EUROPEAN PERSPECTIVE ON THE MEDIA SECTOR: COMPETITION VERSUS REGULATION

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INTRODUCTION

An overview of the media markets suggests a rapid growth characteristic of a fast moving market at the integration of some of the most dynamic segments of media. The main players are the established incumbents upstream and the delivery segments of media downstream. The presence of incumbents, inheritors of previous public monopolies has led Member States to use regulation in a complementary role with competition.

In these markets, the strategy in delivering new products and services and new geographic markets focuses less on organic growth than on alliances and mergers in order to: create either multi-media offshoots; bid for control of content rights; increase products and services diffusion; develop technologies for conditional access and

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transmission standard or thereby to, perhaps, capture advantages through proprietary technology. And the result tends to vertically integrated dominant position either upstream or downstream. There is nothing wrong with vertical integration except when there is market power at one stage of the vertical chain.

Indeed, as far as the media industry is concerned, there are scopes for specific challenges at a European level. The new EU regulatory framework grants some specific competition principles which can be integrated into *ex-ante* regulation. The EU merger control may also prevent potential distortion of competition resulting from the creation or the strengthening of a single or collective dominant position in the media sector at a horizontal level, from foreclosure effects at a vertical level. The EU antitrust control may also ensure that media firms do not engage in restrictive agreements with other competitors or abuse their market power to the detriment of competitors and consumers. Last, the application of the EU State aid rules should guarantee that competition issues in the media sector are properly addressed.2

1. OVERVIEW OF THE MEDIA INDUSTRY

1.1. THE MARKET PLAYERS, THE MARKET SIZE, AND THE VALUE ADDED CHAIN

Many players interact along the media vertical chain. The classical typology of activities in the media markets is the following :3

- The rights’ holders (sports, books, music labels, events, etc) which usually includes the rights’ owners and the rights’ dealers. Rights’ owners are the primary source of content rights. Rights’ owners usually grant rights to content producers. Rights’ dealers are intermediary players who may exploit the rights directly from the rights’ owners or may intervene in the selling of content productions;

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2 This last point will however not be treated in this article.

3 See ANNEX 1 for a complex example: the book chain.
The content producers (films’ producers, TV producers, publishers, etc) are responsible for the production of content by combining know-how and the exploitation of rights.⁴

The aggregators/marketers are responsible for the aggregation of different contents. In the TV business, typical aggregators are public service or free commercial broadcasters as well as pay TV operators. The growing importance of the Internet has prompted the ISPs to become also aggregators of content and content suppliers are offering their services more and more via the Internet. In the book industry, marketers are also called diffusors and are responsible for the diffusion of publishing houses. The aggregators are often associated with distributors but not necessarily.

The distributors are responsible for the transport and the distribution of content products to end users – either retailers or final customers - via all forms of distribution technologies or networks: satellite, cable, terrestrial ADLS, mobile network or via traditional transports of books, CDs etc. The cable industry dominated the pay television landscape with a mostly one-way analogue system capable of delivering forty channels but the direct broadcast satellite now competes with the cable former monopoly situation. The competition of the satellite in the pay TV market has had the effect that now cable operators hugely invest in upgrading their old infrastructure into a two-way digital broadband system. Distributors may be also considered as access providers whose role is to manage end users

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⁴ In terms of market size, the European movie production industry turnover was estimated to around 4bn euros in 2000, with the 50 leading European film production companies having a combined operating revenue of 2.8bn euros. It is a growing market and the production of film has increased from 443 in 1995 to 604 in 2000, with France, Germany, the UK and Italy representing together three quarters of the total European Union film production in 2000. The European television production industry turnover was estimated to be 11.2bn euros in 2000 and also grew over the last two decades. The multiplication of TV channels with growing importance of commercial broadcaster and advertising market, the increasing prices for sport rights, the increasing prices for US production and the increasing demand for local constraints are the most important drivers explaining high growth.
and are indeed responsible for the billing process and customer relationship;

- **The retailers** are the final media players in the value chain. Retailers sell the content products to the final customers either directly or via end users equipment such as set-top boxes, etc.

![Figure 1: the media chain](image-url)
1.2. BUSINESS STRATEGIES

Increasing competition and the importance of technological investment have led to a change in the industry structure leading to the creation of large integrated and international audio-visual groups.\(^5\) In particular, the industry evolution was characterized by different trends in the last years:

- The diversification of access providers and networks to the content production and the packaging industry, these companies wanting to move up the value added chain of industry and to capture more of consumer spending.\(^6\)

- The investment of paper-press firms into the audio-visual industry, since audio-visual operators are competing for the same advertising budgets.\(^7\)

- The diversification of companies not previously active in the media industry in the audio-visual industry, expecting that media would generate higher returns than traditional industries.\(^8\)

- The diversification of customer equipment industry into the content production industry to be able to impose their standards when launching new services.\(^9\)

Indeed, these different strategies of the media players have led to a large change of the media industry structure. Key forces in the media environment may also have an effect on the market structure. Increasing costs for premium rights’ content may increase competition between broadcasters and may favour *de novo* a strategy of vertical integration. In other segments like the content production, barriers to entry

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\(^5\) See in particular “Outlook of the developments of technologies and markets for the European Audiovisual sector up to 2010” by Andersen.

\(^6\) AOL/Time Warner, Telefonica, etc.

\(^7\) Bertelsmann, Lagardère Group, etc.

\(^8\) Bouygues, etc.

\(^9\) Sony, etc.
may decrease as a result of the digitalisation of the industry. The proliferation of new formats may also lead to new entrants. The increasing number of network technologies may also raise competition between access providers and between aggregators/marketers for audience and advertising. Market consolidation by large pan-European groups may also limit the access to distribution channels for small or regional content producers or aggregators/marketers.

Finally, the media industry is characterized by a clear dynamic trend. As a result of new technologies and innovation, new formats and products are constantly appearing, thus creating new markets with new rights attached. The strategies of the different media players have also led to (i) a higher degree of media convergence, and; (ii) in order to protect or extend market power to another segment of the media chain, to strong vertical relationships – either through exclusive contracts or ownership linkages. Indeed, the key questions for competition authorities and regulators are :

- Within the EU, both at national and European level, should this market changes result in changes in the regulatory framework?

- Should antitrust and merger control apply to the media industry as in the other sectors?

- In particular, how does competition policy apply to premium rights like sports’ or films’ rights?

### 2. REGULATION VERSUS COMPETITION IN THE COMMUNICATION SERVICES AND MEDIA SECTOR

Are competition rules sufficient to ensure consumer welfare in sectors being recently liberalised as television, telecommunications or more generally media?

These sectors are still dominated by incumbents who are in each Member State the inheritors of previous public monopolies. That has led Member States to use
regulation and competition in a complementary role in the process of liberalisation. In some EU countries, competition and regulatory authorities are even merged, or they combine the regulators of related sectors. In the UK, OFCOM combines regulatory and competition competences and has supervisory functions such as overseeing media plurality, control of use and regulated use of common facilities.

On the regulatory side, Europe has developed a framework in which National Regulatory Authorities (NRAs) implement European-wide directives in close cooperation with the Directorate General of the Commission in charge of the specific regulation (DG INFSO, DG EAC) and EC Competition law applies in parallel. That implies close cooperation between regulators and competition authorities in the liberalised sectors (telecommunications, television, radio).

In the old regulatory framework for electronic communications, different rules applied for basically the same services depending on the use of different technical infrastructures. The new regulatory framework for electronic communication services and network (which has been in place since July 2003) is a response to the convergence challenge with the possibilities offered by new technology (in particular digital technology) that data may be transmitted to a very large number of users through different networks. Applications and services are decoupled from the mechanisms of transmission and radio, television programmes may be delivered by mobile networks, cable, satellite, Internet… At the same time, traditionally separate media may be put together (sound, video, voice, text) in a single multimedia production using digital technology. In the new regulatory framework, the same regulation applies for the same service independently of the technical infrastructure used.

If different services such as television, telephony and Internet access can now be provided by different infrastructures (cable, television, telephone network or satellite), consumers are not interested in the network infrastructure itself but in what the new networks make possible in terms of media and content. At the same time, there is the question of whether the best approach to help consumers in terms of prices and range of services is through ex-ante regulation or the application of competition rules. In principle, as competition becomes more effective with the process of liberalisation,
much of the sector-specific regulation will be replaced by the application of general competition rules. Ex-ante obligations should only be imposed where competition law remedies are not sufficient to address the problem. From that point of view the general objective of the new regulatory framework was to find the appropriate balance between ex-ante regulatory approach and ex-post competition approach (see Annex on the new regulatory framework).

Ex-ante regulation focuses on the conditions of access to common facilities (pricing, non discrimination) but also on other aspects, in particular in the media sector. In the US, the Federal Communications Commission (FCC) has long had regulations limiting media concentration and cross-ownership between different kinds of media such as newspapers or television. Competition policy instruments are used in the cases of abuse of dominant position or cartels to find structural or behavioural remedies. In the EU, regulatory and competition authorities are both trying to push the process of liberalisation of telecom and media sectors, opening the way to new entrants. As far as the media and communication sectors are concerned, there are challenges in areas where new technology developments and business strategies have required a response at a European level: Recent challenges have arisen for both institutions with the promotion of competition in the last link with the final consumers via the cable or the local loop.

2.1. THE CABLE

On June 1999, the Commission adopted a directive under Article 86(3)\textsuperscript{10} on competition in telecommunication and media services. Pursuant to this directive, Member States must ensure that telecommunication operators in dominant positions pursue their cable television activities in structurally separate companies. A telecom operator active in both networks is faced with the conflict of interests that exists between the operation of the two networks: investment and upgrading of the cable network that competes with its own telephone network for voice telephony or investment and upgrading of the telephone network which also allows broadband transmission and television services. Structurally legal separation was the minimum

regulatory requirement needed to deal with this problem but several operators took the
decision to go one step further with the divestment of their cable network.
The Directives also require Member States to allow cable television network to
provide telecommunication services under the same regulatory conditions as any pure
telecommunication operators.
In the case of France the provision of telecommunication services by the cable
operators required the prior consultation of all the municipalities concerned and a
number of municipalities refused the permission for cable operator to provide
telephone services. Moreover, cable operators do not enjoy the same conditions to
use public facilities as the telecommunication operators. For example, the charges for
using public facilities are much higher for cable operators than telecommunication
operators. The Commission started an investigation in response to a complaint of the
French Association of Multi-Service Network Operators and on 8 April 2003, the
Commission sent France a reasoned opinion for having failed to comply with the
“Cable Directive” and the “full competition” directive concerning the abolition of the
restriction on the use of cable television networks for the provision of already
liberalised telecommunication services.

2.2. THE LOCAL “LOOP UNBUNDLING”

In July 2000, the Commission proposed a new regulation requiring local loop
unbundling which entered into force on 2 January 2001. This regulation imposes
mandatory access to the incumbent telecommunication’s local network by new
entrants in order to introduce competition in the last segment of the telecom networks.
The local loop was considered to be the most appropriate mean of delivering
broadband services relatively cheaply, rapidly and efficiently to a widespread
customer base. In many EU countries a very limited proportion of households is
connected to a cable network and in other Member States, cable networks still need
costly upgrades to be appropriate for two way broadband communication.
The main point of discussion was not so much the principle of the unbundling of local
loop but the pricing of local loop. In a report for the Commission, J. Gual and P.
Seabright presented the two economic considerations to take into account: “The first
is that, given the networks are in place, access to these networks should be available
to the operator that would make the most efficient use of them. The second issue is
that investment in future networks should be encouraged by the promise of prices that enable a proper sector, including a return to risk taking”.

On 21 May, the Commission adopted an Article 82 decision regarding the pricing strategy of Deutsche Telekom AG (O.J. L263, p.9, 14/10/2003). The Commission found that DT was charging new entrants fees for wholesale access to the local loop which were either higher or too close to what final users had to pay to DT for retail lines. This pricing policy (“margin squeeze”) discouraged new entrants from entering the telecommunication market and therefore reduced the choice of suppliers of telecommunication services for final users. The Commission found that the price difference between DT’s retail and wholesale prices was insufficient to cover DT’s product-specific cost of providing its own retail services.

2.3. THE SERVICES AND FACILITIES USED BY BROADCASTERS TO TRANSMIT TO END-USERS OF TELEVISION AND RADIO - AN EXAMPLE OF THE IMPLEMENTATION OF THE NEW REGULATORY FRAMEWORK

Television and radio services are accessed through different transmission channels: the masts and sites of the terrestrial transmission network, the cable transmission and finally the satellite transmission. Generally, national regulatory authorities consider that cable and satellite transmission are in a different market from terrestrial transmission.

In many Member States, cable and satellite transmission services have regulation in place. For example, in the UK cable providers have an obligation to carry the public services channels free of charge to all cable viewers. Satellite providers are required to offer conditional access on regulated terms to all broadcasters11.

On the basis of the new regulatory framework for electronic communication, national regulators had to review competition in communication markets to ensure that regulation is appropriate, taking into account market conditions. In the UK, OFCOM has considered broadcasting television and radio transmission to end-users. Concerning terrestrial transmission, two forms exist, analogue and digital. In terms of

11 OFTEL « Review of Competition: broadcasting transmission services », November 2003
their customer base they are similar but they differ in terms of transmission equipment used and the capacity of carriage, with digital offering the possibility to carry much more content than analogue. OFCOM analysed the market position of NTL and Crown Castle, the two UK operators of the sites and the antennae support structure (mast and towers) for the purposes of broadcasting transmission in the UK. Their initial views are that Crown Castle and NTL both have Significant Market Power (dominant in the sense of Article 82, see Annex on the new regulatory framework) in the market for access to their respective mast and sites for the purposes of analogue and digital terrestrial television broadcasting transmission services. However, for terrestrial radio transmission, OFCOM’s views were that no transmission provider is dominant.

Given the ability of Crown Castle and NTL to behave to an appreciable extent independently of competitors and customers for analogue and digital terrestrial television broadcasting, OFCOM proposes to impose conditions on these operators.

- Requirement to provide network access on reasonable request and on fair and reasonable terms that are reflective of cost.

- Requirement to publish a reference offer and not to unduly discriminate.

For OFCOM, these conditions will enable third parties (providers of electronic communication services and networks) to access the masts and sites of NTL and Crown Castle in order to broadcast television programmes in any area in the UK.

3. ANTITRUST AND MERGER CONTROL IN THE MEDIA MARKETS

In parallel with the use of regulation by sectoral regulators, competition authorities intervene. Antitrust and Merger Controls are instruments that can be applied by European regulators to prevent distortions of competition that may arise as a result of the creation, the strengthening or the abuse of dominant positions in the media markets. Both vertical and horizontal competitive concerns may arise in the media sectors.
3.1. VERTICAL ISSUES

**The rationale behind vertical foreclosure**

Vertical mergers or exclusive vertical contracts may occur between firms when a firm’s product is a component or a complement of the other firm’s one and where products are considered as two distinct markets. Evaluating vertical integrations or exclusive vertical arrangements in dynamic and innovative markets like the media markets presents challenges to competition policy. Such behaviours may achieve pro-competitive efficiency benefits. Vertical integration may undo the effects of imperfect competition at one stage of the vertical chain, eliminating the double marginalisation problem and creating thus efficiencies that benefit the final consumers with lower prices.\(^{12}\) It may lead to synergistic improvements of current products or to the development of new ones. These incentives may be important in the media business. It may also allow a better coordination between upstream and downstream firms, generating cost efficiencies, for example, by streamlining distribution or lowering transaction costs. Finally, knowing that media contents are usually characterized by large sunk costs, vertical integrations may also encourage media operators to invest upstream allowing thus them to keep under direct control downstream revenue flows.

However, competition concerns may arise in vertical integrations when a firm has market power either at the upstream level and/or at the downstream level. This is also the case in exclusionary vertical arrangements when contracts exhibit an excessive duration or when exclusivity concerns premium contents. Such premium contents may also be bundled in joint selling arrangements and may thus still remain inaccessible to potential entrants or current competitors. In these situations, a firm may restrict output in one market by using its market power in the other one, thus

\(^{12}\) Market inefficiency may be due to the so-called double marginalisation, which means that in the absence of vertical integration each firm aims at setting its price at the level where marginal revenue equals marginal cost, but in doing so it fails to internalise the effect that its production and pricing has on the other firm. By vertically integrating, the upstream and the downstream firms may undo such inefficiency and achieve the volume of production that maximises the overall profit.
leading to foreclosure concerns. By definition, vertical foreclosure may arise when a dominant firm controls an input – the bottleneck segment – that is essential for an adjacent market – the potentially competitive market. The bottleneck segment may be either upstream – on the content side - or downstream – on the distribution side.-

The media industry may have characteristics that make foreclosure more likely. In media markets, behaviours that give rise to foreclosure issues are typically situations of leveraging market power from traditional onto new media markets or situations in which a dominant firm (i) denies access to premium content or to scarce distribution network needed by a potential entrant or a current competitor; or (ii) grants long-term exclusive licenses for premium content to a single operator. Premium contents in the media business are by definition scarce inputs like premium sport rights, film rights, or music inputs. In a climate of a rapid growth characteristic of a fast moving market

The incentives to foreclose are diverse. First, firms may vertically integrate to protect market power preventing thus downstream rent dissipation. This concern may arise because the bottleneck owner of premium inputs faces a commitment problem. He would be able to extract his monopoly rent only if he can commit not to sell to the different downstream firms more than the monopoly quantity of premium input and never to set his price below the monopoly level. Finally, once he makes a deal with a first downstream firm, even though these firms will compete with the first one, he has an incentive to sell the premium good to the other firms, depreciating thus the value of its good. See in particular the analysis of Rey and Tirole (2003). Second, firms may vertically integrate to extend market power to another stage of the vertical chain. By integrating backward, firms may thus lock up the supply of a scarce input and vice-versa.

However, according to the Chicago School scholars, there is no rationale for foreclosure as there is only one monopoly rent to extract from the two markets, the one of the monopolized market. Thus, vertical integration or exclusive vertical arrangements should rarely raise anti-competitive concerns. See, for example, Bork (1995) and Posner (1976). Finally, the post-Chicago School literature, recognises that, under certain circumstances, vertical mergers or exclusive vertical contracting may produce anti-competitive effects. The basic assumption is that such practices may modify the incentives of the entity in its dealings with competitors both upstream and downstream. Thus, in setting prices to unaffiliated firms the entity would take into account the impact of competition on the profits of its integrated businesses. For an analysis of the rationale and the social costs of market foreclosure, see Rey and Tirole (2003). See also the abundant literature on vertical mergers, among others: Salinger (1988), Ordover, Saloner and Salop (1990); Hart and Tirole (1990); Riordan and Salop (1995); and on exclusive vertical contracting, see in particular: Aghion and Bolton (1987); Bernheim and Whinston (1998); Segal and Whinston (2000); Rasmussen and al. (1991).
and the emergence of new media market, access to premium contents upstream is crucial to the developments of current competitors or new entrants downstream. In particular, premium contents are vital for new developing platforms like mobile, ADSL or DTT,\textsuperscript{14} which compete with dominant pay TV operators. These contents usually boost the growth of innovative services and therefore the market demand. Access to scarce downstream technical platforms is also of high importance for upstream media operators. Without any access to this system and to the provision of related technical services, rivals would not be able to operate fiercely. Indeed, competition law enforcement should apply to the media industry. Enforcers should balance efficiencies versus foreclosure concerns in order to ensure access by media players to key inputs, to promote market opening and innovation, and therefore to enhance consumers’ surplus.

**Merger Control in the case of vertical mergers**

The Commission has treated different foreclosure cases in a series of merger and antitrust decisions in the media industry. Recent merger Decisions include *AOL/Time Warner (2000), Vivendi/Universal (2000),* and *Telepiù/Stream (2003).*\textsuperscript{15} These transactions may reflect the motivation of players to gain access to all stages in the vertical chain with the final aim of deterring potential entry.

**AOL/Time Warner**

In 2000, the Commission gave conditional approval to the *AOL/Time Warner* merger. Time Warner is one of the world's biggest media and entertainment companies with interests in television and cable networks, magazines, book publishing, music, filmed entertainment. AOL is the leading Internet access provider in the United States and the only provider with a pan-European presence. In Europe, AOL operates mainly through two joint ventures: AOL Europe, a 50/50 deal with Bertelsmann, and AOL

\textsuperscript{14} Digital Terrestrial Transmission.

\textsuperscript{15} AOL/Time Warner COMP/M. 1845; Vivendi/Universal COMP/M. 2050; Telepiù/Stream COMP/M. 2876.
Compuserve France, a venture with both Bertelsmann and Vivendi subsidiaries Cegetel and Canal Plus.

The merger created: (i) the first Internet vertically-integrated content provider, distributing Time Warner branded content (music, news, films, etc.) through AOL's Internet distribution network; (ii) a dominant player through the combination of the music library of Time Warner and Bertelsmann accounting on average for approximately 30-40% of all music rights at a European level and exceeding 30-40% in a number of European countries. The concentration raised serious competition concerns, in particular because of the structural links and some existing contractual arrangements with Bertelsmann:

- AOL could have refused to carry the content of competitors of Time Warner and Bertelsmann or toughen the terms of trade to bias the market towards them. The latter strategy could have been implemented by AOL charging higher prices or degrading the quality of rivals’ content, including making access to rival content slower or more difficult;

- Time Warner and Bertelsmann would have had an incentive to favour AOL and discriminate against competing network operators in Europe. Thus, Time Warner and Bertelsmann could have refused to supply its content to other Internet companies competing with AOL or toughen the terms of trade by means of price or non-price strategies.

Therefore, in order to solve the competition problems created by the transaction, it was necessary to prevent AOL from having preferential access to both Time Warner’s and Bertelsmann’s music rights. To this end the parties gave a number of undertakings aimed at severing all structural links between AOL and Bertelsmann. As a result of these undertakings, Bertelsmann would progressively exit from its European joint ventures with AOL and AOL would meanwhile be precluded from exercising certain contractual rights, gaining preferential access to Bertelsmann’s content.
In 2000, the Commission cleared the merger between Vivendi, Canal+ and Seagram subject to conditions. Vivendi is a leading French company with activities in telecommunications networks and related services, cinema and pay-TV through its 49% equity interest in Canal+, its 25% equity interest in BSkyB (a British pay-TV operator). The Canadian group Seagram is active in particular in the films and in the music businesses, especially through its subsidiary Universal.

The integration of Universal’s premium (films) content with Canal+ would *per se* have strengthened the latter’s market power in the pay-TV market. The transaction would also reinforce Canal+’s bargaining power vis-à-vis the other US studios, in particular with respect to premium films. As a result, the pay-TV markets where Canal+ was active would be foreclosed because of its control over the premium input.

Vivendi offered a package of commitments which includes access for competitors to Universal's film production and co-production. In particular, the parties undertook not to grant to Canal+ ‘first window’ rights,\(^\text{16}\) covering more than 50% of Universal production and co-production.\(^\text{17}\)

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16 Films showed on pay-TV shortly after cinema exhibition and video rental are said to be released on ‘first window’, that is before they are available more widely on television.

17 This commitment covers the following countries: France, Belgium, Italy, The Netherlands, Spain, and the Nordic countries, and has a duration of five years. The notifying party also proposed the divestment of its stake in British pay-TV company BSkyB, which has links with Fox, a major US film studio.
**Stream and Telepiù**

In 2003, the Commission cleared the merger between *Stream and Telepiù* subject to conditions. Telepiù and Stream are both Italian pay-TV platforms, the former controlled by the French firm Vivendi/Universal and the latter by NewsCorp and Telecom Italia.

The deal created a quasi-monopoly in the Italian satellite pay-TV market. The operation also raises competition concerns regarding:

- The acquisition of broadcasting rights for "premium" content such as blockbuster movies and football matches;
- The access to TV platform for potential entrants.18

Clearance was based on the following opening measures on both content and platform: (i) NewsCorp would waive exclusive rights in relation to such content for non-satellite transmission. Cable, DTT and Internet operators will thus be able to buy content directly from right owners (e.g. film producers, football clubs, other sport rights’ owners); (ii) non-satellite competitors would be able to buy premium contents from NewsCorp by means of a "wholesale offer" based on the so-called "retail minus principle". The wholesale offer would work on an unbundled and non-exclusive basis;

18 Competitive constraints will come in the future from e.Biscom (a cable operator with some capacity resources), from future Digital Terrestrial Transmission (DTT) broadcasters, from satellite TV channels and possibly from an alternative fully-fledged satellite platform. Indeed, it was indispensable that blockbuster movies and football matches be accessible in the future, as premium content is what drives subscriptions to pay-TV. Moreover, specifically as regards potential competition from satellite operators, access to a satellite platform and related services are key. In the absence of corrective measures, NewsCorp would be the "gatekeeper" for the access to the technical satellite platform. The technical platform is a system controlling conditional access and the provision of the related technical services. The technical platform deciphers the signals broadcasted by the programme supplier and transmits them to subscribers via the set-top box. NewsCorp would also be the "gatekeeper" for the Conditional Access System (CAS) technology (the software programme which allows set-top boxes to decrypt the encrypted signal) as the new company will most likely adopt the proprietary technology of NDS, a NewsCorp subsidiary. New entrants would thus depend on NewsCorp to obtain licences. Moreover, potential competitors not willing to use NewsCorp's CAS technology would depend on NewsCorp's willingness to co-operate for the setting up of simulcrypt arrangements - i.e. systems allowing the same set-top box to "read" signals encrypted with different technologies.
(iii) access to content would be facilitated also for potential satellite competitors by allowing rights’ owners to unilaterally terminate with no applicable penalties their ongoing contracts with the combined platform and by limiting the duration of future contracts (2 years for football clubs and 3 years for film producers); (iii) Newscorp would grant satellite competitors access to its own platform and would offer all related services under fair and reasonable conditions; (iv) Newscorp would grant licences for its proprietary CAS technology to all applicants on a fair and non-discriminatory basis. Finally, Newscorp would be obliged to enter into simulcrypt agreements within nine months from the request by competitors willing to adopt a CAS technology other than the one owned by Newscorp.

**Antitrust cases**

Joint selling of media premium contents or exclusive licensing to downstream TV operators may raise antitrust concerns. In particular, restrictions affecting neighbouring markets and holdbacks of content for new media markets, especially for new entrants, could lead to anti-competitive effects and in particular may raise foreclosure issues.

**UEFA Champions League**

In 2003, the Commission adopted a formal exemption Decision concerning the joint selling arrangement regarding the sale of the commercial rights of the UEFA Champions League, a pan-European club football competition.

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19 Still to facilitate entry of satellite competitors, Newscorp has also undertaken not to “black-out” so-called second window movie rights. These are rights relating to the delayed and cheaper (compared to first window rights) release of blockbuster movies on pay-TV. In the absence of these conditions, Newscorp would have been able to decide to buy only first window rights while at the same time preventing potential competitors from buying second window rights. Thanks to this undertaking, barriers to entry have been further lowered and consumers might be able to decide when and at what price to watch movies on pay-TV.


21 The Champions League is a tournament organised every year between the top European football clubs, 72 clubs participate from both European Union and non-EU countries. The last stage, which
Until 2003 UEFA sold all the TV rights to the final stages of the UEFA Champions League on behalf of the clubs participating in the league. The rights were sold, by means of a public bidding process, as a bundle on an exclusive basis for up to four years to a single broadcaster in each Member State, in general a free-to-air television company which would normally sub-licence some rights to a pay-TV player.22

The Commission identified different patterns of competition concerns:

- The sale of the entire rights on an exclusive basis and for a long period of time would have the effect of foreclosing the market and thereby reinforcing the position of the incumbent broadcasters. It may also prevent the individual football clubs from individually marketing such rights;

- This, in turn, by barring access to key sport content, would lead to limit the development of sport services on emerging new media markets like the Internet and the new generation of mobile phones.

The main principles of the Commission’s Decision set up a refined scheme of limitations on the scope of exclusivity based on (i) an open tender; (ii) the unbundling of offer; (iii) no excessive exclusivity/no automatic renewal23 – with the final aim of keeping markets open to new entrants. In particular UEFA will continue to market the rights to live TV transmission of the Tuesday and Wednesday night matches centrally. This one-stop-shop for the sale of rights may balance the anti-competitive effects by reducing the transaction costs and by fostering the branding image of the UEFA Champions League products. Nevertheless, the main rights will be split into two separate rights’ packages giving the winning broadcasters the right to pick the two best matches. UEFA will initially have the exclusive right to sell the remaining live

begins in September, comprises the 32 qualifying clubs. The Champions League season ends in May of the following year. The Regulations of the UEFA Champions League provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs. These rules were notified to the Commission in 1999.

22 One of the drawbacks of the system is that some of the rights, including live footage, were unexploited. In fact, the clubs and possibly other players such as regional television channels or small pay-per-view companies, would be happy to use these rights.

23 UEFA will not sell the rights for a period longer than three years and will do so through a public tender procedure allowing all broadcasters to put in bids.
rights of the Champions League products. However, if it does not manage to sell these within a certain cut-off date, the individual clubs will be able to market the matches themselves. Indeed, the new joint selling system would also afford opportunities to new media operators as both UEFA and the football clubs will be able to offer Champions League content to Internet and operators seeking to launch or boost the new generation of mobile phone services using the UMTS technology. Individual football clubs would also, for the first time, have the right to exploit TV rights on a deferred basis and to use archive content, e.g. for the production of videos, therefore providing their fans with a better and more varied offer.

3.2. HORIZONTAL ISSUES

Antitrust cases

In media markets, anti-competitive horizontal effects may emerge as a result of an excessive pooling of media rights. Antitrust concerns may arise when either joint selling or joint purchasing limit or foreclose entry of potential competitors like TV operators or rights’ traders or purchasers. In the media business, joint selling refers to a situation in which a firm, a media right owner like a sport association or a rights’ trader or seller (i) is dominant in the upstream product markets, the premium media contents, and; (ii) bundle media contents to few and big media operators and thereby restricts competition. This may be particularly the case when a right trader offers significant discounts on the purchase of subsequent premium content prior to the purchase of another content. This second content could be either secondary or another premium content. Joint purchasing refers to a situation in which a group of firms purchase jointly premium media contents in order to foreclose rivals by making access to contents more costly to them. The restrictive character of joint selling or joint purchasing could be aggravated by an exclusivity attached to the relevant rights. However, note that potential efficiencies like lower transaction costs, scale economies or lower risk, may balance the final assessment.

24 In this section, excessive pooling is non exclusive. Exclusivity in joint selling or joint purchasing contracts is analysed in our previous section on “vertical effects”.

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As in the case of horizontal foreclosure, the incentives to foreclose horizontally are diverse. Firms may protect entry or to extend market power from a dominant market to a potentially competitive market. Anti-competitive horizontal effects may be particularly relevant in the top football leagues at a national level. At a European level, the joint purchasing by the EBU (‘the European Broadcasting Union’) of the Olympic Games’ rights is currently under the scrutiny of the Court of Justice.

**Merger Control in the case of horizontal mergers**

Under Merger Control, horizontal competition issues may arise in media markets when regulators face the combination of dominant positions leading to either single or collective dominance. However, in media markets, one could often observe the emergence of the combination of horizontal and vertical effects. This was particularly

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25 As in the situation of vertical foreclosure, and according to the Chicago School scholars, there is no rationale for horizontal foreclosure. However, the Chicago results are based on strict assumptions such as monopoly in one market – the tying market, perfect Bertrand competition and constant return to scale (free entry) in the competitive market – the tied market; in most cases both goods are used in fixed proportions. Departures from the Chicago assumptions may lead to anti-competitive effects. Other motivations for tying/bundling aside from foreclosure are (i) price discrimination, and; (ii) the softening of competition. Thus, tying/bundling may be an effective tool of price discrimination as it may reduce the dispersion in valuations that consumers may have on both goods, allowing thus the firm to capture 100% of the consumers’ surplus. In the case of little differentiation in the tied good market, tying/bundling may soften competition by inducing an increase in the degree of differentiation between the firm and its rivals. Indeed, these strategies are clearly motivated by other purposes than entry deterrence effects. For the literature concerning tying/bundling see in particular: Carlton and Waldman (2001-2002), Carbajo, De Meza and Seidmann (1990); Choi and Stefanidis (2001), Nalebuff (1999) and (2000); Whinston (1990).

26 By decision of 2000, The Commission granted a (second) exemption to EBU. Among others, the exemption was subject to a sub-licensing scheme of the EBU to third parties of the jointly acquired television rights to sport events. On 2002, the Court of First Instance, annulled the Commission decision. The EBU appealed against this judgement to the European Court of Justice. This judgement is still pending. See judgment of the Court of First Instance in joined cases T-185/00, M6 and Others v Commission; T-216/00, Antena 3 de television and others v Commission; T-299/00, Gestevisión Telecinco v Commission; T-300/00, SIC v Commission.
investigated in the *Sony/BMG (2004)* and the *Lagardère/Editis (2004)* Decisions.\(^{27}\) For the latter, unilateral effects\(^{28}\) were also a competitive concern.

### Lagardère/Editis

In 2004, the Commission gives the go-ahead for *Lagardère* to acquire part of the publishing business of *Editis* (former *VUP*). Editis is the biggest publisher, marketer and distributor of French-language books. Lagardère, through its subsidiary Hachette Livre, is second, just behind Editis. Lagardère also does business in the retail sale of books, television and radio, and the publication and distribution of newspapers.

In its inquiry, the Commission examined horizontal, vertical, and unilateral effects\(^{29}\):

- Through their many publishing houses and their distribution and logistics systems, Lagardère and Editis may dominate the entire book chain\(^{30}\) in the French-speaking countries of the European Union. In particular, the transaction would have created or strengthened dominant positions both at the upstream level – the purchase and sale of publishing rights – as well as

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\(^{27}\) Sony/BMG COMP/M. 3333, Lagardère/Editis COMP/M. 2978.

\(^{28}\) Unilateral effects refer to situation where two competing firms merge to form a single entity leading to a price increase that results from the firms' individual changes or adjustments following that merger in a particular market. Unilateral effects are now fulfilled with the Commission New Notice on Horizontal mergers; see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ/2004/C 31/03.

\(^{29}\) Unilateral effects were also analysed and included in the final Decision, see the econometric study carried out by the Commission : "Evaluation Économétrique des Effets de la Concentration Lagardère/VUP sur le Marché du Livre de Littérature Générale", by Jérôme Foncel et Marc Ivaldi, revised and increased final version, September 2003. Unilateral effects measure the impact of the concentration between Lagardère and Editis on the public selling prices in the retail market for both hardcovers and paperbacks in general literature (in the absence of reliable data available on the level of the discounts granted to the retailers). Before the merger with Editis, if Hachette Livre (subsidiary of Lagardère) decided to increase prices unilaterally, parts of these final consumers would turn to other competing publishers, among which Editis. As a result of the concentration with Editis, Hachette absorbs a part of these competitive pressures, and can thus recover a part of these customers.

\(^{30}\) From author to reader a book follows a chain in which various intermediate players have a role: the rights’ holder, the publisher, the marketer, the distributor, the wholesaler and the retailer.
at the downstream level – the distribution and sale of books by publishers to retailers (notably fiction in hard covers and paperback, books for young people, practical guides, school books and other textbooks, dictionaries and general encyclopaedias);

- The new entity would also control access to premium input, i.e. well-known authors, whose sales are the lifeblood of publishers;

- In the retail markets of all general literature books (pocket and hardcover formats), from the retailers to the final consumer, the econometric study indicates that, as a result of the merger, prices of the published books would increase significantly. According to the study, which used the Bootstrap method to construct confidence intervals, there is only a 5% probability that the price rise due the concentration could not be included in a significant interval. Consumers’ surplus would also fall significantly, accounting for a non-negligible part of the industry turnover in the general literature field.

In reply to the Commission's concerns, Lagardère has undertaken to sell Editis with the exception of the some assets, which make up around 40% of the total company turnover.

Sony/BMG

31 In addition to the Bootstrap method, different elements speak for the robustness of the model: the very high number of observations; the different statistical tests of significance and robustness, the stability of the main parameters (e.g. the marginal utility of a given book and the intra-brand correlation). Overall, the model employed is very robust and is in line with the state-of-the-art of empirical analysis in such a market.

32 i.e: The Larousse publishing house and all of its business and its publisher's lists; the Dalloz publishing house and all of its business and its publisher's lists; the Dunod publishing house and all of its business and its publisher's lists; the academic lists made up of the publishers’ lists of Armand Colin, Sedes and Nathan Université and the academic journals; the Spanish group Anaya and all of its business and its publisher's lists; the Ivry distribution centre.
In 2004, the Commission cleared the merger between Sony and Bertelsmann thus allowing the combination of their respective global recorded music businesses in a joint venture to be called SonyBMG. The companies’ music publishing, manufacturing and distribution of records would remain separate.

The Commission identified different patterns of competition concerns:

- At a horizontal level, the Commission has assessed whether the deal could create or strengthen a collective dominant position between Sony/BMG, Universal, EMI and Warner Music (the other main players in the music industry) in the recording market. The remaining four major players would hold approximately 80% of the recording market both at a European level and in most national markets in the European Economic Area. The rest of the market is characterised by a large number of mostly smaller players active on a national level. The Commission focussed its attention on the markets for recorded music. An analysis of a large amount of price data in the recorded music markets of the different European Economic Area countries indicated a relatively close price parallelism for CDs released by the majors in some countries as well as certain market indicators that could facilitate tacit coordination. On balance, however, the Commission had to conclude, taking into account a deficit in the transparency of the market, that the evidence found was not sufficient to demonstrate that coordinated pricing behaviour existed in the past. Moreover, a reduction from five to four major recording companies would create or strengthen a collective dominant position in the markets for recorded music.

- At a vertical level, the Commission also examined the merger’s impact in the emerging market for online music licences as well as online music

33 The recording market consists of the signing of artists, the actual recording of the songs, the marketing of the artists and their works and the sales of CDs.
distribution, but did not find any serious competition problems. The same applies to the examination of the vertical relationships between Sony/BMG’s recorded music and Bertelsmann’s downstream TV and radio activities in Germany, France, Belgium, Luxembourg and the Netherlands.

4. CONCLUSION

The media industry is mainly characterised by two principles. First, the media industry is a fast moving industry in which the position of the different players along the vertical chain may change rapidly. Thus, the media players may choose a strategy of forwards or backwards integration with the other players aiming at quickly gaining market power along the vertical chain. Second, this industry is characterised by strong public interest objectives of the national and the European authorities.

Indeed, the media sector remains at the top of the European competition policy concerns and the European regulators. European regulators usually intervene ex-ante in order to guarantee an access to common facilities and to certain media pluralism and diversity. In this industry, competition authorities particularly screen foreclosure concerns which are complex issues. Difficulties come from a constant balancing between pro-efficiency and anti-competitive concerns. A rule of reason may then be a good model of analysis to examine such difficult competitive concerns.

\[34\] Since Sony’s on-line music service does not at this point enjoy a dominant position in the market for on-line music there are no concerns that the merger will create or strengthen a dominant position in the on-line music market.

\[35\] There will not be a significant impact on competition caused by Bertelsmann’s link to the television industry since Bertelsmann does not enjoy a dominant position in the television market.
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ANNEX 1 - AN EXAMPLE OF A VERTICAL CHAIN MARKET

THE BOOK INDUSTRY

Books follow a circuit from author to final consumers - the readers. The different players that are involved at different stages are the authors and/or their representatives, the literary agents, respectively, the rights holders and dealers; the publisher, who plays the role of the content producers; the marketer/the wholesaler; the distributor and the retailer. In the upstream market, the French-language publisher approaches authors or non-French-language publishers, either directly or via literary agents representing them. The publisher designs and manufactures books and then sells them (generally via a marketer) to dealers, on the basis of an agreed discount. The publisher determines the retail price. Marketers and distributors respectively then market and distribute the published book to the downstream players, the dealers – booksellers, hypermarkets and wholesalers. The publishers remunerate them for these services on the basis of a percentage of the list price exclusive of taxes, net of returns. The marketer takes orders from retailers This service is performed by commercial teams consisting of representatives who present new issues, draw attention to existing titles and engage in other promotion operations, and passes them on to distributors. Distributors handle all logistical operations involved in getting books to the final customer, the reader. The distributor acts on behalf of publishers who may or may not belong to the same group as the distributor. The wholesaler is a special player that exercises a resale and marketing function which mainly consists of selling full assortments of books and/or full management of book departments.

36 Margins are mainly taken in the form of discounts calculated on the basis of the list price exclusive of tax (French PPHT) which the publisher or marketer will negotiate with the various retailers. The discounts are based on quantitative criteria linked to the number of titles stocked and qualitative criteria linked to the nature of the services rendered to facilitate book sales. This marketing system is similar in some ways to large-scale distribution, where the real business negotiations are on "back margins".

37 That is to say net of copies that retailers have been unable to sell and are entitled to return to the publisher at their own expense and on certain conditions.

38 This includes stocking titles, registering and checking orders, preparing and sending orders, managing returns, issuing delivery orders and invoices, managing client accounts and recovering amounts due.
("rack-jobbing", especially in supermarkets) with smaller retailers not specialising in selling books. 39 Retailers are classified in different categories depending on their degree of specialisation in book sales, their turnover, the number of titles they keep in stock and their sales area. They may be class 1, 2 or 3 retailers, hypermarkets or supermarkets. Class 1 and 2 retailers are larger bookshops and smaller local bookshops respectively. These retailers are supplied primarily by publishers’ vertically integrated marketing/distribution units, whereas class 3 retailers, most of which are small retail outlets and supermarkets, are supplied by wholesalers. Hypermarkets tend to operate via a central purchasing facility for their supplies of book titles. Retailers are remunerated on the basis of a discount on the list price exclusive of tax and sell their books to final consumers. Furthermore, book clubs, given certain specific features such as publication dates tend to be involved in re-issues and are in any case a separate, independent sales circuit.

ANNEX 2 – THE REGULATORY FRAMEWORK OF ELECTRONIC COMMUNICATION SERVICES

A. EX-ANTE REGULATION

In the new framework, markets to be regulated are defined in accordance with competition law criteria and principles. A “Recommendation on relevant Product and Service Markets within the electronic communication sector susceptible to ex-ante regulation” identifies those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the ex-ante imposition of regulatory obligations.

39 He takes his supplies direct from the publishers and generally has a sales depot or salesroom where retailers can come and obtain books if they wish to order small quantities or at short notice. Wholesalers are remunerated on the basis of discounts calculated on the list price exclusive of tax.
The governing criteria presented in the Recommendation in order to provide sufficient reasoning to justify the imposition of ex-ante regulatory obligations are the following:

**Static criteria:** existence of high and non-transitory entry barriers and the existence of natural monopolies (static criteria). Structural barriers to entry exist when the technology and the cost structures are such that they create asymmetric conditions preventing or even impeding market entry by the new entrants (substantial economies of scale and high sunk costs). Legal or regulatory barriers are not based on economic conditions but have direct effect on the conditions of entry (number of undertakings having access to spectrum).

**Dynamic criteria:** Given the dynamic character of the electronic communications markets, the possibility of overcoming static barriers within a relevant time must also be taken into consideration e.g. innovations from potential competitors not currently in the market.

**Criteria for adequate competition law remedies:** The decision to impose ex-ante regulatory obligations should depend on whether competition law remedies are not sufficient to redress market failures. Where the intervention needed to redress a market failure is extensive, for example because an assessment of costs based on detailed accounting is required (access pricing) or because frequent intervention is needed, ex-ante regulation could constitute an appropriate complement to competition law.

The list of markets presented in the Recommendation does not prevent an NRA from regulating other markets than those listed in this Recommendation. However, the NRA would need the Commission’s prior approval before imposing ex-ante regulatory obligations. NRAs therefore need to know what the Commission criteria for ex-ante regulation are before they extend regulation to markets other than those listed in the Recommendation, since the criteria for regulating national markets should be the same.

**B. DESIGNATION OF DOMINANT OPERATORS**
Under the new regulatory framework, NRAs should impose ex-ante obligations on operators only if they are in a dominant position within the meaning of Article 82 of the EC Treaty. That new definition of SMP is clarified in the “Guidelines on Market Analysis and the Calculation of Significant Market Power” in order to assist NRAs. That will put an end to the existing asymmetric treatment of companies which in the past, under the old framework, were deemed to have significant market power and were thus being subject to ex-ante regulation. The threshold to impose ex-ante obligation on operators under the old framework was a market share of only 25%. The application of fundamental competition law notions, such as market definition and dominance, in an ex-ante environment ensures a smooth transition towards a fully liberalised sector. The Guidelines essentially deal with two main issues, market definition and assessment of dominance in applying the competition rules, in particular, to the telecommunications’ sector.

C. APPROPRIATE REMEDIES

Under the new regulatory Framework, once an operator is designated as having SMP, the NRAs shall impose appropriate remedies on the basis of the relevant obligations listed in the directives.

The ascending hierarchy of obligations listed in the directives relates to transparency, non-discrimination, accounting separation, access, price control and cost accounting. When NRAs have decided on the appropriate remedy to be imposed on operators, the only recourse available to operators against the choice of this remedy is through the national courts. On the other hand, the Commission may intervene when NRAs impose on SMP operators obligations other than those listed in the Directive.

D. CONSULTATION WITH THE EC REGULATORY AUTHORITIES

The NRAs must analyse the product and service markets presented in the Recommendation, determine whether or not there is an SMP operator in these markets, and, finally, withdraw, amend or impose regulatory obligations as appropriate. An NRA may nevertheless challenge the Commission’s assessment and show that certain relevant markets within its territory have characteristics justifying
ex-ante obligations even if the markets are not included in the Recommendation. The assessment by NRAs in different Member States of SMP operators could diverge since SMP is defined on the basis of dominance in the sense of Article 82. The Commission is able to veto draft NRA decisions on SMP designation where interpretations of the concept of dominance diverge and in new markets not included in the Recommendation. This procedure will avoid NRAs defining an operator as dominant under sector-specific regulations when it is not dominant under competition law, and will oblige them to justify the regulation of markets other than those listed in the Recommendation.