent licensing framework compared to nationwide TV licensees (please see [Annex](#) for an overview of the key conditions for a niche licence versus a nationwide licence). This has helped to facilitate the growth of IP-based TV services<sup>6</sup> in Singapore as licensees have greater flexibility to roll out services for different market segments. Today, there are nine niche TV licensees offering around 80 linear and on-demand channels in various languages.

<sup>3</sup> Under the Media Competition Code, a Regulated Person is considered to be dominant, when, in the opinion of MDA, it holds significant market power in a relevant media market. Further, the Code provides that it shall be a rebuttable presumption that a Regulated Person has Significant Market Power if it holds a market share exceeding 60 percent of the relevant media market.

<sup>4</sup> Source: Department of Statistics, Singapore. Figures for non-resident households are not available.

<sup>5</sup> Managed IPTV services are delivered over a dedicated network which enables the operators to have more control over the quality of their services.

<sup>6</sup> Both managed IPTV and OTT TV services.

### 3. Competition in the FTA TV market: A case study

In 2000, Singapore announced the partial liberalisation of Singapore's FTA TV market. In March 2001, Singapore Press Holdings ("SPH"), the dominant licensee in Singapore's newspaper publishing services industry, was granted a FTA TV broadcasting licence through its newly formed subsidiary - SPH MediaWorks ("MediaWorks"), and started offering two FTA TV channels in English and Mandarin respectively<sup>7</sup>.

The competition between MediaCorp and MediaWorks resulted in a greater variety of programming options, fresh and innovative programming concepts, more niche content, and higher quality local productions and acquired programmes. However, while competition resulted in positive outcomes to consumers, it also created significant financial pressures on the licensees due to the small Singapore market and the shrinking advertising pie from the weak economy then. Intense competition between MediaCorp and MediaWorks also forced production and acquisition costs to go up, making the situation economically unsustainable. In September 2004, MediaCorp and SPH merged their mass-market television operations in a rationalisation move to stem losses and enhance shareholder value. The consolidation, which was approved by MDA as required under the Media Competition Code, resulted in a new holding company – MediaCorp TV Holdings Pte Ltd – 80% owned by MediaCorp and 20% owned by SPH respectively. With that, MediaCorp once again became a monopoly in the FTA TV market.

Despite the reach and impact of MediaCorp as the only FTA TV licensee, MediaCorp is faced with declining viewership as viewers move to other providers such as subscription TV and online content. In an attempt to curb this tide, MediaCorp has created an early online presence through its XinMSN portal in 2010 and most recently, completed its trial of its over-the-top ("OTT") interactive service, Toggle, which is expected to be available from 1 February 2013. The service will integrate online and traditional TV by delivering unique features and premium content to subscribers' preferred devices such as connected TVs, computers, tablet devices or mobile phones.

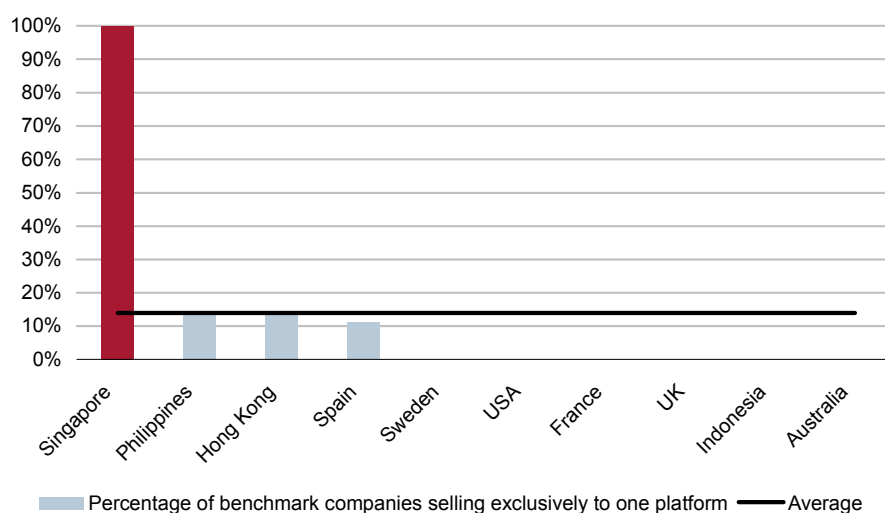
### 4. Competition in the subscription TV market: Addressing content fragmentation

In contrast to the limited competition in the FTA TV market, competition intensified with the entry of the second nationwide subscription TV licensee, SingNet, in 2007. Both nationwide licensees – SCV and SingNet – adopted an exclusive content strategy which resulted in a high degree of content fragmentation unique to Singapore. As shown in [Figure 3](#), all the top multi-national channel-producing companies<sup>8</sup> sold their channels exclusively to subscription TV licensees in Singapore – by far the highest percentage compared to other benchmark countries.

<sup>7</sup> At the same time, MediaCorp Press Limited was granted a newspaper licence.

<sup>8</sup> Walt Disney, Sony, Time Warner, News Corp., NBC Universal, Viacom, Vivendi, CBS Corp., Liberty Media Corp. and Bertelsmann.



**Figure 3. Percentage of Top 10 Channel-producing Companies Selling Channels Exclusively**

Source: Analysys Mason. (2010). Discussion of Market Inefficiencies in the Singapore Pay TV Market

Content fragmentation brought about increased inconvenience and attendant costs for consumers, as well as created significant barriers to entry for new entrants. Furthermore, the attention and resources of the subscription TV licensees were diverted from other aspects of competition, such as service and content innovation. Thus, the market failed to deliver the full benefits generally associated with a competitive market. MDA assessed that content fragmentation was unlikely to be addressed by market forces; regulatory intervention was therefore necessary to promote the interests of consumers and the industry as a whole, and to better align the local subscription TV market to the state of competitiveness observed in other competitive subscription TV markets overseas.

With these considerations, MDA introduced the Cross-Carriage Measure (“Measure”) on 12 March 2010. The Measure is aimed at enhancing competition in the local subscription TV market and to encourage the subscription TV licensees to re-focus competition to include other aspects such as service differentiation, thereby providing more choice and convenience for customers while enabling industry growth.

Under the Measure, a subscription TV licensee that has acquired exclusive content would need to ensure that the exclusive content is cross-carried on the other subscription TV licensee’s platform in its entirety and in an unmodified and unedited form, to be made available at the same price, terms and conditions to any subscriber. The Measure does not require the subscription TV licensees to share the content, and the contractual relationship remains between the subscription TV licensee with the exclusive rights and the consumer. The other subscription TV licensee is only required to provide its platform to cross-carry the content to the consumer.

Since implementation on 1 August 2011, the effects of the Measure have been unfolding. More channels are now available to consumers across multiple retailer platform<sup>9</sup>. There are also new subscription options from the subscription TV licensees. Both nationwide licensees are striving for service

<sup>9</sup> There were only seven channels, mainly foreign public service channels, available on both SCV and SingNet prior to the introduction of the Measure. Today, there are over 50 common channels which include channels such as the FOX International Channels and ESPN Star Sports channels.

differentiation and innovation as more and more content are becoming non-exclusive. For instance, customers can now enjoy value-added services such as online and mobile viewing options. To ensure that the Measure continues to be relevant, MDA would be reviewing the Measure as part of the triennial review of the Media Competition Code scheduled in 2013.

## 5. Regulating in a converged media environment

The integration of traditional broadcasting and online media is fast becoming prevalent in Singapore. The traditional FTA and the subscription TV licensees are delivering or planning to deliver their services through the Internet, in direct competition with the likes of online media providers.

To study the issues impacting consumers, industry and society in the converged media environment, the Singapore Government appointed a Media Convergence Review Panel (“Panel”) in 2012 to put forth recommendations to address such challenges. The Panel recently published their findings and recommendations in the Media Convergence Review Final Report<sup>10</sup>, which the Government is presently reviewing.

In the report, the Panel highlighted the increasing vulnerability of local media licensees to online competition from overseas media service providers who are not subject to local regulatory regimes, and the resultant unlevel playing field, as a key regulatory issue to be addressed. The Panel takes the view that Singapore’s broadcast licensing framework should cover both local and foreign broadcasting services delivered over the Internet and are receivable by the Singapore public. However, it also recognises that it would be impractical to seek to apply the framework to all foreign broadcasters whose content is accessed by users in Singapore. Hence, the Panel recommends that licensing of foreign broadcasters be imposed only on those providers which (a) target the Singapore market; and/or (b) receive subscription fees and/or advertising revenue from the Singapore market<sup>11</sup>, and such foreign broadcasters should be treated no differently from broadcasters that are based in Singapore and subject to licensing obligations.

In coming up with its recommendation, the Panel explained that it is guided by the principle that licensing continues to be necessary to protect the public interest through content regulatory and consumer protection obligations. However, it also recognises the importance of creating a regulatory framework that promotes the growth of broadcasters already licensed here, while not deterring the entry of foreign broadcasters. An underpinning principle is therefore to apply equitable obligations on local broadcasters vis-à-vis their foreign counterparts. Such obligations should then be tied to the scale and impact of the broadcaster, with the overall structure of the licensing framework supporting the entry of new players and industry growth.

## 6. Conclusion

In an era where it is commonplace for converged communications players to offer triple-play and quad-play service offerings, it is necessary for MDA to work closely with the infocomms regulator, the Infocomm Development Authority (“IDA”), which regulates the telecommunication markets. Both agencies come under the Ministry of Communications and Information, and have frequent exchanges to ensure alignment of the regulatory and competition frameworks in the respective markets. The two agencies also work together on joint projects and to address issues concerning converged players. Where

<sup>10</sup> The Media Convergence Review Final Report can be found at <http://www.mda.gov.sg/Reports/Documents/Media%20Convergence%20Review%20Final%20Report.pdf>.

<sup>11</sup> As a guiding principle, the Panel suggests that foreign broadcasting services “targeting the Singapore market” should include those players actively addressing the Singapore market, such as via setting up .SG sites or offices in Singapore; and should not include foreign broadcasting services that consumers had to actively seek out and/or circumvent geo-blocks.

issues are more complex and cross beyond the telecommunications and media markets to other markets, the Competition Commission of Singapore (“CCS”) would also be involved.

With media services transcending national boundaries, MDA would also look forward to collaborations with foreign regulators. International platforms such as the OECD forum on Competition offer an ideal platform to facilitate this process.

## ANNEX

The table below provides an overview of the key conditions for a Niche TV Licence and a Nationwide TV Licence.

	<b>Niche TV Licence</b>	<b>Nationwide TV Licence</b>
<b>Licence duration</b>	5 years	10 years
<b>Number of subscribers</b>	(i) Daily reach of any single channel reaches up to 100,000 unique viewers; or (ii) Daily reach of broadcaster reaches up to 250,000 unique viewers. This Threshold applies to Related Corporations.	No limit to the number of subscribers and/or viewers in Singapore.
<b>Licence fee</b>	The licence fee will be 2.5% of total revenue. A minimum licence fee of \$5,000 per annum will be applicable throughout.	The licence fee will be 2.5% of total revenue. A minimum licence fee of \$50,000 per annum will be applicable throughout.
<b>Performance bond</b>	\$50,000, in the form of either banker’s guarantee or cash.	\$200,000, in the form of either banker’s guarantee or cash.
<b>Ownership</b>	No ownership conditions	Subject to the ownership conditions as stipulated in Part X of the Broadcasting Act.
<b>Must carry</b>	No must carry obligations	Must carry obligations for enabling access to local Free-to-Air channels are applicable for subscribers.
<b>Advertising revenue</b>	No cap on advertising revenue.	Advertising revenue not to exceed 25% of Total Revenue.
<b>Advertising time limit</b>	A 14-minute-per-hour advertising time limit applies for channels with scheduled programming. This time limit is not applicable for VOD (video-on-demand) content and interactive advertising services.	
<b>Content guidelines</b>	The Subscription TV Programme Code applies if scheduled programmes are offered, while the VOD Programme Code applies if on-demand programmes are offered.	

## SOUTH AFRICA

### Introduction

Owing to the apartheid government's perceptions of the risk posed by television to its administration, South Africa only saw television broadcasting in 1976. Television broadcasting was only offered by the South African Broadcasting Corporation ("SABC"). However, in October 1985, the South African government issued its first subscription broadcasting license, which led to the establishment of M-Net ("Multichoice") in 1986. M-Net was owned by the big four newspaper groups, Times Media Ltd (now Avusa/BDFM), Argus (now the Independent Group), Naspers and Perskor (now defunct).

The National Party government's motivation for undermining the SABC's monopoly was not commercial but political. Ownership of a TV network was seen as a way of saving the Afrikaans press, whose revenue had been hard hit by TV advertising on the SABC. In the apartheid period Afrikaner big business grew under the Nationalist government policy of "Afrikaner favoritism". In 1993, M-Net was divided into two companies. M-Net itself became a pure subscription television station while the company's subscriber management, signal distribution and cellular telephone activities were formed into a new company called Multichoice. Multichoice is now a wholly owned subsidiary of Naspers.<sup>1</sup> Until the establishment of Toptv in 2010, Multichoice had been the only provider of subscription television in South Africa.

According to the Department of Communications, there are currently about 11.5 million television owning households in South Africa and approximately 72% of these households rely on free-to-air broadcasting services.<sup>2</sup>

Note at the outset that competition issues in television and broadcasting have not yet been the subject of Competition Tribunal decisions. This submission therefore focuses on how the Competition Commission ("Commission"), which investigates and prosecutes cases of anti-competitive conduct, is approaching the issue. In this regard, the Commission has investigated several third party complaints alleging an abuse of a dominant position in the subscription television market and thus far, non-referred all of them.

Yet concerns about the state of competition in the television broadcasting industry have remained. Given the persistency of competition concerns in subscription television broadcasting, the Commission recently embarked on a scoping exercise (or preliminary research study) to assess the state of competition in the subscription television broadcasting sector. Our comments here are thus focused on the issues we are facing in our cases and findings from the scoping exercise. The primary focus of our comments relates to competition concerns about the abuse of dominant a position in subscription television broadcasting.

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<sup>1</sup> Naspers is a South Africa-based multinational mass media company with principal operations in electronic media (including pay-television, internet and instant-messaging subscriber platforms and the provision of related technologies) and print media (including the publishing, distribution and printing of magazines, newspapers and books, and the provision of private education services).

<sup>2</sup> See Who Owns Whom research report on the telecommunications industry, July 2012.

Before addressing the specific questions we provide an overview of the relevant legal provisions for the assessment of alleged abuse of dominant position cases.

## **1. South African legal provisions governing abuse of dominant position**

The specific abuse of dominance provisions in sections 8 and 9 of the Competition Act 89 of 1998, as amended, (“the Competition Act”) stipulate effects-based economic tests (with some exceptions, such as for excessive pricing). There are also explicit pro-competitive, efficiency and technology defences for most of the abuse prohibitions. Section 8(a) prohibits a dominant firm to charge an excessive price to the detriment of consumers. An excessive price is defined under the Competition Act as a price which bears no reasonable relation to the economic value of the good or service, and is higher than such value. Economic value is not defined in the Act.

Exclusionary conduct is covered under sections 8(b), (c) and (d) of the Competition Act. Section 8(b) prohibits a dominant firm from denying access to an essential facility. Section 8(c) prohibits a dominant firm from engaging in exclusionary conduct defined in general terms, with no penalty for a first contravention and with the onus on the complainant to demonstrate that the anti-competitive effect outweighs its technological, efficiency or other pro-competitive benefits. An exclusionary act is defined as that which impedes or prevents a firm entering into, or expanding within, a market. Section 8(d) identifies particular types of exclusionary acts that are prohibited as an abuse of dominance, and where a penalty may be imposed for a first contravention. The types of conduct specified under section 8(d) are as follows:

- i. requiring or inducing a supplier or customer to not deal with a competitor;
- ii. refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
- iii. selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;
- iv. selling goods or services below their marginal or average variable cost; or
- v. buying-up a scarce supply of intermediate goods or resources required by a competitor.

Price discrimination with the effect of substantially preventing or lessening competition is prohibited under section 9, and has no penalty for first offence. A finding depends on the pricing being for equivalent transactions of products of like grade and quality. The dominant firm may establish that the differences are justified on various grounds, including reasonable allowances for cost differences and meeting competition.

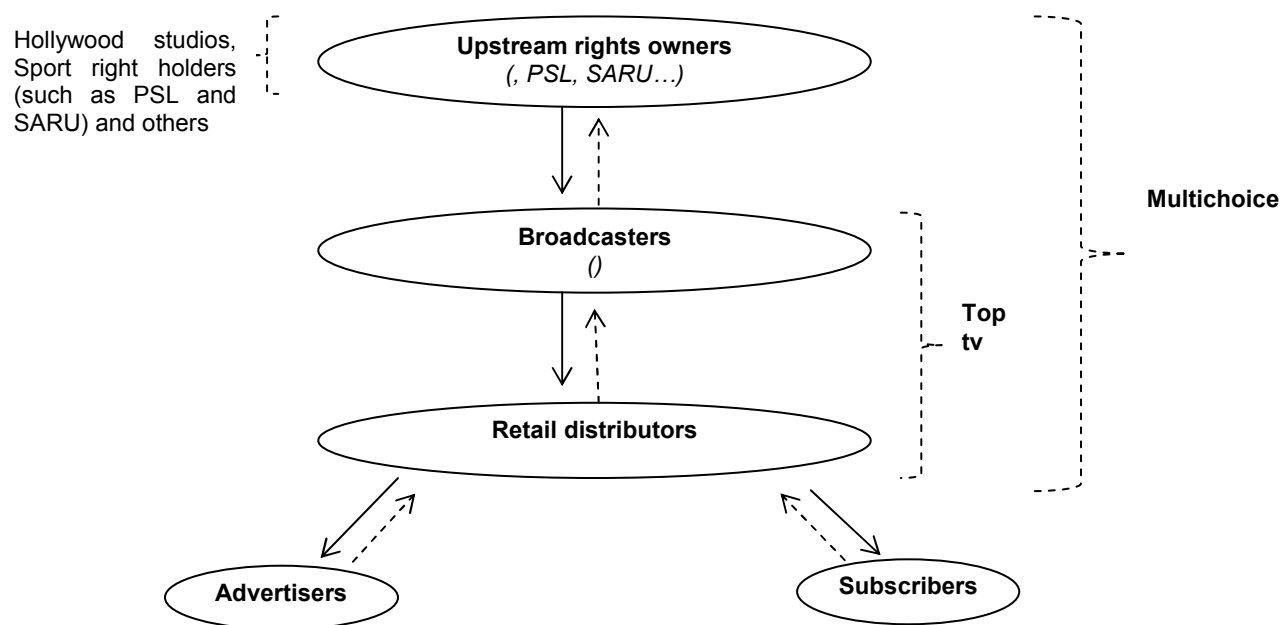
## **2. The state of competition in the television broadcasting sector**

A subscription television broadcasting service is a broadcasting service provided to an end user upon the payment of a fee.

The subscription television broadcasting market can be thought of as comprising three vertically related layers. As shown in Figure 1, the subscription television broadcasting market can be thought of as comprising three vertically related layers. The uppermost layer produces the content desired by viewers, for example Premier Soccer League (“PSL”) matches, South African Rugby Union (“SARU”) matches, the Olympic games and Hollywood movies and sells the rights to this content ‘downstream’ to the broadcasting layer for packaging into channels and ultimately transmission to viewers. The retailing layer

purchases content and channels from broadcasters and sells these directly to viewers, along with a transmission mechanism (i.e. satellite or cable). The broadcasting layer purchases broadcasting rights, ‘creates’ content and packages this content into channels for sale to downstream retailers.

**Figure 1. Vertical Structure in subscription television broadcasting**



Multichoice is the only fully vertically integrated subscription television company in South Africa, and is active at each level in the vertical structure, although it operates primarily in the broadcasting and retailing layers. Its main activity is the purchase of rights to premium content from original rights owners, such as major sports events and Hollywood movies, for direct distribution to its own satellite subscribers, and for resale to its downstream competitors in distribution.

Multichoice is dominant in the subscription television broadcasting market with a market share in the excess of 95%. Multichoice has expanded its offering to nearly 100 video channels from 17 in 1995. Multichoice currently has approximately 4 million subscribers. Multichoice has also expanded with GOtv into other African countries such as Zambia, Kenya, Nigeria, Namibia and Uganda.

Multichoice’s only competitor is TopTv. TopTv was licensed as a subscription television broadcaster by ICASA in 2007. TopTv currently has about 200 000 subscribers. ICASA also issued subscription television broadcasting licenses to Esat, Telkom Media and Walking on Water in 2007. In 2012, ICASA issued another subscription television broadcasting license to Deukom. Esat is reported to have withdrawn its application to become a subscription broadcaster late in 2007. Esat signed an agreement with Multichoice to supply channels to Multichoice rather than become a competitor. In doing so, Esat forfeited the subscription television broadcasting license previously granted to it. Apart from TopTv, none of the above mentioned firms are currently in operation.

Free-to-air television broadcasting service means a broadcasting service which is broadcast and capable of being received without payment of subscription fees.

South Africa has two free to air television broadcasters (that is, the SABC owned by the State and Etv, a privately owned free-to-air commercial broadcaster). Etv has one channel and broadcasts a variety of

shows including popular local series, Hollywood movies and current affairs programs aimed at the middle to upper income groups.

The SABC has three channels. SABC 1 and 2 are referred to as the public channels while SABC 3 is referred to as the public commercial arm. As public channels, SABC 1 and 2 must be mindful of certain public interest obligations. For example, SABC 1 is under an obligation to broadcast program material that represents a reasonable spread of all official languages of South Africa, paying particular attention to historically marginalized languages. There are also obligations to carry a certain amount of local content as well as content that reflects the diversity of all South African religions.

### **3. Challenges for competition policy in television broadcasting**

The main set of issues of concern to the Commission arises from the nature of the exclusive contracts concluded between content rights providers and broadcasters and the impact of these agreements on competition in the downstream subscription television market, more specifically, the exclusive agreements between Multichoice and premium content producers (rights holders). It is not only that the broadcasting rights are exclusive to Multichoice that may be of concern to the Commission, but that Multichoice should end up as the owner of all of the rights available.

The attractiveness of any particular television broadcaster to potential viewers depends heavily on its ability to acquire content, particularly premium content. First-release movies are premium content. Hollywood studios generally are tied into exclusive arrangements with local distributors, such as, Ster-Kinekor, Nu Metro and UIP. Local distributors have exclusive arrangements with Multichoice. Multichoice has market power in the subscription broadcasting market and can outbid any competitor for the content rights. Multichoice has built an extensive film library which then allows it to hoard this content and keep actual and potential competitors out of the market. Other than Hollywood theatrical premium content, subscription broadcasters can approach any foreign content providers directly.

Unlike movies which have a much longer life cycle, sporting events only have a premium value when they are broadcast live. Therefore, any delayed broadcasting loses value and adversely affects the ability of any broadcaster to attract viewers and raise revenue through advertising. Multichoice owns the rights to broadcast most sporting events in South Africa.

For example, the PSL, the local soccer league, has an exclusive arrangement with Multichoice. The present contract duration is 5 years. The PSL acts as a cartel which sells the rights to the matches played by all of the league clubs. Individual clubs cannot sell the rights to the matches they play on their own. While the PSL breaks down the broadcasting rights into small packages, the bidding process does not prevent any particular broadcaster from owning all the broadcasting rights to broadcast the PSL games (the winner takes all principle applies). Multichoice currently owns all the rights to broadcast all the PSL games. Unlike the PSL, SARU does not put its broadcasting rights out to tender. SARU exclusively contracts with Multichoice.

Because Multichoice's willingness to pay for exclusive rights to the premium content exceeds that of rivals, it obtains a significant competitive advantage over its rivals, and the rivals suffer a negative externality. While competition to purchase the rights to premium content sometimes takes place through a bidding process, the bidding process has "externalities" in which downstream competition is affected by the outcome.

The key condition that allows for the persistence of the incumbent's market share in the subscription broadcasting market is possibly the presence of a clear incumbency advantage in favour of Multichoice.

Notwithstanding the above, exclusive contracts may enhance efficiencies by promoting investments that are: (a) customer-specific; (b) not directly contractible by the parties involved; and (c) potentially subject to free-riding by other parties (e.g. competitors to Multichoice).

In terms of the Independent Communications Authority of South Africa (“ICASA”) regulations, Multichoice is required to sub-license sporting events of national interest to the SABC. However, the sub-licensing arrangement excludes other broadcasters such as Toptv and Etv. ICASA only regulates the way in which subscription broadcasting companies sub-license sporting events of national interest to the national broadcaster. Broadcasters such as the SABC, Toptv and Etv have all concluded sub-licensing agreements with Multichoice in one way or the other. There are concerns that the sub-licensing fees may be excessive.

#### **4. Experience in competition law enforcement relating to television and broadcasting?**

In relation to television and broadcasting, the Commission has not dealt with competition law enforcement matters relating to merger assessments and horizontal agreements.

The Commission has investigated several complaints against Multichoice from third party complaints from consumers and non-referred them. The primary reason for non-referral is that the allegations have focused on outcomes of the state of competition and not the underlying issue which allows Multichoice to maintain monopoly power. The third party complaints have included complaints about:

- i. Subscriber fees: to watch live sporting games consumers have to subscribe to Multichoice. Because of the construction of content bundles they have been forced to purchase a bundle of content, whether desired or not simply to access the sporting events;
- ii. Limited choice: even after subscribing to subscription TV, they have been offered only a very limited selection of sporting games played.

In 2012, the Commission undertook a scoping exercise (or preliminary research study) to assess state of competition in television subscription broadcasting. The scoping exercise recommended that the Commission should consider engaging in advocacy with content providers such as sporting unions on (a) the importance of a competitive bidding process (b) the inefficiencies of collective selling and (c) the importance of requiring the winning bidder to sub-license content to other broadcasters.

The Commission is currently investigating allegations of abuse of dominance relating to access to premium content against Multichoice.

#### **5. Concurrent jurisdiction**

ICASA is the regulating authority in the telecommunication sector. ICASA has also been concerned about competition issues in subscription broadcasting. For example, ICASA published a discussion paper (“the 2004 discussion paper”) on the inquiry into subscription broadcasting on 23 April 2004. The purpose of the discussion paper was to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. Following the discussion paper, ICASA published a position paper (“the 2005 position paper”) on subscription broadcasting services on 01 June 2005.

The position paper sets out ICASA’s policy on subscription broadcasting services with respect to matters that were the subject of the inquiry.<sup>3</sup> The 2005 position paper notes that the ability of subscription

<sup>3</sup> ICASA also published a position paper (“the 2003 position paper”) on 25 July 2003 on sports broadcasting rights. This was followed by discussion document (“the 2008 discussion document”) on 02 October 2008



television broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services. For subscription television broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers. Some forms of exclusive arrangements in the broadcasting industry are, therefore, both efficient and desirable. On competition concerns, ICASA's position is that competition issues should be dealt with by way of general competition law.

Section 3(1A)(b) of the Competition Act provides that the manner in which the concurrent jurisdiction provided for in section 3(1A)(a) or other public regulation is exercised, 'must be managed, to the extent possible' in accordance with any agreement between the two regulatory bodies.

The Commission and ICASA have a memorandum of agreement between themselves effective from 16 September 2002.<sup>4</sup> The agreement provides that the Commission will deal with complaints concerning restrictive practices and the abuse of a dominant position, and ICASA to deal with contraventions of telecommunications and broadcasting licence conditions and legislation. Provision is made for the process to be followed in the case of complaints: those relating to matters that fall within the concurrent jurisdiction of both regulators must be made available by the recipient regulator to the other regulator.

Concurrent jurisdiction exists only where the other regulatory authority has the competence to adjudicate the competition aspects of the conduct. The regulators are required to consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of the agreement. Provision is also made for the participation of the other regulator in an advisory capacity in any process.

The Act applies to all economic activity within, or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Electronic Communications Act 36 of 2005 ("the ECA").<sup>5</sup> Chapter 10 of ECA deals with regulation of competition matters affecting the broadcasting industry. The purpose of this chapter is to ensure that competition in the broadcasting industry remains vibrant and robust by ensuring that broadcasters do not engage in any act that is likely to substantially prevent or lessen competition. The ECA does not oust the jurisdiction of the Commission authorities but could well be distorted to give rise to defences to the complaints referred.<sup>6</sup> The legislature has established the competition authorities as the primary authority in competition matters.<sup>7</sup>

## 6. Conclusion

Competition issues in television and broadcasting have not yet been the subject of Competition Tribunal decisions in South Africa. Our comments here are informed by concerns about the abuse of a dominant position in subscription television broadcasting faced in on-going investigations.

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on sports broadcasting rights. The 2008 discussion document raised a number of competition issues as way to locate the review within a broader context. Following this, ICASA issued its findings and reasons document ("2010 findings document") on the sports broadcasting services on 12 April 2010 which also raised competition concerns.

<sup>4</sup> GN 1747 of 2002 (GG 23857 of 20 September 2002).

<sup>5</sup> See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

<sup>6</sup> See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

<sup>7</sup> See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009).

## SPAIN

### 1. Regulatory framework

The new Spanish General Act on Audiovisual Communications came into force<sup>1</sup> in May 2010 and established a new legal framework for the audiovisual sector in Spain, gathering and organizing various earlier regulations.

Among other aspects, this Act established a new Spanish independent regulator<sup>2</sup> in broadcasting at state level<sup>3</sup>. However, the lack of political consensus has blocked the effective launch of this independent authority in 2011. At present, a new cross-sector independent regulatory authority is planned, the National Authority for Markets and Competition<sup>4</sup>. In the meantime, audiovisual matters are supervised by the Ministry of Industry.

As well, a certain competitive environment in the audiovisual market has been guaranteed by the Spanish competition authority (CNC – Comisión Nacional de la Competencia). In this respect, the new audiovisual legislation introduced new and more flexible media ownership rules which, coupled with the multiplication of digital television channels after the digital switch-over of terrestrial television broadcasting in 2010 and the delicate economic situation in the sector, led to a series of television mergers which have required intense supervision and intervention by the CNC.

The 2010 Spanish General Act on Audiovisual Communications has been effective in consolidating legislation and clarifying rules, but it has also introduced some uncertainty, as is the case with the restrictions established concerning the exclusivity contracts of broadcasters with the football clubs, which are different to those established in the CNC case law, as will be further addressed.

Other interesting aspects of the new Act that affect the competitive scenario of the audiovisual markets, are the financing system of the Spanish State broadcaster (which has stopped broadcasting advertisement and is partly financed by contributions paid by third television broadcasters) and the possibility of broadcasting pay digital terrestrial television (DTT) channels.

Finally, the new legislation, despite the growing importance of pay television in the competitive strategies of telecom operators, as can be deduced by Spain's leading telecom operators various attempts to create and strengthen a structural link between the pay television market and the telecommunication markets, did not establish a convergent national regulatory authority for telecommunications and the media. However, this will change with the planned National Authority for Markets and Competition.

A short summary of the above mentioned competition cases, as of other related proceedings, will be provided, bearing in mind that the main objective of the Spanish competition authority has been to guarantee access by competitors to the different segments of the communication markets value chain and its essential inputs.

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<sup>1</sup> Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual.

<sup>2</sup> The State Audiovisual Media Council (Consejo Estatal de Medios Audiovisuales - CEMA).

<sup>3</sup> The only independent audiovisual authorities are regional (in Catalonia, Navarre until 2011 and Andalusia).

<sup>4</sup> CNMC - Comisión Nacional de los Mercados y la Competencia.

## 2. ABERTIS - Access to television broadcasting facilities

The Spanish regulatory framework conceived the digitalization of television as a process of migration from "analogue terrestrial" to "digital terrestrial" broadcasting, with an initial mandatory terrestrial coverage of the population of 96% for commercial television broadcasters, and of 98% for the national public television broadcaster.

In a second phase, covering an additional 2.5% of the population, digitalization was deemed not profitable for commercial broadcasters, so these terrestrial network extension costs are being borne by Public Administrations<sup>5</sup>. Only for the final 1.5% coverage of the population are other technologies used instead of terrestrial broadcasting, such as satellite direct broadcast of DTT (Digital Terrestrial Television) channels.

Therefore, the regulatory framework has consolidated digital terrestrial broadcasting as the leading technology in television broadcasting in Spain, by mandating its use to all national television broadcasters with licenses to use the terrestrial radio electric spectrum, which include the main free-to-air television broadcasters in Spain.

ABERTIS, a Spanish telecommunications infrastructure operator, who owns and manages the only national terrestrial network for the broadcasting of DTT signals in Spain, is the only provider of transport services (from the television broadcaster offices to the terrestrial broadcasting stations) and distribution services (from the terrestrial broadcasting stations to viewers homes) of DTT signals to Spanish national television broadcasters.

Moreover, by virtue of the ex-ante regulation adopted by the Spanish national regulatory authority Telecommunications Market Commission (CMT), ABERTIS is obliged to give access to its national terrestrial network, in order to allow third television broadcasting network operators to use ABERTIS' sites to provide transport and distribution services to television broadcasters. However, until now ABERTIS' competitors only use its sites to give service to regional and local television broadcasters.

Nowadays ABERTIS is the sole provider of terrestrial broadcasting services to national television broadcasters, and its national network of terrestrial broadcasting sites cannot be replicated by any other private operator from an economic point of view.

In this context, in April 2010, the Investigations Division of the CNC opened formal proceedings<sup>6</sup> against ABERTIS, for allegedly impeding other network operators from accessing ABERTIS' network of broadcasting sites via a margin squeeze between wholesale and retail prices.

Based on an analysis of ABERTIS' wholesale prices at which ABERTIS provides access to its network sites, and given the conditions that ABERTIS has agreed with all national television broadcasters, competitors who are as efficient as ABERTIS would have no positive margin for operating in the television signal transport and distribution markets.

In February 2012, the CNC Council adopted an infringement decision according to which ABERTIS had abused its dominant position by hindering the entry of competitors in the market for the distribution transport of DTT signals between April 2009 and December 2011.

Previously, in May 2009, ABERTIS was sanctioned for imposing abusive conditions on national television broadcasters<sup>7</sup>, preventing them from contracting distribution services out to third network operators.

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<sup>5</sup> In 2010, SES Astra Ibérica SA denounced the plan to the European Commission as an illegal public aid.

<sup>6</sup> Case S/0207/09  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0207%2f09&Ambito=Conductas>

### 3. Football Broadcasting Rights – Access to premium football content

Football broadcasting rights of Spanish competitions are one of the most important audiovisual contents for television broadcasters in Spain, especially for pay television operators, as they have a very high capacity to attract audiences and subscriptions, which cannot be replicated in a sustained form by any other kind of audiovisual content.

The existing model for the acquisition of football broadcasting rights in Spanish competitions, and the arrangements for their subsequent exploitation, has until recently been the result of decision-making by actors in the sector (football clubs and media operators), since there was no specific regulatory framework governing the terms for the acquisition and commercialization of those rights. Certain decisions by the Spanish competition authorities and the European Commission, both in relation to restrictive practices<sup>8</sup> and merger control<sup>9</sup> have likewise, albeit asymmetrically, influenced the conditions of competition in the sector.

The tendency towards market closure created by the current model for the acquisition of media rights in Spanish football competitions, which gives considerable competitive advantage to the purchaser which already holds the biggest portfolio<sup>10</sup>, is exacerbated by other elements of contractual practice, such as long contractual terms, and the ability to purchase rights that give an option for future exploitation.

Moreover, under this acquisition framework, rights purchasers have a huge incentive to pool those rights to maximize their value.

These factors combine to create a framework fostering the emergence of potential anti-competitive behavior, requiring very often the intervention by the competition authority.

With regards to the most recent resolutions, on April 2010<sup>11</sup> the Spanish Competition Authority considered that a pooling agreement of football broadcasting rights of Spanish competitions between broadcasters automatically led to a restrictive market sharing agreement between the parties, which might be exempted as long as the pooling agreement would last no longer than three years. Moreover, it considered that all contracts granting football broadcasting rights of Spanish competition on an exclusive basis which exceeded three years were illegal.

In March 2011, the Spanish Competition Authority fined MEDIAPRO<sup>12</sup>, which held broadcasting rights of all the teams in the main Spanish football competitions, for an abuse of a dominant position in the

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<sup>7</sup> Case 2748/06  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=2748%2f06&Ambito=Conductas>

<sup>8</sup> See, in that regard recent Resolutions in CC proceedings S/0006/07 and S/0153/09, and ongoing proceedings in S/0421/12 and S/0436/12.

<sup>9</sup> See digital platform merger of SOGECABLE and VÍA DIGITAL in 2002 (case N-280), and SOGECABLE's proposed 2007 takeover of AVS (case N-06094). See as well European Commission proceedings AVS I (Case IV/36.438 AUDIOVISUAL SPORT) and AVS II (Case COMP/37.652).

<sup>10</sup> At acquisition level, the ownership of the right belongs to the club which hosts the game, but superimposed on this right is the requirement to obtain the consent of the away team to broadcast the match. On each successive acquisition of rights this mechanism gives a considerable competitive advantage to the purchaser which already holds the biggest portfolio.

<sup>11</sup> See case S/0006/07  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?stipobusqueda=3&numero=S/0006/07&ambito=Conductas&PrPag=296&PagSel=300>

<sup>12</sup> Spanish multimedia communications group founded in 1994 and involved in movie and television production, as well as in acquiring football media rights and producing pay television channels (GOL T).

market for resale of these media rights, by offering preferred treatment to its own subsidiary, the pay television channel Gol T.

#### **4. Television Mergers – Access to advertisement revenues and audiovisual content**

The new 2010 audiovisual legislation allows national television channels cross-ownership as long as they do not exceed 27 per cent of the total audience and as long as there are three different national television broadcasters<sup>13</sup>.

After this regulatory change, several mergers between national television broadcasters in Spain were notified to the Spanish Competition Authority.

##### **4.1 TELECINCO / CUATRO**

In April 2010<sup>14</sup> MEDIASET, the number one commercial free-to-air digital television broadcaster in terms of audience, gave notice of a merger with CUATRO<sup>15</sup>, the third commercial broadcaster, reducing the market to three main players, MEDIASET, ANTENA 3 and LA SEXTA.

The main competition problems were primarily identified in the television advertising market in Spain and to a lesser extent in the marketing of audiovisual contents.

In the television advertising market, given the total audience of the channels whose advertising would be managed by MEDIASET if the advertising of those channels was to be marketed jointly, the resulting entity would become indispensable to most advertisers<sup>16</sup>, favouring unilateral price increases. Furthermore, the resulting arrangement of the television advertising market, highly transparent and quite symmetrical, would allow and encourage tacit coordination between MEDIASET and its main competitor, ANTENA 3.

The above competition concerns were aggravated by the regulatory decision in 2010 to eliminate advertising from the national public broadcaster, RTVE.

With regards to the advertisement market, the commitments put forward by MEDIASET during proceedings, try to promote the real possibility that advertisers may continue to advertise separately on the main television channels of the merged entity. In addition, they limit the maximum size of the television advertising packages offered by MEDIASET to an appropriate level, to prevent MEDIASET's television advertising from becoming indispensable for a significant number of advertisers.

As well, MEDIASET undertakes to break its agreements for joint management of advertising on free-to-air digital television channels of third parties and to sign no new agreements of this kind. In the case of advertising on pay television channels, MEDIASET undertakes to manage advertising of the pay television channels of third parties through a separate company and with clearly differentiated commercial policies.

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<sup>13</sup> This percentage figure was carefully chosen because it only prevented a merger between the two dominant commercial operators in Spain, Mediaset (Telecinco) and Antena 3.

<sup>14</sup> See case C/0230/10 TELECINCO/CUATRO  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=C%2f0230%2f10+&Ambito=Concentraciones>

<sup>15</sup> In 2006, the government approved a change in the license-holding conditions for Canal+, until then a pay television channel, to allow it to become a commercial FTA channel. Canal+ became Cuatro, a new commercial channel.

<sup>16</sup> The market test revealed that most advertising campaign need in a short period of time a coverage of at least 80%, which could not be attained without investing in Mediaset.

In this regard, the CNC had previously identified the anti-competitive nature of these types of agreements<sup>17</sup> between free-to-air digital television broadcasters.

With regards to the audiovisual rights markets, the main commitment proposed by MEDIASET is a limit of three years on the duration of its exclusivity contracts for premium audiovisual content.

In summary, the commitments submitted by MEDIASET restricted its commercial autonomy when it comes to managing television advertising and acquiring audiovisual content, which in the opinion of the Council of the CNC as reflected in its October 2010 Resolution<sup>18</sup>, would resolve the competition problems generated by the merger.

The monitoring of MEDIASET's behavioural commitments has proven to be complicated, leading to sanctioning proceedings against MEDIASET<sup>19</sup> and the establishment in February 2013 of a penalty of 15.6 million euros, among other things, for breaching its commitment to guarantee freedom of choice to advertisers when acquiring advertisement on the different channels of the group.

#### 4.2 *ANTENA 3 / LA SEXTA*

Almost two years later, in March 2012 ANTENA 3, MEDIASET's main competitor, gave notice of a merger consisting in the acquisition of exclusive control of LA SEXTA, the third commercial television broadcaster in Spain. The main competition problems raised by this merger were again primarily identified in the television advertising market, where the two media groups would control approximately 85% of the market.

The CNC's analysis indicated that the effects of the merger on competition were more far-reaching than in the previous merger, since the number of main operators was reduced from three to two (rather than from four to three), creating a reasonably symmetrical duopoly with no other operator left to act as a "maverick", as was the case with LA SEXTA, and provide a meaningful competitive alternative for advertisers.

In June 2012, ANTENA 3 lodged a final proposal for commitments, which according to the Spanish competition authority, did not guarantee freedom of choice for advertisers when contracting advertising campaigns on television channels, nor did they guard against the possible abusive exercise of market power by the merged entity, nor did they prevent incentives to tacit coordination by the duopolists.

In view of the above, in July 2012 the CNC allowed the merger but on the basis of several conditions addressing primarily competitive concerns in the television advertising market, which were significantly tougher than the commitments proposed by ANTENA 3 (which were quite similar to MEDIASET's commitments in its previous merger), on the basis that the market structure, where a symmetrical duopoly is created, is fundamentally different and requires different measures to safeguard the effective competition existing prior to the merger. The complications in monitoring the behavioural commitments in the previous merger were logically also taken into consideration.

In August 2012, once ANTENA 3 had declared that the merger would not take place due to the conditions imposed by the CNC, particularly those regarding the obligation to create separate commercial

<sup>17</sup> See case S/0245/10 ANTENA 3/VEO TELEVISION  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0245%2f10&Ambito=Conductas>

<sup>18</sup> See case C/0230/10  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=101&PagSel=102&Numero=C%2f0230%2f10+&Ambito=Concentraciones>

<sup>19</sup> See case SNC/0024/12  
<http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=SNC%2f0024%2f12&Ambito=Ley+30>

units to market the advertisement of the two main channels, the Spanish government stepped in by modifying the conditions, the first time the government made use of the legal right to counter the competition authority in merger cases.

The new conditions established by the Spanish government in ANTENA 3 / LA SEXTA merger mirror the restrictions placed on MEDIASET in its merger with CUATRO.

After this two mergers, there are in Spain two major national television broadcasters dominating the advertising market (MEDIASET and ANTENA 3), three operators dominating audience share (RTVE, MEDIASET, and ANTENA 3), and a group of small channels with tiny and niche audiences.

#### **4.3 PRISA / TELEFONICA / TELECINCO / DIGITAL+ - Convergence of media and telecommunications**

In April 2010 the CNC was notified the merger consisting in the acquisition by PRISA, Spain's leading media conglomerate, TELEFÓNICA, leading Spanish telecom operator, and MEDIASET, leading free-to-air television operator, of joint control over DIGITAL+, the number one pay television operator in Spain, previously under the sole control of PRISA.

The CNC Council resolved to initiate the second phase of the proceeding because the operation raised serious competition concerns, but the notifying parties finally amended the agreements that had given rise to the merger, and the proceedings were closed.

Nonetheless, it is interesting to review the competition concerns identified by the CNC to understand subsequent actions by the Investigative Division of the CNC.

At present, telecoms operators are present in the audiovisual market through subscription television multichannel portfolios. The pay television market is highly concentrated with three main national players, ONO (cable), TELEFÓNICA (IPTV) and DIGITAL+ (satellite), a non-telecom operator but leading subscription broadcaster. Neither ONO nor TELEFÓNICA operate in the free-to-air television market or produce their own audiovisual content, relying therefore to a great degree on premium content provided by third parties, included Digital+.

In light of the above, the merger would have threatened to distort competition in the pay television market, where DIGITAL+ and TELEFÓNICA are important competitors; as well as in the upstream markets of acquisition and commercialization of exclusive rights for premium content (films and sports, primarily football matches), which are the main drivers for customers when deciding to subscribe to a pay television offer, and where the parties would have incentives to foreclose the market to other telecom operators.

As well, the transaction would strengthen TELEFÓNICA's strong position in a number of telecommunications markets, weakening the capacity of alternative operators to replicate its access to technological infrastructures and geographic scope, provided by DIGITAL+'s satellite network, its access to premium content which enables attractive triple play offers, and its access to a large client base.

Even though the merger finally did not take place, TELEFÓNICA has not given up its intention to strengthen its structural link between the pay television market and the telecommunication markets, as means to reinforce its competitive position.

In this regard, during 2012 the CNC has initiated proceedings<sup>20</sup> for possible restrictive agreements between TELEFÓNICA and DIGITAL+ concerning premium audiovisual contents.

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<sup>20</sup> See case S/0436/12 Liga Nacional de Fútbol.

## CHINESE TAIPEI

### 1. Introduction

In preparing the present submission, the Fair Trade Commission (hereinafter “the FTC”) consulted with the regulatory authority of the telecommunication, television and broadcasting, the National Communication Commission (hereinafter referred to as “the NCC”).

### 2. The state of competition in the television broadcasting sector

The Radio and Television Act, Cable Radio and Television Act, and Satellite Broadcasting Act are the three main laws for the *ex ante* regulation of television broadcasting businesses in Chinese Taipei. Businesses are required to obtain a chartered licence before operation in television broadcasting sector. According to the “2011 Communications Performance Report” from the NCC, 509 television broadcasting licenses had been issued by the end of 2011. The table below shows the basic information for these businesses:

**Television broadcasting licenses issued as of the end of 2011**

Business category	Business type	Number of Licenses Issued	Sum	Total	
Satellite Television	Direct satellite television	8			
	Satellite television program provider	158	271		
	Domestic channel Foreign channel	105			
Terrestrial Television	Terrestrial television station	5	5		
	Radio station	General radio station	9		509
		AM station	19	171	
		FM station	143		
	Digital audio broadcasting (DAB)	0	0		
Cable Television	System operator	59			
	Broadcaster	3	62		

#### 2.1 Terrestrial television

Currently, there are five terrestrial television companies (including the Public Television Service). To improve the picture and sound quality of television programs, the government established a policy to promote the digitalization of terrestrial television and completed the digital terrestrial television (DTT) conversion in June 2012. As a result, there are currently 20 DTT channels in service. In the future, the government will continue to evaluate the market environment, encourage converged services, and make plans for the second-stage issuance of digital terrestrial television broadcasting licenses to stimulate investment and increase the number of choices of television programs in the DTT market.

#### 2.2 Cable television

As of the end of 2011, there were 59 system operators and 3 independent broadcasting systems in Chinese Taipei. The NCC in November 2007 approved the service regulations, contracts and rates of the largest fixed network operator, Chunghwa Telecom Co., Ltd., for its multimedia-on-demand (MOD)



platform. Since then, the services of the MOD platform of Chunghwa Telecom have been classified as Internet Protocol Television (IPTV) services as defined in the Telecommunications Act.

The numbers and ratios of cable television services that operated under multiple system operators (MSOs) as of the end of 2011 are as follows: 10 under the CNS Group, 12 under the KBro Group, 5 under the TFN Group, 4 under the TOP Group, and 4 under the TBC Group, while there were also 27 others (including 3 independent broadcasting services) that did not belong to any of the five MSOs, as shown in the table below:

**Cable television services operating under multiple system operators (MSOs) as of the end of 2011**

<b>Group Attributes</b>	<b>KBro</b>	<b>CNS</b>	<b>TBC</b>	<b>TFN</b>	<b>TOP</b>	<b>Other (Broadcasting) Systems</b>	<b>Total</b>
Number of Cable TV Services	12	10	4	5	4	24 ( 3)	62
Number of Subscribers	1,086,449	1,089,933	690,733	544,812	294,562	1,355,248	5,061,737
Market Share	21.46%	21.53%	13.65%	10.76%	5.82%	26.77%	100%

54 of the 59 system operators had completed their digital headend installation and most of them provided broadband services. Overall, cable television operators provided services similar to those from fixed network telecommunication service, therefore having the characteristics of network density and scale economies and considered monopolistic (or oligopolistic). Although, on the other hand, Chunghwa Telecom, the largest fixed network provider, has as many as 1.1 million subscribers to its IPTV services, cable television operations still account for a larger proportion in the video and downstream advertising market.

### **2.3 Radio broadcasting**

Starting in 1993, the government opened broadcasting frequency spectrum to private radio stations in 10 separate stages. As of the end of 2011, 143 radio stations had been given permission to begin operation (66 medium power and 77 low power stations). Including the 28 stations that had already existed before the release of the frequencies, the number of licensed radio stations came to 171. Among them, 7 were public and 164 private. Most of them mainly provided analog broadcasting services. Digital radio broadcasting licenses were made available but only one station had completed the corresponding installation. Presently, the NCC is working on the policy regarding the “release of FM radio frequencies for the 11th time” to boost the utilization of the frequency spectrum and develop a better and fair competitive environment with diversified radio broadcasting services.

### **2.4 Satellite television**

101 companies received approval in 2011 to begin their operations of providing satellite television programs (80 for domestic programs, 29 for extraterritorial programs, and 8 for both), offering 263 channels (158 domestic and 105 extraterritorial channels). There were 8 businesses providing direct satellite broadcasting services (4 for domestic and 4 for extraterritorial). Compared to cable television or telecommunications platforms, the direct satellite television broadcasting services accounted for less than 1% of the market share.

### **3. The most significant current and future challenges in the competition policy in television broadcasting**

In Chinese Taipei, cable television remains the mainstream in the television market with a 62.82% prevalence rate. At present, it is divided into 51 operating areas, with monopolistic management (one operator per area) in as many as 35 areas and duopolistic management (two operators in one area) in 12 areas. The market is developing toward one operator per area. In response to the regulations on area limitations, most businesses had adopted the MSO pattern to conduct cross-area consolidation. After soliciting opinions from various sectors and acquiring the support of the Fair Trade Commission (hereinafter referred to as the FTC) due to its competition advocacy, the NCC in July 2012 decided to rezone the operating areas in accordance with the administrative division of local governments and lower the entry threshold to encourage competition.

As a consequence of the rapid progress in digital convergence, broadband services have grown from one technology providing one service in the past to providing three converged services, including data, voice and video, through one broadband connection. Whether through telecommunications or TV broadcasting signals, consumers are even able to receive video services via the Internet at any time and in any place with mobile communications devices. For regulatory authority, it has thus become a great challenge to integrate the domains of telecommunications and broadcasting, which have long been separated before, and establish more appropriate regulations. It has to be done gradually and in the right order. For the competition authority, the market definition in the context of digital convergence can no longer be limited to the market boundaries of conventional businesses when evaluating whether the market structure and business conduct of a case involve competition restrictions or unfair competition. Market definition can be expected to be the greatest challenge. The Fair Trade Commission will revise the “Disposal Directions (Policy Statements) on the Business Practices of Cross-Ownership and Joint Provision among 4C Enterprises” to be the guidance for handling restrictive or unfair competition cases resulting from the cross-industry management of enterprises.

### **4. Competition law enforcement experiences relating to television and broadcasting businesses**

#### ***4.1 Promotion of reasonable licensing for IPTV businesses to obtain program contents***

By taking advantage of the convergence of telecommunications technologies and advancement in broadband techniques, telecommunications businesses and network content providers have created a competitive environment for different viewing platforms by offering video audio services through Internet in order to break the regional monopoly/oligopoly of cable television operators. To ensure that IPTV businesses have the opportunity for fair competition as well as to promote fair competition between them and cable television operators, the FTC held a seminar “How to Enable IPTV Businesses to Obtain Program Contents License Reasonably” on two occasions. Scholars and specialists, the NCC, relevant government agencies, IPTV businesses, channel operators (including agents), MSOs, and related trade unions and associations were invited to attend and offer opinions on related issues.

The Copyright Review Committee of the Intellectual Property Office made the decision to revise the copyright of video-on-demand programs from the “right of public transmission” to “right of public broadcast”, so that copyrights involved in cable television systems and other similar multimedia video transmission systems in the future could be the same and more alternative video platforms could be introduced into the country to promote competition with domestic cable television services.

#### 4.2 *Television and broadcasting business mergers*

In respect of the filing of television and broadcasting business mergers, the FTC and the NCC consulted with each other and reached the conclusion: “Television and broadcasting business mergers that belong to one of the types described in Article 6 of the Fair Trade Act and also meet one of the thresholds set forth in Article 11 of the same Act are required to file a pre-merger notification with the FTC as stipulated in the same Act. When reviewing such cases, the FTC is to acquire the opinion of the NCC first. If there is a change of the person in charge or a board director, supervisor or manager of the business filing the pre-merger notification after the merger and the change does not constitute any of the conditions described in Article 6 of the Fair Trade Act, the NCC is to process the case in accordance with the Radio and Television Act, Cable Radio and Television Act, Satellite Broadcasting Act, or other related regulations. As for mergers that do not meet one of the merger descriptions in Article 6 of the Fair Trade Act or meet one of the descriptions but fall short of the thresholds set forth in Article 11 of the same act, any change of the person in charge or a board director, supervisor or manager of such businesses shall be processed by the NCC according to the Three Broadcasting and Television Acts and related regulations.”

The more significant broadcasting and television merger notifications in recent years, such as the merger of Da-fu Media Technology Co., Ltd., Sheng-ting Co., Ltd., KBro Co., Ltd. and their 12 affiliated cable television system operators, and the merger of Want Want China Broadband, An-shun Development Co., Ltd., Bo-kang Development Co., Ltd. and their affiliates, all needed the approval of both the FTC and the NCC. The FTC approved the two said mergers with conditions attached while the NCC either demanded that the merging businesses make promises or approved the merger application with conditions attached. Hence, the decisions of the competition authority and the regulatory agency were consistent. So far, neither authority has yet come up with different decisions.

#### 5. **Case: Want Want China Broadband filed a pre-merger notification regarding its intention to merger with An-shun Development Co., Ltd., Bo-kang Development Co., Ltd., and their affiliates**

Want Want China Broadband intended to purchase 100% of the shares of An-shun Development Co., Ltd. and Bo-kang Development Co., Ltd. to gain the financial, management, and personnel appointment and dismissal control of the 11 cable television systems operators under the two companies. Cable television was the main business of the operators of these 11 cable television systems except for one which also operated as a channel agent. As for the shareholders of the merging parties, some of them were also agents for advertising channels, managed other cable television systems, or provided cable television channels. There were significantly potential competition possibilities that made the merger both a horizontal one and a vertical one. Hence, this merger appeared to have the characteristics of horizontal, vertical and conglomerate merger patterns simultaneously. Moreover, each of the 11 cable television system operators accounted for more than one quarter of the market share in the cable television operating area to which they belonged, thus reaching the threshold set forth in Subparagraph 2, Paragraph 1, Article 11 of the Fair Trade Act for the filing of pre-merger notifications. Therefore, according to law, the filing of a pre-merger notification was required.

After analyzing the principal business of the merging parties and their shareholder structures, the FTC believed that the product market involved in this case had to include cable television systems (but did not include multimedia on demand (MOD), terrestrial television, and direct satellite television services), the provision of satellite television programs, and e-shopping and mail order businesses without physical retail outlets. As for the geographic market, the cable television service operating areas demarcated by the regulatory agency were to be the geographic market of the cable television system operators. Regarding the geographic market of the satellite television program providers and the e-shopping and mail-order businesses without physical retail outlets would be defines as entire domestic territory.

The number of subscribers to the cable television systems controlled by the merging parties after the merger would account for 23.05% of the total cable television subscribers whereas these 11 cable television systems would make up 17.46% of the 63 systems. Both ratios would not achieve the thresholds established by the FTC for cable television operations. These figures would also be below the established thresholds. In addition, the 11 channels related to this merger case only accounted for about 10.68% of the analog channels available to cable television system operators. This would not exceed the threshold established by the FTC for the amount of satellite television programs provided by the cable television services, either. Based on the above facts, the merger would not result in disadvantages of competition restraint significantly greater than the overall economic benefit.

As for the likelihood of restrictive competition, the FTC considered that the merger was unlikely to lead to any unilateral effect, abatement of balancing power, obstruction to the competitors' choice of trading counterparts, or reduction of market entry potentiality and timeliness in the present cable television market, satellite television market, and e-shopping and mail order market. However, as future amendments to the Cable Radio and Television Act would relax the restriction on the operating area of cable television system operators by adopting an entire special municipality or county/city as a basic unit, the shareholders of the merging parties could exercise their rights as shareholders to find out the management tendency and competition strategy of other system operators in the merger and, in such circumstances, the possibility of such practices leading to coordinated effects or parallel behaviour could not be ruled out.

Furthermore, some channels represented by the channel agents participating in the merger had viewing rates ranking in the top 20 or were considered by the public to be of good quality. If the merger was approved, the merging parties would become the MSO with the largest number of subscribers and each of the 11 cable television system operators would account for over one quarter of the market share of the operating area of concern. In fact, 7 of them would even have over 50% of the market share of their operating areas. Therefore, if the merging parties and their affiliates abused their status in the cable television or satellite television market and applied inappropriate measures to restrict competition, this could put pressure on other cable television system operators or satellite television program providers that operated in the same operating area but did not participate in the merger. Alternatively, if the merging parties and their affiliates forced their competitors to withdraw from the market by using the power they gained after the merger, this could result in a high degree of concentration in the cable television or satellite television market and the abuse of market power or market closure could follow as a consequence.

The FTC also assessed the characteristics of products sold on TV shopping channels as well as the dynamic trading relations and level of dependence between TV shopping operators and cable television system operators, and the likelihood of TV shopping operators changing their trading counterparts. Cable television system operators apparently had relative market edges over TV shopping operators. Considering the relations between the shareholder structures of the merging parties and the appointment of board directors and supervisors, if the merging parties or their affiliates took advantage of their relative market dominance and unjustifiably refused to lease advertising channels of the cable television systems that were part of the merger to other TV shopping operators or gave them differentiated treatment or jointly boycotted businesses that did not participate in the merger, other TV shopping operators would be forced out of business as a result of such abuse of market power and market closure.

The aforesaid likely restrictive competition concerns in the cable television market, satellite television market and e-shopping and mail order market from the merger could be resolved as a consequence of future progress in communications technologies, the digitalization of cable television, competition from the MOD services provided by fixed telecommunications businesses, the adoption of digital convergence in 4C industries and services, and the adjustment of related regulations. The dominant position of the parties after merger in the cable television market, satellite television market, and e-shopping and mail order market would be reduced and the likelihood of market power abuse or market closure by these businesses

would thus decrease. As for the overall benefit, the FTC considered that the merger could facilitate cable television digitalization, offer consumers the choice of paying different rates for different packages or video on demand, and greatly increase the number of available broadcasting channels for program providers. This could indirectly promote competition and progress in the video media industry, generate more diverse choices for consumers, provide better programs for the public, stimulate the development of the video media industry, and accelerate digital convergence. In order to further prevent any disadvantages likely to derive from competition restrictions thereof incurred and protect the overall economic benefit, the FTC made the decision on April 29, 2011 to attach conditions and structural and behavioral regulations but did not prohibit the merger. The NCC also approved the investment of Want Want China Broadband in the 11 cable television companies with conditions attached on 25 July, 2012. The decision was consistent with that of the FTC.

As to the critical issues regarding the professional independence of the media, unification of opinion, and sources of capital triggered by the cross-industry media acquisition, they did not belong to the jurisdiction of the FTC and had to be reviewed by the NCC and the Investment Commission of the Ministry of Economic Affairs.

## TUNISIA\*

### Abstract

During the last two years, the Tunisian television and broadcasting market has received a rapid expansion. In fact, several new TV and radio channels have been launched, creating a new competitive environment. This paper intends to present the Tunisian television and broadcasting market and analyze its structures and its competition level. Enforcement of the Tunisian competition law to anticompetitive practices in television and broadcasting market is also examined in this paper through a real case.

### 1. Introduction

In the current transition phase, television and broadcasting industry represents the milestone for establishing a democratic climate in Tunisia and consolidating freedom of expression. The Tunisian television and broadcasting market has received a rapid expansion during the last two years. In fact, the revolution of 14 January 2011 has had a positive impact on the development of this market, due to the principles of free media supported by the revolution. Today, the Tunisian television and broadcasting market is composed of 11 TV channels and 21 radio channels. This new era of free media in Tunisia is likely to modify the competition environment in television and broadcasting sector, which was for a long time a non-liberalized sector, dominated by a few number of TV and radio channels.

This paper is organized as follows. Section 2 is dedicated to give an overview of the Tunisian television and broadcasting market with an analysis of its competition level. Section 3 discusses the enforcement of Tunisian competition law to anticompetitive practices in television and broadcasting market. Section 4 summarizes this paper.

### 2. Overview of the Tunisian television and broadcasting market

#### 2.1 *Analysis of competition level*

The Tunisian television and broadcasting market can be divided into two main relevant markets: TV broadcasting market and Radio broadcasting market. In the following, we give an overview on these two markets.

##### 2.1.1 *TV broadcasting market*

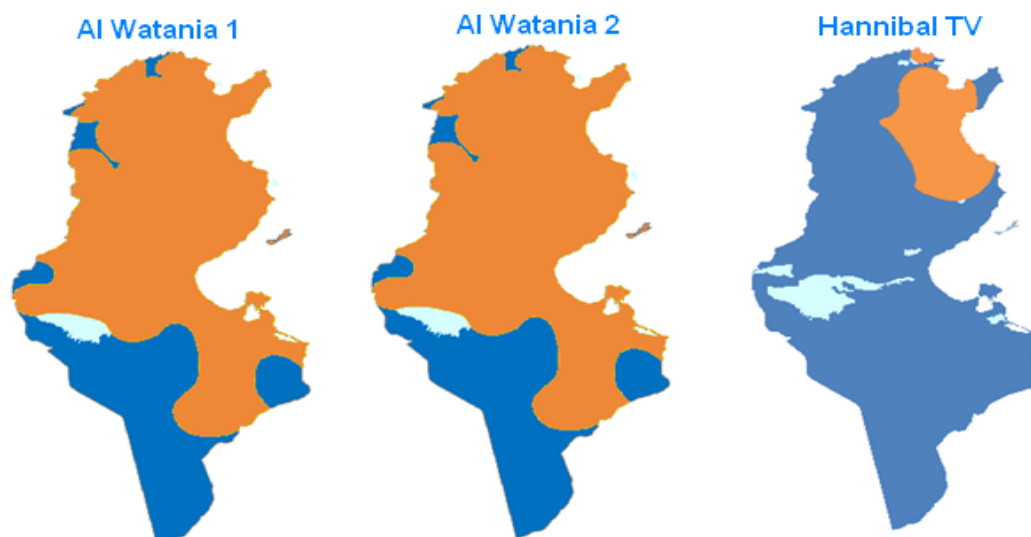
Since there are two TV broadcast systems mainly the analog system and the digital system, therefore we distinguish between two types of TV broadcasting markets, which are: the analog TV broadcasting market and the digital TV broadcasting market. In the analog mode, the Tunisian TV broadcasting market is highly concentrated since it is dominated by three main channels namely Al Watania 1, Al Watania 2 and Hannibal TV. Actually, the programs of Al Watania 1 and Al Watania 2 cover respectively 99.80%

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\* Contribution submitted by Mr. Walid Gani ([walid.gani@cct.gov.tn](mailto:walid.gani@cct.gov.tn)), Public Utilities Counselor and Case Handler, Tunisian Competition Council. The author expresses his appreciation to the Tunisian Competition Council for supporting this paper.

and 99.60% of the Tunisian territory<sup>1</sup>, while the cover rate of Hannibal TV is 44.80%, as shown in Figure 1. It should be noted that the programs of these three channels in analog mode are ensured by the National Broadcasting Corporation.

**Figure 1. The covered Tunisian territorial areas (in orange color) by three main TV channels in analog mode**

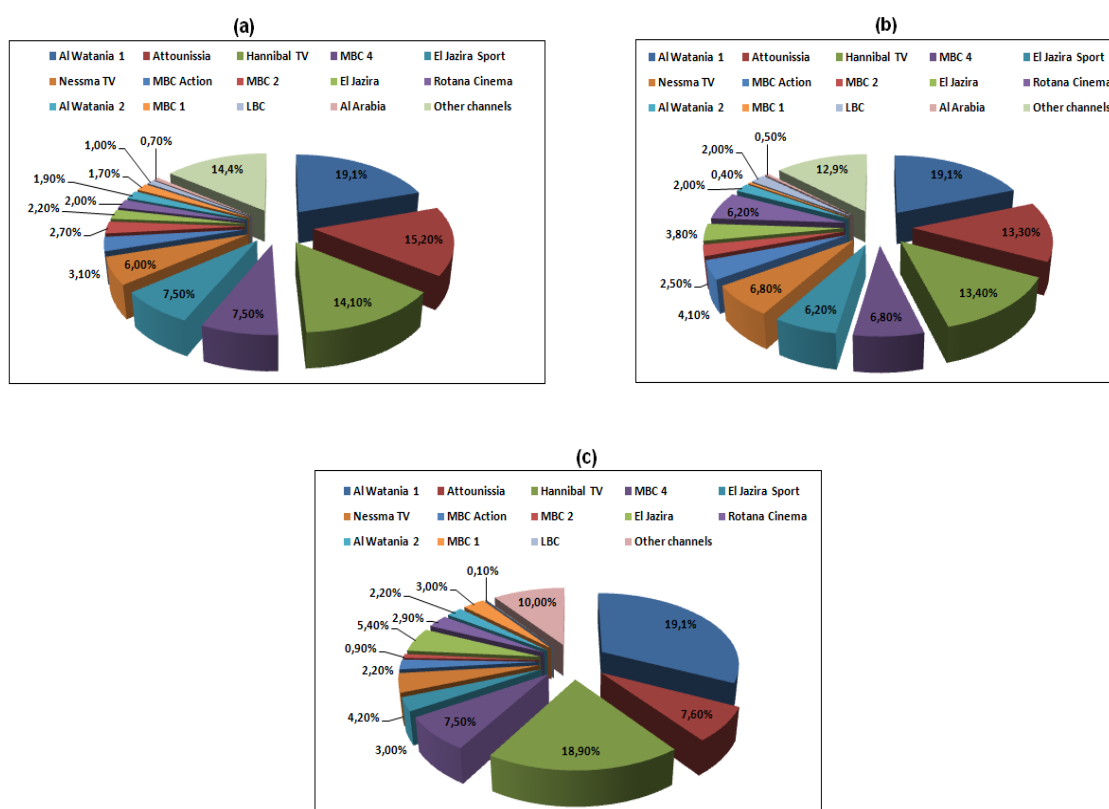


The digital TV broadcasting market, which is much more interesting than the analog one, includes 11 televisions: two public channels which are Al Watania 1 and Al Watania 2, and 9 private channels namely Hannibal TV, Nessma TV, Attounissia, El Hiwar Ettounsi, TWT, Al Janoubia TV, Tounesna TV, Ezzitouna TV and El Kalem TV. According to the last statistics<sup>2</sup> on audience shares in three biggest governorates namely Tunis, Sousse and Sfax, four principal Tunisian TV channels which are Al Watania 1, Hannibal TV, Attounissia and Nessma TV acquire for a total audience share of 55.30%, 52.6% and 62.80% in Tunis, Sousse and Sfax respectively, as shown in Figure 2. Using the Herfindahl-Hirschman Index (HHI), TV broadcasting markets in Tunis and Sousse are considered as unconcentrated, since their HHI, estimated at 942.35 and 813.74 respectively, remains inferior to 1000. However, TV broadcasting market in Sfax is considered as moderately concentrated since its HHI was estimated at 1501.63.

<sup>1</sup> Official statistics of National Broadcasting Corporation.

<sup>2</sup> Statistics of Med Media, November 2012.

**Figure 2. Audience shares of TV channels in three biggest Tunisian governorates:  
(a) Tunis, (b) Sousse and (c) Sfax.**



2.1.2 Radio broadcasting market

The Tunisian Radio broadcasting market is composed of 9 public radio channels and 12 private radio channels, as shown in Table 1. Unlike TV broadcasting market, the Tunisian Radio broadcasting market is considered as highly concentrated. The estimated values of HHI for the three governorates of Tunis, Sousse and Sfax, are about 3075, 3245 and 2602, respectively, which are superior to 2500 meaning a high degree of concentration. As shown in Figure 3, Mosaique FM dominates the Radio broadcasting market of Tunis with an audience share of 51%. The Radio broadcasting markets of Sousse and Sfax are dominated by Jawhara FM and Sfax Radio respectively, with audience shares of 52% and 35%, respectively. The high degree of concentration of Tunisian Radio broadcasting markets can be explained by the fact that the majority of radio channels broadcast their programs in limited geographical zones and therefore the number of radio channels remains insufficient to create a competitive climate.

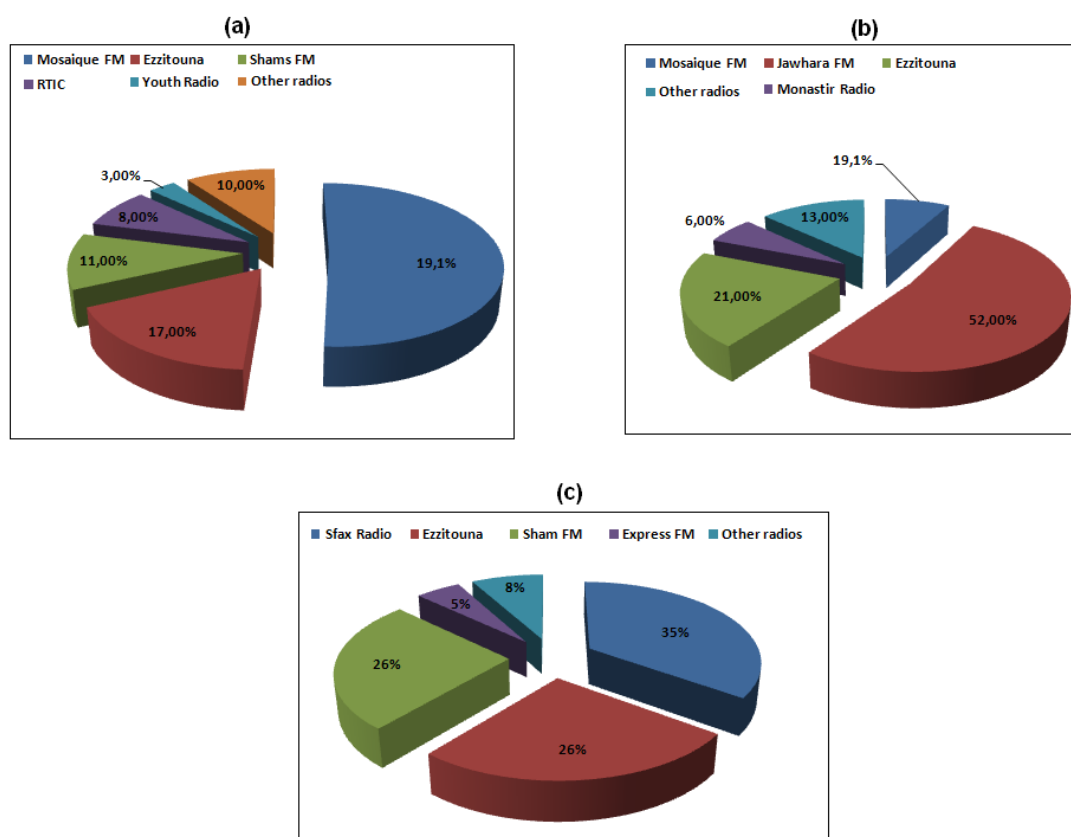


**Table 1 : Tunisian radio channels.**

<b>Radio Channel</b>	<b>Status</b>	<b>Broadcast Mode</b>	<b>Cover rate</b>
The National Radio Channel	Public	Short waves, medium waves, FM and satellites	100% of the Tunisian population
Radio Tunis International Channel	Public	medium waves, FM and satellites	86% of the Tunisian population
The Youth Radio	Public	FM	98% of the Tunisian population
The Cultural Radio Channel	Public	medium waves, FM and satellites	97% of the Tunisian population
Sfax Radio	Public	FM	Limited to the governorate of Sfax
Monastir Radio	Public	FM	Limited to the governorate of Monastir
Gafsa Radio	Public	FM	Limited to the governorate of Gafsa
Le Kef Radio	Public	FM	Limited to the governorate of Kef
Tataouine Radio	Public	FM	Limited to the governorate of Tataouine
Mosaïque FM	Private	FM	Limited to the governorates of Grand Tunis and Cap Bon
Jawhara FM	Private	FM	Limited the Center East and the Sahel
Ezzitouna	Private	FM and satellites	100% of the Tunisian population
Shams FM	Private	FM	60% of the Tunisian population
Express FM	Private	FM	Limited to the governorates of Grand Tunis and Sfax
Oxygène FM	Private	FM	Limited to the governorate of Bizerte
Ibtissama	Private	FM	Limited to the governorate of Grand Tunis
Oasis FM	Private	FM	Limited to the governorate of Gabes
Kalima FM	Private	FM	Limited to the governorate of Grand Tunis
Chaambi FM	Private	FM	Limited to the governorate of Kasserine
Ulysse FM	Private	FM	Limited to the governorate of Mednine
Cap FM	Private	FM	Limited to the governorate of Cap Bon

Source: National Broadcasting Corporation, October 2012.

**Figure 3: Audience shares of Radio channels in three biggest Tunisian governorates:  
(a) Tunis, (b) Sousse and (c) Sfax.**



## 2.2 Television and broadcasting regulations

The television and broadcasting sector is governed by a legislative framework composed of the following texts:

- Law N° 93-8 dated 1 February 1993, relating to the creation of the National Broadcasting Corporation.
- Law N° 2001-1 dated 15 January 2001 promulgating the telecommunications code.
- Law N° 2007-33 dated 4 June 2007, relating to the public audio-visual establishments.
- Decree-Law N° 2011-10 dated 2 March 2011, relating to the creation of a national authority independent for the reform of the sector of information and communication.
- Decree-Law N° 2011-115 dated 2 November 2011, relating to the freedom of press, printing and publication.
- Decree-Law N° 2011-116 dated 2 November 2011, relating to freedom of audio-visual communication and on the creation of the Independent High Authority for Audio-visual Communication.

The Independent High Authority for Audiovisual Communication (IHAAC) plays the role of broadcast regulator by:

- Promoting democracy, human rights and rule of law.
- Promoting and protecting freedom of expression.
- Supporting public, private and associative audiovisual communication sector and enhancing its quality and diversity.
- Promoting the rights of public in media and knowledge by guaranteeing pluralism and diversity in programs related to public affairs.
- Avoiding concentration of ownership of audiovisual communication means and promoting fair competition in this sector.
- Establishing a plural, diverse and balanced audiovisual media scene strengthening the values of freedom, justice and renouncing any discrimination on the bases of origin, gender or religion.
- Promoting accurate and balanced media programming.
- Promoting high quality educational programs.
- Promoting dissemination of audiovisual communication services to the maximum geographical scope nationally, regionally and locally.
- Developing and supporting programming and broadcasting that express the national culture.
- Ensuring control of the use of modern technology.
- Enhancing financial and competitive capacities of audiovisual communication institutions in the Republic of Tunisia.
- Promoting the development of highly qualified human resources.

It is worth noticing that, currently, there is no institution in charge of enforcing the legislation of television and broadcasting sector. Regarding IHAAC, the latter will be activated soon and their members will be appointed by the President of the Republic.

### **3. Enforcement of competition law in television and broadcasting market**

The Tunisian competition law<sup>3</sup> is deeply involved in dealing with television and broadcasting-related competition issues. However, it should be mentioned that there are few cases dealing with anticompetitive practices in television and broadcasting sector. The most important case handled by the Tunisian Competition Council (TCC) concerns the market of televised football matches. Two domestic alleged infringers are involved in this case, namely the Tunisian Football Federation (TFF) and the National Television Corporation (NTC). In fact, in its Decision N° 61126 dated 22 April 2010, the TCC dealt with a

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<sup>3</sup> Law N° 1991-64 on competition and price, enacted in July 29, 1991. It was amended and completed by Law N° 93-83 of July 26, 1993; Law N° 95-42 of April 24, 1995; Law N° 99-41 of May 10, 1999; Law N° 2003-74 of November 11, 2003; Law N° 2005-60 of July 18, 2005

case involving an agreement between the TFF, NTC and the National Agency for Promoting the Audiovisual Sector. According to this agreement, TFF attributed the exclusive audiovisual broadcasting rights of football matches to the NTC. The TCC decided to oppose the concluded agreement and qualified it as anticompetitive practice, impeding competition in the market. The theory of harm applied by TCC was the creation of barriers to entry on the market and exclusion of competitors from the market. The TCC forced infringers to put end to their practices and condemned them to pay a fine of five thousand dinars.

The main challenge encountering this case was essentially related to capacity constraints. The unavailability of data mainly indicators on market shares and turnovers of the concerned parties remain the most important obstacle to conduct rigorous studies on the affected relevant market. Another challenge that arose from the analysis of this case was the absence of a clear and concise legislative framework that governs the rights relating to TV broadcasting of football matches.

The few cases dealing with competition in television and broadcasting sector are explained by the fact that the undertakings in this sector are in general not violating competition law. Another factor that can explain this situation is that the television and broadcasting sector was, for a long time, a non-liberalized sector with a limited number of channels operating in the market. Regarding awareness of anticompetitive practices, it should be noted that undertakings in the television and broadcasting sector, as well as in other sectors, are not very familiar with the Tunisian competition law. This factor could be also a reason for the few number of claims reported to the TCC. In a survey conducted by the Arab Center for the Development of the Rule of Law and Integrity<sup>4</sup> dated October 2009, the score of familiarity with the Tunisian competition law in public, private and legal sectors was estimated at 3.8. This score, which was slightly above the average of a scale of 5, means that awareness and knowledge of competition regulations in Tunisia is not strong, that is why the TCC insists in each annual report on its role of disseminating knowledge on competition law in Tunisia.

In addition to the case discussed above, the TCC gave, within its advisory role, its opinion<sup>5</sup> on a set of four specifications dealing with the conditions of organization of the activity of creating and utilizing of commercial and associative both TV and radio channels. One of the most important remarks highlighted by the TCC in this opinion is that decisions on mergers in audiovisual sector must belong to the competence of Minister of Trade as mentioned in article 7 of the Tunisian competition law and not to IHAAC. The role of the latter should be limited to giving technical opinions on any merger operation in audiovisual sector.

#### **4. Conclusion**

This paper has presented the Tunisian television and broadcasting market and has analyzed its competition level. In addition, application of the Tunisian competition law to anticompetitive practices in television and broadcasting market is examined through a real case. In fact, the most important conclusion that can be drawn from this paper is that cases dealing with anticompetitive practices in Tunisian television and broadcasting market are rare. However, within the new environment of freedom of expression, we expect a rise of the number of cases on competition matters in television and broadcasting sector in the future.

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<sup>4</sup> Details about this survey can be found at <http://www.arabruleoflaw.org>

<sup>5</sup> TCC's opinion N° 112434 dated 19 January 2012.



## TURKEY

### 1. Regulatory framework

Turkish television broadcasting market can be regarded as competitive although an oligopolistic structure prevails in the sector.

Until 1990's there was only one television channel controlled by the state –Turkish Radio Television Agency- but with the wave of liberalization, privately owned broadcasters began to emerge in the market. As of end of 2011 the situation in the market is as follows<sup>1</sup>:

**Table 1. Number of Broadcasters**

Type of Terrestrial Analog TV Broadcast	Number of Broadcasters
Nation wide	25
Regional	15
Local	207
<b>Total</b>	<b>247</b>

**Table 2. Number of Licensees**

Cable TV Licensees	90
Satellite TV Licensees	185

The liberalization of the market began with an amendment in the Turkish Constitution in June 1993 stating that “Radio and television stations shall be established and administered freely in conformity with rules to be regulated by law.”; and with the enactment of the Act on the Establishment and Broadcasting of Radio and Televisions in 1994 (the Act No. 3984). The annulment of some of the provisions of the Act by the Constitutional Court led legal uncertainties regarding the spectrum allocation and licensing<sup>2</sup>.

The most important annulment was about the ownership of a television broadcasting company. The article 29 of the Act No. 3984 states that a natural or legal person's capital share may not exceed 50% in a television company whose annual ratings exceeds 20%. Similarly, if the annual ratings of a company exceed 20%, and if that company's more than 50% share is owned by one natural or legal person, that

<sup>1</sup> Radio and Television Supreme Council, Annual Report, 2011, [http://www.rtuk.org.tr/sayfalar/DosyaIndir.aspx?icerik\\_id=dbb289d9-10c8-47ea-b856-4918d7eb33a5](http://www.rtuk.org.tr/sayfalar/DosyaIndir.aspx?icerik_id=dbb289d9-10c8-47ea-b856-4918d7eb33a5)

<sup>2</sup> As it can be seen from the header of the table-1, due to some legal uncertainties the neither spectrum allocation nor the provision of the licenses to the broadcasters has been made yet. The broadcasters operate in the market with ‘broadcast permission’ given by the Radio and Television Supreme Council for temporary basis.

person should reduce his share below 50%. As stated, these two provisions were annulled<sup>3</sup> by the Constitutional Court and the regime for the ownership structure of television broadcasting market remained unsettled till 2011.

In 2011, new legal framework entered into force with the Broadcasting Act (the Act No. 6112) and the relevant regulations. The Act No. 6112 provides the regulatory authority (Radio and Television Supreme Council) with the necessary means to plan the digital broadcasting, to initiate the spectrum allocation auction and to collect the usage fees from the analog broadcasters. In the Act, media service provider is defined as the legal person who has editorial responsibility for the choice of the content of the radio, television and on-demand media services and determines the manner in which it is organized and broadcast; while infrastructure provider is defined as the organization operating the infrastructure for the transmission of media services and platform operator is defined as an enterprise which transforms multiple media services into one or multiple signals and provides the transmission of them, through satellite, cable and similar networks either in an encoded and/or unencoded mode in a way accessible directly by the viewers. The Act also defines the multiplex operator as an enterprise which ensures the transmission, by combining more than one media service to be provided via terrestrial network in a way they fit into one or more than one signal, between media service providers and the infrastructure operator or between the transmitter systems and operator companies. So, it could be said that with the new legislation several new and different technologies such as IP-TV, DVB-H ve HDTV and new services such as broadcast on demand, multiplex transmission or platform provision for the provision of media services was also included in order to overcome the legal uncertainties and to increase competition in the market.

Besides, the Act provides the limitations for the ownership through which limitations regarding the media ownership have been both reduced and made clearer. According to the article 19:

*“A broadcasting license shall be granted to the incorporations which are established in accordance with the provisions of the Turkish Commercial Law for the purpose of exclusively providing radio broadcasting service, television broadcasting service and on-demand media service... The same company might provide only one radio broadcasting service, one television broadcasting service and/or one on-demand media service.*

*... A real or legal person can be direct or indirect partner to a media service provider holding maximum four terrestrial broadcasting licenses. However, in case of partnership to more than one media service provider, annual total commercial communication revenue of those media service providers in which a real or legal person has direct or indirect shares, should not exceed thirty percent of the total commercial communication revenue of the sector<sup>4</sup>. The real or legal persons whose total commercial communication revenue exceeds this rate, shall transfer their shares in media service providers in a way that it will be reduced down to the aforesaid rate within a time limit of ninety days of the Supreme Council. For any real or legal person who has not fulfilled the decision of the Supreme Council within the given time limit the Supreme Council*

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<sup>3</sup> The Constitutional Court first suspended the enforcement of the relevant provisions in June 2002. In September 2004 the provisions were annulled and in August 2006, the annulment of the provisions entered into force.

<sup>4</sup> Regarding the limitation related with the commercial revenue of the media service provider, The TCA opined the Radio and Television Supreme Council during the preparations of the Act No. 6112 that further limitations for the media service providers with respect to their commercial communication revenue – which could be regarded as a reward for the performance of the service providers- was not necessary as there were already license limitations for the ownership.

*shall impose an administrative fine of four hundred thousand Turkish Liras<sup>5</sup> for the each month of not acting accordingly.*

*...The total direct foreign capital share in media service provider incorporation shall not exceed fifty percent of the paid-in capital. A foreign real or legal person can directly become a partner of maximum two media service providers.”*

As seen from the provisions cited above, the legislation envisages creation of a competitive environment through clear limitations on ownership and measures for the prevention of monopolization in the market.

The Act No. 6112 also states that within two years at the latest as of the publication date of the Act, a ranking tender on digital television multiplex capacity shall be made by the Radio and Television Supreme Council in order to award digital terrestrial broadcasting licenses. Some of the enterprises that has gained the right of digital terrestrial television multiplex capacity allocation in the ranking tender shall also be provided with the opportunity of making analogue television broadcasts for two years at most by considering their ranks in the tender and analogue channel capacities. At the end of the two years following the allocation, analogue terrestrial television broadcasts shall be completely terminated countrywide and analogue terrestrial television broadcasts shall be suspended.

## **2. The TCA's experience in the market**

Regarding the Turkish Competition Authority's (The TCA) experience in television broadcasting market, there are several cases that deal with different types of competition law enforcement.

One of the important cases was related with a horizontal agreement of television broadcasters. BIMAS Birleşik Medya Pazarlama A.Ş. (BIMAS) –an advertisement marketing company founded by the two TV broadcasters Sabah Televizyon Prodüksiyon A.Ş. (Sabah) and DTV Haber ve Görsel Yayıncılık A.Ş. (DTV)- was alleged to encourage the advertiser companies to allocate all their advertisement budget to the TV channels whose the advertisement activities were planned and marketed by the BIMAS through high rebates. It was alleged that the main motive for the creation of the BIMAS by the two TV channels was to exclude their rival channels –mainly Cine 5- out of the market and recoup the all advertisement revenue. As a result of the investigation, it was stated by the Competition Board that BIMAS was owned and controlled by Sabah and DTV, and the commission fee of BIMAS was calculated as 8% of all expenditures BIMAS bear. It was also established that BIMAS did not purchase the advertisement spaces or minutes at first and try to resale them. The mere function of BIMAS was to market the advertisement spaces on behalf of the TV broadcasters. The competent broadcasters used BIMAS as a collective advertisement unit for themselves and they bear the costs of the firm evenly, not according to their shares in expenditures. Therefore, it is not difficult to reach a conclusion that BIMAS was not an independent undertaking. In tariff catalogue of BIMAS, there were 22 different advertisement and several discounts such as launching discount, seasonal discount, continuity discount, budget discount, etc. All the prices and discounts were applicable with same rates to those TV channels. It was established from the receipts that any advertiser company would get the same prices from any of the 4 TV channel for the broadcast of its advertisement if the advertisers would work through the BIMAS instead of negotiating with the TV channels on its own. So the activity of BIMAS could be regarded as the infringement of the competition for the advertisements between the 4 TV channels, not a joint advertisement marketing activity of those channels. Besides, BIMAS was in charge of analyzing the ratings of the programs, movies and series of the channels and advising the channels to change the air time accordingly. Since BIMAS was advising to all 4 channels, all of them were getting the information about their rivals programs, their shares and their

<sup>5</sup> Approximately \$ 220,000.



possible air times. This kind of information sharing also led those TV channels to find a platform to prevent the price competition among them. Because, with this information provided by BIMAS, a TV channel would choose to charge the same prices for an advertisement space for its program as the other TV channels charge, instead of charging different price levels and competing with the rival TV channels to get more advertisement.

In its former decision related with the same subject, the TCA refused to clear the agreement for the establishment of BIMAS and stated that the two TV channels establishing BIMAS then violated the article 4 of the Act No. 4054 on the Protection of Competition (the Competition Act) by determining the prices of TV channels' air spaces.

After the first BIMAS decision<sup>6</sup>, TV channels began to circulate separate air time tariff lists along with the common BIMAS tariff list, however those separate lists were not used and the air space of the channels continued to be marketed by BIMAS. The individual tariffs included the price lists that were higher than the prices marketed by BIMAS. Moreover, the examination of the invoices showed that the individual price lists were never used, all sales were done with BIMAS prices.

As a result, the formation and the activities of BIMAS were deemed to violate the article 4 of the Competition Act and the TV channels founding it were fined<sup>7</sup>.

A recent experience in competition law enforcement in television broadcasting market is the Cine 5 decision, a case related with a TV channel's demand of being included in Digiturk digital platform. The demand of the channel was turned down for a period of time and Cine 5 claimed that the period that it had been declined to be a part of the platform caused a serious loss of advertisement revenue and that conduct was an abuse of dominant position. In the decision the evaluation focused on whether the conduct satisfied the three criteria necessary to arrive at a conclusion of infringement via refusal to deal: the objective necessity of the product or the service to compete in the market, the possibility of elimination of competition due to refusal and the likelihood of consumer harm. The TCA decided that being on the Digiturk digital platform was not objectively necessary for a TV channel to compete in the broadcasting market and therefore decided that the conduct was not a violation of the Competition Act<sup>8</sup>.

As regards to ex-ante control of national television broadcasting market by the TCA, there were also several opinions in relation to the privatization proposals of state-owned broadcasting companies. The most noteworthy opinion of the TCA was the one about the privatization of the media companies of Merkez Group, the second biggest media group of Turkey then. In the opinion, each probable takeover transaction of Merkez Group's companies by three different media group was evaluated separately. Competition Board concluded that the takeover of Merkez Group's companies by Doğan Media Group, the biggest media group, would result in significant impediment of effective competition by creating dominant position (via unilateral effects) along with 80% market share after the transaction; while the probable takeover by Çukurova Group, the third media group, would result in significant impediment of effective competition by creating collective dominant position (via coordinated effects)<sup>9</sup>. As a result of the TCA's opinion, the privatization ended up with takeover of Merkez Group's companies by a new entrant group, Turkuvaz Group.

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<sup>6</sup> Decision dated 01.02.2000 and numbered 00-4/41-19.

<sup>7</sup> Decision dated 05.01.2006 and numbered 06-02/48-9.

<sup>8</sup> Decision dated 03.05.2012 and numbered 12-24/710-198.

<sup>9</sup> Decision dated 06.09.2007 and numbered 07-69/857-M.

It should be noted that concerning the ex-ante control in national television broadcasting markets, there were no sector specific substantive thresholds with regard to the market-share or number of licenses in the previous legislation, i.e. the Act No. 3984, due to the annulment decision of the Constitutional Court. Yet, mergers and acquisitions were still controlled by the TCA according to the substantive test used for a concentration in any market and the TCA did not take into consideration any other specific criterion for concentrations in media sector. For instance, the TCA did not prohibit the acquisition of a terrestrial analogue broadcasting license by the biggest media group, whose license number would increase to four among a total of 23 licenses (20 of them were actively operating) and evaluated the transaction solely according to substantive test based on competition law principles.

There are also some bundling practices in media and telecommunication markets. The Information and Communication Technologies Authority, the regulatory authority in the telecommunications sector, asked in 2010 for an opinion from the TCA upon an application by the firms who were preparing to supply a bundled product in the market. The TCA opined that there were some important factors needed to be taken into account while evaluating such practices and whether the market was foreclosed or not generally needed to be analyzed through an ex-post examination of a case. It could be said that there had already been some practices materialized by three different groups active either in the telecommunications or media broadcasting markets. The first group was dominant in PSTN and ADSL markets and was also operating in GSM operating market. The second group was in dominant position in GSM operating market, had strong market base in pay TV markets and was also operating in broadband internet service market. The last group was operating in pay TV and internet service provider markets. To date, there have not been any anticompetitive practices regarding the bundling of media and telecommunications products.

Anten A.Ş. was another example of ex-ante control on a case regarding broadcasting and telecommunications. In 2008, 20 undertakings came together and formed a joint venture (Anten A.Ş.) that would perform the functions of multiplexing, transmission, aerial systems and aerial carrying (except broadcasting). In its decision the TCA concluded that agreement could not be deemed as a concentration. The TCA stated that the agreement might restrict competition and had to be evaluated with the individual exemption criteria. Following the exemption evaluation the agreement was granted individual exemption on the condition that Anten A.Ş. would provide the service on objective conditions and without discrimination to any media service providers, be them the shareholder of Anten A.Ş. or not<sup>10</sup>.

### **3. Conclusion**

In sum, with the new legislation entered into force in 2011, i.e. the Act No. 6112 and related regulations, issues related with content or ownership structure of the television broadcasting market have been addressed by the sectoral regulatory authority, Radio and Television Supreme Council, more effectively and in a more transparent way. Besides, the TCA has been one of the authorities that have direct influence on the market both through the enforcement of Competition Act and through its advocacy activities.

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<sup>10</sup> Decision dated 08.01.2008 and numbered 08-03/35-11.



## UKRAINE

Presently, the following kinds of broadcasting are spread in Ukraine: satellite, terrestrial, cable, wire, multichannel.

For Ukraine, the transition from the broadcast television (terrestrial television) to cable television was a huge challenge. The reason for this was that the telecommunication operators had to deploy their own cable networks, because community antennas that enabled the transmission of broadcast television were destroyed.

The Antimonopoly committee of Ukraine continuously monitors the market of program services provided through the use of multichannel cable television network. The most recent market research was done in 2011-2012.

Since cable television market is one of the most important ones, the Antimonopoly committee of Ukraine conducted relevant research in 27 regions of Ukraine.

Furthermore, in order to prevent the monopolization of the markets, the abuses of monopolistic (dominant) position, the limiting of competition, the Committee exercises state control over concentrations (mergers or acquisitions) of economic entities in accordance with the Law of Ukraine "On Protection of Competition".

Concentration (merger or acquisitions) can be done only after obtaining a permission of the Committee.

Permission for concentration (merger or acquisition) is granted if it does not monopolize or substantially restrict competition in the market or in a substantial part of it.

Ukraine does not have any vertically integrated telecom providers.

In Ukraine there is also no cross-ownership, because according to the Law of Ukraine "On Television and Radio" no person or legal entity has the right to control in any way (either by influencing the formation of management and / or by influencing the formation of the broadcasting organization's supervisory bodies) more than 35 percent of the total volume of the territorial television and radio market - national, regional or local.

During the last years the Committee has been receiving complaints against providers of program services, both from consumers and from industry associations. After having considered these complaints, the Committee opened proceedings against program service providers which provided their services through multichannel cable television network for an alleged violation of the legislation on economic competition protection.

Thus, the Committee examined 50 cases of violation of the legislation on protection of economic competition, gave 54 mandatory recommendations and fined the companies for about 4 million hryvnas (~\$0.5 million)

Program service providers (telecom operators) were trying to maximize their profits through the abuse of their monopolistic (dominant) position by setting excessive, unreasonable prices for their services.

Today there is also a problem of transitioning from cable television to digital television.

Firstly, it could lead to the closure of the local channels. The transition to digital TV may be financially impossible for many local and regional broadcasters.

Secondly, the financial means of the Ukrainian people should be considered. If analog broadcasting is disabled, millions of citizens will find themselves in a situation where they do not have the right to receive information. According to various sources, Ukraine has 17,5-19 million households, of which about 30% are poor. Since receiving the digital signal is impossible without the digital signal receiver - the decoder, which costs from \$50 to \$100, consumers will be forced to buy it. There is another way, but it is even more expensive than the previous one - buying a new TV that supports the «Digital Video Broadcasting Terrestrial» (DVB-T) format.

Thirdly, there's the lack of legislation in this area. The law does not clearly define how digital TV will be introduced and implemented. Another problem is the large territory of Ukraine, which creates difficulties for the technological process of digital television implementation.

There are certain entry barriers in the field of television and broadcasting at the legislative level in Ukraine. Telecommunications operators must obtain a license for broadcasting. Also, the economic entity must also obtain some other permits, such as the permit for the operation of radio electronic equipment and a conclusion on electromagnetic compatibility of radio electronic devices. All the permits for activities in the field of television and broadcasting are obtained on a paid basis.

Since the license fees are disproportionate and excessive for small and medium business operators, they are being discriminated against in comparison to big business. Thus, monopolization of the pay-TV market occurs due to the ousting of small forms of entrepreneurship. Meanwhile, telecommunication operators require resources for the general economic development of their own television network.

The bodies of the Committee constantly discover violations of the legislation on the protection of economic competition by the service providers (telecom operators) in the form of establishing the prices that would have been impossible to establish under the condition of a highly competitive market. As stated earlier, the Committee examined 50 cases of violation of the legislation on protection of economic competition and gave 54 mandatory recommendations.

The bodies of the Committee constantly receive complaints about the TV programs quality both from the citizens and from the telecommunications operators.

The main barriers of entry to the market of program services provided through the use of multichannel cable television networks are the contradictions between the three basic laws of Ukraine - "On the National Council of Ukraine on Television and Radio," "On Television and Radio", "On the radiofrequency resource of Ukraine ", which regulate the management of the radio frequency resource of Ukraine. These contradictions impede, and sometimes make it completely impossible to exercise effective control in the field of broadcasting.

In Ukraine, there is a single body of state regulation in the field of television and broadcasting, regardless of distribution and transmission methods - the National Council of Ukraine on Television and Radio Broadcasting (hereinafter - the National Council). According to Article 1 of the Law of Ukraine "On the National Council of Ukraine on Television and Radio Broadcasting" The National Council is a constitutional, permanent collegial body, and it's mission is to oversee the compliance with the requirements of laws of Ukraine in the field of broadcasting and to exercise the regulatory powers provided by law.

The National Council develops the Plan for the development of the national television and radio space based on which the National Council decides on the establishment and development of broadcasting channels, broadcast networks and television networks that involve the use of radio frequency resource of Ukraine, determines the competition conditions and announces tenders for broadcasting licenses, determines the conditions of broadcasting licenses.

The National Council performs the typical functions of an executive authority: regulatory, supervisory, etc., therefore, as an independent body it should not feel the pressure of the executive branch.

Spectrum distribution may affect competition but one of the powers of the National Council is to promote competition in the broadcasting.

The same problem arises with the National Commission which provides state regulation in the field of communication and information (hereinafter - NCRC), a body of state regulation in the field of telecommunications, information, radio frequency resources and the provision of postal services.

One of the main functions of the regulatory bodies is the issuing of licenses.

The National Council of Ukraine on Television and Radio Broadcasting is the only government agency that is responsible for licensing of all the kinds of broadcasting: satellite, terrestrial, cable, wire, multi-channel.

In Ukraine, the procedure for issuing the broadcasting licenses is regulated by Articles 23, 25, 27, 32, 35 of the Law of Ukraine "On Television and Radio" and the provisions of the licensing that are established by the National Council. The right to set up a broadcasting entity in Ukraine belongs to legal entities of Ukraine and the citizens of Ukraine, who are not limited civil capacity.

The Committee actively cooperates with other authorities, including the National Council and NCRC, so fortunately there haven't been any cases of parallel application of two different legal regimes.

The cost of the broadcasting licenses and the license of a program service provider is determined in accordance with methods approved by the Cabinet of Ministers of Ukraine.

According to calculations, it is clear that preferences in obtaining the licenses are given to business entities that are using certain TV signal distribution technologies - the technology of satellite platform with DTH (Direct to Home), Mobile WiMAX technology, etc.

Disproportional and excessive license fees for operators of small and medium business promotes the monopolization of the pay-TV market by big business due to the ousting of small forms of entrepreneurship.

We believe that today, Ukraine's regulation of broadcasting sector is insufficiently effective, because the powers of the National Commission and the NCRC are not delineated on legislative level.

To improve the regulatory environment in the field of television and broadcasting, a number of measures and transformations should be implemented in Ukraine, including the following:

- Simplification of the broadcasting license renewal procedure;
- Development of a detailed plan for the introduction of digital TV in order to determine the ways of overcoming all of the problems in this area;

- Implementation of the provisions of the EU Directive "On audiovisual media" on the regulation of Video On Demand and Catch-up TV services and on the enablement of the provision of IPTV services via the Internet without the use of multichannel networks resource into the Ukrainian legislation, including the Law of Ukraine "On Television and Radio";
- Development of the changes to the Methodology for calculating the amount of the license fee for the issuance or renewal of licenses to address the issue of assessment of license fee for the providers IPTV services who offer these services via the Internet without the use of multichannel networks.
- Expansion of the powers of the NCRC by enabling it to perform the analysis of markets.

Cases of violation of the legislation on protection of economic competition were investigated by the Committee after having received numerous citizens' complaints about unjustified increase of tariffs for program services provided through the use of multichannel cable television networks (cable television).

During the investigation, the Committee researched the pricing of the tariffs, the costs and revenues of the program service providers (telecom operators). Following the proceedings the Committee established numerous instances of unreasonable costs that were included in the tariff, by which the offenders tried to explain their unreasonably high prices.

In 2012, the Committee conducted a research to check whether the actions of individual players of television programs market follow the requirements of the legislation on protection of economic competition, particularly in terms of distribution of TV channels of foreign producers in Ukraine.

The study revealed vertical restraints, which can lead to restriction of competition and abuse of dominant (monopolistic) position, as well as to the creation of barriers for market access of other entities.

The study found that Russian TV channels' rights holder (hereinafter -the holder) distribute it's channels in Ukraine by concluding agreements for the distribution of the appropriate channels.

Under the terms of the agreements, the distributor acquired exclusive rights for the distribution of some of the holder's TV channels in Ukraine. These channels are extremely interesting and are in great demand among consumers.

The other channels of the holder are distributed on the basis of non-exclusive rights.

As a result of these agreements on the basis of exclusive rights, the Distributor was able to single-handedly determine the terms of further distribution of these TV channels in Ukraine, which in turn enabled the Distributor to prevent, eliminate, and restrict competition.

The consequences of such actions for more than 300 cable operators could be the following:

- imposition of unfavorable contract terms
- creation of unwarranted market barriers for the access of other market participants to the channels of the holder.

At present, the Committee continues the research.

## UNITED KINGDOM

The United Kingdom Office of Communications (Ofcom) is the independent national regulatory authority and competition authority for the UK communications industries. Ofcom has a number of roles and duties relating to identifying and responding to concerns which are unlawful, anti-competitive, or may otherwise harm consumer interests. Ofcom has regulatory powers in the television and broadcasting sector, and has concurrent powers with the Office of Fair Trading (OFT) to enforce UK and EU competition law prohibitions in relation to communications matters. UK merger control across all sectors is the responsibility of the OFT and Competition Commission (CC). In addition, the CC has responsibility for market investigations which enable it to take a broad, in-depth assessment of the complexities of a market and focus on the functioning of a market as a whole.

This paper provides an overview of the television broadcasting sector in the UK highlighting market developments and existing regulatory provisions particularly relevant to competition. It then identifies a number of current and future challenges for competition policy in television broadcasting. Finally, a list of significant relevant cases sets out the experience of the UK competition authorities in recent years, both in terms of competition law enforcement and regulatory cases.

### 1. Overview of the television broadcasting sector in the UK

The UK media landscape is changing rapidly. Consumers now have access to a greater range of communications and media services than ever before and convergence is changing the way in which we use communications services and consume content. For example, content that was previously only delivered on television, in a cinema, or in a newspaper can now be accessed on devices such as smartphones, tablets and internet-enabled TVs. Equally, traditional broadcast TV continues to have enduring popularity, with UK consumers watching on average over four hours per day.<sup>1</sup> While consumers are benefitting from this evolution and the proliferation of new services and devices is positive for competition, there are market developments which may also raise new content-related competition issues.

#### 1.1 *Content remains important to consumers*

Spend on content by all UK TV channels in 2011 reached £5.5bn, up by 1.6% year on year in nominal terms.<sup>2</sup>

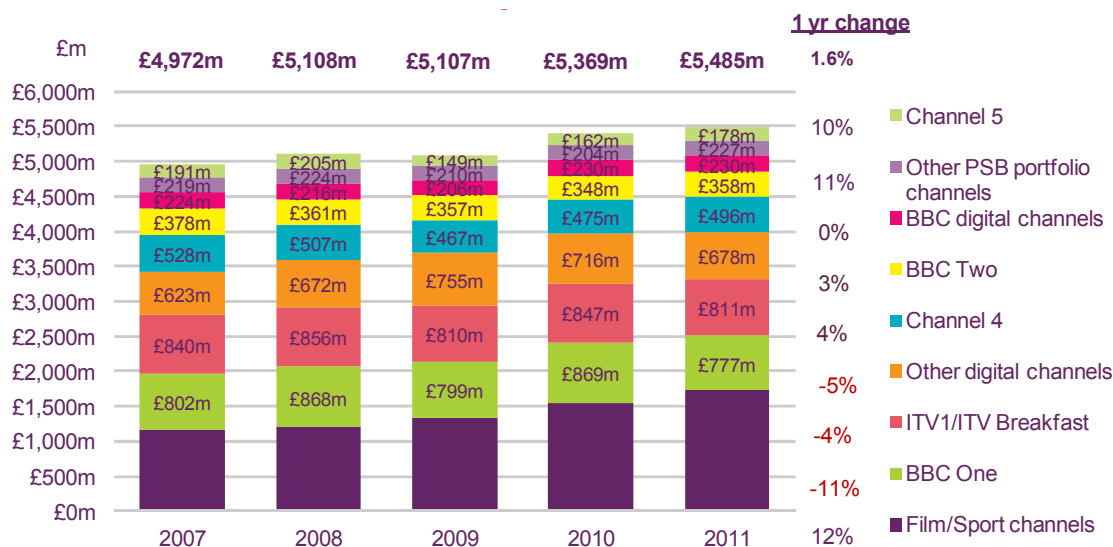
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<sup>1</sup> Ofcom, 2012 CMR, page 21, Fast facts.  
[http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR\\_UK\\_2012.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf).

<sup>2</sup> Ofcom 2012 CMR, figure 2.29.



**Spend on network TV programmes: 2007 - 2011**



Source: Ofcom/broadcasters. Note: Figures expressed in nominal terms. Figures do not include spend on nations and regions output. BBC digital channels includes BBC Three, BBC Four, BBC News Channel, BBC Parliament, CBBC and CBeebies (but not BBC HD). ‘Other digital channels’ includes all genres (excluding Sports and Films). Programme spend comprises in-house commissions, productions, commissions from independents, spend on first-run acquired programmes, spend on rights and on repeats (originations or acquisitions).

Despite the growing number of channels available to consumers, the main public service broadcasting (PSB) channels (BBC 1 and 2, ITV, Channel 4 and Channel 5) still have the majority of audience share – 55.2% of viewing in 2011. Though this majority is falling – in 2001, channels other than the core PSB channels comprised just 19.6% of viewing – if the figures for the whole portfolio of channels offered by the PSBs are considered, their share of all viewing is 74% across the day, and 79% at peak times.<sup>3</sup>

The popularity of the main free-to-air PSB channels is also reflected in the significant proportion of households receiving broadcast TV on a free-to-air platform (see below) following completion of digital switchover in October 2012 and near-universal coverage of digital terrestrial TV.

Nevertheless pay TV is an important part of the TV landscape. The pay TV sector has delivered substantial benefits to consumers since its emergence in the early 1990s. By 2012, 57%<sup>4</sup> of adults were paying to access a greater choice of content, at higher quality, and with a greater degree of control than has historically been available from free-to-air broadcasters. There has been strong innovation in the sector by firms such as Sky, who have also taken commercial risks in delivering these benefits. In general, UK consumers indicate a relatively high and stable level of satisfaction with 90% of digital TV consumers either ‘very’ or ‘fairly’ satisfied overall in 2012.<sup>5</sup> However, competition concerns have also arisen as the UK pay TV sector has matured.

<sup>3</sup> Ofcom 2012 PSB Annual Report: <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/public-service-broadcasting/annrep/psb12/>.

<sup>4</sup> Ofcom 2012 Consumer Experience Report, page 6: [http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-12/Consumer\\_Experience\\_Research1.pdf](http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-12/Consumer_Experience_Research1.pdf).

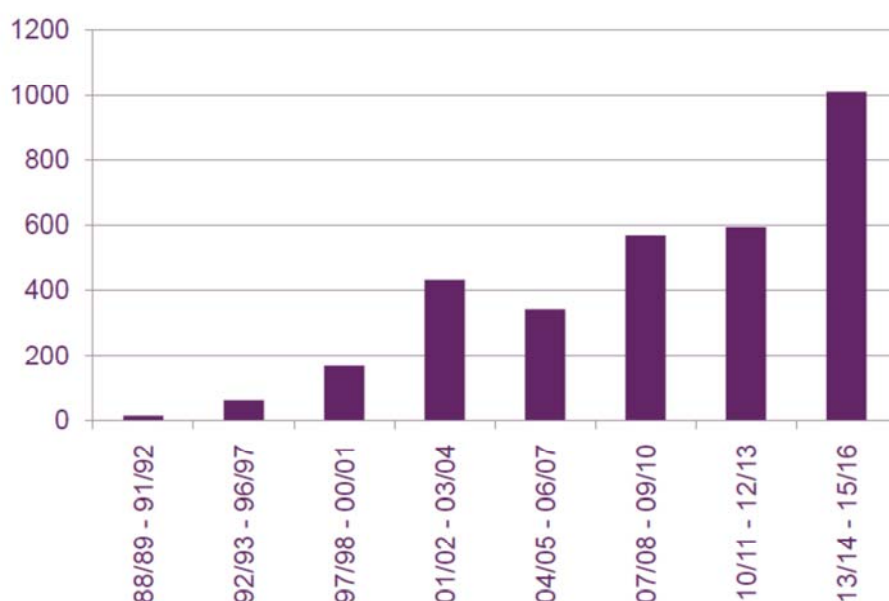
<sup>5</sup> Ofcom 2012 Consumer Experience Report, page 118.

Notwithstanding differences in platforms and delivery, content remains of critical importance to pay TV consumers. Ofcom's investigation into the pay TV market<sup>6</sup> highlighted two key types of content that drive purchasing decisions, because they are both valued by consumers, and not available via free-to-air services – sports rights and premium film content. The research underpinning this review highlighted the importance to consumers of this content: 87% of consumers cited content as being a 'must-have' element of the TV choices; 25% of pay TV consumers cited sport as 'must-have' content. There are other forms of content which are important to consumers, but their widespread availability on free-to-air TV means that they cannot be used as a differentiator, and consumers are therefore likely to be less willing to pay for services based on this content. TV rights to critical content remains held by a small number of players.

The Ofcom Pay TV market review concluded that the pay TV market in the UK is not effectively competitive due to the restricted distribution by Sky of its premium sports and movies channels. Remedies imposed on Sky as a result of Ofcom's findings were overturned on appeal, with the Competition Appeal Tribunal reaching a different conclusion in August 2012 as to Sky's historic behaviour on the basis that Sky acted as a willing wholesaler. That decision may itself be the subject of further appeal.

Regarding sports rights, 59% of all consumers who regularly watch sport on TV cited football matches as 'must-have' content, with a particular focus on FA Premier League matches. In June 2012, together Sky and BT were reported to have paid more than £3.0bn over three years for live broadcast rights to 154 matches per season from 2013-14 – a 70% rise on the current deal. Since 1988, the cost of Premier League rights has risen from £15m per season to over £1bn.<sup>7</sup>

**Total paid for Premier League rights per season (£m) since 1988**



In Ofcom's review of pay TV, premium film rights were defined as the rights from the main six Hollywood studios, in the period 12 months from their theatrical release. The research underlying this review revealed that premium film content was of significant value to consumers.

<sup>6</sup> Ofcom 2010 Pay TV Statement: [http://stakeholders.ofcom.org.uk/consultations/third\\_paytv/statement/](http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/)

<sup>7</sup> Data to 09/10 season drawn from Annex 10 to Ofcom's first Pay TV consultation; later data from news sources.

More recently, the CC completed its market investigation into movies on pay TV in August 2012, concluding that there was no adverse effect in the market in relation to movies, due in part to the launch of new subscription video on-demand (SVoD) services, delivered over the open internet, from LOVEFiLM and Netflix over the previous 12 months. It did however state its view that competition in the pay TV retail market as whole was ineffective.

As consumers' tastes change over time, we may see changes to the types of content that drive their purchasing decisions; new genres of content may emerge as highly valued. For example, UK costume drama *Downton Abbey* attracted between 8.5m and 10m viewers per episode in its first season; in 2010, Sky entered into an exclusive deal with HBO worth in the region of £150m over five years, including rights to HBO's back catalogue as well as new programming. In February 2011, Sky launched a new channel, Sky Atlantic, to be the 'home of HBO' in the UK and exclusive new UK programming.

## ***1.2 Content delivery is diversifying – and increasingly includes online***

Traditionally, broadcast services have been delivered via one-way platforms i.e. via satellite, a cable connection, digital terrestrial TV (DTT) or analogue TV.

Increasingly, as technology develops, those services are migrating towards delivery platforms which are hybrids of traditional broadcast and the internet – via internet protocol TV (IPTV), using a closed or proprietary internet connection, or the open internet. Ofcom's 2012 Communications Report noted that 37% of individuals in Q1 2012 claimed to watch catch-up TV distributed over the internet.<sup>8</sup>

Examples of hybrid platforms include BT Vision, Virgin Media's TiVo service and Sky's Anytime+ pull video-on-demand (VoD) service.

- BT Vision is a hybrid DTT/IPTV service, with broadcast services being received via DTT through a TV aerial while VoD and interactive services are delivered via the user's internet connection.
- Virgin Media offers a next generation set-top box, powered by TiVo, which, among other things, offers on-demand content and enables consumers to record, pause or rewind content and use web apps such as Facebook and Twitter.
- Sky Anytime+ offers movies and TV programmes on-demand and is available to all Sky subscribers with a Sky+ HD box and a broadband connection.

Some hybrid platforms provide access to on-demand content using 'managed services' – that is, where the delivery of the content is managed end-to-end enabling greater quality of service, as opposed to over the open internet. Such content services will typically be offered by service providers retailing internet services and audio-visual content services in a bundled package.

In addition, audio-visual services can be delivered over the open internet – this delivery method is described as an 'over-the-top' (OTT) service (though it should be noted that not all audio-visual services provided via OTT offer users access to the open internet via set-top boxes, for example to browse the web).

There are a growing number of retail service providers distributing their content to consumers principally using the open internet. Some of these services are free-to-view (Google TV, films on

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<sup>8</sup> Ofcom 2012 CMR, page 11.

YouTube), some use a subscription model (LOVEFiLM, Netflix, Sky's NOW TV) and some operate on a pay-per-view basis (Blinkbox, Dixon's 'KnowHow Movies', HMV, iTunes).

#### On-demand services and their UK launch dates

Service (involved parties)	UK launch date
iTunes (owned by Apple)	2001
LOVEFiLM (part of the Amazon group)	2004
Blinkbox (80% owned by Tesco)	2008
Films on YouTube (part of the Google group)	August 2010
HMV on demand	October 2010
Netflix	January 2012
KnowHow Movies (part of the Dixons group)	March 2012
YouView (JV between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk group and Arqiva)	July 2012
NOW TV (owned by SKY)	July 2012

Early in the life of many of these services, they would have been accessed by computer and viewed on a computer screen; relatively recent technology developments mean that increasingly, these services are being streamed to a TV set (for example, via Apple TV) or received and shown on TV sets connected to the internet ('smart TVs'). These developments are blurring the lines between video on demand and linear, licensed television services.

The UK's telecommunications infrastructure is already increasingly supporting these services, with 76% of all UK households having a broadband internet connection and over half of them having access to super-fast broadband services.<sup>9</sup> Though the infrastructure is growing, the take-up of such super-fast services has been more modest to date – as of March 2012, 6.6% of households in the UK had taken up super-fast broadband services.<sup>10</sup>

In Ofcom's view it is too early to tell how OTT services will develop and how consumers will respond. Consumers now upgrade their TV sets more frequently than they used to and OTT services typically do not require an initial contractual commitment. This may enable new services to achieve a faster rate of penetration than past services have achieved. Conversely, these features may mean that it is more difficult for an OTT service provider to maintain viewer/subscriber numbers.

<sup>9</sup> Ofcom 2012 CMR, page 4.

<sup>10</sup> Ofcom 2012 CMR, figure 1.5, page 27.

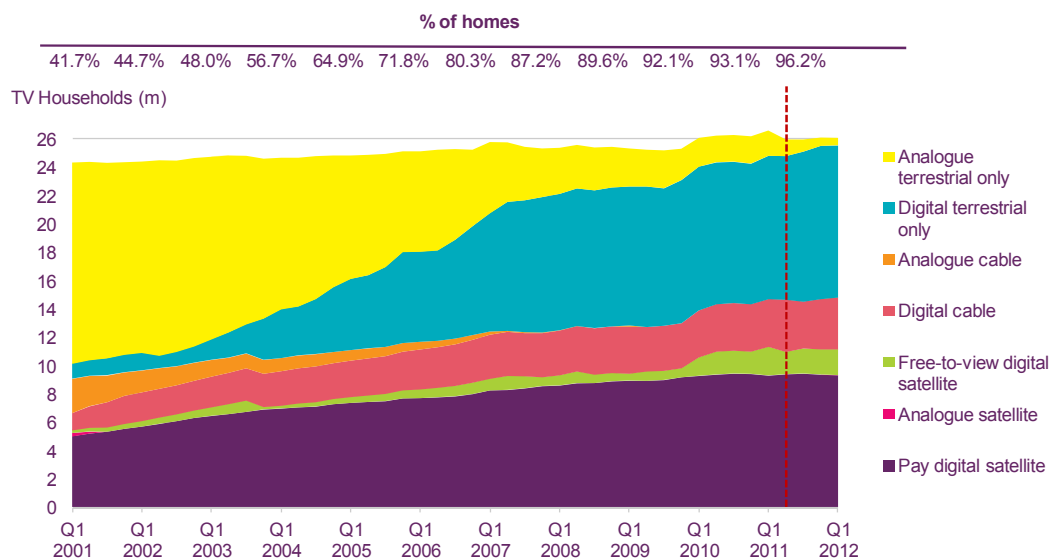
The emergence of new players using technology to innovate and bring new service propositions to the consumer clearly has the potential to deliver consumer benefits. However, network effects could increase the possibility of new bottlenecks emerging, potentially creating new sources of market power.

### 1.3 Consumers are using a range of devices to access content

Traditionally, consumers have accessed content over one platform, delivered to a television set or similar device. For example, with regard to pay TV content, this might be Sky’s satellite platform or Virgin Media’s cable platform, delivered to a television screen. However, technological change has been providing multiple routes for content into the home.

Since 2008, as the number of digital terrestrial-only homes remains broadly constant, the take-up of digital cable, free-to-view satellite and pay digital satellite has increased.<sup>11</sup>

**Multichannel take-up in UK households**



Source: BARB Establishment Survey from Q2 2011, GfK NOP research from Q1 2007, previous quarters include subscriber data and Ofcom market estimates for DTT and free satellite. Note: Digital terrestrial relates to DTT-only homes.

Taking a hypothetical household in the UK in 2012, and how they might use this technology: they may have paid-for satellite services on their main TV– 9.6m homes in the UK take satellite pay TV services on their primary TV set.<sup>12</sup> They may have a second TV set, receiving digital TV via a Freeview box – 61% of second TV sets in UK households take DTT services, and one third of homes with at least one TV set take both DTT services, and either cable or satellite services.<sup>13</sup> This household may also have a broadband connection fast enough to deliver a range of OTT content services (the average actual speed of

<sup>11</sup> Ofcom 2012 CMR, figure 2.4.

<sup>12</sup> Screen Digest TV Annual Market Summary, May 2012. [http://www.screendigest.com/intelligence/tv/uk/tv\\_intel\\_uk\\_1/view.html?start\\_ser=ti](http://www.screendigest.com/intelligence/tv/uk/tv_intel_uk_1/view.html?start_ser=ti).

<sup>13</sup> BARB Establishment Survey of TV Homes, annual, to March 2012.

broadband connections in the UK is 9.0 Mbit/s<sup>14</sup>), and via which they can watch films or TV content on demand, as well as streaming music and videos from sites such as YouTube.

At the device level, a range of television screens now incorporate an internet connection and an unprecedented degree of processing power – to Q1 2012, 2.9m smart TVs with internet connectivity had been sold in the UK.<sup>15</sup> However, the number of consumers making use of this integrated connectivity on a regular basis is uncertain; many of these devices are likely to be used in conjunction with services that provide on-demand content in an integrated interface, (for example, households with Sky and Virgin Media pay TV services) which may be a preferable way to access the same content. There is also the interesting new potential for content to be delivered via 'apps' residing in a smart TV, in a manner that reduces the importance of traditional platform operators. This is analogous to the way smartphones have impacted mobile operators.

Beyond TV sets, consumers are using other devices to access content. By the end of 2010, 55% of UK households had access to a games console, about one-quarter of which used them to access audio-visual content.<sup>16</sup>

The use of smartphones is on the increase: 39% of the UK now have a smartphone device.<sup>17</sup> In addition to smartphones, the last couple of years has seen the emergence and increase in popularity of tablet devices, such as the iPad. Tablet ownership has risen rapidly with take-up reaching 19% of UK internet users by September 2012.<sup>18</sup>

This migration by consumers from TV sets to using a variety of different devices on which to view audio-visual content has a number of potential implications: many of the producers of such hardware have their own proprietary systems for managing rights (i.e. music or film via iTunes, e-books via Kindle) which may create 'stickiness' and reduce customer switching; the line between content delivered via platforms traditionally licensed and regulated, and those which are not, is increasingly blurred. Alternatively, the take-up of devices other than TV sets to view audio-visual content has the potential to decrease the importance of, and control held by, any given individual platform.

#### ***1.4 A number of regulatory provisions are relevant to competition policy***

Under the UK's general competition law framework, in relation to communications matters, Ofcom and the OFT have concurrent functions in relation to enforcement of the Chapter I and Chapter II prohibitions of the Competition Act 1998 and in relation to Articles 101 and 102 of the EU Treaty.<sup>19</sup> Similarly, in relation to communications matters, Ofcom and the OFT have concurrent functions to make market investigation references to the CC under Part 4 of the Enterprise Act 2002.<sup>20</sup>

In addition, Sections 316 to 318 of the Communications Act 2003 create a sector specific competition regime for broadcasting. Section 316 provides for Ofcom to include conditions in services licensed under

<sup>14</sup> Ofcom UK fixed-line broadband performance, May 2012.

<sup>15</sup> GFK sales data.

<sup>16</sup> Ofcom 2012 CMR, page 177.

<sup>17</sup> Ofcom 2012 CMR, page 4.

<sup>18</sup> Ofcom 2012 ICMR, page 25. <http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/icmr/ICMR-2012.pdf>.

<sup>19</sup> Communications Act, Section 371.

<sup>20</sup> Communications Act, Section 370.

the Broadcasting Act 1990 and Broadcasting Act 1996 for content services broadcast over satellite and/or cable, and over DTT respectively. In particular, Ofcom must insert into licences such conditions as it considers are appropriate for securing that a provider of a licensed service does not enter into agreements or engage in practices which Ofcom considers would be prejudicial to fair and effective competition. Before acting under s316 to ensure fair and effective competition Ofcom must consider whether it would be more appropriate to proceed under the Competition Act 1998.

At a European level, the Common Regulatory Framework (CRF) establishes a harmonised framework for the regulation of electronic communications networks (ECN) and electronic communications services (ECS) by EU Member States. The associated Directives establish a pan-European system of regulation with the aim of developing a better-functioning internal market for electronic communications networks and services. This covers all forms of transmissions networks, services and associated facilities, including fixed and wireless telecoms, data transmission and broadcasting. Notably, the CRF does not extend to the regulation of the content carried by such services. The following is an overview of the areas of Ofcom regulation affecting broadcasting that are derived from the CRF:

- Technical Platform Services<sup>21</sup> (Obligations on Sky). The regulation of Technical Platform Services (TPS) is derived from the Access Directive (Articles 5(1)(b), 6(1), Annex I) and covers Conditional Access (CA), EPG Access, and Access Control services. Broadcasters and operators of interactive TV services who wish to gain access to viewers using Sky set top boxes can purchase TPS on regulated terms from Sky. Ofcom has published TPS Guidelines indicating its regulatory approach. Broadly speaking and collectively, the TPS regulations require Sky to ensure that its terms, conditions and charges for providing access to its TPS are fair, reasonable and non-discriminatory. In addition, Sky is required to publish charges or the method for determining charges and provide 90 days' notice prior to implementing amendments to terms, charges and conditions.
- Market review regime. The CRF and 2003 Act require Ofcom to conduct forward-looking market reviews in the communications sector, and to impose *ex ante* Significant Market Power Conditions where it determines that there will be, prospectively, a lack of effective competition in a relevant market. Under the Framework Directive, such obligations are to be imposed only where Ofcom is satisfied that the *ex post* remedies provided in national and EU competition law are not sufficient to address the problem. Ofcom completed a review of the market for Broadcast Transmission Services in 2005.
- Must carry obligations. Section 64 of the Communications Act enables Ofcom to secure the transmission of PSB channels on ECNs, where the ECN is used by a significant number of end-users as their principal means of receiving television programmes. To date, Ofcom has not exercised this power (on the basis that it has not been necessary).
- Dispute resolution powers. Ofcom has statutory powers under Sections 185-191 of the 2003 Act to resolve disputes relating to network access which cover (a) a dispute relating to the provision of network access (b) a dispute relating to the entitlements to network access that a communications provider is required to provide by or under a condition imposed on him under section 45 of the 2003 Act; and (c) a dispute (which is not an "excluded dispute") relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section

<sup>21</sup> Full description of legal basis and framework in Annex 2 of the 2006 TPS Statement <http://stakeholders.ofcom.org.uk/binaries/consultations/tpsguidelines/statement/statement.pdf>

185(2) of the 2003 Act). Following revisions to the CRF in 2009, these powers could include, for example, the power to resolve a dispute between a broadcaster and a distribution platform covered by the CRF.

With respect to media ownership, Ofcom has a statutory duty to review the media ownership rules regularly and make recommendations for any change to the Secretary of State. It last reviewed the rules in November 2012 and recommended no changes<sup>22</sup>. The current rules have a number of provisions:

- National cross-media ownership rules. The current rule prohibits a newspaper group with more than 20% of national newspaper share from holding a Channel 3 licence or a stake in a Channel 3 licensee that is greater than 20%.
- Restrictions on broadcast licences. The current rules disqualify certain persons from holding broadcast licences generally, others from holding certain kinds of broadcast licences, and still others from holding broadcast licences unless Ofcom has determined that it is appropriate for them to do so.
- Appointed news provider rule. Ofcom is required to ensure that regional Channel 3 licensees broadcast nationally news programmes which are able to compete effectively with other national television news, by requiring them to appoint a single news provider between them. Persons who would be disqualified from holding a Channel 3 licence are also disqualified from being the Channel 3 appointed news provider.
- The media public interest test. The Secretary of State may issue an intervention notice in relation to mergers which meet jurisdictional thresholds, which triggers a review of whether the merger may be expected to operate against the public interest.

## 2. Challenges for competition policy in television broadcasting

### 2.1 *Access to content and pay TV markets have been the focus of recent competition reviews*

Content remains of critical importance to consumers. This is particularly the case for competition in pay TV where certain types of exclusive premium content drive purchasing decisions. Exclusive rights to premium sports content, such as broadcast rights for live FA Premier League games, remains an area of interest for competition policy.

Traditionally, access to first-release movies has also been a key driver of pay TV subscriptions. In the market investigation into Movies on pay TV, the CC concluded in August 2012 that the evidence suggested that the availability of Sky Movies was significant to the pay TV subscription decisions of only a relatively small minority of pay TV subscribers and that many of these consumers placed weight on factors other than seeing the most recent movies. It found that although not close substitutes for Sky Movies, the new and improved OTT services of LOVEFiLM and Netflix provide consumers with more alternatives, and have resulted in considerably more content licensed in a second subscription pay TV window. This window provides alternative providers such as LOVEFiLM and Netflix with access to major studio movie rights, on an exclusive basis, at a point in time about 15 months after those same movie rights have already been exploited on an exclusive basis by Sky. In Ofcom's view this development is interesting, but it may merely result in segmentation of the market, rather than effective competition, depending on the extent to which subscribers to premium movie services regard older films as a close substitute for recent films.

<sup>22</sup>

<http://stakeholders.ofcom.org.uk/market-data-research/other/media-ownership-research/rulesreport2012/>.



In the course of its inquiry into Movies on pay TV, the CC identified a pay TV retail market lacking in effective competition, due to (a) estimates for Sky's market share that had been consistently over 60% for several years, with the overall market structure for retail pay TV in the UK staying broadly the same since pay TV started to be offered on a significant scale in the early 1990s; (b) evidence consistent with there being barriers to subscribers switching their traditional pay TV retailer, though the barriers to switching were likely to be lower in the context of switching between OTT pay TV retailers; and (c) significant barriers to large-scale entry and expansion into traditional pay TV retailing, including substantial sunk costs both in setting up a new platform and in marketing to acquire subscribers, costs of acquiring attractive content, and the threat of a competitive response from existing players. It also appeared to the CC that Sky had persistently earned profits substantially in excess of its cost of capital, consistent with other evidence showing a lack of effective competition, and while there had been a significant level of innovation in the UK in pay TV, it observed that this had historically focused on innovations which had favoured satellite technology. However, for reasons explained at paragraph 48, the CC did not find an adverse effect on competition in relation to movies on pay TV.

## **2.2 *Content navigation and greater integration and bundling may raise new challenges***

Looking forward, in terms of content distribution, it is possible that, as an increasing number of households are 'multi-homed' with access to multiple content platforms and service providers at the same time, these market developments may strengthen competitive pressures, potentially easing some of the concerns that have been traditional features of these markets. Conversely, market developments may raise new challenges.

Electronic programme guides (EPGs) provide users of television, radio, and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming. For the three most popular platforms on satellite, cable and DTT, Sky, Virgin Media and Digital UK respectively are responsible for the allocation of EPG numbers. Concerns have been raised about EPG numbers being allocated in ways that are advantageous to a vertically integrated platform operator, to the detriment of third party channels. Such complaints are currently usually assessed under the fair, reasonable and non-discriminatory (FRND) elements of Ofcom's EPG Code. New technologies and innovations are changing the linear EPG world and creating more sophisticated user interfaces. In a move away from the traditional 'now-and-next' model for finding and choosing content, consumers are able to scroll backwards through their EPG to access past programmes on the Virgin Media TiVo and YouView platforms, and online on-demand services from traditional broadcasters (e.g. BBC iPlayer, 4oD) allow users to search for content from recent TV schedules. Responding to concerns about FRND treatment in the context of more complex user interfaces, whether in a two-dimensional format typical of Smart TVs or of another fundamentally different navigation approach, could be significantly more challenging.

Increasing integration may raise issues. There are several ways in which broadcast platforms have typically been integrated:

- vertical integration of content businesses (e.g. Sky is a TV channel broadcaster and a retailer of packages of channels);
- horizontal integration of adjacent elements of the value chain, such as bundling network services with content (e.g. Sky, BT, Virgin Media).

We are now seeing communications players increasing their presence to multiple points of the value chain. For example, Apple is using its operating system to integrate content from iTunes and the Apple store, making content accessible across Apple devices through the cloud, or via devices such as Apple TV, enabling users to combine and stream content from their own content libraries or direct from the internet;

Amazon is using its Kindle e-readers and tablets to build a wider ecosystem integrating its content retail services.

With regard to the retail of such services, consumers continue to buy TV and communications services in bundles for convenience and to take advantage of discounts. Although the growth of buying in bundles seems to be stabilising, such packages remain popular with consumers: 57% of homes took a bundle of communications services in Q1 2012, increasing by four percentage points from 2011.<sup>23</sup>

Most pay TV retailers offer communications as well as pay TV products and may offer a 'triple play' product (i.e. TV, broadband and fixed line telephony, including line rental) at below the price of the constituent TV and communications products, either via a lower list price or by offering greater discounts to new subscribers. In Q1 2012, triple play accounted for 19% of all consumers.

While these trends towards diversification along the value chain and the provision of multiple retail services may create a better consumer experience, they could also lead to increased customer lock-in. Whether there is sufficient competition from a number of well-resourced players across the communications value chain converging from different directions is too early to say, as is whether these are likely to lead to enduring problems and potential harm to consumers. It is worth noting the separate competition regimes for electronic communications and broadcasting which may raise issues; for example in this context, for the telephony/broadband elements of triple play packages on the one hand, and the pay TV element on the other.

### 3. Experience in competition law enforcement relating to television and broadcasting

A significant number of relevant cases have been considered in the UK in recent years.

#### 3.1 *Ex-post competition law enforcement*

Merger assessments including a number of referrals by the OFT to the CC<sup>24</sup>:

- News Corporation / BSkyB (2010). Audio-visual, newspaper publishing, advertising. Withdrawn. In December 2010 the European Commission approved under the EU Merger Regulation the proposed acquisition of pay TV operator BSkyB by News Corporation. The Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or any substantial part of it. The European Commission's findings concerned solely the competition aspects of the proposed transaction. In separate proceedings, the UK Secretary of State for culture, media and sport considered whether to refer the transaction to the CC on public interest grounds, in particular media plurality considerations. On 13 July 2011 News Corporation announced that it would be withdrawing its proposal to take complete ownership of BSkyB following allegations of phone hacking at UK newspapers published by News International.
- Northern & Shell / CLT Holdings (Channel 5) (2010). Television broadcasting, advertising and provision of news. Cleared by the OFT. Northern & Shell is active in newspaper publishing, magazine publishing and pay television broadcasting and acquired the television broadcasting business operating the free-to-air Channel 5 and associated channels in July 2010. The OFT

<sup>23</sup> Ofcom 2012 CMR, figure 1.10.

<sup>24</sup> The UK merger regime involves two stages: the OFT is the first phase body; and if a merger is found to have a realistic prospect of a substantial lessening of competition, the OFT refers the merger to the second phase body, the CC, for an in-depth investigation.

determined that there was limited overlap in television broadcasting given the distinction between pay TV and free-to-air channels, limited overlap in the provision of television advertising, and limited overlap in the provision of news given the distinction between television and printed news. In any event, the OFT did not consider that the transaction gave rise to competition concerns.

- BSkyB / Virgin Media Television (2010). Television Channels. Cleared by the OFT. BSkyB acquired the basic pay TV channel business VMTV from Virgin Media in July 2010. The transaction gave rise to a horizontal overlap in the wholesale supply of television channels and television advertising. The OFT conservatively analysed a wholesale market for the supply of basic pay TV and concluded there were no competition concerns. The OFT noted that the transaction resulted in a minimal increment in Sky's market share for the sale of television advertising but did not consider that significant competition concerns arose.
- Project Canvas: BBC / BT / Channel 4 / Channel 5 / ITV / Talk Talk / Arqiva (2010). Broadcasting. Found not to qualify by the OFT. On 19 May 2010, the OFT concluded that Project Canvas, the proposed joint venture to build an open internet-connected television platform with common technical standards, did not qualify for investigation under the merger provisions of the Enterprise Act 2002. The OFT decided that none of the JV partners (including the BBC) was contributing a pre-existing business ('enterprise') to the Canvas JV. In addition, the OFT concluded that, even if it were the case that the contribution of any of the JV partners did in fact constitute an enterprise, none of the JV partners would individually acquire material influence over the JV or could be considered as having collective control over the JV.
- Arqiva / Digital One (2009). Multiplex operators. Cleared by the OFT. The OFT considered there to be limited horizontal overlap between the parties in the ownership of operational local DAB licences. The OFT was of the view that the transaction was unlikely to lead to the foreclosure of multiplex license holders or of multiplexing services. In particular, the OFT noted that Arqiva's interest in the downstream levels of the supply chain would give it the incentive to increase multiplex capacity utilisation by reducing access prices in order to increase the number of customers (radio stations) requiring these downstream services. In comparison, Global (the existing majority shareholder of Digital One) would have had a reduced incentive to increase DAB capacity utilisation as new stations may have been potential competitors with its own stations.
- Project Kangaroo - BBC Worldwide / Channel 4 / ITV (2008). Video on demand. On 4 February 2009 the CC decided to prohibit the proposed video on demand (VOD) joint venture known as 'Project Kangaroo'. The proposed joint venture was an arrangement between BBC Worldwide, Channel 4, and ITV to provide a 'one-stop shop' for consumers to view catch-up and archive content from each broadcaster. The CC found that the joint venture was likely to result in a substantial lessening of competition (SLC) in the supply of UK TV VOD content at the wholesale and retail levels. The CC observed that the case was essentially about the control of UK-originated TV content with the parties together controlling the vast majority of this material. US and other non-UK material was not found to be a strong substitute for UK-originated programming. The CC considered alternative remedies including a remedy package that simultaneously limited the joint venture's ability to wholesale both catch-up and archive content and preserved separate retail selling points. However, none of these alternatives was considered adequate to address the SLC and its adverse effects. The joint venture was prohibited.
- Macquarie UK Broadcast / National Grid Wireless (2007). Terrestrial broadcast transmission services. Allowed by the CC subject to measures. On 11 March 2008 the CC allowed the completed acquisition by Macquarie UK Broadcast of National Grid Wireless, subject to a package of measures required by the CC to protect the interests of their customers. The CC found that the merger would lead to a SLC in the provision of broadcast transmission services to

television and radio broadcasters, as National Grid Wireless and Arqiva (owned by Macquarie UK Broadcast), were the only UK suppliers of terrestrial broadcast transmission services. The CC concluded that this loss of competition could be expected to lead to higher prices and/or lower service quality under existing, new and renewed contracts. However, when considering what remedial action was appropriate, the CC also took account of the fact that customers could also be the beneficiaries of the cost savings and synergies generated by the merger. The CC considered a range of structural remedies (many of which it thought would require behavioural remedies also) as well as a behavioural package of remedies alone. The CC designed a package of measures which included an immediate 17% price reduction to all radio customers, an immediate 3.25% price reduction to all pre-digital switchover (DSO) television customers and price reductions worth £44 million to 2020 (net present value) for all post-DSO television customers. Arqiva was also required to provide various service quality guarantees and to pay for an adjudicator to resolve disputes. The CC decided that these measures would be effective in addressing the adverse effects of the acquisition, whilst preserving the benefits that could also arise, including reducing the risks associated with DSO.

- Arqiva / BT (2007). Satellite broadcasting services. Cleared by the OFT. The OFT considered the main area of overlap between the merging parties to be the supply to broadcasters of satellite distribution services for television broadcasting to UK viewers. The OFT noted that post-merger, Globecast would remain an active competitor and that potential competitors had the ability and incentive to enter should Arqiva raise prices by a significant amount. The OFT found that sufficient terrestrial teleport and satellite transponder capacity made entry feasible on bundled service offerings and in relation to stand-alone up-linking services, customers felt they had countervailing buyer power in the form of sponsored entry or self provision with evidence of entry from competitors located outside the UK.
- BSkyB / ITV (2007). Broadcasting. Adverse public interest<sup>25</sup> finding on basis of SLC, but not on media plurality grounds, by Secretary of State (upheld on appeal<sup>26</sup>). On 14 December 2007 the CC reported to the Secretary of State for Business, Enterprise and Regulatory Reform on BSKyB's acquisition of 17.9% of the shares in ITV. It assessed the competitive effects of the acquisition in the UK market for television as a whole (all-TV), including both free-to-air (FTA) and pay TV services. The CC concluded that as a result of the acquisition, there was likely to be a SLC arising from a loss of rivalry between ITV and BSKyB in the all-TV market. This was expected to result in a reduction in the quality of the offer, a reduction in innovation, or an increase in the price of audiovisual services in the all-TV market. The CC therefore recommended that the Secretary of State require BSKyB to reduce its stake to below 7.5%. The CC also considered the acquisition's effect on the plurality of news and concluded that it may not be expected to operate against the public interest in this respect given regulatory mechanisms combined with a strong culture of editorial independence. The Secretary of State noted the CC's findings on SLC (which were binding upon him), endorsed the CC's media plurality decision, and accepted the CC's recommendation of divestiture.
- NTL / Telewest (2005). Pay TV, telecommunications services (multi-media). Cleared by the OFT. The OFT concluded that while Telewest and NTL were the only two cable operators, as

<sup>25</sup> Procedure for public interest cases is set out in Part 2 of the Enterprise Act 2002. In public interest cases, the judgment of the Competition Commission is determinative on the issue of SLC, but not determinative on public interest grounds. The CC reports to the Secretary of State, who makes the final determination as to public interest grounds, but who is bound to accept the CC's findings regarding SLC. <http://www.legislation.gov.uk/ukpga/2002/40/part/3/chapter/2>

<sup>26</sup> *British Sky Broadcasting Group v Competition Commission* [2010] EWCA Civ 2 <http://www.catribunal.org.uk/238-656/1095-4-8-08-British-Sky-Broadcasting-Group-plc.html>

their local networks did not overlap, they did not compete in providing services over cable and the potential for them to do so was minimal. Where they did overlap (in wholesale telecommunications services and narrowband internet) outside their local cable networks they would still face a number of other significant competitors.

- BSkyB Broadband Services / Easynet (2005). Telecommunications, internet and pay-TV. Cleared by the OFT. The OFT considered that Sky's acquisition of Easynet would enable it to offer triple-play services (voice telephony, broadband and pay TV), in which it had no offering to date, in competition with other providers. It noted that consumers may be expected to benefit from this. The OFT considered that the merger raised no horizontal issues and that the merger did not materially heighten Sky's incentive to foreclose its rivals.
- ITV / SDN (2005). Digital TV multiplex. Cleared by the OFT. The parties overlapped in the ownership of DTT multiplex licences and the supply of multiplex capacity and related technical services. The merger did not raise horizontal issues but a foreclosure concern was raised: that ITV would use capacity for its own channels or for channels that do not carry advertising. The OFT considered that the merger did not materially affect ITV's incentives to engage in a foreclosure strategy for a number of reasons and also observed that advertisers who buy airtime on ITV channels did not share concerns about foreclosure.
- Carlton Communications / Granada (2003). Television broadcasting. Allowed by the Secretary of State subject to measures. The CC's investigation and subsequent report to the Secretary of State for Trade and Industry<sup>27</sup> considered a number of areas of concern including the future competition for ITV licenses, the independent production of television programmes, and the impact on the other ITV regional licensees. The major focus of the investigation, however, was on the sale of Carlton's and Granada's advertising airtime and, in particular, the share for discount deals struck with advertisers and media buyers. The CC found that other channels were not yet sufficiently close substitutes to prevent an increase in the advertising budget commitment that ITV could demand for a given level of discount, following the removal of competition between Granada and Carlton. The CC ultimately decided, by a 4-1 majority that the most appropriate remedy would be the adoption of the contracts rights renewal (CRR) remedy which provides ITV advertisers with a fall-back option, enabling them to renew the terms of their 2003 contracts. The Secretary of State accepted the CC's conclusions and took undertakings from the parties to alleviate those competition concerns identified.

#### Competition Act investigations:

- Project Canvas (2010). Complaint – no investigation. Project Canvas (now known as YouView) is a partnership between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk and Arqiva which offers digital terrestrial channels and internet-delivered TV services via a set-top box connected to viewers' TV sets. On 19 October 2010, Ofcom announced that it was not opening an investigation into Project Canvas under the Competition Act following complaints made by Virgin Media and IPVision. At that stage of YouView's development, Ofcom's view was that it would be premature to open an investigation. However Ofcom committed to continue monitoring developments, particularly in relation to YouView's approach to sharing standards and its effects on content syndication.
- IMS Media / BBC Broadcast (2007). Complaint – no infringement decision (upheld on appeal). Ofcom concluded that BBC Broadcast (renamed Red Bee Media) was not dominant in the market

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The reference was made under the Fair Trading Act 1973, and under this earlier regime, the judgment of the Secretary of State was determinative.

for the supply of access services to UK television broadcasters. On that basis, Ofcom concluded that there were no grounds for action in relation to the Chapter II/Article 82 allegations that BBC Broadcast abused a dominant position by means of predatory pricing in relation to the Channel 4 contract and that it abused a dominant position by foreclosure in the relevant market as a result of the length and exclusive nature of the Channel 4 contract. Ofcom also concluded that the Channel 4 contract did not appreciably restrict competition and therefore there were no grounds for action in relation to the Chapter I/Article 81 allegation.

#### Market Investigations:

- TV advertising trading (2011). No market investigation reference. During 2011 Ofcom conducted a review of TV advertising trading, which examined the way TV advertising is bought and sold. In December 2011, Ofcom decided not to refer the TV advertising market to the CC having found no clear evidence of harm to consumers – whether TV viewers, advertising or end users of products advertised on TV – and in light of the costs associated with a reference.
- Movies on pay TV (2010). Market investigation – no adverse effect on competition finding. The CC concluded that Sky Movies, which currently offers the first pay movies of all the big Hollywood studios, is not a sufficient driver of subscribers' choice of pay TV provider to give Sky such an advantage over its rivals when competing for pay TV subscribers as to harm competition. The CC found that: more consumers attach importance to other service attributes, like having access to a broad range of content and to price, than they do to seeing recent movie content; the launch of new and improved movie services by Netflix and LOVEFiLM, which reflects an increasing trend of audio-visual content being delivered over the Internet, has increased competition and consumer choice; and the recent launch of Sky Movies on NOW TV gives consumers for the first time a choice of subscribing to Sky Movies separately from their subscription to other pay TV content (from whichever provider).

### 3.2 *Ex-ante competition and regulatory provisions*

#### Section 316 of the Communications Act (Ofcom):

- Sky Sports wholesale must-offer. On 31 March 2010 Ofcom issued a decision inserting conditions into the licences for Sky Sports 1, Sky Sports 2, Sky Sports HD 1 and Sky Sports HD 2. The conditions require Sky to offer to wholesale these channels to retailers on non-Sky platforms. The conditions relating to the SD channels also set a regulated price for offers of the channels (or combinations of the channels). This decision was overturned on appeal, with the Competition Appeal Tribunal reaching a different conclusion in August 2012 as to Sky's historic behaviour on the basis that Sky acted as a willing wholesaler. That decision may itself be the subject of further appeal.
- General licence conditions in broadcasting licences. Ofcom's standard form licences for Television Licensable Content Services and Digital Television Programme Services contain a general licence condition derived from the drafting of s316 of the Communications Act. The DTT multiplex licences contain an equivalent condition, as well as some more specific conditions relating to fair and effective competition, for example in relation to the allocation of multiplex capacity.
- The EPG Code<sup>28</sup>. The EPG code applies to the provision of Electronic Programme Guides, as defined under s310 of the Communications Act. Pursuant to s310 the EPG Code regulates the prominence afforded to public service broadcasting channels on EPGs. The EPG Code also

<sup>28</sup>

<http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>.

contains requirements based on s316 which includes provisions to ensure that any agreement with broadcasters for the provision of an EPG service is made on fair, reasonable and non-discriminatory terms.

- The Cross-promotion Code<sup>29</sup>. Television broadcasters are left with remaining airtime between advertising and programmes which they use for promotions. The current code has two rules: a requirement on all television broadcasting licensees and S4C to limit the subject of cross-promotions to broadcasting-related services; and a requirement on Channels 3, 4 and 5 to maintain neutrality between digital retail TV services and digital platforms.
- The Airtime Sales Rules. The Airtime Sales Rules took effect as a fair and effective competition code issued pursuant to s316(3)(a). The last set of rules in place consisted of: the ‘withholding rule’ which required that all advertising airtime available on ITV1, Channel 4 and Channel 5 must be sold; and the ‘conditional selling rule’ applied to all broadcasters, prohibiting them from forcing advertisers and media buyers, who want to buy airtime on one channel, to purchase airtime on additional channels. Following a review, in July 2010 Ofcom issued a statement containing a decision to remove the rules with effect from 1 September 2010. In deciding to remove the rules Ofcom considered: the changing market landscape; broadcasters’ incentive to breach the rules; and the ability to deal with issues concerning conditional selling on a case-by-case basis.<sup>30</sup>

European Common Regulatory Framework (Ofcom):

- Rapture TV / BSkyB (2006). Dispute – no infringement decision (upheld on appeal). Rapture asked Ofcom to resolve a dispute under Section 185(1) of the Communications Act 2003 between Rapture and Sky concerning the charges for Electronic Programme Guide (“EPG”) services that Sky provides to Rapture. On 9 March 2007 Ofcom issued a determination under sections 188 and 190 of the Communications Act 2003 resolving this dispute finding that Sky’s charges were fair, reasonable and non-discriminatory.
- Teachers TV (EDML) / BSkyB (2005). Complaint – no infringement decision. EDML alleged a breach of Sky's obligations regarding the provision of EPG services. Ofcom completed its investigation into EDML's complaint, and concluded that Sky had complied with paragraph 15 of the EPG Code in its repositioning of Teachers' TV in Sky's EPG.
- ITV / BSkyB (2005). Complaint – withdrawn. ITV alleged a breach of Sky's obligations regarding the provision of EPG services. In light of the fact that ITV and Sky resumed negotiations, ITV withdrew its complaint and Ofcom closed the case.
- Broadcast Transmission Services market review (2005). Market review decision. Ofcom concluded its review of broadcast transmission services in April 2005. Ofcom identified markets for the provision of access to the mast and site network and antenna systems in place for providing terrestrial broadcasting transmission services, determining that Crown Castle and ntl:broadcast both held a position of Significant Market Power in their relevant geographies. SMP conditions imposed were a requirement: to provide network access on reasonable request; not to unduly discriminate in that provision of network access; to provide network access on cost orientated terms; and to publish a Reference Offer for network access.

<sup>29</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/crosspromo.pdf> .

<sup>30</sup> Ofcom’s statement can be found here:  
<http://stakeholders.ofcom.org.uk/binaries/consultations/asr/statement/statement.pdf>

## UNITED STATES

The lawsuit filed in 2011 by the Antitrust Division of the U.S. Department of Justice (Division) to block the formation of a joint venture between Comcast Corp. (“Comcast”) and General Electric Co.’s subsidiary NBC Universal Inc. (“NBCU”)<sup>1</sup> raised many of the issues that will be addressed in this roundtable. This paper summarizes the investigation, lawsuit and judicial consent decree in *Comcast/NBCU*. The Competitive Impact Statement<sup>2</sup> filed with the district court at the time of settlement describes in much greater detail the U.S. video distribution industry, the market for video distribution and competition from new business models, the anticompetitive effects of the proposed transaction, and the remedies incorporated in the final judgment issued by the court in 2011.

### 1. Comcast/NBCU

On January 18, 2011, the Division announced a settlement with Comcast and NBCU that allowed their joint venture to proceed conditioned on the parties’ agreement (1) to license programming to online competitors to Comcast’s cable TV services, (2) to subject themselves to anti-retaliation provisions, and (3) to adhere to Open Internet requirements. The Division stated that the proposed settlement would preserve new content distribution models that offered more products and greater innovation, and the potential to provide consumers access to their favorite programming on a variety of devices in a wide selection of packages.

The Division, along with five state attorneys general,<sup>3</sup> filed the civil antitrust lawsuit in U.S. District Court for the District of Columbia, to block the formation of the joint venture, alleging that the transaction would allow Comcast to limit competition from its cable, satellite, telephone and online competitors. At the same time, the Division and the five states filed a proposed consent decree reflecting the above-referenced settlement, later approved by the court, to resolve the competitive concerns in the lawsuit.

At the time of the lawsuit, Comcast, headquartered in Philadelphia, was the largest video programming distributor in the United States, with approximately 23 million video subscribers. Comcast wholly owned national cable programming networks (e.g., E! Entertainment, Golf, Style), had partial interests in other networks (e.g., MLB Network, PBS KIDS Sprout), and had controlling interests in regional sports networks. Comcast also owned digital properties such as DailyCandy.com, Fandango.com and Fancast, its online video website. In 2009, Comcast reported total revenues of \$32 billion.

GE is a global infrastructure, finance, and media company. At the time of the lawsuit, GE owned 88 percent of NBCU, a Delaware corporation, with its headquarters in New York City. NBCU was principally involved in the production, packaging and marketing of news, sports and entertainment programming. NBCU wholly owned the NBC and Telemundo broadcast networks, as well as 10 local NBC owned and operated television stations (O&Os), 16 Telemundo O&Os, and one independent Spanish

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<sup>1</sup> *United States et al. v. Comcast Corp. et al.*, 808 F. Supp. 2d 145 (D.D.C. 2011); the court filings are all available at <http://www.justice.gov/atr/cases/comcast.html>.

<sup>2</sup> Available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

<sup>3</sup> The participating states were: California, Florida, Missouri, Texas and Washington.



language television station. In addition, NBCU wholly owned national cable programming networks<sup>4</sup> and partially owned A&E Television Networks (including the Biography, History and Lifetime cable networks), The Weather Channel and ShopNBC. NBCU also owned several film studios.<sup>5</sup> In 2009, NBCU had total revenues of \$15.4 billion.

Throughout the investigation, the Division worked in close cooperation and coordination with the Federal Communications Commission (FCC) to reach a result that protected competition, allowing firms to bring new and innovative products to the marketplace, and providing consumers with more programming distribution choices. While the Division and the FCC have concurrent jurisdiction to review mergers involving the transfer of a telecommunications license, the statutory sources of their jurisdiction, standards of review, and burdens of proof differ. Under Section 301(d) of the Communications Act of 1934, the FCC reviews mergers to ensure they are in the public interest, convenience, and necessity.<sup>6</sup> Competition is an element of the FCC's analysis but not the only one. The Division, on the other hand, reviews mergers pursuant to Section 7 of the Clayton Act to determine whether the merger will result in a substantial lessening of competition in a relevant market.<sup>7</sup> The parties to a merger must convince the FCC that a merger is in the public interest, convenience, and necessity, whereas the Division bears the burden of proving to a Court that a merger violates Section 7.

On the same day that the antitrust lawsuit was filed, the FCC issued an order granting regulatory approval to the transaction under its public interest standard, subject to conditions, some of which were similar to those in the Division's settlement. The Division and FCC consulted extensively to coordinate their reviews and to create remedies that were both consistent and comprehensive.

The Division's complaint alleged that Comcast's traditional and online rivals needed access to NBCU programming, including the NBC broadcast network, to compete effectively against Comcast. The proposed joint venture would have less incentive than a stand-alone NBCU to distribute NBCU programming to Comcast's video distribution rivals, and could cause Comcast's rivals and their customers to face higher prices for that content. The Division said that the joint venture, as originally proposed, could substantially lessen competition for video programming distribution in major portions of the United States. The Division also said that the market would experience lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.

Under the settlement and the FCC order, the joint venture must make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors. In addition, the joint venture must offer an OVD broadcast, cable and film content that is similar to, or better than, the content the OVD receives from any of the joint venture's programming peers. These peers are NBC's broadcast competitors (ABC, CBS and FOX), the largest cable programmers (News Corp., Time Warner Inc., Viacom Inc. and The Walt Disney Co.), and the largest video production studios (News Corp., Sony Corporation of America, Time Warner Inc., Viacom Inc. and The Walt Disney Co.).

In the event of a licensing dispute between the joint venture and an OVD, the Division may seek court enforcement of the settlement or permit, in its sole discretion, the aggrieved OVD to pursue a commercial arbitration procedure established under the settlement. The FCC order also required the joint venture to license content to OVDs on reasonable terms and included an arbitration mechanism for resolving disputes. In contrast to the consent decree's arbitration process, the FCC process contains a right of appeal. If timely arbitration is available for resolution of disputes under the FCC order, the Division ordinarily will defer to

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<sup>4</sup> Bravo, Chiller, CNBC, CNBC World, MSNBC, mun2, Oxygen, Sleuth, SyFy and USA Network

<sup>5</sup> Universal Pictures, Focus Films and Universal Studios

<sup>6</sup> 47 U.S.C. § 310(d).

<sup>7</sup> 15 U.S.C. § 18.

the FCC's arbitration process to resolve such disputes. The FCC order also allows Comcast's traditional competitors, such as satellite and telephone companies, to invoke arbitration at the FCC to resolve program access and retransmission consent disputes. The FCC has experience with arbitration involving programming disputes between traditional MVPDs, making it unnecessary for the Division to impose similar relief. OVDs are nascent competitors, however, and consistent with the Division's competition law mandate, the Division reserved the right to offer an alternative to the FCC's arbitration process to advance the competitive objectives of the settlement.

The settlement included other relief aimed at ensuring that Comcast cannot evade the provisions designed to protect competition. For example:

- Comcast may not retaliate against any broadcast network (or affiliate), cable programmer, production studio or content licensee for licensing content to a competing cable, satellite or telephone company or OVD, or for raising concerns to the Division or the FCC;
- Comcast must relinquish its management rights in Hulu, an OVD. Without such a remedy, Comcast could, through its seats on Hulu's board of directors, interfere with the management of Hulu, and, in particular, the development of products that compete with Comcast's video service. Comcast also must continue to make available to Hulu NBCU content that is comparable to or better than the programming content Hulu obtains from its other media owners, Disney and News Corp;
- Comcast is prohibited from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer. Additionally, Comcast is required to give other firms' content equal treatment under any of its broadband offerings that involve caps, tiers, metering for consumption, or other usage-based pricing. Comcast must also maintain the high-speed Internet service it offers to its customers by continuing to offer download speeds of at least 12 megabits per second in markets where it has upgraded its broadband network; and
- Comcast may not, with certain narrowly defined exceptions, require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.

## 2. Conclusion

*Comcast/NBCU* is a good example of a complex transaction involving vertical theories where the Division concluded that the transaction, as proposed, would give rise to competitive harm. Although the Division was prepared to litigate the case, the parties agreed to conditions that addressed the Division's concerns while allowing the potential for procompetitive benefits of the deal to be realized. Decrees in these cases can include a variety of requirements, such as licensing and firewall provisions, reporting obligations, and the creation of complaint mechanisms, to name a few. These types of decrees are commonly referred to as "behavioral" or "conduct" remedies. The goal in these settlements is to address the competitive concerns without limiting the efficiencies of the proposed transaction.

As originally proposed, the joint venture between NBCU and Comcast would have allowed Comcast, the largest cable company in the United States, to limit competition by either withholding or raising the price of NBCU content and effectively stifling new competition in the online video market. The parties agreed to a consent decree that included a variety of conduct provisions that preserved existing and potential competition in the nascent online video market but without regulating how the market should work.<sup>8</sup>

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<sup>8</sup> The Division hosted a Symposium in November 2007 focusing on competition among providers of video programming delivery, local telephone, and broadband services. *Voice, Video and Broadband: the Changing Landscape and its Impact on Consumers* (<http://www.justice.gov/atr/public/reports/239284.pdf>) is the report summarizing the views of industry executives, economists, analysts, and local government officials who participated in the Symposium. That report also addresses many of the questions and points for discussion listed in the Secretariat's Call for Country Contributions.



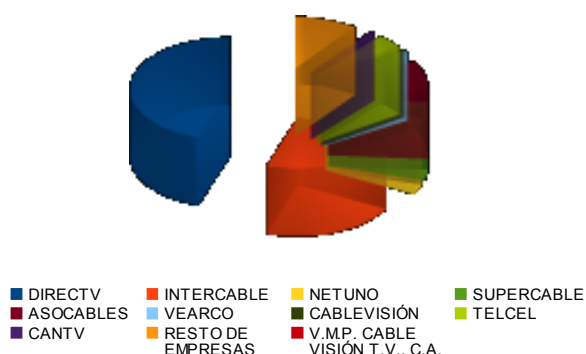
**VENEZUELA\***

-- Version française --

**1. Quel est l'état de la concurrence dans le secteur de la radiodiffusion de télévision relevant de sa compétence?**

Au Venezuela du secteur des télécommunications est réglementée par la Commission nationale des télécommunications (CONATEL). Le secteur de la radiodiffusion télévision inclut le signal ouvert et diffusion par abonnement. Dans le cas de la diffusion par la télévision par abonnement, il a 189 compagnies, dont 182 sont autorisés par CONATEL pour fournir le service au niveau régional. 19 Agents économiques fonctionnent dans les chaînes de télévision hertziennes. Maintenant bien du point de vue de la concurrence, de la diffusion par abonnement 2 télévisions maintient un 67,22 % part du marché, basée sur le nombre d'abonnés. Une telle situation est reflétée ci-dessous :

**Participation des plus importantes sociétés d'abonnement de radiodiffusion de télévision en tenant compte du nombre d'abonnés (I trim 2012)**



Selon le calcul de l'indice de concentration Indice de Herfindahl - Hirschman (HHI) appliquées dans le domaine de la radiodiffusion de télévision par abonnement, en témoigne un marché très concentré, où effectivement une réduction du nombre des entreprises détiennent la plupart des marchés.

**Cadena de valor de la radiodifusión de televisión**

Cadena de creación			Cadena de distribución		
Producción contenido	Incorporación de contenido	Packaging de contenido	Distribución de contenido	Suministro de Plataforma	Difusión final

\* Contribution de l'Inspection Générale pour la Promotion et la Protection de la Libre Concurrence (Antitrust – Venezuela).

**2. Consommateurs ont-ils la possibilité réelle de choix entre les plateformes et les fournisseurs de services autorisés?**

En effet aux consommateurs peuvent choisir les fournisseurs de services de télévision de votre choix selon les prix et la qualité du service, sous ses diverses formes, telles que: UHF, VHF, communauté broadcast et diffusion abonnement.

**3. Y a-t-il des preuves de prix excessifs (par exemple, le prix de la télévision par abonnement de paiement ou des frais facturés aux annonceurs) ?**

En ce qui concerne les prix et tarifs que des fournisseurs de services devraient être régies par les dispositions de la réforme de la loi organique des télécommunications (OTA), publiées dans l'officiel Gazette n° 39.610 en date 7 février 2011, en ce sens, fixer leurs prix sous la supervision de l'organe directeur.

**4. Il y a preuve de mauvaise qualité, mauvais service et / ou le manque d'innovation et d'investissement?**

Une fois que les compagnies sont activés pour fournir des services de télécommunications, elles sont sous réserve de la conformité des paramètres de qualité, qui, dans le cas du service de radiodiffusion d'abonnement est contenue dans une ordonnance administrative, publiées dans la Gazette extraordinaire no 5.831 jour 20/12/2006

**5. Il y a des obstacles importants à l'entrée et expansion (et sortie) ? Quelle est la nature de ces obstacles réglementaires (p. ex., les effets de réseau) ?**

Considérant que, le secteur des télécommunications se caractérise généralement par nécessitent des investissements importants dans l'infrastructure, qui sont projetées pour récupérer à moyen et à long terme, l'analyse faite par un fournisseur potentiel de services de télécommunication doivent tenir compte en plus de l'investissement dans les infrastructures, le respect des exigences prévues par la législation spéciale pour les télécommunications, vu queles entreprises intéressées à fournir un service de télécommunication, doit en faire la demande à l'organisme de réglementation CONATEL et répondre aux exigences économiques et des paramètres techniques et minimum légal pour la fourniture et la qualité du service.

Certains obstacles :

- Accès aux sources de financement.
- Investissement pour l'installation de l'infrastructure permettant la prestation de services de télécommunications, dans le périmètre de rayonnement de.
- Investissement dans la modernisation technologique et le déploiement de l'infrastructure pour obtenir une couverture plus large, ou offrir des services supplémentaires.
- Les coûts de transaction liés à la négociation avec le reste des opérateurs activés, pour l'établissement des coûts d'interconnexion et de co-implantation associées à l'adaptation de l'espace physique.
- Dispositions réglementaires visées pour traiter l'autorisation permettant d'obtenir le correspondant administratif permettent, conformément à l'article 16 de la loi organique des télécommunications. En outre, il est considéré comme le respect des obligations énoncées dans les conditions générales des allotissements générale administrative, pour tous les opérateurs qui ont tout ou partie des attributs figurant dans le général qualités.

**6. Considérez-vous que le cadre juridique et réglementaire actuel est efficace dans le soutien d'une solide politique de la concurrence pour le secteur de la radiodiffusion?**

Au Venezuela ont l'autorité de régulation nationale (ARN), en plus de la CONATEL, qui est responsable de la surveillance, évaluation et diffusion le comportement des variables du marché des statistiques et des télécommunications. En outre, elle contribue à la promotion et la protection de la libre concurrence. (Chapitre II, article 37, paragraphe 21 et 22 de la Loi sur les télécommunications). Vous êtes également avec le Surintendance pour la promotion et la protection de la libre concurrence (antitrust), qui rend des avis contraignants sur les concentrations économiques du secteur des télécommunications.

Il convient d'ajouter, qu'à ce jour cette autorité nationale de concurrence n'a pas passé toute affaire fournisseurs connexes qui sont des entreprises intégrées verticalement.

**7. Ce que vous considérez que sont le plus importants défis actuels et l'avenir de la concurrence dans la politique de radiodiffusion télévisuelle ?**

En ce qui concerne les obstacles à l'entrée d'un concurrent désigné sont en réponse N ° 1, en ce qui concerne les nouvelles technologies et les défis à l'avenir dans le secteur des télécommunications, télévision spécifiquement de l'innovation technologique est un facteur déterminant, les développements continus obliger en même temps, les entreprises à effectuer des investissements, afin de moderniser les réseaux et les infrastructures qui appuient la prestation de services. Dans le passé dix 10 ans de la télécommunications sector, a augmenté et est plus dynamique, un processus d'ouverture a été donné à promouvoir l'égalité des conditions et des possibilités sur le marché vénézuélien pour toutes les entreprises qui veulent tremper dans le secteur concerné. Exemple : La politique de notre gouvernement fait la promotion des projets de télévision numérique, ainsi que des sociétés transnationales qui ont fait des investissements importants pour le fonctionnement du réseau de télécommunications, plus particulièrement la fibre optique.

En revanche, antitrust - Venezuela considéré qu'il pourrait faire face à des problèmes futurs dans le domaine de la concurrence dans le secteur en vertu de l'analyse comme étant très concentré, selon les revenus, bien qu'il existe un grand nombre d'opérateurs. Cependant, la communauté ouverte TV ont été créés.

**8. Vous avez votre concours Office a réalisé une étude pertinente au marché de la radiodiffusion et de télévision?**

Cette autorité de la concurrence a fait des études de marchés pertinents dans la radiodiffusion télévisuelle, à savoir :

- Resolution not SPPLC / 014-2001, dated March 27, 2001, Exp. SPPLC/0051-2000, parties : RCTV, C.A. et PROMOFILM LATINOAMERICANA C.A., par la Commission sur les pratiques déloyales visés à la rubrique de l'article 17 de la loi pour promouvoir et protéger l'exercice de la libre concurrence.
- Résolution N° SPPLC/063-2001, datée du décembre 18, 2001, pièces : société R.C.T.V. C.A (RCTV), Promofilm, S.A mercantile société vs le Corporación Venezolana de televisión (VENEVISION), TI a été déterminé que TI a fait n'est pas err en pratique restrictive de libre concurrence.

- Résolution non SPPLC/0010-2008, en date datée 25 juin 2008, les parties : CORPORACIÓN TELEVEN, C.A., contre la mesure d'AGB PANAMERICANA DE VENEZUELA société mercantile S.A., pour la réalisation de le criminel de pratique interdite, à l'article 8 de la loi pour promouvoir et protéger l'exercice de la libre concurrence concernant la manipulation des facteurs de diffusion de l'information.
- Avis N °SPPLC/VF-0045-2012, Date 7 Décembre 2012, concentrations économiques soulevées par la société mercantile V.M.P. CABLEVISION TV, C.A., grâce auquel les citoyens Jose Ramon Rodriguez de Vegas, Alexis Enrique Martínez et Carlos Alberto Silva de Páez, vendu toutes ses actions dans le citoyen de la société Maigualida Chiossone López, agissant conformément aux dispositions de la disposition Cinquième finale de la Loi de réforme de la loi organique des télécommunications.

## **9. Sa compétence ont une procédure claire pour les licences de spectre?**

Notre compétence a une procédure transparente pour les licences de spectre. Conformément à la décision administrative délivrée par le National Telecommunications Commission N ° 39.832 date du 2011-12-30, seront soumis à l'offre publique de certaines parties du spectre radioélectrique disponible. Dans les cas où ces parties sont destinées partiellement ou complètement avec le gouvernement à l'utilisation pour les besoins de communication des organismes publics, des concessions sont accordées directement par CONATEL, a le pouvoir d'assigner, de diriger et de contrôler les portions du spectre.

Eh bien, les procédures et conditions de l'appel d'offres pour la sélection du concessionnaire sont maintenant établies à l'article N ° 86 de la Loi sur les télécommunications. En ce sens, les offres des portions du spectre vont être engagées d'Office par CONATEL, dans cette lettre établit les conditions pour mener à bien le processus, de spécifier les bandes de fréquences à attribuer, le prix de base estimé, les exigences techniques, économiques et juridiques ainsi que les critères qui seront utilisés pour la sélection. Toute personne souhaitant être les concessionnaires du spectre peuvent présenter une lettre de la CONATEL, qui expriment votre proposition et indiquer la partie du spectre a demandé, l'usage qui en sera le même et les spécifications techniques nécessaires. Les règles et les procédures décrites permettent l'affectation efficace et efficace du spectre radioélectrique pour les radiodiffuseurs et les fournisseurs de services.

## **10. Quelle a été votre expérience dans l'application de la Loi de la concurrence en ce qui concerne la télévision et de radiodiffusion ? ÉTUDES DE CAS :**

### **10.1 Cartel**

Du 26 novembre 2004, SVS a donné ouverture à une pénalité de procédure administrative contre la télévision entreprises RCTV et Venevision, pour la réalisation prétendument les accords et les pratiques d'exclusion ou concertée des pratiques tant pour définir comment les tarifs et les conditions de qualité marchande, de diviser le marché, tous sont des pratiques interdites en chiffres des articles 6 et 10 1 ° et 3 ° de la loi pour promouvoir et protéger l'exercice de la libre concurrence.

En effet, une fois analysé les documents présentés, la Surintendance considéré cette capacité conjointe de vue qui avait à cette époque les deux télévision de plantes (la RCTV et Venevision), afin d'offrir aux annonceurs offres préférentielles pour diriger votre investissement dans des espaces publicitaires, restreignant l'implication effective des autres chaînes de télévision dans la commercialisation d'espace publicitaire sur les émissions de télévision, créant un obstacle artificiel qui a donné la RCTV et Venevision à un impact sur le marché et la possibilité de générer distorsions dans le même, donc se concentrer encore

plus ou maintenir sa position de leader sur ce marché. Pour la réalisation des pratiques susmentionnées, les deux sociétés ont été sanctionnées par impuissant.

### **10.2 Manipulation de facteurs de production**

À compter du 23 mai 2007, la télévision CORPORACIÓN TELEVEN, déposé l'avis de plainte contre la télévision de la société public mesure mesure PANAMERICANA AGB DE VENEZUELA S.A., par la prétendue distorsion de l'information et les données relies aux niveaux de l'auditoire à la télévision en faveur de certaines plantes de la télévision.

SVS déterminé en juin 2008, juridiques et économiques de la preuve présentée, cette société mercantile mesure PANAMERICANA AGB DE VENEZUELA S.A., sanctionné appliqué les comportements afin de créer un mécanisme permettant de déformer ou de manipuler les facteurs de distribution des informations, pour obtenir un échantillon non consona avec la réalité, c'est pourquoi il est sanctionné pour être impliqué dans le criminel de pratique anticoncurrentielle dans l'article 8 ° de la loi pour promouvoir et protéger la libre concurrence, concernant les facteurs de répartition du traitement des renseignements.

### **10.3 Collage**

Date 19 juin 2012, l'organisme de réglementation du secteur des télécommunications au Venezuela, demandé avis à cet organe de surveillance, en ce qui concerne les liens présumés entre plusieurs sociétés qui sont autorisées à exploiter des fréquences radio différentes dans la même région géographique du pays (José HIGUERA MIRANDA Y ASOCIADOS C.A. /ALEJANDRO HIGUERA CARDENAS Y ASOCIADOS, C.A. ) MIRANDA HIGUERA, C.A./COL 105.9 FM C.A. Organisation et Fondation HIGUERA JOSE MIRANDA ).

Dans ce cas, une fois analysé les documents soumis, a conclu que, compte tenu de la structure de son actionnariat des sociétés FUNDACIÓN JOSÉ ALEJANDRO HIGUERA CARDENAS Y ASOCIADOS, C.A., ils sont des personnes morales liées et forment une unité économique, conformément à l'article 15 de la loi pour promouvoir et protéger l'exercice de la libre concurrence. Pour les raisons susmentionnées, le régulateur du secteur (CONATEL), avait suffisamment d'éléments pour envisager une nouvelle subvention de permis administrative et octroi de radiodiffusion pourrait créer une concentration nocive pour le secteur à l'étude.

Il a essayé tous les cas (s) dans lequel ces deux autorités ont travaillé là-dessus ou est censé prendre des décisions incompatibles ? Vous pouvez compter sur un mécanisme d'aborder la question de la coopération entre les ARN et l'autorité nationale de concurrence ? À ce jour aucun cas n'a pris en parallèles et pas envisagées des décisions incompatibles avec une autre autorité de la concurrence. En revanche, antitrust - Venezuela en 2000, ont signé l'accord de coopération avec la CONATEL, aux fins de traiter les cas de la concurrence dans les télécommunications secteur et la Loi sur les télécommunications établit Conatel devrait demander la liaison antitrust avis sur la demande de la concentration économique par les entreprises de télécommunications.





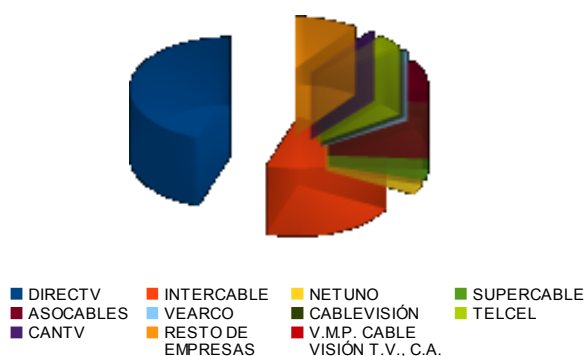
VENEZUELA\*

-- English version --

1. What is the state of competition in the television broadcasting sector in your jurisdiction?

The telecommunications sector in Venezuela is regulated by the National Telecommunications Commission (CONATEL). The television broadcasting sector includes open signal and subscription broadcasting. There are 189 companies in the subscription TV segment, 182 of them authorised by CONATEL to provide the service at regional level. 19 economic agents operate broadcast TV channels. From a competition standpoint, two subscription television channels have a market share of 67.22%, based on the number of subscribers. The situation is reflected in the chart below:

Share of the main subscription TV broadcasting companies by number of subscribers (Q1 2012)



The Herfindahl-Hirschmann concentration index (HHI) applied to the subscription TV sector indicates a highly concentrated market dominated by a small number of firms.

Television broadcasting value chain

Creation chain			Distribution chain		
Production of content	Integration of content	Packaging of content	Distribution of content	Platform provision	Final broadcasting

\* Contribution from the General Inspectorate for the Promotion and Protection of Free Competition (Antitrust – Venezuela).

**2. Do consumers have real choice among authorised platforms and service providers?**

Consumers can pick the television services supplier of their choice on criteria of price and service quality, in various forms such as UHF, VHF, community TV and subscription TV.

**3. Is there any evidence of excessive prices (for example subscription prices of pay-TV or fees charged to advertisers)?**

The prices charged by service providers are governed by the provisions of the Organic Law on Telecommunications, published in the Official Gazette no. 39.610 of 7 February 2011, and as such set their prices under the supervision of the regulator.

**4. Is there evidence of poor quality, poor service, and/or lack of innovation and investment?**

Once companies start providing telecommunications services, they must comply with quality criteria which, in the case of subscription broadcasting, are contained in an administrative order published in the Extraordinary Gazette no. 5.831 of 21 December 2006.

**5. Are there significant barriers to entry and expansion (and exit)? What is the nature of these regulatory barriers (e.g. network effects)?**

Given that the telecommunications business generally requires substantial investment in infrastructure for a medium- to long-term return, the calculation made by a potential telecommunications service provider must take account not only of investment in infrastructure but also compliance with the specific requirements of telecommunications legislation, especially as companies interested in providing a telecommunications service must apply to the regulator, CONATEL, and fulfil both economic criteria and statutory minimum technical requirements for service provision and service quality.

Certain barriers:

- access to sources of financing,
- investment in infrastructure to enable the provision of telecommunications services within a given area,
- investment in technological modernisation and the rollout of infrastructure to extend coverage or offer additional services,
- transaction costs linked to negotiations with other operators to determine interconnection and joint operation costs associated with adaptation of the physical space,
- regulatory provisions to process the authorisation needed to obtain the corresponding administrative license under Article 16 of the Organic Law on Telecommunications. All operators who have all or some of the attributes listed under "general qualities" are considered to comply with the requirements set forth in the general terms for administrative licenses.

**6. Do you consider the existing legal and regulatory framework to be effective in supporting a robust competition policy for the broadcasting sector?**

Venezuela has a national regulatory authority (NRA) in addition to CONATEL, which is responsible for monitoring, evaluating and reporting the behaviour of statistical variables for the telecommunications market. It also helps to promote and protect free competition (Chapter II, Article 37, paras. 21 and 22 of

the Telecommunications Act). There is also the General Inspectorate for the Promotion and Protection of Free Competition (Antitrust), which issues binding opinions on economic concentrations in the telecommunications sector.

To date, the national competition authority has not had to consider any case concerning vertically-integrated providers.

**7. What do you consider to be the most significant current and future challenges for competition policy in television broadcasting?**

The question of barriers to entry for an authorised competitor has been addressed above. Concerning new technologies and future challenges in the telecommunications sector, technological innovation in particular is a key factor, since constant advances mean that companies have to invest in order to modernise networks and the infrastructure on which service delivery depends. The telecommunications sector has expanded over the last ten years and is more dynamic, the industry has been opened up in order to ensure a level playing-field and offer possibilities on the Venezuelan market for any company that wishes to enter the sector. For example, our government promotes digital television projects and transnational companies that have invested substantially in telecommunications network operation, especially optical fibre.

However, Antitrust – Venezuela believes that competition-related problems could arise in the sector in future, since it is highly concentrated in revenue terms even though there are many operators. However, open community TV organisations have been created.

**8. Has your competition authority conducted any market studies relevant to the television and broadcasting sector?**

The competition authority has conducted relevant market studies in the television and broadcasting sector, as follows:

- Ruling no. SPPLC/014-2001 of 27 March 2001, Exp. SPPLC/0051-2000, parties: RCTV C.A. and PROMOFILM LATINOAMERICANA C.A., by the Unfair Practices Commission referred to at Article 17 of the Act to promote and protect free competition.
- Ruling no. SPPLC/063-2001 of 18 December 2001, parties: RCTV C.A., Promofilm S.A v. Corporación Venezolana de Television (Venevision). It was found not to have engaged in anti-competitive practices.
- Ruling no. SPPLC/0010-2008 of 25 June 2008, parties: CORPORACIÓN TELEVEN, C.A., v. AGB PANAMERICANA DE VENEZUELA S.A., for practices prohibited under Article 8 of the Act to promote and protect free competition, concerning the manipulation of factors for the distribution of information.
- Opinion no. SPPLC/VF-0045-2012 of 7 December 2012, concerning economic concentrations raised by V.M.P. CABLEVISION TV, C.A., whereby citizens Jose Ramon Rodriguez de Vegas, Alexis Enrique Martínez and Carlos Alberto Silva de Páez sold all their shares in the company of citizen Maigualida Chiossone López, acting in compliance with the fifth and final provision of the Act reforming the Organic Law on Telecommunications.

**9. Does your jurisdiction have in place a transparent procedure for granting spectrum licenses?**

Our jurisdiction has a transparent procedure for granting spectrum licenses. In accordance with administrative decision no. 39.832 of 30 December 2011 issued by the National Telecommunications Commission, certain parts of the available radioelectric spectrum will be auctioned. Should they be partially or entirely earmarked by the government for the communication needs of public bodies, licenses will be granted directly by CONATEL, which is empowered to allocate, direct and control portions of the spectrum.

Tender procedures and terms for the selection of licensees are set forth at Article 86 of the Telecommunications Act. CONATEL will elicit bids for portions of the spectrum in a letter setting out the conditions for completing the process and specifying the frequency bands to be allocated, the estimated starting price, the technical, economic and legal requirements and the selection criteria. Any person wishing to acquire a license may submit a bid letter to CONATEL, setting out their proposal and stating the part of the spectrum requested, the use that will be made of it and the necessary technical specifications. The rules and procedures described allow for the efficient allocation of the radioelectric spectrum for broadcasters and service providers.

**10. What has been your relevant experience in competition law enforcement relating to television and broadcasting? Case studies:**

**10.1 *Cartel***

On 26 November 2004, SVS initiated administrative proceedings against RCTV and Venevision, alleging agreements and exclusive and concerted practices to define prices and quality conditions and to share out the market, all of these being prohibited practices under Articles 6, 10.1 and 10.3 of the law to promote and protect free competition.

After examining the evidence, the General Inspectorate found that RCTV and Venevision had acted in concert in order to offer advertisers preferential prices for advertising space, thus restricting the involvement of other TV channels in the marketing of advertising space during TV programmes, creating an artificial barrier which gave RCTV and Venevision market impact and the possibility of distorting the market, and hence of increasing concentration in order to maintain their leading position. The two companies were fined for the above-mentioned practices.

**10.2 *Manipulation of factors of production***

On 23 May 2007, CORPORACIÓN TELEVEN filed a complaint against the media research company PANAMERICANA AGB DE VENEZUELA S.A., alleging distortion of information and audience rating data in favour of certain TV channels.

In June 2008, the antitrust authority found on the basis of the legal and economic evidence that Panamericana had behaved in such a way as to create a mechanism that enabled it to distort or manipulate factors for the distribution of information in order to obtain a sample inconsistent with the reality. It was therefore fined for involvement in anti-competitive practices under Article 8 of the law to promote and protect free competition, concerning factors relating to the processing of information.

**10.3 *Concentration***

On 19 June 2012, Venezuela's telecommunications regulator was asked for an opinion on the presumed links between a number of companies authorised to use different radio frequencies in the same

region of the country (José HIGUERA MIRANDA Y ASOCIADOS C.A. /ALEJANDRO HIGUERA CARDENAS Y ASOCIADOS, C.A. MIRANDA HIGUERA, C.A./COL 105.9 FM C.A. Organisation and Foundation HIGUERA JOSE MIRANDA ).

After examination, the regulator concluded, in view of their share ownership structure, that the companies FUNDACIÓN JOSÉ ALEJANDRO HIGUERA CARDENAS Y ASOCIADOS, C.A. were related entities forming an economic unit within the meaning of Article 15 of the law to protect and promote free competition. For the above-mentioned reasons, the regulator, CONATEL, had sufficient evidence to suppose that granting a new administrative license and broadcasting license could result in concentration harmful to the sector under consideration.

Have you dealt with any case(s) where these two authorities reached or planned to reach inconsistent decisions? Do you have in place any mechanism addressing the issue of cooperation between NCA and NRA? There has not been any case to date of parallel jurisdiction or of two authorities reaching or planning to reach inconsistent decisions. However, Antitrust – Venezuela concluded a cooperation agreement with CONATEL in 2000 for the purposes of treating competition-related cases in the telecommunications sector, and under the Telecommunications Act CONATEL should seek the competition authority's opinion on planned business concentrations of telecommunications undertakings.



## ZAMBIA\*

### 1. The state of competition in the television broadcasting sector in Zambia: Introduction

Broadcasting could be defined in numerous ways. According to Zambia's the Independent Broadcasting Authority Act No 17 of 2002, "broadcasting" means the distribution of television or radio, by means of terrestrial or **satellite means**. Zambia's broadcasting industry dates back to the 1940's when the British colonial authorities initiated an African radio service. Twenty years later, in 1961, television arrived in the country, courtesy of the privately owned London Rhodesia Company. However, as soon as the country gained its independence, the Zambian government purchased the television station, and it became part of the Zambia Broadcasting Services (ZBS), the forerunner to the Zambia National Broadcasting Corporation. From then on, it became an integral part of the development of Zambian society.

No other broadcasting service was allowed except ZBS as Zambia was between 1972 and 1991 a One Party Participatory Democracy following the country's decision to do away with multi-party politics in 1972. In 1991, Zambia reverted to multiparty politics and media de-regulation became an important offshoot of the democratization process. Since the country's reversion to democratization and de-regulation of the media sector, the country has seen the development of its broadcasting industry, both radio and television.

Since then, so much has changed technologically to quicken the development of the sector. With this growth, a whole array of competition issues are more likely to emerge particularly in a concentrated environment. These may range from concentrated media ownership, limited access telecommunications platforms and distribution systems, abuse of dominance and other restrictive vertical and horizontal arrangements.

This paper focuses on the application of competition policy and law to Zambia's broadcasting industry, particularly Television, and shares some of the country experiences, through the Competition and Consumer Protection Commission (CCPC) experiences in the enforcement of competition law in the industry.

### 2. State of competition in Zambia's television broadcasting sector

The Zambian broadcasting sector was liberalized in 1993 following the enacting of the Zambia National Broadcasting Corporation (ZNBC) Licensing Regulations and the Telecommunications Act in 1994. This liberalization led to the introduction of more broadcasting stations. Prior to this, only ZNBC radio and Television were allowed to provide broadcasting services to citizens.

Since the liberalization of the sector and at the time of compiling this report, there was a combined total of fifty nine (**59**) fully registered radio and television stations countrywide with full operating

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\* Contribution submitted by Mr. Brian M. Lingela, Director-Consumer & Education, and Ms. Liya B. Tembo, Director- Legal & Enforcement, Competition & Consumer Protection Commission



licenses. This comprises 17 community radio stations, 15 religious radio stations and 27 commercial radio stations. At least 8 free to air TV stations exist.

Currently, there is limited competition in Zambia's TV broadcasting sector. There are eight (8) free to air TV stations and 2 pay TV stations. The free-to-air TV stations include Zambia National Broadcasting Corporation (ZNBC) TV, a government owned Television network with two channels, MUVI TV, private commercial television station which is free to air in the Capital, Lusaka but paid for through decoder to the rest of the country; MOBI TV, a Lusaka based private commercial station, CB-TV a Ndola based private commercial station with limited reach, Central Broadcasting Company (CBC) a private commercial station with limited reach to Lusaka. Others are Trinity Broadcasting Network (TBN) a private station focusing mostly on religious programming. North-West TV in Solwezi in North-West Zambia and Chipata Television in Zambia's eastern province. The latter two are new stations currently on test transmission permit pending final licensing by the Ministry of Information and Broadcasting Services (MIBS). Of these stations, ZNBC TV continues to enjoy monopoly status particularly in the provision of free-to-air television services in Zambia. This is because the broadcaster is presently the only one with reach to most parts of the country including rural areas while the rest of the players broadcast to within a radius of 50kms. ZNBC is the biggest and dominant player, followed by MUVI TV and then the other stations mentioned earlier.

The two pay TV stations providing services via digital satellite include Multichoice Zambia, which is a joint venture between Multichoice Africa and Zambia National Broadcasting Corporation (ZNBC) in which ZNBC has a 49% shareholding while Multichoice Africa has 51% shareholding therein, and My TV. MUVI Television also provides a pay TV service to rural consumers. Multichoice Zambia has an estimated subscriber base of 69,000 subscribers representing a market share of 90% compared to My TV with 6000 and MUVI TV 2000. Since Multichoice has a market share of over 90% in the Pay TV product market, it would be considered a dominant firm<sup>1</sup>.

Although ZNBC TV has been unpopular especially with regard to the provision of balanced news and information in the past<sup>2</sup>, it continues to be relied on by the majority of the population particularly those in rural areas that cannot afford alternative sources of information some of which are considered elitist in nature such as Pay TV. However, it is important to note that in remote areas where terrestrial TV signals do not reach, consumers there rely on the Pay TV DSTV which is powered by Multichoice Zambia using solar energy. This platform carries the ZNBC TV channel and such consumers are abreast with what is happening in the country despite being in remote areas. The many channels that this pay TV provider offers is also an important alternative to ZNBC, MUVI, MOBI or any other free-to-air- TV in the country. Most consumers, particularly the relatively well to do emerging middle class can now afford subscription to pay TV channels. Monthly subscriptions for DSTV can be as low as USD 12<sup>3</sup> and consumers can thus have access to not only ZNBC TV but other international news, information and entertainment channels.

### **3. Constraints on competition in the televisions broadcasting sector in Zambia**

There are a number of constraints on competition in the Television broadcasting sector in the country that are enunciated in this section of the paper. However, most importantly, ZNBC is dominant in the

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<sup>1</sup> Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, Case File No:CCPC/RBP 003, July 2011

<sup>2</sup> Especially during the 2011 Presidential, Parliamentary and Local Government elections which ushered in new Republican President His Excellency Mr. Michael Chilufya Sata.

<sup>3</sup> Access Bouquet, the low end DSTV product

distribution of its content because it is the only TV station with infrastructure throughout the country to deliver its programmes.

### **3.1 Consumer choice**

Consumer choice is an important factor to consider when analyzing competitiveness of a sector. In the television broadcasting sector, ordinary Zambians in urban and rural areas depend mostly on ZNBC TV for their news and information needs when it comes to Television. This is in view of its dominance in the infrastructure as it has a wide national infrastructure available in every district except very remote outpost some of whose few consumers may rely on pay TV. Despite the emergence of Pay TV services like Multichoice's DSTV, MUVI Television and My-TV, pay TV has made little impact especially in rural areas and to this extent, people still rely on ZNBC TV, the dominant player.

### **3.2 Quality of service, innovation and investment in television broadcasting sector**

Issues of Quality service, innovation and investment by ZNBC TV would appear to have been improving especially its TV2 Channel, which mostly broadcasts business and entertainment programming with reach to few areas only although from midnight until the following morning, its programmes are broadcast using the ZNBC main TV channel across the country. Prior to the 2011 Presidential and Parliamentary elections, ZNBC TV was perceived highly bias in its coverage of news and information especially during elections<sup>4</sup>. On the other hand, other alternative TV stations such as MUVI TV were considered to provide balanced news and information and appeared to enjoy good audiences.

There has also been some innovation particularly with MUVI Television which has given a competitive edge over ZNBC TV especially on news and other entertainment programmes. MUVI TV appears to have also invested in equipment as they are able to broadcast remotely from any part of the country. This gives them effective competition against the main broadcaster, ZNBC.

There is presently also a new phenomenon of radio stations operating via the internet broadcasting to Zambia and other countries. Among these is CrossFire blogtalkradio, a radio talk show hosted in the United Kingdom by two Zambians which broadcasts programmes about Zambia every Tuesday evening and Saturday morning<sup>5</sup>. Radio stations such as this, as Djoktoe notes<sup>6</sup>, "*raises questions about the changing face of radio broadcasting in the light of government's attempt to restrict frequencies and the reach of FM stations in the country. It also raises pertinent questions about the freedom of expression, regulation of broadcasters operating outside the jurisdiction of the Zambia Information and Communication Technology Authority (ZICTA) but reaching listeners within Zambia and about the future of radio broadcasting in the age of internet-based broadcasting*". This broadcast is said to be hosted by two people who are in different cities of the United Kingdom 400 kilometers apart using Skype and other

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<sup>4</sup> Report of the Study into the Zambia National Broadcasting Corporation (ZNBC) News Coverage During the 2006 Local Government, Parliamentary and Presidential Elections- August 2006. First published on 26<sup>th</sup> April 2011 on [http://issuu.com/misa\\_zambia\\_publications/docs/zNBC-news-monitoring-report-august-2006](http://issuu.com/misa_zambia_publications/docs/zNBC-news-monitoring-report-august-2006). Jointly researched and authored By Brian M. Lingela and Fidelis H. Muzyamba and similarly in Report of the Commonwealth Observer Group, Zambia General Elections, 20<sup>th</sup> September 2011, Commonwealth Secretariat, Page 21.

<sup>5</sup> <http://www.crossfireblogradio.com/> retrieved on 7<sup>th</sup> January 2012.

<sup>6</sup> Djokotoe, E; State of the media in Zambia 1 July to 30 September 2012 report compiled for Media Institute of Southern Africa (MISA) Zambia.

new media technologies to communicate and co-ordinate among themselves as well as broadcast to listeners in Zambia and others in far-flung places like Russia and New Zealand.<sup>7</sup>

It would appear that the sector is slowly opening up with at least eight (8) more applications for Television licenses pending before the Ministry of Information and Broadcasting Services. It would also appear that the sector will continue to be even more concentrated as more channels are made available through the digital migration process currently underway. However, ZNBC is likely to have much more access to viewership in view of their dominant position as a national infrastructure that allows them to broadcast to all parts of the country compared to other operators that are likely to be restricted. It remains to be seen what regulations the IBA will put in place in this regard.

With only 3 Free-to Air and 1 Pay TV Station as at 2005, one would hold the view that the Television sector appeared to have been slow in terms of growth). Huge investment costs could be attributable to the slow growth. Despite the granting of “construction permits<sup>8</sup>” by the Ministry as at 2002, for example, MOBI TV, CBS TV, and Telecare still had not began operations by 2005. To this effect, ZNBC TV continued to dominate the free-to air-TV market.

For other remaining stations, they have continued to lack innovation in their programming. Their inability to expand due to restrictions also continue to be uncompetitive compared to their players like ZNBC and MUVI TV.

### **3.3 Barriers to entry and expansion**

The OECD Glossary of Statistical Terms further provides insight into what entry barriers are and defines barriers as factors which prevent or deter entry of new firms into an industry even when incumbent firms are earning excess or monopolistic profits. Thus, a barrier to entry is a rent that is derived from incumbency or a cost of producing which must be borne by a firm, which seeks to enter an industry but is not borne by firms already in the industry.

With regard to entry and expansion barriers, there are a few that are regulatory in nature. Since time immemorial, the broadcasting sector in Zambia has been regulated by the Ministry of Information and Broadcasting Services (MIBS). Up until 2002 before the Independent Broadcasting Authority (IBA) Act No. 17 of 2002 was enacted, there were perceived concerns regarding the regulation of the sector. Where radio or TV licenses were given, their license conditions provided for short broadcasting radius. For a long time, for example, most radio station licensees were restricted to broadcast to a radius of only 150 kms. This limitation is reflected in most licenses given to operators.

There is no clear and agreed upon policy position on what should constitute the radius for respective types of licenses. It would appear that the restriction of radius was because operators would cease to be “community” in a sense.<sup>9</sup> However, the current challenge has led to some operators such as MUVI TV and Q-FM radio to circumvent this regulatory bottleneck by using technology, which is the internet to broadcast to national audiences. MUVI TV, licensed to broadcast to Lusaka and surrounding places, until

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<sup>7</sup> Ibid.

<sup>8</sup> Temporary license to allow applicant begin construction their station.

<sup>9</sup> Community Broadcasting in Zambia Country Report Compiled by Lingela B. Muletambo & Presented to a Community Broadcasting Strategy Seminar, May 20-21 2008, The Lakes Protea Hotel, Benoni South Africa.

mid 2009 when it introduced digital broadcasting, now is able it to send signals via satellite using the dish to any place in the country.<sup>10</sup> This has provided competition to ZNBC.

The only other licensee that operates outside this unwritten policy is Radio Christian Voice, a private/religious broadcasting station broadcasting to Africa and beyond using a Short Wave (SW) signal. The station benefited from the benevolence of the Government that liberalized the broadcasting airwaves to allow private participation in the sector. Since the start of broadcasting, only the national public broadcaster ZNBC was allowed to operate on Short Wave. To a large extent, Radio Christian Voice has provided an alternative source of information especially to listeners in rural areas at a time when the signals of ZNBC Radio could not reach and continues to provide effective competition. This is because by nature, Short Wave traverses wide boundaries. The National Assembly appears to be of the considered view that *the Government should not insist on restrictions on the area of coverage for commercial broadcasters, as this will be incompatible with the new technological era and the world practices on information dissemination*<sup>11</sup>.

In addition, there have been administrative barriers during the licensing process. There has for a long time now been a dual licensing framework involving both MIBS, who are the current content regulators, and the Zambia Information and Communication Technology Authority (ZICTA) who have been responsible for the frequency spectrum management in the absence of the Independent Broadcasting Authority (IBA). License applicants would have to pay relevant fees to both institutions although this does not appear much of a real barrier.

There are also entry barriers into the distribution or delivery of programming via digital technology using the available infrastructure. Currently, only ZNBC has been authorized to carry test digital signals via its infrastructure. Although ZICTA has indicated that other players will be informed that they are free to send their test signals via ZNBC infrastructure there is no evidence yet of this decision<sup>12</sup>. As things stand, ZNBC would be the only carrier to do the pre-testing of the digital platform and that all other carriers and applicants would have to go through ZNBC route, free of charge. As ZICTA notes, *“government policy will not allow every player to be a carrier as allowing all willing players to be carriers by themselves would not be an efficient way of managing the system but that the most likely choice will be ZNBC which is a public broadcaster with the mandate to provide country wide coverage. Further that the important thing is that the carrier would have to accommodate all the willing players in the market”*<sup>13</sup>.

The Government, through the Zambia Public Procurement Authority (ZPPA), has since advertised the tender for the implementation of the digital terrestrial television migration.<sup>14</sup> However, a group of private Television broadcasters namely, Mubi Television, Muvi Television, Chipata Television, Solwezi

<sup>10</sup> [http://www.muivitv.com/?page\\_id=10](http://www.muivitv.com/?page_id=10). Retrieved on 6<sup>th</sup> January 2013.

<sup>11</sup> Second Report of the Committee on Information and Broadcasting Services for the fourth Session of the Tenth National Assembly appointed on 24th September, 2009, page 14.

<sup>12</sup> Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, Case File No:CCPC/RBP 003, July 2011.

<sup>13</sup> Third Party submission by ZICTA to CCPC enquiry on Allegations of anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer PROTECTION Commission, cited in Case File No:CCPC/RBP 003, July 2011.

<sup>14</sup> Remarks by Ministry of Information and Broadcasting Permanent Secretary Mr. Amos Malupenga at a two-day stakeholder consultative conference on digital migration held at the Government Complex in Lusaka on September 19 and 20, 2012.

Television, CB-Television and other equipment dealers calling itself “Consortium of Stakeholders on Digital Migration” appear aggrieved with the decision by Government to float the tender as they observed “*pertinent observations perceived to be detrimental to the realization of the full benefits to all stakeholders to the programme.*”<sup>15</sup> Before the Commission engaged them, they had resorted to taking a legal course. One of the many terms of reference for the taskforce is to recommend for a carrier of the digital signal in order to have a fair playing field.

Other possible barriers to entry include high cost of infrastructure, Set-Top Boxes (STB) costs, Applications Programme Interfaces, verification software (CA), Electronic Navigation Software, satellite transponder capacity and subscriber management services. Further, Set Top Boxes, which are an essential gateway to accessing programmes in the subscription television environment are generally expensive and maynot be easily affordable unless subsidized. A STB can be broken into component parts, primarily the Applications Programme Interface (API) the verification software and the Electronic Navigation Software (EPG). Developing STB that is proprietary is high cost and more often leads to high consumer prices<sup>16</sup>.

### 3.4 *Legal and regulatory framework*

Legally, the legislation which is supposed to be regulating the broadcasting sector in Zambia<sup>17</sup> is the Independent Broadcasting Authority Act No. 17 of 2002 which was subsequently amended in 2010. Inter alia, the specific functions of the IBA as set out in section 5 subsection 2 are as follows:

- (a) *To promote a pluralistic and diverse broadcasting industry in Zambia*
- (b) *To establish guidelines —*
  - (i) *For the development of broadcasting in Zambia through a public process which shall determine the needs of citizens and social groups in regard to broadcasting;*
  - (ii) *For the issuing of licenses, giving due regard to the need to discourage monopolies in the industry in accordance with the Competition and Fair Trading **Cap. 417** Act;*
  - (iii) *On the required levels of local content and other issues that are relevant for a pluralistic and diverse Broadcasting industry;*
- (c) *To safeguard the rational and efficient use of the frequencies allocated to broadcasters by developing a frequency plan for broadcasting, which shall be a public document, in compliance with international conventions;*
- (d) *To grant, renew, suspend and cancel licenses and frequencies for broadcasting and diffusion services in an open and transparent manner;*
- (e) *To enforce the compliance of broadcasting and diffusion services with the conditions of the licenses issued under this Act;*

<sup>15</sup> Letter to Minister of Information and Broadcasting Services Hon. Kennedy Sakeni dated 25<sup>th</sup> September 2012 copied to the CCPC.

<sup>16</sup> Report on Allegations of Anti-Competitive Trade Practices against MultiChoice Zambia Limited and Zambia National Broadcasting Corporation by MUVI Television, Competition & Consumer Protection Commission, Case File No:CCPC/RBP 003, July 2011, Page 20.

<sup>17</sup> Section 5(1) of the IBA Act no 17 of 2002.

- (f) *To issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting;*
- (g) *To oblige broadcasters to develop codes of practice and monitor compliance with those codes;*
- (h) *To develop program standards relating to broadcasting in Zambia and to monitor and enforce compliance with those standards;*
- (i) *To receive, investigate and decide on complaints concerning broadcasting services including public broadcasting services;*
- (j) *To develop regulations in regard to advertising, sponsorship, local content, and media diversity and ownership;*
- (k) *To perform such other functions as may be conferred on it by this or any other Act; and*
- (l) *to do all such other acts and things as are connected with or incidental to the functions of the Authority under this Act.*

However, the sector has since 2002 when the Act was enacted been supervised and regulated by the Ministry of Information and Broadcasting Services in a caretaker capacity. This is because the IBA as an institution has not yet been established following a protracted legal battle between the Government of Zambia and civil society organizations over the legal interpretation in the appointment process<sup>18</sup> for Board members of the IBA and subsequent need for the Government through MIBS to amend the Act and clarify the appointment process of Board members of the institution. Before the amendment of the Act, Board members were to be appointed by the minister on the recommendation of the appointments Committee subject to ratification by Parliament. To avoid ambiguity, this was amended to provide for the appointment of Board members by the Minister. This is consistent with current Government policy of having Ministers appoint board members for public institutions.

Section 5 (2) (b) (iii) of the IBA Act provides that the Authority shall “establish guidelines on the required levels of local content and other issues that are relevant for a pluralistic and diverse broadcasting industry”. This means that all licensees, whether public service, subscription, commercial, community or religious are expected to broadcast a particular percentage of local content to their audiences. This provision, despite not indicating exactly what the local content ratios will be, has at least provided a requirement for developing regulations for such. In order to illustrate the importance of local content in broadcasting, the Act has prescribed several requirements for respective broadcasters to uphold. For example, all programmes by a commercial broadcasting service shall, subject to the conditions of a licence and regulations of the Authority —

- (a) *Reflect the culture, character, needs and aspirations of the people in the areas that they are licensed to serve;*
- (b) *Provide an appropriate amount of local or national programming;*
- (c) *include news and information programmes on a regular basis, including discussion on matters of national, regional, and where appropriate, local significance<sup>19</sup>.*

<sup>18</sup> Matibini, P (Phd), *The Struggle for Media law Reforms in Zambia*, MISA Zambia, 2006, pgs 127-149.

<sup>19</sup> Section 21 (2) of the IBA Act N0 17 of 2002.

For Community and religious broadcasting services, licenses for both free-to air radio and television broadcasting licenses shall require programming which shall –

- (a) *Reflect the needs of the people in the community which shall include the cultural language and demographic needs and shall—*
- (b) *Provide a district broadcasting service dealing specifically with issues which are not predominantly dealt with by the broadcasting service covering the same area; and focus on the provision of programmes that highlight grassroots community issues including but not limited to developmental and general, educational affairs, environmental affairs, local, international and current affairs reflection of local culture<sup>20</sup>;*

Similarly, free-to-air- televisions broadcasting services require that programmes shall, as a whole include significant proportions of Zambian drama, documentaries and children's programmes that reflect Zambian themes, literature and historical events<sup>21</sup>. Already, TV stations such as MUVI and ZNBC 1 and ZNBC (TV2) have been trying to ensure local content programming is elevated in their schedules.

It is generally hoped that once the IBA is in place<sup>22</sup>, it shall develop these guidelines in consultation with industry players in a manner that shall develop the TV broadcasting sector in the country. Suffice to indicate that it is common for broadcast regulators to set local content quotas. Notwithstanding this, research has shown that production of local content n Africa is more costly compared with importing foreign content. As Karithi<sup>23</sup> notes, in South Africa, the cost of producing local content is more that USD300 per minute compared with USD 30 per minute for sourcing foreign programmes. Additionally in Zimbabwe, where local content quotas were set at 75% by the Broadcasting Authority of Zimbabwe (BAZ), the costs of producing local content stood approximately at USD 60 million. The costs are higher in countries like Zambia whose local production industry is still in its infancy. Nevertheless, TV broadcasters are free to commission independent local content producers in the country or even beyond and broadcasters have already been doing so.

With regard to ownership conditions, section 19 of the IBA Act precludes (a) a political party or organization or a legal entity founded by a political party or organization and (b) a person who is not a citizen of Zambia from holding a broadcasting license. In this section, "citizen of Zambia " in relation to a body corporate means a company in which not less than seventy five percent of shares are held by citizens of Zambia<sup>24</sup>. It would appear that this quota, if considered too high by potential investors, may discourage foreign direct investment in the sector notwithstanding the sensitive nature of broadcasting for which most African governments approach cautiously.

In subsection 4 of section 19, licenses are allowed to provide various classes of broadcasting services namely: (a) a public broadcasting service; (b) a commercial broadcasting service; (c) a community and religious broadcasting service; or (d) a subscription broadcasting service. The inclusion of public broadcasting as part of the categories of applications requiring licenses is good particularly that it does not

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<sup>20</sup> Section 22 of the IBA Act No. 17 of 2002.

<sup>21</sup> Section 24(2) of IBA Act No. 17 of 2002.

<sup>22</sup> The Ministry of Information & Broadcasting has recently, in January 2013 advertised for a Director General who shall be the Chief Executive Officer of the institution and secured office space and a budgetary allocation.

<sup>23</sup> Issues in Local Content, in Broadcasting Policy and Practice In Africa, Article 19, 2001.

<sup>24</sup> Subsection 3 of section 19 of IBA Act No. 17 of 2002.

spare the public service broadcaster, ZNBC from being licensed. For a long time and in view of its status as a government owned/public broadcaster, as ZNBC has had a deemed license compared with other private/commercial, community and religious broadcasters that have had to apply to the Ministry. In a sense, this levels the regulatory environment as ZNBC will be subject to the IBA Act just like all other operators.

With regard to infrastructure issues, the Act does not preclude operators from complying with other pieces of legislation. Particularly, operators are expected to comply with the Information and Communication Technologies Act No. 15 of 2009 which regulates the ICT sector including technical issues of broadcasting and radio communications. Part IV of the ICT Act specifies the licensing of radio communications services particularly the establishment of transmitting stations and erection of radio apparatus, assignment of frequencies among others. Further, Part VII of the ICT Act prescribes how the frequency spectrum will be managed and broadcasting frequencies, as part of the frequency spectrum are equally included. In this regard, when MIBS is satisfied that a particular TV or radio applicant should be licensed to operate, they have to liaise with the Zambia Information and Communication Technology Authority (IBA) on the available frequencies in a particular locality for them to be granted. This is consistent with section 20 of the Independent Broadcasting Authority (Amendment) Act 2010.

### 3.5 *Vertical integration and cross media ownership issues*

Issues of vertical integration of media companies do not appear to raise any competition concerns so far. There is not much vertical integration in the sector so far. However, it is important to note that The Post newspapers, the largest and dominant print (with online presence) media newspaper with widest circulation in Zambia has also joined the ICT sector and runs a broadband Internet Service Provider (ISP), Post ISP Zambia<sup>25</sup> So far, there has been no competition concern arising out of this arrangement.

Related to vertical integration of media companies in Zambia is the issue of cross ownership of media companies. In Zambia, cross ownership of media companies is a reality, though not pronounced and presently, it is not clear how this is dealt with from a regulatory perspective in the absence of the IBA. For example, it is no secret that The Post Newspapers referred to above were denied a radio broadcasting license in Lusaka for apparent cross media ownership reasons. Similarly, UNI Holdings, the owners of radio Phoenix were in 2002 denied a free-to-air television broadcasting license apparently for reasons of discouraging cross-media ownership<sup>26</sup>. At the same time, the owners of Petauke Explorers, a private/commercial radio station broadcasting in Petauke, about 300 kms east of Lusaka, have applied to MIBS for a private/commercial Television station known as Chipata Television, which will be a regional based private free-to-air television operator in Zambia. The application is currently before the MIBS for consideration. It will be interesting to see how this will be decided particularly in light of one of the principal responsibilities of the IBA to establish guidelines for the issuing of licenses, “*giving due regard to the need to discourage monopolies in the industry in accordance with the Competition and Fair Trading Cap. 417 Act.*”

From the Competition and Consumer Protection Act No. 24 of 2010’s perspective, however, there is no prohibition against being dominant as is common in Competition law. The prohibition is with respect to the abuse of dominance. This is because a firm with market power can bring about economies of scale and

<sup>25</sup> [Post Newspaper throws hat into ISP business](http://www.zedian.co.uk/2008/05/post-newspaper-throws-hat-into-isp.html), article on <http://www.zedian.co.uk/2008/05/post-newspaper-throws-hat-into-isp.html> Monday, 19 May 2008 but retrieved on 6<sup>th</sup> January 2012.

<sup>26</sup> Cited in Possible Implications for Regulating the Broadcasting Industry in Zambia Under the IBA Act No 17 Of 2002 – A Practical Perspective, Paper Presented to the Media Institute of Southern Africa (MISA) Zambia Organized Independent Broadcasting Regulation One Day Sensitisation Workshop for Broadcasting Stations on 19<sup>th</sup> March 2004 at Ndeke Hotel, Lusaka Zambia by Brian Muletambo Lingela.



good consumer prices. Therefore, in analyzing a case in this sector, the Commission would first of all have to determine whether a firm is dominant in the provision of broadcasting services in a particular geographic and product market. Thereafter assess whether or not that dominance has been abused. Nevertheless, it is worth noting that the IBA Act recognizes the role of the CCPC in safeguarding competition in all sectors of the economy and obligates the IBA to consider the Competition and Consumer Protection Act when considering cases of a monopoly nature in the broadcasting sector.

#### **4. Significant current and future challenges for competition policy in television broadcasting in Zambia**

##### **4.1 *New technologies and future challenges***

There is no doubt that the broadcasting industry even in Zambia is constantly and continuously evolving. The convergence of the Internet and television, in particular is revolutionising the broadcasting industry and has the potential to transform the market for all the players; both actual and potential. Traditional television business models based on proprietary and vertically integrated distribution networks are being challenged by more personalized programming. Where viewers cannot access content on multiple platforms, broadcasters can establish a more direct relationship with the viewer, thereby leading to a long term fragmentation of the audience.

In this regard, there is no doubt that competition authorities will face a different set of challenges. Among which include the definition of product and geographical markets especially where markets are fragmented with more personalized content for different viewing audiences.

In Zambia, technological challenges in broadcasting are a reality. First of all, convergence of technologies cannot be ignored as can be seen by the decision of privately owned MUVI TV to circumvent regulatory requirements limiting its service to a small radius when they opted to use satellite options to beam their digital signal to subscribers outside their allowable radius. Privately owned Q-FM Radio, Church owned Radio Maria and privately owned Hot FM and Breeze FM, among others have had plans to expand their radius using other new technologies but the absence of a policy framework in the past made it impossible. Currently, Zambia has a National Task Force on Digital Migration charged among other things with overseeing the migration of Zambia's television sector from analogue to digital by 2015, the International Telecommunication Union (ITU) deadline. With the digital framework in place, it is expected that there will be more channels available for Television broadcasters with more and varied programming genres and more competition. It is also expected that markets will be more and more concentrated with more players coming on the scene and the emergence of different and diverse product markets. The Competition and Consumer Protection Commission will thus be expected to ensure that product markets are properly and correctly defined so that cases could be properly addressed.

Unfortunately the Commission has save for two cases, not done any market study in the television and broadcasting sector. The two cases that have been done are available with the Commission but are presented in this paper.

##### **4.2 *Access to content***

There does not appear much concern on the exclusive acquisition of premium content by operators. It would appear that broadcasters are free to obtain content from any source. However, it would be of concern if say a private TV operator obtained exclusive content of critical national interest that should be viewed by the general population through other operators like the national public TV.

### 4.3 *Efficient spectrum allocation & management issues*

As stated earlier, the frequency spectrum is managed by ZICTA and the IBA is expected to liaise with them on available frequencies for television and radio. To that effect, ZICTA sits on the Radio and Television Licensing Committee of the Ministry of Information and Broadcasting Services that is charged with the responsibility of licensing applicants. In the past, there were concerns about the scarcity of frequencies which were considered as a wasting asset and hence their allocation needed to be carefully done. However, this is no longer a technical barrier to entry in the sector owing to improved technologies at global level that have also benefited Zambia. Zambia is presently implementing a frequency plan which is consistent with the International trends and does not worry about scarcity of frequencies anymore.

This notwithstanding, there is a possibility that digital frequencies will be contested in view of the many economic opportunities that they offer. Previously, there were allegations of lack of transparency in the award of both radio and Television licenses by MIBS. However, these concerns do not seem to be prevalent following the decision by the MIBS to issue 10 full licenses and 16 construction permits (temporary licenses) to all outstanding radio and Television applications in 2012. As Minister of Information and Broadcasting Services Kennedy Sakeni, MP observed, the move was meant to enhance citizens' participation in the affairs of the nation and to provide them with a platform to air their views on issues of national interest. *“The number of licenses this government has issued is higher than the previous government's record of only two full radio licenses and eight construction permits between 2010 and September 2011. This is a clear demonstration of the PF government's commitment to transparency and accountability by ensuring free flow and public access to information.”*<sup>27</sup>

## 5. **Zambia's experience in competition law enforcement relating to television and broadcasting**

### 5.1 *Case studies*

In describing Zambia's experiences in enforcing Competition Law in the television broadcasting sector, a case study approach will be employed.

#### 5.2 **Case 1: Tied selling in Pay-tv sector**

##### 5.2.1 *Background*

On 18<sup>th</sup> March 2008, the Commission became aware through an advertisement on DStv that MultiChoice Zambia (hereafter referred to as MultiChoice) embarked on *“Smartcard/Decoder Marriage”*. This practice refers to a conduct or situation where a subscriber's smartcard is solely linked and locked to the subscriber's decoder. This means that the smartcard cannot be used on any other decoder apart from the one it had been linked or married to. Thus, another decoder procured from another independent supplier or supplied by MultiChoice itself cannot be used with an already married smartcard unless it is first divorced from one decoder it was initially married to.

The Commission viewed this practice as a form of tying by MultiChoice, a practice that is likely *prima facie*, to be anti-competitive from the point of view of both competitors and consumers. Specifically, the Commission was concerned that the marriage of the smartcard to decoders supplied by MultiChoice, has and/or is likely to lead to the following adverse effects on the market as indicated below:

<sup>27</sup> As cited by Djokotoe, E; State of the media in Zambia 1 July to 30 September 2012 report compiled for Media Institute of Southern Africa (MISA) Zambia accessed from [www.misazambia.org.zm](http://www.misazambia.org.zm) on 6<sup>th</sup> January 2013.

- (i) Marrying a smartcard to a decoder adversely affects the freedom of the purchaser (consumer) in terms of the flexibility of use of the smartcard with decoders supplied by other alternative suppliers of decoders;
- (ii) Marriage of the smartcard to one decoder would likely foreclose the market for decoders sold by competitors; and
- (iii) Marriage of the smartcard to a decoder supplied by one service provider who holds a dominant position in the market would likely lead to adverse monopolisation effects of abuse of market power and therefore, the restriction, distortion and prevention of competition in the relevant market.

This concern arose especially due to the structure of the relevant market, i.e. the provision of Pay TV services in Zambia.

### 5.2.2 Market structure

The Zambian Pay TV market at the time the case was investigated, and even now, is highly concentrated with only three (3) local players namely MultiChoice Zambia, MUVI TV and MY TV. However, there are also individuals that subscribe directly from other Pay TV digital satellite service providers domiciled outside the Republic of Zambia notably, South Africa. As can be seen in the table below, market share for the three (3) parties was 80% MultiChoice, 10% My TV and approximately 10% for subscribers that pay to service providers abroad and MUVI TV.

#### Zambian Pay TV Market

	<b>Firm</b>	<b>Approx Market Share (%)<sup>28</sup></b>
1	MultiChoice	80%
2	My TV	10%
4	MUVI TV + Foreign Pay TV Service Providers	10%
	<b>Total</b>	<b>100%</b>

In Zambia, typical customers of the Pay TV service are those in the middle and upper class of socio-economic strata of society. These are people that can afford to procure and sustain receipt of the service that include, kit procurement and remission of monthly subscription payments to the service provider. The rest of the population either does not watch television or opts to watch free –to- air channels.

In terms of the distribution channels, the service is mainly in peri-urban and urban areas of the main cities and towns with a few individuals in rural areas receiving the service. Those in rural areas mainly access MUVI TV channel mainly because of its affordability.

### 5.2.3 Justification for the conduct

According to MultiChoice the practice of smartcard marriage is objectively justifiable as it is used by MultiChoice to protect the DStv service from piracy, and as such to protect its commercial viability and integrity; smartcard marriage, together with other technological measures, is an essential tool in the fight against piracy and the protection of copyright; and further, it is essential to the commercial viability of a pay TV service and is standard business practice of pay TV operators globally.

<sup>28</sup> Submission by Strong Technologies (Providers of MY-TV Pay Services) to Zambia Competition Commission (ZCC) (Forerunner to Competition and Consumer Protection Commission: 15<sup>th</sup> June 2010.

#### 5.2.4 *Conclusions and determinations*

It was found that due to evolving forms of piracy MultiChoice was doing away with the decoders that needed to operate with smartcards and would replace them with smartcard embedded decoders. It was resolved that under the circumstances there was no case worth pursuing by the Commission as such the case was closed.

#### 5.3 *Case 2: Exclusionary conduct*

On 23<sup>rd</sup> May 2011, the Commission received a complaint from Muvi TV alleging that Multichoice Zambia Limited (Multichoice) and Zambia National Broadcasting Services (ZNBC) had engaged in anti-competitive practices. Specifically it was alleged that the two broadcasting partners launched a project that would allow Multichoice to run a terrestrial signal using public infrastructure (transmitters) belonging to ZNBC. It was alleged that the said project was scheduled for launch on June 6<sup>th</sup> 2011.

According to the Complainant, the result of the project is that Multichoice will provide set top boxes to consumers for free on which eight channels including ZNBC will be hosted for viewing at a monthly subscription of approximately twenty thousand kwacha (K20, 000.00) which is approximately US\$4.

There was a concern that the agreement between ZNBC and Multichoice and the decision by the former to allow access to its infrastructure to only Multichoice at that moment in time was likely to create barriers to entry for other players in the market thereby resulting in the prevention, restriction and distortion of competition.

The Commission determined that both ZNBC and Multichoice Zambia were dominant firms in the provision of free-to-air television services and Pay TV services respectively. Furthermore, it was determined that because ZNBC was and still is the only entity that has been given frequencies to use to send out test digital signals in preparation for digital migration, no other player could at that moment and even now, send out a digital signal minus the use of ZNBC infrastructure (transmitters). It is on the basis of this that the ZNBC infrastructure was deemed as an essential facility.

Having determined the existence of an essential facility, the issue left for determination was whether access thereto was denied. No evidence was submitted to show that access was requested by the Complainant and that the said access was denied. The Commission could therefore not make a determination that ZNBC or Multichoice had abused its dominant position of market power by denying the Complainant access to an essential facility. As such no instance of abuse of dominant position of market power was established.

The Commission however issued a directive to the Ministry of Information and Broadcasting Services to ensure that the National Taskforce on Digital Migration established a standard access agreement for parties wishing to use available facilities for transmission of signals in view of the pending digital migration. This is an on-going process.



## BIAC

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on competition issues in television and broadcasting.

### 1. Introduction

The subject of this roundtable, competition in TV and broadcasting, reflects competition in many markets segments, at different levels of the production and distribution process, that interact in different ways within and among legal jurisdictions. Indeed, as time passes, the competitive dynamic of TV broadcasting is becoming more complex, requiring a dynamic approach to evaluating competition.

The market segments relevant to the analysis include, among others, competition in the creation or production of programming, competition by channels to secure rights to distribute programming, competition within and among means of distribution of programming including evolving distribution technologies, competition for subscribers by distributors, competition for viewers by television channels, and competition to secure advertisers who may desire to reach the viewers of programming.

BIAC’s constituency includes members at all levels of competition within this broad field. In some cases, these members have very different views on the extent to which antitrust laws should be utilized, or the point at which regulators should intervene, in the television and broadcasting industry. Indeed, many of the significant disputes between these constituents involve what is, in essence, a zero-sum-gain profit-shifting exercise between different vertical levels of the “product chain” of TV broadcasting. The stakes in these disputes can be very high and the outcome can cause seismic shifts in the profitability and sustainability a business model.

In these cases, BIAC takes no specific view on the merit of the antitrust arguments espoused by any particular company or industry segment. Often, these battles reflect the dynamic witnessed in many competitive markets where suppliers and customers in a vertical distribution chain have differential bargaining power based on the value of their asset base and the differentiation of their product offering and, as a result, one group profits at the expense of the other. Where that differential bargaining power stems from superior skill, foresight or business acumen antitrust enforcers should be reluctant to interpose themselves to alter the competitive dynamic.

In the television and broadcasting industry, however, differential market power also can result from regulatory restrictions or regimes imposed by governments. Often, these restrictions were put in place long before the current technologies that expand the means of program distribution were introduced. This historical regulatory “drag” can potentially inhibit effective competition. A foremost concern of government regulators (antitrust and otherwise) should be to evaluate whether these government-imposed barriers to competition exist and, if so, to remove or alleviate such restrictions in a way that ensures that competition is conducted on a level playing field.

Despite the highly regulated environment in which much of the competition in TV and broadcasting takes place, BIAC is of the view that special rules for the assessment of competition in these markets are not necessary. Established means of evaluating mergers, dominance, exclusive dealing and other

competition issues should be relied upon. In particular, the competition authorities should not be more anxious or reluctant to act in respect to TV and broadcasting markets merely because they are in the public eye and often subject to significant political interference. Indeed, TV and broadcasting markets provide an important opportunity for competition authorities to prove their independence from political pressures.

Moreover, the focus of competition authorities in TV and broadcasting should remain on economic markets. Competition authorities should focus on competition issues and not base their evaluation on non-competition factors, such as (non-competition) public interest concerns, diversity of “voice,” plurality of media ownership, desirability of public programming, etc. BIAC believes that any regulatory action based on non-competition concerns should be evaluated, decided and effectuated by a specialist regulatory agency charged with specific jurisdiction over such issues. Likewise, where the authority granted to a specialist regulatory agency is arguably broad enough to encompass competition concerns, the competition analysis should be ceded to the national competition authority, thereby allowing each agency to focus on its own core competencies. In conducting its review, a competition authority should not allow non-competition issues to influence the competition review of matters and should not be called upon by governments to enact non-competition policy through a competition review.

With these overarching basic principles as a backdrop, BIAC reviews several important aspects of competition within the TV and broadcasting industry below.

## **2. The TV and broadcasting industry is highly dynamic**

Tremendous changes to the television and broadcasting field have occurred over the past decade. Where television programming traditionally was distributed to end users through over-the-air broadcast, and then cable, it now also is broadcast via satellite, over the internet, and on mobile devices. Moreover, where television programming historically was viewed only in real-time, much of today’s programming is “time-shifted,” with viewers watching on-demand or through playback of a digital video recording that allows them to watch according to their own schedule rather than the broadcaster’s schedule. Additionally, in many countries, TV and broadcasting has gone from a national to international scope, probably most evident in Europe where it has gone from a landscape where each country had a handful of local language channels with predominantly local content to a much more international offering of channels and content. These changes have altered the competitive dynamics of the industry dramatically in the past 10 years.

A brief review of industry dynamics, and the competitive incentives they create, may be useful. The competitive landscape for television and broadcasting in many countries is highly regulated. Telecommunications authorities often regulate the television broadcast industry, particularly with respect to the granting and monitoring of broadcasting rights. Because free-to-air broadcasting involves the use of frequencies on the radio spectrum -- historically within the purview of government as a public good -- this layer of competition has been subject to ongoing government intervention that differentiates it from, for example, the production of programming which is largely unregulated.<sup>1</sup> Traditional television broadcast networks, therefore, evolved under a highly regulatory regime, which significantly restricts the conduct of broadcast stations and imposes heavy regulatory costs.

The traditional form of over-the-air TV broadcasting can be seen as a two-sided market. Previously, free-to-air channels were the norm, with channels competing to develop or procure programming and to sell advertising to raise revenues and make profits. These broadcasters drew demand both from viewers and from advertisers and, like other two-sided markets, had to intermediate between the interests of, and account for the interactions of demand between, these two groups. For example, they could reduce the cost

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<sup>1</sup> We note, however, that governments often are involved directly in sponsoring public television channels and may influence the development and broadcasting of programming in such cases.

of advertising by expanding the time dedicated to ads, but this reduction in quality (since it is well documented that viewers dislike ads) would alienate viewers. Or they could appease viewers by reducing commercial time, but this limitation on advertising output would increase ad prices.<sup>2</sup>

There were significant limitations in free-to-air channels, however, in part due to restrictions on the amount of broadcast spectrum available to broadcast the free programming. Technological advances in distribution made it possible to expand, sometimes to a huge degree, the amount of programming available through paid TV distribution services, such as cable or satellite. These advances also made it possible to exclude non-paying viewers, which was not possible with over-the-air broadcasts. This helped to control the costs of free-riding to some degree and facilitated the large investments in physical facilities that were required. The pay-TV model raises revenues principally by charging user fees directly to viewers.

Broadcast networks now often distribute their content not only over the airwaves, but also through pay-TV distribution networks that can enhance both the reach and quality of the broadcast. Absent controlling regulatory requirements, broadcast networks that also distribute their channels through pay-TV distribution, maximize profits by choosing a balance between charges to distributors based on the desirability of their content to viewers, and charges to advertisers for selling commercial time, which detracts from the desirability of their content to viewers.

Whereas free-to-air distribution prompted significant competition between channels in the end-user markets (i.e., for viewers and advertisers), the pay TV market operates on the basis of different incentives because the distributor (rather than the channels) sets the end-user price simultaneously for all channels (or packages of channels). Pay-TV distributors compete principally on the quality and variety of programming available and on differentiation from other forms of distribution (including free-to-air broadcasting). Pay-TV, therefore, can often promote investments at the programming level that would not be made in free-to-air broadcasting.

Online and mobile distributors of video content shift the dynamic even further. They are similar to broadcast networks in that they generate their revenues principally through advertising revenues, yet different in that they do not promote competition between channels. Online distributors, in particular, often have a significant cost advantage over other distribution rivals in that the costs of infrastructure are much lower because (unlike cable and satellite) they rely on the public internet and do not have to build-out their own assets for distribution. At the same time, they can “free-ride” on the advertising and promotion of programming by program developers and distribution competitors.

### **3. Defining relevant markets**

These changes in distribution have been driven by significant changes in technology. Technological changes have created a convergence in competition among various forms of media distribution. Whereas enforcement agencies, historically, viewed different types of media (television, radio, internet, newspapers, etc.) as separate relevant product markets, a more current evaluation of competition in television and broadcasting suggests that a broader market interpretation recognizing the convergence of video programming distribution may be appropriate.

This convergence of competition was evident in the recent U.S. enforcement action in the merger of Comcast and NBC, where the Antitrust Division of the Department of Justice acted to prevent potential vertical foreclosure in video program distribution. On December 3, 2009, the Comcast Corporation

<sup>2</sup> See Hans Jarle Kind, Tore Nilssen & Lars Sorgard, *Price Coordination in Two-Sided Markets: Competition in the TV Industry*, (CESifo Group, Working Paper No. 3004, Mar. 2010), available at [www.cesifo-group.de/portal/pls/portal/docs/1/1185680.PDF](http://www.cesifo-group.de/portal/pls/portal/docs/1/1185680.PDF).



(Comcast) and NBC Universal, Inc. (NBCU) announced that Comcast would purchase a controlling interest in NBCU.<sup>3</sup> Comcast owns the largest cable distribution network in the U.S., and NBC was one of the country's largest television broadcast networks. Comcast also is a significant provider of broadband internet access (often through a "triple play" offering of cable, internet and telephony services). Although the parties competed to some extent in local advertising, their main relationship to one another was that NBCU provided video programming to Comcast which Comcast then distributed to consumers through its cable network. Both the Antitrust Division of the Department of Justice (DOJ) and the telecommunications regulator, the Federal Communications Commission (FCC), reviewed the merger. The parties required affirmative FCC approval to transfer various telecommunications licenses in order to effectuate the merger. The FCC's authority allows it to evaluate the merger on public interest grounds, which includes considerations of competition, but also involves a review of broader non-competition concerns.

The DOJ focused on three potential competitive harms. First, that Comcast would have the ability to control the prices charged to its distribution rivals either by raising the cost of the NBCU content or denying the content altogether. Relevant to this concern are the FCC's program access rules, which prohibit vertically integrated multichannel video programming distributors (MVPDs) from refusing to sell certain popular content to its competitors or selling it on discriminatory terms. Second, that Comcast would have an incentive to slow the growth of Hulu, an increasingly popular online video distribution site in which NBCU had an investment stake, by influencing key strategic decisions. Third, that as a provider of internet access Comcast could have an incentive to block or discriminate against "Online Video Distributors" (OVDs) with respect to content that might otherwise compete with NBCU or Hulu.

Under a settlement reached between DOJ and the parties, the joint venture must make available to OVDs the same package of broadcast and cable channels that it sells to traditional video programming distributors. The joint venture must offer an OVD broadcaster cable and film content that is similar to, or better than, the content the distributor receives from any of the joint venture's programming peers. Additionally, the FCC's order requires the joint venture to license NBCU content to Comcast's cable, satellite and telephone competitors, requires the joint venture to license content to OVDs on reasonable terms and includes an arbitration mechanism for resolving disputes, and also allows Comcast's traditional competitors, such as satellite and telephone companies, to invoke arbitration at the FCC to resolve program access and retransmission consent disputes.<sup>4</sup>

The scope of the relief, which is intended to ensure that OVDs can continue to develop as a source of programming distribution, signals that online distribution is recognized as a marketplace rival to traditional cable distribution, since the post-merger incentives of Comcast cited by the DOJ would not be credible in the absence of such rivalry.

At the same time, the heavily regulatory settlement in Comcast/NBCU, and the oversight necessary to implement the remedy,<sup>5</sup> reflects the vestige of intensive regulation by the FCC to traditional broadcasters

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<sup>3</sup> Press Release, Comcast, Comcast and GE to Create Leading Entertainment Company (Dec. 3, 2009), available at [www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=938&SCRedirect=true](http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=938&SCRedirect=true).

<sup>4</sup> Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Allows Comcast-NBCU Joint Venture To Proceed With Conditions (Jan. 18, 2011), available at [www.justice.gov/atr/public/press\\_releases/2011/266149.pdf](http://www.justice.gov/atr/public/press_releases/2011/266149.pdf); and In The Matter of Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc., 2011-1 Trade Cases ¶ 77312, 26 FCC Rcd. 4238, 2011 WL 194538 (F.C.C. Jan. 18, 2011).

<sup>5</sup> Reports of complaints by programming distributors that Comcast is not abiding by the settlement already have surfaced.

such as NBCU and traditional distributors such as Comcast. A merger in an unregulated sector of the economy would be far less likely to see such an expansive remedy. Indeed, although Comcast may have market power in some segments of the country where it owns the cable distribution franchise (which is regulated by States or localities, not by the FCC), NBC's share of advertising revenue would be well below dominant levels, even when regarded in the context of narrow demographic segments.<sup>6</sup>

#### 4. Risks of regulatory protectionism

The intervention of the state in television broadcasting differs by jurisdiction, but in many markets TV broadcasting involves not only the regulation of private operators, but also the direct participation by the state in the market through state-owned or state-approved television stations. These state-owned channels can distort competition significantly, thwart new entry, and harm private operators by introducing a highly or completely subsidized competitor into the marketplace. The presence of public television channels in the marketplace can also create an incentive for regulators to discriminate against private parties in order to protect the interests of the state in its state-owned television channels.

One matter in which discrimination was alleged by the parties and some observers is in the failed attempt by News Corp. in 2010 to acquire the remaining 60.9 percent of BSkyB's shares which it did not already own. News Corp. and BSkyB operate largely in different markets in the UK and Ireland but compete with each other to a limited extent in the wholesale supply of basic pay-TV channels and in the supply of online and TV advertising space. Since the parties are involved in different levels of the market, the European Commission's examination of the deal targeted the potential for "anticompetitive effects arising from vertically linked or neighboring activities in the audiovisual sector, in newspaper publishing, or in advertising." According to the Commission, which cleared the deal in Phase 1 with no remedies, the proposed transaction "would only lead to a small increment on BSkyB's existing share of the market for the supply of basic pay-TV channels in the UK and Ireland." In addition, the parties have a small combined market share in the online and TV advertising market. As a result, the transaction did not raise horizontal anticompetitive concerns. The Commission approved the proposed acquisition on Dec. 21, 2010, but emphasized that its decision covers the competition aspects only and explained that the UK must determine "whether the proposed transaction is compatible with the UK interest in media plurality, which is different from the commission's competition assessment."<sup>7</sup>

The UK Secretary of State for Business Innovation and Skills issued a European intervention notice on Nov. 4, 2010, which required the relevant UK authorities to investigate and report on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality of persons with control of media enterprises.<sup>8</sup> The plurality review was conducted under specific UK legislation enacted under Section 58 of the UK Enterprise Act of 2002. On December 31, 2010, Ofcom

<sup>6</sup> The DOJ traditionally has used advertising revenues as the basis for assessing market power in television mergers. *See, e.g.*, Complaint for Injunctive Relief, U.S. v. Univision Commc'n, Inc., (No. CV03-00758) 2003 WL 23781621 (D.D.C. Mar. 26, 2003).

<sup>7</sup> Press Release, European Comm'n, Mergers: Commission Clears News Corp's Proposed Acquisition of BSkyB Under EU Merger Rules (Dec. 21, 2010), available at [http://europa.eu/rapid/press-release\\_IP-10-1767\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1767_en.htm); and Case No. COMP/M.5932, News Corp/ BSkyB, SG-Greffe(2010) D/C(2010) 9684, (Dec. 21, 2010), available at [http://ec.europa.eu/competition/mergers/cases/decisions/m5932\\_20101221\\_20310\\_1600159\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf).

<sup>8</sup> Press Release, United Kingdom, Dep't for Bus. Innovation & Skills, Business Secretary Intervenes in Proposed BSkyB Acquisition (Nov. 4, 2010), available at <http://news.bis.gov.uk/content/Detail.aspx?ReleaseID=416355&NewsAreaID=2>.

submitted its report to the UK Secretary of State for Culture, Media and Sport<sup>9</sup> who informed the parties that he would entertain remedies prior to referring the case to the Competition Commission. Remedies were accepted in March 2011 and a consultation was launched for third-party views. Revised remedies were submitted by News Corp in June 2011, which included Sky News being spun off to operate independently from BSkyB, and another consultation was launched. But News Corp. withdrew its remedies on July 11, 2011 and on the same day the UK Department for Culture, Media and Sport referred the deal to the Competition Commission.<sup>10</sup> Shortly thereafter, on July 13, 2011 News Corp. withdrew its offer to BSkyB.<sup>11</sup> The Competition Commission formally cancelled its inquiry on July 25, 2011.<sup>12</sup>

The News Corp/BSkyB transaction is an example of public interest considerations, in the guise of competition concerns, being used to disrupt a transaction that, by objective standards, would appear not to raise genuine competition concerns. Ofcom's review involved considerations of "sufficiency of plurality" and allegations of bundling that are more properly analyzed in the realm of antitrust economics. In this light, it is difficult to reconcile the conclusions of the European Commission with the UK's determination of a need for remedies based on an "[in]sufficiency of plurality of persons with control of media enterprises."

BIAC takes no view on the News Corp/BSkyB transaction, but is of the view that competition enforcers should not be charged with assessing or addressing non-competition concerns relating to potential mergers in the television and broadcasting industry. If such public interest concerns are to be addressed, they should be addressed only by a qualified regulatory authority with a clear and transparent mandate to identify, study, and enforce non-competition standards. The credibility of competition law enforcers generally should not be strained by the introduction of non-competition concerns. Likewise, specialist broadcast or telecommunications regulators should not take the lead in conducting what amounts to competition analysis.

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<sup>9</sup> United Kingdom, Ofcom, Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation (Dec. 31, 2010), *available at* [http://www.culture.gov.uk/images/publications/OfcomPITReport\\_NewsCorp-BSkyB\\_31DEC2010.pdf](http://www.culture.gov.uk/images/publications/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf).

<sup>10</sup> United Kingdom, Ofcom, Oral Statement: NewsCorp/BSkyB Merger Update (July 11, 2011), *available at* [http://www.culture.gov.uk/news/ministers\\_speeches/8285.aspx](http://www.culture.gov.uk/news/ministers_speeches/8285.aspx).

<sup>11</sup> Press Release, News Corp., News Corporation Withdraws Proposed Offer for British Sky Broadcasting Group PLC (July 13, 2011), *available at* [www.newscorp.com/news/news\\_494.html](http://www.newscorp.com/news/news_494.html).

<sup>12</sup> Press Release, United Kingdom Competition Comm'n, CC Formally Cancels News Corp/BSkyB Inquiry (July 25, 2011), *available at* [www.competition-commission.org.uk/assets/competitioncommission/docs/2011/media-centre/41\\_11\\_news\\_corp\\_bskyb\\_cancel.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/media-centre/41_11_news_corp_bskyb_cancel.pdf).

Admittedly, the simultaneous application to the same transaction of competition rules and non-competitive public interest concerns by separate agencies can lead to complex situations. One such example is that of the recent approval by the French Autorité de la Concurrence of Canal Plus' takeover of Bolloré Group's free-to-air channels Direct 8 and Direct Star, and the same day the re-approval of Canal Plus' 2006 merger of CanalSat and TPS.<sup>13</sup> These were ostensibly based on a traditional competitive analysis, and subject to conditions which were probably especially strict in view of the fact that, in a rare move, the first approval of the TPS deal had been repealed in 2011 on account of the failure to implement some of the original commitments. Several weeks later, the sector-specific Conseil Supérieur de l'Audiovisuel (CSA) approved the Direct 8 – Direct Star acquisition, subject to further conditions based on non-competition public interest considerations.<sup>14</sup> Although both agencies had acted in a coordinated fashion, with CSA having provided an official “advice” to Autorité de la Concurrence prior to the latter's decision, such situations make it extremely difficult for businesses to identify clear standards and draw lessons to frame their own behavior.

Even where state-owned or approved television stations do not operate directly in the market, the state often places restrictions or limitations on the content of programming that uses publically-granted spectrum by imposing broadcasting standards and practices. These often are imposed by the telecommunications regulator for various “public interest” reasons that are unrelated to the promotion of competition. In many countries, non-broadcast competitors may not face any such restrictions. For example, broadcasting services are regulated in Europe with regard to consumer protection (advertising, child protection etc.) or reserving a certain share for European content. In contrast to regulated broadcasting services, OTT providers such as YouTube and Netflix are not regulated at all. Since these services are often provided by companies based outside the EU, the enforcement of existing regulatory rules (on a national or European level) is very difficult. In addition, OTT providers usually do not contribute to financing ICT-infrastructures. European network operators, who often are also engaged in the distribution of pay-TV services, are not able to gain transportation fees from OTT players, allowing the OTT players to “free ride” on the investments of their competitors.

As cable channels, pay-TV options and online distribution proliferate, and with over-the-air broadcasting representing a dwindling share of television viewership, regulatory authorities should reconsider the application of these standards to broadcast networks and whether they support the principle of a level competitive playing field. Competition authorities should consider the use of competition advocacy with industry-specific regulators to remove or reduce the burdens of public interest considerations to the extent that they create an imbalance in the competitive playing field.

<sup>13</sup> See, Press Release, Autorité de la Concurrence, The Autorité de la Concurrence, Ruling Again on the Acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus, Has Cleared the Transaction Subject to Several Injunctions, July 23, 2012, available at [www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=418&id\\_article=1949](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1949); Décision No 12-DCC-100 relative à la prise de contrôle exclusif de TPS et Canal satellite par Vivendi et Groupe Canal Plus (July 23, 2012), available at [www.autoritedelaconcurrence.fr/pdf/avis/12DCC100decision\\_version\\_publication.pdf](http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC100decision_version_publication.pdf) [in French]; Press Release, Autorité de la Concurrence, The Autorité de la Concurrence Clears the Acquisition of Direct 8 and Direct Star by Vivendi and Groupe Canal Plus, Subject to Conditions, July 23, 2012, available at [www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=418&id\\_article=1953](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1953); and Décision No 12-DCC-101 relative à la prise de contrôle exclusif des sociétés Direct 8, Direct Star, Direct Productions, Direct Digital et Bolloré Intermédia (July 23, 2012), available at [www.autoritedelaconcurrence.fr/pdf/avis/12DCC101\\_decision\\_version\\_publication.pdf](http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC101_decision_version_publication.pdf) [in French].

<sup>14</sup> Press Release, Conseil Supérieur de l'Audiovisuel, Le CSA autorise sous conditions l'achat de Direct 8 et Direct Star par le groupe Canal+, Sept. 18, 2012, available at [csa.fr/en/Espace-Presse/Communiqués-de-presse/Le-CSA-autorise-sous-conditions-l-achat-de-Direct-8-et-Direct-Star-par-le-groupe-Canal](http://csa.fr/en/Espace-Presse/Communiqués-de-presse/Le-CSA-autorise-sous-conditions-l-achat-de-Direct-8-et-Direct-Star-par-le-groupe-Canal) [in French].

## 5. Horizontal mergers in TV and broadcasting

Horizontal mergers in the TV and broadcasting industry can be evaluated based on principle that apply equally to other areas of competition.

One example of a straightforward application of common merger principles in the TV industry involves the attempted merger of EchoStar and DirecTV, two competing suppliers of satellite television distribution. On October 28, 2001, EchoStar and Hughes Electronics - owner of DirecTV - announced that they would merge. At the time, the two companies controlled the only orbital slots allocated for direct broadcast satellite service over the continental United States. On October 31, 2002, the U.S. Department of Justice Antitrust Division filed suit to block the merger citing that it would create a "monopoly" in areas without cable TV and would concentrate the market for multi-channel video programming distribution services from three companies to two. As stated by then-Assistant Attorney General Charles James, "This merger would create a monopoly in those areas where cable television is not available, thereby eliminating the only competitive choice for millions of households. It would leave tens of millions of households - for whom DirecTV, DISH Network, and cable now compete to provide multichannel video programming distribution service - with a reduction from three to two competitive choices."<sup>15</sup> The DOJ concluded the parties could not demonstrate that any efficiencies likely to result from the merger were sufficient to outweigh the substantial adverse impact of the transaction on competition and consumers. Similarly, the DOJ found that the parties' proposed remedies were unlikely to become a sufficient replacement for the vigorous competition that existed between Hughes and Echostar within a reasonable period of time.

## 6. Barriers to entry in pay TV distribution

Many jurisdictions feature both free-to-air and pay-TV models of distribution engendering competition between the two. As noted, the market success of pay-TV depends strongly on providing both a broader range and higher quality of programming as compared to free-to-air offerings. It is also clear that there is a significant difference in acceptance of the two models, even where both are offered, and that this rate of acceptance differs greatly by jurisdiction.

In the U.S., for example, more than 75% of all viewers subscribe to some form of cable, satellite or fiber optic pay-TV service. This excludes those viewers who watch only over the internet or on mobile devices. Many of these pay-TV services offer 400+ channels of video programming.

In other countries, free-to-air TV is the predominant form of distribution, with free-to-air channels garnering the large majority of viewership. In these countries, there is a relatively low acceptance of pay TV services. This dynamic often is influenced heavily by public broadcast channels.

As an example, in Germany there exist more than 70 free-to-air TV channels, with an overall viewing share of more than 90%. Pay-TV providers are required to make significant investments in order to compete with free-to-air television. The demand for commercial Video-on-Demand-Services likewise is limited in Germany by free offers of fee-based services in Germany (ARD and ZDF<sup>16</sup> with 14 full programs, 6 special interest channels). The expansion of public-broadcasting channels therefore can act to increase the barriers to entry for pay-TV providers, particularly in those countries where there is a high degree of acceptance of pay-TV viewership combined with a large number of public broadcast channels.

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<sup>15</sup> Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Files Suit to Block Echostar's Acquisition of Hughes Electronics (Oct. 31, 2002), *available at* [www.justice.gov/atr/public/press\\_releases/2002/200412.pdf](http://www.justice.gov/atr/public/press_releases/2002/200412.pdf).

<sup>16</sup> ARD is a consortium of public-law broadcasting institutions of the Federal Republic of Germany based in Munich. ZDF is an abbreviation for "Second German Television," located in Mainz.



## 7. Licensing of premium content

BIAC has recognized that the success of distributors, particularly pay-TV distributors, depends on the licensing of premium content, without which it is difficult for pay-TV providers to compete with free-to-air channels. The licensing of such rights often is the subject of regulations by a jurisdiction's telecommunications regulator.

For example, on October 15, 2010, Ofcom launched an investigation against British Sky Broadcasting plc (BSkyB) after a complaint by Top Up TV (TUTV) relating to the terms of its contract with BSkyB for the wholesale supply of Sky Sports 1 and Sky Sports 2 and a restriction on the provision of the channels via CI + CAMs (conditional access modules). Ofcom upheld the complaint on December 13, 2010 ruling that restrictions imposed by BSkyB were in breach of Condition 14A of the Television Licensable Content Service licenses for Sky Sports 1 and 2 and required that the term be removed.<sup>17</sup>

On December 13, 2010, BT plc (BT) asked Ofcom to investigate a complaint against BSkyB concerning the requirement on BT to provide BSkyB with information on BT Visions total number of pay subscribers and total number of customers as required by BSkyB's wholesale supply agreement with BT for premium sports channels, Sky Sports 1 and Sky Sports 2. The investigation concluded on March 29, 2011 and found that BSkyB breached its obligation to provide access to the channels on fair and reasonable terms.<sup>18</sup> Ofcom opened another investigation on the same day against BSkyB resulting from a complaint by Virgin Media regarding the wholesale supply of Sky Sports 1 and 2 HD which focused on whether BSkyB breached rules governing licenses by calculating the wholesale price on a per-device basis. Ofcom issued a draft decision to the parties, but subsequently closed the case when Virgin Media withdrew its complaint on March 16, 2011.<sup>19</sup>

The acquisition of premium content can also have implications for competition in other non-TV markets. For example, an attractive and sustainable "triple play" offer (telephony, internet, TV) may be driven by the TV offering and, therefore, may depend heavily on access to premium content. Regulated telecommunication companies and cable network operators who are newer entrants to markets with established relationships and exclusive deals sometimes face difficulties in gaining access to premium content on acceptable commercial terms. Moreover, because both cable networks and broadcasting platforms over telecommunication networks often are subject to regulatory "must carry" rules, their ability to avoid carrying less-desirable content may be limited.

BIAC recognizes that these issues may give rise to antitrust issues in certain circumstances, particularly where vertical foreclosure by a dominant firm is possible. We emphasize that traditional modes of competitive analysis should be used in these situations. Where it may be necessary to consider regulatory resolution of these issues based on non-competition grounds by imposing open access or must-

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<sup>17</sup> United Kingdom, Ofcom, Investigation into complaint by TUTV against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2, Case No. CW/TUTV Sky, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_TUTV\\_Sky/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_TUTV_Sky/).

<sup>18</sup> United Kingdom, Ofcom, Investigation into a complaint by BT against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2, Case No. CW/01061/11/10, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01061/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01061/).

<sup>19</sup> United Kingdom, Ofcom, Investigation into a complaint by Virgin against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2 HD, Case No. CW/01060/11/10, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01060/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01060/). See also, [www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited/html](http://www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited/html).

offer rules, BIAC is of the view that the specialized regulator, rather than the competition authority, should impose such rules in view of its broader regulatory responsibility.

## **8. Conclusion**

Competition in TV and broadcasting is undergoing a revolution due to significant technological advances in distribution technologies. A primary focus of competition authorities should be to eliminate artificial barriers to competition, particularly those imposed by the government, while recognizing that the proprietary investments made by industry participants at all levels (including regulated participants) should not be considered as “public goods” to be opened-up to the marketplace for broad exploitation.

BIAC encourages competition regulators to resist the temptation to act as an industry regulator and to take action only where competition abuses, as measured by traditional standards, warrant intervention.

## **COMPETITION ISSUES IN BROADCASTING AND INTERNET CONTENT – NAVIGATING THE UNKNOWN AND THE UNKNOWABLE**

*By Mr. Allan Fels\**

### **1. What are the key competition issues in broadcasting?**

Market power over the physical infrastructure used to supply programming to end users has traditionally been of concern to regulators internationally. The substantial sunk costs and economies of scale associated with the deployment of transmission networks and programming distribution networks (including set-top boxes and conditional access systems) have in past led some regulators to mandate access those underlying networks.

For example, in the EU broadcasting transmission services were included in the European Commission's 2003 recommendations as a market that was susceptible to ex ante regulation.<sup>1</sup> Conditional access systems had been required to be provided on fair, reasonable and non-discriminatory terms in the EU and the Access Directive explains that this obligation could be extended to electronic programme guides (EPGs) and application program interfaces (APIs).<sup>2</sup> In Australia, wholesale access to digital set-top boxes is available at through a special access Undertaking made to the Australian Competition and Consumer Commission by the largest pay TV network, Foxtel.

Increasingly the focus of competition authorities and regulators has turned to content supply and the way in which the sale and distribution of content affects competition in downstream markets. Content is an essential input into the supply of programming and retail pay TV services. Limitations in its availability, for example through exclusive supply arrangements, the aggregation of content into bundled wholesale content rights or other barriers to participation in the acquisition of content, can therefore restrict competition in downstream markets.

The competition assessment conducted by the UK Competition Commission of pay TV movie content supply is an example of potential concerns surrounding content acquisition (see Case Study 1 below). In that case, a key concern of Ofcom was that Sky's strong position in the retail pay TV market enabled it to acquire the rights to virtually all premium movie content, thereby perpetuating its market power in the supply of retail pay TV services. The Competition Commission found that, taking into account consumer preferences and market developments that had occurred the course of the investigation, new suppliers using 'over-the-top' OTT methods of supply were able to contest content rights. Consequently, there was not an adverse effect on competition of Sky's role in acquiring and distributing premium movie content.

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\* Note prepared by Mr. Allan Fels, Professor of Government and Director International Advanced Leadership Programs, Australia and New Zealand School of Government.

<sup>1</sup> Commission of the European Communities, Commission Recommendation of 11/02/2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, C(2003)497.

<sup>2</sup> Official Journal of the European Communities, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Article 10.



### Case Study 1 (UK): Competition Commission's assessment of pay TV movie content

In 2010, Ofcom referred to the Competition Commission its concerns regarding Pay TV movie content sale and distribution.<sup>3</sup> Ofcom was of the view that Sky Television (Sky), the largest provider of pay TV services in the UK, effectively had control of rights to premium movie content and was concerned that it would use its market power in distribution of content to restrict distribution of premium movie content and charge excess prices. Ofcom was also concerned that as Sky expanded further into the provision of subscription Video-on-Demand (SVOD) it could effectively transfer its market power in traditional Pay TV service provision to SVOD provision, given the joint sale of licensing rights of premium linear channel and SVOD content.

Ofcom considered that in the absence of a commercial resolution to these competition concerns, remedies that could be applied would include: (1) regulations on the way that premium movies rights are sold – for example, rules which limit the aggregation of content; and (2) a regulatory mandate for Sky to provide wholesale access to premium movie content.

The Competition Commission published its findings on pay TV movie rights in August 2012. It found that it was likely that Sky had market power in the distribution of content in the retail pay TV market due to barriers to large-scale entry and expansion using traditional distribution networks, as indicated by the low level of switching and the high market concentration.<sup>4</sup> However, it also found that: (1) based on survey information, premium movie content did not have a significant impact on consumer choice of retail Pay TV supplier; (2) new SVOD suppliers had entered the market and captured a significant share of subscribers within a short period of time; (3) barriers to the acquisition of premium movie content has fallen because over the top (OTT) providers are able to quickly acquire the subscriber base necessary to bid effectively against Sky for content; and (4) Sky's position as an acquirer and distributor of premium Pay TV movie content would not have a significant adverse effect on competition.

The UK case study demonstrates that the way that retail Pay TV services are supplied and contested is evolving, which can alter the ability of a firm to use market power and the need for regulatory intervention.

A proposed acquisition in Australia by an investor in the free-to-air Seven network of additional shares in a sports producer and broadcaster further examples the importance of content acquisition arrangements to competition in the downstream market. In the Australian example, the competition authority considered that the ability of the free-to-air (FTA) broadcaster to enter into joint bids with the cable network operator was an important means by which FTA channels could acquire sports content. The main competition concern was that with one FTA channel having significant ownership of a key sports producer and broadcaster and the pay TV networks, other FTA channels would be constrained in the sports rights they could acquire. That constraint would in turn limit their ability to offer adequate content to TV subscribers and hence reduce their effectiveness as competitors.

<sup>3</sup> Ofcom (August 4, 2010), Premium pay TV movies – Decision. Available at: [http://stakeholders.ofcom.org.uk/consultations/movies\\_reference/statement/](http://stakeholders.ofcom.org.uk/consultations/movies_reference/statement/)

<sup>4</sup> Competition Commission (August 2, 2012), Movies on pay TV market investigation - A report on the supply and acquisition of subscription *pay-TV movie rights and services*. Available at: [http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

### Case study 2 (Australia): Acquisition by Seven of CMH

In 2012, Seven Group Holding (Seven) sought informal clearance from the Australian Competition and Consumer Commission (ACCC) to acquire the remaining shares of Consolidated Media Holdings (CMH) that it not already own.

At the time of the proposed transaction, Seven held investments in a number of media companies, including those that operate the commercial free-to-air television Seven network. CMH had a 50% share in the sports producer and broadcaster Fox Sports Australia (FSA) which supplied sports programming to Foxtel, Australia's largest provider of subscription television to end customers. FSA had a 50% shareholding of Foxtel and as a result CMH held an indirect share of 25% of Foxtel.

In February 2013 the ACCC published its Competition Assessment of the acquisition which concluded that it would oppose the acquisition, finding that: "the proposed acquisition by Seven of the remaining shares it did not hold in CMH would be likely to have the effect of substantially lessening competition in the market for the supply of free to air television services in Australia, in contravention of section 50 of the (Competition and Consumer) Act."<sup>5</sup>

The ACCC reached this view because it considered that "the proposed acquisition would put Seven Network in a position of advantage relative to other free to air networks with respect to entering into joint bids and other commercial arrangements with FSA and FOXTEL for acquisition of sports rights. Being able to come to such arrangements with FSA or FOXTEL would enhance Seven Network's ability to acquire the rights to premium sports. Given the importance of premium sporting content to a free to air network's ability to compete strongly with other free to air networks, the ACCC considered that the advantage that Seven Network would gain with respect to the acquisition of such content would be likely to lead to a substantial lessening of competition in the market for the supply of free to air television services."<sup>6</sup>

Vertical integration across the functions necessary to provide retail Pay TV services has also been of significant concern to regulators and competition authorities in recent times. Functions necessary for the supply of retail pay TV include:

- The production of content;
- The supply of programming;
- The broadcast of programming; and
- The use of the physical infrastructure used to disseminate programming (cable networks, DSL networks, satellite facilities etc)

Examples of the potential anti-competitive effects of vertical integration between 2 or more layers of the supply chain include:

- Refusal to supply essential inputs to rival downstream firms;
- Margin squeezes;
- Raising rivals' costs; and
- Other discriminatory practices.

A recent example of where a competition authority has identified vertical integration concerns in the broadcasting markets is in regard to the Comcast acquisition of NBCUniversal in the US. Issues of concern regarding vertical integration between content supply and the cable pay TV network included whether the acquisition would result in the competing pay TV networks no longer having access to some content or having to pay inflated prices.

<sup>5</sup> ACCC (February 15, 2013) Public Competition Assessment: Seven Group Holdings Limited - proposed acquisition of remaining shares in Consolidated Media Holdings Limited, para 50.

<sup>6</sup> ACCC (February 15, 2013), para 34.

A second type of vertical integration concern identified in the Comcast matter was that Comcast may have the incentive to restrict traffic travelling on its cable network to online video distributors (OVDs) who compete with Comcast's newly acquired OVD, Hulu.

### Case study 3 (USA): Comcast acquisition of NBCU

Comcast is the largest cable network operator in the US, supplying almost 24 million cable subscriptions in 39 states plus the District of Columbia.<sup>7</sup> In 2011 it entered a joint venture with General Electricity which gave Comcast a controlling 51% share in NBCUniversal.<sup>8</sup> Comcast has recently announced that it will be acquiring the remaining 49%.<sup>9</sup> NBCUniversal owns broadcast networks, television stations, cable programming networks, television and motion picture studios, and the online video distributor, Hulu.

The US Department of Justice in assessing the joint venture in 2011 identified a number of competition concerns associated with the vertical integration between of content supply and distribution. As discussed by Kimmelman, key concerns associated with the joint venture and the acquisition of a 51% share by Comcast were that Comcast would have incentives to:

- raise content licensing fees charged to rival content distributors;
- or refuse access to content entirely; and
- potentially stream online traffic away from competing OVD services.<sup>10</sup>

As a result of these concerns, a number of obligations were required under a Consent Decree, including:

- the provision of economically equivalent video programming terms to OVDs
- the supply of comparable video programming to OVDs
- that OVDs have rights to commercial arbitration
- and relinquishing control of Hulu.<sup>11</sup>

Specific conduct constraints were also applied to Comcast through the Consent.

In addition, the FCC review of the joint venture transaction resulted in a number of requirements implemented under an FCC order which, as explained by Kimmelman, included:

“a requirement that the joint venture license all of its programming to traditional distributors, enhancements to its existing process for commercial arbitration for licensing disputes involving traditional distributors, and a requirement that the joint venture license content to OVDs on reasonable terms, along with an arbitration mechanism for resolution of any resulting disputes.”<sup>12</sup>

<sup>7</sup> FCC (January 20, 2011), In the Matter of Applications of Comcast Corporation, General Electricity Company and NBCUniversal Inc for Consent to Assign Licenses and Transfer Licenses, MB Docket No 10-56, p.6.

<sup>8</sup> Comcast (January 31, 2011), “Comcast and GE complete transaction to form NBCUniversal, LLCC”, Comcast media release.

<sup>9</sup> Gustin, Sam (February 14, 2013) “Comcast’s NBCUniversal Deal: As One Media Era Ends Another Begins” TIME.

<sup>10</sup> Kimmelman, Gene I. (Chief Counsel for Competition Policy and Intergovernmental Relations Antitrust Division U.S. Department of Justice) (June 21, 2012), “Antitrust Enforcement and Media Industries: Competition and Beyond”, Remarks as Prepared for the American Antitrust Institute’s Civil Liberties and Competition Policy Conference Washington, DC, p.5.

<sup>11</sup> United States District Court for the District of Columbia (September 1, 2011), United States of America, State of California, State of Florida, State of Missouri, State of Texas and State of Washington – Final Judgement, Case 1:11-cv-01106 Judge Leon, Richard J.

<sup>12</sup> Kimmelman (June 21, 2012), p. 7.

## 2. How do technology trends affect competition in the broadcasting markets?

Changes in technology in the broadcasting markets have a variety of effects on competition. Technological developments alter, among other things:

- The range and quality of services provided;
- The underlying costs of provision;
- The extent of barriers to entry – for example, new technologies can provide new means by which the market can be contested;
- The ability of customers to switch supplier; and
- Pricing mechanisms that can be used – for example, digitisation allows for pay per view services to be provided.

Digitisation, which leads to a larger volume and range of content being made available, has in combination with the roll-out and upgrade of high-speed broadband networks, generally reduced barriers to entry.

There are now a greater range of platforms over which content can now be disseminated. In addition to the use of traditional Pay TV platforms (eg, via cable, satellite and terrestrial networks), OTT technology allow the provision of SVOD over high speed broadband networks regardless of the underlying broadband technology type (such as cable, fibre or DSL). As a result, as was found by the UK Competition Commission in Case Study 1 above, competition from OVD can now at least to some degree constrain the conduct of pay TV operators. Nonetheless, as the US case study demonstrates, it is possible that cable operators could affect the quality of service of competition from OVDs in a discriminatory manner.

Despite the general presumption that increased platform competition is beneficial for consumers there is some evidence that increased inter-platform competition can result in increased prices and lower penetration. For example, Ramello and Silvia (2008) find that in Italy following competitive entry in the Pay TV market, the cost of providing subscriptions increased by 25.6% from 1998 to 2000 which they attribute to the effects of fragmenting the market.<sup>13</sup>

While new platforms may increasingly provide enhanced levels of competition it seems clear that certain premium content can remain a source of market power. Sports content is a one such example. Seabright (2006) observes that post-digitisation: “content rights replace transmission bottlenecks as source of market power.”<sup>14</sup>

Domenech (2009) finds in an econometric analysis of the Spanish Pay TV market that while price per view is not a significant explanatory of platform penetration, owning the rights to the rights to broadcast Spanish Professional Football League matches in pay-per-view is a crucial variable.<sup>15</sup> Domenech expresses the view that these results suggest that pay TV platforms compete primarily in terms of content rather than price. This further emphasises the importance of close scrutiny of content supply and acquisition, particularly of scarce premium content.

<sup>13</sup> Ramello, Giovanni B. and Francesco Silva (2008), “Exclusion, Competition & Change: The Shifting Boundaries of the Television Market” Review of Economic Research on Copyright Issues, vol. 5(1), pp. 55-74

<sup>14</sup> Seabright (2006) pp 14-15 .

<sup>15</sup> Domenech, Laia, Competition between TV Platforms (October 1, 2009). XREAP 2009-09. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.1825103>

Accompanying digitisation has been the introduction of and growth in personal video recorder (PVR) set top box units. PVRs allow customers to easily record content, including programmes that are broadcast simultaneously. During playback customer can readily fastforward advertisements, increasing their enjoyment at the expense of the commercial viability of traditional Free to Air broadcasting models. If PVR use grows sufficiently the FTA model will need to evolve, for example, through the use of product placement advertising (as explained in Seabright 2006) in order to achieve the revenues necessary to compete with Pay TV operators.

### **3. Some economic considerations**

A key concern that emerges from these cases is that a downstream broadcasting service provider (SP) may be able to leverage its market position to gain power in an upstream market for content. This concern amounts to a claim that the SP would be able to corner an upstream market—that by having access to a large number of viewers or subscribers in the downstream access market, the SP would be able to buy up or otherwise control upstream supply, consolidating its downstream position. At face value, this sounds bad enough, but there is also the concern that this upstream “buyer’s” power would enable the exercise of additional market power in the downstream market. The question is the circumstances under which such outcomes can occur.

Analysis suggests that such anticompetitive leveraging is more likely to be possible profitable in some circumstances than others. As a result, it is important for competition authorities to undertake a careful assessment of market structure in examining potentially troublesome conduct. So as to illustrate the relevance of market structure to this assessment, it is useful to consider two mutually exclusive cases. In the first, the downstream broadcasting market is initially competitive; in the second, there is provider in that market with a substantial degree of market power.

#### **3.1 Case 1—A competitive downstream market**

In this section we assume that the downstream market (for instance, for pay TV services) is initially competitive. However, the structure of the upstream market also has an important impact on market outcomes. In the case where upstream markets are structurally competitive, then it is impossible to corner upstream output. Alternatively, if upstream supply is competitive but less responsive to price, then for a downstream firm must pay a high price to corner the market. Finally, if upstream supply is monopolized it is very difficult for a downstream firm to profitably corner all output. We deal with each of these cases in turn.

##### **3.1.1 Competitive and responsive upstream supply**

In this section we demonstrate that in a competitive market for content, if supply is highly responsive to price, then it is rarely, if ever, possible to profitably foreclose the content market. This is simply because the downstream firm must increase its purchases of content by an amount sufficient to restrict the availability of content. That is, it must purchase enough to increase the price of content. Of course, buying more at higher prices is expensive, but even worse, when supply is highly responsive to price, a very large amount of content must be bought to have this effect. As a result, such large purchases can be highly unlikely to be profitable.

The responsiveness of suppliers to price is called supply elasticity. Supply is highly responsive to price if a small increase in price leads to a relatively large increase in output levels. As a matter of terminology, economists equate responsiveness to elasticity, thus the more responsive supply is, the more elastic it is. This means that if, as a result of increased demand, the price for content were to rise, supply would quickly also rise. Only a very substantial increase in demand could effect a substantial increase in price.

Now consider a strategy by a downstream firm to corner the market in content. Imagine it substantially increases its exclusive purchases of content (and note exclusivity raises the price it would have to pay). It hopes by doing so it will reduce the availability of content to the point where it will be able to dictate terms both to suppliers of content and to other downstream firms that need content to compete with it. But if it is to have any chance of success, its new purchases must make content considerably more scarce than it was in the past. If it does not, downstream competitors will simply be able to buy elsewhere at only slightly elevated prices and the downstream market will remain competitive. However, if supply is very responsive to price then a very large increase in demand will have limited effect on price. Increased demand will put some upward pressure on price, but this will immediately result in substantial increases in supply. Demand will be met after price has risen only a little. In fact, when demand is highly responsive to price it is virtually impossible to have a substantial impact on price.

Worse, the ultimate goal in the leveraging argument is not to raise price—in fact this is expensive to the firm undertaking the conduct since it must buy more at higher prices. Rather, the ultimate goal is to be able raise downstream prices in a manner that increases its profit. However, an elastic upstream supply function means that one must buy an enormous amount of upstream output to even effect a small rise in price. But if only a small upstream price rise can be achieved, then this can only raise downstream prices by a small amount (remembering that price is pressed to cost downstream). The net effect is that while the firm's downstream competitors will indeed reduce their supply of services a little, and price in that market will rise, the additional revenues the firm attempting to corner the upstream market earns in the now slightly higher priced downstream market cannot hope to cover the costs of the voluminous upstream purchases necessary to effect this result. It is therefore virtually impossible to profitably raise downstream prices by seeking to monopolise the upstream content market when upstream supply is relatively elastic.

### 3.1.2 *Competitive and inelastic upstream supply*

In the previous section, where upstream supply was elastic, we showed it was extremely unlikely (indeed, usually impossible) to profitably purchase upstream output in order to set a high or even monopoly price downstream. On the other hand, if upstream supply is inelastic, the conditions are much more favourable to this strategy. In fact, under certain circumstances the profit gained by a firm that successfully monopolises upstream supply can exceed the price of purchasing that content.

If upstream supply is highly inelastic then output—let us call it content for concreteness—does not expand much with increases in demand. Instead, prices rise. This means that if a large downstream operator sought to monopolise upstream output it would not have to purchase much to begin to have a real impact on the upstream content prices. Unfortunately, in order to have this effect on price that operator must pay a high price. As a result, for this strategy to be profitable, the operator has to make substantial additional downstream profits thanks to its foreclosure strategy. It turns out that when competitive supply is greater than monopoly levels—and with a highly inelastic supply function the reverse is at least possible<sup>16</sup>—then this may be achieved. A content monopolist could indeed earn more than what would be necessary to bribe competitive content suppliers to exclusively provide a limited amount of content to itself (as a monopolist it will reduce output) and to not engage in any further production.

However, even if the facts necessary for this possibility were in place, care must be exercised in concluding that such profitable ‘cornering’ of the content market is indeed likely. This is for two reasons: first, there must be questions of credibility; and second, this possibility seems to require the leveraging of a position of no market power to obtain a position of power. We consider each of these in turn.

<sup>16</sup> To see this consider a supply function shaped like a L reflected about its vertical. The steeply rising part of the supply function may well cross demand to the left of point at which a monopolist would operate if the vertical part of the L was less steeply sloped.

### 3.1.3 *Credibility*

Assume upstream supply is highly inelastic, but competitive, and output exceeds monopoly levels. In these circumstances, it is possible for the cost of acquiring exclusive rights to all content to be less than the profit associated with being a monopolist over content. The issue that must be addressed before concluding that this is likely is why such a strategy is not open to any other firm as well, including those upstream, or even outside of the industry. After all the strategy is simple—buy up exclusive rights to an inelastic upstream output, and then monopolise its use downstream, either by “own use” if the buyer is a large downstream operator, or by selling to other downstream operators. Of course, competition by firms seeking to implement such a strategy would be self-defeating. Put another way, for this strategy to be credible, the firm that engages in the strategy must in some respect be unique.

### 3.1.4 *Leveraging in the absence of market power*

There is an ongoing controversy in economics as to whether market power can be leveraged from one market to another. However, what is proposed here is leverage into another market from a position of no market power (the case of a downstream firm having market power is dealt with below). There is no theory in economics that suggests that can be done. Rather, if the downstream market is competitive, then inelastic upstream supply does not in itself create an opportunity for leverage by a downstream operator.

However, matters are more complex where an upstream firm already has market power. This raises the possibility that market power might be leveraged from the upstream market into the downstream market. The orthodox view, which is associated with the Chicago school, is that leverage from a position of market power, into a market where the firm has no power, is impossible. More recent work has suggested that under a number of circumstances, this need not always be the case.

In short, where both the downstream and upstream markets are structurally competitive, monopolisation by ‘cornering’ the content market is likely to be impossible. It will also be impossible if the upstream market has highly elastic supply, regardless of downstream conditions. However, where a firm dominates the upstream market, it may have incentives to seek to leverage its power into the downstream market, though whether that will be possible and profitable depends on a number of special conditions being met.

## 3.2 *Case 2—Market power downstream, and both upstream and downstream*

Up to this point it was assumed that the downstream firm had no substantial market power. This assumption is now relaxed. This means that, putting aside views of the Chicago school, there is at least some market power which may be used to engage in leverage. Of course, that fact need not change the results set out above: for example, when upstream supply is competitive and highly elastic, which may be the case in at least some content markets, it remains impossible to prevent one’s competitors from accessing content. Notice also that the more market power the downstream firm has, the less interested it is in engaging in such an action. Indeed, if the firm is a monopolist it has no need to exclude competitors as it has none.

This impossibility result changes, under some circumstances,<sup>17</sup> as upstream supply becomes increasingly inelastic. Whether this will be profitable depends on the precise circumstances; after all, since the downstream firm is already claiming some monopoly rents, the gain from engaging in such behaviour is reduced, and in the extreme case where the firm in question is a monopolist, it has no need to monopolise content.

The most complex case in this respect is where there is market power *both* up and downstream. In these circumstances, it remains the case that absent any anticompetitive vertical relationships, there is no

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<sup>17</sup> For example, that supply is extremely inelastic, but crosses demand to the right of monopoly levels.

reason to believe that a downstream firm could leverage power in an upstream market, especially when the upstream firms have countervailing power. However, even if the Chicago school position is wrong, one should also note that the possibility remains that other upstream firms with market power could also vertically integrate with downstream firms and provide countervailing power across both markets. In addition, in this case, there may be efficiency-enhancing reasons for vertical integration or some other vertical relation—for example, to avoid any losses that might arise due to double marginalisation (the effect of having an upstream firm mark prices up above costs compounded by the downstream firm doing the same, resulting in a retail price that is a mark-up on a mark-up).

### 3.3 *Conclusion*

In summary, where upstream markets are competitive, and not inelastic in supply, it is extremely unlikely a downstream buyer could profitably monopolise these services. Further, even if upstream supply is inelastic, leverage remains unlikely if at least some downstream firms are reasonably evenly matched.

These arguments significantly qualify the possibility of leverage if both markets are competitive, or if there is competition downstream and upstream supply is elastic. This leaves three cases, each with some degree of market power. The first involves a competitive downstream, with market power upstream. In this case, and putting the doubts of the Chicago school aside, leverage is possible, through vertical links between an upstream firm with market power and a downstream operator. The second case concerns downstream market power, with an inelastic but competitive upstream. While an inelastic upstream supply function (if it exists) creates the prospect of market rents, and downstream power provides something to lever off, this case relies on a vertical relationship being established between the upstream and downstream provider, and the possibility that leverage itself is a likely strategy. The last case has market power both up and downstream. Leverage in this case is again possible through vertical integration, though subject to the usual Chicago school objections. However, it should also be noted that the presence of multiple firms upstream with market power would create the opportunity for other vertically related firms to compete with any vertically integrated entity that came into being.

In practice, competition authorities become most concerned when a merger between a downstream broadcaster and a provider of ‘premium’ content threatens the availability of that content to competing broadcasters. This obviously depends on the elasticity of supply of competing content; but where that supply is highly elastic, it seems unlikely that it would indeed be regarded as ‘premium’ or ‘must have’. However, even if competing supply is relatively inelastic, it does not follow that it will inevitably be profitable for the merged entity to refuse supply to downstream competitors.

Rather, that depends on the profits it can gain by doing so—which in turn depends on the balance between (1) the loss of profits from foregone sales to downstream competitors, compared to (2) the increased profits from greater sales in the downstream market. The appendix sets out a simple mathematical framework for making this assessment; it emerges that (depending on mark-ups in the two markets and on the extent to which sales lost by downstream competitors are gained by the merged entity) in some cases, a refusal to deal will be profitable; in others, it will not.

In short, competition concerns in content markets certainly cannot be ruled out as a matter of economics. However, any assessment of the likelihood of those issues arising depends on a complex, and often counterintuitive, analysis of market structure and conduct in both the upstream and downstream market.



#### 4. Policy responses and dilemmas

Finally, we consider some policy issues and dilemmas. It is clear that the markets at issue are being reshaped by rapid technological change. In the past, communications services were largely defined by the technology used for their delivery. For example, the free to air broadcast industry was predominantly developed around wireless unidirectional broadcast technologies, while the telecommunications was based on centralised switches using circuit-switching technologies to create a continuous link between the two parties communicating. However, technological change is allowing the delivery of multiple communications services through multiple technologies using common—or converged—digital platforms.

Convergence in the traditional broadcast media markets, bringing new entrants using communications technologies, has already occurred. Satellite, fixed-wireless and fixed network provision of broadcast television compete with traditional free-to-air broadcasters, and may indeed be displacing them. This has brought new competing suppliers in broadcast transmission and in broadcasting. Moreover, it is likely that, within a decade, the emerging two way broadband market will subsume both the broadcasting and data markets.

A major impact that the convergence process and the associated technological changes have had, and will continue to have, is the dramatic levels of uncertainty it has introduced into business planning.

More specifically, service providers face at least four types of increased uncertainties as a result of convergence.

The first is *demand uncertainty* which has been most apparent in the markets in which online services are supplied. Firms providing these services are still endeavouring to fathom what content or applications will succeed and how these can be priced. Customer segmentation, the increased visibility and use of personalisation as part of service offerings and the fragmentation of markets, all heighten the growing irrelevance of a “one size fits all” approach.

A second source of uncertainty relates to the deployment of new *technologies*. With new investment occurring in new infrastructure (for example, the different forms of fibre networks) and new uses for existing technologies, technology risks have increased, in terms of choice of functionality, implementation and viability (with a real risk of stranded investment as the pace of technology development accelerates), often in the absence of any significant precedent or established standards.

Third, despite the obvious success of firms such as Google and Facebook, uncertainty remains as to whether, and if so what, a profitable *business model* for a particular service might be. For example, while it seems there is vast commercial potential remaining to be exploited in the internet, it is not clear precisely how the revenue model will balance the provision of access, transactions, content and advertising. Globally, no consistent, profitable business model has yet emerged in many aspects of internet service and significant experimentation is occurring with new models appearing regularly.

Finally, uncertainty also arises as to the potential sources of competitive products. Firms competing in converging markets may be less concerned about their traditional competitors than they are about integrated and/or specialised competitors from other industries (for example, media companies, software companies, computer hardware companies, service integrators and the financial services industry) and successful start-up companies in new markets.

In combination, these four types of uncertainty flowing from convergence generate significant market uncertainty. Furthermore, the above discussion underlines the deep uncertainty that exists about where profit opportunities lie in the emerging, but as yet poorly understood, markets. A heavy investor in the wrong parts of the industry may find its asset is used, but the real profits accrue to a supplier somewhere else in the production chain.

These uncertainties create dilemmas for competition regulators. On the one hand, the inherent uncertainty can make intervention dangerous, both as market circumstances are difficult to assess and as intervention may rule out otherwise desirable market development. On the other hand, the potential for innovation means it is crucial to keep opportunities open for future competition to develop.

As a general matter, this should make regulators cautious. At its simplest, that is because regulatory ignorance is exceptionally large in the presence of the uncertainty generated by the present forms of convergence. There are a number of reasons for this, derived from the characteristics of convergence enunciated above:

- the speed and unpredictability of technology change and its market consequences. The market is usually far better placed than Government or a regulator to respond flexibly and quickly to these uncertainties;
- the other uncertainties which characterise rapidly changing markets – for example, uncertainty as to levels and patterns of demand for new services. In such an environment, a light-handed regulatory approach can maximise the flexibility of market participants to seek viable business models undistorted by regulatory intervention; and
- convergence implies a broadening of markets and enhancement of competition. Whereas competition has traditionally been limited within industries, or even within segments of industries, a definitive characteristic of convergence is increasing substitutability of goods and services, across traditional industry boundaries. Absent regulatory distortion, this should be so for both infrastructure and services markets. Emerging competition will lessen the need for, and heighten the potential distortion of, regulatory intervention.

That said, some of regulatory risks are unavoidable, so that the appropriate task is to seek to minimise, where possible, both the risk that regulatory errors will occur at all and the economic impact of those errors that do occur and which cannot be avoided.

In considering how this might be done, it is useful to consider the paradigm of sequential innovation—in which market change occurs through relatively abrupt shifts from one form of supply to another. For example, Google displaced earlier search engines and expanded into a wide range of services; it now faces intense competition from social networks expanding into its area of operation. Equally, both free to air broadcasters and traditional cable TV operators face ever stronger competition from the myriad forms of Internet-based broadcasting, as do conventional radio stations. It seems reasonable to suggest competition regulators should put a high priority on ensuring this process can continue—in other words, that new generations of supply can displace the existing generation.

Conversely, where competition issues essentially involve the rents accruing to established suppliers—the gain they make from any market power they may enjoy—that should be of somewhat less concern, so long as the manner in which those operators seek to secure or retain their rents does not undermine inter-generational competition.

There is an analogy here to the traditional analysis of inter-brand versus intra-brand competition. In essence, what is being suggested is that competition authorities should be less concerned about ensuring competition within an existing broadcasting platform so long as new platforms can displace it.

In practice, this will not be an easy line to draw—an exclusive content agreement may both undermine existing competitors and deter new competitors and types of supply from emerging. However, the greater the extent to which the exclusivity is specific to a particular, narrowly defined, type of platform, the lower that risk is; conversely, the greater the degree to which it covers all existing and prospective types of platforms, the greater the scrutiny it should receive.

Overall, as the process of convergence continues, competition issues about broadcasting content and transmission are likely to be more acute. However, technological change is also reducing the entry barriers into the production of content and expanding the range of transmission options—both of which should serve to reduce competition concerns. At the same time, the speed and unpredictability of technological change makes it vital competition authorities recognise the risks of ‘getting it wrong’: in the sense of mistaking transient commercial success for market power; or, conversely, in over-estimating the corrective efficacy of entry and of new competition. Striking the balance between these errors will undoubtedly be challenging for competition regulators, and at times frustrating for market participants, in developed and developing countries alike.

**APPENDIX: A SIMPLE FRAMEWORK FOR EXAMINING THE PROFITABILITY OF REFUSING THIRD PARTIES ACCESS TO PREMIUM CONTENT**

In this appendix, we consider a simple case in which a pay TV operator (PTV1) acquires a provider of premium content (CS1). The question is whether it will be profitable for CS1, once it is acquired by PTV1, to refuse content to PTV1's competitors. A simple framework is set out for considering this issue. It is important to note that this framework is intentionally mechanical—it abstracts from competing entry and from complex dynamics between market participants. Rather, its purpose is to illustrate, in an essentially static framework, the trade-offs inherent in any refusal to supply.

**1. Partial foreclosure**

We first analyze the potential concern of “partial foreclosure”. This refers to the hypothetical scenario in which CS1 would not completely foreclose PTV1's rivals (or would completely foreclose a few small rivals only). In this scenario, the amount of foreclosure would be relatively small and therefore it is unlikely that there would be any significant price effects. Partial foreclosure (i.e., foreclosure on a relatively small scale) may potentially be an optimal strategy when foreclosure on a larger scale is likely to lead to a significant price increase and thus to induce entry or backward integration by competitors.

If the merged firm engages in partial foreclosure, then it foregoes a profit equal to:

$$m_U \times \Delta Q \quad (1)$$

Here  $m_U$  is the upstream margin earned by CS1 on sales made to the foreclosed rivals, and  $\Delta Q$  is the reduction in the rivals' volume of business with CS1 caused by the foreclosure strategy. (All margins are denominated in dollars per unit.)

However, the foreclosure strategy also will tend to increase PTV1's profits as some of the former customers of the foreclosed rivals will switch to PTV1. This corresponds to a gain equal to:

$$\delta \times \Delta Q \times (m_U + m_D) \quad (2)$$

Here  $\delta$  is the diversion ratio and thus  $\delta \times \Delta Q$  is the volume of sales diverted from the foreclosed rivals to PTV1. For every unit diverted to PTV1, the total margin earned by the merged firm is equal to  $m_U + m_D$ , where  $m_D$  is the downstream margin of PTV1.

It follows that partial foreclosure is profitable if and only if the gain in Eq. (2) is greater than the loss in Eq. (1). Equivalently, partial foreclosure is profitable if and only if the diversion ratio,  $\delta$ , is greater than the following *critical diversion ratio*:

$$\delta > \frac{m_U}{m_U + m_D} \quad (3)$$

For example, if the upstream margin is three times as large as the downstream margin (i.e.,  $m_U = 3 \times m_D$ ), then the critical diversion ratio is equal to 75%.

The main empirical question then is the following: Is the actual diversion ratio greater or smaller than the critical diversion ratio. If it is greater (smaller) then foreclosure is likely (not likely) to be profitable.

## 2. Total foreclosure

We now analyze the potential concern of “total foreclosure”. In this hypothetical scenario, the merged firm would foreclose all the rivals of PTV1 either completely or almost completely. For example, the merged firm could decide to drastically reduce the quantity or quality of service supplied to each rival. Since the amount of foreclosure would be very large, we have to account for the possibility that the foreclosure strategy could allow the merged firm to increase price in the downstream market.

If the merged firm engages in total foreclosure, it foregoes an upstream profit equal to:

$$m_U \times Q_R \quad (4)$$

Here  $Q_R$  is the CS1’s total volume of business with PTV1’s rivals.

However, the foreclosure strategy will tend to increase PTV1’s profits in two ways. First, as in the previous section, some former customers of the foreclosed rivals will switch to PTV1. This corresponds to a gain equal to:

$$\delta \times Q_R \times (m_U + m_D) \quad (5)$$

Second, the merged firm may now have the ability to raise price in the downstream market. Assuming for the moment that PTV1 could raise price by  $\Delta$  dollars per unit without losing any sales, this corresponds to a gain equal to:

$$\Delta \times (Q_T + \delta Q_R) \quad (6)$$

Here  $Q_T + \delta Q_R$  is PTV1’s total volume of sales post-foreclosure.

It follows that total foreclosure is profitable if and only if Eq. (4) is smaller than the sum of Eq. (5) and Eq. (6). Equivalently, total foreclosure is profitable if and only if the actual diversion ratio,  $\delta$ , is greater than the following *critical diversion ratio*:

$$\delta > \frac{m_U - \frac{s\Delta}{1-s}}{m_U + m_D + \Delta} \quad (7)$$

Here  $s$  is PTV1’s current share of CS1’s output. For example, suppose that  $s = 25\%$  and  $\Delta = m_D$  (i.e., PTV1 would be able to double its downstream profit margin). Assuming that  $m_U = 3 \times m_D$  (as in the previous section), then the critical diversion ratio is equal to about 53%.

A main criticism of Eq. (6) is that it implicitly assumes that demand is perfectly inelastic (with respect to a price increase of  $\Delta$  dollars per unit). In reality, PTV1 might be able to raise price by, say, 10% and that might lead to, say, a 5% reduction in the volume of PTV1's sales. It is fairly straightforward to adjust Eq. (6) to account for a reduction in the volume of sales. Eq. (7) then becomes more cumbersome. A simpler approach is to continue to use Eq. (7) but assume a smaller price increase – say, 5% instead of 10% – to grossly capture the fact that a likely reduction in sales volume would make the foreclosure strategy less profitable (or more unprofitable).

There is in fact an even simpler approach. Intuitively, foreclosure increases the demand faced by PTV1. The critical diversion ratio in Eq. (3) assumes that PTV1 does not respond to this increase in demand by raising price but instead responds by increasing its volume of sales at the current price. Alternatively, PTV1 could respond to the increase in demand (due to the foreclosure strategy) by raising price by a certain amount while maintaining its current (pre-foreclosure) volume of sales. The *critical price increase* is defined as the minimum price increase that PTV1 would have to be able to implement (while keeping its current volume of sales) for the foreclosure to be profitable. The formula for the critical price increase can be found by setting  $\delta = 0$  in Eq. (7) and then solving for  $\Delta$ :

$$\Delta > \frac{1-s}{s} m_U \quad (8)$$

(The downstream gain,  $\Delta s$ , must be greater than the upstream loss,  $(1-s)m_U$ .)

The main question now becomes: Is it likely that foreclosure would allow PTV1 to raise price by more than this critical amount while keeping the same volume of sales as it currently has? The answer may depend critically on whether entry (or backward integration) is easy.

That brings us back to the issues discussed in section 0 above about the extent to which competing supply could expand—and its timeliness and effectiveness in so doing.



## RADIODIFFUSION ET CONTENU INTERNET – NAVIGATION DANS L'INCONNU ET DANS L'INCONNAISSABLE

*Par M. Allan Fels\**

### 1. Quels sont les principaux problèmes de concurrence dans la radiodiffusion ?

Les régulateurs dans le monde entier s'intéressent traditionnellement au pouvoir de marché sur l'infrastructure physique utilisée pour diffuser des programmes aux utilisateurs finaux. Compte tenu de l'importance des coûts irréversibles et des économies d'échelle associés au déploiement de réseaux de transmission et de réseaux de distribution de programmes (notamment les boîtiers décodeurs et les systèmes d'accès conditionnel) certains régulateurs en sont arrivés, dans le passé, à rendre obligatoire l'accès à ces réseaux sous-jacents.

Au sein de l'UE, par exemple, les services de radiodiffusion figuraient dans les recommandations de 2003 de la Commission européenne en tant que marché susceptible d'être soumis à une réglementation ex ante.<sup>1</sup> Il a été rendu obligatoire de fournir un accès conditionnel à des conditions équitables, raisonnables et non discriminatoires au sein de l'UE et la Directive « accès » explique que cette obligation pourrait être étendue aux guides électroniques de programmes (EPG) et aux interfaces des programmes d'application (API).<sup>2</sup> En Australie, l'accès au niveau du marché de gros aux boîtiers décodeurs numériques est assuré par le biais d'un engagement d'accès spécial pris auprès de l'Australian Competition and Consumer Commission par le plus grand réseau de télévision à péage, Foxtel.

De plus en plus, les autorités de la concurrence et les régulateurs s'intéressent à la fourniture de contenu et à la façon dont la vente et la distribution de contenu affectent la concurrence sur les marchés en aval. Le contenu est un élément essentiel dans la fourniture de programmes et la distribution au détail de services de télévision payante. La limitation de la disponibilité du contenu, par exemple par le biais d'accords d'exclusivité, l'agrégation du contenu en droits groupés de vente en gros ou d'autres obstacles à la participation à l'acquisition de contenu, peuvent par conséquent restreindre la concurrence sur les marchés en aval.

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<sup>1</sup> Commission des Communautés européennes, Recommandation de la Commission du 11/02/2003 concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation ex ante conformément à la Directive 2002/21/CE du Parlement européen et du Conseil relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, C(2003)497.

<sup>2</sup> Journal officiel des Communautés européennes, Directive 2002/19/CE du Parlement européen et du Conseil du 7 mars 2002 relative à l'accès aux réseaux de communications électroniques et aux ressources associées (directive « accès »), Article 10.



L'évaluation de la concurrence réalisée par l'UK Competition Commission sur la fourniture de contenu cinématographique de la télévision payante est un exemple des préoccupations que peut susciter l'acquisition de contenu (voir l'étude de cas ci-après). Dans ce cas, une préoccupation majeure de l'Ofcom tenait au fait que la position de force de Sky sur le marché de détail de la télévision payante lui permettait d'acquérir les droits pour la quasi-totalité des contenus cinématographiques de premier ordre, perpétuant ainsi son pouvoir de marché dans la fourniture de services de télévision payante au détail. La Competition Commission a conclu que, compte tenu des préférences des consommateurs et de l'évolution du marché au cours de l'enquête, de nouveaux fournisseurs de services de télévision OTT étaient en mesure de concurrencer les opérateurs en place pour acquérir des droits à contenu. Le rôle de Sky dans l'acquisition et la distribution de contenu cinématographique de premier ordre n'avait donc pas d'effet défavorable sur la concurrence.

**Étude de cas 1 (Royaume-Uni) : Évaluation par la Competition Commission  
du contenu cinématographique de la télévision payante**

En 2010, l'Ofcom a saisi la Competition Commission de ses préoccupations concernant la vente et la distribution de contenu cinématographique à la télévision payante.<sup>3</sup> L'Ofcom considérait que Sky Television (Sky), le plus grand fournisseur de services de télévision payante au Royaume-Uni, contrôlait effectivement les droits à contenu cinématographique de premier ordre et qu'il était à craindre que cet opérateur n'use de son pouvoir de marché pour restreindre la distribution de contenu cinématographique de premier ordre et pratiquer des prix excessifs. L'Ofcom craignait aussi que Sky, qui continuait de développer la fourniture de vidéo à la demande par abonnement (SVOD), n'arrive en fait à transférer son pouvoir de marché dans la fourniture de services traditionnels de télévision payante vers la fourniture de SVOD, compte tenu de la vente conjointe des droits de licence du canal linéaire de premier ordre et de contenu SVOD.

L'Ofcom considérait qu'en l'absence d'une solution commerciale à ces problèmes de concurrence, on pouvait appliquer les mesures correctrices suivantes : (1) des réglementations relatives aux modalités de vente des droits à contenu cinématographique de premier ordre – par exemple, des règles limitant l'agrégation de contenu ; et (2) un mandat réglementaire imposant à Sky de permettre l'accès à la vente en gros de contenu cinématographique de premier ordre.

La Competition Commission a publié ses conclusions sur les droits cinématographiques dans la télévision payante en août 2012. Elle a conclu que Sky avait probablement un pouvoir de marché dans la distribution de contenu sur le marché de détail de la télévision payante en raison d'obstacles empêchant l'entrée à grande échelle et l'expansion à l'aide des réseaux de distribution traditionnels, comme en témoignaient le faible taux de changement d'opérateur et la forte concentration du marché.<sup>4</sup> La Commission a toutefois estimé aussi que : (1) d'après les informations recueillies dans le cadre de l'étude, le contenu cinématographique de premier ordre n'influaient guère sur le choix d'un fournisseur de télévision payante par les consommateurs ; (2) de nouveaux fournisseurs de SVOD avaient pénétré sur le marché et avaient attiré à eux une part importante d'abonnés en peu de temps ; (3) les obstacles à l'acquisition de contenu cinématographique de premier ordre ont diminué parce que les fournisseurs de télévision OTT ont la possibilité de constituer rapidement la base d'abonnés nécessaire pour concurrencer efficacement Sky en matière de contenu ; et (4) la position de Sky en tant qu'acquéreur et distributeur de contenu cinématographique de premier ordre dans la télévision payante n'aurait pas d'effets défavorables importants sur la concurrence.

<sup>3</sup> Ofcom (4 août 2010), Premium pay TV movies – Decision. Disponible à l'adresse : [http://stakeholders.ofcom.org.uk/consultations/movies\\_reference/statement/](http://stakeholders.ofcom.org.uk/consultations/movies_reference/statement/)

<sup>4</sup> Competition Commission (2 août, 2012), Movies on pay TV market investigation - A report on the supply and acquisition of subscription *pay-TV movie rights and services*. Disponible à l'adresse : [http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

L'étude de cas réalisée au Royaume-Uni montre que la fourniture de services de télévision payante au détail et les modalités de concurrence sur ce marché évoluent, ce qui peut modifier la capacité d'une entreprise d'utiliser un pouvoir de marché et la nécessité d'une intervention réglementaire.

Un projet d'acquisition en Australie, par un investisseur diffusant en clair sur le réseau Seven, de parts supplémentaires d'un producteur et diffuseur d'événements sportifs illustre encore l'importance des systèmes d'acquisition de contenu pour la concurrence sur le marché en aval. Dans l'exemple australien, l'autorité de la concurrence a considéré que la possibilité pour le diffuseur en clair de participer à des soumissions conjointes avec l'opérateur de réseau câblé était un moyen important, pour les chaînes en clair, d'acquérir du contenu sportif. Le principal problème du point de vue de la concurrence était que, avec une seule chaîne en clair détenant une part importante d'un grand producteur et diffuseur d'événements sportifs et des réseaux de télévision payante, les autres chaînes en clair seraient limitées dans leurs possibilités d'acquérir les droits sportifs. Cette contrainte limiterait elle-même leur capacité d'offrir un contenu suffisant aux abonnés de la télévision et, partant, réduirait leur efficacité en tant que concurrents.

### **Étude de cas 2 (Australie) : Acquisition de CMH par Seven**

En 2012, Seven Group Holding (Seven) a sollicité auprès de l'Australian Competition and Consumer Commission (ACCC) l'autorisation d'acquérir les parts restantes de Consolidated Media Holdings (CMH) qui lui manquaient encore.

A cette époque, Seven détenait des parts dans un certain nombre d'entreprises de médias, notamment celles qui exploient le réseau commercial de télévision en clair Seven. CMH avait une participation de 50 % dans l'entreprise de production et de diffusion d'événements sportifs Fox Sports Australia (FSA) qui fournissait des programmes sportifs à Foxtel, le plus grand fournisseur de télévision par abonnement aux consommateurs finaux en Australie. FSA détenait 50 % de Foxtel et, de ce fait, CMH détenait une part indirecte de 25 % de Foxtel.

En février 2013, l'ACCC a publié son évaluation de la concurrence pour ce projet d'acquisition, concluant qu'elle s'opposerait à l'acquisition : "l'acquisition envisagée par Seven des parts restantes qu'elle ne détenait pas dans CMH aurait probablement pour effet d'affaiblir notablement la concurrence sur le marché de la fourniture de services de télévision en clair en Australie, ce qui est contraire à l'article 50 de la Loi (Competition and Consumer Act)."<sup>5</sup>

L'ACCC a pris cette décision car elle considérait que « l'acquisition envisagée avantagerait Seven Network par rapport aux autres réseaux en clair du point de vue de la participation à des soumissions conjointes et à d'autres arrangements commerciaux avec FSA et FOXTEL pour l'acquisition de droits sportifs. Le fait de pouvoir parvenir à ce type d'accords avec FSA ou FOXTEL renforcerait la capacité de Seven Network d'acquérir les droits aux événements sportifs de premier ordre. Compte tenu de l'importance du contenu sportif de premier ordre pour permettre à un réseau en clair de concurrencer efficacement les autres réseaux en clair, l'ACCC a estimé que l'avantage que Seven Network obtiendrait du point de vue de l'acquisition de ce type de contenu aurait sans doute pour effet d'affaiblir la concurrence sur le marché de la fourniture de services de télévision en clair."<sup>6</sup>

L'intégration verticale des fonctions nécessaires à la fourniture de services de télévision payante au détail préoccupe aussi grandement les régulateurs et les autorités de la concurrence depuis quel temps. Les fonctions nécessaires à la fourniture de services de télévision payante au détail sont les suivantes :

<sup>5</sup> ACCC (15 février 2013) Public Competition Assessment: Seven Group Holdings Limited - proposed acquisition of remaining shares in Consolidated Media Holdings Limited, para 50.

<sup>6</sup> ACCC (15 février, 2013), para 34.

- La production de contenu ;
- L'offre de programmes ;
- La diffusion des programmes ; et
- L'utilisation de l'infrastructure physiques pour la diffusion des programmes (réseaux câblés, réseaux DSL, networks, installations satellites etc.)

Comme exemples des effets anticoncurrentiels potentiels de l'intégration verticale entre deux ou plusieurs niveaux de la chaîne d'approvisionnement, on peut citer :

- Le refus de fournir des inputs essentiels aux entreprises concurrentes en aval ;
- Des compressions de marges ;
- L'élévation des coûts des concurrents ; et
- D'autres pratiques discriminatoires.

Un exemple récent de cas où une autorité de la concurrence a détecté des problèmes liés à l'intégration verticale sur les marchés de radiodiffusion est celui de l'acquisition par Comcast de NBCUniversal aux Etats-Unis. Les préoccupations suscitées par l'intégration verticale entre la fourniture de contenu et le réseau câblé de télévision payante avaient trait notamment à la question de savoir si l'acquisition interdirait l'accès des réseaux concurrents de télévision payante à certains contenus ou obligerait ces réseaux à payer des prix plus élevés.

Un second type de problème lié à l'intégration verticale dans l'affaire Comcast était que cette entreprise pourrait être incitée à restreindre l'utilisation de son réseau câblé aux distributeurs de vidéos en ligne qui concurrencent Hulu, le distributeur dont Comcast a fait récemment l'acquisition.

### Etude de cas 3 (USA) : Acquisition de NBCU par Comcast

Comcast est le plus grand opérateur de réseau câblé aux Etats-Unis, fournissant des services à près de 24 million d'abonnés dans 39 Etats plus le District of Columbia.<sup>7</sup> En 2011 Comcast a formé une coentreprise avec General Electricity, qui lui a assuré une participation de contrôle de 51% dans NBCUniversal.<sup>8</sup> Comcast a annoncé récemment son projet d'acquérir les 49 % restants.<sup>9</sup> NBCUniversal possède des réseaux de radiodiffusion, des stations de télévision, des réseaux de diffusion de programmes par câble, des studios de télévision et de cinéma et le distributeur de vidéos en ligne, Hulu.

L'US Department of Justice, lors de l'évaluation de la coentreprise en 2011, a identifié un certain nombre de problèmes de concurrence liés à l'intégration verticale entre la fourniture de contenu et la distribution. Comme l'indique Kimmelman, les principales préoccupations liées à la coentreprise et à l'acquisition d'une part de 51 % par Comcast tenaient au fait que Comcast serait incité à :

- augmenter les droits de licence de contenu pour les distributeurs de contenu concurrents ;
- ou refuser tout accès au contenu ; et
- éventuellement, écarter de son réseau les distributeurs concurrents de vidéos en ligne OVD.<sup>10</sup>

Du fait de ces préoccupations, un certain nombre d'obligations ont été imposées par le Consent Decree, au nombre desquelles :

- l'application de modalités économiquement équivalentes de fourniture de programmes aux distributeurs de vidéos en ligne
- la fourniture de programmes vidéo comparables aux distributeurs de vidéos en ligne
- le droit des distributeurs de vidéos en ligne à l'arbitrage commercial
- et la renonciation au contrôle d'Hulu.<sup>11</sup>

Des contraintes spécifiques en matière de conduite ont aussi été appliquées à Comcast par le Consent Decree.

Par ailleurs l'examen de la coentreprise par la FCC a abouti à la mise en œuvre d'un certain nombre d'obligations, au nombre desquelles, selon Kimmelman, figurait :

“l'obligation pour la coentreprise d'autoriser la distribution de tous ses programmes par les distributeurs traditionnels, l'amélioration du processus existant d'arbitrage commercial des conflits relatifs aux licences avec les distributeurs traditionnels, l'obligation pour la coentreprise d'accorder des licences de contenu aux distributeurs de vidéos en ligne à des conditions raisonnables, ainsi qu'un mécanisme d'arbitrage pour le règlement des conflits qui pourraient en résulter.”<sup>12</sup>

<sup>7</sup> FCC (10 janvier 2011), In the Matter of Applications of Comcast Corporation, General Electricity Company and NBCUniversal Inc for Consent to Assign Licenses and Transfer Licenses, MB Docket No 10-56, p.6.

<sup>8</sup> Comcast (31 janvier 2011), “Comcast and GE complete transaction to form NBCUniversal, LLCC”, Comcast media release.

<sup>9</sup> Gustin, Sam (14 février, 2013) “Comcast’s NBCUniversal Deal: As One Media Era Ends Another Begins” TIME.

<sup>10</sup> Kimmelman, Gene I. (Chief Counsel for Competition Policy and Intergovernmental Relations Antitrust Division U.S. Department of Justice) (21 juin 2012), “Antitrust Enforcement and Media Industries: Competition and Beyond”, Remarks as Prepared for the American Antitrust Institute’s Civil Liberties and Competition Policy Conference Washington, DC, p.5.

<sup>11</sup> United States District Court for the District of Columbia (1<sup>er</sup> septembre 2011), United States of America, State of California, State of Florida, State of Missouri, State of Texas and State of Washington – Final Judgement, Case 1:11-cv-01106 Judge Leon, Richard J.

<sup>12</sup> Kimmelman (21 juin 2012), p. 7.

## 2. Quel est l'effet de l'évolution technologique sur la concurrence dans les marchés de la radiodiffusion ?

L'évolution technologique dans les marchés de la radiodiffusion a des effets divers sur la concurrence. L'évolution technologique modifie notamment :

- La gamme et la qualité des services fournis ;
- Les coûts sous-jacents de fourniture ;
- L'importance des obstacles à l'entrée – les nouvelles technologies peuvent, par exemple, offrir de nouveaux moyens d'entrer en concurrence sur le marché ;
- La possibilité pour les consommateurs de changer de fournisseur ; et
- Les mécanismes de tarification qui peuvent être utilisés – la numérisation, par exemple, permet d'offrir des services de paiement à la séance.

La numérisation, qui permet la mise à disposition d'un volume plus important et d'une gamme plus étendue de contenu, a, avec le développement et l'amélioration des réseaux Internet à haut débit, généralement réduit les obstacles à l'entrée.

La gamme de plateformes de diffusion de contenu est maintenant beaucoup plus large. Outre l'utilisation de plateformes traditionnelles de télévision payante (passant par les réseaux câblés, satellites et terrestres, par exemple), la technologie OTT permet la fourniture de SVOD sur les réseaux Internet à haut débit quel que soit le type de technologie à large bande sous-jacent (comme le câble, la fibre ou la DSL). De ce fait, comme l'a constaté l'UK Competition Commission dans l'étude de cas 1 présentée plus haut, la concurrence des distributeurs de vidéos en ligne peut aujourd'hui, jusqu'à un certain point du moins, imposer des contraintes aux opérateurs de télévision payante. Néanmoins, comme le montre l'étude de cas réalisée aux Etats-Unis, il est possible que les opérateurs de réseaux câblés influent de façon discriminatoire sur la qualité de la concurrence exercée par les distributeurs de vidéos en ligne.

Même si l'on suppose généralement qu'une concurrence accrue entre plateformes est profitable pour le consommateur, certains éléments d'observation indiquent que cette concurrence plus vive peut faire monter les prix et réduire la pénétration. Ramello et Silvia (2008), par exemple, constatent qu'en Italie, suite à l'arrivée de concurrents sur le marché de la télévision payante, le coût des abonnements a augmenté de 25.6 % entre 1998 et 2000, une hausse qu'ils attribuent aux effets de la fragmentation du marché.<sup>13</sup>

S'il est vrai que de nouvelles plateformes peuvent, de plus en plus, intensifier la concurrence, il paraît évident que le contenu de premier ordre peut rester une source de pouvoir de marché. Le contenu sportif en est un exemple. Seabright (2006) observe qu'après la numérisation « les droits de diffusion se sont substitués aux goulets d'étranglement dans la transmission comme source de pouvoir de marché. »<sup>14</sup>

Domenech (2009) conclut, dans une analyse économétrique du marché espagnol de la télévision payante, que si le prix à la séance n'est pas une variable explicative importante de la pénétration des plateformes, la détention des droits de diffusion des matches de la Ligue espagnole du football

<sup>13</sup> Ramello, Giovanni B. et Francesco Silva (2008), "Exclusion, Competition & Change: The Shifting Boundaries of the Television Market" Review of Economic Research on Copyright Issues, vol. 5(1), pp. 55-74

<sup>14</sup> Seabright (2006) pp 14-15.

professionnel avec paiement à la séance est une variable décisive.<sup>15</sup> Selon Domenech, ces résultats laissent penser que les plateformes de télévision payante se font concurrence davantage sur le contenu que sur les prix. Cela souligne encore l'importance de surveiller de près la fourniture et l'acquisition de contenu, en particulier le contenu de premier ordre, dont l'offre est rare.

La numérisation s'est accompagnée de l'apparition et du développement des boîtiers décodeurs pour les magnétoscopes personnels. Les magnétoscopes personnels permettent aux consommateurs d'enregistrer facilement du contenu, notamment des programmes qui sont diffusés simultanément. Lors de la visualisation de l'enregistrement, le consommateur peut aisément accélérer les passages de publicité, ce qui lui permet de mieux profiter du contenu aux dépens de la viabilité commerciale des modèles traditionnels de diffusion en clair. Si l'utilisation des magnétoscopes croît suffisamment, le modèle de diffusion en clair devra évoluer, par exemple, par le recours à la publicité de placement de produits (comme l'explique Seabright, 2006) afin d'obtenir les recettes nécessaires pour concurrencer les opérateurs de télévision payante.

### 3. Quelques considérations d'ordre économique

Un des principaux aspects préoccupants qui ressort de ces études de cas est qu'un fournisseur de services de radiodiffusion sur un marché en aval peut user de sa position pour exercer un pouvoir sur un marché de diffusion en amont. Cela revient à dire que le fournisseur de services serait en mesure d'accaparer un marché en amont – du fait qu'il a accès à un grand nombre de téléspectateurs ou d'abonnés sur le marché en aval, le fournisseur aurait la possibilité d'acheter ou de contrôler par d'autres moyens l'offre en amont, consolidant ainsi sa position en aval. A première vue, cela paraît assez grave, mais à cela s'ajoute le fait que le pouvoir de cet « acheteur » en amont lui permettrait d'exercer un pouvoir de marché accru en aval. Reste à savoir dans quelles circonstances cette situation peut se produire.

L'analyse semble indiquer que cette pratique anticoncurrentielle a plus de chances d'être rentable dans certaines circonstances que dans d'autres. Il importe par conséquent que les autorités de la concurrence évaluent soigneusement la structure du marché en examinant les comportements qui peuvent être à l'origine de perturbations. Afin d'illustrer l'intérêt que la structure du marché présente pour cette évaluation, il est utile d'examiner deux cas qui s'excluent l'un l'autre. Dans le premier cas, le marché de la diffusion en aval est concurrentiel au départ ; dans le second cas, il y a un fournisseur qui possède un important pouvoir de marché.

#### 3.1 Cas 1 — Marché concurrentiel en aval

Dans cette section, nous supposons que le marché d'aval (pour les services de télévision payante, par exemple) est initialement concurrentiel. Toutefois, la structure du marché d'amont a aussi un impact important sur les résultats. Dans le cas où les marchés d'amont sont structurellement concurrentiels, il est impossible d'accaparer la production en amont. Dans un scénario différent, si l'offre en amont est concurrentielle mais moins réactive aux prix, une entreprise en aval doit payer un prix élevé pour accaparer le marché. Enfin, si l'offre en amont est monopolisée, il est très difficile pour une entreprise en aval d'accaparer de façon rentable la totalité de la production. Nous traiterons chacun de ces cas à tour de rôle.

##### 3.1.1 Offre concurrentielle et réactive en amont

Dans cette section, nous montrons que, sur un marché de diffusion concurrentiel, si l'offre est très réactive aux prix, il est rarement possible, voire jamais, de verrouiller de façon rentable ce marché. Cela

<sup>15</sup> Domenech, Laia, Competition between TV Platforms (1<sup>er</sup> octobre 2009). XREAP 2009-09. Disponible à l'adresse SSRN: <http://dx.doi.org/10.2139/ssrn.1825103>

tient simplement au fait que l'entreprise d'aval doit accroître ses achats de contenu suffisamment pour restreindre la disponibilité de contenu, c'est-à-dire qu'il lui faut acheter assez pour faire monter le prix du contenu. Évidemment, acheter davantage à des prix plus élevés coûte cher, mais pire encore, lorsque l'offre est très réactive aux prix, il faut acheter un énorme volume de contenu pour obtenir cet effet. Par conséquent, il est fort improbable que ces achats massifs soient rentables.

La réactivité des fournisseurs au prix est appelée « élasticité de l'offre ». L'offre est très réactive au prix si une légère hausse de prix entraîne une augmentation relativement importante des niveaux de production. Les économistes appellent « élasticité » cette réactivité de l'offre, donc plus l'offre est réactive, plus elle est élastique. Cela signifie que si, par suite d'une demande accrue, le prix du contenu augmentait, l'offre croîtrait rapidement aussi. Seule une hausse très marquée de la demande pourrait provoquer une forte augmentation du prix.

Considérons maintenant une stratégie élaborée par une entreprise d'aval pour accaparer le marché de la diffusion. Imaginons qu'elle accroisse considérablement ses achats exclusifs de contenu (à noter que l'exclusivité majore le prix qu'elle aura à payer). L'entreprise espère ainsi réduire la disponibilité du contenu au point où elle sera en mesure d'imposer ses conditions à la fois aux fournisseurs de contenu et aux autres entreprises en aval qui ont besoin de contenu pour lui faire concurrence. Cependant, pour que cette opération ait des chances de réussir, il faut que ses nouveaux achats rendent le contenu beaucoup plus rare qu'il ne l'était dans le passé. Si ce n'est pas le cas, les concurrents en aval pourront simplement acheter ailleurs à des prix à peine plus élevés et le marché d'aval restera concurrentiel. Toutefois, si l'offre est très réactive au prix, une augmentation très importante de la demande aura un effet limité sur le prix. Une demande accrue exercera une certaine pression à la hausse sur le prix, mais cela entraînera immédiatement un accroissement considérable de l'offre. La demande sera satisfaite une fois que les prix auront augmenté un peu seulement. En fait, lorsque la demande est très réactive au prix, il est pratiquement impossible d'obtenir un effet substantiel sur le prix.

Pire, l'objectif ultime dans l'argument de l'utilisation de l'effet de levier n'est pas de faire monter le prix — en réalité cela coûte cher à l'entreprise qui adopte cette conduite puisqu'il lui faut acheter plus à des prix plus élevés. L'objectif ultime de l'entreprise est plutôt de faire monter les prix en aval de façon à accroître ses bénéfices. Cependant, une fonction d'offre élastique en amont signifie qu'il faut acheter un volume énorme de la production en amont pour provoquer une légère hausse de prix. Mais si l'on n'arrive à obtenir qu'une faible hausse de prix en amont, ce ne peut faire monter que légèrement les prix en aval. L'effet net est que, tandis que les concurrents de l'entreprise en aval réduiront, de fait, légèrement leur offre de services, et que le prix sur le marché augmentera, les recettes additionnelles que l'entreprise qui tente d'accaparer le marché d'amont engrange sur le marché d'aval où les prix sont maintenant légèrement plus élevés ne suffisent pas pour couvrir le coût des achats massifs en amont nécessaires pour produire ce résultat. Il est donc quasiment impossible de faire monter de façon rentable les prix en aval en cherchant à monopoliser le marché du contenu en amont lorsque l'offre en amont est relativement élastique.

### 3.1.2 *Offre concurrentielle et inélastique en amont*

Dans la section précédente, où l'offre en amont était élastique, nous avons montré qu'il était fort improbable (et de fait, généralement impossible) qu'une entreprise puisse, de façon rentable, acheter la production en amont afin de fixer un prix élevé, voire un prix de monopole, en aval. En revanche, si l'offre en amont est inélastique, les conditions sont beaucoup plus favorables à cette stratégie. En fait, dans certaines circonstances, les bénéfices engrangés par une entreprise qui parvient à monopoliser l'offre en amont peuvent être supérieurs au prix d'achat de ce contenu.

Si l'offre en amont est très inélastique, la production — que nous appellerons « contenu » pour être concrets — n'augmente guère suivant la hausse de la demande. Ce sont au contraire les prix qui

augmentent. Cela signifie que si un grand opérateur en aval cherchait à monopoliser la production en amont, il n'aurait pas besoin d'acheter beaucoup pour commencer à avoir un impact réel sur les prix du contenu en amont. Malheureusement, pour obtenir cet effet sur le prix, cet opérateur doit payer cher. Par conséquent, pour ce cette stratégie soit rentable, il doit réaliser d'importants bénéfices additionnels en aval grâce à sa stratégie d'éviction. On observe que lorsque l'offre concurrentielle est supérieure aux niveaux de monopole -- et avec une fonction d'offre très inélastique l'inverse est au moins possible<sup>16</sup> -- on peut obtenir ce résultats. Une entreprise qui a le monopole du contenu pourrait, de fait, gagner plus qu'il ne serait nécessaire pour corrompre les fournisseurs de contenu concurrents afin qu'ils lui fournissent en exclusivité un volume limité de contenu (en tant que détentrice d'un monopole, elle réduira la production) et ne produisent pas davantage.

Toutefois, même si les conditions requises pour ce que cela soit possible étaient réunies, il faut faire preuve de prudence lorsqu'on conclut que cet « accaparement » rentable du marché de contenu est, de fait, probable. Il y a deux raisons à cela : premièrement, il doit y avoir des questions de crédibilité ; et deuxièmement, cette possibilité semble nécessiter le passage d'une absence de pouvoir de marché à une position de pouvoir. Nous examinerons chacune de ces questions l'une après l'autre.

### 3.1.3 *Crédibilité*

Supposons une offre en amont très inélastique mais concurrentielle, et une production supérieure aux niveaux de monopole. Dans ces conditions, il est possible que le coût d'acquisition de droits exclusifs pour la totalité du contenu soit inférieur aux bénéfices associés à la détention monopolistique du contenu. La question à aborder avant de conclure que cela est probable est celle de savoir pourquoi cette stratégie n'est pas ouverte à n'importe quelle autre entreprise également, notamment celles qui sont en amont, ou même en dehors du secteur. Après tout, la stratégie est simple — acheter des droits exclusifs pour une production inélastique en amont, puis en monopoliser l'utilisation en aval, soit pour « son propre usage » si l'acheteur est un grand opérateur en aval, soit en vendant à d'autres opérateurs en aval. Évidemment, la concurrence d'entreprises cherchant à mettre en œuvre une telle stratégie serait vouée à l'échec. Autrement dit, pour que cette stratégie soit crédible, l'entreprise qui l'applique doit être, d'un certain point de vue, unique.

### 3.1.4 *Création d'un pouvoir de marché à partir d'une position d'absence de pouvoir de marché*

Il y a actuellement une controverse parmi les économistes sur la question de savoir si le pouvoir de marché peut être créé en passant d'un marché à un autre. Cependant, ce dont il est question ici est le passage d'une position d'absence de pouvoir de marché à une position de pouvoir sur un autre marché (le cas d'une entreprise en aval ayant un pouvoir de marché sera traité plus loin). Aucune théorie économique ne donne à penser que cela puisse se faire. Si le marché en aval est concurrentiel, une offre inélastique en amont ne crée pas, par elle-même, une possibilité d'obtention d'un pouvoir par un opérateur en aval.

Toutefois, les choses sont plus complexes lorsqu'une entreprise en amont possède déjà un pouvoir de marché. Il serait dès lors possible que le pouvoir de marché soit transféré du marché amont vers le marché aval. Selon le point de vue orthodoxe, qui est celui de l'école de Chicago, le transfert d'une position de pouvoir de marché vers un marché où l'entreprise n'a pas de pouvoir est impossible. Des travaux plus récents semblent indiquer que, dans un certains nombre de circonstances, cela n'est pas forcément toujours le cas.

<sup>16</sup> Pour observer cela, prenons une fonction d'offre en forme de L, en miroir autour de son axe vertical. La partie de la fonction d'offre qui augmente de façon abrupte pourrait bien croiser la demande à la gauche du point auquel une entreprise en situation de monopole opérerait si la partie verticale du L avait une pente plus faible.



En résumé, lorsque les marchés d'aval et d'amont sont tous les deux structurellement concurrentiels, la monopolisation par « accaparement » du marché de contenu est probablement impossible. Cela sera impossible aussi si le marché d'amont se caractérise par une offre très élastique, quelles que soient les conditions en aval. Cependant, dans les cas où une entreprise domine le marché d'amont, elle peut être incitée à chercher à étendre son pouvoir sur le marché d'aval, encore que la faisabilité et la rentabilité de cette stratégie exigent qu'un certain nombre de conditions spécifiques soient remplies.

### 3.2 *Cas 2 – Pouvoir de marché en aval, et à la fois en amont et en aval*

Jusqu'à-là, il était supposé que l'entreprise en aval n'avait pas de pouvoir de marché important. Cette hypothèse est maintenant assouplie, c'est-à-dire que, compte non tenu des vues de l'école de Chicago, il y a au moins un certain pouvoir de marché qui peut être utilisé pour accaparer le marché. Bien entendu, ce fait ne change pas forcément les résultats énoncés plus haut : par exemple, lorsque l'offre en amont est concurrentielle et très élastique, ce qui peut être le cas sur au moins certains marchés de contenu, il reste impossible d'empêcher ses concurrents d'accéder au contenu. On notera aussi que plus l'entreprise d'aval a de pouvoir de marché, moins elle pense à se lancer dans une telle stratégie. De fait, si l'entreprise jouit d'une situation de monopole, elle n'a pas besoin d'exclure ses concurrents puisqu'elle n'en a pas.

Cette impossibilité entraîne des changements, dans certaines circonstances,<sup>17</sup> puisque l'offre en amont devient de plus en plus inélastique. La rentabilité de la stratégie dépendra des circonstances précises ; après tout, comme l'entreprise d'aval revendique déjà certaines rentes de monopole, l'avantage tiré de ce comportement est réduit, et dans le cas extrême où l'entreprise en question jouit d'une situation de monopole, elle n'a pas besoin de s'approprier la totalité du contenu.

Le cas le plus complexe à cet égard est celui où il existe un pouvoir de marché *à la fois* en amont et en aval. Dans cette situation, il reste vrai qu'en l'absence de toute relation verticale anticoncurrentielle, il n'y a pas de raison de croire qu'une entreprise en aval puisse transférer son pouvoir sur un marché en amont, surtout lorsque les entreprises en amont ont un pouvoir faisant contrepoids. Cependant, même si la position de l'école de Chicago est erronée, il convient aussi de noter qu'il demeure possible que d'autres entreprises d'amont qui ont un pouvoir de marché procèdent aussi à une intégration verticale avec des entreprises d'aval et obtiennent ainsi un pouvoir de contrepoids sur les deux marchés. Par ailleurs, dans ce cas, l'intégration verticale ou une autre relation verticale peut être motivée par un souci d'amélioration de l'efficacité – afin, par exemple, d'éviter des pertes qui pourraient résulter d'une double marginalisation (le fait d'avoir une entreprise en amont qui fixe des prix supérieurs aux coûts, aggravé par le fait que l'entreprise en aval en fait autant, ce qui donne un prix de détail rehaussé d'une marge sur un prix déjà majoré).

### 3.3 *Conclusion*

En résumé, lorsque les marchés d'amont sont concurrentiels et que l'offre n'est pas inélastique, il est hautement improbable qu'un acheteur en aval puisse monopoliser ces services de façon rentable. Par ailleurs, même si l'offre en amont est inélastique, le recours à l'effet de levier reste improbable si au moins certaines entreprises d'aval présentent des caractéristiques raisonnablement égales.

Ces arguments réduisent notablement la possibilité d'un effet de levier si les deux marchés sont concurrentiels ou s'il y a concurrence en aval et que l'offre en amont est élastique. Il reste trois cas, chacun avec un certain degré de pouvoir de marché. Le premier est celui d'un marché en aval concurrentiel, avec un pouvoir de marché en amont. Dans ce cas, et si l'on fait abstraction des doutes de l'école de Chicago,

<sup>17</sup> Par exemple, l'offre est extrêmement inélastique mais croise la demande à la droite des niveaux de monopole.

l'effet de levier est possible, à travers les liens verticaux qui existent entre l'entreprise d'amont qui a un pouvoir de marché et un opérateur en aval. Le deuxième cas est celui où il existe un pouvoir de marché en aval, avec une offre inélastique mais un marché concurrentiel en amont. S'il est vrai qu'une fonction d'offre inélastique en amont (si elle existe) ouvre la perspective de rentes de marché, et que le pouvoir en aval offre de quoi tirer parti de la situation, ce cas repose sur l'établissement d'une relation verticale entre le fournisseur en amont et le fournisseur en aval, et sur la possibilité que le recours à l'effet de levier soit lui-même une stratégie probable. Le dernier cas se caractérise par l'existence d'un pouvoir de marché à la fois en amont et en aval. L'effet de levier, dans ce cas, est encore une fois possible par le biais de l'intégration verticale, sous réserve toutefois des objections habituelles de l'école de Chicago. Il convient cependant de noter que la présence de multiples entreprises d'amont ayant un pouvoir de marché permettrait à d'autres entreprises associées verticalement de concurrencer toute entité intégrée verticalement qui se créerait.

Dans la pratique, les autorités de la concurrence sont surtout préoccupées lorsqu'une fusion entre un opérateur de radiodiffusion en aval et un fournisseur de contenu « de premier ordre » menace de rendre ce contenu indisponible pour les opérateurs concurrents. Cela dépend à l'évidence de l'élasticité de l'offre de contenu concurrent ; mais dans les cas où cette offre est très élastique, il semble improbable qu'elle soit, de fait, considérée comme « de premier ordre » ou comme « incontournable ». Toutefois, même si l'offre concurrente est relativement inélastique, il ne s'ensuit pas qu'il sera inévitablement rentable pour l'entité fusionnée de la refuser aux concurrents en aval.

Cela dépend plutôt des bénéfices que l'entreprise engrangera en agissant de la sorte – ces bénéfices dépendant eux-mêmes de l'équilibre entre (1) la perte de bénéfices résultant des ventes perdues aux concurrents en amont, et (2) le surcroît de bénéfices résultant de ventes plus importantes sur le marché en aval. L'annexe présente un cadre mathématique simple pour procéder à cette évaluation ; il ressort que (selon les marges pratiquées sur les deux marchés et la mesure dans laquelle les ventes perdues par les concurrents en aval sont gagnées par l'entité fusionnée), dans certains cas, il sera rentable de refuser la transaction ; dans d'autres, ce ne sera pas rentable.

En un mot, les problèmes de concurrence sur les marchés de contenu ne peuvent certainement pas être exclus d'un point de vue économique. Toutefois, toute évaluation de la probabilité d'apparition de ces problèmes dépend d'une analyse complexe, et souvent contraire à l'intuition, de la structure du marché et de la conduite des entreprises tant en amont qu'en aval.

#### **4. Action publique : réponses et dilemmes**

Pour finir, nous examinons quelques questions et dilemmes touchant à l'action publique. Il est évident que les marchés en question sont refaçonnés par la rapide évolution technologique. Dans le passé, les services de communications étaient définis principalement par la technologie utilisée pour leur prestation. Le secteur de la radiodiffusion en clair, par exemple, s'était essentiellement développé autour des technologies unidirectionnelles sans fil, tandis que les télécommunications étaient fondées sur des centraux téléphoniques utilisant des technologies de commutation de circuits afin d'établir une liaison continue entre les parties en communication. Or le changement technologique permet aujourd'hui d'assurer de multiples services de communications à l'aide de technologies multiples utilisant des plateformes numériques communes – ou convergentes.

La convergence sur les marchés des moyens de diffusion traditionnels, qui se traduit par l'entrée de nouveaux opérateurs utilisant des technologies de communications, est déjà une réalité. Les services de télévision par satellite, réseau fixe et réseau fixe sans fil concurrencent les services traditionnels de diffusion en clair et peuvent même les évincer. Cela a amené de nouveaux fournisseurs concurrents dans le secteur de la transmission et de radiodiffusion. Par ailleurs, il est probable que, d'ici une décennie, le

marché émergent des communications bidirectionnelles à large bande englobera à la fois les marchés de la radiodiffusion et les marchés de données.

Un impact important du processus de convergence et de l'évolution technologique correspondante est le degré spectaculaire d'incertitude que cela a introduit dans la planification des activités des entreprises.

Plus précisément, les fournisseurs de services sont confrontés à au moins quatre éléments d'incertitude accrue du fait de la convergence.

Le premier est l'*incertitude de la demande* qui est surtout perceptible sur les marchés de services en ligne. Les entreprises qui fournissent ces services cherchent toujours à déterminer quels contenus ou quelles applications vont réussir et comment les tarifer. La segmentation de la clientèle, la visibilité et l'utilisation accrues de la personnalisation dans l'offre de services et la fragmentation des marchés sont autant de facteurs qui font qu'il n'existe plus d'approche « unique pour tous ».

Une deuxième source d'incertitude est liée au déploiement de *nouvelles technologies*. Avec les nouveaux investissements consacrés aux infrastructures nouvelles (comme les différentes formes de réseaux en fibre, par exemple) et les nouvelles utilisations des technologies existantes, les risques technologiques ont augmenté, en termes de choix de fonctionnalité, de mise en œuvre et de viabilité (avec un risque réel d'investissement échoué à mesure que le rythme du progrès technologique s'accélère), souvent en l'absence de précédent significatif ou de normes établies.

En troisième lieu, malgré la réussite manifeste d'entreprises telles que Google et Facebook, l'incertitude demeure quant à la question de savoir s'il existe un *modèle d'entreprise* rentable pour un service particulier et, s'il en existe un, lequel ? S'il semble, par exemple, qu'il existe un vaste potentiel commercial à exploiter dans l'internet, on ne sait pas précisément comment le modèle mettra en balance la fourniture d'accès, les transactions, le contenu et la publicité. A l'échelle mondiale, on n'a pas encore trouvé de modèle d'entreprise rentable et cohérent à bien des égards concernant le service internet et une importante phase d'expérimentation est en cours, caractérisée par l'apparition régulière de nouveaux modèles.

Enfin, l'incertitude provient aussi des sources potentielles de produits concurrents. Les entreprises qui opèrent sur les marchés convergents se préoccupent peut-être moins de leurs concurrents traditionnels que des concurrents intégrés et/ou spécialisés qui viennent d'autres secteurs (tels que les entreprises de médias, les fabricants de logiciels, les fabricants de matériel informatique, les intégrateurs de services et le secteur des services financiers, par exemple) et des nouvelles entreprises qui réussissent sur les nouveaux marchés.

Ces quatre éléments réunis créent une grande incertitude sur le marché. Par ailleurs, l'analyse qui précède souligne la profonde incertitude qui existe quant à savoir où trouver des possibilités de profit sur les marchés émergents, qui sont encore difficiles à comprendre. Un investisseur de poids dans des segments peu rentables du secteur peut trouver que son actif est utilisé mais que les bénéfices réels vont à un fournisseur qui situe un autre point de la chaîne de production.

Ces incertitudes posent des dilemmes aux organismes de réglementation de la concurrence. D'un côté, l'incertitude inhérente peut rendre toute intervention dangereuse, à la fois parce que les conditions du marché sont difficiles à évaluer et parce qu'une intervention peut écarter une évolution par ailleurs souhaitable sur le marché. De l'autre côté, le potentiel d'innovation fait qu'il est essentiel de maintenir des possibilités ouvertes pour permettre à la concurrence de se développer dans l'avenir.

De manière générale, cela devrait inciter les régulateurs à la prudence. Pour simplifier, c'est parce que l'ignorance réglementaire est exceptionnellement grande face à l'incertitude créée par les formes actuelles

de la convergence. Il y a un certain nombre de raisons à cela, liées aux caractéristiques de la convergence décrites plus haut :

- la rapidité et l'imprévisibilité de l'évolution technologique et ses conséquences pour le marché. Le marché est généralement beaucoup mieux placé que les pouvoirs publics ou les régulateurs pour réagir rapidement et avec souplesse à ces incertitudes ;
- les autres incertitudes qui caractérisent les marchés en rapide mutation – l'incertitude quant au niveau et à la configuration de la demande pour des services nouveaux, par exemple. Dans ce contexte, une approche réglementaire souple peut maximiser la flexibilité des participants au marché à la recherche de modèles d'entreprise viables, qui ne soient pas faussés par l'intervention des autorités de réglementation ; et
- la convergence nécessite un élargissement des marchés et une intensification de la concurrence. Alors que, jusqu'à présent, la concurrence était limitée à l'intérieur des secteurs, ou même à l'intérieur des segments des secteurs, la convergence se caractérise manifestement par une substituabilité croissante des biens et des services entre les secteurs. En l'absence de distorsion réglementaire, il devrait en être ainsi tant pour les marchés d'infrastructure que pour les marchés de services. La concurrence émergente réduira la nécessité d'une intervention des autorités réglementaires et accentuera les distorsions que cette intervention pourrait causer.

Cela dit, certains des risques réglementaires sont inévitables, et il convient donc de chercher à réduire au minimum, chaque fois que possible, le risque d'erreurs réglementaires ainsi que l'impact économique des erreurs qui se produisent malgré tout et qui sont inévitables.

Pour déterminer la façon de procéder, il est utile de réfléchir au paradigme de l'innovation séquentielle – selon lequel l'évolution du marché se fait par le passage relativement soudain et répété d'une forme de fourniture à une autre. Google, par exemple, a évincé des moteurs de recherche qui existaient auparavant et a développé une gamme étendue de services ; l'entreprise est maintenant confrontée à une vive concurrence des réseaux sociaux qui se développent dans son domaine d'activité. De même, les opérateurs de diffusion en clair, tout comme les opérateurs traditionnels de télévision par câble, font face à une concurrence encore plus forte des innombrables formes de diffusion via internet, tout comme les stations de radio classiques. Il semble raisonnable de conseiller aux organismes de réglementation de la concurrence de s'attacher en toute priorité à faire en sorte que ce processus se poursuive – en d'autres termes, que les nouvelles générations de fourniture puissent évincer la génération existante.

A l'inverse, dans les cas où les problèmes de concurrence ont trait essentiellement aux rentes que s'assurent les fournisseurs en place – ce qu'ils engrangent de par leur pouvoir de marché – la question devrait être un peu moins préoccupante tant que la manière dont ces opérateurs cherchent à s'approprier ou à conserver ces rentes ne nuit pas à la concurrence intergénérationnelle.

Il y a ici une analogie avec l'analyse traditionnelle de la concurrence intermarque par opposition à la concurrence intramarque. Au fond, ce qui est proposé c'est que les autorités de la concurrence se préoccupent moins d'assurer la concurrence au sein d'une plateforme de diffusion existante **tant que** de nouvelles plateformes peuvent l'évincer.

Dans la pratique, la ligne ne sera pas facile à tracer – un accord de contenu exclusif peut à la fois nuire aux concurrents existants et dissuader de nouveaux concurrents ou de nouveaux types de fourniture d'émerger. Cependant, plus l'exclusivité est spécifique à un type de plateforme particulier, étroitement défini, moins il y a de risque ; inversement, plus l'exclusivité couvre l'ensemble des types de plateforme existants et futurs, plus il faut être vigilant.

Globalement, au fur et à mesure que le processus de convergence se poursuit, les problèmes de concurrence concernant la diffusion de contenu et la transmission prendront sans doute une plus grande acuité. Toutefois, l'évolution technologique réduit aussi les obstacles à l'entrée dans la production de contenu et l'extension de la gamme d'options de transmission – ces deux aspects devant contribuer à atténuer les problèmes de concurrence. En même temps, compte tenu de la rapidité et de l'imprévisibilité de l'évolution technologique, il est essentiel que les autorités de la concurrence reconnaissent les risques d'erreur, laquelle erreur consisterait à confondre une réussite commerciale passagère avec un pouvoir de marché ; ou, inversement, à surestimer l'efficacité correctrice de l'entrée sur le marché et d'une concurrence nouvelle. Il sera sans doute difficile aux régulateurs de trouver le juste équilibre entre ces erreurs, et cela sera parfois frustrant pour les participants au marché, tant dans les pays développés que dans les pays en développement.

**APPENDICE : UN CADRE SIMPLE POUR EXAMINER LA RENTABILITÉ D'UNE  
STRATÉGIE CONSISTANT A REFUSER L'ACCÈS DE TIERCES PARTIES AU CONTENU DE  
PREMIER ORDRE**

Dans cet appendice, nous examinons un cas simple dans lequel un opérateur de télévision payante (PTV1) acquiert un fournisseur de contenu de premier ordre (CS1). Il s'agit de savoir s'il sera rentable pour CS1, une fois qu'il appartiendra à PTV1, de refuser du contenu aux concurrents de PTV1. Un cadre simple est établi afin d'examiner cette question. Il importe de noter que ce cadre est intentionnellement mécanique – il ne tient pas compte de l'entrée de concurrents ni de la dynamique complexe entre participants au marché. L'objectif est plutôt d'illustrer, dans un cadre essentiellement statique, les arbitrages inhérents à tout refus de fourniture.

### 1. Éviction partielle

Nous analysons tout d'abord le problème potentiel d' « éviction partielle », qui renvoie au scénario hypothétique dans lequel CS1 n'empêcherait pas complètement l'accès des concurrents de PTV1 (ou n'empêcherait complètement l'accès que pour quelques petits concurrents seulement). Dans ce scénario, le volume de services refusé serait relativement faible et n'aurait donc probablement pas d'effets importants sur les prix. L'éviction partielle (c'est-à-dire à échelle relativement petite) pourrait être une stratégie optimale lorsque l'éviction à plus grande échelle risque de provoquer une hausse sensible des prix et, ainsi, de favoriser l'entrée ou l'intégration en amont de concurrents.

Si l'entreprise fusionnée procède à une éviction partielle, elle enregistre un manque à gagner égal à :

$$m_U \times \Delta Q \quad (1)$$

Ici  $m_U$  est la marge en amont gagnée par CS1 sur les ventes aux concurrents évincés, et  $\Delta Q$  est la réduction du chiffre d'affaires des concurrents avec CS1 due à la stratégie d'éviction. (Toutes les marges sont libellées en dollars par unité.)

Cependant, la stratégie d'éviction augmentera aussi généralement les bénéfices de PTV1 du fait que certains des anciens clients des concurrents évincés prendront PTV1 comme opérateur. Cela correspondant à un égal à :

$$\delta \times \Delta Q \times (m_U + m_D) \quad (2)$$

Ici  $\delta$  est le taux de détournement et donc  $\delta \times \Delta Q$  est le volume de vente détourné des concurrents évincés vers PTV1. Pour chaque unité détournée vers PTV1, la marge totale réalisée par l'entreprise fusionnée est égale à  $m_U + m_D$ , où  $m_D$  la marge en aval de PTV1.

Il s'ensuit que l'éviction partielle est rentable si, et seulement si, le gain dans l'équation (2) est supérieur à la perte dans l'équation (1). De même, l'éviction partielle est rentable si, et seulement si, le taux de détournement  $\delta$  est supérieur au *taux de détournement critique* suivant :

$$\delta > \frac{m_U}{m_U + m_D} \quad (3)$$

Par exemple, si la marge en amont est trois fois plus importante que la marge en aval (i.e.,  $m_U = 3 \times m_D$ ), le taux de détournement critique est égal à 75 %.

La principale question qui se pose d'un point de vue économétrique est alors la suivante : Le taux de détournement effectif est-il supérieur ou inférieur au taux de détournement critique? S'il est supérieur (inférieur), l'éviction sera sans doute (ne sera sans doute pas) rentable.

## 2. Éviction totale

Nous analysons maintenant le problème potentiel d'« éviction totale ». Dans ce scénario hypothétique, l'entreprise fusionnée évincerait tous les concurrents de PTV1 complètement ou presque complètement. L'entreprise fusionnée pourrait, par exemple décider de réduire de façon draconienne la quantité ou la qualité du service fourni à chaque concurrent. L'éviction étant très importante, nous devons prendre en compte la possibilité que la stratégie d'éviction permette à l'entreprise fusionnée d'augmenter le prix sur le marché en aval.

Si l'entreprise fusionnée procède à une éviction totale, son manque à gagner en amont est égal à :

$$m_U \times Q_R \quad (4)$$

Ici  $Q_R$  est le volume total des affaires traitées avec les concurrents de PTV1.

Cependant, la stratégie d'éviction augmentera généralement les bénéfices de PTV1 de deux manières. Premièrement, comme dans la section précédente, certains anciens clients des concurrents évincés prendront PTV1 comme opérateur. Cela correspond à un gain égal à :

$$\delta \times Q_R \times (m_U + m_D) \quad (5)$$

Deuxièmement, l'entreprise fusionnée est peut-être maintenant en mesure de relever le prix sur le marché en aval. Si l'on suppose pour le moment que PTV1 pourrait augmenter le prix de  $\Delta$  dollars par unité sans perdre de ventes, cela correspond à un gain égal à :

$$\Delta \times (Q_T + \delta Q_R) \quad (6)$$

Ici  $Q_T + \delta Q_R$  est le volume total des ventes de PTV1 après éviction.

Il s'ensuit que l'éviction totale est rentable si, et seulement si, l'équation (4) est inférieure à la somme des équations (5) (6). De même, l'éviction totale est rentable si, et seulement si, le taux de détournement effectif  $\delta$  est supérieur aux *taux de détournement critique* suivant :

$$\delta > \frac{m_U - \frac{s\Delta}{1-s}}{m_U + m_D + \Delta} \quad (7)$$

Ici  $s$  est la part actuelle de la production de CS1 détenue par PTV1. Supposons, par exemple, que  $s = 25\%$  et  $\Delta = m_D$  (c'est-à-dire que PTV1 serait en mesure de doubler sa marge bénéficiaire en aval). Si l'on suppose que  $m_U = 3 \times m_D$  (comme dans la section précédente), le taux de détournement critique est égal à environ 53 %.

Une des principales critiques que l'on peut faire concernant l'équation (6) est qu'elle suppose implicitement que la demande est parfaitement inélastique (par rapport à une hausse de prix de  $\Delta$  dollars par unité). En réalité, PTV1 pourrait être en mesure d'augmenter le prix de, disons, 10 % et cela pourrait se traduire par une réduction de, disons, 5 % du volume des ventes de PTV1. Il est assez simple d'ajuster l'équation (6) pour tenir compte d'une réduction du volume des ventes. L'équation (7) devient alors plus encombrante. Une solution plus simple est de continuer d'utiliser l'équation (7) mais de supposer une hausse de prix plus faible – disons, 5 % au lieu de 10 % – pour tenir compte, en gros, du fait qu'une réduction probable du volume des ventes rendrait la stratégie d'éviction moins rentable.

Il existe en fait une solution encore plus simple. Intuitivement, l'éviction accroît la demande à laquelle PTV1 fait face. Le taux de détournement critique dans l'équation (3) suppose que PTV1 ne réagit pas à cet accroissement de la demande en augmentant son volume de ventes au prix en vigueur. Ou bien PTV1 pourrait répondre à l'accroissement de la demande (dû à la stratégie d'éviction) le relevant le prix d'un certain montant tout en maintenant son volume de ventes existant (celui d'avant l'éviction). La *hausse de prix critique* est définie comme étant l'augmentation de prix minimum que PTV1 aurait à appliquer (tout en maintenant son volume de ventes existant) pour que l'éviction soit rentable. On peut trouver la formule pour la hausse de prix critique en fixant  $\delta = 0$  dans l'équation (7) puis en calculant pour  $\Delta$  :

$$\Delta > \frac{1-s}{s} m_U \quad (8)$$

(Le gain en aval,  $\Delta s$ , doit être supérieur à la perte en amont  $(1-s)m_U$ .)

La principale question est maintenant la suivante : Est-il probable que l'éviction permettrait à PTV1 de relever le prix d'un montant supérieur à ce montant critique tout en maintenant le même volume de ventes qu'actuellement ? La réponse dépendra sans doute essentiellement de la question de savoir si l'entrée (ou l'intégration en amont)<sup>2</sup> est facile.

Cela nous ramène aux questions examinées dans la section 0 quant à la mesure dans laquelle l'offre concurrente pourrait se développer – et quant au choix du moment opportun et à l'efficacité de cette action.





## SYNTHÈSE

*Par le Secrétariat*

A la lumière des échanges de la table ronde, du document de référence et des contributions écrites des délégués et des experts, il ressort plusieurs points :

- (1) *Le secteur de la télévision et de la radiodiffusion a subi de profondes évolutions technologiques et structurelles : le consommateur peut désormais accéder à une grande diversité de services de communication et de média. La convergence transforme la manière dont les consommateurs utilisent les services de communication et consomment des contenus, car ces services et ces contenus sont accessibles sur de nouvelles plateformes et sur différents services portables sans fil. Dans le même temps, le changement technologique a eu un impact sur la réglementation et les conditions de concurrence.*

La pénétration de nouvelles technologies et les effets dynamiques de la concurrence changent la manière dont les consommateurs accèdent aux contenus numériques et les consomment. Une multitude de plateformes peuvent désormais être utilisées : radiodiffusion terrestre analogique ou numérique, satellite, câble ou protocole Internet (IP) et télévision en accès direct (OTT).

L'un des changements fondamentaux qui ont affecté la radiodiffusion traditionnelle tient à la migration des réseaux vers la transmission des données au protocole IP. Combinée à la forte pénétration du haut débit, à l'augmentation de la bande passante et la prolifération des terminaux numériques, cette évolution permet à tout une gamme d'appareils d'utiliser les mêmes réseaux et permet aux acteurs des communication de lancer plus facilement de nouveaux services et de bouquets. Les consommateurs peuvent par conséquent recevoir et décoder des services vidéo sur une multitude d'appareils fixes et mobiles.

Ces évolutions technologiques ont un impact sur la concurrence, dans la mesure où ils modifient beaucoup de paramètres : la portée et la qualité des services ; la base des coûts ; les obstacles à l'entrée (les nouvelles technologies ouvrent de nouvelles voies pour contester les marchés) ; la capacité des consommateurs à changer de fournisseur ; les mécanismes de tarification (la technologie permet désormais des services de visualisation à la demande). Tout cela revient à dire que la numérisation tend à abaisser les barrières à l'entrée.

L'une des implications de la convergence est que la réglementation doit être conçue dans le respect de la neutralité technologique. De plus, les ANC (autorités nationales de concurrence) doivent être conscientes de cette dimension de neutralité technologique et surveiller les formes de discrimination du trafic sur le réseau qui pourraient être anticoncurrentielles dans certaines circonstances spécifiques : création d'une « voie rapide » pour certains services, dégradation de la qualité de certains services ou changement de méthode de comptabilisation de la consommation de vidéo par rapport au plafond autorisé. Certains pays (Chili, Pays-Bas et Slovaquie) ont élaboré des réglementations qui traduisent une approche plus stricte du respect de la neutralité du réseau. Il peut y avoir un impact concurrentiel sur les marchés de télévision, comme on le constate à travers un certain nombre de cas : KT/Samsung en Corée (2012), Free/Google en France (2013) ou Comcast/NBCU aux États-Unis (2009). Enfin, on a pu constater récemment une forte pression concurrentielle venant des fournisseurs de vidéo en ligne, comme l'ont montré certaines décisions d'autorités de réglementation : Comcast/NBCU (2009),

le Projet Kangaroo (2009) et Newscorp/BSkyB (2012). Les ANC devraient donc faire particulièrement attention à la neutralité du réseau sur les marchés de la vidéo, notamment en ce qui concerne les fournisseurs de vidéo en ligne.

La convergence a encore accru le degré d'incertitude qui prévaut pour la planification de l'activité des entreprises, particulièrement en ce qui concerne la demande future, le déploiement de nouvelles technologies, le choix d'un modèle d'entreprise rentable ou et les sources potentielles de produits compétitifs. En outre, ces incertitudes créent des dilemmes pour les autorités de concurrence. D'une part, lorsque les circonstances du marché sont difficiles à évaluer, l'intervention peut exclure un développement du marché par ailleurs souhaitable. D'autre part, le potentiel d'innovation signifie qu'il est essentiel de laisser ouverts les espaces dans lesquels pourra se développer la concurrence future. Par conséquent, les autorités de réglementation devraient faire preuve de circonspection, car elles travaillent à l'aveugle étant donné l'incertitude liée au mouvement actuel de convergence. Une certaine dose de risque réglementaire est toutefois inévitable et une politique de non-intervention peut conduire à l'émergence rapide de nouvelles formes de pouvoir de marché. Le Professeur Allan Fels suggère que la politique réglementaire pourrait se définir à la lumière du paradigme de l'innovation séquentielle, veillant en priorité à laisser la voie ouverte à de nouvelles générations d'offres susceptibles de succéder à la génération actuelle.

Enfin, la convergence a abouti à une remise en question des frontières entre le secteur des télécommunications et celui de la radiodiffusion. Comme les services convergents utilisent les mêmes infrastructures d'accès, il pourrait aussi être une bonne chose de combiner les cadres réglementaires, afin de promouvoir l'efficacité de la prise de décision et de réduire les possibilités d'arbitrage et de manœuvres entre les deux cadres. Certains pays projettent d'intégrer leur système dual de réglementation et de le remplacer par une loi générale unique couvrant à la fois la radiodiffusion et les télécommunications (la Corée, par exemple).

- (2) *Les progrès technologiques et l'émergence de produits et de services nouveaux ont, certes, rendu les marchés de média plus concurrentiels, mais par certains côtés, l'évolution des marchés de la télévision et de la radiodiffusion pose de nouvelles difficultés à la politique de la concurrence.*

Avec les évolutions technologiques et la convergence, la définition du marché de produits est devenue particulièrement délicate. Pour définir correctement le marché pertinent, les ANC doivent avoir une idée claire de la substituabilité côté offre et côté demande tout au long de la chaîne de valeur. L'analyse du marché doit aussi tenir compte des différentes variables spécifiques aux produits audiovisuels et aux marchés de services, comme le niveau élevé des coûts fixes, le faible niveau des coûts marginaux, l'existence d'offres groupées, la concurrence hors prix, la nature biface ou multiface de certains marchés ou le rythme effréné de l'évolution technologique. La convergence a permis l'émergence d'offres triservices regroupant télécommunications, télévision par câble et Internet, voire quadriservices avec télécommunications, télévision par câble, Internet et téléphonie mobile. La définition des marchés varie généralement d'un pays à l'autre, et d'un marché à l'autre, mais en règle générale, on peut distinguer un marché de gros pour les contenus, un marché de gros pour l'accès aux infrastructures et un marché de détail. La définition des marchés peut être plus étroite, axée sur le type de radiodiffuseur, de plateforme, services de télévision payante ou contenus premium. Historiquement, les différentes formes de média (télévision, radio, Internet ou presse écrite) étaient considérées comme des marchés de produits séparés, mais avec la convergence, un certain nombre d'ANC ont élargi leur définition de certains marchés (CME/Balkan News Corporation et TV Europe en Bulgarie, par exemple). De même, les représentants de la profession sont favorables à l'adoption d'une définition plus large du marché de produits.

Bien que la convergence et les évolutions technologiques aient abaissé les barrières à l'entrée, il reste un certain nombre de problèmes importants qui peuvent limiter l'accès au marché. La doctrine en fournit une liste non exhaustive ; politiques gouvernementales, présence d'acteurs dominants dans la radiodiffusion, accès aux contenus, habitudes du public, coûts pour le consommateur ou exigences de fonds propres.

La politique gouvernementale (la réglementation ou les pratiques de l'administration, par exemple) peut limiter l'accès au marché. Le protectionnisme réglementaire prend différentes formes et peut se fonder sur des principes d'ordre économique, social, culturel ou technique. La licence de radiodiffusion peut être limitée à un rayon défini (la Zambie, par exemple). Il importe donc que la réglementation de l'accès au marché soit claire, transparente et non discriminatoire. De plus, dans de nombreux marchés, l'État est lui-même acteur de la radiodiffusion de télévision à travers des participations au capital ou le financement de stations de télévision. Ces chaînes à capitaux publics peuvent entraîner d'importantes distorsions du marché, former des barrières à l'entrée ou gêner les opérateurs privés. La présence d'opérateurs publics peut aussi influencer les autorités de réglementation et les pousser à agir de manière discriminatoire contre les acteurs privés au profit de l'acteur public. La domination ou l'expansion de radiodiffuseurs hertziens publics peut ainsi accroître les barrières à l'entrée aux opérateurs de télévision payante.

L'accès aux infrastructures d'émission peut encore représenter un problème. Bien que la numérisation ait considérablement abaissé les barrières à l'accès aux infrastructures d'émission, les problèmes de concurrence n'ont pas disparu. Par exemple, si les autorités de régulation décident de limiter la distribution du signal TNT à une seule technologie, elles peuvent ainsi empêcher les acteurs de la radiodiffusion de télévision d'opter pour d'autres technologies d'émission et exclure d'autres opérateurs de réseaux des débouchés offerts par le passage au numérique (Astra/Abertis en Espagne, par exemple).

L'accès aux contenus premium est un important goulot d'étranglement et un facteur de puissance de marché. Les retransmissions sportives premium (Jeux Olympiques ou matches de football, par exemple) et la programmation d'œuvres cinématographiques en première exclusivité, pour lesquels il n'existe pas de substitution possible, sont essentielles au succès des fournisseurs de télévision payante. L'intégration de propriétaires de contenus et de radiodiffuseurs, les contrats d'exclusivité ou les pratiques d'exclusion verticale par un acteur dominant peuvent représenter des barrières à l'accès aux contenus. Les contenus premium peuvent aussi avoir un impact sur la concurrence dans d'autres marchés que celui de la télévision. Par exemple, dans les marchés des offres triservices et quadriservices, ces contenus peuvent accroître l'attrait de l'ensemble de l'offre. Une analyse de la structure des marchés par les ANC est déterminante pour traiter les problèmes liés à l'accès aux contenus. L'un des risques importants est qu'un fournisseur de radiodiffusion en aval profite de sa position sur le marché pour acquérir de la puissance sur un marché de contenu en amont. Cette puissance d'acheteur en amont pourrait lui permettre d'accroître encore sa puissance sur le marché en aval. Dans le scénario d'un marché en aval concurrentiel, la structure du marché en amont a un fort impact sur l'évolution du marché. Les ANC sont surtout préoccupées quand une fusion entre un diffuseur en aval et un fournisseur de contenu premium peut remettre en cause la disponibilité de ce contenu pour des diffuseurs concurrents. Cela dépend de l'élasticité de l'offre de contenu concurrente. L'analyse du Professeur Allan Fels montre que les problèmes de concurrence sur les marchés de contenu ne peuvent pas être exclus, mais toute évaluation de la probabilité d'apparition de tels problèmes exige une analyse complexe, et souvent contre-intuitive, de la structure et du comportement du marché sur les marchés tant en amont qu'en aval.

De plus, une stratégie axée sur les contenus exclusifs peut se traduire par une fragmentation de ces contenus entre plateformes. Face à ce risque, certains pays (Singapour, par exemple) ont instauré une obligation légale de diffusion croisée aux titulaires de licences de télévision payante : chaque titulaire de licence de télévision payante a l'obligation de faire en sorte que ses contenus exclusifs soient également diffusés sur la plate-forme concurrente dans leur intégralité, sans modification ni coupures. Des problèmes spécifiques sont également signalés pour l'acquisition de contenus par les services de télévision non linéaire (CanalSat/TPS en France, par exemple). Enfin dans certains pays (l'Égypte, par exemple), le piratage a érodé la valeur des contenus premium.

L'intégration verticale entre les différentes fonctions nécessaires pour offrir des services de télévision payante au détail est aussi un problème majeur aux yeux des autorités de réglementation et des ANC (Comcast/NBCU, par exemple). En effet, toute une gamme de problèmes de concurrence peut se poser : refus de mettre à disposition des éléments essentiels aux entreprises concurrentes en aval, compression des marges, renchérissement des coûts des concurrents, accords d'exclusivité ou situation de monopsonne pour l'acquisition de contenu.

- (3) *Les autorités de concurrence sont devenues plus interventionnistes sur les marchés de la télévision et de la radiodiffusion. Dans certains cas, elles ont pris en compte des aspects de l'intérêt public qui n'ont rien à voir avec les problèmes de concurrence. Il est souvent difficile de démêler les objectifs économiques et non économiques. Cela pose la question de la répartition des compétences entre les ANC et les autorités sectorielles, ainsi que du modèle de leur coopération.*

Les évolutions technologiques rapides et la convergence ont permis la fourniture d'offres triservices et quadriservices, ce qui entraîne un risque de chevauchement des compétences entre autorités de réglementation. En particulier, l'analyse de la concurrence dans le secteur de la télévision et de la radiodiffusion peut relever des autorités de réglementation sectorielle, comme l'autorité de réglementation des télécommunications, qui intègrent généralement les questions de concurrence dans une vision plus large des intérêts publics. De leur côté, les ANC peuvent avoir le mandat d'aller au-delà de la politique de la concurrence et de tenir compte de facteurs non économiques, ce qui accroît le risque de décisions inopportunes. Pour cette raison, lorsqu'elles travaillent sur les questions de radiodiffusion de télévision, les ANC ne devraient pas prendre en compte des considérations qui n'ont trait à la concurrence. Ces intérêts publics devraient être traités par les autorités sectorielles. De même, les autorités sectorielles ne devraient pas s'occuper d'analyser la concurrence. L'application simultanée à une même transaction du cadre de réflexion concurrentiel et de celui de l'intérêt public par des autorités différentes peut aboutir à des résultats contradictoires ou d'une complexité excessive. De plus, cette confusion prive les entreprises d'orientations claires. Les différentes contributions à la table ronde ont présenté des exemples de bonnes pratiques de coopération institutionnelle en la matière (la décision dans l'affaire Comcast/ NBCU, par exemple). De plus, certains pays ont adopté des accords plus ou moins formels qui prescrivent des procédures pour cette coopération.

## NOTE DE RÉFÉRENCE

*Par le Secrétariat \**

### 1. Introduction

Sur l'ensemble du globe, d'importants changements technologiques et structurels sont en cours dans le secteur de la diffusion audiovisuelle. Ces transformations permettent aux consommateurs d'accéder à un éventail de services de communications et de médias qui n'avait encore jamais été aussi large. Hier, par exemple, le contenu télévisuel n'était accessible qu'à une certaine heure et uniquement en un point fixe. Aujourd'hui, la convergence modifie la manière dont le public utilise les services de communication et consomme du contenu. En effet, ce contenu est de plus en plus disponible *via* Internet ou divers appareils portables sans fil.

L'évolution technologique et l'émergence de nouveaux produits et services ont entraîné une intensification globale de la concurrence sur les marchés des médias, avec des effets bénéfiques directs pour les consommateurs. Néanmoins, certains changements survenus sur ces marchés accentuent les problèmes de concurrence, surtout en termes de contenu. C'est pourquoi cette Note de référence entend examiner les questions de concurrence qui se posent au niveau de l'offre de diffusion télévisuelle dont bénéficient les consommateurs et dans quelle mesure ces changements se traduisent par une concurrence accrue dans ce secteur. Du point de vue du Forum mondial sur la concurrence, c'est un thème d'actualité. De fait, la diffusion audiovisuelle, qu'il s'agisse des services de radio ou de télévision, forme une composante essentielle des technologies de l'information et des communications (TIC), et assurer un large accès permettrait non seulement de réduire la fracture numérique, mais également de promouvoir le développement et d'atténuer la pauvreté.

Un large accès à la radiodiffusion et à la diffusion télévisuelle est fondamental pour plusieurs raisons, économiques et non économiques, tant dans les pays de l'OCDE que dans les pays non membres. Sur le plan économique, la diffusion audiovisuelle constitue un important secteur d'activité à part entière et peut avoir de grandes répercussions sur de nombreux marchés connexes. De plus, si la radio et la télévision restent la première source d'information en général, elles constituent aussi une « source d'information essentielle pour les segments de population analphabètes, ce qui est particulièrement crucial dans les situations d'urgence. »<sup>1</sup>

Bien que, de toute évidence, le secteur de la diffusion audiovisuelle soit devenu plus concurrentiel au cours de la dernière décennie, les autorités de la concurrence, sur l'ensemble du globe, interviennent davantage, et dans certains cas sur la base de critères relatifs à l'intérêt général et non à la concurrence. Le présent document ne se penchera pas sur les objectifs sociaux et culturels de la réglementation du secteur. Néanmoins, il ne faut pas oublier que les objectifs économiques et non économiques sont souvent imbriqués, et qu'une intervention des autorités peut être destinée à atteindre ces deux objectifs.

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\* Cette Note de référence a été rédigée par Anna Pisarkiewicz, spécialiste des politiques de la concurrence, et par Gregory Bounds, en charge par interim des relations mondiales, Division de la concurrence de l'OCDE.

<sup>1</sup> UIT (2010), *World Telecommunication/ICT Development Report 2010 : Monitoring the WSIS targets*, 9<sup>e</sup> édition, disponible (en anglais) à l'adresse suivante : [www.itu.int/dms\\_pub/itu-d/opb/ind/D-IND-WTDR-2010-PDF-E.pdf](http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-WTDR-2010-PDF-E.pdf)

Face aux défis liés à la convergence, mais aussi devant le nombre croissant de problèmes de concurrence, beaucoup de pays ont décidé d'examiner de près leurs marchés des médias, ou du moins certains de leurs segments. Ainsi, en mars 2012, l'Australie a rendu public un rapport final sur la convergence, qui analyse la mise en œuvre de la réglementation des médias et des communications dans ce pays et qui évalue la capacité de cette réglementation à atteindre ses objectifs dans l'environnement de convergence.<sup>2</sup> En 2011, l'autorité de régulation de l'Afrique du Sud, l'ICASA, avait exploré et analysé différents aspects du marché de la transmission dans ce pays.<sup>3</sup> En 2009, la Nouvelle-Zélande avait publié un rapport qui évaluait les problèmes de concurrence sur le marché national de la diffusion télévisuelle, et qui s'interrogeait notamment sur la nécessité d'une réglementation sectorielle<sup>4</sup>. À Hong Kong, le conseil législatif a organisé une audition pour déterminer si le comportement de TVB, le producteur numéro un de contenus pour la télévision terrestre chinoise, pouvait être qualifié d'anticoncurrentiel. Au Royaume-Uni, à la demande d'Ofcom (le régulateur britannique), la commission de la concurrence a dressé un état des lieux de la concurrence sur le marché de la télévision à péage.<sup>5</sup>

Les analyses du marché et les enquêtes ne sont que quelques-uns des nombreux moyens dont disposent les pays pour vérifier que leur marché national de la diffusion audiovisuelle fonctionne efficacement. La plupart des pays de l'OCDE prennent les devants pour encadrer leur propre marché. Le plus souvent, ces interventions consistent à appliquer le droit général de la concurrence *ex post* et la réglementation sectorielle *ex ante*. Alors qu'hier, la réglementation reposait sur des considérations technologiques, telles que la rareté de la bande passante ou le coût élevé des systèmes de cryptage et de décryptage, c'est aujourd'hui de moins en moins le cas en raison d'importantes évolutions technologiques. Cependant, même si les fondements traditionnels de la réglementation ne s'appliquent plus dans la plupart des pays, des problèmes de concurrence nouveaux et épineux sont apparus.

Dans beaucoup de pays non membres de l'OCDE, dont certains n'ont que récemment libéralisé ce secteur,<sup>6</sup> la diffusion audiovisuelle reste aux prises avec de graves difficultés. Eltzroth souligne que « la structure et la réglementation d'autres secteurs économiques clés ont certes été transformées depuis le

<sup>2</sup> Cette étude s'est penchée, en particulier, sur les lois régissant les droits de propriété des médias, sur les règles relatives au contenu des médias, sur la production et la distribution du contenu australien et local, ainsi que sur l'affectation des ressources spectrales. Le rapport final est disponible (en anglais) à l'adresse suivante : [www.dbcde.gov.au/data/assets/pdf\\_file/0007/147733/Convergence\\_Review\\_Final\\_Report.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf)

<sup>3</sup> ICASA (2011), *Regulatory Framework for Broadcasting Transmission Services, Discussion Paper for Comment, Notice 346 of 2011*, disponible à l'adresse suivante : [www.icasa.org.za/Portals/0/Regulations/Working%20Documents/Broadcasting%20Transmission%20Services/Draft/Discussion%20Document%20on%20Broadcasting%20Transmission%20Services%20%2034371.pdf](http://www.icasa.org.za/Portals/0/Regulations/Working%20Documents/Broadcasting%20Transmission%20Services/Draft/Discussion%20Document%20on%20Broadcasting%20Transmission%20Services%20%2034371.pdf)

<sup>4</sup> Ministère du Développement économique et ministère de la Culture et du Patrimoine de la Nouvelle-Zélande (2009), *Television Broadcasting: Competition Issues, Report to the Minister of Broadcasting and the Minister for Communications and Information Technology*, disponible à l'adresse suivante : [www.beehive.govt.nz/sites/all/files/Departmental%20Analysis%20of%20Competition%20in%20Broadcasting.pdf](http://www.beehive.govt.nz/sites/all/files/Departmental%20Analysis%20of%20Competition%20in%20Broadcasting.pdf)

<sup>5</sup> Competition Commission (2012), *Movies on pay TV market investigation, A report on the supply and acquisition of subscription pay-TV movie rights and services*, disponible à l'adresse suivante : [www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main\\_report.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf)

<sup>6</sup> Sur le continent africain, par exemple, le portail [www.balancingact-africa.com](http://www.balancingact-africa.com) se fait l'écho de l'étude intitulée *Open or closed broadcasting markets: will all of Africa step up to the plate in 2012?* ([www.balancingact-africa.com/news/broadcast/issue-no120-0/top-story/open-or-closed-broad/bc](http://www.balancingact-africa.com/news/broadcast/issue-no120-0/top-story/open-or-closed-broad/bc)) selon laquelle « 35 % des pays d'Afrique ne comptent plus un télédiffuseur public unique, mais plusieurs opérateurs, et d'autres viennent s'ajouter à cette liste, mais à un rythme bien trop lent ».

début des années 1990, mais, dans de nombreux pays, la diffusion audiovisuelle a, par comparaison, peu évolué sur des aspects aussi cruciaux que les contenus, la publicité, les relations avec les producteurs de contenus, la transmission à l'international, la gestion de l'infrastructure et de ses nouvelles composantes, les règles de concurrence, l'indépendance des régulateurs, l'attribution de licences, l'indépendance de la presse et la collecte de l'information, le problème de la diffamation et les droits de propriété intellectuelle ».<sup>7</sup>

Même si les problèmes auxquels seront confrontés les pays de l'OCDE et les pays non membres pourraient être dans une certaine mesure différents, et, pour certains, liés aux revenus, la concurrence sur les marchés est un objectif qui vaut la peine de déployer des moyens pour sa réalisation. Ainsi que le note le rapport de l'UIT, « dans les pays qui ne comptent qu'un diffuseur public et où l'offre multi-chaînes est soit inexistante soit prohibitive ou illégale, il n'y a pas beaucoup de demande télévisuelle. En revanche, là où les pouvoirs publics ont adopté une attitude libérale envers la radiodiffusion, les contenus sont plus variés et les ménages trouvent des moyens de contourner les problèmes budgétaires ou d'alimentation électrique. »<sup>8</sup>

## **2. Panorama des évolutions technologiques et réglementaires dans le secteur de la diffusion audiovisuelle**

### **2.1 Description de la diffusion audiovisuelle**

La pénétration des nouvelles technologies et les effets dynamiques de la convergence changent la manière dont les consommateurs accèdent à des contenus audiovisuels et visionnent ces contenus. Les services de diffusion audiovisuelle ne cessant d'évoluer, on ne peut plus en proposer une définition uniforme et globale, qui rendrait compte de toutes les spécificités de ce marché. Il existe pléthore de services audio et vidéo, proposés *via* différents médias, qui ne correspondent pas à définition traditionnelle de la diffusion audiovisuelle. Ainsi, YouTube, qui a d'abord été un site d'hébergement de vidéos déposés par des particuliers, offre aujourd'hui un accès à des contenus postés par certains des grands diffuseurs, tels que, au Royaume-Uni, la BBC. Cependant, plus généralement, on définit la diffusion audiovisuelle comme « l'activité consistant à produire un contenu d'information interactif et à le distribuer par le biais de services de télécommunications. »<sup>9</sup>

Cette Note de référence est spécifiquement axée sur la *télévision et la diffusion audiovisuelle*, ainsi que sur les sujets sur lesquels les autorités de la concurrence devraient se pencher pour veiller à ce que les consommateurs tirent le meilleur parti des services de diffusion télévisuelle. Toutefois, étant donné les effets de la convergence technologique, il est toujours plus compliqué et difficile de délimiter précisément ce qui constitue, et ce qui ne constitue pas, la diffusion télévisuelle.

En 1998, dernière année où le Comité de la concurrence de l'OCDE s'est penché sur les questions de concurrence dans le secteur de la diffusion audiovisuelle, il s'est préoccupé des changements que les nouvelles technologies risquaient d'induire dans ce secteur. Même à cette époque, on cherchait avant tout à déterminer comment l'évolution de la technologie et de la demande des consommateurs influait sur le fonctionnement de la diffusion audiovisuelle et remettait en cause les fondements traditionnels de la réglementation sectorielle. On s'est rendu compte que, dans le secteur de l'information et des communications, les réseaux, les services, les entreprises et les appareils convergeaient de plus en plus, et le Comité a estimé que cette tendance faciliterait une mutation spectaculaire de la diffusion audiovisuelle.

<sup>7</sup> Eltzroth, C. (2006), *Broadcasting in Developing Countries: Elements of a Conceptual Framework for Reform*, Massachusetts Institute of Technology, Information Technologies and International Development, vol. 3, n° 1, pp. 19-37.

<sup>8</sup> UIT (2010).

<sup>9</sup> OCDE (1998), *Réglementation et concurrence dans la diffusion audiovisuelle, eu égard à la convergence*, DAF/COMP/GF(99)1.



Cette transformation s'est caractérisée par l'abandon de l'ancien modèle analogique au profit du nouveau modèle numérique. Dans l'ancien modèle, un volume d'information limité était transmis de façon unidirectionnelle sur une bande passante étroite du spectre radio, vers un large public. Dans le nouveau modèle, un volume d'information potentiellement illimité peut être transmis de façon interactive sur un vaste éventail de voies de télécommunications à large bande (haut débit), vers un public fragmenté.

Il apparaît clairement que les changements que la convergence risquait d'entraîner sont aujourd'hui une réalité dans le secteur de la diffusion audiovisuelle. C'est la raison pour laquelle on ne peut pas définir simplement ce secteur en fonction des caractéristiques discrètes de la transmission, du public ou même des modes de visionnage. Par conséquent, nombre des fondements traditionnels de la réglementation de la diffusion audiovisuelle ne sont plus valides, et de nouveaux problèmes de concurrence se posent. Une redéfinition des frontières entre le secteur des télécommunications et celui de la diffusion audiovisuelle a entraîné des changements fondamentaux :

- Des réseaux à haut débit fixes et mobiles capables d'acheminer une grande diversité de contenus (voix et vidéo) ont été constitués ;
- Internet a brouillé la distinction entre communications privées (télécommunications) et publiques (diffusion audiovisuelle) ;
- Les différenciations suivant la nature du message (données, voix ou images audiovisuelles) sont devenues obsolètes, et
- L'équipement utilisé pour enregistrer, transmettre et recevoir les messages ne permet plus de différencier services de télécommunications et services de diffusion audiovisuelle.

Cette convergence a un effet immédiat : le marché de la télévision ne dépend plus exclusivement du mode de visionnage des services vidéo (sur un téléviseur dédié ou sur un autre appareil permettant de projeter des images). La distinction entre télévision et services vidéo s'amenuise rapidement, surtout en ce qui concerne les programmes enregistrés.

En tant que source de contenus interactifs, le secteur de la diffusion audiovisuelle est en concurrence, à un niveau, avec d'autres secteurs qui fournissent des services de loisirs et d'information, tels que les médias imprimés, les salles de cinéma ou les médias enregistrés (DVD). Cependant, lorsque la rapidité de l'information est un critère essentiel, peu de services sont à même de se substituer à la télévision et à la radio. C'est le cas, par exemple, dans les situations d'urgence et pour la diffusion de l'actualité. Et, en particulier, quand il s'agit de communiquer immédiatement des résultats sportifs, rencontre par rencontre, il apparaît que la diffusion audiovisuelle (et peut-être la diffusion télévisuelle traditionnelle) n'a pas de substituts, malgré les progrès technologiques. Par conséquent, dans le domaine de l'élaboration et de la fourniture de produits et de services de diffusion audiovisuelle, des problèmes de concurrence continuent de survenir au niveau des maillons de la chaîne de valeur sur lesquels les radiodiffuseurs sont susceptibles d'exercer un pouvoir de marché important, soit en contrôlant la distribution d'un contenu spécifique, soit en créant des goulets d'étranglement dans les services de distribution.

### *2.1.1 Les stades de la production – production et distribution de contenus*

Le secteur de la diffusion audiovisuelle se compose d'entreprises qui participent aux différents stades en relation verticale (de la production à la distribution de contenus). La production de contenus consiste principalement à élaborer et développer des contenus. La distribution et l'« acheminement » d'un contenu peuvent former un seul et même processus si ce contenu est assemblé en marques ou en chaînes pouvant être proposées aux consommateurs. La distribution au détail nécessite de convertir le contenu dans un format pouvant être décodé par le terminal du consommateur pour le visionnage. La distribution au détail impose également de gérer les services comptables et clients concernés. La distribution du contenu dépend elle-même de la fourniture de l'infrastructure de diffusion qui assure la communication en provenance et à destination du

fournisseur de services de gros et au niveau des activités de détail. Enfin, le vendeur du terminal procure l'équipement requis pour décoder ou convertir le signal en messages audiovisuels recevables.

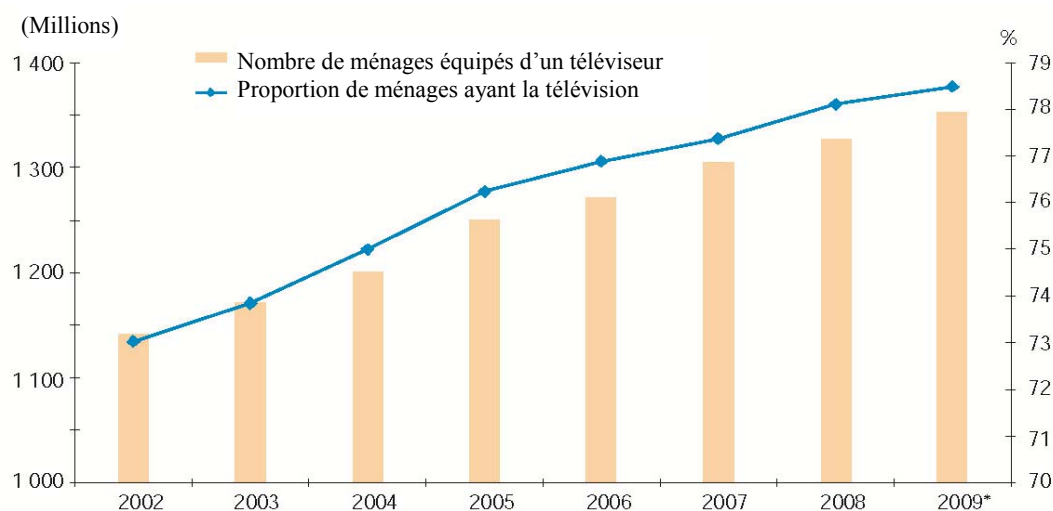
**Tableau 1. La chaîne de valeur multimédia**

Stade	Exemple
Production et développement de contenus	Studios d'Hollywood, studios de télévision, sociétés de production, éditeurs sur le Web.
Agrégation et assemblage de contenu en chaînes (produits)	Diffuseurs hertziens en clair, grandes chaînes du câble (CNN, HBO)
Fourniture de services au détail (transmission, décodage et comptabilité client)	Fournisseurs par câble locaux, fournisseurs par satellite, fournisseurs de services Internet
Fourniture d'infrastructure	Télécommunications, diffuseurs par satellite, autre mode de transmission
Vente de terminaux	Fabricants de téléviseurs, de boîtiers adaptateurs (décodeurs) et d'appareils dotés d'un accès Internet.

### 2.1.2 Diffusion télévisuelle : des plateformes multiples

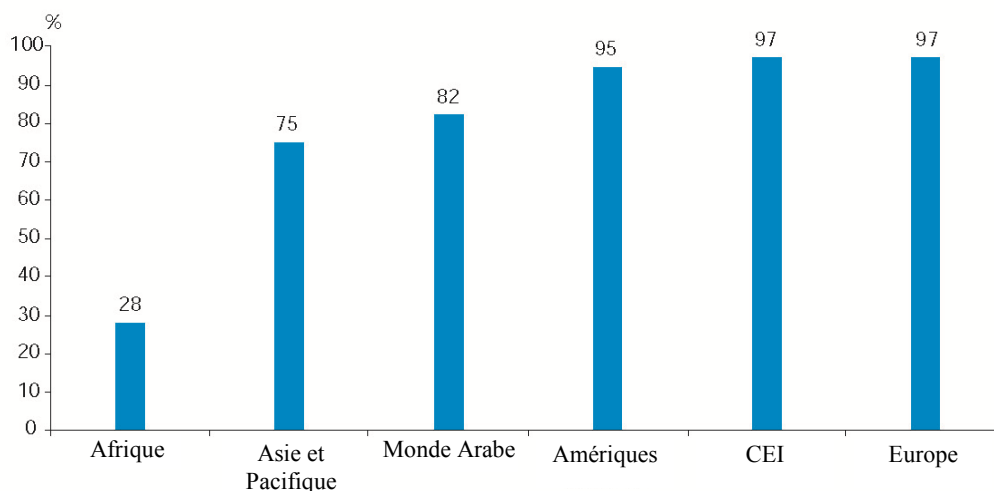
Le terme « plateforme de diffusion » désigne les types de réseaux qui servent à acheminer le signal télévisuel jusqu'au consommateur. Les principaux modes de diffusion télévisuelle sont aujourd'hui les suivants : i) la diffusion analogique terrestre ; ii) la diffusion numérique terrestre ; iii) la diffusion directe par satellite ; iv) la télévision par câble, et v) la télévision sur IP (protocole Internet) et la télévision OTT (*Over-the-top Television*, parfois appelée « télévision par contournement »). Le graphique ci-dessous montre que la couverture ne cesse de s'élargir dans le monde.

**Graphique 1. Proportion de ménages équipés d'un téléviseur, 2002-2009 (dans le monde)\***



Note : \* Estimation.

Source : UIT, *World Telecommunication*/base de données sur les indicateurs des TIC

**Graphique 2. Proportion de ménages équipés d'un téléviseur, par région, 2009\***

Note : \* Estimation.

Source : UIT, *World Telecommunication*/base de données sur les indicateurs des TIC.

- *Diffusion analogique terrestre* : C'est le principal mode traditionnel de diffusion du signal télévisuel depuis la naissance de la télévision. Ce signal est envoyé *via* les ondes radio (hertziennes) à travers un réseau national constitué de pylônes et d'antennes de réception-transmission et il est reçu par les téléspectateurs grâce à une antenne hertzienne. Cependant, plusieurs pays sont en train d'abandonner la diffusion analogique terrestre au profit de la diffusion numérique.<sup>10</sup> Dans certains, comme aux États-Unis, en France ou en Irlande, il n'y a plus de diffuseurs analogiques.<sup>11</sup> Le Kenya entend être l'un des premiers pays d'Afrique à passer à la télévision numérique. Ce basculement était initialement prévu pour 2012. Néanmoins, à la suite d'une plainte déposée par une association de consommateurs, la Haute Cour de justice du Kenya a décidé que le basculement serait différé car le prix du décodeur nécessaire pour recevoir le signal numérique est trop élevé pour une grande partie de la population, qui n'aurait alors plus accès aux services de télévision.<sup>12</sup>
- *Diffusion numérique terrestre* : Comme la télévision analogique classique, la télévision numérique terrestre (TNT) recourt aux fréquences radio. La différence se situe dans l'utilisation de multiplexeurs, qui permettent la faire passer de multiples canaux dans le même espace que celui précédemment occupé par un seul canal analogique. Le téléspectateur reçoit le signal par l'intermédiaire d'un boîtier adaptateur numérique, ou d'un autre appareil récepteur intégré, qui est capable de décoder le signal reçu par une antenne hertzienne classique.
- *Diffusion directe par satellite* : La télévision par satellite recourt à des satellites de communication. Le signal est reçu par des antennes paraboliques et des décodeurs. Dans de nombreuses régions du monde, et surtout dans celles qui ne sont pas couvertes par la télévision terrestre ou par câble, la télévision par satellite permet d'offrir un large éventail de chaînes et de services.

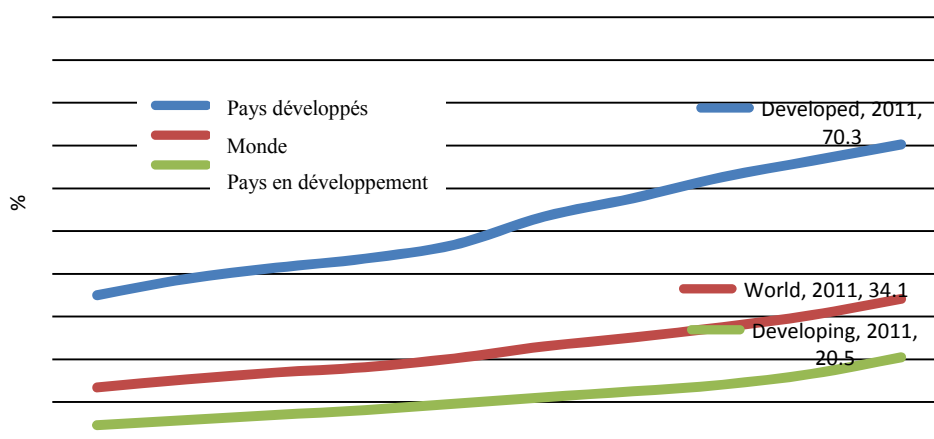
<sup>10</sup> Ainsi, en 2006, lors de la Conférence régionale des radiocommunications de l'UIT, les pays d'Europe, d'Afrique et du Moyen-Orient ont signé un traité par lequel ils ont accepté une mise en place progressive de la diffusion numérique d'ici 2015, date à laquelle la diffusion analogique cessera.

<sup>11</sup> La diffusion analogique terrestre a cessé le 12 juin 2009 aux États-Unis, le 24 octobre 2012 en Irlande et dans la nuit du 28 au 29 novembre 2009 en France.

<sup>12</sup> article19.org (2013), « Kenya: Digital switchover must protect the right to freedom of expression », disponible à l'adresse suivante : [www.article19.org/resources.php/resource/3583/en/kenya:-digital-switchover-must-protect-the-right-to-freedom-of-expression](http://www.article19.org/resources.php/resource/3583/en/kenya:-digital-switchover-must-protect-the-right-to-freedom-of-expression)

- *Télévision par câble* : Le signal télévisuel est acheminé au moyen de câbles à fibre optique et/ou de câbles coaxiaux fixes, ce qui permet au fournisseur d'éviter de recourir au système d'antennes de radiodiffusion classique. C'est principalement sur le continent américain, en Asie, dans la région du Pacifique et en Europe que cette technologie a été déployée à grande échelle. En revanche, elle est quasiment inexistante dans le monde arabe et en Afrique, où la diffusion directe par satellite remporte un grand succès et où le déploiement de la télévision par câble serait très onéreux.
- *Télévision sur IP et télévision OTT* : La télévision sur IP constitue une autre solution d'accès à la télévision multi-chaînes. Elle requiert une liaison ADSL ou à fibre optique à haut débit (large bande). De plus, les téléspectateurs peuvent également opter pour la télévision OTT, qui est la technologie la plus récente, et peut-être celle qui entraînera le plus de changements dans le secteur de la diffusion audiovisuelle. La différence entre la télévision sur IP et la télévision OTT est que la première est généralement proposée par des opérateurs de télécommunications (dont Orange TV en France et AT&T U-Verse aux États-Unis) *via* un réseau géré, avec une qualité de service garantie, tandis que la seconde est proposée par des propriétaires de contenus (tels que la BBC au Royaume-Uni ou Hulu aux États-Unis) ou par de nouveaux acteurs spécialisés (Netflix au Royaume-Uni et aux États-Unis, ou Roku, par exemple) sans qu'un fournisseur d'accès à Internet (FAI) ou un opérateur de réseau ne contrôle le contenu ou l'accès par le téléspectateur. La caractéristique de la télévision OTT est son accessibilité par l'intermédiaire de multiples appareils reliés à Internet, notamment les téléviseurs connectés qui permettent au téléspectateur de choisir le mode de visionnage.<sup>13</sup> Cette technologie étant récente, il est difficile d'obtenir des informations fiables à son sujet. Il semble néanmoins qu'il existe peu d'obstacles techniques à sa pénétration accrue sur les marchés où la bande passante offre une capacité adéquate et où les appareils nécessaires sont aisément disponibles. Parmi les équipements grand public qui permettent de recevoir la télévision OTT, on trouve un large éventail d'appareils dotés d'un accès Internet, et même les diffuseurs par câble sont en train de passer à l'IP pour proposer des médias plus interactifs.

**Graphique 3. Proportion de ménages disposant d'un accès à Internet, par niveau de développement du pays, 2002-2010**



Note : La classification pays développés/pays en développement repose sur le codage statistique normalisé des pays et zones (M49) établi par les Nations Unies : <http://www.itu.int/ITU-D/ict/definitions/regions/index.html>

Source : UIT, World Telecommunication/base de données sur les indicateurs des TIC

<sup>13</sup>

Au Canada, par exemple, cette technologie n'existe que depuis le lancement de Netflix en septembre 2010. Miller, P. H. et R. Rudniski (2012), *La télévision par contournement au Canada en 2012 : incidence sur le marché et indicateurs*, rapport destiné au Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC), p. 2, disponible à l'adresse suivante : [www.crtc.gc.ca/fra/publications/reports/rp120330.htm](http://www.crtc.gc.ca/fra/publications/reports/rp120330.htm).

Aujourd'hui, toutes les plateformes se font concurrence et s'attachent à renforcer leurs attraits afin d'élargir leur portefeuille de clientèle. Leur popularité et leur part de marché sont plus ou moins grandes selon le pays ou la région du monde.<sup>14</sup> Les services de télévision qui font appel aux nouvelles technologies (IP et haut débit fixe ou sans fil) compléteront la diffusion terrestre. Cependant, d'après l'Union européenne de radio-télévision (UER), cette dernière continuera de jouer un rôle de premier plan au moins sur les cinq à dix prochaines années, car les nouvelles technologies ne constituent pas forcément une solution de remplacement viable pour la diffusion de masse, en particulier dans les zones peu peuplées.<sup>15</sup>

### 2.1.3 *Changements influant sur la diffusion audiovisuelle traditionnelle*

La diffusion hertzienne en clair présente les caractéristiques d'un bien public : elle ne produit pas d'effets d'exclusion (toute personne disposant d'un téléviseur peut y avoir accès), ni d'effets de rivalité (un nombre illimité de récepteurs peut capter le signal). Comme l'illustre l'histoire des feuilletons télévisés (*soap operas*), c'est pour insérer des messages publicitaires que les réseaux de télévision privés ont initialement créé des programmes. La transmission des signaux codés sur les réseaux de diffusion par câble ou par satellite et la conception de décodeurs de marque, destinés au terminal du consommateur, ont permis d'instaurer des abonnements, source de recettes, ce qui a transformé le marché de la diffusion télévisuelle.

Un autre changement fondamental a eu des répercussions sur la diffusion audiovisuelle traditionnelle : le passage des réseaux à la technologie de commutation de paquets IP pour la transmission de données. Conjugué à la large pénétration du haut débit et à l'accroissement de la puissance de calcul qui ont nettement élargi la bande passante et entraîné une multiplication des appareils numériques, cette migration technologique a permis à des équipements et des applications différents d'utiliser les mêmes réseaux. Elle a aussi amélioré la capacité du secteur des communications à proposer des services nouveaux et groupés. Les consommateurs peuvent ainsi recevoir et décoder des services vidéo au moyen de divers appareils fixes ou mobiles, tels qu'un ordinateur, une console de jeux, un téléphone ou une tablette.

Dans cet environnement, l'asymétrie de la réglementation des différents services peut conférer un avantage concurrentiel aux opérateurs historiques et risque de limiter les opportunités qui s'offrent aux consommateurs. D'après la Banque mondiale, les effets de la convergence imposent d'élaborer une réglementation technologiquement neutre et d'en confier l'administration à des autorités de contrôle. « À mesure que les services convergents recourent aux mêmes infrastructures d'accès, la régulation et le cadre juridique pourraient devoir converger eux aussi, afin de promouvoir des décisions efficaces du côté des pouvoirs publics et de limiter les possibilités d'arbitrage et de course aux tribunaux (*forum shopping*). »<sup>16</sup>

<sup>14</sup> Voir notamment OCDE (2012), *Communications Outlook*, chapitre 6, *Broadcasting and Audiovisual Content*, DSTI/ICCP/CISP(2012)9/CHAP6.

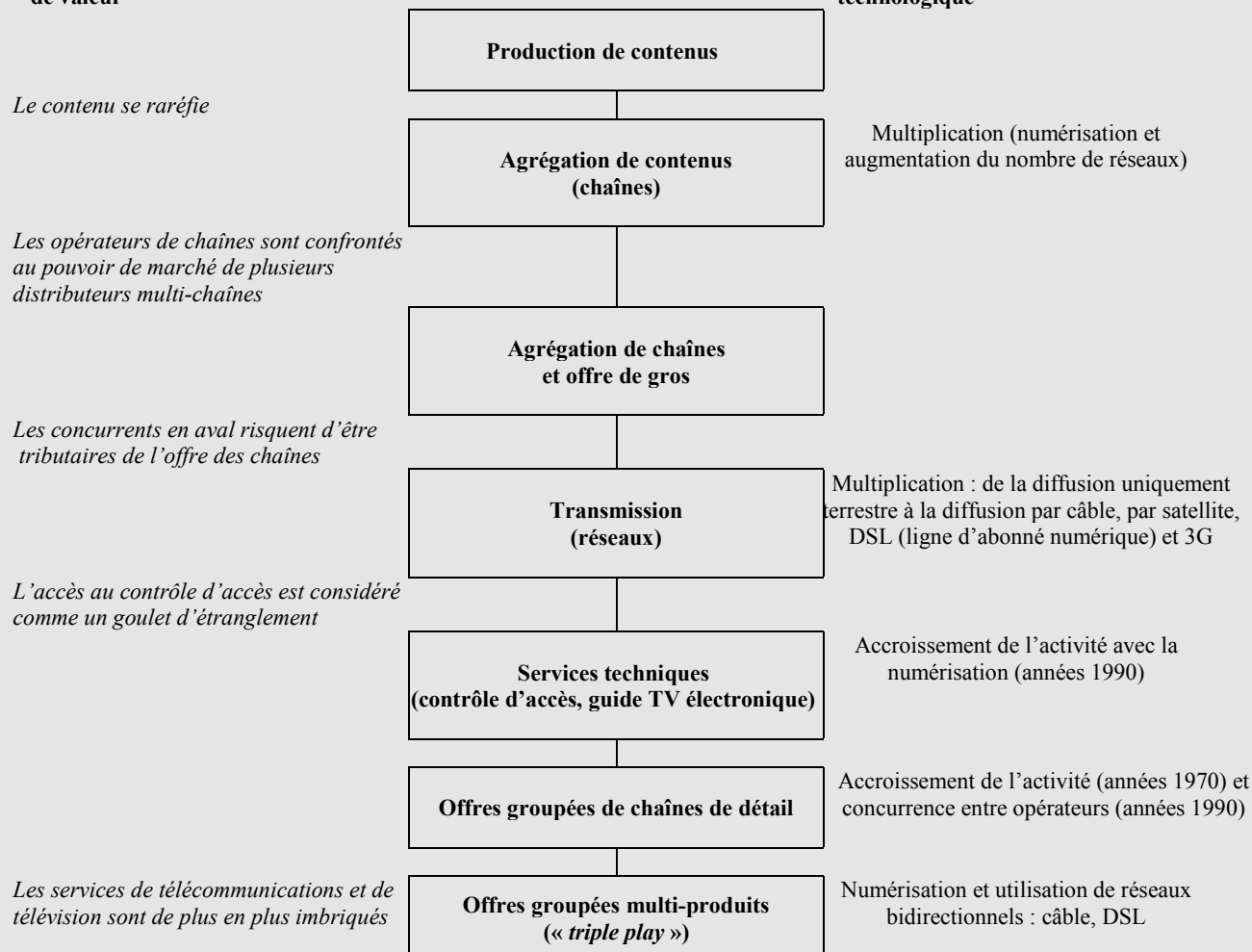
<sup>15</sup> UER (2011), *The Future of Terrestrial Broadcasting, Technical Report 013*, disponible à l'adresse suivante : <https://tech.ebu.ch/docs/techreports/tr013.pdf>

<sup>16</sup> Banque mondiale (2007), *Regulatory trends in Service Convergence*, division des politiques, Département des technologies de l'information et des communications mondiales, Washington, D. C., p. 11.

### Encadré 1 : Effets de la convergence technologique sur la chaîne de valeur télévisuelle

#### Problèmes nouveaux sur la chaîne de valeur

#### Effets de la convergence technologique



Source : Pablo Ibañez Colomo<sup>17</sup>

Ce tableau illustre la réduction des obstacles à l'entrée grâce à l'introduction des technologies de compression numérique et au développement de nouveaux réseaux, mais également les nouveaux problèmes de concurrence qui se posent sur la chaîne de valeur. La multiplication des réseaux et l'accroissement de la capacité de transmission ont permis aux distributeurs multi-chaînes de grouper des chaînes de télévision au niveau des activités de gros et de les distribuer au détail sous forme de différentes combinaisons, notamment sans abonnement, *via* les réseaux terrestres. Les problèmes nouveaux concernent l'accès au contenu, car, en raison de la multiplication des réseaux, le contenu se raréfie. Le développement des services techniques nécessaires pour la télévision numérique constitue un autre goulet d'étranglement potentiel : ayant ajouté un niveau supplémentaire à la chaîne de valeur, il risque de restreindre le signal télévisuel crypté aux seuls clients de services payants, par l'intermédiaire d'un système de contrôle d'accès et d'un système de navigation assistée (guide TV électronique). Ces systèmes peuvent en effet être configurés de façon à limiter l'accès à certains réseaux de distribution. L'expansion des offres groupées multi-chaînes (*triple play* ou *quadruple play* avec des services de télécommunications tels que téléphonie et Internet) risque également d'être source d'exclusion.

<sup>17</sup>

Ibañez Colomo, P. (2012), *European Communications Law and Technological Convergence: Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications*, European Monographs, volume 79, Wolters Kluwer Law & Business.

#### 2.1.4 Interconnexion

L'objectif de la réglementation des réseaux est de veiller à ce que l'accès aux infrastructures essentielles soit ouvert aux nouveaux entrants, selon des conditions équitables et raisonnables, et que les opérateurs de réseaux n'abusent pas de leur position dominante pour exclure les concurrents sur les marchés en amont et en aval. L'interconnexion et l'utilisation des réseaux se complexifient, surtout en cette période de transition vers davantage de convergence : l'interconnexion doit impérativement être gérée avec efficacité afin que la concurrence puisse s'imposer. La réglementation de l'interconnexion peut devenir encore plus complexe à mesure que la convergence modifie le profil des parties à l'interconnexion ; ainsi, les diffuseurs se mêlent aux opérateurs de télécommunications, ou à des intervenants totalement nouveaux. Dans un tel contexte, les accords d'interconnexion et dispositifs réglementaires existants ne sont plus toujours adéquats compte tenu de la diversité des services nouveaux susceptibles d'être supportée par les mêmes infrastructures.

Traditionnellement, le modèle Internet reposait sur l'interconnexion volontaire en ce qui concerne l'infrastructure des réseaux et les régulateurs n'ont généralement pas jugé nécessaire de définir des obligations particulières pour l'interconnexion des réseaux dorsaux Internet, hormis dans les cas de fusion. Cependant, le document OCDE (2012) perçoit un rôle potentiel pour les régulateurs dans les accords d'interconnexion privés entre fournisseurs d'accès à Internet (FAI) pour le transport de données sur les réseaux dorsaux Internet.<sup>18</sup>

*La montée en puissance de la distribution de contenus numériques va mettre les pratiques des réseaux dorsaux dans le collimateur des régulateurs. Selon que la relation entre deux fournisseurs soit assimilée à du peering, ou échange de trafic (sans contrepartie financière), ou à du transit (l'un des deux paie l'autre pour le transport des données), les conséquences économiques peuvent être très différentes. Ainsi, fin 2010, le principal opérateur de réseau dorsal aux États-Unis, Level 3, a accusé Comcast de prélever indûment une redevance mensuelle sur le trafic à destination du fournisseur d'accès haut débit.<sup>19</sup>*

*Dans le précédent contrat entre les parties, c'était Comcast qui payait Level 3 pour le transit. Lorsque Level 3 est devenu le premier réseau d'acheminement du trafic de Netflix, il s'est mis à envoyer aux clients de Comcast beaucoup plus de trafic qu'il n'en recevait. Comcast a donc affirmé que ce paiement était justifié par le surcoût qu'entraînait pour lui ce nouveau trafic ; Level 3 y voyait une menée anticoncurrentielle de Comcast pour désavantager un concurrent de son service de télévision par câble. La FCC [commission fédérale des communications] a refusé d'intervenir, arguant qu'il s'agissait d'un différend commercial et non d'un problème de neutralité du réseau. Une bataille similaire pourrait se préparer en Europe, où plusieurs grands opérateurs cherchent à trouver des recettes supplémentaires auprès de fournisseurs de contenus sur Internet.<sup>20</sup>*

<sup>18</sup> OCDE (2012), *Développement et diffusion des contenus numériques*, OECD Digital Economy Papers, n° 213, p. 34, disponible en anglais à l'adresse suivante : <http://dx.doi.org/10.1787/5k8x6kv51z0n-en>.

<sup>19</sup> Stelter, B., « Netflix Partner Says Comcast “Toll” Threatens Online Video Delivery », *New York Times*, Media Decoder, 29 novembre 2010, à l'adresse suivante <http://mediadecoder.blogs.nytimes.com/2010/11/29/netflix-partner-says-comcast-toll-threatens-online-video-delivery/> ; Golding, D., « The Real Story Behind the Comcast-Level 3 Battle », *GIGAOM*, 1<sup>er</sup> décembre 2010, à l'adresse suivante : <http://gigaom.com/2010/12/01/comcast-level-3-battle>.

<sup>20</sup> Parker, A. et T. Bradshaw (2011), « EU Telecoms Groups Seek Charging Shake-Up », *FT.COM*, 12 juillet 2011, à l'adresse suivante : [www.ft.com/intl/cms/s/0/cce9b8b0-abcf-110-945a-00144feabdc0.html#axzz1Ro7wOyD4](http://www.ft.com/intl/cms/s/0/cce9b8b0-abcf-110-945a-00144feabdc0.html#axzz1Ro7wOyD4).

### 2.1.5 *Réglementation du contenu : obligations de diffusion et de mention dans les guides de programmes*

La réglementation du contenu, y compris les obligations de diffusion, s'applique généralement aux diffuseurs, constituant une condition d'octroi de licence, et s'adressent classiquement aux chaînes de service public, locales ou régionales. Il s'agit de veiller à ce que le diffuseur inclue dans sa programmation un minimum de contenus qui respectent certains critères. Il faut, le plus souvent, que le contenu soit produit localement ou qu'il prenne en compte les caractéristiques d'un public spécifique, par exemple avec des programmes dans une langue donnée ou qui traitent de sujets particuliers, comme les programmes pour enfants.

Le contenu qui était auparavant réservé à un réseau spécifique peut, dans un environnement convergent, facilement être mis à disposition sur différentes infrastructures et plateformes, d'où la coexistence de plusieurs niveaux de réglementation du contenu. S'ensuivent des difficultés particulières pour veiller à ce que les services de radiodiffusion atteignent les objectifs sociaux consistant à promouvoir et à protéger des traditions culturelles, ou à protéger les citoyens contre un contenu potentiellement nuisible.

La réglementation qui impose un niveau minimum de contenu national constitue classiquement l'une des obligations à respecter pour obtenir une licence de diffusion. Cependant, les dispositions de la législation sur les obligations de diffusion à l'intention des diffuseurs peuvent ne pas être impératives pour les prestataires de services de télévision sur IP. De même, la télévision sur IP peut ne pas être contrainte de fournir des services imposés, par exemple le sous-titrage codé pour malentendants, qui rendent la télévision plus accessible à certains pans de la population. Contrairement à ce qui se passe avec les plateformes traditionnelles de radiodiffusion, les pays n'ont guère la possibilité de réguler le contenu d'Internet ; en conséquence, ils y appliquent moins de règles. Et cela pourrait bien se vérifier de plus en plus à mesure que les principes de neutralité du réseau sont mis en œuvre.

## 3. **Problèmes relatifs à la concurrence**

Compte tenu des évolutions technologiques, les diffuseurs historiques ont été contraints de livrer concurrence d'une part à des fournisseurs de télévision par câble et par satellite, puisque ceux-ci commençaient à se faire une place sur le marché, et, d'autre part, à des prestataires de services de télécommunications, puisque ces derniers élargissaient le périmètre de leurs activités. Même si, au cours de la dernière décennie, on a noté une augmentation globale du nombre d'opérateurs de télévision se faisant concurrence à travers le monde, la concurrence dans la diffusion télévisuelle reste limitée dans un certain nombre de pays.

### 3.1 *Accès au marché et obstacles à l'entrée*

La convergence permet à de nouvelles entreprises de pénétrer sur des marchés qui étaient auparavant protégés, ce qui fait naître une concurrence entre un certain nombre d'acteurs intervenant dans des secteurs qui, par le passé, constituaient des marchés distincts, notamment : les câblo-opérateurs, les prestataires de services de télévision *via* Internet (télévision sur IP), les opérateurs de services de télécommunications et les diffuseurs terrestres. Même si, dans l'ensemble, le secteur de la radiodiffusion devient de plus en plus concurrentiel, la convergence engendre un certain nombre de problèmes relatifs aux obstacles à l'entrée, lesquels ont, à leur tour, des répercussions sur la politique de la concurrence.

Les obstacles à l'entrée (et à la sortie) sont importants, dans la mesure où seule leur existence est susceptible de pérenniser une position de force sur le marché. Partant, afin de déterminer si une fusion ou



le comportement d'une entreprise dominante sont anticoncurrentiels, les autorités de la concurrence doivent examiner soigneusement les conditions d'entrée et de sortie sur tel ou tel marché.

Selon la définition retenue, les barrières à l'entrée peuvent désigner soit la capacité des entreprises en place à faire des surprofits (Bain)<sup>21</sup> soit « un coût de production (pour une partie ou chaque taux de production) que doit supporter une entreprise qui cherche à entrer dans le secteur mais qui n'est pas supporté par les entreprises opérant déjà dans le secteur » (Stigler).<sup>22</sup> Les obstacles à l'entrée peuvent découler de l'action publique, des exigences de fonds propres, des économies d'échelle ou de la différenciation des produits. Si l'on en trouve à des degrés divers dans tous les secteurs des médias,<sup>23</sup> on considère souvent que c'est dans le secteur de la diffusion qu'il est le plus difficile de pénétrer. D'après Picard et Chon, de nouveaux entrants qui envisagent de s'implanter dans ce secteur se heurtent habituellement à six obstacles critiques :<sup>24</sup>

- *La politique publique* : Ce type d'obstacles à l'entrée peut être de nature réglementaire ou administrative. Dans le processus d'octroi des licences de diffusion audiovisuelle, les autorités compétentes prennent en compte des facteurs économiques aussi bien que culturels et sociaux, ce qui peut fausser la concurrence. Ainsi, en Zambie, l'octroi de licences de radio et de télévision s'est appuyé sur des dispositions n'autorisant qu'un rayon de radiodiffusion court. Cette restriction se justifiait apparemment par la nature communautaire des diffuseurs.<sup>25</sup> De manière générale, l'État est mieux à même de contrôler les entrées et d'influer sur les niveaux de concurrence sur le marché pour la télévision terrestre que pour la télévision par satellite. L'encouragement de la concurrence imposant que les barrières à l'entrée soient réduites au minimum, il faut que les règles qui régissent l'entrée sur le marché soient claires, transparentes et non discriminatoires.
- *La présence de diffuseurs historiques dominants* : Ces diffuseurs ont généralement noué une relation de longue date avec les téléspectateurs, et vraisemblablement aussi avec les annonceurs, relation qui devra être remise en cause par les nouveaux entrants.
- *La disponibilité de programmes adéquats* : Une entrée réussie sur le marché de la diffusion télévisuelle requiert un accès (production et/ou acquisition auprès de tiers) à une programmation intéressante, et à un prix raisonnable. L'acquisition de certains de ces programmes, qui peut se révéler essentielle pour attirer les téléspectateurs, représente vraisemblablement un coût sensible pour les nouveaux acteurs.
- *Le comportement du public* : Étant donné la présence de diffuseurs historiques dominants, les nouveaux entrants doivent présenter des offres suffisamment attrayantes pour convaincre les téléspectateurs de modifier leurs habitudes en ce qui concerne les programmes et les chaînes

<sup>21</sup> Bain, J.S. (1954), « Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries », *American Economic Review*, vol. 44, n° 1, pp. 15-39.

<sup>22</sup> Stigler, G. J. (1968), *The Organisation of Industry*, Homewood, IL, Richard D. Irwin. Voir également Baumol, W. J. et R. D. Willig (1981), « Fixed Costs, Sunk Costs, Entry Barriers and Sustainability of Monopoly », *Quarterly Journal of Economics*, vol. 96, n° 3, pp. 405-431.

<sup>23</sup> Picard, R. G. (2002), *The Economics and Financing of Media Companies*, New York, Fordham University Press.

<sup>24</sup> Picard, R. G. et B. S. Chon (2004), « Managing Competition Through Barriers to Entry and Channel Availability in the Changing Regulatory Environment », *The International Journal on Media Management*, vol. 6, n° 3 et 4, pp. 168-175.

<sup>25</sup> Voir contribution de la Zambie, DAF/COMP/GF/WD(2013)21.

qu'ils choisissent de regarder. Les diffuseurs commerciaux, dont l'exploitation est financée grâce aux recettes publicitaires, doivent en un laps de temps assez court recueillir l'adhésion d'un public qui attirera un nombre suffisant d'annonceurs.

- *Les coûts pour les consommateurs* : Très vraisemblablement, les nouveaux entrants proposeront des services de diffusion télévisuelle faisant appel au câble, au satellite ou aux technologies numériques, qui imposent tous aux téléspectateurs de supporter des coûts d'équipement. Les difficultés et les coûts que peuvent rencontrer les téléspectateurs lorsqu'ils passent d'un diffuseur de télévision à l'autre risquent de les décourager de changer totalement leurs habitudes de visionnage. Ainsi, les consommateurs qui passent d'un opérateur de télévision par satellite à un autre ont généralement des frais de location ou d'achat d'un équipement adéquat, comme des décodeurs. Toutefois, lorsque différentes plateformes (satellite, câble, télévision sur IP) se font véritablement concurrence, on pourrait s'attendre à ce que les coûts de migration soient faibles, étant donné qu'il est probable que chaque plateforme ne facturera pas de frais, ou seulement des frais minimes, pour l'installation et l'équipement nécessaire, afin de convaincre les abonnés d'autres plateformes et/ou d'opérateurs de télévision de changer de prestataire.<sup>26</sup>
- *Les exigences de fonds propres* : Lorsque les exigences de fonds propres atteignent un niveau prohibitif, cela peut constituer un important obstacle à l'entrée. Toutefois, les diffuseurs peuvent recourir à des contreparties ou à d'autres accords à même de rendre les exigences de fonds propres moins difficiles à respecter.

Naturellement, à mesure que l'industrie de la diffusion télévisuelle continue d'évoluer, certaines des caractéristiques mentionnées ci-dessus pourraient bien cesser d'être un obstacle à l'entrée. De plus, certaines caractéristiques peuvent constituer une barrière dans un pays, mais pas dans l'autre. Ainsi, à Singapour, la fragmentation des contenus a largement freiné l'entrée de nouveaux acteurs car toutes les grandes multinationales qui produisent des chaînes ont vendu celles-ci exclusivement à des titulaires de licences pour la télévision à péage.<sup>27</sup> En revanche, dans certains autres pays, elles sont moins de 15 % à avoir vendu leurs chaînes exclusivement à ce type de titulaires de licences. Les autorités de la concurrence évaluent donc régulièrement leurs marchés respectifs et les possibilités d'implantation de nouveaux opérateurs.

### 3.1.1 *De la transmission au contenu exclusif de qualité : goulets d'étranglement et source de position dominante sur le marché*

Pour pouvoir proposer des services de diffusion télévisuelle, les nouveaux entrants doivent obtenir l'accès à des services de transmission (télécommunications) ainsi qu'à du contenu. Dans le domaine de la diffusion analogique, les modèles anciens de réglementation de la télévision considéraient généralement la capacité de transmission comme un obstacle majeur à l'entrée. En effet, étant donné la capacité limitée du spectre radio, on estimait que le nombre de chaînes de télévision resterait lui aussi limité. En outre, si seulement un ou une poignée de diffuseurs avaient la main sur une capacité de diffusion déjà limitée, on pouvait raisonnablement s'attendre à ce qu'il y ait peu de concurrence.

Cependant, comme le soulignent Seabright et Weeds, « avec la transmission numérique [...], les limitations du spectre quant au nombre de chaînes disparaissent de fait, et la rente de rareté n'a plus lieu d'être. Les capacités de transmission existantes suffisent à répondre aux besoins (aux niveaux actuels et futurs, selon les estimations) et il existe une forte incitation à utiliser les capacités disponibles, si bien que

<sup>26</sup> Ainsi, au Royaume-Uni, Sky propose une offre qui inclut Sky gratuitement, ainsi qu'un décodeur HD.

<sup>27</sup> Voir la contribution de Singapour (2013), DAF/COMP/GF/WD(2013)33.

l'accès à la transmission ne constitue guère un obstacle à l'entrée ».<sup>28</sup> En d'autres termes, on considère que la numérisation, qui, en compressant les signaux télévisuels, a induit une hausse substantielle de la capacité de transmission et a abaissé les coûts de reproduction et de transmission de l'information, a nettement réduit certains des obstacles à l'entrée dans le secteur de la diffusion.

Au sein de l'UE, les barrières à l'entrée jugées élevées et non provisoires forment un élément des trois critères cumulatifs qui, s'ils sont satisfaits, conduisent à imposer une réglementation *ex ante*.<sup>29</sup> En fait, la Recommandation de la Commission de 2003 concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation *ex ante* inclut, dans la liste des marchés concernés, celui des services de radiodiffusion destinés à livrer un contenu radiodiffusé aux utilisateurs finaux (marché 18).<sup>30</sup> Cependant, au titre de la Recommandation de 2007, qui remplace la précédente, ce marché n'est plus réglementé.<sup>31</sup> De l'avis de la Commission et sur la base des commentaires reçus des autorités de réglementation nationales, il existe certes encore plusieurs obstacles à l'entrée sur ce marché, mais la dynamique de marché est telle que l'on peut anticiper une réelle concurrence dans un délai adéquat. Le deuxième des trois critères cumulatifs n'est donc plus satisfait, puisqu'« il existe des preuves d'une concurrence croissante entre les plateformes à mesure que se déploie la transition des plateformes analogiques au numérique ».<sup>32</sup>

Néanmoins, malgré une concurrence accrue entre les plateformes et une capacité de transmission apparemment suffisante pour répondre aux besoins actuels et futurs, la concurrence ne cesse pas pour autant de poser question. Les préoccupations concernent simplement d'autres domaines connexes. Ainsi, certains actifs de transmission (comme par exemple les sites de transmission terrestre) sont simplement trop onéreux pour être dupliqués. Les instances de réglementation qui redoutent la possible exploitation d'une position dominante sur ces actifs peuvent choisir de réglementer les conditions auxquelles leur accès est accordé.<sup>33</sup> De plus, lorsque de tels actifs sont aux mains d'une entreprise dominante, il existe un risque

<sup>28</sup> Seabright, P. et H. Weeds (2007), « Competition and market power in broadcasting : where are the rents ? » in Seabright, P. et J. von Hagen (dir. pub.), *The Economic Regulation of Broadcasting Markets*, Cambridge University Press.

<sup>29</sup> Dans l'UE, les autorités de réglementation nationales imposent des obligations spécifiques au secteur lorsque trois critères cumulatifs sont satisfaits. Dans le cadre de cette évaluation, les autorités examinent i) s'il existe des barrières « élevées et non provisoires » à l'entrée, ii) si la structure du marché ne présage pas d'évolution vers une situation de concurrence effective dans un délai adéquat et iii) l'incapacité du droit de la concurrence à remédier à lui seul à la ou aux défaillance(s) du marché.

<sup>30</sup> Recommandation de la Commission du 11 février 2003 concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation *ex ante* conformément à la directive 2002/21/CE du Parlement européen et du Conseil relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, JO [2003] L 114/45.

<sup>31</sup> Recommandation de la Commission du 17 décembre 2007 concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation *ex ante* conformément à la directive 2002/21/CE du Parlement européen et du Conseil relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, JO [2007] L 344/65.

<sup>32</sup> Commission européenne, Note explicative (en anglais), document accompagnant la Recommandation de la Commission concernant les marchés pertinents de produits et de services dans le secteur des communications électroniques susceptibles d'être soumis à une réglementation *ex ante* conformément à la directive 2002/21/CE du Parlement européen et du Conseil relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques, SEC(2007) 1483/2.

<sup>33</sup> Comreg (2012), *Market Review: Broadcasting Transmission Services in Ireland*, document de consultation et décision préliminaires, Document n° 12/77, disponible à l'adresse suivante : [www.comreg.ie/fileupload/publications/ComReg1277.pdf](http://www.comreg.ie/fileupload/publications/ComReg1277.pdf)

que celle-ci adopte unilatéralement un comportement anticoncurrentiel. Le cas *Astra/Abertis* présenté par les autorités de la concurrence espagnoles, à propos d'un abus de position dominante, montre clairement que l'accès aux infrastructures de transmission peut encore poser de graves problèmes de concurrence, même si, généralement, on ne considère plus que la transmission crée des barrières à l'entrée.<sup>34</sup>

En outre, la réussite de l'entrée dans le secteur de la diffusion télévisuelle sera fonction de la capacité des nouveaux diffuseurs à obtenir l'accès au contenu que les consommateurs demandent et à différencier leur offre de celle des diffuseurs en place. Si la convergence technologique, et la numérisation en particulier, a peu à peu résolu le problème de la rareté des ressources spectrales et des chaînes, il apparaît que la convergence n'a pas eu d'impact direct sur la fourniture du contenu. Il n'y a que quelques *blockbusters* et un nombre limité de manifestations sportives chaque année ; le contenu se fait, par conséquent, plus rare, et il est de fait devenu un goulet d'étranglement sur le marché de la diffusion.

Au niveau des contenus d'appel, il convient de distinguer en particulier les événements sportifs et les superproductions hollywoodiennes.<sup>35</sup> Si ces deux types de contenu ont toujours été considérés comme un élément moteur de la demande pour les abonnements à la télévision à péage, ils ne présentent pas nécessairement les mêmes caractéristiques. Le problème des goulets d'étranglement est particulièrement aigu en ce qui concerne les contenus pour lesquels le temps est un facteur critique et, partant, pour lesquels la diffusion ne dispose pas de substitut adéquat, et également en ce qui concerne le contenu demandé par un vaste public, pour lequel les technologies de diffusion traditionnelles bénéficient d'un avantage concurrentiel. Les grandes manifestations de sport de haut niveau remplissent tous ces critères.<sup>36</sup>

Si le marché de la télévision à péage ne semble pas présenter les caractéristiques d'un monopole naturel, on considère généralement que l'accès (exclusif) à un contenu d'appel revêt une importance essentielle pour le fonctionnement des marchés de télévision payante.<sup>37</sup> C'est ce que pensent à la fois les autorités de la concurrence et les acteurs du marché dans le monde entier. Ainsi, dans sa décision

<sup>34</sup> Voir le résumé de l'affaire dans la section 4 de la Note de référence.

<sup>35</sup> Par exemple, Ofcom définit les droits sur les films d'appel comme étant les droits sur les six principaux studios hollywoodiens sur la période de 12 mois suivant leur sortie en salle.

<sup>36</sup> Dans la deuxième moitié du XX<sup>e</sup> siècle, la télévision a révolutionné la manière dont des millions de personnes à travers le monde vivent le sport. Grâce à la télévision, des millions de personnes à la fois peuvent partager l'expérience qui consiste à regarder des grands événements comme la Coupe du monde de la FIFA ou la cérémonie d'ouverture des Jeux Olympiques. Il n'est donc pas surprenant que les demandes de droits de diffusion des manifestations sportives aient fortement augmenté ces dernières décennies. Cette croissance est essentiellement tirée par le nombre grandissant de diffuseurs opérant sur le marché et élargissant la part de marché de la diffusion commerciale. Initialement, lorsque la fourniture de télévision était dominée par des réseaux publics, les sommes demandées pour les droits de diffusion des événements sportifs étaient relativement modestes puisque les diffuseurs publics étaient en situation de monopole. Toutefois, à mesure que la télévision commerciale a gagné des téléspectateurs et commencé à faire concurrence aux diffuseurs en place, ces sommes ont enregistré une hausse exponentielle, et ces événements sportifs ne sont plus aujourd'hui diffusés par les chaînes de télévision publiques, mais par des chaînes commerciales de télévision à péage. Ainsi, pour acquérir le droit de diffuser les Jeux Olympiques 2006 et 2008, NBC a déboursé 1 508 milliards USD, alors que pour les éditions 2010 et 2012, elle a payé 2 201 milliards USD, soit un tiers de plus. Cette flambée des droits de diffusion des événements sportifs peut s'expliquer par i) la stratégie généralement déployée par les opérateurs de télévision payante, qui exigent l'exclusivité, laquelle facilite à son tour leur stratégie pour accaparer le marché, et ii) la stratégie des détenteurs des droits, qui cherchent à tirer le maximum de profits de la vente de leur contenu.

<sup>37</sup> D'après Spence et Owen, un contenu pour lequel la demande est assez inélastique sera plutôt fourni aux téléspectateurs sur abonnement que sur une chaîne dépendant de la publicité. Spence, M. et B. Owen (1977), « Television Programming, Monopolistic Competition, and Welfare », *Quarterly Journal of Economics*, vol. 91, n° 1, pp. 103-126.

concernant la fusion de NewsCorp et Telepiù, la Commission européenne a expressément énoncé que « l'accès aux contenus d'appel – principalement des films récents et des épreuves de football, mais aussi d'autres manifestations sportives – est indispensable à l'exploitation réussie d'une télévision payante ». <sup>38</sup> En Afrique du Sud, MultiChoice, créé à partir de la branche de gestion des abonnés de M-Net, et M-Net, qui a été le seul prestataire de télévision à péage à bénéficier d'une licence ces deux dernières décennies, ont conjointement indiqué que « pour les services de diffusion sur abonnement, l'exclusivité constitue la condition fondamentale leur permettant d'attirer et de retenir des abonnés ». <sup>39</sup> Toutefois, comme le soulignent le ministère du Développement économique et le ministère de la Culture et du Patrimoine de la Nouvelle-Zélande dans leur rapport conjoint sur les questions de concurrence dans le secteur de la diffusion télévisuelle, « tout diffuseur à même de 'bloquer' des droits à long terme sur la totalité ou sur la grande majorité des contenus d'appel a potentiellement la capacité de dominer le marché et d'exercer un pouvoir de marché ». <sup>40</sup>

Les facteurs qui font obstacle à l'accès à du contenu et les problèmes de concurrence peuvent avoir diverses causes, telles que l'intégration des détenteurs de contenus et des prestataires de services de transmission, ou les dispositions contractuelles existantes. Les sociétés de diffusion traditionnelles (câble, voie terrestre et/ou satellite) sont toutes susceptibles d'entretenir de longue date une relation leur assurant un accès privilégié à du contenu spécifique, ce qui crée des obstacles pour les nouveaux entrants. Les sociétés de télécommunications peuvent également constituer des « chasses gardées », dont l'accès n'est autorisé qu'aux prestataires de contenu avec lesquels ils ont passé des accords.

### 3.1.2 La rareté des ressources spectrales et l'absence de gestion efficace

Le passage du spectre analogique au spectre numérique plus efficace a considérablement réduit la rareté des ressources spectrales et ainsi permis à un plus grand nombre de chaînes d'être acheminées sur un plus petit nombre d'ondes <sup>41</sup>. Cette situation permet d'écartier beaucoup des arguments potentiels des monopoles en faveur de l'octroi de licences à un nombre limité de diffuseurs et d'offrir une gamme étendue de nouveaux services et de faire évoluer les services existants. Cependant, dès lors que l'octroi de licences pour les services concerne désormais la technologie et la neutralité des services, l'attribution et la gestion des ressources spectrales doivent pouvoir offrir des opportunités aux différentes portions du spectre radioélectrique qui peuvent accueillir de nouveaux services et des nouvelles technologies.

En outre, même si le problème de la rareté des ressources spectrales a, dans une large mesure, été atténué, des comportements anticoncurrentiels sur le marché spectral peuvent toujours apparaître, en particulier lorsque les détenteurs de ressources spectrales tentent d'établir une position forte dans l'offre de services en aval. La portée de ces comportements est plus importante lorsque les ressources spectrales accordées pour un usage particulier sont rares. La rareté peut découler directement d'une réglementation qui empêcherait explicitement certaines ressources spectrales. Par exemple, Cave (2010) relève que « 40 % du spectre en dessous de 1 GHz sont utilisés pour la radiodiffusion hertzienne terrestre, et il se peut par exemple qu'une station de télévision ne soit pas autorisée unilatéralement à interrompre sa diffusion et à utiliser les fréquences qui lui ont été accordées pour transmettre des appels téléphoniques cellulaires » <sup>42</sup>. De même, l'attribution de fréquences peut reposer sur des critères anticoncurrentiels. Récemment, la

<sup>38</sup> Commission européenne [2003], Affaire COMP/M.2876, NewsCorp/Telepiù.

<sup>39</sup> ICASA (2005), *Subscription Broadcasting Services: Position Paper*.

<sup>40</sup> Ministère du Développement économique et ministère de la Culture et du Patrimoine de la Nouvelle-Zélande (2009).

<sup>41</sup> Dans certains cas, il a été estimé qu'il était six fois plus efficace.

<sup>42</sup> Cave, M. (2010), « Anti-competitive behaviour in spectrum markets: Analysis and response », *Telecommunications Policy*, vol. 34, pp. 251-261.

Commission européenne a entamé des poursuites contre le Gouvernement bulgare qu'elle soupçonnait d'avoir octroyé en 2009 cinq fréquences numériques à seulement deux radiodiffuseurs (la société lettonne Hannu et la société slovaque Towercom) en « limitant sans aucune justification le nombre d'entreprises qui pouvaient potentiellement entrer sur le marché »<sup>43</sup>.

Ainsi, il est possible de réduire le risque de comportements anticoncurrentiels sur les marchés du spectre radioélectrique en mettant en place les outils adéquats directement dans la réglementation du spectre. Il convient toutefois de relever que les préoccupations liées à la gestion des ressources spectrales dans les pays à revenu faible et moyen peuvent être très différentes de celles qui existent dans les pays à revenu élevé. La Banque mondiale fait observer que « les pays en voie de développement peuvent souffrir d'une pénurie de ressources spectrales plutôt que d'une pénurie d'offre » et que « tous les petits marchés avec un potentiel de forte croissance, les zones étendues sans service, l'incomplétude des infrastructures, les restrictions administratives à l'entrée et le manque de capitaux sont autant de signes d'une sous-utilisation du spectre »<sup>44</sup>.

Lorsque des mesures réglementaires se révèlent insuffisantes pour écarter les risques de comportements anticoncurrentiels, le droit général de la concurrence peut s'attaquer aux pratiques anticoncurrentielles individuelles sur le marché du spectre. Par exemple, lorsqu'une fusion donnée concerne le transfert de ressources spectrales et qu'il est fort possible qu'une telle transaction ait des effets néfastes sur la concurrence, l'autorité de la concurrence peut approuver cette fusion, mais sous réserve de la mise en œuvre des recours affectant le contrôle de ces ressources.

### 3.1.3 Contrôle des participations

L'un des effets de l'évolution et de la convergence technologiques sur le marché des médias est l'attrait croissant qu'exercent les co-entreprises et les fusions tant au niveau national qu'au niveau mondial. Une concentration élevée sur les marchés des médias peut susciter des préoccupations différentes et plus grandes que pour d'autres secteurs. En particulier, elle peut porter atteinte à la diversité et à la pluralité, ce qui revêt une importance capitale dans les secteurs des médias.

Dans la plupart des secteurs, les dysfonctionnements du marché et les comportements ou pratiques anticoncurrentiels entraînent une augmentation des prix. Cependant, sur les marchés des médias riches en informations, où les acteurs offrent des produits dits « de confiance », une plus forte concentration et une diminution de la concurrence peuvent diminuer la qualité de l'information<sup>45</sup>. Même s'il permet de répondre à la question de la concentration et du choix, le droit de la concurrence ne garantit nullement que les participations soient dispersées et que de nouveaux acteurs puissent entrer sur le marché. Dès lors que le

<sup>43</sup> Berra, S. (2013), « *DG COMP sues Bulgaria over digital TV* », 28 janvier 2013, <http://www.globalcompetitionreview.com/news/article/32968/dg-comp-sues-bulgaria-digital-tv/>

<sup>44</sup> Banque mondiale (2008), « *Managing the Radio Spectrum: Framework for Reform in Developing Countries* », *Policy Research Working Paper WPS 4549*.

<sup>45</sup> Dans leur article, Stucke et Grunes citent à titre d'exemple la réaction des médias aux propos tenu par celui qui était alors le sénateur Obama lors de la campagne présidentielle de 2008. En réponse à une question posée lors d'une étape de campagne dans l'Oregon, le sénateur Obama a déclaré que, s'il était élu, il chercherait à faire appliquer plus strictement les lois antitrust et il a indiqué que la consolidation des médias suscitait plusieurs craintes à cet égard. Les auteurs soulignent qu'« aucun des vingt journaux de premier plan étudiés par l'*American Antitrust Institute* n'a rapporté ces propos de manière indépendante ». Certains des grands journaux, comme le *Washington Post* et le *New York Times*, ont examiné la réaction des juristes américains aux propos du sénateur Obama, sans toutefois évoquer les craintes relatives à la consolidation des médias qu'avait exprimées Obama. Stucke, M E. et A. P. Grunes (2009), « *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy* », *Connecticut Law Review*, vol. 42, n° 1, pp. 101 à 146.

droit et la politique de la concurrence poursuivent des objectifs économiques, tels que l'efficacité et le bien-être des consommateurs, ils ne sauraient offrir une protection suffisante pour la diversité et la pluralité des médias. C'est la raison pour laquelle de nombreuses juridictions à travers le monde ont adopté des règles précises régissant le niveau maximal de participation dans des plates-formes de diffusion particulières (limites de concentration) et/ou pour différentes plates-formes de diffusion (limites des participations croisées). Cependant, de telles règles peuvent également tendre à encourager la concurrence.

Au Royaume-Uni par exemple, Ofcom a l'obligation légale de réexaminer régulièrement les règles en matière de participation sur le marché des médias et de faire au Secrétaire d'État des recommandations en vue de toute modification de ces règles<sup>46</sup>. Aux États-Unis, la Commission fédérale américaine des télécommunications (*Federal Communications Commission*, FCC) est tenue, en application de l'article 202 h) de la loi de 1996 sur les télécommunications, de réexaminer tous les quatre ans ses règles en matière de participation sur le marché des médias afin d'établir si elles correspondent à l'intérêt du public au regard de la concurrence et, s'il y a lieu, de modifier ou d'abroger toute réglementation en place qui ne remplirait plus ce critère. Le dernier examen quadriennal de la réglementation a eu lieu en 2010 et, en décembre 2011, la FCC a adopté et publié un avis de proposition de réglementation<sup>47</sup>. Actuellement, la FCC dispose de règles dans les domaines suivants :

- Participation dans les télévisions au niveau local ;
- Participation dans les radios locales ;
- Participation croisée pour la presse écrite et la radiodiffusion ;
- Participation croisée pour la radio et la télévision ; et
- Doubles réseaux.

Pour la FCC, une règle en matière de double réseau est nécessaire pour promouvoir tant la concurrence que le localisme. Bien qu'elle autorise la copropriété de plusieurs réseaux de diffusion, cette règle interdit une fusion entre les quatre plus grands réseaux, à savoir ABC, CBS, Fox et NBC. Une telle interdiction, selon la FCC, est justifiée au motif que, « compte tenu du niveau d'intégration verticale de chacun des quatre grands réseaux et de la subsistance de leur rôle de "groupe stratégique" sur le marché national de la publicité, une fusion entre les quatre grands réseaux suscite des préoccupations en termes de concurrence dans la mesure où cette entreprise fusionnée pourrait alors réduire l'achat de ses programmes et/ou le prix qu'elle paierait pour la programmation »<sup>48</sup>. La règle sur les doubles réseaux a également été confirmée par la Cour d'appel du troisième circuit qui a estimé qu'elle était justifiée en raison de l'intégration verticale des quatre grands réseaux de diffusion et de leur capacité à toucher un public plus large que les autres réseaux<sup>49</sup>.

Si des règles tendant à contrôler les participations sont imposées en vue de garantir la diversité et la pluralité des opinions, le rôle de la concurrence à cet égard n'en est pas moins capital. En règle générale, évaluer la qualité et la véracité de l'information est une tâche peu aisée, à plus forte raison si la qualité de l'information doit être établie indépendamment de son contexte. D'un côté, la concurrence permet « aux

<sup>46</sup> La dernière révision a eu lieu en novembre 2012, et Ofcom n'a recommandé aucune modification des règles en place. Voir la contribution du Royaume-Uni, DAF/COMP/GF/WD(2013)39. Voir également : <http://stakeholders.ofcom.org.uk/market-data-research/other/media-ownership-research/rulesreport2012/>.

<sup>47</sup> FCC (2011), avis de proposition de réglementation pour l'examen quadriennal de la réglementation de 2010 : « *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* », [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-186A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-186A1.pdf)

<sup>48</sup> FCC (2011), par. 136.

<sup>49</sup> *Prometheus Radio Project v. Federal Communications Commission* (2011), 652 F.3d 431 at 464.

consommateurs de juger de la qualité avec une plus grande précision car ils peuvent comparer les informations d'une entreprise avec celles d'une autre »<sup>50</sup>, et de l'autre elle peut réduire la partialité liée à l'offre<sup>51</sup>.

Il convient de souligner que, même si le contrôle des participations peut contribuer à préserver la diversité et le pluralisme, l'efficacité de ces règles du point de vue de la politique de la concurrence dépend de la définition des services de radiodiffusion et médias. Il devient difficile d'établir des distinctions précises en présence de fournisseurs de services multiples qui brouillent les limites entre les transmissions audiovisuelles via différentes plates-formes. Par exemple, on pourrait se poser la question de savoir si le contenu vidéo acheminé sur les terminaux portables relèvent d'un service de radiodiffusion.

De même, dans cet environnement dynamique, si l'on tient compte de la façon dont l'évolution technologique redéfinit les secteurs des télécommunications et des médias, il peut être malaisé de comprendre comment l'acquisition de sociétés pourra entraver le développement de la concurrence et potentiellement créer des opportunités pour le contrôle des « tubes » de médias qu'il convient d'utiliser pour barrer le chemin à la concurrence sur les marchés médiatiques en aval.

#### 3.1.4 Numérotage des chaînes de télévision

Les numéros de chaînes présentent un indice de rappel local important chez les consommateurs dès lors que les stations de télévision qui existent de longue date ont un avantage concurrentiel. Cette question devra être examinée lors de l'attribution des ressources spectrales numériques et de la migration des chaînes analogiques. Elle pourra également se poser dans le contexte de la diffusion télévisuelle sur Internet via différentes plates-formes, les chaînes provenant de différents endroits géographiques et l'agrégation de chaînes pouvant entraîner des répétitions dans le numérotage. Aux États-Unis par exemple, la FCC a proposé, lors du passage de l'analogique au numérique, de mettre en œuvre un processus de sélection des chaînes afin de permettre aux détenteurs de licences de choisir la chaîne qu'ils préféreraient.

#### 3.1.5 L'impact des technologies perturbatrices

Le secteur de la télévision est manifestement en proie à une agitation considérable. D'un support unidirectionnel, il n'a eu de cesse d'évoluer vers un support bidirectionnel avec lequel les téléspectateurs ne doivent plus accéder à un programme particulier à un moment précis comme cela était le cas avec les modèles de distribution statiques propres à la radiodiffusion hertzienne terrestre classique. Le modèle commercial traditionnel de la télévision fondé sur des réseaux de distribution exclusifs et intégrés verticalement doit aujourd'hui faire face à une programmation plus personnalisée. Lorsque les téléspectateurs peuvent accéder à du contenu sur de multiples plateformes, les sociétés de diffusion peuvent établir un lien plus direct avec eux, ce qui entraîne une fragmentation à long terme du public, lequel fragmente à son tour le temps qu'il consacre aux médias en faisant appel à une pléthore de chaînes et de plates-formes.

L'une des toutes récentes évolutions touchant le secteur de la diffusion télévisuelle est ce que l'on appelle la télévision ou les services « *over-the-top* » (OTT). Comme nous l'avons déjà vu, il s'agit essentiellement de la fourniture de trains numériques vidéo sur des réseaux de transmission à large bande et non plus sur des réseaux câblés et réseaux satellitaires traditionnels et d'autres moyens de radiodiffusion, en plus d'autres services habituellement offerts via Internet. Cependant, la pertinence de la télévision OTT ou de la télévision sur Internet ne doit pas être examinée uniquement sous l'angle de la fourniture de

<sup>50</sup> Gentzkow, M. et J. M. Shapiro (2008), « Competition and Truth in the Market for News », *Journal of Economic Perspectives*, vol. 22, n° 2, pp. 133 à 154.

<sup>51</sup> Voir Stucke et Grunes (2009) pour un survol des études qui ont montré comment la concurrence entre différentes sources de médias réduit la « partialité liée à l'offre », laquelle désigne la communication d'informations déformées, autocensurées ou tendancieuses.



contenu télévisuel numérique via Internet. Selon certains, la télévision OTT est susceptible de fixer le cap de ce que sera la télévision à l'avenir<sup>52</sup>.

En raison de la concurrence croissante entre les acteurs du marché convergé qui offrent des services télévisuels, de télécommunications et Internet, et de l'évolution de la structure du secteur de la diffusion télévisuelle<sup>53</sup>, les autorités de la concurrence doivent faire face à des niveaux de complexité inédits. Dès lors que l'évolution technologique est rapide et le plus souvent imprévisible, personne ne saurait raisonnablement attendre des autorités de la concurrence et de la réglementation qu'elles prédisent sans se tromper l'issue de l'évolution en cours ou la nature exacte des nouveaux enjeux. Cependant, puisque les gouvernements continuent de jouer un rôle important dans l'élaboration des politiques en matières de médias, lesquelles portent également sur la diffusion télévisuelle, les autorités chargées de la concurrence et de la réglementation devraient au moins tenter de poursuivre leurs enquêtes tout en gardant à l'esprit le risque que l'évolution technologique modifie complètement les structures actuelles du marché, ce qui, à son tour, pourrait rendre hors de propos certaines des préoccupations actuelles en matière de concurrence. Bien qu'il ne soit pas possible de prédire ce que sera le modèle de consommation télévisuel dans cinq ou dix ans, on peut supposer en toute sécurité que la diffusion télévisuelle continuera d'évoluer vers un modèle où les téléspectateurs consomment des contenus de façon plus interactive, personnelle et mobile. Si les autorités de la concurrence en ont le pouvoir, elles pourront envisager de réaliser des études de marché ou des enquêtes en vue d'apprécier l'évolution des modèles de la consommation télévisuelle et les changements qui en découlent sur les structures du marché. Si elles ne disposent pas de tels pouvoirs, les autorités de la concurrence devront, lorsqu'elles enquêtent sur des affaires individuelles, examiner avec soin l'aspect dynamique du marché et l'impact qu'il peut avoir sur le renforcement de la concurrence.

### 3.1.6 *Chevauchement des compétences en matière de réglementation*

Dans une économie de plus en plus mondialisée, où il est habituel pour les acteurs convergés sur le marché des communications d'offrir des triple-services ou des quadruple-services, le risque de conflits de compétences entre les différentes autorités et la nécessité d'une coopération étroite entre elles se font de plus en plus pressants. Aujourd'hui, la question la plus pertinente porte sur les conflits qui surviennent au niveau national et, en particulier, entre différentes autorités de la concurrence potentiellement compétentes, et entre des autorités de la réglementation et de la concurrence.

- *Autorités chargées de la réglementation des télécommunications et de la radiodiffusion* : tenant compte de la convergence qui a eu lieu dans le contexte technologique et économique à la base de la fourniture de services de télécommunications et audiovisuels, un nombre croissant d'experts estiment qu'une convergence semblable, au moins à un niveau minimal, surviendra pour les régimes de réglementation respectifs<sup>54</sup>. La question principale est celle de savoir si les cadres juridiques nationaux en place offrent une stabilité et une orientation à long terme pour le secteur des communications et offrent dans le même temps aux prestataires et aux utilisateurs de services

<sup>52</sup> Pour une description de modifications potentielles dans la consommation de contenu télévisuel, voir par exemple Meyer, L. (2006), « Three scenarios for TV in 2015 », *Communications & Strategies*, n° 62, pp. 93 à 108.

<sup>53</sup> Aux États-Unis par exemple, AT&T et Verizon Communications, à l'instar de nombreux autres fournisseurs de services de télécommunications dans le monde, font aujourd'hui appel à leurs propres réseaux par fibres pour faire directement concurrence aux radiodiffuseurs câblés et satellitaires numériques traditionnels.

<sup>54</sup> Pour un examen de l'impact de la convergence sur la réglementation propre au secteur, voir par exemple Yoo, C. S. (2009), « The Convergence of Broadcasting and Telephony: Legal and Regulatory Implications », *Communications & Convergence Review*, vol. 1, n° 1, pp. 44-55.

la flexibilité suffisante pour déployer et utiliser ces services en faisant appel aux nouvelles technologies.

Dans la pratique, les dysfonctionnements du marché ou les questions stratégiques concernant l'accès au contenu et la qualité de ces derniers sont à distinguer des questions qui touchent à la garantie de l'accès à l'acheminement des données, si bien que séparer les fonctions de réglementation entre les contenus et l'acheminement ne devrait pas poser de problème particulier. Les normes fixant un certain niveau de service de radiodiffusion n'ont habituellement fait aucune distinction en fonction de l'usage qu'il en est fait. Dans un environnement convergé, où l'intégralité du contenu n'est pas contrôlée par l'autorité de la réglementation, il pourra être intéressant d'évaluer les retombées de l'instauration de normes sur une gamme limitée de services.

Traiter des services semblables de la même manière, et s'assurer que des services semblables soient traités de la même manière au regard du droit, peut toutefois poser problème. Il se peut que les arguments qui avaient été avancés en faveur d'une distinction entre l'accès aux télécommunications et la radiodiffusion ne soient plus applicables lorsque les deux services offrent les mêmes produits. Cependant, dans les juridictions où il existe un mécanisme distinct de réglementation pour les télécommunications et la radiodiffusion, un organisme compétent pourra faire valoir que ses règles supplantent celles des autres. Cette situation favorisera la recherche de la juridiction la plus avantageuse ou un arbitrage entre réglementations, ce qui portera atteinte à l'efficacité de la réglementation et augmentera les coûts pour les prestataires de services.

La réglementation commune préconisée par certains experts prévoit également la création d'une seule et même autorité convergée de la réglementation. Cette approche a déjà été retenue dans quelques pays de l'OCDE tels que le Royaume-Uni (Ofcom) et l'Italie (Agcom). On recense également plusieurs économies qui ne relèvent pas l'OCDE où certains pays ont décidé de créer une autorité de réglementation convergée en vue de répondre aux défis liés à la convergence et d'« éliminer les règles désuètes qui entravent les investissements et ralentissent la concurrence dans le secteur des TIC »<sup>55</sup>. C'est par exemple le cas de l'Afrique du Sud et de l'Inde où une autorité de la réglementation convergée a été mise en place afin de bien rendre compte de la nature convergente des TIC<sup>56</sup>.

- *Autorités chargées de la réglementation et de la concurrence* : la convergence ayant entraîné l'érosion des monopoles naturels et rendu possible une concurrence intermodale, certains commentateurs estiment par conséquent qu'il sera plus difficile de mettre en œuvre une réglementation propre à un secteur particulier et plus facile de mettre en œuvre une législation antitrust conventionnelle<sup>57</sup>. Que cela soit le cas ou non, des conflits pourront également survenir lorsque les autorités chargées de la réglementation et de la concurrence rendent des décisions contradictoires sur la même question. Afin de réduire le risque de conflits de compétence et de décisions divergentes, certains pays ont adopté des accords plus ou moins formels ou des mémorandums d'accord qui fixent des procédures précises en matière de coopération.

<sup>55</sup> García-Murillo, M.A. (2005), « Regulatory responses to convergence: Experiences from four countries », *Info*, vol. 7, n° 1, pp. 20-40.

<sup>56</sup> L'*Independent Communications Authority of South Africa* (ICASA) a été créée au lendemain de la fusion de deux autorités distinctes chargées de la réglementation : la *South African Telecommunications Regulatory Authority* (SATRA) et l'*Independent Broadcasting Authority* (IBA).

<sup>57</sup> Geradin, D. et M. Kerf (2003), « *Controlling market power in telecommunications: Antitrust v. sector-specific regulation* », Oxford University Press, Oxford, Grande-Bretagne.

Outre les conflits qui peuvent survenir au niveau national, le risque de chevauchement au niveau international entre des juridictions antagonistes est de plus en plus marqué à l'heure où le contenu migre vers Internet. L'une des conclusions du *Media Convergence Review Panel* à Singapour est que les détenteurs de licences sur le marché local des médias sont de plus en plus soumis à « la concurrence en ligne de prestataires de services médiatiques étrangers qui ne relèvent pas des mécanismes réglementaires locaux »<sup>58</sup>. Face à ces conditions de concurrence inévitables, le Panel a proposé que « le cadre d'octroi des licences de radiodiffusion de Singapour s'applique aux services de diffusion tant nationaux qu'étrangers qui sont acheminés via Internet et destinés au public singapourien », tout en reconnaissant les difficultés liées à la mise en pratique d'une telle solution<sup>59</sup>.

### 3.2 La définition du marché

La définition du marché est sans aucun doute l'un des outils d'analyse les plus importants à la disposition des autorités de la concurrence pour examiner et évaluer les problèmes en matière de concurrence. Il est vrai qu'une analyse de la concurrence ne peut en général pas avoir lieu indépendamment de la définition du marché<sup>60</sup>.

Il est fort possible que le marché de la diffusion télévisuelle soit difficile à définir puisque le secteur de la radiodiffusion est axé autour d'une multitude de relations. Pour définir correctement le marché en question et donc recenser les préoccupations potentielles en matière de concurrence, les autorités chargées de la concurrence doivent tout d'abord parfaitement comprendre les substitutions tant du côté de la demande que de celui de l'offre sur l'ensemble de la chaîne de valeur. Dès lors que la diffusion de programmes télévisés fait intervenir une multitude d'acteurs, l'analyse de la substitution doit prendre en compte l'ensemble de ces acteurs, y compris les annonceurs publicitaires, les téléspectateurs, les radiodiffuseurs, les opérateurs d'infrastructures et de réseaux ou les détenteurs de droits pour le contenu.

En outre, la définition du marché sera davantage compliquée par l'existence de plusieurs caractéristiques que l'on rencontre souvent sur les marchés de produits et de services audiovisuels, tels que des charges fixes élevées et des coûts marginaux faibles, le groupement des offres, la concurrence hors prix, la nature bilatérale des marchés, l'intégration verticale du processus de production et de distribution, et l'évolution technologique rapide et souvent imprévisible.

À l'heure de la migration vers le trafic IP et du recours de plus en plus fréquent aux produits et aux services sur Internet, les programmes télévisuels pouvant être obtenus depuis plusieurs terminaux, il sera vraisemblablement plus difficile de définir le marché en question. Cependant, comme le relève le rapport établi par l'organisme canadien de réglementation, CRTC, « [c]e niveau de complexité supplémentaire ne signifie toutefois pas que les outils et les méthodes mis en place sont désuets. L'objectif principal, qui consiste à déterminer les limites d'un marché – pour aider à déterminer le pouvoir de marché, soit la capacité d'une entreprise ou d'un groupe d'entreprises de maintenir les prix au-dessus du niveau concurrentiel pour une période non transitoire – demeure pertinent »<sup>61</sup>.

<sup>58</sup> Contribution de Singapour, DAF/COMP/GF/WD(2013)33.

<sup>59</sup> Ibid.

<sup>60</sup> Sur l'importance et l'évolution de la définition du marché, voir OCDE (2012), *Market Definition*, DAF/COMP(2012)19.

<sup>61</sup> Csorgo, L. et I. Munro (2011), « Enjeux relatifs à la définition du marché à l'égard des produits et services audio et audiovisuels de distribution dans un environnement numérique », rapport préparé pour le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC), <http://www.crtc.gc.ca/fra/publications/reports/rp110215.htm>.

Un grand nombre de facteurs interviennent dans la délimitation exacte du marché en question, notamment la nature des relations et la mesure dans laquelle le secteur de la radiodiffusion dans un pays donné est intégré. Tandis que les définitions du marché sont susceptibles de varier en fonction des différents marchés de radiodiffusion et des juridictions, il est généralement possible de faire la différence entre i) un marché de gros de « contenus bruts », ii) un marché de gros d'accès à l'infrastructure et iii) un marché de détail.

En outre, les autorités de la concurrence peuvent définir les marchés de manière plus étroite en fonction de ce qui suit :

- le type de radiodiffuseur (commercial ou public) et, en particulier, l'offre de programmes de télévision payante par opposition à des programmes de télévision hertzienne<sup>62</sup> ;
- le type de plate-forme utilisé pour acheminer le contenu télévisuel (câble, satellite, terrestre numérique, etc.) ;
- le type de services de télévision payante (programme payé à la chaîne, paiement à la séance, vidéo à la demande, diffusion numérique interactive)<sup>63</sup> ; et
- le type de contenu de premier ordre qui est offert, et en particulier les chaînes sportives et cinématographiques de premier ordre<sup>64</sup>.

Pour définir le marché en question dans des secteurs considérablement dynamiques présentant des produits et des services très différenciés, les autorités chargées de la concurrence et de la réglementation devront se fonder sur un ensemble étoffé de données et d'informations. Même si la définition du marché tirée d'un cas préalable pourra revêtir un certain intérêt, les autorités compétentes devront définir le marché en question avec rigueur pour chacun des cas afin d'appréhender la concurrence dynamique et en constante évolution entre les nouveaux diffuseurs télévisuels.

### 3.3 *La concurrence entre les plates-formes*

Là où la diffusion télévisuelle repose sur différentes plates-formes, il convient d'examiner le degré de substitution potentielle entre ces plates-formes pour pouvoir cerner la mesure dans laquelle un marché donné est concurrentiel. Dans certains pays, le déploiement de réseaux câblés, lesquels ont atteint une

<sup>62</sup> Par exemple, lors de la fusion entre News Corp et Telepiù en 2003, la Commission européenne a conclu « il existe [...] une distinction évidente, du point de vue des clients comme de celui des fournisseurs, entre la télévision à accès libre et la télévision payante », (News Corp/Telepiù, par. 19). Dans cette affaire, aucune distinction n'avait été faite s'agissant des moyens de transmission des contenus concernés. Plus récemment, lors de l'acquisition des 60,9 % restants de British Sky Broadcasting Group PLC (Sky) par News Corp, la Commission a une nouvelle fois conclu que les offres au détail pour la télévision payante et la télévision en clair constituaient des marchés distincts. Affaire M.5932, News Corp/BSkyB, 21 décembre 2010.

<sup>63</sup> Dans *News Corp/BSkyB* (2010), la Commission européenne a conclu que « sur le marché de la télévision payante, la fourniture au détail de services non linéaires », tels que les DVD, le paiement à la séance et la vidéo à la demande, et que « les canaux linéaires appartiennent à deux marchés distincts », par. 106-107.

<sup>64</sup> En Europe, après la migration des droits de diffusion vers la télévision payante, les autorités de la concurrence ont régulièrement adopté une définition étroite du marché en réponse à la question de savoir si des formes de contenus autres que le contenu sportif sont des substituts et si des plates-formes autres que la télévision payante offrent des programmes adaptés. Cette situation s'explique largement par les différences considérables qui existent entre les prix qui sont payés pour le contenu sportif de premier ordre et les chaînes sportives de premier ordre et toute autre alternative.

pénétration quasi-universelle, a petit à petit marginalisé les technologies terrestres, comme ce fut le cas dans les pays du Benelux dans les années 1980. En revanche, d'autres pays, tels que le Royaume-Uni, la France, l'Espagne ou l'Italie, ont continué à faire très largement appel aux plates-formes terrestres.

À n'en pas douter, l'offre de services télévisuels via les nouvelles technologies (Internet, haut débit fixe ou sans fil) viendra compléter la radiodiffusion terrestre et rendra plus compétitive la diffusion télévisuelle. Cependant, il se peut que ces nouvelles technologies ne soient pas en mesure de remplacer parfaitement la radiodiffusion traditionnelle. Par exemple, Internet et le haut débit fixe ou sans fil sont peu susceptibles de constituer des alternatives viables pour la distribution à un public de masse, en particulier dans les zones à faible population. En outre, en termes de substituabilité avec d'autres modes de transmission, on fait souvent valoir que la qualité offerte par la télévision sur Internet est moins bonne que celle offerte par d'autres réseaux de télévision numérique. Cependant, les opérateurs de télévision sur Internet n'ont de cesse de mettre en œuvre des changements, lesquels visent certes à améliorer la couverture, mais également à rapprocher le niveau et la fiabilité de leurs services de télévision avec la qualité offerte par les opérateurs de télévision numérique traditionnelle.

Vu le potentiel qu'ont les nouvelles technologies, et en particulier la télévision sur Internet et la télévision OTT, de redéfinir intégralement la manière dont les téléspectateurs regardent la télévision, bouleversant ainsi les structures du marché existantes, il n'est pas surprenant que les opérateurs de télévision de longue date cherchent à entraver l'entrée et/ou l'expansion de nouveaux acteurs. L'exemple du cartel « câble exclusivement » en Corée du Sud montre comment des câblo-opérateurs ont tenté d'empêcher l'entrée sur le marché d'opérateurs de télévision sur Internet.

**Encadré 2 : Le cartel « câble exclusivement » entre cinq exploitants  
de systèmes multiples de TV câblée  
(Corée du Sud, 2011)<sup>65</sup>**

En mai 2011, l'autorité sud-coréenne de la concurrence, KFTC, a délivré une ordonnance de cessation et imposé à 24 exploitants de systèmes sur le marché de la télévision payante une amende totale d'environ 6,7 millions d'euros. Selon la KFTC, ces exploitants avaient passé, entre novembre 2008 et mai ou juillet 2010, un accord collusif visant à empêcher le développement de la télévision sur Internet comme nouvelle plate-forme concurrentielle.

*Le contexte du marché sud-coréen de la télévision payante*

En Corée du Sud, le secteur télévisuel se compose de marchés de diffusion télévisuelle en clair et payante. Le groupe d'acteurs suivant intervient sur le marché de la télévision payante :

- *Exploitants de systèmes* : ils exploitent plus de 70 canaux de radiodiffusion dans chaque zone régionale. Ils tirent leurs recettes des frais d'abonnement et des frais d'installation, ainsi que des frais de location des décodeurs qu'ils louent aux consommateurs. On dénombre 100 exploitants de systèmes pour 77 zones de radiodiffusion régionales.
- *Exploitants de systèmes multiples* : il s'agit des exploitants de systèmes qui mènent leurs activités dans au moins deux zones régionales et qui comptent de nombreux exploitants de systèmes en filiale. On comptait huit exploitants de systèmes multiples en 2009, et 78 des 100 exploitants de systèmes appartenaient à l'un des huit exploitants de systèmes multiples. Les trois plus grands exploitants de systèmes multiples détiennent 63,4 % du marché des exploitants de systèmes.
- *Radiodiffuseurs satellitaires* : ils acheminent leur service de radiodiffusion vers les consommateurs à l'échelle nationale. On compte deux radiodiffuseurs satellitaires.

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KFTC (2011), affaire n° 2010서감2951, Décision de la KFTC n° 2011-153.

- *Diffuseurs de télévision sur Internet (IPTV)* : ils acheminent leur service de radiodiffusion vers les consommateurs à l'échelle nationale. Depuis que la télévision sur Internet a été autorisée en février 2009, trois diffuseurs de télévision sur Internet sont entrés sur le marché de la télévision payante.
- *Fournisseurs de programmes* : ils passent un contrat avec les exploitants de systèmes (ou les radiodiffuseurs satellitaires ou les diffuseurs de télévision sur Internet) et offrent leur contenu. Ils tirent leurs recettes, d'une part, des exploitants de systèmes (ou des radiodiffuseurs satellitaires ou des diffuseurs de télévision sur Internet) en échange de l'offre de contenu radiodiffusé et, d'autre part, des redevances publicitaires en échange de la diffusion d'annonces publicitaires lors de la diffusion de leur contenu. Le marché de la télévision payante compte 184 fournisseurs de programmes.

En 2008, le déséquilibre entre les exploitants de systèmes et les fournisseurs de programmes était de plus en plus marqué. Bien que le marché de la télévision payante compte un grand nombre d'exploitants de systèmes, la plupart d'entre eux sont affiliés à l'un des huit exploitants de systèmes multiples. Par conséquent, les exploitants de systèmes multiples sont libres de décider quel canal sera octroyé à chaque fournisseur de programmes. En particulier, les trois plus grands exploitants de systèmes multiples, qui détiennent 63,4 % du marché, ont renforcé leur position sur le marché des exploitants de systèmes. En revanche, le marché compte également de nombreux fournisseurs de programmes (environ 184), et chacun d'eux souhaite réellement s'entendre avec les exploitants de systèmes multiples pour obtenir un des numéros de chaîne les plus bas et les plus prisés<sup>66</sup>, ces chaînes pouvant attirer un plus grand nombre de téléspectateurs, ce qui à son tour génère davantage de recettes publicitaires.

Au vu des caractéristiques du marché de la télévision payante présentées ci-dessus, on constate un déséquilibre entre le nombre important de fournisseurs de programmes et le nombre limité d'exploitants de systèmes multiples eu égard à l'offre et à la demande de canaux de radiodiffusion. C'est pourquoi les fournisseurs de programmes dépendent structurellement plus qu'avant des exploitants de systèmes multiples s'agissant des contrats d'attribution des canaux. Dans le même temps, les exploitants de systèmes multiples sont en mesure d'adopter plusieurs pratiques de concurrence déloyale susceptibles de retentir sur les fournisseurs de programmes, comme i) la modification unilatérale du numéro de la chaîne, ii) la décision unilatérale de reconduire les contrats, iii) exiger des fournisseurs de programmes qu'ils ne transmettent pas leur contenu populaire (films, sports) à leur concurrent (radiodiffuseurs satellitaires ou diffuseurs de télévision sur Internet) en les menaçant de ne plus reconduire les contrats ou de leur attribuer des numéros de chaînes moins intéressants.

*L'accord collusoire « câble exclusivement »*

Depuis l'adoption en janvier 2008 de la loi sur les activités de diffusion multimédia, de nouveaux opérateurs de télévision sur Internet étaient censés faire leur entrée comme concurrents sur le marché de la télévision payante. Cependant, cinq exploitants de systèmes multiples<sup>67</sup> ont passé un accord pour s'assurer que les fournisseurs de

<sup>66</sup> La plupart des chaînes favorites sont habituellement à proximité des chaînes des radiodiffuseurs publics (MBC - 11, KBS - 9, SBS - 6) ou la chaîne populaire de téléachat.

<sup>67</sup> Chacun des exploitants de systèmes multiples compte de nombreux affiliés qui occupent une position de monopole ou d'oligopole dans leur zone régionale. Les cinq exploitants de systèmes multiples sont : Tbroad (le plus grand de Corée avec 29 % de part de marché en 2009), CJ Hellovision (19,3 % de part de marché en 2009), C&M (le troisième, avec une part de marché de 18 % en 2009), Hyundai HCN (le quatrième, avec une part de marché de 8,5 % en 2009) et Curix (qui a fusionné avec Tbroad en 2009).

programmes ne fournissent qu'à eux seuls leur contenu. Cette stratégie avait pour but d'empêcher les opérateurs de télévision sur Internet de réussir leur entrée sur le marché. Or, l'un des fournisseurs de programmes, One Media<sup>68</sup>, a décidé de fournir son contenu à un diffuseur de la télévision sur Internet en octobre 2008. Les cinq exploitants de systèmes multiples ont alors craint que de nombreux autres fournisseurs de programmes emboîtent le pas à One Media. C'est ainsi, qu'avec leurs affiliés, ils<sup>69</sup> ont passé un accord le 14 octobre 2008 baptisé « câble exclusivement ». Premièrement, en application de cet accord, les exploitants de systèmes multiples ont décidé de sanctionner One Media en réduisant le nombre de chaînes qu'elle pouvait transmettre via leurs installations de radiodiffusion. Deuxièmement, ils ont réuni des fonds et offert un soutien financier (d'environ 25 millions de dollars) à un autre fournisseur de programmes, CJ Media<sup>70</sup>, qui envisageait de signer un contrat avec un diffuseur de télévision sur Internet, à condition qu'il ne fournisse pas son contenu aux diffuseurs de télévision sur Internet.

*Les retombées de l'accord collusoire : une diminution de la concurrence substantielle*

Au lendemain de l'accord, les cinq exploitants de systèmes multiples, avec leurs 19 affiliés, ont réduit de 19 % à 28 % le nombre de chaînes de ONE Media lors de la reconduction des contrats en 2009, afin que One Media ne soit plus en mesure de fournir son contenu via un nombre réduit de chaînes. CJ Media, motivée par le soutien financier qu'elle avait reçu des participants à l'entente, a décidé de ne pas fournir son contenu aux diffuseurs de télévision sur Internet. Les mesures prises à l'encontre de One Media ont constitué une menace pour les autres fournisseurs de programmes, qui ont compris qu'il valait mieux ne pas fournir leur contenu aux diffuseurs de télévision sur Internet. C'est ainsi que de nombreux fournisseurs de programmes ont préféré ne pas fournir leurs programmes aux diffuseurs de télévision sur Internet. Dès lors que les diffuseurs de télévision sur Internet n'ont pas été en mesure d'obtenir un contenu populaire de bonne qualité des nombreux autres fournisseurs de programmes ainsi que des deux plus grands fournisseurs de programmes, à savoir CJ Media et One Media, ils ne sont pas parvenus à trouver des consommateurs et à renforcer leur présence sur le marché de la télévision payante. En d'autres termes, les diffuseurs de télévision sur Internet n'ont pas pu faire concurrence aux câblodiffuseurs télévisuels établis de longue date. Globalement, l'entente entre les cinq exploitants de systèmes multiples i) a entravé la liberté commerciale des fournisseurs de programmes, ii) a permis aux exploitants de systèmes multiples concernés de renforcer leur position monopolistique ou oligopolistique dans leur zone régionale, iii) a limité la concurrence substantielle sur le marché de la télévision payante et iv) a porté atteinte au droit des consommateurs de choisir librement entre différentes chaînes.

### 3.4 *Intégration verticale et verrouillage du marché en aval*

Au fil des ans, on a constaté que de nombreuses entreprises avaient eu tendance à chercher à accroître le plus possible de degré de leur intégration verticale<sup>71</sup>. En réalité, une tendance croissante en faveur d'une intégration verticale dans le secteur de la radiodiffusion a suscité des préoccupations chez les autorités chargées de la réglementation et de la concurrence, dont certaines ont décidé de consulter le public afin de répondre à ces préoccupations<sup>72</sup>.

<sup>68</sup> La société One Media est un fournisseur de programmes qui, en 2008, était le n° 2 du marché avec une part de 17,9 %. Elle réalise des films et des animations, etc., et c'est le fournisseur de programmes cinématographiques le plus populaire d'entre tous les autres fournisseurs de programmes cinématographiques.

<sup>69</sup> Il y a eu au total 24 entreprises puisque 7 affiliés de Tbroad, 6 affiliés de Hyundai HCN, 6 affiliés de Curix ont participé à l'entente dans chacune de leur région.

<sup>70</sup> La société CJ Media est également un fournisseur de programmes avec une part de 19,6 % du marché des fournisseurs de programmes (en 2008).

<sup>71</sup> Voir par exemple Groupe d'analyse, Ltée (2012), « *Vertical Integration in TV Broadcasting and Distribution in G8 Countries and Certain Other Countries* ».

<sup>72</sup> « L'industrie de la radiodiffusion change très rapidement avec les fusions de propriété et l'adoption de nouvelles plates-formes médiatiques. Des transactions majeures entraînent une intégration verticale : une seule entité détenant soit les propriétés de programmation et de distribution, soit les propriétés de

Bien que l'intégration verticale présente certains avantages, puisqu'elle peut par exemple permettre de réduire les coûts, elle peut aussi accroître la capacité d'une société, qui renforce sa présence sur de plus en plus de marchés pour l'ensemble de la chaîne de valeur, à empêcher l'entrée sur un ou plusieurs marchés connexes là où cette société a déjà une position dominante. Si tel est le cas, l'intégration verticale peut en soi constituer une barrière à l'entrée. Le document OCDE 1998 faisait la distinction entre cinq structures de secteur représentatives différentes. En règle générale, on a considéré que la convergence avait pour effet de désintégrer encore davantage la structure du marché réelle du secteur de la radiodiffusion.

- *La structure « totalement intégrée »* : dans cette structure, les rôles de fournisseur de contenu, de fournisseur d'infrastructure, d'« assembleur » et de fournisseur d'équipements terminaux sont intégrés. C'est un système fermé au sein duquel différents fournisseurs intégrés verticalement ne sont pas compatibles. Elle correspond à la situation de la télévision payante et satellitaire où les équipements terminaux sont dédiés au fournisseur de services et où les consommateurs assument les coûts pour avoir plusieurs fournisseurs de services. Dans cette structure, les coûts d'entrée sont élevés et doivent couvrir tous les niveaux. Lorsque les radiodiffuseurs sont en nombre limité, ils peuvent exploiter leur position de force sur le marché pour exercer une influence tant sur les annonceurs que sur les consommateurs.
- *La structure du « marché des terminaux libéralisé »* : dans cette structure, les équipements terminaux des clients peuvent capter les signaux de différents diffuseurs, et les clients peuvent passer de l'un à l'autre sans devoir acheter un nouveau terminal. Elle correspond à la situation de la télévision hertzienne et de la télévision sur Internet qui peuvent être visionnées sur plusieurs terminaux.
- *Structure partiellement dissociée I* : c'est le cas d'une structure où les fournisseurs de contenu sont séparés des fournisseurs d'infrastructure/assembleurs, qui peuvent acheter les contenus qu'ils offrent. Cette structure réduit les barrières à l'entrée pour le contenu, à moins qu'il existe des accords exclusifs verticaux entre les fournisseurs de contenu et les fournisseurs d'infrastructures.
- *Structure partiellement dissociée II* : lorsqu'aucun fournisseur de contenu ou d'infrastructures/assembleurs n'est en position de force sur le marché, il peut apparaître une structure de marché où les consommateurs peuvent accéder à tout le contenu en passant par un fournisseur d'infrastructure quelconque. Dans cette structure, les fournisseurs de contenu peuvent commercialiser leur contenu directement aux consommateurs.
- *Structure complètement désintégrée* : dans cette structure, le consommateur peut acheter séparément chacun des composants du marché de la radiodiffusion. Il dispose d'un vaste choix dans les équipements terminaux et les moyens lui permettant d'accéder à plusieurs assembleurs. C'est le cas de la structure facilitée par la fourniture de services audiovisuels sur Internet. Dès lors que les différents segments du secteur sont complètement distincts les uns des autres, l'entrée est ouverte, et il ne sera pas facile d'étendre un goulot d'étranglement à un segment tel que l'infrastructure pour contrôler le contenu, ou vice versa.

#### **4. Préoccupations dans le cadre de l'action menée en faveur de la concurrence relatives aux décisions habituellement prises par les autorités nationales de la concurrence et les tribunaux**

Ces dernières années, bon nombre de juridictions à travers le monde ont été témoin d'importantes interventions dans le cadre de l'action menée en faveur de la concurrence dans le secteur de la diffusion

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production et de programmation, ou les trois — production, programmation et distribution », Président de l'autorité canadienne chargée de la réglementation, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC), Konrad von Fickenstein, novembre 2010.



télévisuelle. Les enquêtes effectuées par les autorités de la concurrence ont porté sur de possibles entraves à la concurrence sous la forme d'abus de position dominante ou de monopolisation, de fusions ainsi que des accords anticoncurrentiels horizontaux et verticaux. Les autorités de la concurrence se sont le plus souvent intéressées au verrouillage du marché découlant d'un manque d'accès au contenu de premier ordre ou aux installations de transmission. En Europe, l'accès au contenu de premier ordre a déjà fait l'objet d'examen tant par les autorités chargées de la concurrence que celles chargées de la réglementation compétentes pour le secteur de la radiodiffusion en Autriche, en Espagne, en France, en Italie, aux Pays-Bas et au Royaume-Uni en application des dispositions relatives à l'abus de position et/ou aux fusions. Des enquêtes portant sur des abus de position dominante concernant la transmission par radiodiffusion ont été menées en Espagne, en France et en Hongrie.

#### **4.1 Accès au contenu de premier ordre et exclusivité de ces contenus : risque de comportements anticoncurrentiels**

Comme cela avait déjà été relevé en 1998 dans la note de référence de l'OCDE sur la réglementation et la concurrence dans la diffusion audiovisuelle : « En général, les barrières à l'entrée sur le marché de la production de contenu sont faibles [...] il existe une multitude de petits ou grands producteurs de contenu audiovisuel dans tous les pays de l'OCDE »<sup>73</sup>. Elles ne sont cependant pas faibles pour tous les types de contenu. Comme le fait apparaître la théorie économique, tant les détenteurs de droits que les diffuseurs sont incités à passer entre eux des contrats d'exclusivité concernant le contenu de premier ordre. Dès lors que le contenu est un produit à forte différenciation, les opérateurs de télévision cherchent à acquérir du contenu de premier ordre dans le but de différencier leur offre de celle de leurs rivaux et de se disputer efficacement un public plus large. Ils souhaitent en particulier l'acquérir à titre exclusif dans la mesure où ils entendent renforcer leur position sur le marché et freiner la concurrence d'autres acteurs sur ce marché<sup>74</sup>. S'agissant des détenteurs de droits pour le contenu de premier ordre, c'est-à-dire les grands studios de Hollywood et les grands organismes sportifs, il n'est pas surprenant qu'ils aient tendance à vendre leurs droits à titre exclusif sur un territoire donné dans la mesure où ils cherchent à obtenir le loyer maximal pour leur contenu.

L'exclusivité, sous l'effet conjugué de la rareté du contenu de premier ordre<sup>75</sup> et de la concurrence acharnée que se livrent les opérateurs de la télévision payante, a entraîné une flambée des prix des droits de diffusion<sup>76</sup>, tandis que le contenu de premier ordre, qui est considéré comme l'un des principaux éléments dynamisant la demande pour les services de télévision payante, a dans une large mesure migré vers la télévision payante<sup>77</sup>. Même si les superproductions hollywoodiennes et les manifestations sportives à

<sup>73</sup> OCDE (1998), Réglementation et concurrence dans la diffusion audiovisuelle, DAF/CLP(99)1, <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/1920359.pdf>

<sup>74</sup> Bien que la portée de l'exclusivité puisse varier d'un secteur à l'autre, elle a, dans le secteur de la diffusion audiovisuelle, été habituellement jugée vitale pour une entrée réussie sur le marché de la télévision payante. En revanche, sur le marché des jeux vidéo, les jeux des plus grands éditeurs existent pour chaque console, c'est-à-dire Microsoft Xbox, Nintendo Wii et Sony PlayStation.

<sup>75</sup> Comme nous l'avons vu précédemment, le contenu de premier ordre est considéré aujourd'hui comme le nouveau goulot d'étranglement du secteur de la diffusion audiovisuelle. Voir, par exemple, Geradin, D. (2005), « Access to Content by New Media Platforms: A Review of the Competition Law Problems », *European Law Review*, vol. 30, n° 1, pp. 68 à 94.

<sup>76</sup> Wachtmeister a affirmé que les prix d'acquisition pour les diffuseurs sont supérieurs aux bénéfices pour les détenteurs de droits lorsque la concurrence est plus intense du côté de la demande. Voir Wachtmeister, A-M. (1998), « Broadcasting of sports events and competition law », *Competition Policy Newsletter*, n° 2, pp. 18 à 28.

<sup>77</sup> Par exemple, l'enquête menée par Ofcom sur le marché de la télévision payante a fait apparaître que, pour les 57 % des adultes abonnés aux services de télévision payante, le contenu guide les décisions d'achat.

grands succès sont tous deux considérés comme du contenu de premier ordre, la situation concurrentielle dans la fourniture de ce contenu peut varier, comme le montrent les conclusions du Tribunal de recours pour les questions de concurrence et de la Commission de la concurrence au Royaume-Uni.

**Encadré 3 : Accès aux marchés du contenu et de la télévision payante  
(Royaume-Uni, Commission de la concurrence)**

En mars 2007, en réponse aux moyens invoqués par BT, Setanta, Top Up TV et Virgin Media, Ofcom a ouvert une enquête concernant le marché de la télévision payante. Au terme d'une analyse complète et de trois consultations du public, elle a :

- communiqué ses conclusions relatives au marché de la télévision payante, lesquelles ont donné lieu à une obligation d'offre de gros pour Sky Sports 1 et 2,
- soumis deux marchés apparentés à l'examen de la Commission de la concurrence (CC) : i) le marché des droits de diffusion de films issus des grands studios de Hollywood dans la première fenêtre de télévision payante par abonnement (FSPTW) et ii) le marché de la fourniture en gros de bouquets de télévision payante, y compris les principales chaînes cinématographiques de premier ordre.

Au terme de son examen du marché de la télévision payante, Ofcom a conclu qu'au Royaume-Uni, le jeu de la concurrence était faussé sur ce marché en raison des restrictions imposées par Sky pour la distribution de ses chaînes sportives et cinématographiques de premier ordre<sup>78</sup>. S'agissant de la diffusion de films, Ofcom a estimé que les deux marchés présentaient des caractéristiques qui portaient atteinte à la concurrence dans la mesure où le mode de vente et de distribution de ces films créait une situation dans laquelle Sky avait une incitation et la capacité de fausser la concurrence. Une telle situation se traduisait par une réduction du choix, une perte d'innovation et une augmentation des prix, autant d'effets nuisibles pour le bien-être des consommateurs.

En août 2012, la Commission de la concurrence a rendu son rapport final, dans lequel elle était en désaccord avec certaines des hypothèses retenues par Ofcom. En particulier, elle a conclu que la position de Sky dans l'acquisition et la distribution de films dans la FSPTW n'avait pas porté atteinte à la concurrence sur le marché au détail de la télévision payante. S'appuyant sur les preuves qu'elle avait pu recueillir, la Commission de la concurrence a conclu que la disponibilité des films les plus récents n'entraînait véritablement en ligne de compte dans la décision de s'abonner que pour une toute petite minorité d'abonnés à la télévision payante, et que les consommateurs attachent une plus grande importance à d'autres attributs des services, tels que le prix ou l'existence d'une gamme étendue de contenus. Elle a également conclu que, depuis le lancement de nouveaux services OTT améliorés, tels que LoveFilm et Netflix, la concurrence et le choix des consommateurs avaient été renforcés.

À peu près au même moment où la Commission de la concurrence estimait que le marché de la télévision payante était plus concurrentiel que ne l'affirmait Ofcom, le tribunal de recours pour les questions de concurrence annulait l'obligation d'offre de gros qu'avait imposée Ofcom à Sky. En application de cette décision, qui avait été imposée en mars 2010, Sky était tenue d'offrir Sky Sports 1 et 2 aux tarifs de gros réglementés, et considérablement réduits, aux détaillants utilisant d'autres plates-formes.

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Pour 87 % des consommateurs interrogés, le contenu était un élément "déterminant" de leurs choix télévisuels, en particulier pour les manifestations sportives et les films de premier ordre qui ne sont pas offerts en cas de diffusion hertzienne.

<sup>78</sup>

Quelque 59 % des consommateurs qui regardent régulièrement du sport à la télévision considéraient que le football était un contenu « obligatoire », en particulier les matches de la FA Premier League.

Pour garantir l'accès au contenu de premier ordre, les autorités de la concurrence peuvent intervenir à différents niveaux de la chaîne de valeur, et en particulier sur les marchés des acquisitions et des exploitations.

- Les *marchés des acquisitions* font intervenir un contrat entre des détenteurs de droits et des opérateurs de chaînes.
- Les *marchés des exploitations* supposent en revanche des transactions entre des opérateurs de télévision et des distributeurs multi-chaînes.

Sur les marchés des acquisitions, les détenteurs de droits préfèrent traiter à titre exclusif, ce qui rend les marchés des acquisitions comparables aux marchés d'adjudication « purs » où les opérateurs de télévision se disputent le marché au lieu de se faire concurrence « sur » le marché.

L'intervention des autorités de la concurrence en cas d'accords d'octroi de licences exclusives est habituellement guidée par trois préoccupations différentes : i) la restriction horizontale de la concurrence, ii) la restriction verticale de la concurrence et iii) d'autres craintes, comme le groupement des droits télévisuels entre plusieurs plates-formes<sup>79</sup>.

S'agissant de la restriction horizontale de la concurrence, l'un des principaux problèmes dans la diffusion audiovisuelle est la vente collective des droits médiatiques au nom de clubs sportifs affiliés<sup>80</sup>. La vente combinée aurait pour avantage de promouvoir une ligue sportive dans son ensemble, au lieu de rencontres distinctes, et de permettre des revenus plus élevés qui peuvent être redistribués entre des clubs moins compétitifs et réinvestis dans le sport (joueurs et installations), ce qui au final profite au public amateur de ce sport. D'aucuns font également valoir que, dans la mesure où des droits exclusifs rendent plus attirant un programme global, les diffuseurs sont incités à se faire concurrence en élaborant leur propre infrastructure afin de remporter toute adjudication. Dans ce contexte, la vente combinée peut également limiter l'offre moyennant des accords restrictifs empêchant la diffusion de tous les matches d'une manifestation sportive ou la concentration de pouvoir sur le marché entre quelques diffuseurs qui chercheraient à verrouiller le marché de la diffusion.

En Europe, plusieurs tribunaux nationaux ont rendu des décisions divergentes sur la vente combinée<sup>81</sup>. Les affaires en Europe ont principalement porté sur la nécessité d'une vente collective pour la promotion de la ligue ainsi que l'impact de la vente combinée sur le marché de la diffusion en aval. L'Italie et les Pays-Bas ont interdit les ventes combinées au motif qu'il était possible de réaliser les objectifs de redistribution par des accords de partage moins restrictifs, tandis qu'en France, la fédération nationale est légalement autorisée à exploiter tous les droits de diffusion<sup>82</sup>. On a également observé qu'en Europe, les droits de diffusion avaient tendance à être vendus à titre exclusif. La Commission a reconnu que l'exclusivité pouvait profiter au public car elle incitait les diffuseurs à proposer un produit de haute qualité mais que des accords portant sur des périodes supérieures à un an seraient passés au crible pour s'assurer qu'ils ne risquent pas de limiter la concurrence sur les marchés de la diffusion.

<sup>79</sup> Ibañez Colomo (2012).

<sup>80</sup> Des pratiques susceptibles d'entraver la concurrence en cas de vente combinée peuvent en particulier découler d'accords de fixation des prix ou de restriction à la production.

<sup>81</sup> Pour un survol des problèmes que posent pour la concurrence la vente combinée et la diffusion de programmes sportifs, voir OCDE (2010), La concurrence et le sport, DAF/COMP(2010)23.

<sup>82</sup> Articles 17 et 18 de la loi n° 84-610 du 16 juillet 1984 (Loi du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives).

Dans l'ensemble, l'attitude des autorités de la concurrence à l'égard de l'examen des contrats exclusifs concernant l'accès au contenu de premier ordre a évolué au fil du temps. Dans les années 1990, les autorités de la concurrence des États membres de l'Union européenne se ralliaient à l'avis du diffuseur dominant selon lequel un accès exclusif au contenu était nécessaire pour le bon fonctionnement du marché de la télévision payante. En outre, la Cour de justice de l'Union européenne (CEJ) a estimé, dans l'affaire *Coditel II*, laquelle a marqué un tournant, que l'octroi de licences de diffusion exclusives par les producteurs de films constituait une application légale des dispositions contenues à l'article 101-1 du Traité sur le fonctionnement de l'Union européenne eu égard aux droits d'auteur<sup>83</sup>.

Cependant, les mesures imposées dans les affaires plus récentes montrent clairement que les autorités de la concurrence ont modifié leur méthode d'action, qui vise aujourd'hui à s'assurer que les diffuseurs concurrents puissent accéder au contenu de premier ordre de manière non discriminatoire.

Les accords octroyant un accès exclusif au contenu de premier ordre sont relativement monnaie courante dans le secteur de la diffusion audiovisuelle. Cependant, dans la mesure où ces accords ont transformé le secteur de la télévision payante en modèle de concurrence tendant à s'accaparer le marché, sur lequel, à l'instar d'un marché d'adjudication absolu, le vainqueur rafle la mise, les autorités de la concurrence commencent à se soucier des possibles effets nuisibles qu'auraient de tels contrats exclusifs sur la concurrence. La mesure dans laquelle ils sont susceptibles d'exclure du marché les sociétés rivales dépend largement des investissements réalisés ainsi que de la durée de la période d'exclusivité. Posner, par exemple, a reconnu qu'il était peu probable que l'exclusivité pose des problèmes en termes de concurrence si elle était consentie pour une courte période et qu'elle présentait en fait certains avantages. Cependant, des effets nuisibles sont possibles lorsque l'exclusivité est consentie pour des périodes plus longues<sup>84</sup>.

Si elles craignent que des contrats exclusifs relatifs au contenu de premier ordre portent atteinte à la concurrence, les autorités de la concurrence ont tendance à imposer des mesures comportementales concernant l'accès au contenu, par exemple comme condition à une autorisation de fusion<sup>85</sup>. Par exemple, dans la décision *News Corp/Telepiù*, la Commission européenne, après avoir reconnu que la durée du contrat exclusif aurait empêché les nouvelles entrées sur le marché, a donné son aval à la fusion sous réserve de conditions. Ces dernières visaient dans la pratique à limiter la durée de l'exclusivité des droits à une période maximale de trois ans pour les films et de deux ans pour le football. Le Conseil des ministres espagnol a adopté une attitude semblable lors de la fusion *Sogecable/Canal Satellite Digital/Via Digital*<sup>86</sup>, et

<sup>83</sup> Affaire 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, e.a. v. Ciné-Vog Films SA e.a.* [1982], ECR I-3381.

<sup>84</sup> Posner, R. A. (1974), « Exclusionary Practices and Antitrust Laws », *The University of Chicago Law Review*, vol. 41, n° 3, p. 506 à 535. Un examen rapide d'une partie de la littérature de la lutte antitrust consacrée aux accords exclusifs révèle que l'avis des experts de la concurrence diverge s'agissant de l'impact que peuvent avoir de tels accords sur la concurrence. Par exemple, selon Weeds, une distribution exclusive profite aux consommateurs car elle intensifie la concurrence par les prix. En revanche, pour Armstrong ou Harbord et Ottaviani, une interdiction des accords exclusifs profiterait à la concurrence en aval. Weeds, H. (2007), « *TV Wars: Exclusive Content and Platform Competition in Pay TV* », 5th International Workshop on Media Economics, Bologne, Italie ; Armstrong, M. (1999), « Competition in the Pay-TV Market », *Journal of the Japanese and International Economies*, vol. 13, n° 4, p. 257 à 280 ; Harbord, D. et M. Ottaviani (2001), « Contracts and competition in the pay-TV market », *London Business School Working Paper*.

<sup>85</sup> Par exemple, dans l'affaire *Vivendi/Canal+/ Seagram*, la Commission européenne, qui avait des craintes quant au renforcement de la position dominante de Canal+, a exigé de l'entité fusionnée qu'elle cède au moins 50 % de ses droits à un opérateur multi-chaînes concurrent en France. Décision de la Commission [2000], affaire n° COMP/M.2050, *Vivendi/Canal+/Seagram*.

<sup>86</sup> Décision du Conseil des ministres du 29 novembre 2002, *Sogecable/Canal Satellite Digital/Via Digital*, BOE (2003), 12/1707.

la France dans la fusion *Canal Plus/TPS*<sup>87</sup>. Il est certain que les mesures relatives au contenu imposées par les autorités de la concurrence peuvent aider les nouvelles plates-formes médiatiques à accéder au contenu de premier ordre. Néanmoins, certains commentateurs estiment que de telles mesures ne suffisent pas à elles seules à créer des conditions de concurrence équitables sur le marché pour l'acquisition d'un tel contenu<sup>88</sup>.

En outre, il se peut que la stratégie d'octroi de licences exclusives, qui donne lieu à l'octroi de droits de diffusion au plus offrant, ne soit pas nécessairement la plus optimale pour les détenteurs de droits ou les diffuseurs. En réalité, certains détenteurs de droits, en particulier dans le secteur sportif, examinent actuellement les avantages potentiels liés à un partage de l'accès et à des contrats non exclusifs avec différentes plates-formes multimédias. Evens (2010) cite l'exemple d'Eredivisie Live, qui est la chaîne numérique qui diffuse les matches de la première division de football néerlandaise. Il explique qu'au lieu de vendre des droits de diffusion exclusifs à la plate-forme la plus offrante, le championnat de football néerlandais a signé des contrats de distribution avec tous les opérateurs de plates-formes (à savoir câble, satellite, terrestre, xDSL), mais également cédé le contrôle des tarifs à ces plates-formes<sup>89</sup>.

Enfin, puisqu'il est possible que les autorités de la concurrence ne parviennent pas à imposer le partage du contenu de premier ordre, les pays pourront opter en faveur des principes fixés par les agences ou les tribunaux dans la législation nationale concernée. C'est ce qui, par exemple, été le cas en France. Lorsque l'initiative de l'autorité française de la concurrence n'a pas donné les résultats escomptés s'agissant du partage du contenu de premier ordre dans le cas de TPS<sup>90</sup>, le législateur français a décidé de rendre un décret<sup>91</sup> limitant à trois ans la période d'exclusivité en application des principes énoncés dans l'affaire *UEFA Champions League*. Pour résoudre le problème de l'accès à des événements sportifs majeurs, plusieurs autres pays, parmi lesquels l'Australie, les États-Unis, le Royaume-Uni ou l'Irlande, ont adopté des législations anti-siphonage fondées sur les considérations sociales et culturelles.

#### **4.2 Comportement unilatéral d'exclusion : verrouillage en aval et exploitation de la position dominante**

Des comportements unilatéraux d'exclusion peuvent encore largement se manifester dans le secteur de la diffusion audiovisuelle. Malgré l'augmentation importante des capacités de transmission grâce à la numérisation, le manque d'accès à l'infrastructure de transmission peut toujours susciter des préoccupations en matière de concurrence.

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<sup>87</sup> Autorité de la concurrence (2006), Décision du 30 août 2006 autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Canal Plus.

<sup>88</sup> Voir en particulier Geradin, D. (2005).

<sup>89</sup> Evens, T. (2010), « *Challenging content exclusivity in network industries: the case of digital broadcasting* », article présenté au 21st European Regional ITS Conference, Copenhague.

<sup>90</sup> Voir Décis. du Conseil de la Concurrence (2003) n° 03-MC-01, demandes de mesures conservatoires par TPS.

<sup>91</sup> Décret n° 2004-699 du 15 juillet 2004 pris pour l'application de l'article 18-1 de la loi n° 84-610 du 16 juillet 1984 et relatif à la commercialisation par les ligues professionnelles des droits d'exploitation audiovisuelle des compétitions ou manifestations sportives, Journal Officiel n° 163 du 16 juillet 2004.

**Encadré 4 : Abus de position dominante sur les marchés des services de gros d'accès aux centres de diffusion pour la transmission de signaux DTT et sur les marchés de détail du transport de signaux DTT (Espagne, CNC, 2012)<sup>92</sup>**

En avril 2010, en réponse à une plainte déposée par SES Astra Ibérica S.A. (Astra), l'autorité espagnole de la concurrence (CNC) a entamé une procédure d'infraction à l'encontre d'Abertis Telecom S.A.U. (Abertis). Astra est le principal fournisseur de services de diffusion par satellite pour la plate-forme de télévision payante Digital+ en Espagne, tandis qu'Abertis détient un réseau national de transport et de diffusion audiovisuelle. Les centres de transmission à la base du réseau national d'Abertis ne peuvent pas être répliqués : il est donc impératif d'y accéder pour fournir les services de transport des signaux DTT destinés aux opérateurs nationaux et régionaux.

La CNC a cherché à savoir si les prix de gros pratiqués par Abertis pour la colocalisation des équipements dans ses centres de transmission des signaux DTT ainsi que les prix de détail fixés dans les contrats avec des opérateurs nationaux et certains opérateurs régionaux de télévision équivalaient à un abus de position dominante. Sur la base des résultats de son enquête, la CNC a conclu qu'il y avait bel et bien eu abus de position dominante sur le marché des services de gros d'accès aux centres de diffusion pour la transmission des signaux DTT et sur le marché des services de détail pour le transport des signaux DTT en Espagne. Cet abus a revêtu la forme d'une compression des marges entre les prix de gros et le prix de détail, et la société a par conséquent été condamnée à payer une amende de près de 14 millions d'euros. Selon la CNC, dans la mesure où l'entrée sur le marché était techniquement viable et économiquement possible, l'absence de concurrents réels ne pouvait s'expliquer que par le comportement anticoncurrentiel d'Abertis, qui avait, dans les faits, bloqué l'entrée d'autres opérateurs.

En outre, compte tenu de la tendance croissance vers une intégration verticale dans le secteur de la diffusion audiovisuelle, on peut également considérer que les conditions dans lesquelles une société verticalement intégrée offre ses chaînes en aval ou au détail enfreignent les règles nationales en matière de monopolisation ou d'abus de position dominante. En particulier, des comportements anticoncurrentiels peuvent émaner d'un refus de conclure des contrats, d'une compression des marges, d'une discrimination, d'accords de ventes liées et du groupement d'offres. Les deux derniers pourront être plus intéressants à étudier avec l'émergence des triple-services et quadruple-services.

#### **4.3 Mesures imposées dans quelques affaires**

Les décisions rendues par les autorités de la concurrence en matière de diffusion audiovisuelle concernent de plus en plus souvent l'accès au contenu de premier ordre. Pour instaurer un cadre de concurrence équitable pour la diffusion télévisuelle, les autorités de la réglementation et de la concurrence disposent de plusieurs mécanismes permettant d'éliminer le problème de l'exclusivité en imposant des mesures *ex ante* ou *ex post*. Par exemple, les autorités de la réglementation peuvent imposer des obligations d'accès de gros comme ce fut le cas pour Sky au Royaume-Uni, tandis que les autorités de la concurrence peuvent autoriser des fusions en imposant des mesures liées à l'accès.

Aujourd'hui, les fusions sur le marché de la diffusion télévisuelle semblent être rarement interdites. De plus en plus souvent, les autorités de la concurrence autorisent les fusions, même si elles engendrent une position de « quasi-monopole », préférant consacrer leurs efforts à l'imposition d'obligations adéquates et au contrôle *ex post* du marché. Par exemple, en 2006, l'autorité espagnole de la concurrence a autorisé une fusion entre Audiovisual Sport (AVS) et le chef de file du marché de la télévision payante en Espagne, Sogecable SA, à la seule condition qu'AVS garantisse l'accès de tiers au contenu footballistique de façon équitable, en toute transparence et de manière non discriminatoire.

<sup>92</sup> CNC (Espagne), *Resolución, Expte. S/0207/09 Transporte Televisión.*

Lors de la fusion en 2011 de Comcast, le plus grand câblo-opérateur aux États-Unis, et l'entreprise de diffusion audiovisuelle NBC Universal, le Département américain de la Justice a exigé que Comcast rende accessible aux distributeurs de contenu vidéo en ligne (OVD) le même bouquet de chaînes radiodiffusées et câblées qu'elle vend aux distributeurs de programmes vidéo traditionnels et qu'elle offre un contenu OVD radiodiffusé, câblé et cinématographique semblable, voire supérieur, au contenu que le distributeur reçoit de toute autre société de programmation de la coentreprise. Le règlement interdisait également à Comcast d'user de représailles à l'encontre de tout réseau de diffusion (ou affilié), câblo-programmeur, studio de production ou titulaire d'une licence de contenu pour avoir autorisé à un concurrent de Comcast/NBC d'utiliser leur contenu ou pour avoir suscité les craintes de la FCC ou du Département de la Justice. En outre, Comcast était tenue de réserver le même traitement au contenu des autres sociétés dans le cadre de chacune de ses offres de diffusion dont la tarification dépend de l'utilisation. Comcast n'a pas été autorisée à imposer des conditions d'octroi de licence aux programmeurs ou aux distributeurs de contenu vidéo visant à limiter l'accès des distributeurs en ligne au contenu.

Cependant, comme il est possible que les entreprises visées par la fusion ne respectent pas les obligations qui leur sont imposées, les autorités de la concurrence souhaitent peut-être examiner *ex post* si la concurrence sur le marché concerné fonctionne efficacement. À cet égard, l'Autorité de la concurrence en France constitue un exemple intéressant d'examen *ex post*.

**Encadré 5 : Annulation de la décision autorisant l'acquisition de TPS et de CanalSatellite par Vivendi Universal et Canal Plus Groupe (France, 2011)<sup>93</sup>**

En 2006, l'Autorité de la concurrence a autorisé l'acquisition de TPS et de CanalSatellite par Vivendi Universal et Canal Plus Group. Dès lors qu'une fusion entre les deux principaux opérateurs sur le marché français de la télévision payante entraînait l'apparition d'un monopole pour l'édition de chaînes et la distribution d'émissions de télévision payante de premier ordre (puisque la nouvelle entité détiendrait alors 75 % du marché en aval) et donc que la transaction comportait d'importants risques eu égard à la concurrence, l'Autorité a subordonné son autorisation de fusion à un ensemble de 59 engagements. En particulier, en application de la décision finale du ministre compétent, la nouvelle entité était tenue i) de fournir, en gros et de façon non groupée, une chaîne cinématographique de premier ordre et quelques autres chaînes et ii) d'offrir le principal bouquet télévisuel de premier ordre parmi les bouquets multi-chaînes concurrents.

En septembre 2011, l'Autorité de la concurrence a rendu une décision qui i) annulait la décision de 2006 autorisant la fusion et ii) imposait une amende de 30 millions d'euros, après avoir conclu que 10 des 59 engagements n'avaient pas été respectés. Bien que Canal Plus Group ait fait valoir, comme circonstance atténuante, que la société avait tout de même respecté plus de 80 % des engagements qui lui avaient été imposés, l'Autorité de la concurrence a souligné que la nature et la portée de ces engagements variaient considérablement et que, par conséquent, il n'était pas possible de se contenter de tenir compte des engagements que la nouvelle entité avait respectés.

Il s'agit de la première décision par laquelle l'Autorité de la concurrence a annulé une fusion préalablement autorisée au motif que la nouvelle entité n'avait pas respecté ses engagements.

Canal Plus a fait appel de cette décision devant la Cour constitutionnelle française en faisant valoir que l'Autorité de la concurrence avait outrepassé la compétence que la Constitution lui confère.

<sup>93</sup> Autorité de la concurrence (2011), Décision n° 11-D-12 du 20 septembre 2011 relative au respect des engagements figurant dans la décision autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus. <http://www.autoritedelaconcurrence.fr/pdf/avis/11d12.pdf>. Voir le communiqué de presse : [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=388&id\\_article=1696](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1696)

## 5. Conclusions

Pour la transmission de contenu audiovisuel interactif dans des délais précis, la diffusion audiovisuelle n'a que quelques substituts. Une concurrence effective dans la diffusion audiovisuelle est nécessaire pour garantir la diversité des produits et des services, qui doivent offrir des moyens variés d'expression politique et sociale, réduire les prix et promouvoir et partager les atouts de l'économie de l'information.

Cependant, il n'est plus aussi facile qu'avant de définir la diffusion audiovisuelle. La convergence technologique brouille les modes de transmission et l'élargissement de la gamme des dispositifs permettant de visualiser le contenu audiovisuel. Le contenu audiovisuel est de plus en plus diversifié, et il peut être visionné sur plusieurs dispositifs et fourni via diverses plates-formes de diffusion, ce qui modifie fondamentalement la nature des marchés de la diffusion télévisuelle et rend beaucoup plus complexe la définition des marchés concernés.

Même à l'heure où la diffusion télévisuelle est devenue plus concurrentielle, il restera possible d'acquérir une puissance de marché où il existe des barrières à l'entrée pour la distribution des signaux de diffusion et pour le contrôle du contenu audiovisuel. L'accès croissant aux réseaux à large bande haut débit et le passage à la transmission numérique réduit la puissance de marché de certaines plates-formes de diffusion traditionnelles. Cependant, dans un environnement où il existe plusieurs plates-formes de diffusion, il est de relativement de plus en plus rare pour les fournisseurs d'accéder au contenu à haute valeur.

À l'échelle mondiale, le marché de la télévision payante est en pleine croissance, tout comme le marché des services de diffusion OTT. Cependant, sur les marchés géographiques présentant un faible taux de pénétration d'Internet, les modes de diffusion traditionnels restent dominants. En outre, pour le contenu qui requiert une distribution dans certains délais à un public de masse, tels que les manifestations sportives et, dans une moindre mesure, les nouveautés cinématographiques, les modes de diffusion traditionnels conservent leur avantage concurrentiel sur les nouveaux modes de diffusion.

S'agissant des mesures imposées dans les différentes affaires, on constate que la pratique des autorités de la concurrence consiste de plus en plus souvent à limiter la durée des licences d'utilisation du contenu afin de régler le problème de l'exclusivité. Parmi ces mesures figure par exemple l'obligation faite aux acteurs du marché de facturer leurs services sur la base des abonnés ou de limiter la durée des contrats exclusifs. Quoi qu'il en soit, il se peut qu'une mesure soit envisageable dans un cas mais pas dans un autre.

Les stratégies économiques traditionnelles en matière de réglementation du contenu et de distribution sont fondées sur des barrières à l'entrée et dépendent du contrôle efficace de certains modèles de distribution des services audiovisuels. La convergence a eu pour effet de faire disparaître les objectifs initiaux de la réglementation dans certains domaines. Dans d'autres cas, des facteurs peuvent militer en faveur d'une modification de la réglementation pour s'assurer que les conditions d'une concurrence équitable soient réunies pour différents modes de transmission. Cette situation est susceptible de donner lieu à une convergence du rôle des différents organismes de réglementation en matière de diffusion audiovisuelle et de télécommunications, ce qui, à son tour, permettrait de réduire le risque de décisions contradictoires ou d'écarter la possibilité d'une course au tribunaux et d'arbitrage réglementaire. En outre, un recours de moins en moins fréquent à la réglementation *ex ante* entraînera un recours de plus en plus fréquent au droit de la concurrence pour garantir la diversité des produits et des services.

Il est clair que la multiplication des opportunités de concurrence sur le marché de la fourniture de services de diffusion télévisuelle est susceptible d'améliorer les services de diffusion et d'avoir des effets positifs dans bon nombre de secteurs qui dépendent de la diffusion d'informations dans certains délais. C'est le cas dans des pays de l'OCDE mais également dans des pays qui ne sont pas membres de



l'Organisation, quelles que soient les différences technologiques et les contraintes monétaires. Comme le précise l'UIT, « [i]l serait faux de croire que la fracture numérique dans la diffusion audiovisuelle est exclusivement due aux revenus. Même s'il est vrai que les revenus constituent une barrière, en particulier pour les ménages les plus pauvres (même dans les pays à revenu moyen), les données semblent montrer que l'électricité est une barrière encore plus importante et que le contenu, bien qu'il soit difficile à quantifier, joue également un rôle majeur »<sup>94</sup>. Par conséquent, même dans les pays où l'accès à l'électricité est limité, les consommateurs trouvent toujours le moyen de capter les programmes télévisés si le contenu existe. L'intervention des autorités de la concurrence qui parvient à éliminer les goulots d'étranglement au niveau de la fourniture du contenu, ou ceux qui apparaissent dans les secteurs apparentés (tel que celui de l'électricité) et qui permet l'adoption d'autres solutions techniques dans les modèles de diffusion est capable de créer d'excellentes perspectives dans le secteur de la diffusion audiovisuelle.

Des barrières à l'entrée devraient continuer à apparaître avec l'accès aux plates-formes de transmission, en raison du comportement de l'entreprise et des contraintes techniques. La nature actuellement dynamique du secteur devrait, dans de nombreux cas, encourager les organismes de la concurrence à se livrer à un examen en vue de recenser les perspectives de concurrence sur le marché de fourniture de services de diffusion télévisuelle. Cela est vrai tant pour les pays membres que les pays non membres de l'OCDE où l'évolution liée à la convergence crée une diversité sur le marché des services de diffusion télévisuelle. Un tel examen devrait porter sur l'évolution dans d'autres secteurs apparentés, tel que celui des télécommunications, ou d'autres nouvelles plates-formes de distribution, qui seraient susceptibles d'avoir un impact sur le développement du secteur de la diffusion télévisuelle. Il contribuerait à définir le marché, à préciser les risques liés à l'intégration verticale et à recenser toute restriction à l'accès au contenu de premier ordre qui devrait être éliminée. Grâce à ces informations, les autorités de la concurrence devraient être davantage en mesure d'instaurer un cadre de concurrence équitable dans le secteur.

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## COMPTE RENDU DE LA DISCUSSION

*Par le Secrétariat*

### 1. Introduction générale aux questions de concurrence dans la télévision et la radiodiffusion

Le Président, M. Ashok Chawla, *Président de la Commission indienne de la concurrence*, ouvre la discussion de la table Ronde sur les questions de concurrence dans la télévision (TV) et la radiodiffusion et remercie des délégués de leurs contributions reçues par la Secrétariat. Le Président présente les quatre experts intervenants : M. Agustín Díaz-Pinés de la Direction de la science, de la technologie et de l'industrie de l'OCDE ; le Professeur Allan Fels, Professor of Government and Director International Advanced Leadership Programs, Australia and New Zealand School of Government ; M. David Hyman, General Counsel chez Netflix ; et M. Christophe Roy, Directeur Juridique Adjoint, Distribution et Concurrence, du Groupe Canal+.

Le Président présente les trois thèmes spécifiques qui seront traités durant la table Ronde : premièrement, la convergence et son impact sur les barrières à l'entrée et la réglementation ; deuxièmement, les enjeux de la politique de la concurrence dans la télévision et la radiodiffusion ; et troisièmement les enjeux additionnels dans la télévision et la radiodiffusion et les réponses des autorités nationales de la concurrence (ANC). Le Président donne ensuite la parole à Gregory Bounds, co-auteur du document de référence du Secrétariat.

Tout d'abord, Gregory Bounds note que le fait d'assurer un large accès aux services de radiodiffusion peut non seulement réduire la fracture numérique mais aussi aider à promouvoir le développement et à faire reculer la pauvreté. Puis, M. Bounds souligne que la convergence est maintenant au centre des questions de la concurrence dans la télévision et la radiodiffusion. Celle-ci a changé la façon dont les consommateurs accèdent aux contenus radiodiffusés, qui deviennent de plus en plus disponibles sur l'Internet et sur des appareils portables sans fil. Les effets de la convergence sont ressentis sur les marchés du monde entier, mais à des degrés variables. Le document de référence suggère que l'évolution technologique et l'émergence de nouveaux produits et services ont élargi les possibilités de concurrence.

M Bounds observe que de nombreuses communications à la Table ronde démontrent que certaines contraintes à la concurrence subsistent dans la radiodiffusion télévisuelle, et qu'elles varient selon les marchés géographiques. Mais surtout, l'accès au contenu exclusif de qualité (premium) est devenu un goulet d'étranglement sur le marché de la radiodiffusion. Ce problème concerne les contenus qui s'inscrivent dans une actualité immédiate, ceux qui n'ont pas d'équivalent, et les contenus demandés par un public de masse, pour lesquels les technologies de radiodiffusion traditionnelles disposent d'un avantage concurrentiel. M. Bounds évoque ainsi des manifestations sportives comme la Coupe du monde de la FIFA ou les Jeux olympiques. On peut également penser aux diffusions en exclusivité de films hollywoodiens à grand spectacle.

Enfin, M. Bounds explique que la politique gouvernementale peut conduire à des distorsions de la concurrence sur le marché de la radiodiffusion. Des mesures réglementaires ou administratives répondant à des considérations d'intérêt national ou prenant en compte des facteurs économiques aussi bien que culturels ou sociaux pourraient affecter le niveau de la concurrence.

## 2. La convergence et son impact sur les barrières à l'entrée et la réglementation

Le Président ouvre la première section de la Table ronde et donne la parole à Agustín Díaz-Pinés qui traite de la question de la convergence sur les marchés de la télévision et de la vidéo.

M. Díaz-Pinés débute son intervention en observant que la convergence est un phénomène mondial qui progresse à des rythmes variables selon les pays. Ses principaux moteurs sont le déploiement de l'Internet rapide et la montée progressive des débits. M. Díaz-Pinés note qu'elle accentue la concurrence entre les radiodiffuseurs traditionnels – privés ou publics – et de nouveaux acteurs qui opèrent exclusivement sur l'Internet. De surcroît, la convergence a un impact sur la prolifération des équipements qui sont utilisés pour regarder des vidéos et services télévisuels, par exemple tablettes, *smartphones* ou ordinateurs.

En premier lieu, M. Díaz-Pinés évoque la question de la neutralité des réseaux. Concernant la question de l'intervention, la neutralité des réseaux peut être définie comme une situation dans laquelle l'Internet n'avantage pas une application (par exemple le world wide web) au détriment des autres (par exemple la messagerie). Il existe toutefois différentes formes de discrimination qui peuvent influencer sur la neutralité du réseau, comme l'introduction d'une "voie rapide" pour certains services, la dégradation de la qualité pour d'autres ou la méthode retenue pour comptabiliser la consommation de vidéo dans les forfaits de données. La position de l'OCDE concernant la hiérarchisation du trafic privilégie la concurrence, notamment entre les fournisseurs de services Internet, ainsi que la transparence. En pratique, la neutralité du réseau peut affecter la concurrence sur les marchés de la télévision, comme on l'a observé dans plusieurs cas : KT/Samsung en Corée (2012), Free/Google en France (2013) ou Comcast/NBCU (2009). De plus, certains pays (Chili, Pays-Bas et Slovénie) ont élaboré des réglementations qui traduisent une approche plus stricte quant au respect de la neutralité des réseaux. M. Díaz-Pinés explique que l'interconnexion sur Internet est un problème connexe et que le modèle actuel fonctionne de façon satisfaisante en maintenant les prix bas et en renforçant la concurrence, bien qu'il s'agisse d'un marché non réglementé. Enfin, on a pu constater récemment une forte pression concurrentielle venant des fournisseurs de vidéo en ligne, comme l'ont montré certaines décisions de quelques autorités de régulation : Comcast/NBCU (2009), le Projet Kangaroo (2009) et Newscorp/BSkyB (2012). En conséquence, les autorités de régulation devraient dans l'avenir prêter une attention toute particulière à la neutralité du réseau sur les marchés de la vidéo, notamment en ce qui concerne les fournisseurs de vidéo en ligne.

M. Díaz-Pinés expose ensuite le problème de l'intégration verticale sur les marchés de la télévision et de la vidéo et il note l'existence de plusieurs entreprises verticalement intégrées, notamment en Brésil, en France, au Mexique et aux États-Unis. Parmi les nombreuses questions que soulèvent l'intégration verticale dans ce secteur, M. Díaz-Pinés note l'éviction des fournisseurs de contenu concurrents, la privation de canaux pour les concurrents en aval et les négociations d'exclusivité ou de monopsonne dans l'acquisition de contenu, notamment pour les retransmissions sportives et les œuvres cinématographiques. Des difficultés particulières peuvent aussi être notées pour l'acquisition de contenu pour le DSL et la VOD. Enfin, dans certains cas, il s'est révélé difficile de suivre les engagements pris par des entités qui ont fusionné (par exemple CanalSat/TPS – France 2006).

En troisième lieu, M. Díaz-Pinés évoque les problèmes liés aux offres groupées. Le document de 2011 de l'OCDE intitulé « Broadband Bundling: Trends and Policy Implications » concluait que celles-ci offraient comme avantages : (i) des réductions de prix pour la vidéo, la voix ou les données ; (ii) le subventionnement par le surplus du consommateur des services qui sont moins recherchés ; et (iii) l'unification de la facturation et du service client. Les problèmes qu'elles posent tiennent à l'enfermement du consommateur ou aux obligations d'achat de services non recherchés par le consommateur. En conséquence, les implications des offres groupées sur la concurrence devraient être attentivement évaluées.

Enfin, M. Díaz-Pinés aborde la question du cadre institutionnel et pose la question de savoir si les institutions devraient être adaptées à la convergence de la technologie. À l'intérieur de ce thème, plusieurs problématiques méritent d'être approfondies : le rôle de la réglementation sectorielle par opposition au droit de la concurrence, l'unification des autorités de régulation des télécommunications et des médias (par exemple dans la République d'Afrique du Sud), la réglementation technologiquement neutre et la réglementation des contenus par opposition à celle des infrastructures. M. Díaz-Pinés conclut en disant que dans un monde idéal, une réglementation convergente et technologiquement neutre devrait être la règle.

Le Président remercie l'orateur de son intervention et invite le Professeur Allan Fels à présenter son document sur les questions de concurrence dans la radiodiffusion et de contenu sur Internet.

Le Professeur Fels débute sa contribution en observant que le pouvoir du marché sur l'infrastructure physique utilisée pour la fourniture de programmes aux utilisateurs a de tout temps fait partie des préoccupations des régulateurs. Toutefois, l'attention des autorités nationales de la concurrence et des régulateurs se tourne de plus en plus vers la fourniture de contenu et la façon dont la vente et la distribution de contenu affectent la concurrence sur les marchés en aval, comme le montrent la décision de la Commission de la concurrence du Royaume-Uni relative à Sky Television et celle de la Commission australienne de la concurrence et de la consommation concernant l'acquisition par Seven de Consolidated Media Holdings.

Le Professeur Fels indique que l'intégration verticale des diverses fonctions nécessaires pour fournir des services de détail de télévision payante est également un sujet majeur de préoccupation des régulateurs et des autorités de la concurrence. Les fonctions requises à cet égard sont notamment : la production de contenu, la fourniture de programmes, la radiodiffusion de programmes et l'exploitation de l'infrastructure physique pour la distribution des programmes (réseaux par câble, réseaux DSL, installation satellitaires, etc.). Un certain nombre de problèmes de concurrence peuvent apparaître tels que le refus de mettre à disposition des moyens de production essentiels aux entreprises concurrentes en aval, l'amenuisement des marges, le renchérissement des coûts des concurrents et d'autres pratiques discriminatoires. Un exemple récent dans lequel une autorité de la concurrence a observé de possibles problèmes liés à l'intégration verticale est celui de l'acquisition par Comcast de NBC Universal aux États-Unis, dont l'approbation a été assujettie à certaines conditions.

Puis, le Professeur Fels aborde la façon dont les tendances technologiques affectent la concurrence sur les marchés de la radiodiffusion. Les progrès technologiques modifient : la diversité et la qualité des services ; les coûts sous-jacents ; l'importance des barrières à l'entrée (les nouvelles technologies offrent de nouveaux moyens de rendre le marché plus contestable) ; la possibilité offerte aux consommateurs de changer de fournisseurs ; de même que les mécanismes de tarification (la numérisation permet la fourniture de services avec paiement à la séance). La numérisation réduit donc de façon générale les barrières à l'entrée.

Parmi les considérations économiques de la concurrence dans la radiodiffusion, le Professeur Fels souligne que l'analyse de la structure du marché est essentielle pour les autorités de la concurrence. Un problème clé est qu'un fournisseur de service de radiodiffusion en aval peut être en mesure de tirer parti de sa position sur le marché pour accroître son pouvoir sur un marché de contenu en amont. Dans ces conditions, il serait en mesure d'accaparer un marché de contenu en amont, et cette puissance d'achat en amont, lui permettrait de disposer d'un pouvoir de marché supplémentaire sur le marché en aval. Dans le scénario d'un marché en aval concurrentiel, il s'avère que la structure du marché en amont a un impact important sur le fonctionnement du marché. Lorsque les marchés en amont sont structurellement concurrentiels et l'offre est élastique, il est alors impossible d'accaparer la production en amont. Par ailleurs, si l'offre en amont est concurrentielle, mais moins sensible au prix, une entreprise en aval devra

payer un prix élevé pour accaparer le marché. Enfin, si l'offre en amont est monopolisée, il est très difficile pour une entreprise en aval d'accaparer rentablement l'ensemble de la production.

Le Professeur Fels observe que les autorités de la concurrence sont surtout préoccupées quand une fusion entre un diffuseur en aval et un fournisseur de contenu premium peut remettre en cause la disponibilité de ce contenu pour des diffuseurs concurrents. Cela dépend de l'élasticité de l'offre de contenu concurrente. Quand l'offre est élastique, il est peu probable qu'elle puisse être considérée comme premium ou « incontournable » mais, même si l'offre concurrente est inélastique, il n'en découle pas nécessairement qu'il est profitable pour l'entité fusionnée de refuser de fournir des concurrents en aval. Cela est fonction en fait de la perte de bénéfices liée aux ventes non effectuées aux concurrents en aval, comparée aux profits accrus résultants d'un plus grand nombre de ventes sur le marché en aval. L'analyse effectuée par le Professeur Fels montre que les problèmes de concurrence sur les marchés de contenu ne peuvent pas être exclus, mais toute évaluation de la probabilité d'apparition de tels problèmes dépend d'une analyse complexe, et souvent contre-intuitive, de la structure et du comportement du marché sur les marchés tant amont qu'en aval.

En outre, on se préoccupe plus largement du fait que les marchés en question sont redéfinis par un progrès technologique rapide, qui permet la fourniture de multiples services de communications via de multiples technologies utilisant des plateformes numériques communes ou convergées. Le Professeur Fels explique qu'un impact majeur que le processus de convergence et les progrès technologiques qui l'accompagnent ont eu et continueront d'avoir, tiennent à l'incertitude considérable ainsi introduite dans la planification de l'activité des entreprises. Dans ces conditions, les fournisseurs de services font face à au moins quatre types d'incertitudes : (i) l'incertitude de la demande, (ii) le déploiement de nouvelles technologies, (iii) la question de savoir si, et dans quelle mesure, un modèle économique pour un service particulier peut être rentable, et (iv) les sources potentielles de produits compétitifs. En outre, l'incertitude est grande quant à savoir où se situeront les opportunités de profits sur les marchés émergents, mais encore mal connus.

Enfin, le Professeur Fels souligne que ces incertitudes créent des dilemmes pour les autorités de la concurrence. D'une part, l'incertitude inhérente peut rendre l'intervention dangereuse, du fait et à la fois tant que les conditions du marché sont difficiles à évaluer et que l'intervention peut interdire des évolutions du marché par ailleurs souhaitables. D'autre part, le potentiel d'innovation signifie qu'il est essentiel de garder des possibilités ouvertes pour permettre à la future concurrence de se développer. Par conséquent, le Professeur Fels suggère que, de façon générale, les régulateurs devraient faire preuve de prudence, car l'ignorance de la réglementation est considérable parallèlement à l'incertitude générée par les formes actuelles de convergence. Certains risques réglementaires sont toutefois inévitables et une politique de non-intervention peut conduire à l'émergence rapide de nouvelles formes de pouvoir de marché. En examinant la façon dont il serait possible d'agir, le professeur Fels renvoie au paradigme de l'innovation séquentielle, dans lequel l'évolution du marché se fait par des changements relativement brusques d'une forme d'offre à une autre. Le Professeur Fels suggère donc que les autorités de régulation de la concurrence privilégient le fait que ce processus puisse se poursuivre, afin que de nouvelles générations d'offre puissent évincer la génération du moment. Par conséquent, les autorités en charge de la concurrence devraient moins se préoccuper d'assurer la concurrence au sein d'une plateforme de diffusion existante, dès lors que de nouvelles plateformes peuvent la supplanter. Concrètement, la frontière est difficile à tracer, dans la mesure où un accord d'exclusivité de contenu peut à la fois porter préjudice aux concurrents existants et dissuader de nouveaux concurrents et de nouvelles formes d'offre d'émerger. Toutefois, plus l'exclusivité est spécifique à un type de plateforme particulier, défini de façon stricte, plus le risque est faible. Le Professeur Fels conclut en déclarant qu'il sera sans doute difficile pour les autorités de la concurrence de trouver le bon dosage, et cela pourra être parfois frustrant pour les acteurs du marché, dans les pays développés comme dans les pays en voie de développement.

Le Président remercie le Professeur Fels de sa contribution et invite les participants à faire part de leurs commentaires.

David Hyman convient que les changements technologiques à venir sont difficiles à prédire, et que la prudence doit donc être davantage de mise dans l'approche réglementaire.

Christophe Roy reconnaît que dans leur approche réglementaire et leur pratique décisionnelle les autorités nationales de la concurrence devraient prendre en compte à la fois les changements technologiques et le fait que le secteur évolue très rapidement.

Le Président ouvre la séquence des contributions nationales en invitant la Zambie à faire part de son expérience concernant les barrières à l'entrée.

Le délégué de la Zambie note tout d'abord que les barrières à l'entrée et à l'expansion peuvent être de nature réglementaire. Ainsi, avant 2002, les licences de radio et de télévision n'autorisaient la radiodiffusion que sur un rayon limité. La plupart des licences de station de radio étaient limitées à un rayon de 150 kilomètres. La deuxième barrière à l'entrée peut être liée au pouvoir du marché et à l'avantage dont bénéficie un acteur historique. Troisièmement, l'ampleur des coûts d'investissement, notamment dans la télévision, en ce qui concerne l'infrastructure, la technologie ou les coûts de la migration vers le numérique constituent un obstacle significatif en Zambie. Quatrièmement, l'infrastructure de distribution initiale peut aussi être une source de préoccupation. Enfin, le délégué rappelle les expériences négatives des consommateurs avec de nouveaux entrants et note que pour cette raison ils sont réticents à opter pour un autre nouvel acteur sur le marché.

Le Président présente la contribution de la Lettonie et note qu'elle offre un exemple très spécifique d'une barrière réglementaire dans laquelle le régulateur préfère un modèle d'opérateur terrestre unique alors que le rapport de l'autorité nationale de la concurrence est favorable à un modèle d'opérateurs multiples.

Le délégué de la Lettonie explique que des amendements à la législation régissant le secteur ont été engagés en 2012. En première lecture, les projets d'amendements proposaient qu'au lieu d'un seul opérateur terrestre, la législation en autorise deux ou davantage. Le rapport du Conseil de la concurrence établissait que dans certaines conditions, le modèle avec plusieurs opérateurs était plus favorable à la concurrence. Finalement, le Parlement s'est décidé en faveur du modèle à un seul opérateur terrestre, qui doit être choisi par appel d'offre. Le délégué note que l'État devra engager d'importants investissements supplémentaires dans l'achat des équipements nécessaires pour rendre possible la concurrence sur la plateforme terrestre. De plus, les avantages de la concurrence sur les plateformes terrestres sont limités, car chaque opérateur peut offrir un maximum de 40 canaux. Le délégué conclut qu'au vu de ces arguments, les retombées d'une telle concurrence ne seront pas significatives.

Le Président observe que la contribution de Singapour montre que des barrières à l'entrée peuvent naître d'une fragmentation du contenu.

Le Délégué de Singapour signale que même si le marché de la télévision payante est libéralisé, l'accès au contenu constitue une barrière à l'entrée. En effet, les titulaires de licence tendent à adopter une stratégie de contenu exclusif. Cela s'est traduit par un niveau élevé de fragmentation du contenu entre les deux plateformes nationales – qui n'ont en commun que sept canaux. Cette fragmentation du contenu a entraîné des désagréments et des coûts supplémentaires pour les consommateurs, de même que de nouvelles barrières importantes à l'entrée. De plus, l'attention et les ressources des titulaires de licence de télévision payante ont été mobilisées au détriment d'autres aspects de la concurrence, comme l'innovation dans les services et dans le contenu.



Pour redresser la situation, une mesure d'obligation croisée de diffusion a été introduite en 2010. Celle-ci prévoit qu'un titulaire de licence de télévision payante qui a acquis un contenu exclusif doit faire en sorte qu'il soit diffusé aussi sur la plateforme de l'autre titulaire de licence de TV payante, dans son intégralité et sous une forme non modifiée ni éditée, et qu'il soit mis à la disposition de tout abonné au même prix et selon les mêmes modalités et conditions. Les titulaires de licence de TV payante ne sont pas tenus de partager le contenu, et la relation contractuelle est maintenue entre le titulaire de licence détenteur des droits exclusifs et le consommateur. L'autre titulaire de licence de TV payante est simplement tenu de mettre à disposition sa plateforme pour la diffusion du contenu au consommateur. Depuis l'introduction de la mesure, plus d'une cinquantaine de chaînes sont devenues accessibles sur les différentes plateformes proposées aux consommateurs, de nouvelles options d'abonnement sont proposées par les titulaires de licences de télévision par abonnement et les titulaires de licences nationales ont introduit des différenciations et innovations dans leurs services à mesure qu'augmentait le volume du contenu devenant non exclusif.

Le Président invite l'Ukraine à faire part de son expérience concernant le passage à la télévision numérique.

Le délégué de l'Ukraine souligne que le principal sujet de préoccupation concernant le passage au numérique tient aux règles régissant l'accès aux locaux résidentiels et non résidentiels pour le développement des réseaux de télécommunications. La situation actuelle dans ce domaine (tarifs élevés, règles spécifiques d'accès) crée des obstacles excessifs pour les opérateurs de réseaux. Pour résoudre le problème, un projet de loi a été proposé sur la mutualisation des éléments d'infrastructure des locaux résidentiels et non résidentiels, qui devrait régler les problèmes qui surgissent entre entités économiques, opérateurs, prestataires de télécommunications, autorités locales et propriétaires de l'infrastructure existante.

Le Président demande sa contribution à l'Union européenne (UE) pour expliquer la question de l'aide publique et du passage au numérique mais également de clarifier les problèmes possibles de concurrence concernant l'affectation du dividende numérique.

Le représentant de la Commission Européenne (la Commission) fait observer que la migration vers le numérique s'accompagne d'avantages significatifs mais aussi de quelques risques. La transition de la radiodiffusion terrestre analogique à la télévision numérique terrestre (TNT) d'ici 2012 constituait l'un des objectifs de l'UE. Son mandat l'autorise à prendre certaines mesures à cet égard.

Tout d'abord, s'agissant de l'accès au spectre, les États membres de l'UE sont tenus par les principes inscrits dans les Directives « Concurrence », « Autorisation » et « Cadre » pour l'attribution du spectre de la TNT. Ces règles exigent, notamment, que ces fréquences soient attribuées selon des critères ouverts, transparents, objectifs, non discriminatoires et proportionnés, sans préjudice de critères et de procédures spécifiques visant à la poursuite d'objectifs d'intérêt général. Sur cette base, la Commission a engagé des procédures d'infraction contre certains États membres, notamment l'Italie, la France et la Bulgarie. Deuxièmement, la Commission contrôle les aides publiques pour la radiodiffusion et le passage au numérique. Sur ce dernier point, indépendamment des règles spécifiques concernant les aides publiques, la Commission vérifie la neutralité technologique du projet recevant l'aide. Le but est de s'assurer de conditions égales entre les différentes plateformes de transmission, telles que terrestre, par câble ou par satellite. L'examen par la Commission porte sur l'aide, tant directe qu'indirecte, aux consommateurs et aux radiodiffuseurs. Le délégué conclut que le passage au numérique étant pratiquement achevé, la question suivante devrait porter sur les perspectives de la TNT en clair par opposition à la télévision par câble ou satellite. Le délégué s'interroge aussi sur ce que réserve l'avenir pour la TNT compte tenu du développement de l'Internet à très haut débit.

Le Président introduit la contribution de la France et demande au délégué d'expliquer le potentiel concurrentiel du segment de la télévision payante face à l'émergence de services de télévision non linéaire.

Le délégué de la France rappelle la décision de l'autorité de la concurrence (Autorité) concernant l'acquisition de TPS et de CanalSatellite par le Groupe Vivendi et le Groupe Canal Plus (GCP), et indique qu'à cette occasion l'autorité a abordé la question de la pression concurrentielle des services non linéaires sur la télévision payante traditionnelle. Il explique que ces services peuvent prendre la forme de paiements à la séance ou de vidéo à la demande (VOD). En l'espèce, l'opération consistait à regrouper les activités de télévision payante de TPS et de GCP – en d'autres termes les deux bouquets satellite de CanalSat et TPS, Canal+ et les chaînes thématiques de Multithématiques – au sein de Canal+ France. La fusion a été autorisée en 2006, mais comme elle a ensuite conduit à un quasi-monopole, l'autorisation a été assujettie à cinquante-neuf engagements. Puis, en 2011, l'autorité a constaté que Vivendi et GCP ne respectaient pas dix conditions, qui ont été imposées pour remédier aux restrictions sur la concurrence résultant de la fusion. L'autorité a donc retiré son autorisation et ordonné aux parties d'au moins revenir à leur statut antérieur à la fusion, pour ensuite notifier de nouveau l'opération.

En 2012, sur la base de la nouvelle notification, l'a a approuvé la fusion, mais sous réserve du respect de conditions additionnelles. Le délégué indique que la nouvelle décision a nécessité l'examen de l'évolution des marchés concernés, comme l'apparition de services non linéaires. L'autorité a constaté que la VOD et la vidéo à la demande sur abonnement (SVOD) n'étaient toujours pas développées. En particulier, les services VOD et SVOD étaient principalement offerts par des opérateurs de télévision payante et en association avec des services traditionnels de télévision payante, les services en accès direct (over-the-top ou OTT) représentant 15 % de la consommation, et cela pour une double raison. Tout d'abord, certaines règles applicables en France concernant la radiodiffusion de films peuvent constituer une barrière à l'entrée. Les nouveaux films peuvent être proposés en VOD de quatre à douze mois après leur sortie en salle, alors que pour la SVOD le délai est de trente-six mois. De plus, les opérateurs de VOD et SVOD sont tenus, comme les diffuseurs traditionnels de télévision payante, de contribuer financièrement à la production cinématographique française et à proposer un pourcentage déterminé de films français. L'autre raison tenait à la position de Canal+ sur les marchés d'acquisition et à la taille importante de sa base de films. L'autorité a noté que Canal+ disposait d'un avantage considérable sur les marchés d'acquisition, sur lequel le groupe pourrait s'appuyer pour ses services de VOD et SVOD. L'autorité a imposé des injonctions pour faire en sorte que l'entité résultant de la fusion ne neutralise pas le potentiel de concurrence créé par les services de télévision non linéaire.

Le Président oriente le débat sur le besoin de réforme juridique dans le contexte de la convergence et demande si une législation générale unique sur la radiodiffusion et les télécommunications constitue la bonne solution. Le Président donne la parole au délégué de la Corée.

Le délégué de la Corée observe que les lois nationales sur la radiodiffusion n'ont pris en compte qu'avec lenteur la convergence. La Corée dispose de deux ensembles indépendants de réglementations - l'un pour la radiodiffusion terrestre, par câble et par satellite et l'autre pour la télévision par IP (Internet Protocol). Le délégué remarque que cela a pu être une source de problèmes liés à des réglementations disproportionnées entre services et l'absence de marges de manœuvre pour l'adoption de nouveaux services convergés enrichis par des technologies de pointe. Ce type d'inégalités entre acteurs établis et nouveaux venus freine la croissance du secteur. La Corée se propose donc d'intégrer son système dual de réglementation de la radiodiffusion au sein d'une loi générale unique sur la radiodiffusion et les télécommunications.

### **3. Enjeux de la politique de la concurrence dans la télévision et la radiodiffusion**

Le Président introduit le deuxième thème de la Table ronde et donne la parole à Christophe Roy pour qu'il expose le point de vue du secteur privé.

M. Roy entame son intervention en donnant certaines données de base concernant Canal+. Il s'agit d'un groupe français de télévision payante actif dans la production de chaînes, la distribution d'offres de télévision payante, ainsi que dans la production et la distribution d'œuvres cinématographiques. Canal+ a été le premier opérateur à proposer des programmes de télévision payante en France (en 1984) et le groupe s'est récemment lancé dans le secteur de la télévision en clair suite à l'acquisition de deux chaînes. Il compte 11.5 millions d'abonnés à la télévision payante dans le monde et a dégagé un chiffre d'affaires de 5 milliards EUR en 2012.

Tout d'abord, M Roy définit les menaces de la concurrence pour Canal+ en France. Pour un certain nombre de raisons, le marché de la télévision payante devient de plus en plus concurrentiel. Cela tient à l'évolution des usages, car il existe de multiples moyens de regarder la télévision (multi-écrans, TV de rattrapage, VOD et SVOD). Par ailleurs, le développement de la TNT en clair (dix-huit chaînes) crée une concurrence directe pour la télévision payante. M. Roy suggère que cela devrait être pris en compte dans la définition pertinente du marché, pour lequel on a jusqu'à présent considéré séparément le marché de la télévision payante et celui de la télévision en clair. Enfin, le développement des services OTT et des téléviseurs connectés, de même que l'arrivée d'acteurs internationaux (Apple, Google, Amazon ou Netflix), ont eu un impact sur les conditions de la concurrence. Sur ce dernier point, ces acteurs disposent d'importantes ressources financières et d'un pouvoir de marché substantiel pour négocier leur accès au contenu et au contenu premium.

La stratégie de Canal+ à l'égard des nouvelles conditions de la concurrence est essentiellement basée sur le contenu. Le groupe met l'accent sur la fourniture de contenu diversifié et éditorialisé et sur la création de marques fortes. Un élément important de sa stratégie consiste à assurer une distribution sur toutes les plateformes disponibles et sur toutes les chaînes de valeur télévisuelles. Cela devrait créer un cercle vertueux dans lequel le surcroît de recettes est réinvesti dans le contenu premium, qui à son tour enrichit la valeur des services offerts. Un autre aspect important consiste à élaborer un classement objectif des services et des contenus sur toutes les plateformes, afin de promouvoir les contenus français et européens et la diversité culturelle.

M. Roy explique que les concurrents de Canal+ ne sont pas réglementés, alors que la société elle-même est surréglementé. Il importe donc d'égaliser les conditions de la concurrence avec un ensemble unique de règles s'appliquant à tous les acteurs et services, indépendamment de la plateforme. Ces règles devront prévoir : l'investissement dans la production audiovisuelle, la protection de la jeunesse, le respect de la chronologie des médias français, la protection des données et les dispositions anti-piratage ainsi que l'harmonisation des règles en matière de TVA. M. Roy propose qu'un nouveau statut juridique soit défini pour les nouveaux acteurs de l'audiovisuel. Enfin, la question de la présentation des contenus et services par les géants de l'Internet devrait être abordée. D'autre part, M. Roy fait valoir que Canal+ est trop réglementé, étant soumis à la fois au droit de l'audiovisuel et au droit de la concurrence. Depuis 2006, suite à l'acquisition de TPS, un nombre important de mesures correctives a été imposé. Récemment, Canal+ s'est vu imposer par l'autorité française de la concurrence de mettre en œuvre trente-trois injonctions dans les cinq ans, qui peuvent être renouvelées pour cinq années supplémentaires. Ces injonctions restreignent les activités de l'entreprise tout au long de la chaîne de valeur : marchés en amont (acquisition de droits), marchés intermédiaires (les relations avec les éditeurs de chaînes indépendants) et marchés en aval (commercialisation de son offre de télévision payante, de ses offres VOD et SVOD, obligations de gros).

Enfin, M. Roy souligne qu'au vu de l'expérience de Canal+, trois questions peuvent être formulées en matière de droit de la concurrence dans le secteur de la radiodiffusion. La première concerne la délimitation des compétences d'une autorité de la concurrence par rapport à ceux détenus par les régulateurs sectoriels. Dans une autre décision récente portant sur l'acquisition par Canal+ de deux chaînes de télévision en clair, le régulateur de l'audiovisuel a émis des recommandations qui allaient au-delà des mesures effectivement adoptées par l'autorité de la concurrence. La deuxième question est celle de savoir jusqu'où une ANC peut aller dans la surveillance et la régulation de la politique commerciale d'une entreprise privée. M. Roy estime que les injonctions appliquées à Canal+ sont intrusives et permettent à l'autorité de la concurrence de déterminer la politique marketing de l'entreprise concernant ses offres de télévision payante. Enfin, M. Roy demande comment des injonctions sur de longues périodes peuvent être justifiées par le pouvoir de marché d'une entreprise sur un marché qui évolue constamment.

Le Président demande à David Hyman de présenter un autre point de vue du secteur privé sur la question.

M. Hyman évoque les opportunités et défis auxquels font face les fournisseurs de vidéo OTT. Tout d'abord, M. Hyman explique que Netflix a contribué au lancement de la diffusion en flux (streaming) de films et programmes de télévision sur Internet. En 2008, la société a commencé la distribution en flux de vidéos sur les téléviseurs au moyen de quelques boîtiers connectés à Internet. Aujourd'hui plus de trente millions de consommateurs de plus de quarante pays différents utilisent le service de diffusion de Netflix sur des milliers de différents types d'équipements interconnectés. L'entreprise distribue chaque mois à ses consommateurs plus d'un milliard d'heures de films et émissions de télévision en flux.

Cela implique une approche innovante à plusieurs niveaux. En 2012, Netflix a introduit son réseau Open Connect – réseau de distribution de contenu dédié axé sur la distribution efficace de gros fichiers média, qui contribue à rendre l'utilisation d'Internet plus rapide et moins coûteuse. Les interfaces avec les utilisateurs, par lesquelles les consommateurs découvrent et utilisent la vidéo, évoluent elles-aussi. L'Internet aide aussi à reconceptualiser la façon dont le contenu est créé et consommé. Pour la première fois des productions de qualité connaissent sur Internet une diffusion en première exclusivité (par exemple "House of Cards"). De plus, l'entreprise a innové dans la diffusion de séries télévisuelles en offrant tous les épisodes en même temps dans tous les pays. Enfin, pour étendre l'audience de son contenu vidéo, Netflix utilise le pouvoir d'Internet pour aider les consommateurs à découvrir des films et des émissions de télévision en utilisant un dispositif technique de recommandation et de merchandising.

M. Hyman note que la mutation induite par les services OTT a conduit à spéculer sur la disparition des plateformes traditionnelles de distribution vidéo. Il indique toutefois que ces plateformes s'adapteront au nouveau paysage de la vidéo. C'est ce qui s'est déjà produit avec les offres de vidéo avec authentification sur Internet, qui donnent aux abonnés de la télévision payante traditionnelle un accès à un éventail de contenus au moyen de dispositifs connectés à Internet. De la sorte, les abonnés à la télévision payante traditionnelle bénéficient de la vidéo sur Internet à l'intérieur de leur offre groupée de services télévisuels. Cette tendance va s'accroître, à mesure que les plateformes et réseaux traditionnels s'orientent vers la distribution de leur contenu sous une forme à la demande sur Internet.

Les opérateurs traditionnels commencent à concurrencer plus directement les fournisseurs de vidéo OTT, certains problèmes de concurrence peuvent survenir lorsque les premiers ont la maîtrise de l'infrastructure à haut débit. C'est pourquoi Netflix est en faveur de la neutralité du réseau et constate que les régulateurs doivent veiller à ce que les propriétaires de l'infrastructure ne bloquent ou ne dégradent pas le trafic au profit de leurs propres services, et à ce que ces prestataires n'imposent pas de quotas de données discriminatoires. De plus, l'interconnexion au niveau du dernier kilomètre des réseaux à haut débit doit être assurée. En fin de compte, l'avenir de la radiodiffusion est lié à l'avenir d'Internet, et tous les acteurs vont s'appuyer sur Internet pour rivaliser.

M. Hyman conclut en suggérant la prudence quant à savoir si des évolutions du marché exigent de nouvelles réglementations. Comme il est difficile de prédire les évolutions de ce marché, il convient de faire preuve de flexibilité afin que l'innovation continue.

Puis le Président présente rapidement les quatre sous-sections du second thème de la Table ronde : (i) définition du marché ; (ii) accès aux équipements de transmission ; (iii) problèmes liés au contenu ; (iv) mesure de l'audience et recettes publicitaires. Le Président introduit la contribution du Taipei chinois sur la question de l'évolution de la définition du marché.

Le délégué du Taipei chinois souligne qu'avec les progrès des technologies de l'information et des communications (TIC), la convergence numérique a fait éclater les barrières dans l'industrie. Elle a conduit aux offres triservices, regroupant télécommunications, télévision par câble et Internet, voire quadriservices avec télécommunications, télévision par câble, Internet et téléphonie mobile. Par conséquent la définition du marché ne peut plus être limitée aux frontières traditionnelles utilisées pour classer les entreprises. La convergence numérique se caractérise par des marchés bifaces ou multifaces. Les différences entre les marchés monofaces et les marchés bi-ou multifaces résident dans les effets de réseau et de rétroaction.

Le délégué donne l'exemple d'une fusion entre Da-Fu Media Technology Co., Ltd., et douze câblo-opérateurs (2010). Dans la définition du marché de produits, l'autorité de la concurrence s'est basée sur le degré de substituabilité de la demande ou de substituabilité de l'offre d'un produit ou d'un service en termes de fonctionnalité, de caractéristique, d'utilisation ou de prix. Au bout du compte, c'est le marché de la télévision par câble qui a été considéré comme le marché de produits (en excluant la télévision, la radiodiffusion par satellite et la musique à la demande), du fait de l'absence de substituabilité de la demande et de l'offre entre fournisseurs de services vidéo en termes de nombre de chaînes, de contenu de réglementation et de demande des abonnés. Une étude publiée par Tsai and Fan (2012), qui examine cette fusion, indique que la définition du marché devrait être élargie pour inclure la télévision par IP dans les marchés pertinents de la télévision par câble. Le délégué conclut que l'autorité de la concurrence suit en permanence les paramètres importants du cadre de la fusion horizontale et révisé sa politique en fonction des tendances de la convergence du numérique.

Le délégué de la Bulgarie évoque l'acquisition par CME de la Balkan News Corporation et de TV Europe (2010), décision pouvant servir d'exemple de la pratique en matière de définition des marchés de produit dans le secteur de la radiodiffusion. À l'issue de la fusion, CME contrôlerait cinq chaînes de télévision (une en clair et quatre canaux de télévision par câble ou satellite). La Commission de protection de la concurrence (CPC) a centré son analyse sur le marché de la distribution télévisuelle et sur celui du contenu audiovisuel. Elle a constaté qu'en Bulgarie les chaînes de télévision en clair et les chaînes de télévision diffusées par le satellite ou le câble ne peuvent être séparées en des marchés de produit différents et indépendants. En conséquence, la CPC a défini le marché de produits pertinent comme le marché du contenu audiovisuel, englobant l'ensemble des productions (notamment films, sports, informations, etc.), pouvant être diffusées par des opérateurs de télévision, aussi bien en tant que créateurs de contenu qu'en tant que détenteurs de droits habilités.

La CPC a axé son analyse sur l'accès technologique à la programmation, son profil et son modèle de financement. Tout d'abord, une enquête auprès d'un certain nombre d'acteurs a montré qu'il existait peu de différences sur la qualité et le choix de services additionnels entre les deux catégories d'opérateurs de télévision. De plus, les services de télévision par câble sont largement disponibles en Bulgarie et ils distribuent des signaux à la fois analogiques et numériques. En outre, tous les programmes en clair sont inclus dans l'abonnement de base de l'ensemble des plateformes par câble et par satellite. La fourniture d'un contenu additionnel nécessiterait le paiement d'un droit supplémentaire, s'ajoutant au prix de l'abonnement de base. Deuxièmement, il n'existait pas de différence significative dans le profil des programmes offerts, ce qui impliquait leur interchangeabilité. Troisièmement, le modèle de financement

était similaire. Enfin, le délégué souligne que cette définition du marché est spécifique à ce cas de fusion et qu'elle n'implique pas une approche similaire dans d'autres décisions antitrust.

Le Président ouvre la discussion sur la deuxième sous-section, consacrée à l'accès aux équipements de transmission, et il donne la parole au délégué de l'Espagne sur le comportement d'exclusion unilatérale.

Le délégué de l'Espagne indique que l'affaire ABERTIS démontre la façon dont une décision réglementaire qui affecte les services de transmission peut avoir d'importantes conséquences sur la capacité des diffuseurs de télévision en clair à rationaliser leurs coûts et à être compétitifs en aval. Le cadre réglementaire espagnol prévoyait la numérisation de la télévision comme un processus de migration de la télévision terrestre analogique vers la TNT, avec une forte contrainte de couverture de la population. De ce fait, ce cadre réglementaire a renforcé la position de la TNT comme technologie dominante, en imposant son utilisation à tous les radiodiffuseurs nationaux de télévision titulaires d'une licence d'exploitation du spectre radioélectrique terrestre, dont notamment les principaux radiodiffuseurs de télévision en clair en Espagne. ABERTIS, qui est l'opérateur de l'infrastructure de télécommunications, détient et gère le seul réseau terrestre national pour la radiodiffusion des signaux TNT en Espagne, tout en étant également le seul fournisseur de services de transport (depuis les bureaux du radiodiffuseur de télévision jusqu'aux stations de radiodiffusion terrestre) et de services de distribution (depuis les stations de radiodiffusion terrestre jusqu'aux téléspectateurs) des signaux TNT des radiodiffuseurs de télévision nationaux espagnols. Après le passage au numérique, ABERTIS a continué de monopoliser les services de transmission en amont et était peu incité à autoriser l'accès à ses équipements essentiels de transmission. Dans ce contexte, en avril 2010, la *Comisión Nacional de la Competencia (CNC)* a engagé officiellement des poursuites contre ABERTIS au motif qu'il empêcherait d'autres opérateurs de réseaux d'accéder à son réseau de sites de radiodiffusion par une compression des marges entre tarifs de gros et de détail. En février 2012, la CNC a jugé qu'ABERTIS était coupable d'abus de position dominante en entravant l'accès de concurrents au marché du transport et de distribution des signaux TNT. En définitive, la décision réglementaire de restreindre à une seule technologie la distribution des signaux TNT empêchait les radiodiffuseurs de télévision de changer d'opérateur de réseau ou d'utiliser d'autres technologies de transmission, et les opérateurs de réseaux tiers de tirer parti des possibilités offertes par le passage au numérique.

Le Président annonce la troisième sous-section concernant les questions liées au contenu et il donne la parole au Royaume-Uni.

Le délégué du Royaume-Uni observe que les événements sportifs et les films très recherchés ont toujours été considérés comme du contenu premium. Ils font généralement l'objet de droits exclusifs détenus par un radiodiffuseur ou revendeur de télévision payante, ce qui peut conduire à ce qu'ils ne soient disponibles que sur une seule plateforme, contrairement au contenu offert par les radiodiffuseurs de service public. De plus, les droits d'exclusivité ont tendance à être concentrés dans les mains d'un nombre relativement limité d'acteurs. Le principal attrait de la retransmission sportive réside dans le direct, de sorte que la transmission en différé n'en est pas véritablement un substitut. Le contenu sportif premium continue donc de poser des problèmes et de susciter la vigilance des autorités de régulation. En revanche les films premium ont connu une plus grande évolution. Les études auprès des consommateurs tendent à montrer que les nouveaux films ne pèsent pas autant que le sport comme facteur déterminant de la demande de télévision payante. On observe toutefois des changements positifs, comme la forte production de séries télévisuelles. En outre, de nouveaux modes de distribution (par exemple OTT) tendent à abaisser les barrières à l'entrée et à dynamiser la concurrence. En revanche, les droits d'exclusivité demeurent majoritairement aux mains des opérateurs historiques. Le délégué est d'accord avec le Professeur Fels pour dire qu'il s'agit d'un domaine d'incertitude et qu'il y a de bonnes raisons pour avancer prudemment.

Le délégué des Pays-Bas évoque la cession sous licence des droits de retransmission de matches de football premium dans le cadre d'une fusion entre EMM et Fox. Cette proposition de fusion a amené la

Commission néerlandaise de la concurrence (NMa) à examiner la concurrence non pas entre entreprises de radiodiffusion mais entre plateformes de distribution. À partir de la saison 2005/2006, les clubs de l'Eredivisie néerlandais ont commencé à offrir les droits de radiodiffusion de matches de football. Or les chaînes qui avaient acquis ces droits (Talpa/RTL et Tele2) ayant subi des pertes considérables n'ont pas été en mesure de générer un revenu suffisant pour couvrir les droits dus à Eredivisie. Lors du deuxième appel d'offres (2008), les propositions pour les matches en direct ont été si basses que les clubs de l'Eredivisie ont décidé de créer leur propre chaîne de télévision payante : Eredivisie Live. La chaîne Eredivisie Live était proposée à toutes les plateformes de distribution intéressées et les droits sur les meilleurs moments étaient vendus à la chaîne publique néerlandaise (NOS). Fin 2012, EMM, qui commercialisait les droits de radiodiffusion dans le football, a été reprise par la Fox. La NMa a décidé de publier un avis formel sur la compatibilité des plans de commercialisation, distinct de la décision formelle sur la concentration, après que la Fox se soit engagée sur plusieurs concessions qui garantissaient une concurrence non faussée dans la radiodiffusion de télévision en clair et la concurrence entre plateformes de distribution.

Le délégué note que cela a créé une situation passablement unique dans laquelle il n'y a plus de marché pour les droits de radiodiffusion des matches en direct. La Fox s'est engagée à proposer la chaîne Eredivisie Live à toutes les plateformes sur une base non discriminatoire et elle se propose de créer une nouvelle chaîne de télévision en clair, qui retransmettra les meilleurs moments. Le délégué observe que cette chaîne diffusant les meilleurs moments représente un contenu très recherché pour les plateformes de distribution, et il se peut donc qu'elle occupe une position dominante vis-à-vis de ces plateformes, même si elle peut ne pas détenir une grande part du marché.

Le délégué des États-Unis demande au délégué de la Bulgarie d'expliquer la raison pour laquelle la définition du marché n'était pertinente que pour la fusion et serait différente pour une affaire antitrust.

Le délégué de la Bulgarie répond que la motivation derrière la définition du marché adoptée dans la décision sur la fusion était d'analyser en détail le marché du contenu. S'il s'agissait d'une affaire antitrust, l'autorité privilégierait sans doute le segment de la chaîne de distribution.

Le délégué du Mexique indique que Grupo Televisa (Televisa) et TV Azteca sont les seules entreprises à fournir des services de télévision en clair couvrant l'ensemble du pays. Ces deux entreprises sont verticalement intégrées. Televisa détient environ 70 % du marché de la télévision en clair et près de 50 % de celui de la télévision payante. Azteca détient les 30 % restants du marché de la TV en clair et possède sa propre entreprise de téléphonie mobile, qui détient 4 % du marché.

En 2011, une fusion entre Televisa et Iusacell a été notifiée à la Comisión Federal de Competencia (CFC). Sur le marché de la téléphonie mobile, la CFC a estimé que l'opération apportait à Iusacell un surcroît de capital qui renforcerait la concurrence. Sur les marchés de la télévision en clair et payante, la CFC a considéré que l'opération étaient anticoncurrentielle, car la fusion donnerait aux deux entreprises des incitations à coordonner leurs activités. Lorsque la CFC a décidé de bloquer la fusion, les deux parties ont proposé des engagements. Tout d'abord, s'agissant du marché télévisuel ouvert, elles sont convenues de dissoudre la nouvelle entreprise si un appel d'offres public pour une troisième concession sur un réseau de télévision n'était mené à bien dans les 24 mois suivant la fusion. De même, l'entreprise résultant de la fusion doit offrir des espaces publicitaires sur une base non discriminatoire et la séparation des fonctions de gestion des deux entreprises doit être assurée. Pour ce qui est du marché de la télévision payante, les parties se sont engagées notamment à vendre le contenu sur une base non discriminatoire et non groupée.

Le délégué de la Pologne décrit le cas d'un accord limitant la concurrence sur le marché des événements sportifs premium. En 2006, l'Office de la concurrence et de la protection du consommateur (UOKiK) a imposé des amendes de quelque 8 millions PLN à la Fédération polonaise de football Association (PZPN) et à Canal+. PZPN disposait du droit exclusif d'accorder une licence pour la

radiodiffusion de matches de football de première et deuxième divisions et de la Coupe de Pologne. Cette licence exclusive était accordée par PZPN à l'entreprise qui a présenté la meilleure offre lors d'un appel d'offres organisé par PZPN. En 2000, PZPN a signé un contrat avec Canal+. L'UOKiK a constaté que le contrat donnait également à Canal+ une priorité dans l'obtention future d'une licence exclusive. Aux termes du contrat, PZPN était tenue d'informer Canal+ des conditions des offres soumises par ses concurrents. Canal+ pouvait obtenir une licence si dans les 30 jours l'entreprise offrait des conditions égales à la meilleure offre. L'UOKiK a observé que la possibilité de contracter avec PZPN à des conditions identiques à celles offertes par des concurrents potentiels de Canal+ limitait ses risques économiques. L'obligation pour PZPN d'informer Canal+ sur les autres offres conduisait à une dissymétrie de l'information. Le délégué souligne également que de ce fait Canal+ était le véritable détenteur des droits exclusifs, officiellement détenus par PZPN. Finalement, Canal+ n'a pas invoqué cette clause, car l'entreprise a fait l'offre la plus élevée au premier tour.

Le délégué de l'Égypte évoque le piratage des nouveaux films et son impact sur le marché du contenu. En général les producteurs de films, lorsqu'ils préparent la distribution de leurs produits, contactent d'abord les diffuseurs de télévision payante qui ensuite redistribuent les films à d'autres radiodiffuseurs de télévision (par exemple la télévision en clair). La concurrence pour la diffusion de films en première exclusivité se heurte à plusieurs contraintes du fait de l'émergence du secteur informel et du piratage. Tout d'abord le décryptage pirate diminue la valeur du contenu premium. Ce type de piratage a obligé les chaînes en clair à rivaliser sur le marché en clair et à acheter du contenu auprès des producteurs. Par ailleurs, la violation des obligations contractuelles est une autre forme de piratage. Aux termes des contrats conclus avec les propriétaires de contenu, les radiodiffuseurs de télévision ne peuvent diffuser les films qu'un nombre limité de fois. Or ces obligations n'ont pas été respectées par plusieurs radiodiffuseurs, ce qui diminue aussi la valeur du contenu. La troisième contrainte est liée au piratage dont se rendent coupables les radiodiffuseurs concurrents de Nile TV. Un certain nombre de radiodiffuseurs de télévision disposant de fréquences sur des satellites occupant la même position orbitale que Nile Sat sont en mesure de diffuser sans licence. Certains diffusent sur leurs plateformes des films en première exclusivité acquis illégalement. Le délégué conclut que le remède à ces pratiques réside dans une coopération internationale énergique.

Le Président passe ensuite à la quatrième sous-section, sur la mesure de l'audience et la publicité, et évoque à ce propos la contribution de l'Inde. L'autorité indienne de la concurrence a reçu une plainte pour présomption d'abus de position dominante dans les mesures d'audience télévisuelle. Le plaignant prétend que la seule entreprise qui mesure l'audience télévisuelle et suit les dépenses publicitaires sur l'ensemble des chaînes de télévision, de la radio et de la presse écrite a manipulé les données en faveur de radiodiffuseurs qui lui versaient de l'argent. Ce qui s'est traduit par une perte de recettes publicitaires du plaignant. L'affaire est actuellement en cours d'examen. Le Président note également les contributions de la Colombie et de l'Irlande traitant des remises publicitaires et de leur impact sur le marché.

#### **4. Autres enjeux dans le secteur de la radiodiffusion et réponses des autorités nationales de la concurrence**

Le Président présente le troisième thème de la Table ronde sur les autres enjeux dans le secteur de la radiodiffusion et il donne la parole au délégué du Comité consultatif économique et industriel auprès de l'OCDE (BIAC).

Le délégué du BIAC partage les vues exprimées dans le document de référence quant au fait qu'une approche technologiquement neutre est essentielle dans l'élaboration de la réglementation et son application. Ce qui implique la nécessité d'assurer des conditions égales pour tous sur toute la chaîne de valeur de la radiodiffusion télévisuelle. Cela tend donc aussi à indiquer l'élimination des barrières à l'entrée et du déséquilibre résultant de la présence de réseaux de télévision détenus ou financés par l'État. Il appartient donc aux autorités nationales de la concurrence de voir dans quelle mesure les entreprises



publiques et les réglementations restrictives créent de telles barrières. Le délégué reconnaît que les ANC sont souvent exposées à des pressions gouvernementales internes, notamment des pressions politiques qui entravent la réforme. L'analyse de la concurrence dans le secteur de la télévision et de la radiodiffusion peut faire intervenir des autorités de régulation sectorielles, des télécommunications par exemple, qui souvent abordent les questions de concurrence sous l'angle plus général des intérêts de la politique publique. À l'inverse, les ANC peuvent recevoir pour instruction de regarder au-delà de la politique de la concurrence et de prendre en compte des facteurs non économiques, ce qui accroît les possibilités de décisions médiocres. Le délégué laisse entendre que des règles sectorielles sont utilisées pour réglementer des marchés non compétitifs ou fonctionnant de façon imparfaite, et donc qu'elles se prêtent mal à une analyse économique sérieuse. C'est la raison pour laquelle le BIAC estime que l'analyse de la concurrence devrait être laissée aux ANC, qui ne devraient pas introduire des critères d'intérêt public dans leur examen des marchés de la radiodiffusion télévisuelle. Dans le même temps, une autorité de régulation sectorielle spécialisée devrait se préoccuper des questions d'intérêt public.

Le délégué des États-Unis indique qu'un cas récent offre un bon exemple de coopération entre la Division Antitrust du Ministère de la justice des États-Unis et la Commission fédérale des communications (FCC). En 2011, cette Division a engagé une action pour bloquer la formation d'une entreprise conjointe entre Comcast Corp. (Comcast) et NBC Universal Inc. (NBCU), filiale de la General Electric Co. À l'époque, la société Comcast était le plus gros distributeur de programmes vidéo, elle détenait des réseaux nationaux de câblodistribution, avait des intérêts partiels dans d'autres réseaux et détenait des participations de contrôle dans des réseaux régionaux de programmes sportifs. NBCU était active dans la production, la mise en forme et la commercialisation de programmes d'information, de sport et de divertissement. Elle possédait les réseaux de diffusion de NBC et Telemundo, de même que dix stations locales de télévision, des réseaux nationaux de programmes par câble et un studio de cinéma.

La Division a coopéré avec la FCC pour l'analyse des effets de la co-entreprise et la mise au point de mesures correctrices. En premier lieu, le délégué note que leurs mandats statutaires en matière de compétence, de normes d'examen, et de charge de la preuve ne sont pas les mêmes. La FCC examine les fusions pour s'assurer qu'elles répondent à l'intérêt, à la commodité et au besoin du public, la concurrence n'étant qu'un facteur parmi bien d'autres. Dans le même temps, la Division applique le paradigme de la concurrence. Cependant, la Division et la FCC ont tenu d'intenses consultations pour coordonner leurs examens et créer des mesures correctrices qui soient à fois cohérentes et complètes. Ainsi aux termes de la décision de la Division et de l'ordonnance de la FCC, l'entreprise conjointe doit mettre à la disposition des distributeurs de vidéo en ligne (OVD) le même bouquet de canaux de radiodiffusion et du câble que celui vendu aux distributeurs traditionnels de programmes vidéo ou rendre disponible une programmation similaire à celle que les OVD ont pu acquérir sous licence auprès des créateurs de contenu pour Comcast. De plus, en cas de litige de licence entre l'entreprise conjointe et un OVD, la Division peut saisir les tribunaux pour faire appliquer sa décision ou autoriser l'OVD lésé à solliciter un arbitrage commercial. L'ordonnance de la FCC impose aussi à l'entreprise conjointe de céder sous licence du contenu aux OVD et prévoit un mécanisme d'arbitrage pour le règlement des litiges. De même, l'ordonnance de la FCC autorise les concurrents traditionnels de Comcast, comme les opérateurs de satellite et de téléphonie, à demander l'arbitrage de la FCC pour la résolution de litiges en matière d'accès aux programmes et d'autorisation de retransmission. La FCC dispose d'une expérience de l'arbitrage dans ces domaines, ce qui dispense la Division d'imposer des mesures similaires. Enfin, l'ordonnance de la FCC contient aussi des dispositions d'intérêt public concernant la transmission de contenus particuliers sortant du cadre de la mission de la Division en matière de concurrence.

Le délégué du Pérou donne un exemple dans lequel un régulateur sectoriel, l'Organismo Supervisor de la Inversión Privada en Telecomunicaciones (Osiptel), et l'autorité de la concurrence, l'Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Indecopi), sont parvenus à des résultats différents sur le même cas. L'Osiptel contrôle les pratiques anticoncurrentielles

dans les services de télécommunications publiques, notamment la téléphonie et la télévision payante. En 1999, un câblodistributeur local, Tele Cable S.A. (Tele Cable), a déposé plainte contre Telefónica Multimedia S.A.C. (Telefónica) et deux développeurs de contenu pour le câble, Fox Latin American Channel Inc. (Fox) et Turner Broadcasting System Latin America Inc. (Turner). Le plaignant faisait valoir que ces entreprises avaient conclu un accord de distribution exclusive pour la transmission de contenu. Comme les fournisseurs de contenu n'étaient pas considérés comme des entreprises de télécommunications, l'Indecopi a analysé la plainte de Tele Cable contre la Fox et Turner, tandis que l'Osiptel a analysé celle contre Telefónica. Finalement, l'Indecopi a estimé que la Fox et Turner n'avaient pas de position dominante et a rejeté la plainte. Osiptel, pendant ce temps, a décidé que Telefónica occupait une position dominante et que les accords d'exclusivité avec la Fox et Turner avaient des effets négatifs sur les concurrents et amplifiaient les barrières à l'entrée. L'Osiptel a donc ordonné l'annulation de ces accords. Le délégué indique que ce type de problème est maintenant évité, car dans la loi amendée l'Osiptel est habilitée à examiner les affaires de concurrence dans lesquelles l'une des parties à la transaction est un opérateur de télécommunications.

Le délégué de la Tunisie indique que dans la phase actuelle de transition, le secteur de la radiodiffusion est capital pour instaurer un climat démocratique et consolider la liberté d'expression. Avant la révolution, le marché de la radiodiffusion télévisuelle était fortement concentré et dominé par les chaînes de télévision publiques. Après janvier 2011, les marchés de la télévision et de la radio se sont sensiblement développés et sont devenus moins concentrés. Le délégué indique que la Haute Autorité Indépendante pour la Communication Audiovisuelle (HAICA) a été créée récemment pour remplir le rôle de régulateur sectoriel.

L'affaire la plus importante traitée par le Conseil tunisien de la concurrence (CTC), qui concernait la commercialisation de matches de football télévisés, fournit un exemple de problèmes d'accès à des données suffisantes. En 2010, la CTC a constaté que la Fédération Tunisienne de Football (FTF) et la Télévision Nationale Tunisienne (TNT) avaient conclu un accord anticoncurrentiel selon lequel la FTF accordait à la TNT l'exclusivité de la retransmission des matches de football. Le CTC a décidé que l'accord créait des barrières à l'entrée et excluait des concurrents. La principale difficulté dans cette affaire tenait à l'indisponibilité d'indicateurs majeurs (parts de marché et chiffres d'affaires), les parties refusant de coopérer.

## 5. Remarques finales

Le *Président* met un terme à la Table ronde en concluant que le secteur de la télévision et de la radiodiffusion est sensible à plusieurs égards. Il compte une multitude d'acteurs qui influent à différents degrés sur le fonctionnement du marché. Un premier aspect à noter est celui de la capacité des consommateurs à payer. Deuxièmement, le secteur se caractérise par une forte dimension socio-politique. Troisièmement, sa réglementation fait intervenir non seulement des considérations de politique publique, mais aussi des aspects techniques, sociaux et économiques. Par ailleurs, le marché connaît des bouleversements dus au changement technologique, qui contraignent les acteurs à réévaluer des questions majeures comme les frontières des marchés de produits, l'accès au contenu, l'accès aux équipements de transmission ou la composition de la chaîne verticale. De plus, la neutralité technologique et l'égalité des conditions de concurrence deviennent de plus en plus pertinentes. Enfin, le paradigme de la politique de la concurrence gagne en importance sur les considérations de politique publique, ce qui entraîne un certain nombre de conséquences quant aux dispositions de fond et à la coopération institutionnelle.

Le Président remercie aussi bien les experts que les délégués pour leurs contributions.



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3	Competition Policy and Film Distribution	OCDE/GD(96)60
4	Efficiency Claims in Mergers and Other Horizontal Agreements	OCDE/GD(96)65
5	The Essential Facilities Concept	OCDE/GD(96)113
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