



The Role of Media Pluralism in the Enforcement of EU Competition Law

Konstantina Bania

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Examining Board

Prof. Giorgio Monti, Supervisor-European University Institute
Dr. Rachael Craufurd-Smith, University of Edinburgh
Prof. Michal Gal, University of Haifa
Prof. Peggy Valcke, Katholieke Universiteit Leuven

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This thesis has been submitted for language correction

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ABSTRACT

EU Competition Law is generally believed to play a negligible role in protecting media pluralism. Three arguments are usually put forward to support this position. First, the application of EU competition law ensures market access, thereby potentially delivering an outcome that is of benefit to media pluralism, but this outcome is entirely dependent on the economic concerns the European Commission attempts to address in each individual case and hence (at best) coincidental. Second, precisely because it is driven by efficiency considerations, EU competition law is incapable of grasping the qualitative dimension of media pluralism. Third, when exercising State aid control, the Commission can (and must) play only a marginal role in the planning and implementation of aid measures aimed at promoting media pluralism.

This thesis puts forward the claim that EU competition law has potential that remains unexplored by questioning the accuracy of the above three assumptions. To test this claim, it examines a number of traditional and new media markets (broadcasting, print and digital publishing, online search, and news aggregation) and competition law issues (concentrations, resale price maintenance agreements, online agencies, abuses of dominance, and State aids to public service media). The study demonstrates that if relevant assessments are conducted properly, that is, by duly taking account of the dimensions that drive competition in the media, including quality, variety and originality, and by making appropriate use of the tools provided by the applicable legal framework, EU competition law may go a long way towards safeguarding media pluralism without the need to stretch the limits of the Treaty on the Functioning of the European Union. Amidst a deregulatory trend towards the media and given that the likelihood that action with far-reaching implications under other branches of EU law is low, the normative suggestions put forward in this thesis possibly form the only realistic proposal on the contribution the EU can make to the protection of pluralism.

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Chapter 1 – Introduction

Digitization, the diffusion of broadband networks, and improvements in computing and wireless technologies are rapidly changing the media ecosystem as we know it. On the supply side, new distribution platforms have emerged, whereas spectrum shortages and large upfront investments have been replaced by unlimited space and the ability to set up an outlet at almost no cost. As a result, there has been a proliferation of content and sources with the era of technical and economic scarcity gradually being succeeded by what is referred to as the ‘era of communicative abundance’¹ or the ‘age of plenty’.² On the user side, these developments have brought individuals to a whole other level. Consumers can now access content anytime, anywhere and on any digital device from TV sets to tablets, from smartphones to laptops and desktops. Most importantly, web 2.0 may lead to unprecedented levels of engagement because citizens can actively participate in public discourse either by commenting on the content provided by mainstream media organizations or by creating their own outlets.

The digital revolution has undoubtedly brought significant benefits to media pluralism. As new sources may now instantly and effortlessly reach the public, audiences may access immeasurably more information than they could in the analogue environment. But the changes brought about by digital technologies have by no means rendered outdated the discussion over how media pluralism can be effectively protected. To the contrary, alongside concerns that policymakers attempted to address in the past, such as a concentration of ownership and interference with editorial freedom, which remain relevant, new concerns posed by businesses that have emerged with the advent of the Internet, such as search engines and digital content stores, have arisen.

More often than not, threats to media pluralism are not addressed in the domestic sphere. This is so for a number of reasons that may or may not be attributed to the Member States. For example, the legislator may have opted for a ‘light’ regulatory framework in order to advance national competitiveness vis-à-vis third countries. Where strict rules do apply, these cannot be enforced on media firms that are located outside the jurisdiction of the State the citizens of which they reach. In many cases, the shape of national media markets depends on action taken by the EU. For instance, concentrations of an EU dimension and the implementation of State aid schemes in support of media organizations are subject to the European Commission’s approval.

¹ Keane, J. (1999). *Public Life in the Era of Communicative Abundance*. Canadian Journal of Communication, 24, 165-78

² Ellis, J. (2002). *Seeing Things: Television in the Era of Uncertainty*. London and New York: I.B. Tauris

What role, if any, should the EU play in safeguarding media pluralism in all the above cases? This issue has attracted wide attention in the scholarly literature, which offers several approaches to whether, and if so to what extent, the EU may act to protect this value. Avenues that have been explored thus far include human rights monitoring under Article 7 TEU, the enactment of a pan-European instrument setting minimum standards, and the development of soft-law initiatives that may lead to sound policymaking at the national level. Yet, action that could be taken under the branch of EU law that has played the most decisive role in shaping the European media markets, namely competition law, has received little attention to date. This is arguably because there has been a great deal of misunderstanding about its likely contribution to pluralism. The objective of this thesis is to resolve this misunderstanding by identifying the unexplored potential of strict competition enforcement for promoting a pluralistic offer.

1. Laying the groundwork: The Gordian knot of EU competence in the area of media pluralism

The relationship between EU law and media pluralism has been a thorny one, not least for the complexities that arise in attempting to delineate competence boundaries. On the one hand, the Court of Justice of the EU has long held that media pluralism ‘is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, *which is one of the fundamental principles guaranteed by the [EU] legal order*’ [emphasis added].³ However, because the Member States have had a general human rights competence since the inception of the European integration project, the endorsement by the Court of a principle that was construed as a manifestation of the exercise of a human right that received wide recognition among Member States was meant to ensure that *the EU institutions* would not develop policies that would force Member States to ‘disapply constitutional rights or international human rights’, and to bind the Member States *only* when they applied EU law.⁴ This division of competences has remained intact after the most recent amendments introduced by the Lisbon Treaty; the Charter of Fundamental Rights is now legally binding, however, it also explicitly provides that it does not afford new powers

³ See, for instance, ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23-29, and ECJ, Case C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands* [1991] ECR I-4069, paragraph 30. While the EU has not acceded to the European Convention on Human Rights yet, all Member States are signatories to the Convention and, on some occasions, they have been brought before the European Court of Human Rights for violations of media pluralism. For an overview of this case law and a criticism of the relevant judicial mechanism see, for instance, Komorek, E. (2013). *Media Pluralism and European Union*, 61-81. Alphen aan den Rijn: Kluwer Law International

⁴ Besson, S. (2011). *The Human Rights Competence in the EU – The State of the Question after Lisbon*, 39. In Kofler, G., Miguel Poiares Maduro and Pasquale Pistone (eds.). *Taxation and Human Rights in Europe and in the World*. Amsterdam: IBFD

or tasks for the Union in the field of human rights.⁵ Hence, even if Article 11(2) of the Charter establishes the obligation to ‘respect’ media pluralism, the Member States are still primarily responsible for protecting this value in their jurisdiction.

On the other hand, the EU does not lack competence altogether to act in support of media pluralism. Article 7 TEU introduces a mechanism that equips the EU institutions with the means of ensuring that all Member States respect the Union’s founding principles, namely human rights, liberty, democracy, equality, and the rule of law.⁶ More particularly, Article 7 establishes a procedure whereby the Council may determine whether there is a *clear risk of a serious breach* or whether there has been a *serious and persistent breach* by a Member State of one of the aforementioned principles.⁷ Due to its deep-rooted relationship with freedom of expression, media pluralism is, *inter alia*, key to ‘the democratic process in the Member States and in the European Union as a whole’;⁸ media has the capacity to mold public opinion and, by exposing the citizens to diverse viewpoints, it allows them to make informed voting decisions. As a result, EU action against a Member State that engages in conduct harmful to media pluralism may rest on Article 7.

Moreover, media policies have traditionally been thought to form an integral part of the Member States’ cultural policies. This is so because one of the key roles that media is expected to play in a democracy is to advance social cohesion⁹ by ensuring that the various linguistic, cultural, and ethnic minorities of a given society are fairly and diversely represented.¹⁰ Pursuant to Articles 167(1) and 6(c) TFEU, the EU may carry out actions to support, coordinate or supplement action taken at the national level in order to contribute to the flowering of the cultures of the Member States.¹¹ Article 167(5) TFEU provides that, to fulfill the aforementioned objective, the EU may adopt incentive measures and recommendations,¹² but not instruments that would harmonize national

⁵ See Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 6 (1) and (2), and Charter of the Fundamental Rights of the European Union [2010] OJ C 83/389, Article 51(1). Article 51(1) explicitly lays down that its provisions bind the Member States only when they implement EU law and that the EU institutions must observe the principles enshrined therein ‘respecting the limits of the powers of the Union as conferred on it in the Treaties’

⁶ Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 2

⁷ For an overview of the actions that the Commission has undertaken in this field see: http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/133500_en.htm

⁸ European Commission (2007, January). Press Release IP/07/52. *Media pluralism: Commission stresses need for transparency, freedom and diversity in Europe’s media landscape*

⁹ On the link between social cohesion and democracy see, for instance, Henning, C. and Karin Renblad (2009). *Perspectives on Empowerment, Social Cohesion and Democracy – An International Anthology*. Jönköping: School of Health Sciences, Jönköping University

¹⁰ Lefever, K., Ellen Wauters and Peggy Valcke (2013, July). *Media Pluralism in the EU – Comparative analysis of measurements systems in Europe and US*, 7. Retrieved from: http://www.steunpuntmedia.be/wp-content/uploads/2014/03/Steunpunt-Media_ICRI_Monitoring_D1D2.pdf

¹¹ Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47

¹² For more information on the initiatives the EU has developed in this area see http://ec.europa.eu/culture/calls/index_en.htm The most widely known incentive measure adopted under Article 167(5) TFEU is the MEDIA program which ran from 1991 until 2013.

media laws and regulations. The *rationale* that lies behind assigning the EU subordinate tasks in this domain is that the Member States are better placed to develop the relevant legal tools in accordance with their traditions, community needs, and specificities of domestic markets.

Finally, the EU has extensive powers insofar as the economic aspects of this sector are concerned. More particularly, it has an exclusive competence to establish the competition rules that apply to undertakings that operate within the EU, thereby including domestic and international media firms, and a shared competence to adopt legally binding acts for the completion of the single market.¹³ Of course, regulating this industry in order to achieve the desired level of economic integration more often than not entails the adoption of measures that may somehow affect non-economic values. The Treaty itself acknowledges that tensions may arise as a result of the fact that media services are ‘as much cultural services as they are economic services’¹⁴ (the so-called culture/commodity conundrum), which is why Article 167(4) TFEU establishes the duty of the EU institutions to take media pluralism into account under other provisions of the Treaties.

As is clear from the above, the extent to which the EU may intervene in order to safeguard media pluralism is a labyrinthine, multi-layered competence matter that involves several types of action that may be taken under different branches of EU law. On several occasions, this different set of competences has created considerable uncertainty over how far the EU can go to protect this value, for it is difficult, if not impossible, to isolate economic considerations from the social, cultural, and political functions that the media is expected to perform.

2. Background, State-of-the-art, and Research Question

As already mentioned, media pluralism as an issue of concern to the EU is a topic that has been extensively discussed in the scholarly literature, which has explored the potential and weaknesses of the relevant EU legal toolkit from numerous perspectives. The purpose of this section is to summarize the major findings in this area, examine whether these findings remain the same in light

For more information see: http://eacea.ec.europa.eu/media/index_en.php On the strengths and weaknesses of measures adopted under this provision see, for instance, Hitchens, L. P. (1994). *Media Ownership and Control: A European Approach*. The Modern Law Review 57(4), 585-601; Craufurd-Smith (2004). *Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship*, European Law Review, 29(5), 668, and Komorek, E. (2013), *supra n. 3*, 185-187

¹³ Ibid., Article 4(2)(a)

¹⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 332/27, Recital (5)

of recent market and legal/regulatory developments, and identify the gap in the knowledge in the current body of literature that this thesis shall attempt to fill.

2.1 EU human rights law and media pluralism

In the field of human rights, Craufurd-Smith discussed the role of Article 7 TEU in ensuring that the Member States provide an adequate level of protection of pluralism within their jurisdiction.¹⁵ As noted above, this provision enables the EU institutions to act against a Member State that either clearly risks breaching¹⁶ or has already committed a serious and persistent breach¹⁷ of media pluralism. In the former case (e.g. where a Member State has enacted a law posing threats to journalistic freedom¹⁸), the Council may (but is not required to) ‘address recommendations’ to the Member State concerned.¹⁹ In the latter case (e.g. where a law posing threats to journalistic freedom has already been implemented²⁰), the Council may (but is not bound to) suspend certain of the rights deriving from the application of the Treaties to the Member State in question.²¹ Craufurd-Smith maintains that, in theory, Article 7 is a powerful instrument in the hands of the EU on the grounds that it may produce a deterrent effect.²² She acknowledges, however, that reliance on Article 7 to develop an EU policy that effectively protects media pluralism is problematic for many reasons: action under this provision is reactive in nature, suspension of Treaty rights may put in jeopardy the realization of the EU project by leading to an ‘anti-EU feeling’ within the Member State that is punished, and, perhaps more importantly, Article 7 has had limited to no practical significance because the political sensitivities surrounding its implementation are difficult to overcome.²³ She illustrates this latter point by describing a process initiated by petitions made to the European Parliament in 2003 under Article 194 of the then EC Treaty (currently Article 227 TFEU²⁴) regarding the level of concentration in the Italian broadcasting market.²⁵ The primary aim of the petitioners was

¹⁵ Craufurd-Smith, R. (2004), *supra n.* 12, 659-663

¹⁶ Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 7(1)

¹⁷ *Ibid.*, Article 7(2)

¹⁸ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM/2003/0606 final, 7

¹⁹ Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 7(1)

²⁰ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM/2003/0606 final, 8

²¹ Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 7(3)

²² Craufurd-Smith, R. (2004), *supra n.* 12, 661

²³ *Ibid.*, 659-662

²⁴ Article 227 TFEU reads as follows: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Community’s fields of activity and which affects him, her or it directly’

²⁵ Petition 356/2003 by Federico Orlando and three co-signatories (Italian), on behalf of the ‘Articolo 21 Liberi Di’ association, on the implementation of Article 7 of the Treaty on European Union regarding the protection of freedom of information in Italy and Petition 1256/2003 by Ornella Erminio and Petition 35/2004 by Marco Canepari and 3286 others on the breach committed by Italy of the freedom and pluralism of the media guaranteed by Article 6

for the Italian problem to be considered by the Council under Article 7.²⁶ Indeed, the European Parliament, having regard to Article 7, adopted a *Resolution on the risks of violations, in the EU and especially in Italy, of freedom of expression and information*.²⁷ After referring to, *inter alia*, the repeated instances of governmental interference with the editorial freedom of public broadcaster RAI,²⁸ and the conflict of interest arising from the fact that (the then) Prime Minister Silvio Berlusconi owned the most powerful private media group in Italy, the Parliament instructed its President to forward the resolution to the Council.²⁹ Nevertheless, the Council did not take action under Article 7(1) in order to determine whether there was a clear risk of media pluralism violations in Italy.

The point that the role of Article 7 TEU was, is and will most likely remain purely symbolic, even in cases of outright violations on behalf of the Member States,³⁰ has often been raised by human rights scholars.³¹ A recent case involving the Hungarian authorities lends further support to the argument that there is a ‘sense of futility in looking to Art. 7 as a meaningful basis for policy’.³² In 2010, Hungary adopted a controversial media law³³ that drew criticism from international organizations³⁴ and the governments of other Member States alike.³⁵ Media pluralism was found to be compromised, *inter alia*, because the law facilitated political interference with the appointment process of the members of the national media regulator and because it did not define abstract terms, including and especially the concept of ‘public order’, which could be misused to force journalists to

²⁶ Craufurd-Smith, R. (2004), *supra n.* 12, 660 referring to the text of the petition

²⁷ European Parliament Resolution of April 22, 2004 on the risks of violations, in the EU and especially in Italy, of freedom of expression and information, P5_ TA-PROV (2004) 0373

²⁸ *Ibid.*, paragraphs 55 and fol.

²⁹ *Ibid.*, paragraph 88

³⁰ Pinelli, C. (2012). *Protecting the Fundamentals. Article 7 of the Treaty on the European Union and beyond*, 6. Foundation for European Progressive Studies Working Paper. Note that, in addition to the tools provided by Article 7 TEU, Pinelli also explores the strengths and limitations of two further mechanisms that could contribute to the protection of human rights in the EU, namely ‘purely judicial intervention’ in cases of infringement of Article 20 TFEU and infringement proceedings under Articles 258-260 TFEU. Retrieved from: <http://www.feps-europe.eu/assets/9a4619cf-1a01-4f96-8e27-f33b65337a9b/protecting%20the%20fundamentals.pdf>

³¹ See, for instance, de Búrca, G. and Paul Craig (2011). *EU Law: Text, Cases, and Materials* (5th edition), 390. Oxford: OUP, and Müller, J-W. (2013). *Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order*, 17. Transatlantic Academy Paper Series 2012-2013, No. 3. For a general overview of the limitations of Article 7 TEU see, for instance, de Witte, B. and Gabriel N. Toggenburg (2004). *Human Rights and Membership of the European Union*. In Peers, S. and Angela Ward (eds.). *The EU Charter of Fundamental Rights*. Oxford: Hart Publishing, 59-82

³² Williams, A. (2006). *The indifferent gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's invasion of Iraq*. *European Law Review*, 31(1), 26

³³ European Commission. MEMO/11/89. *Media: Commission Vice-President Kroes welcomes amendments to Hungarian Media Law*. Retrieved from: http://europa.eu/rapid/press-release_MEMO-11-89_en.htm

³⁴ See, for instance, Council of Europe (2011, February). *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*. Retrieved from: <https://wcd.coe.int/ViewDoc.jsp?id=1751289>, and OSCE (2010). *Analysis and assessment of a package Hungarian legislation and draft legislation on media and telecommunications*. Retrieved from: <http://www.osce.org/fom/71218?download=true>

³⁵ See, for instance, *Chorus of Criticism: Germany Denounces New Hungarian Media Law*. Spiegel, 22 December 2010. Retrieved from: <http://www.spiegel.de/international/europe/chorus-of-criticism-germany-denounces-new-hungarian-media-law-a-736206.html>, and *Hungary PM slams French, German criticism of media law*. Agence France-Presse, 6 January 2011. Retrieved from: <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=hungary-pm-slams-french-german-criticism-on-media-law-2011-01-06>

disclose their sources.³⁶ In an attempt to convince Hungary to introduce substantial amendments to the law in question, the European Commission (hereinafter the Commission) embarked on a dialogue with the government,³⁷ whereas the European Parliament adopted a Resolution calling upon the State authorities ‘to restore independence of media governance and halt state interference with freedom of expression [...], [for] over-regulation of the media is counterproductive, jeopardizing effective pluralism in the public sphere’.³⁸ In spite of the fact that the above extra-legal initiatives³⁹ were not particularly fruitful, neither the Commission nor the European Parliament initiated proceedings under Article 7 TEU.⁴⁰

Yet, despite the fact that Article 7 has not been used to stigmatize or penalize a Member State that posed a threat to or has indeed harmed media pluralism, it has served as a basis on which the EU has attempted to build a system of regular monitoring of respect for human rights.⁴¹ Perhaps the first notable example of this line of effort⁴² is the Commission’s decision to entrust a Network of

³⁶ OSCE (2010, December). *Hungarian media law further endangers media freedom, says OSCE media freedom representative*. Retrieved from: <http://www.osce.org/fom/74687>

³⁷ European Commission (2011, January). Speech 11/6. *Hungary's new media law*. Retrieved from: http://europa.eu/rapid/press-release_SPEECH-11-6_en.htm

³⁸ European Parliament resolution of 10 March 2011 on media law in Hungary P7_TA (2011) 0094, paragraph 7. Retrieved from: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7_TA-2011-0094+0+DOC+XML+V0//EN Note that, as opposed to the Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (see *supra n. 27*, paragraph 83) to which I referred above, the Resolution on the media law in Hungary does not make any reference to the right of the European Parliament to initiate the Article 7 TEU procedure. It is further worth noting that the motion for a resolution prepared by the political group of the Greens/European Free Alliance includes a paragraph recalling ‘the possibility of the European Parliament to initiate the procedure under Article 7(1) TEU in view of determining whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, such as respect for freedom, democracy and human rights’, which was not incorporated into the final text of the resolution adopted by the European Parliament. See Motion for a Resolution on Media Law in Hungary, tabled by Daniel Cohn-Bendit, Rebecca Harms, Judith Sargentini, Helga Trüpel on behalf of the Greens/ European Free Alliance Group, B7-0103/2011 of 9.2.2011, paragraph 9. Retrieved from: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-103&language=EN>

³⁹ Note that Article 7 TEU does not require the EU institutions that are competent to initiate proceedings under either Article 7(1) or 7(2) to invite the Member State to submit observations. This step is taken only after the Council has decided to engage in determining whether a clear risk exists or a breach has been committed

⁴⁰ Note that in this case the EU institutions were entitled to initiate proceedings under Article 7(2) because the government appears to have used the law to engage in practices that aimed at suppressing information. For instance, the media regulator, which is in charge of regulating media content and granting broadcast licenses, cancelled the license of the leading independent radio station Klub Radio that has been critical of the ruling party. More particularly, Klub Radio was refused the renewal of its license because the tender issued by the media regulator for its frequency called for a station that would broadcast 60% music, explicitly laying down that bids for this frequency would be evaluated based on that criterion. However, this condition would substantially change the news station’s profile, which did not manage to get an approval decision. Furthermore, the findings of the Human Rights Watch research mission to Hungary, which was instructed to investigate the effects of the implementation of the media act, reveal that its entry into force was followed by political dismissals of journalists working for the public broadcaster as well as by an increase in political control over the latter’s editorial policies. For more information see Human Rights Watch (2012, February). *Memorandum to the European Union on Media Freedom in Hungary*. Retrieved from: <http://www.hrw.org/news/2012/02/16/memorandum-european-union-media-freedom-hungary>

⁴¹ While no reference to ‘regular monitoring’ of human rights protection is made in Article 7 TEU, the Commission and the European Parliament are of the view that the provision opens the door to the establishment of such a mechanism. See, for instance, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 9-10, and Motion for European Parliament Resolution on the situation as regards fundamental rights in the European Union (2002) (2002/2013(INI)), points 3 and 4. On this issue see, for instance, von Bogdandy, A. (2000). *The European Union as a Human Rights Organization? Human Rights and the Core of European Union*. Common Market Law Review, 37(6), 1318, and de Búrca, G. (2004). *Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union*. Fordham International Law Journal, 27(2), 713.

⁴² See Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM/2003/0606 final, 9

Independent Experts with the task to prepare annual reports on the situation of fundamental rights in the EU. This Network was created in 2002 and produced a total of four reports.⁴³ It was subsequently incorporated into the EU Fundamental Rights Agency (hereinafter the FRA)⁴⁴ that was established in 2007⁴⁵ in order to provide the EU and the Member States (when implementing EU law) with assistance and expertise on fundamental rights. Regrettably, the FRA's mission is far more limited than originally envisaged. More particularly, while the Commission had initially suggested the creation of an agency that would *systematically* oversee the situation on *the full spectrum* of fundamental rights in the Member States of the EU,⁴⁶ it was ultimately decided that the FRA's remit would cover certain thematic areas⁴⁷ that would be defined in advance by a Multi-Annual Framework.⁴⁸ The FRA's duties mainly consist of collecting data, preparing studies, publishing reports, and networking with civil society.⁴⁹ This 'minimalist mandate',⁵⁰ attributed to the Member States' unwillingness to allow the EU to expand its competence in the field of human rights,⁵¹ was unsurprisingly considered a 'missed opportunity'.⁵² Furthermore, the FRA does not have the power to decide on the topics that it studies, for it is the Council that adopts the Multi-Annual Framework.⁵³ This arguably undermines the FRA's independence⁵⁴ in that, as Williams puts it, it places the 'issue of human rights fully within the diplomatic realm allowing national government sensitivities to be protected'.⁵⁵

For our purposes, it bears noting that media pluralism has not been included in the Multi-Annual Frameworks that have been adopted thus far (covering the periods 2007-2012 and 2013-

⁴³ The Reports of the Network are available at: http://ec.europa.eu/justice/fundamental-rights/document/index_en.htm along with the annual reports on the application of the EU Charter of Fundamental Rights

⁴⁴ Retrieved from: http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/133500_en.htm

⁴⁵ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ [2007] OJ L 53/01

⁴⁶ European Policy Evaluation Consortium (EPEC) (2005). *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency Final Report*, 42-43

⁴⁷ See Commission proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, COM (2005) 280 final, 6. Retrieved from: http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0280en01.pdf, 6

⁴⁸ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ [2007] OJ L 53/01, Recital (11)

⁴⁹ Ibid., Article 4(1)

⁵⁰ Amnesty International (2007, March). Press Release. *EU Fundamental Rights: A long way to go*. Retrieved from: <http://www.amnesty.eu/en/news/press-releases/eu-human-rights-defenders/eu-fundamental-rights-a-long-way-to-go-0296/#.VWzNzs2kOPU>

⁵¹ Pinelli, C. (2012), *supra n.* 30, 13

⁵² Ibid.; Amnesty International (2007, March) *supra n.* 50, and Alegre, S. (2008). *Human Rights and the Future of the European Union*. A Justice Futures Paper, 12. Retrieved from: <http://www.statewatch.org/news/2008/apr/eu-justice-human%20rights-and-future-of-the-EU.pdf>

⁵³ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ [2007] OJ L 53/01, Recital (11)

⁵⁴ Milanova, N. (2011). *EU Agency for fundamental rights (FRA): a reality check*, 34-35. Report prepared for Human Rights Without Frontiers International. Retrieved from: <http://www.hrwf.net/index.php/publications/107-policy-and-advocacy-papers>

⁵⁵ Williams, A. (2010). *The Ethos of Europe. Values, Law and Justice in the EU*, 142. Cambridge: Cambridge University Press

2017).⁵⁶ However, the EU has not deleted media pluralism from its human rights agenda. To the contrary, over the past eight years it has undertaken initiatives that were based on its commitment to protect media pluralism ‘as an essential pillar of the right to information and freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights’.⁵⁷ For example, the Commission has published a number of texts that range from Working Papers on the status of media pluralism in the Member States⁵⁸ to Guidelines for EU support to media pluralism in enlargement countries.⁵⁹ The Commission has further financed studies in order to make available to the Member States instruments that would allow them to identify *lacunae* in relevant laws and modify them accordingly. For instance, the Commission commissioned an independent study which delivered the Media Pluralism Monitor, a diagnostic tool for understanding risks to media pluralism.⁶⁰ This tool is based on indicators that cover a range of legal, economic and socio-cultural dimensions in domains that are relevant to media pluralism, such as media ownership and control, safeguards for journalistic freedom, etc.⁶¹ Once this data is collected and processed by the software that was designed for its implementation, the Monitor may indicate a high risk, a moderate risk, or a low risk for media pluralism in the Member State concerned.⁶² The Commission also assigned a group of experts, known as the High-Level Group on Media Freedom and Media Pluralism, to analyze issues and provide a set of recommendations for the protection and support of media pluralism and freedom in Europe.⁶³ The High-Level Group delivered a report that tackled several issues of concern to the competent policymakers, such as political and private interference with editorial independence, concentration of ownership, and the levels of funding received by public service broadcasters, and put forward a number of proposals to address the problems to which these issues give rise.⁶⁴

⁵⁶ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ [2007] OJ L 53/01, Article 2. The remit includes information society but refers in particular to respect for private life and protection of personal data

⁵⁷ European Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32

⁵⁸ Ibid.. For additional documents the Commission has drafted in this area as well as Resolutions adopted by the European Parliament see footnotes 3 and 2 respectively of the Staff Working Document. See also European Commission (2005). *Issues paper for the Liverpool Audiovisual Conference: Media pluralism – What should be the European Union’s role?* Brussels: DG Information Society and Media

⁵⁹ European Commission, DG Enlargement (2014). *Guidelines for EU support to media freedom and media integrity in enlargement countries, 2014-2020*. Retrieved from: http://ec.europa.eu/enlargement/pdf/press_corner/elarg-guidelines-for-media-freedom-and-integrity_210214.pdf

⁶⁰ European Commission (2009). *Independent study on indicators for media pluralism in the Member States: Towards a risk-based approach*, ix. Retrieved from: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf

⁶¹ Ibid., ix

⁶² Ibid., 109

⁶³ High Level Group on Media Freedom and Pluralism (2013). *A free and pluralistic media to sustain European democracy*. Retrieved from: <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

⁶⁴ For more information on these and other initiatives undertaken by the Commission in this area see <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

The above initiatives (including any studies dealing with media pluralism that may be carried out by the FRA in the future) undoubtedly advance the debate on the challenges facing media pluralism. Furthermore, they involve independent reviewers, allow endemic violations of media pluralism to be identified, and, broadly speaking, they ensure that relevant suggestions are suited to the needs and traditions of the Member State concerned.⁶⁵ Yet, we cannot help but wonder whether studies commissioned by the EU institutions will produce any meaningful effects on the design of national media policies. The remark made by Craufurd-Smith regarding the potential impact of the reports prepared by the Network of Independent Experts appears to be relevant in the post-Lisbon era: Member States have occasionally been willing to disregard Court rulings⁶⁶ and we should not expect that they will be eager to follow expert committee recommendations on how to safeguard media pluralism in their jurisdiction, no matter how well-formulated these recommendations are. An example illustrating this point is that no Member State has taken the initiative to implement the Media Pluralism Monitor to date.⁶⁷

2.2 Single Market and Media Pluralism

Several studies discuss the impact of the completion of the single media market on media pluralism. This issue has been examined from two different perspectives, namely the desirability and legitimacy of adopting an instrument harmonizing national policies on media ownership that is based on one of the Treaty provisions related to the proper functioning of the internal market, and the effectiveness of existing instruments that primarily seek to facilitate the free movement of media services but also contain provisions that have as their objective the protection of media pluralism.

2.2.1. An instrument specifically aimed at addressing ownership concentration

The contribution that a pan-European legislative instrument addressing ownership concentration can make to the preservation of media pluralism is a long-standing debate that dates back to the early 1990s when the European Parliament called upon the Commission to propose a measure so as to introduce restrictions to media consolidation.⁶⁸ Ownership of or control over media organizations has been subject to regulatory intervention both across and beyond the European

⁶⁵ Craufurd-Smith, R. (2004), *supra n.* 12, 661. The same conclusion may be drawn in respect of any recommendations made by the Council under Article 7(1) TEU, if the latter provision is ever implemented

⁶⁶ *Ibid.* 660-661

⁶⁷ The EU assigned a research center, the Center for Media Pluralism and Freedom, to conduct the implementation, which, at the time of writing is an ongoing project

⁶⁸ European Commission. *Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action*. COM (92) 480 final, 7

Union⁶⁹ because it is generally believed that, due to the ability of the media to shape the political agenda and influence citizen behavior, accumulation of significant market power in the hands of a few ‘may result in a skewed public discourse where certain opinions are excluded or under-represented’.⁷⁰ The means through which national laws aim at alleviating concerns over media concentration vary from one country to another.⁷¹ For example, certain Member States impose limitations on the number of licenses that may be acquired by the same person or organization, whereas others impose thresholds on the audience shares that may be held by an individual or firm.⁷² These measures, however, have one thing in common: broadly speaking, they regulate economic aspects relating to the degree of market power any given media undertaking may exercise, but their primary objective is to ensure that the role of the media in maintaining a well-informed citizenry is not undermined.⁷³ As already seen, the Treaty does not provide the EU with a strong legal basis to enact an instrument that is solely or mainly concerned with achieving this latter objective. Nevertheless, it has been argued that because the EU has the power to regulate the media as ‘services’⁷⁴ and because the European project has evolved in a way that encompasses, but is not limited to, economic integration, there would be scope for a supranational instrument *if* national measures and/or action on behalf of the Member States were inadequate or insufficient to address the *cross-border* concerns that arise from media concentration.⁷⁵ Ariño puts forward two reasons why this may be the case. First, regulatory initiatives that sought to expedite the economic integration agenda allowed powerful media undertakings to expand into the markets of other Member States.⁷⁶ Perhaps the most prominent example of this type of initiative is the ‘country of origin’ principle whereby only one Member State has jurisdiction over an audiovisual media service provider.⁷⁷ On the basis of this principle, the provider may operate across the EU provided that it complies with the rules of the Member State from which it emanates with the receiving State not being entitled to exercise secondary control.⁷⁸ The ‘country of origin’ rule enabled media service providers to engage

⁶⁹ Valcke, P. (2011), *Looking For the User in Media Pluralism Regulation: Unraveling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation*. Journal of Information Policy 1, 291. Retrieved from: <http://jip.vmlhost.psu.edu/ojs/index.php/jip/article/view/31>

⁷⁰ European Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 5

⁷¹ For an overview of the different systems see Valcke, P. (2009). *From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods*. Journal of Media Business Studies 6(3), 19-42

⁷² Valcke, P. (2011), *supra n.* 69, 291

⁷³ Note that certain Member States also impose qualitative requirements (e.g. requirements relating to management board representation). For a brief overview see *ibid.*, 291-294

⁷⁴ The term ‘services’ is defined in Article 57 TFEU

⁷⁵ Ariño, M. (2005). *Regulation and Competition in European Digital Broadcasting - A study of pluralism through access*, 425-6. PhD thesis. Florence: European University Institute

⁷⁶ *Ibid.*, 426

⁷⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 332/27, Recital (33-34)

⁷⁸ *Ibid.*, Recital, (36). There are some exceptions to this rule which are laid down in Article 3 of the Directive

in activities that transcend national frontiers, such as direct broadcasts and the sale of program rights.⁷⁹ The abolition of obstacles to intra-Union trade has also facilitated an intense process of cross-border mergers and acquisitions.⁸⁰ The reasons for this latter development are manifold: the option to merge with or acquire a company operating beyond national frontiers may be appealing to media firms that seek to attract critical mass to their content, share investment risks, or because the national competition authority under the jurisdiction of which they fall did not let them fulfill further consolidation plans.⁸¹ As a result of the above, Ariño says, *it is becoming increasingly difficult for the Member States to apply their anti-concentration laws to media organizations with transnational ownership structures*, especially in cases where they deal with multinational corporations whose national affiliations are not strong enough to trigger the application of these laws.⁸² There have been cases that lend support to this argument. For example, the Greek competition authority cleared the acquisition by the Luxembourg-based media conglomerate RTL of one of the most popular generalist TV channels in Greece, Alpha TV, on the grounds that RTL had no other interests in the Greek media market and that Alpha TV did not control more than 35% of the affected market, which is the threshold set by Law 3592/2007 on media concentration.⁸³

Second, Ariño maintains that the Member States may *refrain from establishing strict ownership rules or even engage in a race-to-the bottom regulatory competition* in order to either attract profitable firms to their jurisdiction or provide them with the incentive not to move their operations to another State with less stringent regulation.⁸⁴ Indeed, over the past number of years, there has been ‘a wave of deregulation in [media] ownership rules across Europe’;⁸⁵ several Member States have either entirely abolished or significantly relaxed related restrictions.⁸⁶ Illustrative in this regard is the statement made by the UK authorities during the consultation on media ownership rules that preceded the adoption of the Communications Act 2003:

⁷⁹ See, for instance, European Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9, and European Commission Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 22

⁸⁰ European Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9

⁸¹ Council of Europe Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions (2004). *Report on Transnational media concentrations in Europe*, 10

⁸² Ariño, M. (2005), *supra n. 75*, 427

⁸³ Hellenic Competition Commission (2008). Decision 422/V/2008, *RTL Central & Eastern Europe/Wakerock Limited*, 13 and 19

⁸⁴ Ariño, M. (2005), *supra n. 75*, 427

⁸⁵ Commissariat voor de media (2011). *Media Monitor – The Dutch Media in 2010*, 6. Retrieved from: <http://77.87.161.246/wp-content/uploads/2013/08/Mediamonitor-The-Dutch-media-in-20101.pdf>

⁸⁶ See, for instance, Open Society Foundations (2012). *Mapping Digital Media in the European Union - A Report for the High-Level Group on Media Freedom and Pluralism*, 2. Retrieved from: http://www.opensocietyfoundations.org/sites/default/files/Mapping_Digital_Media_EU_20121217_0.pdf; Ofcom (2009). *Report on Media Ownership Rules*, pp. 21 *et seq.*, and Freedom House (2013). *Report on Spain*. Retrieved from: https://www.freedomhouse.org/report/freedom-press/2013/spain#.VMJr_M016eY

‘[w]hilst the need for a plurality of media sources remains clear, we are committed to a deregulatory approach to media markets. From a commercial point of view, further liberalization would benefit existing and potential new investors, providing for further consolidation, greater efficiency, more scope for investment, and a more significant international presence’.⁸⁷

Another example that reveals the Member States’ unwillingness to address media pluralism concerns that arise from excessive concentration is that Article 21(4) of the Merger Regulation,⁸⁸ which lays down that if the European Commission decides to clear a media concentration that does not raise concerns as to its compatibility with the common market, the Member States concerned may take appropriate measures to ensure that the transaction in question does not damage media pluralism in the domestic sphere, has had no practical significance.⁸⁹

Even if there is convincing evidence supporting the argument that, for a number of reasons, the Member States are not in the position or willing to deal with media concentration, the question remains as to what would be the appropriate legal basis for a supranational instrument that establishes restrictions on media ownership. Many claim that the instrument concerned may rest on Article 114 TFEU.⁹⁰ This provision stipulates that:

‘The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’.

The Court has held that the EU may make use of Article 114 TFEU in situations where, in the absence of action at EU level, the laws and/or practices of the Member States raise obstacles to the

⁸⁷ See UK Department for Culture, Media, and Sport (2001). *Consultation on Media Ownership Rules*, paragraph 1.8.

⁸⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1

⁸⁹ For a detailed analysis of the role that Article 21(4) of the Merger Regulation has played thus far see, for instance, Whish, R. and David Bailey (2012). *Competition Law* (7th edition), 852-4. Oxford: OUP, and Ariño, M. (2005), *supra n.* 75, 411. For our purposes here, suffice it to say that reference to media pluralism as a ground for application of Article 21(4) is made in two decisions, *News Corp/BSkyB* and Commission decision *Newspaper Publishing Case No IV/M.423* [1994] OJ C 85/5. It is worth mentioning that in both cases the UK authorities ultimately gave the green light to the transactions. In *News Corp/BSkyB*, the Secretary of Business, Innovation and Skills, who may intervene in mergers involving newspapers and/or broadcasting companies on public interest grounds, issued a ‘European intervention notice’, making the proposed operation subject to an additional review on media plurality issues by the competent UK authorities, namely OFT and Ofcom. After several undertakings proposed by the parties to the deal, the Secretary of State was willing to give the green light to the proposed transaction. However, due to a phone hacking scandal in which News Corp was found to be involved the same period of time that the deal was being negotiated, News Corp ended up dropping its plans to take full ownership of BSkyB. For an overview of this case see, for instance, http://blogs.lse.ac.uk/mediapolicyproject/resources/dossier-media-plurality/_Newspaper_Publishing was not even referred to the Monopolies and Mergers Commission: <http://www.publications.parliament.uk/pa/cm199394/cmhansrd/1994-03-18/Writtens-5.html> The legal framework which was applicable at the time was Article 58(3) of the Fair Trading Act, available at: <http://www.legislation.gov.uk/ukpga/1973/41> MGN, Prisa and Espresso were not successful in the bid. See: <http://ketupa.net/espresso2.htm>

⁹⁰ Craufurd-Smith (2004), *supra n.* 12, 663; Komorek, E. (2013), *supra n.* 3, 254-257. Craufurd-Smith and Barzanti have also explored the potential of a handful of Treaty provisions outside the realm of the internal market that could be used by the EU to regulate media pluralism, namely Articles 352 and 25 TFEU and Article 11 TEU. They both acknowledge, however, that any action under these provisions faces significant competence limitations and is unlikely to be backed by the Member States. See Craufurd-Smith (2004), *supra n.* 12, 664-666, and Barzanti F. (2012). *Governing the European Audiovisual Space: What modes of governance can facilitate a European approach to media pluralism?* EUI Working Papers RSCAS 2012/49, 19-20

completion of the internal market.⁹¹ In the case at hand, it has been contended that the disparities in the various anti-concentration measures that apply throughout the EU may, *inter alia*, lead to a drain of investment from countries with stringent ownership rules to countries where relaxed or no rules apply, ultimately fragmenting the internal market.⁹² However, Komorek identifies certain limitations that the use of Article 114 would entail that cannot easily be overlooked. More particularly, she notes that, when assessing whether an instrument rests on the correct legal basis, the Court takes account of the primary objective that the instrument pursues, the principles that underlie it and its ideological premises.⁹³ And she refers to the case where the Court was called upon to determine whether the correct legal basis for the Framework Directive on Waste was Article 192, which provides that the EU may adopt Directives that contribute to the preservation of the quality of the environment, or rather Article 114.⁹⁴ In this case, the Court held that, from the preambles of the Directive, it could be inferred that the instrument sought to achieve a high level of environmental protection and that, by virtue of the obligation it established, namely the duty to take action in order to encourage the reduction of waste production, it had as its object the management of waste.⁹⁵ The Court acknowledged that waste is a ‘good’ and that, as such, its free movement should not be prevented⁹⁶ as well as that some of the provisions of the Directive, in particular the introduction of a common definition of waste, could affect the functioning of the internal market,⁹⁷ but ruled that ‘recourse to Article [114] is not justified where the measure to be adopted has only *the incidental effect of harmonizing market conditions* within the [EU]’ [emphasis added].⁹⁸ Komorek claims that the Court is highly likely to follow a similar approach if it is called upon to examine whether an instrument harmonizing media ownership rules should rest on Article 114.⁹⁹ Indeed, as we have already seen, the anti-concentration laws of the Member States may regulate economic dimensions of the media, but the objective they seek to attain is a well-informed citizenry. It bears repeating that, contrary to environmental protection or any other area where the EU shares competence with the Member States, in the field of media the EU may solely take action to support national initiatives. In accordance with Article 167(5) TFEU, this action may not take the form of an instrument harmonizing national media

⁹¹ ECJ, Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-07079

⁹² Note that this is one of the justifications the Commission put forward in its Green Paper on *Pluralism and Media Concentration in the Internal Market - An Assessment of the Need for Community Action*. COM (92) 480 final, 87 *et seq.*

⁹³ Komorek, E. (2013), *supra n. 3*, 256 referring to Chalmers, D. Gareth Davies and Giorgio Monti (2006). *European Union Law: Text and Materials*, 212. Cambridge: Cambridge University Press. This is an approach that the Court has followed consistently throughout its case law. See, for instance, ECJ, Case C-295/90, *Parliament v. Council* [1992] ECR I-4193, paragraph 13 and ECJ, Case C-300/89, *Commission v. Council* [1991] ECR I-2867, paragraph 10

⁹⁴ ECJ, Case 155/91, *Commission of the European Communities v Council of the European Communities*, [1993] ECR I-00939

⁹⁵ *Ibid.*, 8-10

⁹⁶ *Ibid.*, 12

⁹⁷ *Ibid.*, 18

⁹⁸ *Ibid.*, 19

⁹⁹ Komorek, E. (2013), *supra n. 3*, 256-257

laws and regulations. That is to say, as opposed to the Framework Directive on Waste referred to above, the EU institutions are not entitled to base an instrument on media ownership on Article 167 TFEU alone. Along the same line, Harcourt points to the weak terms in which Article 167 TFEU is drafted, remarking that the Court is highly unlikely to back media concentration legislation ‘without an explicit Treaty statement from EU Member States’.¹⁰⁰

Leaving the issue of legal basis aside, we must also consider the feasibility of any proposals to enact pan-European rules on media concentration. In the late 1990s, the Member States rejected the Commission’s draft proposals for a ‘Media Pluralism’ Directive¹⁰¹ that would set common rules on media ownership across the EU and there are no signs indicating that the tide may be turning. To the contrary, during the consultation the Commission conducted in 2013, with the aim to collect opinions on whether the EU should be considered competent to act in order to safeguard media pluralism at State level,¹⁰² there was consensus among the Member States that the EU lacks the power ‘to develop a legislative framework to engage directly with media in an interventionist manner’.¹⁰³

2.2.2. Existing internal market instruments that include provisions specifically aimed at safeguarding media pluralism

As already mentioned, certain studies focus on the effectiveness of existing Directives that primarily facilitate the free movement of media services but also contain provisions that seek to ensure that the single media market is not realized at the expense of media pluralism. While these provisions are a clear attempt to comply with Article 167(4) TFEU, there have been strong doubts raised over whether they make a meaningful contribution to that end. A good example illustrating that the duties the aforementioned instruments impose may not be appropriate or sufficient to safeguard media pluralism is the ‘European works quota’ rule laid down in the Audiovisual Media Services Directive. Article 16(1) of the Directive provides that the ‘Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time excluding the time allotted to news, sports events, games,

¹⁰⁰ Harcourt, A. (2005). *The European Union and the Regulation of Media Markets*, 72. Manchester: Manchester University Press

¹⁰¹ On this issue see, for instance, Doyle, G. (1997) *From ‘Pluralism’ to ‘Ownership’: Europe’s emergent policy on Media Concentrations navigates the doldrums*. *Journal of Information Law and Technology* (3). Available online at: http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_3; Michalis, M. (1999). *European Union Broadcasting and Telecoms Towards a Convergent Regulatory Regime?* *European Journal of Communication*, 14 (2), 147-171, and Iosifides, Petros (1997). *Pluralism and media concentration policy in the European Union*. *Javnost-The Public*, 4(1), 85-104

¹⁰² European Commission (2013). *Public consultation on the Independent Report from the HLG on Media Freedom and Pluralism-Text of the consultation*, 9. Retrieved from: <https://ec.europa.eu/digital-agenda/en/news/public-consultation-independent-report-hlg-media-freedom-and-pluralism---read-contributions>

¹⁰³ *Ibid.*, 2

advertising, teletext services and teleshopping'. In a similar vein, Article 17 provides that the 'Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, [...] or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters'. The quota rule has traditionally been regarded as the main mechanism at EU level that is aimed at protecting pluralism¹⁰⁴ on the grounds that it ensures that citizens will have access to content provided by firms that are not owned or controlled by the broadcasters bound by the rule, and that broadcasters established in the EU are not limited to the transmission of generic format programming produced by non-European, most notably, US, media conglomerates.¹⁰⁵ The Member States have undoubtedly made significant progress since the Television Without Frontiers Directive, which first introduced this rule, entered into force. For example, while in 1994 several broadcasters of eight out of (the then) thirteen Member States did not broadcast the requisite proportion of European works,¹⁰⁶ the most recent report on the implementation of the Directive notes that the quotas are widely respected and that the average broadcasting time for European works in 2010 amounted to 64.3%.¹⁰⁷ However, this latter figure and any other related figure occasionally referred to by the Commission in its attempt to present the quota rules as a 'success story' have, arguably correctly, been treated with skepticism. Burri-Nenova, for instance, maintains that a high share of European productions is not a valid indication of a pluralistic offer for the reason that, for a work to be defined as 'European' for the purposes of the Directive, it is sufficient that the work originate in a Member State¹⁰⁸ and that no further conditions, including and especially originality or quality requirements, need to be fulfilled.¹⁰⁹ This definition, Burri-Nenova says, is not adequate to address the challenges facing diversity in the current broadcasting landscape, such as the growing homogenization of content and the steady decline in quality TV.¹¹⁰ As she so vividly puts it, 'a "Big Brother" type of show financed with European money qualifies perfectly as [...] a European work'.¹¹¹ It bears noting that the Directive provides that the Member States are allowed to adopt a

¹⁰⁴ Burri-Nenova, M. (2007). *The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity*. *Common Market Law Review*, 44(6), 1706

¹⁰⁵ *Ibid.*, fn. 120

¹⁰⁶ European Commission. Report on application of Directive 89/552/EEC and proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (presented by the Commission). COM (95) 86 final, 14

¹⁰⁷ European Commission. First report on the application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010. Promotion of European works in EU scheduled and on-demand audiovisual media services. COM (2012) 522 final, 9

¹⁰⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 332/27, Article 1(1)(n)

¹⁰⁹ Burri-Nenova, M. (2007), *supra n.* 104, 1707

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 1708. The same point is also raised by Harrison and Woods: the definition of European works 'does little or nothing to prevent the quotas being met by programs that are of poor quality and which do not therefore meet informational, educational and

more detailed definition of the term ‘European works’. Nevertheless, the vast majority of them transposed into national law the definition laid down in the Directive without establishing more stringent criteria.¹¹² Another criticism concerns the exclusion of news programming from the quota mechanism. Harrison and Woods note that the decision of the EU legislator to exclude from the quota calculation content with journalistic elements is an attempt to address industrial policy concerns, that is to say, an attempt to ensure that an *x* amount of broadcast time is devoted to entertainment content created with ‘European money’,¹¹³ rather than an effort to provide European citizens with more diverse programming, including and especially factual programming.¹¹⁴

Another example is the Universal Services Directive, which forms part of the EU Telecoms Package¹¹⁵ and which provides that, under certain circumstances, the Member States may impose ‘must carry’ obligations on undertakings providing electronic communications networks used for the distribution of radio and television broadcasts to the public.¹¹⁶ A ‘must carry’ obligation is the duty to carry certain channels that serve general interest objectives, which must be clearly defined by the Member State.¹¹⁷ These channels are often (but not necessarily) channels offered by public service broadcasting organizations which are financed through State resources and entrusted by the public

cultural aims or goals’. See Harrison, J. and Lorna Woods (2007). *European Broadcasting Law and Policy*, 247. Cambridge: Cambridge University Press

¹¹² Graham, D. and Associates (2009). *Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services (i.e. including television programs and non-linear services)*, 77. Retrieved from: http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/art4_5/final_report.pdf

¹¹³ This is also a point raised by Burri-Nenova. See *supra* n. 104, 1707

¹¹⁴ Harrison, J. and Lorna Woods (2007), *supra* n. 110, 248. For a critical overview of other aspects of the quota rules see *ibid.*, 249-265; de Witte, B. (1995). *The European Content Requirement – Five Years After*. In Barendt, E. (ed.). *Yearbook of Media and Entertainment Law*, 101-127. Oxford: Oxford University Press; Harrison, J. and Lorna Woods (2001). *Television Quotas: Protecting European Culture?* Entertainment Law Review, 12(1), 5-14; Lupinacci, T.M. (1991). *The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?* Vanderbilt Journal of Transnational Law, 24, 113-154; Katsirea, I. (2003). *Why The European Broadcasting Quota Should Be Abolished*. European Law Review, 28 (2). 190-209, and Drijber, B. J. (1999). *The Revised Television Without Frontiers Directive: Is It Fit For The Next Century?* Common Market Law Review, 36(1) 87-122. For a more general discussion of the quota rules see Herold, A. (2009). *The New Audiovisual Media Services Directive*. In Pauwels, C., Harri Kalimo, Karen Donders and Ben Van Rompuy (eds.), *Rethinking European Media and Communications Policy*, 107-115. Brussels: VUB Press. Two other provisions of the Audiovisual Media Services Directive that are related to the exercise of the right to information and hence, albeit indirectly, related to media pluralism are Articles 14 (‘listed events mechanism’ for the broadcasting of events of major societal importance) and 15 (short news reporting on events of high interest to the public). For a critical overview of these provisions see Ariño, M. (2005), *supra* n. 75, 253-259; Lefever, K. (2012). *New Media and Sport: International Legal Aspects*, 225-291. The Hague: T.M.C. Asser Press, and Helberger, N. (2006). *The “right to information” and digital broadcasting – About monsters, invisible men, and the future of European broadcasting regulation*. Entertainment Law Review, 17(2), 70-80

¹¹⁵ For a comprehensive overview of the rules established by the Telecoms Package see Helberger, N. (2005). *Regulating Conditional Access in Digital Broadcasting*. Alphen aan den Rijn: Kluwer Law International, and Harrison, J. and Lorna Woods (2007), *supra* n. 110, 115-145. For a brief overview of rules adopted by Member States to regulate Electronic Program Guides see, for instance, van der Sloot, B. (2012). *Walking a Thin Line: The Regulation of EPGs*. JIPITEC, 3, 138-147

¹¹⁶ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108/51, Recital (43), (2002 USD), and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance), Recital (48) (2009 USD)

¹¹⁷ 2009 USD, *supra* n. 116, Article 31(1)

authorities with safeguarding media pluralism by making available to the citizens a balanced and varied programming. The Directive explicitly states that Member States may determine appropriate remuneration for offering these channels,¹¹⁸ but in practice these are usually provided free-of-charge.¹¹⁹ While ‘must carry’ rules might have sound theoretical foundations (e.g. a vertically integrated network provider has the ability and incentive to grant preferential treatment to its own channels, marginalizing competing content, including content that is created with the aim to advance important societal goals), their design and implementation have been far from perfect. A common criticism of the ‘must carry’ rules is that they may bind the network providers *only*. The Directive explicitly lays down that undertakings ‘providing content such as the offer for sale of a package of sound or television broadcasting content’, that is, undertakings that operate at the level of the supply chain that succeeds network provision (commonly referred to as service providers), are not subject to ‘must carry’ obligations.¹²⁰ The channel that benefits from the ‘must carry’ status must negotiate usage of the facilities controlled by the service providers (on which accessibility for end-users to the content offered by the channel in question ultimately depends) on market terms. This, Varney and Feintuck say, is a ‘weakness in the current provisions and perhaps prevents Member States from making effective use of [the ‘must carry’ rules] to promote pluralism’.¹²¹ Indeed, if the objective of the ‘must carry’ duty is to establish a favorable regime for channels that bring an added value to the citizen, the exclusion of the service provider from the scope of the regime would appear to be a major obstacle to achieving this objective. This is particularly so, in cases where, even if the Member State has decided to establish ‘must carry’ rules, it may not enforce them on the network operator that carries the channels which are offered by the domestic service provider because the operator is established outside its jurisdiction.¹²² Another criticism concerns the narrow approach the Commission has followed in relation to how the Member States should define the ‘general interest’ objectives pursued by the channels that may benefit from ‘must carry’ status, potentially disrupting initiatives on behalf of the Member States that sought to stimulate media pluralism by granting the privilege to new (commercially funded) channels.¹²³

¹¹⁸ 2002 USD, *supra n.* 116, Article 31(2)

¹¹⁹ van Eijk, N. and Bart van der Sloot (2012). *Must-carry Regulation: a Must or a Burden?*, foreword. In European Audiovisual Observatory (ed.). *Must-carry: Renaissance or Reformation?* Iris plus 2012-5

¹²⁰ 2002 USD, *supra n.* 116, Recital 45

¹²¹ Feintuck, M. and Mike Varney (2010). *Regulating Media Markets: The Need for Subsidiarity and Clarity of Principle*, 169. In Birkinshaw, P. and Mike Varney (eds.). *The European Union Legal Order after Lisbon*. Alphen aan den Rijn: Kluwer Law International

¹²² On the issue of jurisdiction see Komorek, E. (2013), *supra n.* 3, 168

¹²³ On this issue and for a general criticism of the must-carry rules see, for instance, Valeke, P. (2006). *The Future of Must-Carry to a Concept of Universal Service in the Info-Communications Sector*. *Media Law and Policy*, 15(2), 247-267

The ‘European works quotas’ and ‘must carry’ obligations are two, and perhaps the most notable, examples of the type of legislative action the EU has taken to ensure that the single media market is not realized in ways that undermine media pluralism. Scholarly literature has put forward a number of reasons why the mechanisms the aforementioned rules establish have probably fallen foul of achieving that objective. Taking stock of the lessons learned, any legislative revisions would need to address the loopholes that have been left open. However, the following two points must be borne in mind: first, any future provisions attempting to protect media pluralism will always need to respect the division of competences between the EU and the Member States in this area. Second, and related to the above, the fact that the overwhelming majority of the Member States have decided not to attach to the term ‘European works’ quality or originality conditions illustrates that the national legislator may not be very keen to develop initiatives so as to ensure that relevant mechanisms will reach their full potential.

2.3. EU competition law and media pluralism

The question of whether, and if so to what extent, EU competition law can protect media pluralism has been a somewhat more complex topic in that, even those who argue in favor of an expansive approach to EU competence in the field of media, adopt different and, in some cases, opposing perspectives. Broadly speaking, the studies that discuss the strengths and weaknesses of EU competition law can be divided into three categories.

First, certain authors contend that EU competition law in general and merger control in particular can play a major role in preventing the accumulation of significant power in the hands of a few media owners, on the grounds that the compatibility of a concentration with the common market is assessed *ex ante* and that an increasingly large number of concentrations affecting the European media marketplace falls within the Commission’s (exclusive) competence.¹²⁴ However, according to these authors, to ensure that it leads to an outcome that is pluralism-friendly, the EU merger control system needs an ‘extra something’. This is because, so the argument goes, in certain cases the Commission is called upon to scrutinize concentrations which are not problematic from a competition perspective (e.g. where the merging firms are active in separate geographic markets), but which raise concerns over media pluralism (e.g. where the acquiring firm engages in practices that undermine journalistic freedom).¹²⁵ Proponents of this approach suggest that an obligation to conduct an

¹²⁴ Craufurd-Smith (2004), *supra n. 12*, 669; Ariño, M. (2005), *supra n. 75*, 405-412, and Komorek E. (2013), *supra n. 3*, 281-283

¹²⁵ Ariño, M. (2005), *supra n. 75*, 384-385; Komorek E. (2013), *supra n. 3*, 136-137, and Craufurd-Smith (2004), *supra n. 12*, 669

assessment of the effects of the concentration on media pluralism be incorporated into the Merger Regulation.¹²⁶ And they recommend the establishment of a specialist body within the Commission, or even the creation of a European media concentration authority that would advise the Competition Directorate-General on the pluralism-specific issues to which the concentration in question would give rise.¹²⁷ If this proposal materialized, EU merger control could indeed tackle problems that it cannot presently address. For example, currently, the Commission may check whether a merger will grant the involved firms the ability and incentive to foreclose competitors, thereby depriving consumers of a variety of choices.¹²⁸ Yet, a merger assessment that further seeks to determine the impact on media pluralism would also entail an analysis of whether the merged entity would acquire significant opinion-forming power, thereby being capable of marginalizing different viewpoints.¹²⁹ However, as advocates of this approach acknowledge, the above proposal raises at least three issues, which might render it an unrealistic and possibly unattractive alternative to the *status quo*. First, given the (politically and culturally) sensitive nature of a pluralism review, it is questionable whether the Commission, that is, a supranational competition authority, is the most appropriate institution to decide relevant matters.¹³⁰ Second, the proposal to establish a European body tasked with the duty to inform the Commission of the pluralism concerns that arise from media concentrations has in the past been turned down by the Commission.¹³¹ Third, and perhaps more importantly, the Member States would most likely be unwilling to support this idea in that integrating a pluralism assessment into the EU merger proceedings would probably be perceived ‘as an illegitimate attempt to do indirectly what could not be agreed directly through the “appropriate” regulatory procedures’.¹³²

¹²⁶ European Institute for the Media (2004). *The Information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed*, 251. Retrieved from: <http://edz.bib.uni-mannheim.de/daten/edz-ma/ep/04/pe358896-en.pdf>; Craufurd-Smith (2004), *supra n.* 12, 669; Ariño, M. (2005), *supra n.* 75, 405-410, and Komorek E. (2013), *supra n.* 3, 281-283

¹²⁷ *Ibid.*

¹²⁸ See Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 8 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraph 10

¹²⁹ See, for instance, Ofcom (2010). *Report on Public Interest test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation*, paragraph 1.18. Retrieved from: http://www.culture.gov.uk/images/publications/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf

¹³⁰ Craufurd-Smith (2004), *supra n.* 12, 670; Komorek E. (2013), *supra n.* 3, 281, and Ariño, M. (2005), *supra n.* 75, 405. Helberger takes the same position though she studies the application of EU competition law to media markets from a different perspective. See Helberger, N. (2005), *supra n.* 114, 190

¹³¹ Craufurd-Smith (2004), *supra n.* 12, 670 referring to Palzer, C. and Caroline Hilger (2001). *Media Supervision on the Threshold of the 21st Century - Structure and Powers of Regulatory Authorities in the Era of Convergence*. European Audiovisual Observatory 8 IRIS plus. Retrieved from: <http://www.obs.coe.int/documents/205595/264571/IRIS+plus+2001en4LA.pdf/264dd63f-96f1-46f5-ab8e-59ebb28aa514>

¹³² Craufurd-Smith (2004), *supra n.* 12, 670; Scheuer, A. and Peter Strothmann (2002). *Media Supervision on the Threshold of the 21st Century What are the Requirements of Broadcasting, Telecommunications and Concentration Regulation?*, 7. Retrieved from: <http://www.obs.coe.int/documents/205595/264573/IRIS+plus+2002en1LA.pdf/32fb1b2a-fb83-44e8-a0d3-384f3999b599>

The second avenue that is explored¹³³ is based on the same premise, namely that EU competition law can make an important contribution to the protection of media pluralism, but follows a more modest approach, which does not involve legislative amendments. Proponents of this latter approach argue that the competition provisions of the Treaty cannot be applied in a vacuum, that is to say, detached from the non-economic values that the EU is bound to respect.¹³⁴ As Article 167(4) TFEU dictates, so the argument goes, concerns over media pluralism that may arise in the context of competition proceedings must be duly considered and balanced against considerations of a purely economic nature. These studies primarily seek to determine whether the Commission may either permit restrictions of competition or sacrifice efficiency in order to ensure that media pluralism or any other non-economic value that is at stake is taken into account. For example, Van Rompuy maintains that, in deciding whether to grant an exemption to an anti-competitive agreement under Article 101(3) TFEU, the Commission should assess the restrictions of competition introduced by the agreement concerned against the efficiencies it may generate as well as against the contribution it may make to the enhancement of other public policy values.¹³⁵ In the case of mergers, Ariño argues that the Commission should opt for the ‘second’ or ‘third best’ alternative if the first, more efficient, solution is likely to endanger the democratic process.¹³⁶ In other words, according to Ariño, the Commission should be determined to forgo to some extent economies of scale and scope that could be achieved as a result of the merger in order to benefit media pluralism.¹³⁷ Advocates of this approach identify at least two weaknesses in attempting to apply competition law by reference to non-economic values. First, in cases where reconciliation between competition considerations and considerations relating to the non-economic value concerned is impossible, the former must supersede the latter, for otherwise the Commission would act in violation of the Treaties.¹³⁸ Second, given that after Regulation 1/2003 entered into force national competition authorities are entitled to apply Articles 101 and 102 TFEU,¹³⁹ the integration of non-economic considerations in relevant analyses may jeopardize legal certainty by leading to an inconsistent application of the competition provisions across the EU, possibly subjecting the latter to opportunistic and arbitrary

¹³³ Note that certain authors explore both the first approach discussed above as well as the second approach discussed here. See, for instance, Ariño, M. (2005), *supra n. 75*, 400-412

¹³⁴ See, for instance, Van Rompuy, B. (2012). *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?*, 283-404. Alphen aan den Rijn: Kluwer Law International; Lefever, K. (2012). *New Media and Sport: International Legal Aspects*, 118-128. The Hague: T.M.C. Asser Press (note that Van Rompuy and Lefever focus on broadcast rights to sports events); Ariño, M. (2005), *supra n. 75*, 400-405, and Psychogiopoulou, E. (2006). *The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?* *European Law Journal*, 12, 585-591

¹³⁵ Van Rompuy, B. (2012), *supra n. 133*, 228-229

¹³⁶ Ariño, M. (2005), *supra n. 75*, 402-403

¹³⁷ Ariño, M. (2004), *Competition Law and Pluralism in European Digital Broadcasting: Addressing the gaps*, *Communications and Strategies* 54, 118

¹³⁸ Ariño, M. (2005), *supra n. 75*, 402

¹³⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

interpretation.¹⁴⁰

Finally, there are studies that ascribe a negligible role to EU competition law as a tool for guaranteeing media pluralism.¹⁴¹ Three arguments are typically put forward in the relevant literature. The first two are intertwined and concern the trend that has emerged in EU competition enforcement over the past twenty years, namely the shift to a ‘more economics-based’ approach, which posits that economic efficiency and consumer welfare are the guiding principles of EU competition policy¹⁴² and that, as a result, concerns over other public policy values, including media pluralism,¹⁴³ are expelled from competition assessments. While critical of this paradigm shift, studies falling under the category examined here appear to have accepted that the Commission is unlikely to rearrange its priorities in order to make allowance for non-economic considerations.¹⁴⁴ And, on this basis, they identify the following two reasons why EU competition law is not adequate to safeguard media pluralism: first, *the application of EU competition law ensures market access* (e.g. by prohibiting a concentration that would grant the merging firms significant market power),¹⁴⁵ thus potentially delivering an outcome that is of benefit to media pluralism, but this outcome is entirely dependent on the economic concerns the Commission attempts to address in each individual case and hence (at best) coincidental.¹⁴⁶ Second, it is claimed that, precisely because it is driven by efficiency considerations, *EU competition law is incapable of grasping the ‘(coessential) qualitative (and not just quantitative) dimension’ of pluralism*.¹⁴⁷ That is to say, the narrowing of the objectives that competition law pursues makes it difficult, if not impossible, to embrace parameters other than cost reductions and lower prices. The third argument is related to competence limitations in the field of State aids. More particularly, it is pointed out that, when exercising State aid control the Commission can (and must) play *only a marginal role in the planning and implementation of aid measures aimed at promoting media pluralism*.¹⁴⁸ This marginal role is attributed to the Member States’ right to

¹⁴⁰ See Van Rompuy, B. (2012), *supra n.* 133, 403, and Harrison, J. and Lorna Woods (2007), *supra n.* 110, 166

¹⁴¹ Note that certain authors explore both the first approach discussed above as well as the third approach discussed here. See, for instance, Komorek, E. (2013), *supra n.* 3, 135-142 and 281-283

¹⁴² See Lowe, P., *Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?*, Speech given at the 13th International Conference on Competition and 14th European Competition Day, Munich, 27 March 2007

¹⁴³ See, for instance, Ibáñez Colomo, P. (2006), *Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector*. Research Papers in Law, 07/2006, Global Competition Law Centre, 26

¹⁴⁴ See, for instance, Barzanti, F. (2012), *supra n.* 90, 14-15

¹⁴⁵ Barzanti, F. (2012), *supra n.* 90, 14-15; Komorek, E. (2013), *supra n.* 3, 136-142; Ungerer, H. (2014). *The Reasons For Intervention Through Competition Policy*, 405-426. In Donders, K., Caroline Pauwels and Jan Loisen (ed.). *The Palgrave Handbook of European Media Policy*. New York: Palgrave Millan. The Commission takes the same position. See, for instance, European Commission (2005). *Issues paper for the Liverpool Audiovisual Conference: Media pluralism – What should be the European Union’s role?*, 2. Brussels: DG Information Society and Media and Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 7

¹⁴⁶ See Barzanti, F. (2012), *supra n.* 90, 14-15, and Komorek, E. (2013), *supra n.* 3, 136-142

¹⁴⁷ Barzanti, F. (2012), *supra n.* 90, 15. Harrison and Woods also appear to dismiss the idea that EU competition law may be applied by reference to qualitative considerations. See *supra n.* 110, 149-150

¹⁴⁸ See *infra n.* 166

design aid schemes as they deem appropriate, with the Commission being restricted to verifying that the monies dispersed do not exceed what is necessary to achieve the objective the measures concerned pursue.

While not entirely devoid of merit, the above three arguments raise strong doubts as to whether we should dismiss the idea that EU competition law can make a meaningful contribution to media pluralism, one that goes beyond the limits prescribed by the aforementioned studies. This is because, as opposed to all other suggestions that were examined above, the studies that belong to this category refer to the limitations without exploring the potential of strict competition enforcement. As a result, many questions remain unanswered. The loopholes the above three arguments leave open are examined in more detail below.

First, with respect to *access*, several authors refrain from testing the hypotheses on which the Commission has based its practice in order to ensure that media markets remain open to competition.¹⁴⁹ For example, to protect undistorted competition in broadcasting markets, the Commission has been mainly concerned with imposing behavioral remedies on undertakings that own or control access to premium content, namely content that has the capacity to attract large audiences.¹⁵⁰ The overwhelming majority of studies have been limited to discussing how these remedies were designed.¹⁵¹ Surely, access to premium content is a significant bottleneck in broadcasting markets and thus a topic worthy of discussion, but the issue of whether there are other tools in the Commission's hands that are more effective than access remedies must also be examined. Moreover, even if one insists that access must be ensured through commitments relating to the acquisition of premium content, we would still need to evaluate the effectiveness of the remedies that have been imposed thus far against how the markets evolved. Impact assessment based on empirical data is key to sound economic policymaking. Another example concerns resale price maintenance (hereinafter RPM) agreements in the print publishing sector. These arrangements usually fall foul of

¹⁴⁹ Nikolinakos, N. (2006). *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT sectors*, 138-161. Alphen aan den Rijn: Kluwer Law International; Capito, R. and Moira Kettner (2008). *Excursus: EC Merger Regulation*, 188-198. In Castendyk, O., Egbert J. Dommering and Alexander Scheurer. *European Media Law*. Alphen aan den Rijn: Kluwer Law International; Psychogiopoulou, E. (2008). *The Integration of Cultural Considerations in EU Law and Policies*, 246-291. Leiden, Boston: Martinus Nijhoff Publishers; Ungerer, H. (2014), *supra n.* 144, 409-416, and Komorek, E. (2013), *supra n.* 3, 130-135. See also Lefever, K., (2012), *supra n.* 133, 135-157. Note, however, that she discusses the issue from a different perspective, that of the exercise of the right to information

¹⁵⁰ See, for instance, Commission Decision *Vivendi/Canal+/Seagram*, Case COMP/M. 2050 [2000] C 311/03; Commission Decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73; Commission Decision *BSkyB/Kirch Pay-TV* Case COMP/JV.37, [2000] OJ C 110/45, and Commission decision *SFR/Télé 2 France*, Case No COMP M.4504 [2007] OJ L 316/57

¹⁵¹ See *supra n.* 148

EU competition law,¹⁵² however, they have traditionally been regarded as beneficial to media pluralism on the grounds that they facilitate the production and distribution of a wide variety of titles, including low-demand books.¹⁵³ The Commission has declared most of these agreements incompatible with the Treaty for the reason, *inter alia*, that they prevented booksellers from using low prices to penetrate the markets of other Member States.¹⁵⁴ Studies that discuss the relevant decision-making are restricted to condemning the Commission¹⁵⁵ for being unsympathetic to the non-economic pluralism-specific objectives they sought to achieve. Yet, these studies do not assess the decisions concerned against the backdrop of economics literature in this area that has provided convincing evidence that it is only under certain conditions that RPM can deliver a pluralistic outcome.¹⁵⁶ The above examples illustrate why, when we draw conclusions on the weaknesses of ensuring market access as a proxy for media pluralism, we need to discuss whether the Commission's practice is well-founded.

The second premise, namely that competition is mainly about cost efficiencies, tells only part of the story. A number of policy documents rightly point out that in a competition assessment several other factors come into play. For example, the (Horizontal and Non-Horizontal) Merger Guidelines lay down that the Commission's mission consists in preventing mergers that would be likely to significantly increase the market power of firms, and explains that an increase in market power refers to 'the ability of one or more undertakings *to profitably increase prices, reduce output, choice or quality of goods and services or diminish innovation*' [emphasis added].¹⁵⁷ In other words, competition has several non-price dimensions. Whether, and if so to what extent, these dimensions influence the outcome of a competition analysis will depend on the particular characteristics of the

¹⁵² In EU competition law, RPM has been treated as a 'hardcore restriction', that is, a restriction of competition 'by object' which, as such, results in the exclusion of the agreement from the scope of application of the Block Exemption Regulation. In cases where an RPM clause is contained in the agreement, that agreement is presumed to be caught by Article 101(1) TFEU, but it is established case law that parties to *any* agreement may plead an efficiency defense under Article 101(3) TFEU in an individual case. See Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 47

¹⁵³ For the Member States where RPM laws for books apply as a means to protect media pluralism see Joint Research Center (2012). *Technical Report on Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry*, fn. 198. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC76642.pdf>

¹⁵⁴ See Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36 and Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association - Net Book Agreements) [1989] OJ L22/12

¹⁵⁵ See, for instance, Everling, U. (1997). *Book Price Fixing in the German Language Area and European Community Law*, 112-118. Baden-Baden: Nomos; Sich, V. (2004, November). *The system of fixed book prices in Germany-A short overview of the history, the regulations, and the impact of retail price maintenance*. Retrieved from: <http://www.tau.ac.il/~nirziv/FixedBookPricesinGermany1.pdf>, and Psychogiopoulou, E. (2008), *supra* n. 148, 279-286;

¹⁵⁶ See, for instance, Appelman, M. and Marcel Canoy (2002). *Horses for Courses: Why Europe should not harmonize its book policies*. De Economist 150(5), 583-600, and Canoy, M., Jan C. van Ours and Frederick van der Ploeg (2005). *The Economics of Books*. CESifo Working Paper No. 1414, 12. Retrieved from: https://ideas.repec.org/p/ces/ceswps/_1414.html

¹⁵⁷ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 8 and Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraph 10

market concerned and the importance that the consumers of the products or services offered by the undertakings under scrutiny attach to them. For example, in the market for recorded music, it is the quality of sound¹⁵⁸ whereas in server operating systems, it is the security features built into the system that aim to protect the user against unauthorized access, viruses, etc.¹⁵⁹ Similarly, in media markets, price is not necessarily the only or the most relevant parameter that drives competition. For example, demand for certain products, such as newspapers, is highly inelastic in price because it is spurred by the readers' political preferences.¹⁶⁰ In other cases, such as free-to-air television, it is the variety of content offered by the broadcasters or the availability of programming on catch-up TV.¹⁶¹

The third and final limitation attributed to EU competition law concerns the narrow boundaries within which State aid control can be exercised. At the outset it bears noting that, indeed, compared against antitrust and merger control, the Commission's competence in the field of State aids is more limited. This is because, on the basis of the principle of subsidiarity, the Member States get to decide what sort of aids (if any) would satisfy the needs of a given society. State aid control is limited to ensuring that the measure does not allow the beneficiary of the aid to misuse the public funds it receives in order to harm competition. In examining mergers, agreements or abuses of dominance, the Commission can undoubtedly be more flexible in shaping the measures that, in its view, would best serve competition. It is due to the above competence restriction that it is either explicitly asserted or implied that the Commission can and must play only a minimal role in the design of aid schemes aimed at protecting media pluralism. Scholarly literature appears to have taken two different directions with respect to this issue. First, there are those who seek to answer the question of whether, and if so to what extent, EU competition law can safeguard media pluralism by focusing on merger and antitrust control, refraining altogether from discussing the Commission's State aid practice.¹⁶² However, it is doubtful whether we can give a complete answer to the above question if we ignore how State aid decisions have impacted relevant national policies. This is because, even if the nature of competition intervention is different depending on whether the Commission is called upon to exercise antitrust, merger or State aid control (e.g. mergers and new aid schemes are subject to prior notification whereas action against abuses of dominance is reactive in nature) and even if the standards that are used in conducting the relevant assessments vary (e.g. in the case of anti-

¹⁵⁸ Commission decision *Universal Music Group/EMI Music*, Case No. COMP/M.6458 [2012] OJ C 220/8, paragraph 127

¹⁵⁹ Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraph 652

¹⁶⁰ Joint Research Center (2012). *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry*, 24. Retrieved from: <http://iips.jrc.ec.europa.eu/publications/pub.cfm?id=5380>

¹⁶¹ Csorgo, L. and Ian Munro (2011). *Market Definition Issues for Audio and Audio-Visual Distribution Products and Services in a Digital Environment, A Report Prepared for the Canadian Radio-television and Telecommunications Commission*. Retrieved from: http://www.crtc.gc.ca/eng/publications/reports/rp110215.htm#_ftn7

¹⁶² See, for instance, Ariño, M. (2005), *supra n. 75*

competitive agreements the restrictions to competition must be assessed against efficiencies and consumer welfare whereas with State aid the harm to competition must be balanced against social welfare¹⁶³), the objective the Commission aspires to attain in all the above cases is the same, namely that competition is not unduly distorted. In seeking to achieve this objective, action under each pillar of competition will somehow impact media pluralism. For example, a relaxed approach towards a merger will increase media concentration, whereas a sloppy approach towards a State aid scheme may have the effect of foreclosing media service providers that compete with the beneficiary of the aid. In view of the above, in determining the degree to which EU competition law can protect media pluralism, an assessment of the Commission's State aid practice is as relevant as the practice developed in exercising merger and antitrust control. Second, there are studies that discuss the potential effects of State aid decisions on media pluralism. These focus on whether the Commission has exceeded its competence limits by imposing on the Member States concerned stringent requirements on how to design the aid measure, for example, by interfering with the definition of the mandate public service broadcasters are expected to discharge. However, the overwhelming majority of these studies have abstained from inquiring whether the Member States have indeed complied with the conditions set by the Commission and if so, whether compliance has produced any positive results.¹⁶⁴ And yet examining this latter issue is essential to drawing conclusions on the actual impact of the outcome of State aid proceedings on media pluralism. The few authors that have assessed how the Commission's decision-making influenced national media policies have a focus different from the one of the present study,¹⁶⁵ or ignore to a large extent the question of how far the Commission can go to alleviate concerns in areas where it clearly has the power to act. For example, as regards this latter issue, it is established case law that the Commission may not carry out efficiency assessments when deciding whether aid schemes in support of public service broadcasters, which

¹⁶³ The Commission explains that '[s]ocial welfare takes into account not only the sum of consumers' and producers' surpluses, but also how welfare is distributed across countries and citizens. Social welfare thus integrates efficiency elements (i.e. by looking at how much wealth is created by affecting consumers' and/or producers' surpluses) as well as equity elements (i.e. by looking at how this wealth is divided between Member States and citizens). A social welfare standard takes into account all the effects that may be generated by the aid'. See European Commission (not dated). *Common Principles for an Economic Assessment of the Compatibility of State Aid Under Article 87(3)*. Retrieved from: http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf

¹⁶⁴ See, for instance, Psychogiopoulou, E. (2008), *supra n.* 148, 293-332; Komorek, E. (2013), *supra n.* 3, 286-297, and Harrison, J. and Lorna Woods (2007), *supra n.* 110, 290-311;

¹⁶⁵ For example, Lefever examines the effects of State aid decisions on the exercise of the right to information on sports competitions. See *supra n.* 133, 172-177. Donders looks into whether and if so, to what extent State aid control obstructs the realization of the public broadcasting project and is driven by a one-size-fits-all approach towards national policies that are heterogeneous. See Donders, K. (2011). *Public Service Media and Policy in Europe*. New York: Palgrave Millan. Other studies with a different focus include: Donders, K. and Hallvard Moe (eds.) (2011). *Exporting the Public Value Test. The regulation of public broadcasters' new media services across Europe*. Göteborg: Nordicom; Donders, K. (2009). *State Aid and Public Service Broadcasting. How future Proof is the Remit of Public Broadcasting Organizations?*, 206. In Pauwels, C., Harri Kalimo, Karen Donders and Ben Van Rompuy (eds.), *Rethinking European Media and Communications Policy*. Brussels: VUB Press; Schulz, W. (2009). *The Legal Framework for Public Service Broadcasting in Germany: Procrustean Bed or Hammock?* *Journal of Media Law*, 1(2), 219-241, and Donders, K. (2011). *Superficial Harmonization Versus One-Size-Fits-All: The Implementation of European State aid principles in Flanders and the Netherlands*. *Journal of Media Law*, 3(2), 237-261

have traditionally been regarded as a vehicle for media pluralism, are compatible with the common market.¹⁶⁶ In other words, the Commission may not judge the ‘value for money’ attributes of public broadcasting services. The Commission can, however, conduct a proportionality assessment, that is, it can check whether the financing received by the broadcaster went beyond what was necessary to fulfill the public service mission. It would appear that the Commission has not always been diligent in exercising this proportionality control. For instance, in a decision concerning the Irish public broadcasting measures, the Commission noted that the procedure would *not* deal with ‘possible disproportionate effects on competition related to the scope of sports rights acquired by RTÉ [the Irish public broadcaster]’.¹⁶⁷ The Commission refrained from explaining why in the assessment of the legitimacy of the scheme it refused to examine whether the State funds allocated to the acquisition of sports rights were disproportionate. The Irish case illustrates that the Commission may have failed to act in cases where it was competent to intervene. This hands-off approach raises concerns over both competition and media pluralism: if public broadcasters empty the market for sports rights with public money, other providers are deprived of the ability to access a valuable input that drives competition in media markets. An excessive focus on sports content results in the public broadcaster not offering a balanced and varied programming to the citizens it is meant to serve. Authors that noticed the Commission’s inaction in this area have not put forward a normative proposal on how proportionality assessments should be conducted in relevant cases.¹⁶⁸

The above remarks indicate that the three assumptions on which the position that EU competition law can do little to nothing to protect media pluralism may be ill-founded. If so, EU competition law has potential that remains unexplored. The present study shall examine whether this is indeed the case by testing the accuracy of the above three claims. In doing so, it shall address two issues; the first is of a legal nature whereas the second is purely practical. First, ascribing a very limited role to EU competition law is partly responsible for how scholarly literature in this area has evolved. More particularly, this approach has led the vast majority of authors that have dealt with the topic to focus on initiatives that could be developed under other branches of EU law, the main instruments of which were discussed above. Still, the question of whether EU competition law is applied to media markets properly, that is, by duly taking account of the parameters that drive

¹⁶⁶ See GCEU, Joined Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)*, [2010] ECR II-3397, paragraph 141 and Case T-275/11 *Télévision française 1 (TF1) v. European Commission* (not yet reported), paragraphs 130, 133-4 and 138

¹⁶⁷ Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, fn. 6

¹⁶⁸ See, for instance, Lefever, K., (2012), *supra n.* 148, 172-177, and Van Rompuy, B. and Karen Donders (2012). *Competition Law, Sports, and Public Service Broadcasting: The Legal Complexity and Political Sensitivity of Measuring Market Distortion and Public Value*, Journal of Media Law, 4(2), 223

competition in the media and by using the full toolkit the Commission has at its disposal, should precede any discussion over whether and if so, what type of further action should be taken by the EU to preserve this value. This is because, as already discussed, the vast majority of proposals that have been put forward thus far raise competence issues that cannot be ignored and may not enjoy the necessary political will to materialize. It bears repeating that the EU has exclusive competence to establish the competition rules that apply to media undertakings that operate within the EU. In light of the above, and even if opinions on what would be the best course of action to safeguard media pluralism at the EU level may pull in different directions, may we all agree that it is only after determining the point at which EU competition law exhausts its limits, we may ask what form of intervention, be it amendments to the Merger Regulation, soft law in the form of recommendations, or hard law in the form of instruments potentially stretching the Treaty boundaries, would address the issues that remain unresolved. Second, from a practical perspective, a discussion over the contribution EU competition law enforcement can make to media pluralism may have more to offer than discussions over action under other branches of EU law. For example, as already seen, Article 7 TEU has never been applied, and only a handful of Member States have imposed stricter conditions to ensure that the term ‘European works’ corresponds to quality and innovative content. Moreover, in recent years, the Commission has explicitly stated that a harmonizing instrument in support of media pluralism is not in the EU legislative agenda.¹⁶⁹ Yet, at the time of writing, the Commission has adopted 1,374 competition decisions affecting this sector.¹⁷⁰ It is not only the amount of cases that have fallen under the Commission’s scrutiny thus far that illustrates the impact of EU competition law on the structure of media markets. In implementing the EU competition policy, the Commission has dealt with numerous undertakings such as broadcasters, newspaper publishers, digital retailers, news aggregators and search engines whose practices may pose numerous threats to media pluralism. In light of the above, EU competition law has influenced media markets and, by extension pluralism, significantly more than other branches of EU law and there are valid indications that this is not likely to change in the near future.

To sum up, the present study shall test the claim that, if properly applied, EU competition law has the potential to protect media pluralism in a way which does not fit into the either excessively narrow or excessively broad frame molded by the relevant literature to date. It shall do so by revolving around the following three questions that remain largely unanswered: has the Commission

¹⁶⁹ See, for instance, Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 4

¹⁷⁰ Search by NACE code. Retrieved from: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

managed to prevent market foreclosure in the media sector? If not, what would be an alternative, proper application of the competition provisions of the Treaty to ensure that competition is not distorted? And would this alternative deliver an outcome that is more pluralism-friendly? This study is the first to adopt this novel approach to the application of EU competition rules to media markets and shall attempt to demonstrate that strict competition enforcement may go a long way towards protecting a non-economic value without stretching the Treaty limits.

3. Research method

3.1. An interdisciplinary approach

A study exploring the contribution that strict competition enforcement can make to the protection of media pluralism cannot be approached from a legal standpoint *only*. In order to identify the challenges facing pluralism in the current media ecology and the *lacunae* in the Commission's decision-making, an in-depth understanding of relevant technological advancements and sector-specific economics is required. How has digitization affected the architecture of media markets? Has it altered content consumption patterns? Has scarcity of frequencies been replaced by other, possibly artificial, forms of scarcity? How does the two-sided nature of advertising-based media impact a competition assessment? These questions illustrate that the legal issues examined throughout this thesis cannot be considered in a vacuum. Moreover, new business models for the sale of media content have surfaced (e.g. online agency agreements for the sale of news subscriptions), the relationship between the consumer and the media content provider has undergone significant changes (e.g. atypical 'transactions' whereby the supplier offers content in exchange for personal data are becoming more and more common), and competition authorities are increasingly being called upon to assess practices whose effects are not entirely clear (e.g. algorithm manipulation), thereby finding themselves in unknown territory. In view of the above, it is only through an interdisciplinary approach, whereby the legal analysis is informed and shaped by market and technological developments, economic theory, and empirical evidence, that any meaningful normative proposal on how EU competition law must be applied to media markets can be put forward.

3.2. The markets that will be examined: a dual (old/new) media perspective

The studies that discuss the role of EU competition law in protecting media pluralism have

mainly focused on broadcasting markets.¹⁷¹ The present study, however, adopts a wider approach. More particularly, in addition to decisions concerning **television**, it will examine the Commission's practice in traditional **print publishing** as well as more recent cases dealing with new media markets, namely **online search**, **news aggregation**, and markets for the **retail sale of e-content such as news apps and newspaper subscriptions**. This dual (old/new media) perspective is driven by three considerations. First, *in terms of use*, traditional media still plays a major role in informing Europeans. For example, television remains their preferred source of news on political matters¹⁷² and more than one third of them read newspapers on a regular/daily basis.¹⁷³ However, alongside traditional media, entities that have emerged with the advent of the Internet, including and especially digital intermediaries, that is, firms that deliver content produced by third-party suppliers to online users,¹⁷⁴ are now playing an important role in determining the amount and quality of information that citizens access and engage with. In several Member States search engines are the most popular means of discovering news online¹⁷⁵ and news aggregators the second most popular.¹⁷⁶ Second, and related to the above, *in terms of policy*, a discussion about the potential benefits to or dangers for media pluralism today cannot take place by focusing on one or the other type of media. For example, a key question is whether 'old' gatekeepers, which are more often than not (horizontally and/or vertically) integrated and which control traditional media markets, may still raise concerns over media pluralism. If this question is answered in the affirmative, does the new media environment, which makes available a vast amount of content, address the above concerns? Or do entities that operate in new media markets engage in practices that create additional risks for media pluralism? If so, could

¹⁷¹ See, for instance, Komorek, E. (2013), *supra n. 3*, 95-142; Ariño, M. (2005), *supra n. 3*, and Harrison, J. and Lorna Woods (2007), *supra n. 110*, 146-172. Note that more recent studies discussing the Commission's competition practice in media markets have also focused on the broadcasting sector. See, for instance, Van Rompuy, B. (2012), *supra n. 133*, 319-390; Ungerer, H. (2014), *supra n. 144*; Donders K. and Hallvard Moe (2014). *European State-Aid control and PSB: Competition Policy Clashing or Matching with Public Interest Objectives?*, 426-441. In Donders, K., Caroline Pauwels and Jan Loisen (ed.). *The Palgrave Handbook of European Media Policy*. New York: Palgrave Millan; Van Rompuy, B. (2014). *The Impact of EU Competition Policy on the Sale of Sports Media Right: Trends and Developments at the National Level*, 442-460. In Donders, K., Caroline Pauwels and Jan Loisen (ed.). *The Palgrave Handbook of European Media Policy*. New York: Palgrave Millan, and Iosifidis, P. (2014). Pluralism, Media Mergers and European Merger Control, 461-478. In Donders, K., Caroline Pauwels and Jan Loisen (ed.). *The Palgrave Handbook of European Media Policy*. New York: Palgrave Millan. 'Traditional' or 'old' media are media introduced prior to the advent of the Internet, such as television, newspapers, and magazines. New media is a broad concept 'used to describe the new generation of digital, computerized, or networked information and communication technologies'. This concept includes, for instance, social media such as Facebook and news aggregators such as Google News. See Electronic Frontiers Foundation. *Definition of media*. IRM of 24/11/2009. This study uses the term 'traditional media providers' to refer to organizations that were established before the digital revolution commenced such as broadcasters and newspaper publishers and the term 'new media providers' to refer to firms that have emerged with the advent of the Internet such as blogs and wikis. The study, however, acknowledges that, as a result of technology convergence, this distinction is becoming increasingly blurred

¹⁷² European Commission (2013). *Media Use in the European Union*, 5 and 9. According to the Commission, the average European watches up to 4 hours a day. See http://ec.europa.eu/avpolicy/index_en.htm

¹⁷³ *Ibid.*, 11

¹⁷⁴ Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*, 25

¹⁷⁵ See, for instance, Ofcom (2013). *International Communications Market Report*, Figure 1.58. Retrieved from: <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr13/international/icmr-1.58>

¹⁷⁶ Ofcom (2013). *International Communications Market Report*, Figure 1.57. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/icmr/ICMR_2013_final.pdf

these latter risks be mitigated by granting State aids to a vibrant and independent public service media organization? To put it simply, any meaningful policy proposal on how to safeguard pluralism in the current media landscape cannot be formulated without carefully considering how perils posed by one type of media can be balanced against opportunities created by the other. Finally, *from a competition law perspective*, the Commission's decision-making in traditional media should not be studied in isolation from the practice it is currently developing in new media markets. For example, in cases dealing with free-to-air television, the Commission finds that the exercise of market definition should consist in identifying the effective alternative sources of supply for the advertisers, not the viewers.¹⁷⁷ The Commission is of the opinion that a market for viewers need not be defined on the grounds that the latter do not pay for the content they receive.¹⁷⁸ And yet, the opposite position would seem to find support in modern economic theory.¹⁷⁹ The attention that this issue deserves becomes clear if we think of the abundance of undertakings operating in the information economy, such as online search engines and news aggregators, that offer content for free. Another example concerns the publishing sector: as already mentioned, the Commission has declared incompatible with the common market RPM agreements between publishers and brick-and-mortar retailers. Arrangements with RPM elements are making a comeback, but this time around they govern trade in digital content such as e-books and news apps. Was the approach to assessing RPM for traditional print titles based on a sound reasoning so that it can guide the Commission in digital content cases with a similar factual background? The above two examples illustrate that traditional and new media share certain characteristics (e.g. revenue model and pricing strategies) that are relevant for a competition analysis. Since the Commission's practice in traditional media markets is more mature than in new media markets, it is of utmost importance to assess the approach adopted in older cases in order to ensure that errors committed in the past are not incorporated into future decisions.

3.3. Thesis Structure

In explaining the reasons why it is essential that the present study a) adopt an interdisciplinary approach and b) consider the Commission's decisional practice in both traditional and new media

¹⁷⁷ Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, paragraph 13. See, for instance, Commission decisions *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73 paragraph 24; *NewsCorp/BSkyB*, Case COMP/M. 5932 [2011] OJ C37/2 paragraph 97; *SFR/Télé 2*, Case COMP/M.4504 [2007] OJ L 316/57, paragraph 45; *Newscorp/Premiere*, Case COMP/M.5121 [2008] OJ C 219/4, paragraph 19; *Telenor/Canal+/Canal Digital*, Case COMP/C.2/38.287 [2003] OJ C 149/10 paragraph 28; *BSkyB/Kirch Pay-TV*, Case COMP/JV.37 [2000] OJ C 110/45, paragraph 24, and *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 18 and *Kirch/Richemont/Multichoice/Telepiù*, Case IV/M.584 [1995] OJ C 129/6, paragraph 15

¹⁷⁸ *Ibid.*

¹⁷⁹ See, for instance, Filistrucchi, L., Damien Geradin, Eric van Damme, E. and Pauline Affeldt (2012). *Market Definition in Two-Sided Markets: Theory and Practice*. TILEC Discussion Paper No. 2013-009. Available through SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850

markets, I posed the key questions facing the topic that I shall examine, namely whether, and if so to what extent, a proper application of EU competition law can protect media pluralism. To answer the above questions, I structured the thesis as follows: one of the first issues that is raised in discussions concerning media pluralism is whether, in light of the advancements that have taken place over the past few years, policy intervention in support of this value is still needed. Many argue that in today's media landscape the citizen is given access to a wide range of information and countless opportunities to participate in public discourse. Through an analysis of how market, regulatory and technological developments have affected supply and consumption of media content, Chapter 2 dismantles the argument that digital technologies have remedied concerns over media pluralism. In doing so, Chapter 2 exposes the reader to the main challenges confronting the realization of a pluralistic offer, such as a natural tendency of (traditional and new) media markets to concentration, content homogenization, and practices impairing the free flow of media content in the online universe.

As already mentioned, at the EU level, cases that have raised pluralism issues have been mainly examined by the Directorate General for Competition. After establishing in Chapter 2 that media pluralism is (still) worthy of protection, Chapter 3 will inquire whether, and if so to what extent, EU competition law has been/can be applied in a pluralism-friendly manner. By pinpointing the loopholes the Commission has left open in a number of (antitrust, merger, and State aid) cases that touched upon a number of issues that arise in relevant competition investigations, such as access to valuable inputs (e.g. premium content), the role of the non-price dimensions of competition in market definitions and competitive assessments, and the boundaries within which State aid control can be exercised, the Chapter puts forward two claims: first, the practice that the Commission has developed in media markets has fallen short of protecting *either competition or media pluralism*. And second, EU competition law can be applied in a way which goes beyond the Commission's predispositions and which may lead to *competition decisions that are more accurate and pluralism-friendly* without giving rise to controversies over competence.

Chapters 4-7 are concerned with testing the above two claims. They do so by attempting to encapsulate the main issues the Commission has encountered in older and more recent cases that raise both competition and pluralism concerns. The decisional practice the Commission has developed under each of the four pillars of competition law, namely merger control, Article 101, Article 102, and State aids will be examined by reference to a specific sector in a way that reflects a business strategy (e.g. consolidation), practice (e.g. algorithm manipulation), pricing model (e.g.

RPM), or revenue mechanism (e.g. financing of broadcasting activities through State resources) that has been a major (competition and media) policy matter in the market concerned.

More particularly, Chapter 4 will explore the parameters against which the Commission exercises merger control in cases concerning broadcasting markets. In this sector, mergers and acquisitions have had a broad appeal due to the significant economies of scale and scope that broadcasters can achieve by integrating with other firms that operate at the same (horizontal integration) or at different levels of the supply chain (vertical integration). For our purposes, it bears noting that, from a competition perspective, a concentration may, *inter alia*, increase the ability and incentive of the merging firms to crowd out competing content suppliers, whereas from a pluralism perspective a concentration may allow the individuals controlling the merged entity to marginalize opposing viewpoints.

Consolidation has not been as popular in the publishing sector as it has been in television. In the publishing industry, as indicated above, a popular strategy has been RPM, whereby the publisher sets the retail prices of the titles it produces and the retailer is not permitted to offer discounts or any other form of promotion unless the publisher explicitly grants its authorization. For this reason, Chapter 5 examines how the Commission has applied/may apply Article 101 TFEU to agreements with RPM elements governing the sale of newspapers and books. Depending on market conditions, RPM may promote competition for titles and/or encourage small publishers to penetrate the market. The analysis seeks to identify these conditions.

With respect to news aggregation and online search, a recent case that deals with a number of potentially anti-competitive practices in which the entity leading these markets engages, namely *Google Search*, is particularly relevant for the purposes of this study. More particularly, the Commission is currently investigating complaints that Google has abused its dominant position in (general and vertical) online search and news aggregation.¹⁸⁰ As mentioned above, by acting as intermediaries between content providers and the audiences, search engines and news aggregators are gradually playing an important role in determining the amount and quality of information that consumers access and engage with. It will be seen in greater detail in Chapter 2 that there are several areas in which the activities they develop may impact undistorted competition and pluralism, including the control they exercise over what may be regarded as *distribution bottlenecks* through

¹⁸⁰ European Commission. Case AT.39740, *Google Search*. All relevant documentation is available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

which users access content, the *editorial-like judgments* they perform in selecting the content they link to or carry, and their role in shaping *future economic models for news provision*.¹⁸¹ *Google Search* is a vivid illustration of the above issues. For example, insofar as news economics is concerned, one of the complaints has to do with the copying and display of parts of news articles (also referred to as ‘scraping’) in Google’s news aggregation platform, Google News.¹⁸² Does scraping affect the ability of news providers to generate (advertising and subscription) revenues? If so, are the effects positive or negative? If the effects are negative, can news providers rely on Article 102 TFEU to prevent Google from using their content? A complaint that exemplifies the role of an intermediary as a distribution bottleneck concerns Google’s retaliation practices, whereby news providers that object to the use of their stories on the Google News website are excluded from Google’s services altogether, including general search results.¹⁸³ To what extent does this practice deprive users of discovering news online? Could this conduct be regarded as abusive tying for the purposes of Article 102 TFEU? Finally, with respect to editorial-like judgments, allegations have been made that Google has been deliberately demoting competing websites whilst ensuring prominent display for its own content.¹⁸⁴ Does this practice affect the range of content to which users are exposed? And is preferential treatment of one’s own products a violation of EU competition law? The above issues will be discussed in detail in Chapter 6, which, building around the issues that have arisen throughout the *Google Search* investigation, will examine how Article 102 TFEU may be applied to digital intermediaries that engage in conduct introducing artificial forms of information scarcity.

Chapter 7 deals with the remaining pillar of EU competition law, namely State aid control. The Chapter focuses on State aid decisions concerning advantages granted to public service broadcasters for mainly three reasons. First, compared against other media undertakings that receive public funding, public service broadcasters are by far the most generously funded.¹⁸⁵ Second, the overwhelming majority of State aid decisions the Commission has adopted in the media sector concern public broadcasters.¹⁸⁶ In other words, State aid control in public service broadcasting is the

¹⁸¹ Foster, R. (2012), *supra n.* 173, 6-7

¹⁸² For an overview of the complaints that are currently being investigated by the Commission see European Commission (2014, February). Memo. *Antitrust: Commission obtains from Google comparable display of specialized search rivals - Frequently asked questions*. Retrieved from: [http://europa.eu/rapid/press-release MEMO-14-87_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-87_en.htm?locale=en)

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Compare the amount of money dispersed in support PSBs against, e.g., those in support of newspapers. The State aid measures containing the relevant figures are available at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf (PSBs) and http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result (newspapers)

¹⁸⁶ For example, the Commission has adopted 38 decisions in the broadcasting sector and only 5 in the newspaper publishing sector. A list with all State aid decisions concerning PSB schemes is available at:

dominant policy issue insofar as the application of State aid rules to media markets is concerned. Finally, the granting of aid in support of public broadcasters has become an issue of major concern to undertakings other than commercial broadcasters. Public broadcasters are increasingly expanding into new media markets, providing a variety of services from mobile news apps to catch-up TV to online advertising space. Therefore, they now directly compete with a wide range of content producers and distributors, including newspapers and IPTV providers. In light of the above, the likelihood that unlawful aid in support of certain media organizations will harm competition and – to the extent that they prevent market entry – media pluralism seems to be greater in cases of aid measures supporting public broadcasters than in cases of schemes supporting other media.

The main theme that cuts across Chapters 4-7 is *control over an asset or factor* that may somehow affect competition and pluralism in the affected markets. For example, in broadcasting, it is *control over premium content or infrastructure*; in publishing, it is *control over price*; in online search and news aggregation, it is *control over a vastly popular online platform* through which users access information, and in the case of a publicly funded undertaking operating offline and online, it is *control over State resources*.

A final remark on the topics that will be covered: naturally, in addition to the business strategies/practices, pricing models, and revenue mechanisms that were described above, traditional and new media entities may affect competition and media pluralism in an abundance of ways that, given how complex the structures of the relevant markets and companies are, are difficult if not impossible to identify in an exhaustive manner. However, this study does aspire to expose the reader to the main issues that have arisen thus far in competition cases concerning the most widely used media and to explore a variety of ‘traditional’ and ‘new’ concerns over pluralism that can be addressed under all four pillars of competition law.

http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf and a list with all State aid decisions concerning aid schemes in support of newspapers is available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

Chapter 2 – Media pluralism and the myth of communication abundance

1. Introduction

In the midst of the changes brought about by digital technologies, policymakers from across Europe have started rethinking the status of media pluralism as a fundamental communications policy principle. More particularly, as already mentioned in Chapter 1, the argument that media pluralism is to a large extent a natural outcome of the digital revolution is gaining ground. This argument is based mainly on two assumptions that are increasingly being reflected in media policies. First, digital technologies are believed to have remedied concerns relating to concentration of ownership. The fear that significant opinion-forming power may end up in the hands of a few is said to have diminished on the grounds that currently, alongside well-established media organizations, there are many other sources providing information as well as several platforms through which marginalized viewpoints, which would not have found their way to the audiences in the analogue environment, may reach the public. Second, citizens are believed to use the media in ways that strengthen citizenship. The abundance of information they can now access, the control they can exercise over content, and the ability to create and distribute content on matters of common concern are considered to create ideal conditions for exposure to diverse ideas and active participation in public discourse.

The objective of this Chapter is three-fold. **First**, to explain the approach of the present study to media pluralism as a normative concept in light of the aforementioned developments (Part 2). The aim here is not to propose a new legal definition, but to illustrate that the evolution of communication technologies and markets has had implications for media pluralism as a policy goal. **Second**, to discuss whether policy intervention to protect and promote media pluralism is still needed by examining whether the above two assumptions, on which modern media policymaking is being built, are well-grounded. For that purpose, I shall analyze the conditions that reflect the current state of European media markets and inquire whether these assumptions are supported by empirical evidence. More particularly, Part 3 examines whether concerns regarding concentration of ownership have indeed subsided whereas Part 4 focuses on the demand side, discussing habits that have emerged with the advent of new media. **Third**, through the study of (old and new) supply and consumption patterns and sector-specific economics, to lay the groundwork for subsequent Chapters, which will discuss the characteristics of traditional and new media markets that the European Commission must take into consideration when it is called upon to assess a merger, anti-competitive agreement, unilateral conduct or State aid scheme.

2. The legal definition of media pluralism: Is it still about what the market has to offer?

Media pluralism is widely perceived as a prerequisite for democracy, *inter alia*, on the grounds that access to a broad range of information strengthens citizenship and advances social cohesion. Yet, in spite of the broad respect it generates for these merits, a definition of media pluralism does not exist in international statutory law.¹ The lack of a definition of media pluralism in international legal texts is largely attributed to the fact that this value has been thought to be better conceptualized by reference to the specific political, social, cultural and economic conditions of a given State on the basis of a number of criteria, such as the presence of linguistic and/or ethnic minorities² and policy approaches to the media industry. As any description of media pluralism involves choices about the types of content that should be provided to the audiences, as well as choices about the parameters that are appropriate for assessing whether a media landscape is pluralistic or not, achieving ‘a meeting of the minds’ when drafting an international legal document that touches upon this issue has proven to be an insurmountable goal.³ As regards the European Union, several legal texts, including primary EU law such as the Charter of Fundamental Rights and the Amsterdam Protocol on Public Service Broadcasting,⁴ refer to media pluralism. These texts, however, do not go so far as to describe its nature, scope or meaning.⁵ In addition to the heterogeneity characterizing the media landscapes of the various Member States,⁶ this definitional *lacuna* relates to the Union’s competence limitations in the field of media, which were extensively discussed in Chapter 1. Therefore, the Member States have

¹ Valcke, P. (2011), *Looking For the User in Media Pluralism Regulation: Unraveling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation*. Journal of Information Policy 1, 288. Retrieved from: <http://jip.vmhost.psu.edu/ojs/index.php/jip/article/view/31>

² For instance, the preservation of linguistic diversity would not play a major role in the Netherlands, a linguistically homogeneous country, as opposed to Belgium which has three official languages

³ Karpinnen, K. (2007). *Making a difference to media pluralism. A critique of the pluralistic consensus in European media policy*, 21. In Cammaerts, B. & Nico Carpentier (eds.). *Reclaiming the Media*. Bristol: Intellect Books

⁴ Protocol No. 29 on the System of Public Broadcasting in the Member States [2010] OJ C 83/312, which reads as follows: ‘The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union: The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organizations for the fulfillment of the public service remit as conferred, defined and organized by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account’

⁵ Valcke, P. (2011), *supra n. 1*. On secondary EU law which refers to media pluralism see, for instance, Audiovisual Media Services Directive [2010] OJ L 332/27, Recitals 8, 12, 34, 48 and 94; Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraphs 2, 11, 14-16 and 47, and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1, Article 21(4)

⁶ European Commission (2009). *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-based Approach*, 1. Retrieved from: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf

been free to give form to this value in accordance with national traditions and the peculiarities of domestic media markets. However, a description of media pluralism is not to be found in national law either. For example, while throughout their case law national constitutional courts have established that media pluralism is a value inherently related to the exercise of freedom of expression and, as such, a necessary condition for the well functioning of a democratic society, they have refrained from providing a precise definition of the term.⁷ National legislators from across Europe have adopted the same approach.⁸

Nonetheless, descriptions of media pluralism can be found in numerous policy texts.⁹ Most comprehensively, the concept of media pluralism has been elaborated by the Council of Europe (CoE) and its advisory committees.¹⁰ Among other documents of a non-legally binding character, the Explanatory Memorandum of Recommendation No. R (99) 1 on Measures to Promote Media Pluralism, which was adopted by the CoE's Committee of Ministers in 1999, refers to media pluralism as

‘a ***diversity of media supply***, reflected, for example, in the existence of a plurality of independent and autonomous media (generally called structural pluralism) as well as a ***diversity of media types and contents (views and opinions)*** made available to the public’ [emphasis added].¹¹

The Memorandum correctly makes a distinction between diversity of media supply and diversity of media types and contents. This is because in media markets the former does not automatically guarantee the latter.¹² In other words, even if there are many structurally separated media organizations operating in a given market, this does not necessarily mean that these organizations will ensure that the audience members will have access to diverse ideas and/or that the needs of niche audiences will be catered to. One example that illustrates why diversity of supply should not be relied upon to achieve diversity of content and type is commercial free-to-air TV, which is mainly funded

⁷ Valcke, P. (2011), *supra n. 1*, 288. For more information on the national courts' case law as well as the relevant case law of the Council of Europe see references in *ibid.*, footnote 2.

⁸ All Member States of the EU have adopted regulatory instruments that aim at safeguarding media pluralism. In some cases, the Constitution explicitly refers to media pluralism. Yet, to my knowledge, neither regulation nor the Constitutions in question define media pluralism

⁹ For an EU perspective see, for instance, European Commission. *Pluralism and Media Concentration in the Internal Market - An Assessment of the Need for Community Action*. Green Paper COM (92) 480 final, and Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32

¹⁰ Valcke, P. (2011), *supra n. 1*, 288 referring to Klimkiewicz, B. (2009). *Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies*, 46. In Czepek, A., Melanie Hellwig, and Eva Nowak, *Press Freedom and Pluralism in Europe: Concepts and Conditions*. Bristol: Intellect

¹¹ Explanatory Memorandum to Recommendation No. R (99) 1 on Measures to Promote Media Pluralism. Retrieved from: [https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(99\)1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(99)1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

¹² Empirical research has not provided definitive evidence on the relationship between supply and content diversity. However, traditional media regulation in support of media pluralism has used supply diversity-related measures as a proxy for content diversity. For more information on this issue see, for instance, Valcke, P. (2011), *supra n. 1*, 294-5 and Napoli, P. M. (1999). *Deconstructing the Diversity Principle*, *Journal of Communication* 49(4), 7-34

by advertisers. As free-to-air broadcasters depend on ad revenues, they usually opt for distributing programs that appeal to the masses with a view to attracting advertisers.¹³ This means that in practice they tend to either offer programming similar to what has already proven successful for a competitor or they recycle a program which received high audience ratings in the past, rather than invest in original programming with highly uncertain demand or programming which serves the needs of cultural or linguistic minorities and which attracts too small an audience to generate cost recovery revenues. As a result, companies in a competitive broadcasting market may be conducive to filling the same middle ground,¹⁴ in which case an anomaly may arise whereby a considerable amount of broadcasters does not lead to a varied offer, but rather to program duplication.¹⁵ Diversity of supply is therefore distinguished from diversity of types and contents because the relationship between the number of media organizations active in a given market and the range of content that is made available to consumers is not necessarily causal.¹⁶

The dichotomy between supply and content diversity has not been the epicenter of the relevant standard-setting work of the Council of Europe only; ¹⁷ policymakers, ¹⁸ media regulators, ¹⁹ competition authorities²⁰ and constitutional courts²¹ from across Europe have adopted the same distinction.

¹³ Ariño, M. (2005). *Regulation and Competition in European Digital Broadcasting - A study of pluralism through access*, 58. PhD thesis. Florence: European University Institute

¹⁴ Prosser, T. (2005). *The limits of competition law: Markets and Public Services*, 209. Oxford: Oxford University Press

¹⁵ Craufurd-Smith, R. (2004). *Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship*. *European Law Review*, 29(5), 653

¹⁶ On the relationship between supply and content diversity see Part 3.a.

¹⁷ See, for instance, Council of Europe. *Recommendation No. R (99) 1 of the Committee of Ministers to member States on measures to promote media pluralism; Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector and its Explanatory Memorandum Pluralism in the multi-channel market: suggestions for regulatory scrutiny* (MM-S- PL(1999) 012def); *Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting and its Explanatory Memorandum*, and *Recommendation No. R (94) 13 of the Committee of Ministers to member States on measures to promote media transparency*

¹⁸ This distinction has influenced media policy and law making in, for instance, Germany, Greece, Denmark and Belgium. See German Interstate Broadcasting Treaty (Rundfunkstaatsvertrag), Articles 25(1) and 26(2); ELIAMEP (2010). *MEDIADEM background information report on media policies and regulatory practices in a selected set of European countries, the European Union and the Council of Europe: the case of Greece*, 23; Greek Law 3592/2007 on media concentrations and licensing rules applicable to media organizations, Article 3(3); ELIAMEP (2010). *MEDIADEM background information report on media policies and regulatory practices in a selected set of European countries, the European Union and the Council of Europe: the case of Denmark*, 18 and 20; ELIAMEP (2011). *MEDIADEM Case study report: Does media policy promote media freedom and independence? The case of Belgium*, pp. 22 *et seq.* On a supranational level, see, for instance, Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 5

¹⁹ See, for instance, Ofcom (2010). *Report on Public Interest test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation*, paragraph 1.18. Retrieved from: http://www.culture.gov.uk/images/publications/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf

²⁰ See, for instance, UK Competition Commission (2007). *Report on the Acquisition by BSKyB plc of 17.9% of the shares in ITV Plc sent to Secretary of State (BERR) of 14 December 2007*, paragraph 30

²¹ For a discussion of the relevant case law in a selected set of EU countries (France, Italy, Germany) see, for instance, Valcke, P. (2004), *Digitale Diversiteit – Convergentie van Media-, Telecommunicatie- en Mededingingsrecht (Digital Diversity – Convergence of Media, Telecommunications and Competition Law)*, 127-148. Brussel: Larcier

However, this definition of pluralism, albeit accommodating certain particularities of the media markets (see above example of how advertising affects the diversity of content broadcast), is incomplete because it only takes account of the supply side.²² In other words, it is concerned with what media organizations provide, but not with what individuals really read and watch. Yet, if one accepts that the ultimate goal of any policy intervention to support media pluralism is at least²³ ‘exposure to diverse ideas, sources, and perspectives that facilitates the well-informed decision-making that is central to the democratic notion of effective self-governance’,²⁴ media pluralism cannot be properly conceptualized without regard to the amount and type of content that audiences access and engage with. This is simply because the diversity of sources and content actually consumed, also referred to as *exposure or use diversity*, may be different from the diversity of sources and content that is made available in the market.²⁵ Actually, empirical studies show that the diversity provided does not coincide with the diversity consumed.²⁶

The integration of exposure diversity considerations in media policies has always been important. As an economic policymaker needs to know how consumers react to price changes, a communications policymaker needs to know how audiences react to changes in their media system.²⁷ If not, there is the risk that a given regulatory instrument that seeks to safeguard (or otherwise affects) media pluralism is based upon false assumptions. In spite of the above, exposure diversity has largely been ignored thus far. This is so mainly for two reasons. First, traditional media policymaking has been based on the passive consumption theory according to which audiences are powerless to resist the persuasive messages that media carry.²⁸ Second, in the past, due to high entry barriers relating to, *inter alia*, spectrum shortages and large upfront investments, the sources and content that found their way to the audiences were scarce.²⁹ Hence, individuals were expected to consume most of what was offered.³⁰

²² Klimkiewicz (2009), *supra n.* 10, 46

²³ Helberger notes that policy intervention in support of media pluralism may go ‘beyond facilitating autonomous choices’, in which case an additional role for media regulation ‘would be to guide users in their choices’. On the different conceptions of exposure diversity as a policy goal see Helberger, N. (2011). *Diversity Label: Exploring the Potential and Limits of a Transparency Approach to Media Diversity*. *Journal of Information Policy*, 1, pp. 345 *et seq.*

²⁴ Napoli, P. (2001, October). *Diversity and Localism: A Policy Analysis Perspective*, 4. Paper presented at an FCC Roundtable on Media Ownership. Retrieved from: http://transition.fcc.gov/ownership/roundtable_docs/napoli-stmt.pdf

²⁵ *Ibid.*, 3-4

²⁶ See, for instance, Cooper, C. and Tang Tang (2009). *Predicting Audience Exposure to Television in Today’s Media Environment: An Empirical Integration of Active-Audience and Structural Theories*. *Journal of Broadcasting & Electronic Media*, 53(3), 400-418; Webster, J. G. (2005). *Beneath the Veneer of Fragmentation: Television Audience Polarization in a Multi-Channel World*. *Journal of Communication* 55(2), 366-382, and Prior, M. (2005). *News vs. Entertainment: How Increasing Media Choice Widens the Gap in Political Knowledge and Turnout*. *American Journal of Political Science* 49(3), 577-592

²⁷ Napoli, P. (2001), *supra n.* 24, 4

²⁸ Valcke, P. (2011), *supra n.* 1, 304

²⁹ Helberger, N. (2011). *Media Diversity from the User’s Perspective: An Introduction*. *Journal of Information Policy* 1, 242

³⁰ Goodman, E. (2004). *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*. *Berkeley Technology Law Journal*, 19, 1457

However, exposure diversity can no longer be marginalized. As a result of technological developments, there exist plenty of sources and content which individuals may now access, including pay-per-view services, blogs, wikis and online newspapers that operate alongside well-established media organizations. It is therefore becoming increasingly important to determine how audience members behave in an environment where content and sources are abundant. For example, do consumers continue to concentrate around a few familiar brands or do they actively look for diverse content? Has consumption of news content increased? If so, do new information sources play an important role in the public opinion-formation process? In addition, digital technologies allow citizens to comment on the content provided by mainstream media and/or establish their own outlets. The question then arises whether audience members use the media in order to actively engage in public discourse. If citizens indeed search for diverse information, consult with several sources and produce and distribute content on matters of common concern, then regulating the media to guarantee source and content diversity would not seem to be as important as it once was.

There is evidence that policymakers are increasingly starting to consider exposure diversity. For example, in its Green Paper on Pluralism and Media Concentration of 1992, the European Commission (hereinafter the Commission), clearly focusing on the supply side, noted that diversity of information can be assessed ‘according to the *editorial content* of the broadcasts or the press, according to the *number of channels* or titles, and according to the *number of* media controllers or *owners*’ [emphasis added].³¹ However, in its Staff Working Document Media Pluralism in the Member States of the EU, published in 2007, the Commission adopted a broader approach that arguably encompasses demand-side considerations. The Document lays down that ‘although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. [...] *Ensuring media pluralism*, in our understanding, implies *all measures that ensure citizens’ access* to a variety of information sources, opinion, voices etc. in order to form their opinion’ [emphasis added].³²

³¹ Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 19

³² Ibid., 5. Similar to the Staff Working Document, the Independent Study that followed it noted that pluralism is a multi-layered concept encompassing ‘the *diversity of media supply, use and distribution*, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests’ [emphasis added]. Examples of exposure diversity-related indicators that the Independent Study identified include the range of citizens and citizens’ groups using online media for posting content relevant for political debate and the level of influence on political and public debate by bloggers. See European Commission (2009). *Independent study on indicators for media pluralism in the Member States: Towards a risk-based approach*, 5 and 106. Retrieved from: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf

Similar remarks can be made with respect to the approach followed by national policymakers. For example, in its 2010 report on the status of the Dutch media, media regulator Commissariat voor de media underlined that ‘[a]lthough the news market share per independent supplier is considered one of the most important indicators of opinion power [...] another indicator is the number of news sources consumers consult. Even though there is an incredible amount of information available, *actual exposure to a wide range of sources is not guaranteed*’ [emphasis added]. The report concludes that ‘media are in transition [...] and *exposure diversity should also be measured for the news market*’ [emphasis added].³³

This change of direction is welcomed because it (at least) seeks to ensure that media pluralism as a normative concept is adapted to the conditions that characterize the modern media ecosystem (whether the mere ability to get exposed to various sources and content has been used to justify (de-)regulatory reforms that were not well-grounded will be discussed in more detail below). Similarly, this thesis, *scripta in anni 2010-2015*, acknowledges the importance of taking account of all three components, that is, diversity of suppliers, diversity of content and type, and diversity of exposure.

These three components have been defined and further broken down into sub-components by Napoli and Valcke. More particularly, drawing on the goals that have been (or should be) pursued by the competent policymaker in the US, Napoli distinguishes between source, content and exposure diversity, and sub-categorizes each of these three dimensions as follows:

Source Diversity	Content Diversity	Exposure Diversity
1. Ownership a. Programming b. Outlet	1. Format/Program Type	1. Horizontal
2. Workforce	2. Demographic	2. Vertical
	3. Idea/Viewpoint	

Source: Napoli (2001:2), Figure 1

Napoli’s model builds upon and extends the diversity framework that has traditionally been employed by the US media regulator, the Federal Communications Commission.³⁴ The concept of source diversity is defined in terms of both outlet *and* content ownership.³⁵ Indeed, outlet and content ownership do not necessarily coincide. For example, a TV channel may choose to distribute content

³³ Commissariat voor de Media (2011). *MEDIAMONITOR – The Dutch Media in 2010*, 90-91. Retrieved from <http://www.mediamonitor.nl/dsresource?objectid=11689&type=org>. See also Ofcom (2012). *Measuring Media Plurality*, paragraph 1.3 where Ofcom defines pluralism as ‘a) ensuring there is a *diversity of viewpoints available and consumed* across and within media enterprises and b) preventing any one media owner or voice having too much influence over public opinion and the political agenda’ [emphasis added]. Ofcom then referred to several parameters that would characterize an ideal plural outcome, including a variety of independent news media voices across all platforms *and* active multi-sourcing, that is, the consumption of a range of different news sources (see paragraph 3.22)

³⁴ Napoli, P.M. (2001), *supra* n. 24, 3

³⁵ *Ibid.*

the broadcast rights of which it purchased from a film studio. Workforce diversity is defined in terms of the gender and ethnic composition of a media outlet’s workforce.³⁶ The second component, content diversity, is defined in terms of diversity of ideas/viewpoints, which refers to the diversity of political, social and cultural perspectives represented within the media, diversity of programs/types (e.g. drama, comedies, news programs, talk shows, etc.),³⁷ and demographic diversity, which refers to the gender and ethnic composition of those represented in media content.³⁸ Finally, horizontal exposure diversity refers to the distribution of viewers/readers/users across all available content options whereas vertical exposure diversity refers to the diversity of content consumption within individual audience members.³⁹

Valcke identifies the same components, but makes a further distinction between a quantitative and qualitative sub-component in each of these three elements.⁴⁰ In Valcke’s understanding, quantitative refers to a simply numerical assessment of diversity whereas qualitative diversity of suppliers, product and use is determined by parameters such as religion, ethnicity, program type, etc.⁴¹ Listed below are some examples of how Valcke sub-categorizes each component:

Source/Supplier/Provider Diversity	Product/Content Diversity	Exposure/Use Diversity
Quantitative: How many independent owners are active in a given market?	Quantitative: How many book titles are available in the market?	Quantitative: How many news sources do online users consult on a daily basis?
Qualitative: Are politicians prevented from owning media organizations?	Qualitative: Does the State entrust a public service broadcasting organization with the task to offer programming that serves the needs of linguistic minorities?	Qualitative: Can online users critically evaluate media content?

The present study will be guided by Valcke’s model for mainly two reasons. First, Valcke’s distinction is particularly useful here because one of the main arguments put forward herein is that EU competition law, as applied to media markets, must be concerned with quantitative *and* qualitative considerations. As a result, Valcke’s model may capture parameters which are arguably relevant to a competition analysis. Take a merger between two competing free-to-air generalist TV channels by way of example. We assume that, post-merger, both channels continue to operate *and* that their programming remains the same. However, the merging firms decide to increase the

³⁶ Ibid., 4. See also Napoli, P. M. (2011). *Exposure Diversity Reconsidered*. Journal of Information Policy 1, 247

³⁷ Napoli, P. M. (1999), *supra n.* 12, 18 and 22

³⁸ Ibid.

³⁹ Ibid., 5

⁴⁰ Valcke, P. (2011), *supra n.* 1, 291. Note that Valcke refers to *source diversity*, *supplier diversity*, and *provider diversity* interchangeably. She does the same with the notions of *content diversity* and *product diversity* on the one hand, and *exposure diversity* and *use diversity* on the other hand

⁴¹ Ibid.

advertising/content ratio in their news programs. For the avoidance of confusion, we assume that, following this change, the amount of time devoted to different viewpoints post-merger is redistributed proportionately to reflect representation prior to the increase in the advertising/content ratio.⁴² Based on Napoli's categorization and given that program/format types and viewpoint representation remain essentially unchanged, the merger does not appear to adversely affect content diversity. However, if the amount of time devoted to the transmission of advertisements is a quality indicator that determines demand-side substitutability, the increase in the advertising/content ratio could, based on Valcke's distinction, be regarded as a decrease in qualitative content diversity. Second, Valcke's categorization is based on policies that were developed by the Member States of the EU. As a result, it takes account of policies, including and especially fixed book pricing mechanisms (aspect of quantitative content diversity) and State aid schemes in support of public broadcasting organizations (aspect of qualitative content diversity), which have not played an important normative role in the U.S. system. The policies that the Commission has developed vis-à-vis fixed book pricing arrangements and State aid measures in support of public broadcasters will be examined in detail in Chapters 5 and 7 respectively. Given the focus of this thesis on EU competition law, the reader will be able to better understand where the Commission positions itself in respect of the above two policies.

Prior to delving into the opportunities for and challenges facing media pluralism in the current media landscape, a note to the reader regarding the types of media content that will be covered throughout the thesis: broadly speaking, there are two approaches to measuring media pluralism. The first takes account of all media content, that is, it does not attempt to measure whether the outcome is pluralistic by reference to a specific genre.⁴³ The second focuses on news mainly on the grounds that '[t]he unrestricted dissemination of a diverse range of information, opinions and arguments about the day's news and events provides the greatest potential to inform citizens and ensure an effective democratic process'.⁴⁴ The present study acknowledges that, when we refer to media pluralism as a prerequisite for a socially cohesive, democratic society, news content is perhaps more relevant than other content, e.g. a US comedy series. For this reason, it intends to study a number of issues that are relevant to news markets, including resale price maintenance for the sale of print newspapers, online agency agreements for the sale of news subscriptions, and State aid in support of the provision of news apps. However, the analysis will not be restricted to news markets for the following two

⁴² For example, before the merger, left wing politicians would get a 5 minute coverage whereas right wing politicians a 10 minute coverage. Post-merger, left wing politicians get a 2.5 minute coverage whereas right wing politicians a 5 minute coverage

⁴³ Ofcom (2012), *supra* n. 33, 9

⁴⁴ *Ibid.*, 9-10

reasons. First, as already discussed in Chapter 1, the purpose of this study is to explore how far a proper application of the EU competition rules can go to safeguard media pluralism. Were we to limit our analysis to cases that deal exclusively with news provision, we would fall short of grasping in its full extent the impact that EU competition enforcement has had on media markets, including news markets. For example, while the Commission has not scrutinized mergers between thematic news channels, it examined a vast amount of mergers involving generalist free-to-air channels that provide news as well as pay-TV operators that provide a bouquet of channels devoted to the analysis of current affairs. Second, while undoubtedly justifiable from a practical perspective (basing a media pluralism measurement on news content *only* is more manageable than putting into the mix all media content),⁴⁵ focusing on news may run the risk of ignoring content that fulfills the democratic functions the media is expected to perform. For example, is ‘infotainment’ news more relevant to the democratic process in a given State than a documentary about indigenous peoples residing in the territory of the State in question?⁴⁶

Having explained what my approach to media pluralism as a normative concept is, I will now examine whether policy intervention to support this value is still needed.

3. Assumption no. 1: Media concentration is no longer a problem – The market will provide

Media policymakers and commentators alike are increasingly putting forward the argument that the proliferation of sources and content that citizens can now access and engage with resolves the problems originating from a concentration of ownership that were pervasive in the traditional media landscape. With the amount of information that citizens now have at their fingertips, they say, rules aimed at addressing concentration of ownership are becoming obsolete. This view is progressively being integrated in media regulation, the most blatant example being the trend towards relaxation (or abolition) of ownership restrictions that has emerged over the past few years. This part discusses whether digital technologies have indeed rendered concerns about media concentration superfluous. I first explain the economic and political reasons why traditional media markets in Europe are concentrated as well as the implications of concentration for pluralism. After introducing the reader

⁴⁵ Ibid. See also Center for Media Pluralism and Media Freedom (CMPF) (2013). *European Union Competencies in Respect of Media Pluralism and Media Freedom*, 13. Retrieved from: <http://cmpf.eu.eu/Documents/CMPFPolicyReport2013.pdf>

⁴⁶ See Craufurd-Smith, R. and Damian Tambini (2012). *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges*. *Journal of Media Law*, 4(1), 54: ‘although news is centrally important for the democratic process and plays a key role in opinion formation, other genres also provide information and can be socially and culturally influential’

to the main issues related to concentration of ownership, I inquire whether the decline of ‘old gatekeepers’, such as TV broadcasters and newspapers, has indeed taken place and if not, whether communicative abundance in the digital environment ensures a balance of opinion-forming power.

3.1. Why are traditional media markets in Europe concentrated?

Traditional media markets have a natural tendency to concentration. This has been confirmed by empirical studies that have examined the structure of the media industry in Europe and beyond.⁴⁷

High entry barriers The reasons why traditional media markets have high concentration ratios are manifold and strongly linked to an array of obstacles that make it difficult for new businesses to break through and compete effectively with well-established media organizations. Let’s take television broadcasting by way of example: launching a TV channel requires compliance with sector-specific rules that determine the number of competitors in a given market. More particularly, television broadcasting has traditionally been subject to a licensing regime; due to spectrum shortages, governments across the European Union have adopted laws regulating how much of the usable frequency shall be used for broadcasting as well as the broadcast power and locations of broadcast licenses.⁴⁸ Moreover, the new entrant needs to make an exceptionally large investment to set up operations and pay start-up losses.⁴⁹ This initial investment includes investment in premium content, that is, content that has the capacity to attract mass audiences (e.g. Hollywood blockbusters and major sporting competitions). Purchasing premium content is a daunting task and may amount to an entry barrier not only because the rights holders usually charge the licensees excessive prices, but also because the content in question is often controlled by already existing

⁴⁷ See, for instance, Autorità per le Garanzie nelle Comunicazioni (2012). *Indagine conoscitiva sul settore della raccolta pubblicitaria* (Allegato A alla delibera 551/12CONS). Retrieved from: <http://www.agcom.it/documents/10179/1/document/bd184d98-cdcd-41e1-b141-9864dcfba8d6>, and Ward, D., Oliver Carsten Fueg and Alessandro D’Armo (2004). *Mapping Study of Media Concentration and Ownership in Ten European Countries*. Retrieved from: <http://77.87.161.246/wp-content/uploads/2013/08/A-Mapping-Study-of-Media-Concentration-and-Ownership-in-Ten-European-Countries.pdf> In addition to the above, other studies that examine the phenomenon of media concentration are, for instance: Open Society Institute (2005). *Television across Europe - Monitoring Report*; Council of Europe (2002). *Media Diversity in Europe. Report prepared by - Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions*. Retrieved from: [http://www.coe.int/t/dghl/standardsetting/media/doc/H-APMD\(2003\)001_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/H-APMD(2003)001_en.pdf); European Federation of Journalists (2005). *Media power in Europe: The big picture of ownership*. For the study of the phenomenon of media concentration in non-European markets see, for instance, Mastrini, G. and Martin Becerra (2011). *Estructura, concentración y transformaciones en los medios del Cono Sur latinoamericano*. Scientific Journal of Media Literacy, 36, 51-59, and Noam, E.M. (2009). *Media ownership and concentration in America*. Oxford: Oxford University Press

⁴⁸ Picard, R. G. and Bum Soo Chon (2004). *Managing Competition Through Barriers to Entry and Channel Availability in the Changing Regulatory Environment*. The International Journal on Media Management 6(3), 168-170. See also Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 1

⁴⁹ See, for instance, European Commission, Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 115 and Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 17

broadcasters through long-term exclusive agreements.⁵⁰ Competition authorities have attempted to address foreclosure concerns relating to exclusivity by imposing remedies, most notably by requiring the broadcasters involved in the transaction under scrutiny to reduce the duration and/or scope of exclusivity.⁵¹ However, these attempts have largely failed to ensure that the market for the acquisition of premium content remains open to competition.⁵² Another barrier to market entry is the presence of public broadcasting organizations. The activities of these organizations are generously supported by State funds, an advantage which commercial startups do not enjoy.⁵³ The amount of money that public service broadcasters receive without ‘sweating’ is not the only factor that may discourage a potential competitor from launching a channel. The mechanisms several Member States have set up in order to ensure that public service broadcasters do not misuse State funds are not entirely transparent or fair vis-à-vis commercial providers, and State aid proceedings before the European Commission take several years to complete.⁵⁴ Consumers’ unwillingness to bear high switching costs, that is, costs incurred as a result of changing suppliers, is another obstacle difficult to overcome. For example, in the case of satellite TV, if existing operators do not provide interoperability, consumers may refrain from changing to a new channel aggregator in order to avoid buying a new set-top box (the satellite receiver).⁵⁵ Switching costs can also be psychological; audience members have long-established content consumption habits that are strongly associated with existing providers. For example, in the case of a broadcaster, this may be a popular soap opera or a trusted anchorman. In the case of newspapers, one of the main factors determining customer loyalty is family heritage.⁵⁶ This makes the creation of new viewing and reading patterns a slow process that may demand years of unprofitable wait.⁵⁷

*High production costs + low
distribution costs=Economies of
scale=Integration*

In addition to the above, media content has high first-copy costs (e.g. labor costs, purchase of equipment, promotion and brand-development costs, etc.).⁵⁸ But, once the provider has

⁵⁰ These agreements usually include holdback and pre-emption rights. For a detailed analysis of the entry barriers relating to premium content acquisition see Geradin, D. (2005). *Access to content by new media platforms: A review of the competition law problems*. European Law Review 30(1), 68-94

⁵¹ See, for instance, Commission decision *Joint Selling of the Media Rights of the FA Premier League (FAPL)* (Case COMP/C.2/38.173) [2006] OJ L 176/104, paragraph 16 and Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 225

⁵² For a detailed analysis of access to premium content-related remedies see Chapter 3, Part 2.a. and Chapter 4, Parts 3.b. and 4.c.

⁵³ Spector, D. (2007). *The economic policy of State aids: The assessment criteria*. In Vivier, X. (ed.). *Competition Policy in the EU- Fifty Years on from the Treaty of Rome*, 179-180. Oxford: OUP

⁵⁴ For a critical analysis of how the State aid rules have been applied to the broadcasting sector see Chapter 7

⁵⁵ OECD (2003). *Policy Roundtable on Media Mergers*, 22

⁵⁶ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 231

⁵⁷ Picard, R. G. and Bum Soo Chon (2004), *supra n.* 48, 171

⁵⁸ OECD (2003), *supra n.* 55, 21. See also Goodman, E. (2004), *supra n.* 30 1433-4. For example, in 2009, the New York Times reportedly spent \$63 million per quarter on raw materials and \$148 million on wages and benefits. See Carlson, N. *Printing The NYT Costs Twice As Much As Sending Every Subscriber A Free Kindle*. 30 January 2009, Business Insider. Retrieved from:

produced the content, the incremental cost to an additional consumer is low.⁵⁹ For example, in the case of newspapers, costs incurred in newsgathering, and the acquisition and preparation of the printing mechanism are necessary to create even one copy. However, the next copies may be produced at negligible marginal costs (e.g. the paper and ink to print an additional newspaper).⁶⁰ The fact that media content is very expensive to create but fairly cheap to deliver incentivizes media companies to expand into every possible distribution platform and succeeding and/or preceding levels of the supply chain⁶¹ because it gives them the opportunity to exploit large economies of scale and scope. By enabling established firms to rationalize resources, reduce transaction costs and spread the related risks, large economies of scale and scope stimulate horizontal (expansion at the same level of the supply chain, e.g. television broadcaster merges with television broadcaster), vertical (expansion at different levels of the supply chain, e.g. television broadcaster acquires film studio) and/or diagonal (diversification into new business areas, e.g. newspaper diversifies into magazine publishing)⁶² integration.

Another element that reinforces the tendency of traditional media markets to concentration is their two-sided nature. A two-sided market is generally defined as a market in which ‘1) two sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affects the outcomes of the other set of agents’.⁶³ Two-sided platforms arise in cases in which there are externalities and in which transaction costs do not allow the two sets of agents to address the externality directly.⁶⁴ The platform is the intermediary that solves the externality by minimizing the costs that a transaction between entities belonging to these groups of agents would entail.⁶⁵ The type of two-sided markets in which several types of traditional media are active is advertising-based media. Advertising-based media use the content they provide to attract audiences and then sell access to these audiences to advertisers.⁶⁶ Therefore, in order to generate profit, they must engage both the audience members (through the provision of attractive content) and the advertisers (through the provision of a large pool of audience

<http://www.businessinsider.com/2009/1/printing-the-nyt-costs-twice-as-much-as-sending-every-subscriber-a-free-kindle?IR=T#ixzz3PXgJfaiY>

⁵⁹ Goodman, E. (2004), *supra n. 30*, 1432-1434

⁶⁰ Norton, S. W. and Will Norton Jr. (1986). *Economies of Scale and the New Technology of Daily Newspapers: A Survivor Analysis*. University of Nebraska – Lincoln College of Journalism & Mass Communications, Working Paper 6

⁶¹ Doyle, G. (2002). *Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media*, 4. London: Sage Publications

⁶² *Ibid.*, 4-5

⁶³ Rysman, M. (2009). *The Economics of Two-sided Markets*. *Journal of Economic Perspectives*, 23(3), 125

⁶⁴ Evans, D.S. and Richard Schmalensee (2007). *Industrial Organization of Markets with Two-Sided Platforms*. *Competition Policy International* 3, 154

⁶⁵ OECD (2009). *Policy Roundtable Report on Two-Sided Markets*, 11-12. Retrieved from: <http://www.oecd.org/daf/competition/44445730.pdf>

⁶⁶ Evans, D.S. and Richard Schmalensee (2007), *supra n. 64*, 155

members to whom advertisers can address their ads). The relationship between these two sets of agents is characterized by indirect network effects⁶⁷ that create what Caillaud and Jullien call ‘a chicken and egg dynamic’.⁶⁸ This means in practice that the broadcaster with the largest audience base or the newspaper with the highest circulation will tend to attract more advertisers. The more appealing that broadcaster or newspaper becomes to advertisers, the more the other providers’ ad revenues decline. The fewer advertisers the latter attract, the less resources they have at their disposal to produce or acquire attractive content. This leads to a decline in audience which causes a further drop in advertisers. Charging less for ad space is not the solution to the problem because advertisers are not so interested in paying lower prices as in reaching as many viewers/readers as possible. As a result of the above, smaller firms find themselves in a downward spiral, which, if it does not eventually crowd them out, at least results in one or very few providers enjoying significant market power.⁶⁹

It bears noting that the relationship between each of the above characteristics and concentration varies from medium to medium. For example, compared against newspapers and television, magazines and radio have low first-copy costs.⁷⁰ Moreover, producing a TV series is more expensive than producing a newspaper, but distributing a newspaper is more expensive than distributing a TV series.⁷¹ However, these differences cannot be relied upon to draw definitive conclusions regarding which sector is more concentrated than others. For example, radio has lower first-copy *and* lower distribution costs than newspapers, but newspaper markets in the Netherlands and Italy are less concentrated than radio markets.⁷² This means that a policymaker that seeks to address concerns relating to (mono- *and* cross-media) concentration of ownership, including market foreclosure and threats to pluralism, needs to understand the role that each of the above parameters plays in the market under scrutiny in order to be able to select the best course of action (e.g. what are the most appropriate remedies in a merger transaction, how should a regulatory instrument be designed in order to lower entry barriers, etc.).

⁶⁷ OECD (2003), *supra n.* 55, 21 and 26. Network effects arise in situations where the size of one group of agents has an impact on another group of agents. See OECD (2012), *Policy Roundtable on Market Definition*, 54. Retrieved from: <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf> For instance, the number of audience members that watch a given channel has a positive impact on the advertisers in that more audience members increase the possibilities that their ads will be watched thereby possibly leading to a profitable transaction

⁶⁸ Caillaud, B. and Bruno Jullien (2003). *Chicken & egg: competition among intermediation service providers*. RAND Journal of Economics 34(2), 309–328

⁶⁹ OECD (2003), *supra n.* 55, 21

⁷⁰ Bardoel, J. and Jan van Cuilenburg (2008). *Strategic Media Management*. In Fourier, P. J. (ed.). *Media Studies – Policy, Management and Media Representation* (2nd edition), 176. Cape Town: Juta & Co.

⁷¹ *Ibid.*

⁷² Ward, D., Oliver Carsten Fueg and Alessandro D’Armo (2004), *supra n.* 47, 8 and 13

Besides the economic *rationales* behind the industry's movement for consolidation, a series of national and supranational policies have facilitated, if not encouraged, media concentration across the EU. First, in 1989, the Television Without Frontiers (now Audiovisual Media Services or AVMS⁷³) Directive⁷⁴ was adopted with the aim to liberalize the broadcasting (and, after the AVMS Directive entered into force, audiovisual media) markets. As already mentioned in Chapter 1, pursuant to the Directive, for an audiovisual media provider to operate across the whole of the EU, it suffices that it complies with the rules of the Member State from which it emanates (country of origin principle).⁷⁵ This rule has played a major role in the expansion of media undertakings into other countries. While less than eighty-five cross-border television channels existed in 1989, by November 2008, at least 650 channels targeted the market of a Member State other than the country of establishment.⁷⁶ Combined with the increasing acceptance of generic formats such as reality TV programs and comedy series, which has reduced cultural barriers, liberalization allowed (formerly purely national) media groups to grow significant business outside their primary markets.⁷⁷ The expansion of media undertakings into the markets of other Member States has also been facilitated by a wave of deregulation. National governments have gradually been abolishing or relaxing ownership rules in order to attract new investors and ultimately become more competitive vis-à-vis third countries.⁷⁸ Deregulation is also the

⁷³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 332/27

⁷⁴ Council Directive 89/442/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television Without Frontiers Directive) [1989] OJ L 298/23

⁷⁵ See Audiovisual Media Services Directive, *supra n.*, 73, Articles 2 and 3

⁷⁶ European Commission, *Seventh report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC 'Television without Frontiers'*, 3 COM (2009) 309 final

⁷⁷ Council of Europe (2004). *Transnational media concentrations in Europe. Report prepared by the Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions*, 7. Retrieved from: http://www.coe.org.rs/REPOSITORY/133_aapmd2rev5.2004--report-transnational-media-concentrations_205-.pdf On this issue see also Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9; Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 22, and Harcourt, A. (2004). *Institution-driven competition: The regulation of cross-border broadcasting in the EU*. European University Institute Working Papers, RSCAS No. 2004/44, 1. Retrieved from: http://www.eui.eu/RSCAS/WP-Texts/04_44.pdf

⁷⁸ Since the early 1980s, the governments of several European countries such as the UK, Finland, Greece, Italy and Bulgaria have been promoting deregulation in the media industry. For more information on the process of liberalization and deregulation see, for instance, ELIAMEP (2010). *MEDIADEM background information report on media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe*. Retrieved from: <http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/BIR.pdf> For example, during the consultation on media ownership rules that preceded the adoption of the Communications Act 2003, the UK government stated that '[w]hilst the need for a plurality of media sources remains clear, we are committed to a deregulatory approach to media markets. From a commercial point of view, further liberalization would benefit existing and potential new investors, providing for further consolidation, greater efficiency, more scope for investment, and a more significant international presence'. See UK Department for Culture, Media, and Sport (2001). *Consultation on Media Ownership Rules*, paragraph 1.8. The European Commission has been supportive of this approach on the grounds that 'too restrictive ownership rules might hinder European companies from competing globally'. See Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9

outcome of initiatives which supranational policymakers undertook throughout the 1990s with a view to creating a ‘Global Information Society’;⁷⁹ the denationalization of the processes of media production and distribution was largely pushed by the International Monetary Fund and other international regulatory bodies.⁸⁰ Finally, the European Commission, which has exclusive competence to decide whether a concentration of a Union dimension is compatible or not with the common market,⁸¹ has adopted a very tolerant approach to the expansion plans of undertakings, including U.S. firms that provide media services across the EU. Since the Merger Regulation entered into force, only six concentrations affecting the traditional media sector were prohibited,⁸² out of a total of 161 operations that sought regulatory approval.⁸³ In some cases, the Commission has gone so far as to clear transactions in spite of the fact that clearance would lead to a near-monopoly in the affected markets.⁸⁴

3.2. What is the impact of media concentration on pluralism?

Diversity of ownership or control over media organizations is the dimension that has received the most attention⁸⁵ in regulation supporting media pluralism, both across⁸⁶ and beyond⁸⁷ the European Union. Ensuring that significant opinion-forming power is not concentrated in the hands of a few has been (or, at least until recently, was) a priority because of the presumed negative effects of concentration on media pluralism.⁸⁸ To quote Lord MacIntosh of Haringey, former UK Minister for Culture, Media and Sport, the principle underlying media ownership restrictions ‘*is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda*’.⁸⁹

⁷⁹ Doyle, G. (2002), *supra n.* 61, 2

⁸⁰ See Arsenault, A.H. and Manuel Castells (2008). *The Structure and Dynamic of Global Multi-Media Business Networks*, International Journal of Communication, 2, 708–711

⁸¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1, Article 4(1)

⁸² See http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result Note that this list has omitted Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1

⁸³ See http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

⁸⁴ Commission decision *Newscorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, paragraph 140

⁸⁵ Valcke, P. (2011), *supra n.* 1, 291

⁸⁶ The relevant measures that the EU Member States have adopted vary. For instance, some Member States impose limitations on the number of licenses that may be held by the same person whereas others impose limitations on the total amount of audience, capital, or market shares that a single person, natural or legal, can control. For an overview of the different systems see Valcke, P. (2009). *From Ownership Regulation to Legal Indicators of Media Pluralism: Background, Typologies, and Methods*. Journal of Media Business Studies 6(3), 19–42

⁸⁷ For instance, media ownership is regulated in the U.S. and Australia. For an overview of the U.S. rules see the website of the Federal Communications Commission, at: <http://www.fcc.gov/guides/review-broadcast-ownership-rules> whereas for an overview of the Australian framework see the website of the Parliament of Australia, at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/medieregulation

⁸⁸ Valcke, P. (2011), *supra n.* 1, 291

⁸⁹ Ofcom (2010), *supra n.* 19, 17

Saying that *every* media concentration is *always only* harmful to pluralism is not accurate. Depending on the circumstances, a concentration may have some positive effects on media pluralism. For example, if a mainstream publisher acquires a niche publisher that is on the verge of bankruptcy, or headed for some serious financial difficulties, an outlet that offers alternative content survives. Similarly, a merger between two local newspapers that keep their editorial departments separate post-merger may enhance pluralism if the advertising market is so small that it cannot sustain both newspapers.⁹⁰ A merger between two local broadcasters may lead to the creation of a strong national player with a program offer that is different from the generic programming of competing multinational broadcasters.

However, experience shows that a concentration is highly likely to have negative consequences for pluralism.⁹¹ From a purely economic perspective, a concentration increases the incentive to crowd out competing content suppliers. Take vertical mergers affecting broadcasting markets for example – in several cases where competition authorities found that the merged entity would enjoy significant power in the upstream market for the purchase of premium content, they imposed upon the involved firms the obligation to sublicense the acquired content to competitors post-merger.⁹² However, in the vast majority of cases, the merged entities deprived other broadcasters of the ability to effectively compete in the downstream market for TV audiences.⁹³ Equally ineffective were sublicensing mechanisms establishing the duty to grant access to infrastructure that is essential to competition but cannot feasibly be duplicated (e.g. a cable network).⁹⁴ These examples illustrate that a vertically integrated firm with access to a valuable input will do everything within its power to foreclose the

⁹⁰ Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 8. Note that in the U.S. this is encouraged under the Newspaper Preservation Act, U.S. Code, Title 15, Chapter 43

⁹¹ The examples here concern the impact of an individual operation on media pluralism. As regards the impact of a concentrated market structure, there are studies that found that the more concentrated the sector, the less pluralistic the media landscape. See, for instance, Humphreys, P. (1996). *Mass media and media policy in Western Europe*. Manchester: Manchester University Press; Einstein, M. (2002). *Media Diversity: Economics, Ownership, and the FCC*. New York: Routledge, and La Porte Alfaro, M. T. and Teresa Sabada (2001). *Globalization of the Media Industry and Possible Threats to Cultural Diversity – A Study prepared for the European Parliament*. Final Study. Working document for the STOA Panel. There are also studies that did not manage to identify a relationship between ownership concentration and media pluralism, especially content diversity, in *quantitative* terms. See, for instance, Berry, S. and Joel Waldfogel (2001). *Do mergers increase product variety? Evidence from radio broadcasting*. Quarterly Journal of Economics, 116, 1009-1025 and Ward, D. (2006). *Final Report on the Study Commissioned by the MC-S-MD - The Assessment of Content Diversity in Newspapers and Television in the Context of Increasing Trends Towards Concentration of Media Markets*, MC-S-MD (2006) 001, 4. Strasbourg: Council of Europe. However, even in the latter case, there are *qualitative* parameters, and in particular parameters that determine whether the power that goes with ownership is used to direct editorial decisions, which are key to understanding whether concentration harms pluralism (e.g. are politicians prevented from owning a media outlet? Does the owner promote a self-censorship approach to the issues journalists working for the outlet cover?). These parameters have been the subject of other studies (see *infra* n. 103)

⁹² For an analysis of sublicensing mechanisms imposed by the European Commission see Chapter 3, Part 2.a. and Chapter 4, Part 3.b. For an analysis of sublicensing mechanisms imposed by national competition authorities see Ofcom (2009). *Wholesale must-offer remedies: International examples*

⁹³ *Ibid.*

⁹⁴ On this issue see Chapter 4, Part 4.c.

market to other content providers, potentially harming supply diversity. An integrated media organization may also negatively impact content diversity, most notably through decisions relating to the use of the outlets' resources. For example, horizontally integrated newspapers tend to use the same content across all titles held in common ownership in order to reduce the costs incurred in the newsgathering process.⁹⁵

From a non-economic perspective, concentration may have adverse effects on pluralism when individuals controlling several (and/or popular) media seek to promote a certain political agenda; history is full of examples of media moguls, often linked to political parties, that have used the opinion-forming power of their outlets in order to protect their own interests, rather than to expose the audiences to opposing viewpoints or inconvenient truths.⁹⁶ These individuals have interfered with journalistic autonomy either directly (by literally making day-to-day editorial decisions) or indirectly (e.g. by appointing only like-minded people or by creating a spirit of obedience that leads to self-censorship).⁹⁷ Practices undermining the editorial independence of the media are facilitated by a number of *lacunae* in the applicable legal framework of several Member States, including the absence of transparency rules requiring media firms to publish their ownership structure⁹⁸ and/or the absence of rules preventing political parties from holding broadcast licenses or running newspapers.⁹⁹

⁹⁵ Doyle, G. (2002), *supra n.* 61, 23. Drawing on empirical research on media companies' behavior to multiuse their products, Murray (2005:431) notes that 'once hit content has been identified it can be milked for revenue almost ad infinitum'. See Murray, S. (2005). *Brand loyalties: rethinking content within global corporate media*, *Media, Culture & Society*, 27(3), 415–435

⁹⁶ A good example is former Prime Minister of Italy, Silvio Berlusconi who, in the March 1994 elections, 'used his three TV stations reaching 40 percent of the Italian audience to give unremitting support to his own political party'. Subsequent research proved 'not only that there was a bigger swing to the right (3.5 percent more) among Berlusconi viewers than in the electorate in general, but also that this swing could not be explained by the fact that viewers of Berlusconi channels were already more right wing. Viewers of these channels were found to be middle of the road and only shifted their voting *after* watching the Berlusconi channels'. See Owen, B. (2006). *The tragedy of broadcast regulation*, 82. In Hassan, R. and Julian Thomas (eds.), *The New Media Theory Reader*. Berkshire UK: Open University Press. Berlusconi won these and subsequent elections with numerous supranational initiatives stressing that Italy was (and still is) in desperate need of effective regulation addressing the conflict of interest that arises in cases where a politician may own shareholdings in media organizations. See, for instance, EU Network of Independent Experts on Human Rights (2003). *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, 110; European Parliament Resolution of April 22, 2004 on the risks of violations, in the EU and especially in Italy, of freedom of expression and information (2003/2237(INI)). Similar remarks can be made when an owner uses the outlet to promote a certain corporate agenda. A good example is the following: Until recently, UK newspapers the Times and the Sun, which belong to media tycoon Rupert Murdoch, had a favorable attitude towards UK's Prime Minister David Cameron because Murdoch was hoping to get in return approval to acquire the 61% of the stock that he did not already own in BSkyB. Both newspapers changed attitude though after Cameron announced his decision to appoint a judge to investigate a phone hacking scandal involving another Murdoch newspaper, News of the World. For more information on this case see, for instance, <http://blogs.lse.ac.uk/mediapolicyproject/resources/dossier-media-plurality/> See also Burns, J. F. and Alan Cowell. *Cameron Defends Handling of Murdoch Bid to Take Over Sky Broadcasting*. New York Times, 25 May 2012. Retrieved from: http://www.nytimes.com/2012/05/26/world/europe/e-mail-shows-murdoch-bid-maneuvering.html?_r=0; Holton, K. *UK's Cameron defends role in Murdoch takeover deal*. 25 May 2012, Reuters. Retrieved from: <http://www.reuters.com/article/2012/05/25/britain-hacking-cameron-idUSL5E8GP7PN20120525>, and Simons, N. *Rupert Murdoch Uses Twitter To Attack David Cameron Over Donor Row*. 26 March 2012, The Huffington Post. Retrieved from: http://www.huffingtonpost.co.uk/2012/03/26/rupert-murdoch-turns-on-david-cameron-over-cash-for-access-allegations_n_1379057.html

⁹⁷ Doyle, G. (2002), *supra n.* 61, 19-20

⁹⁸ OSCE (2003). *The Impact of Media Concentration on Professional Journalism*, 56

⁹⁹ Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 6-7

3.3. Is concentration in traditional media markets still a concern?

The concern that traditional media organizations may impair the fair and free flow of information is still pervasive in the EU. This is so for the following three reasons.

First, as discussed above, because the economics of media markets encourages, if not dictates, concentration, and because policymakers have become more permissive vis-à-vis ownership restrictions, traditional media markets in Europe are already concentrated. Evidence suggests that a shift to disintegration is unlikely to occur: In 2014, the European Commission alone received (and approved) thirteen merger notifications in the traditional media sector.¹⁰⁰ This is approximately 30% more than the (traditional media) merger transactions that sought EU regulatory approval in 2013.¹⁰¹ On a national level, over the past five years, several Member States (e.g., the UK, Spain, the Netherlands, etc.) have further relaxed their mono- and cross-media ownership rules.¹⁰² These developments cannot be expected to reduce the ability and incentive of powerful media organizations to engage in practices undermining journalistic autonomy. To the contrary, as a result of this tolerance towards concentration, there has reportedly been ‘a rise in political ownership -in some cases clandestine- as well as a resurgence of “press baronism”’.¹⁰³

Second, traditional media are a big part of Europeans’ media diet. For example, television is the most popular medium in the EU and radio the second most popular.¹⁰⁴ In terms of use, written press comes fourth (after the Internet), but a considerable percentage of Europeans (33%) continue to read newspapers every day, or almost every day.¹⁰⁵ For the purposes of this study, it bears noting that television is still the main medium for molding the citizen’s view on matters of common concern: television remains Europeans’ preferred source of news on both national and European political affairs.¹⁰⁶ Moreover, recent qualitative research showed that television continues to have the most

¹⁰⁰ Search by NACE Code, see: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

¹⁰¹ Ibid., see http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

¹⁰² See Open Society Foundations (2012). *Mapping Digital Media in the European Union - A Report for the High-Level Group on Media Freedom and Pluralism*, 2. Retrieved from: http://www.opensocietyfoundations.org/sites/default/files/Mapping_Digital_Media_EU_20121217_0.pdf; Ofcom (2009). *Report on Media Ownership Rules*, pp. 21 *et seq.*, and Freedom House (2013). *Report on Spain*. Retrieved from: https://www.freedomhouse.org/report/freedom-press/2013/spain#.VMJr_M016eY

¹⁰³ Open Society Foundations (2012), *supra n.* 102, 2. Similarly, the 2012 MEDIADEM Report found that, in their effort to be loyal to the outlet’s private interests, editors more often than not ‘promote unprofessional and unethical practices in the newsrooms’. See ELIAMEP (2012), *MEDIADEM Comparative Report on Media freedom and Independence in 14 European countries*, 146-147. Retrieved from: <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/09/D3.1.pdf>

¹⁰⁴ European Commission (2013). *Media Use in the European Union*, 5 and 9. According to the Commission, the average European watches up to 4 hours a day. See http://ec.europa.eu/avpolicy/index_en.htm

¹⁰⁵ Ibid., 11

¹⁰⁶ Ibid., 37 and 41

impact on public opinion due to ‘its immersive audiovisual qualities that bring stories to life’.¹⁰⁷ The popularity of this medium combined with the great influence it may exert on viewers has underpinned the methodologies that media regulators have designed and employed in recent years to measure media pluralism; TV is (arguably correctly) assigned far greater weight than other media.¹⁰⁸

Third, as the analysis below will demonstrate, the new media environment has not created a ‘diverse’ enough offer that can be balanced against the content supplied by traditional media outlets. Put simply, new media have not yet fully addressed the concerns relating to the excessive opinion-forming power ‘old gatekeepers’ enjoy.

3.4. The advent of digital media: Is concentration no longer a problem?

Among the many developments that have occurred over the past few years, two technologies have had a particularly significant impact on the media marketplace, namely the introduction of Digital Terrestrial Television (DTT) and the Internet.¹⁰⁹ Digital television is a new broadcasting technology that is gradually replacing the traditional analogue model. In analogue broadcasting, the signal takes the form of a continuous wave whereas digital technology converts analog signals into a binary code of zeros and ones.¹¹⁰ One of the main advantages of digital broadcasting is that it releases spectrum, the so-called digital dividend; due to advanced compression, the technology may transmit eight digital TV channels using the same amount of spectrum needed to transmit one analogue TV channel. As for the Internet, not only does it provide unlimited space, but it also allows the production and distribution of content at (almost) no cost.¹¹¹

These technologies have marked the beginning of the end of the spectrum scarcity era and significantly lowered the barriers that new providers need to overcome in order to penetrate the market.¹¹² As a result, new information sources have proliferated. Despite the fact that both technologies are relatively new (the Internet started an expansion to Europe less than fifteen years ago and most of the Member States have only recently completed the digital switchover, that is, the

¹⁰⁷ See, for instance, Ofcom (2012), *supra n.* 33, 14

¹⁰⁸ *Ibid.* See also Ofcom (2010), *supra n.* 19, 58. The FCC’s Diversity Index also assigns greater weight to television than to other media. For an overview and criticism of the methodology see, for instance, Hill, B. C. (2006). *Measuring media market diversity: concentration, importance, and pluralism*. Federal Communications Law Journal, 58, 169-194

¹⁰⁹ CMPF (2013), *supra n.* 35, 27, and Council of Europe (2002), *supra n.* 47, 26, paragraph 101

¹¹⁰ European Commission (2006). *The European Commission’s Approach to Digital Interactive Television: Frequently Asked Questions*, Memo/06/60. Retrieved from: http://europa.eu/rapid/press-release_MEMO-06-60_en.htm

¹¹¹ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 5

¹¹² CMPF (2013), *supra n.* 35, 27

transition from analogue to digital broadcasting¹¹³), relevant figures are impressive: in the period 2003-2004, when the first major steps for the transition from analogue to digital broadcasting were made, 860 channels with potential national coverage were broadcast across Europe,¹¹⁴ whereas in 2010, according to the Commission, there were 7,500 broadcasters available across the EU.¹¹⁵ As regards the Internet, raw data merely gives us an idea of the amount of information that may be found online. For example, the *Report on User-Created-Content: Supporting a Participative Information Society* notes that over 160 billion videos were produced and shared by Internet users in 2012 alone.¹¹⁶

This revolution has sparked a polarized debate about whether the long-standing concern over concentration of ownership has subsided.¹¹⁷ On the one hand, the ‘media optimists’, that is, those who are enthusiastic about the effects of new technologies on media pluralism, argue that, since the fear that certain players will take advantage of technical or economic scarcity to dominate the marketplace has diminished, the circumstances for the creation of a pluralistic media environment are more favorable now than ever before. Digital media, the media optimists say, have made access to the audiences easy and cheap¹¹⁸ whereas new horizontal networks, the development of which was prompted by the Internet, facilitate the multimodal exchange of interactive messages from many to many.¹¹⁹ According to the optimists, due to accessibility, affordability and interactivity, cultural and social boundaries are increasingly dissolving,¹²⁰ and insurgent politics can now intervene more decisively in the new communication space.¹²¹ These changes, they believe, will ultimately dismantle the power held by the traditional media system where news production is defined by the interaction between political elites and journalists, and create a ‘multiactivity’ structure where non-mainstream

¹¹³ While the European Commission suggested that that the beginning of 2012 be agreed for switch-off in all Member States, Greece, Hungary, Poland and Bulgaria were expected to complete digital switchover by 2014 whereas Romania is scheduled to complete the process by 2015. For more information see the European Commission’s website, at: http://europa.eu/legislation_summaries/audiovisual_and_media/124223a_en.htm with links to related documents

¹¹⁴ European Commission. *Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC ‘Television without Frontiers’*, SEC (2006) 160, 4. Retrieved from: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0049&from=EN>

¹¹⁵ European Commission. *First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU ‘Audiovisual Media Service Directive’* COM (2012) 203 final, 3

¹¹⁶ Helberger, N., Guibault, L. and Janssen E. H. (2012). *User-Created-Content: Supporting a Participative Information Society. Understanding the Digital World*. Final Report 2008 Amsterdam Law School Research Paper No. 2012-32, 80-81

¹¹⁷ For a comprehensive overview of the arguments put forward by media optimists and those supported by media pessimists see Karppinen, K. (2009). *Rethinking media pluralism and communicative abundance*. *Observatorio Journal* 3(4), 151-169

¹¹⁸ Compaine, B.M. and Douglas Gomery (2000). *Who owns the media? Competition and concentration in the mass media industry*, 575. Mahwah, N.J.: L. Erlbaum Associates

¹¹⁹ Castells, M. (2007). *Communication, power and counter-power in the network society*. *International Journal of Communication* 1, 247

¹²⁰ McNair, B. (2006). *Cultural Chaos – Journalism, News and Power in a Globalized World*, 6. London: Routledge

¹²¹ Castells, M. (2007), *supra n.* 119, 248

political actors can set the political agenda.¹²² On the other hand, the ‘media pessimists’ argue that digital media have fallen short of resolving issues relating to concentration of power in the hands of very few gatekeepers. New technologies, they say, are stuck in old hierarchies that still determine the amount and type of content ultimately reaching the citizens.¹²³ These hierarchies use new technologies either to protect and promote certain political interests¹²⁴ or, taking advantage of the increasing acceptance of generic format content, to maximize profit.¹²⁵ The pessimists also distrust new media businesses which are increasingly playing a major role in finding and selecting content that is (or should be) of interest to the user; they believe that these businesses create new silos of information instead of breaking down the old ones.¹²⁶

Regulatory reforms that took place over the past decade suggest that the optimists have greatly influenced modern media policymaking. For example, in 2003, the Federal Communications Commission approved new media ownership rules that allowed TV broadcasters to reach 45% of the national audience, an increase of 10% from the previous restrictions.¹²⁷ The document outlining the amendments to the then applicable media ownership thresholds lays down that citizens ‘*have more choices, more sources of news and information, and more varied entertainment programming available to them than ever before [...] and via the Internet, Americans can access virtually any information, anywhere, on any topic. [...] [O]wnership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America’s gatekeepers*’.¹²⁸ Similarly, in its report on the status of Dutch media in 2010, Commissariat voor de Media notes that ‘a wave of deregulation in ownership rules seems to go through Europe. This also applies to the Netherlands where the Temporary Act Media Concentration was repealed as of the first of January 2011. *The increasing amount of news sources is one of the reasons why concerns about media diversity gradually seem to move away from measures which aim to secure a minimal number of players in a market*’ [emphasis added].¹²⁹

¹²² Williams, B. A. and Michael X. Delli Carpini (2004). *Monica and Bill all the time and everywhere: The collapse of gatekeeping and agenda setting in the new media environment*. *American Behavioral Scientist*, 47(9), 1213

¹²³ Hindman, M. (2008). *The Myth of Digital Democracy*, 18. Princeton, NJ: Princeton University Press

¹²⁴ Braman S. (2004). *Where Has Media Policy Gone? Defining the Field in the Twenty-First Century*. *Communication Law and Policy*, 9(2), 153-182

¹²⁵ Council of Europe (2004). *supra n. 77*, 25-26; Fenton, N. (2010). *Drowning or Waving? New Media, Journalism and Democracy*. In Fenton, N. (ed.), *New Media, Old News. Journalism and Democracy in the Digital Age*, 3-16. London: Sage

¹²⁶ Verhulst, S. (2007). *Mediation, Mediators and New Intermediaries. Implications for the Design of New Communications Policies*, 113-137. In Napoli, P. M. (ed.). *Media Diversity and Localism: Meaning and Metrics*. Mahwah, NJ: Lawrence Erlbaum

¹²⁷ For an overview and critical analysis of these changes see, for instance, Miller, D. S. (2004). *Limits on Media Ownership: Should the FCC Curb Its Reliance on Deregulation?* *U. ILL. J.L. Tech. & Pol’y*, 2, 345-367. For an overview of the currently applicable rules see: <http://www.fcc.gov/guides/review-broadcast-ownership-rules>

¹²⁸ Federal Communications Commission (2003). *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127, points 3 and 4

¹²⁹ Commissariat voor de media (2011), *supra n. 33*, 6. See also Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 4 and 15-16: The European Commission has taken the stance that the adoption of pan-European media ownership rules would not be appropriate, *inter alia*, because ‘*the Internet [allows] ‘licensed media and unlicensed*

The assumption on which the aforementioned regulatory reforms are based is arguably not well-grounded, for a numerical increase in sources and content has not made concerns relating to media concentration disappear with a magic yardstick. I am certainly not saying that the media ownership rules that were repealed or relaxed were well-designed and effectively implemented and that therefore they should continue to apply. Nevertheless, and without undermining the role that they may play (or have already played) in reducing the power held by old gatekeepers, I am skeptical about whether, in the absence of ownership restrictions,¹³⁰ digital media can indeed reach their full potential. Evidence on supply and demand patterns in digital television and Internet markets suggests that new technologies have not remedied the communicative inequalities that result from media concentration. This is so mainly for two reasons: first, traditional media organizations still hold significant opinion-forming power because they have managed to reposition and establish a very strong presence in digital content markets. Second, new media businesses that have emerged with the advent of the Internet, most notably digital intermediaries, may have engaged in practices that hinder the fair and free flow of information, introducing artificial forms of scarcity. Each of these two issues is examined separately below.

3.4.1. Traditional media organizations repositioning in digital broadcasting markets: The wolf changes its fur, but not its nature

The introduction of digital television has not made market entry easy for new content suppliers, or at least not as easy as originally anticipated. This may be inferred from recent research that shows that the European audiovisual marketplace remains highly concentrated¹³¹ *and* that the most profitable companies are ‘the usual suspects’, that is, businesses, most notably U.S. firms, that were already well established before the digital revolution commenced.¹³² There are several reasons that can explain why new entrants have been unable to challenge older competitors that started off as traditional broadcasters.

First, the positive impact that lower production and distribution costs may have on diversity has

*media to compete on the web using a mixture of text, graphics, photographs and video [...] without the high entry costs and entry barriers inherent in broadcast or traditional print media*⁷

¹³⁰ Or alternatively, with very tolerant ownership restrictions

¹³¹ See *supra* n. 47

¹³² See, for instance, European Audiovisual Observatory (2009). *Video on demand and catch-up television in Europe*

arguably been exaggerated. As Owen correctly notes, ‘access’ is different from ‘success’;¹³³ while establishing a media outlet is not as expensive as it once was, costs incurred in the creation of *attractive* content that manages to generate the advertising¹³⁴ or subscription revenues¹³⁵ that will ensure the longevity of the outlet remain high.¹³⁶ For example, in the U.S., none of the twenty-five most-watched TV shows of the 2012-2013 season was produced and/or distributed by a new provider.¹³⁷ The same holds true for the fifty most-watched TV shows of the 2013-2014 season.¹³⁸ Big ratings require, as a rule, big budgets. For example, the actors that star in CBS’ *The Big Bang Theory* (first in the 2013-2014 list) are each paid \$1 million per episode.¹³⁹ AMC’s *The Walking Dead* (fourth in the list) reportedly costs \$2.8 million per episode.¹⁴⁰ TV series produced by companies established in the EU may not be as ‘lavish’ as U.S. shows, but they are not cheap either. For example, the BBC reportedly spent £800,000 for the pilot of its mini-series *Sherlock Holmes*.¹⁴¹ The ‘megabucks’ spent to create a first copy combined with the high audience ratings the above series achieve may be the digital media outcome to which Baker refers to as the ‘Hollywood effect’.¹⁴² Baker expects that the ability to create and deliver content at less or almost no cost will have two implications for diversity.¹⁴³ First, it will lead to a numerical increase in commercial and non-commercial product offerings, which he calls the ‘diversity effect’.¹⁴⁴ Second, it will incentivize existing providers to invest more in first copies.¹⁴⁵ This latter effect, which corresponds to the major Hollywood studios’ capacity to spend significant amounts of money on the first copy allowed them to

¹³³ Owen, B. M. (2004, April). *Confusing Success with Access: “Correctly” Measuring Concentration of Ownership and Control in Mass Media and Online Services*. Paper prepared for the ‘Media Concentration and the Internet - Empirical, Business and Policy Research’, a Symposium at the Columbia Institute for Teleinformation (CITI), Columbia Business School

¹³⁴ See, for instance, the TV series of which suppliers secured the highest advertising revenues in 2013: De Moraes, L. *NBC’s ‘The Blacklist’ Tops Annual New-Series Ad Price Survey*. Deadline Hollywood, 14 October 2013. Retrieved from: <http://deadline.com/2013/10/nbcs-the-blacklist-tops-annual-new-series-ad-price-survey-610874/>

¹³⁵ Note that consumers are more willing to bear the extra cost of new hardware or subscriptions if the new product is provided by recognizable brands. This is so, because consumers seek to avoid psychological discomfort, which they experience when switching to providers with which they are not familiar. See Murray, S. (2005), *supra n.* 95, 431 and Picard, R. G. and Bum Soo Chon (2004), *supra n.* 48, 170

¹³⁶ Karppinen, K. (2009), *supra n.* 117, 158

¹³⁷ See Schneider, M. *America’s Most Watched: The Top 25 Shows of the 2012-2013 TV Season*. 10 June 2013, TV Guide. Retrieved from: <http://www.tvguide.com/news/most-watched-tv-shows-top-25-2012-2013-1066503/>

¹³⁸ See Schneider, M. *America’s Most Watched: The Top 50 Shows of the 2013-2014 TV Season*. 06 June 2014, TV Guide. Retrieved from: <http://www.tvguide.com/news/most-watched-shows-2013-2014-1082628/> It is also worth noting that a staggering 48% of the programs included in the latter list is distributed by CBS, a television network that was established in 1928. See <http://www.cbcorporation.com/portfolio.php?division=93>

¹³⁹ Savage, M. *More buck for your Big Bang Theory: What justifies a \$1 million pay packet?* BBC News, 05 August 2014. Retrieved from: <http://www.bbc.com/news/entertainment-arts-28658258>

¹⁴⁰ Rowles, D. *Which TV Shows Command The Highest Ad Prices, And How Much Does AMC Make On ‘The Walking Dead’?* 21 October 2013, Uproxx. Retrieved from: <http://uproxx.com/tv/2013/10/tv-shows-command-highest-ad-prices-much-amc-make-walking-dead/>

¹⁴¹ Heritage, S. *Sherlock Holmes’s smarter brothers: the best pilots that never made it to air*. The Guardian, 28 May 2010. Retrieved from: <http://www.theguardian.com/tv-and-radio/tvandradioblog/2010/may/28/sherlock-holmes-best-pilots-never>

¹⁴² Baker, E. C. (2007). *Media concentration and democracy: why ownership matters*, 105. Cambridge/New York: Cambridge University Press

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

dominate the world's film industry, will result in the concentration of the audiences around the products of established firms, ultimately leading to a decrease in the diversity of sources and contents actually consumed.¹⁴⁶

Second, there are indications that lower technical barriers to entry have not enhanced supply diversity; the possibility of increased efficiency from economies of scale makes it fairly easy for traditional media companies to expand and solidify their presence in neighboring media markets. More particularly, while the switch-off of analogue television releases spectrum, instead of creating opportunities for new entrants, it may well favor existing media conglomerates that have both the financial resources to invest in new and multiple channels and enough content to 'feed' them.¹⁴⁷ The UK market is a good example to illustrate how (communicative and market) power is distributed in digital television: In the UK, which completed the digital switchover in 2012, 689 international, national and regional channels are currently available.¹⁴⁸ All of these channels are delivered by a handful of well-known groups such as the BBC, ITV, CBS and Viacom.¹⁴⁹ BSkyB alone provides seventy-four channels.¹⁵⁰ It is therefore important to make a clear distinction between entry barriers and economies of scale; it may be less complicated to enter the market now than it was in the past, but this does not make efficiencies irrelevant. Noam, who studied the evolution of information markets, found that when entry barriers drop and economies of scale rise, a U-shaped effect is created whereby there will initially be more operators but ultimately fewer survivors, those that benefit from large economies of scale.¹⁵¹ In view of the above, and given that the digital switchover has only recently been completed in most Member States, it remains to be seen how many of the thousands of channels which are now available in the European audiovisual space¹⁵² and which do not belong to powerful media organizations will continue to exist in the next few years.

Third, and related to the above, previously different communication infrastructures now use the same transport protocols. This means that television broadcasts can currently be delivered on multiple platforms with significantly less cost.¹⁵³ For example, besides terrestrial, direct-to-home satellite and cable networks, TV programming is also available on Internet Protocol television,

¹⁴⁶ Ibid., 102

¹⁴⁷ European Federation of Journalists (2005), *supra n.* 47, 5-6

¹⁴⁸ See <http://mavise.obs.coe.int/country?id=14>

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Noam, E. M. (2009), *supra n.* 47, 37

¹⁵² European Commission (2012), *supra n.* 115

¹⁵³ Pavlik, J. (2005). *Understanding Convergence and Digital Broadcasting Technologies for the Twenty-First Century*. NHK Broadcasting Studies. Retrieved from: https://www.nhk.or.jp/bunken/english/reports/pdf/05_no4_08.pdf

offered by telecommunication providers over managed network with high quality of service, and Over-The-Top (OTT) television, provided by the content owners themselves (e.g. the BBC iPlayer, Hulu, YouTube,¹⁵⁴ etc.) without the ISP or network operator controlling viewer access.¹⁵⁵ As a result, the same content can be delivered on multiple devices (e.g. traditional TV set, tablets and smartphones) and in several formats (e.g. linear transmission, catch-up and on-demand). This feature, one of the many facets of convergence, incentivizes media companies to distribute the same content across all new platforms.¹⁵⁶ Doyle studied the impact of this practice on the new media offer. More particularly, Doyle studied the strategy that UK television suppliers are increasingly employing to produce and deliver content, known as ‘360-degree commissioning’, whereby, from their earliest stages, decisions on what type of content to invest in are determined by the content’s ability to generate revenue through multiple platforms.¹⁵⁷ Doyle concludes that this practice undoubtedly improves the use of resources,¹⁵⁸ but that it also results in established media outlets recycling those themes and genres that appeal to the masses.¹⁵⁹ One of the messages that this empirical research conveys is that, to the extent that and as long as existing media firms rely on tried recipes to reposition in neighboring content markets, the emergence of distribution platforms may have a chilling effect on content diversity.

3.4.2. Concentration online and digital intermediaries (aka the new information gatekeepers)

Alongside traditional media organizations, businesses that have emerged with the advent of the Internet, most notably digital intermediaries, are increasingly determining the amount and quality of information that citizens can access and engage with. For the purposes of this study, digital intermediaries may be defined as undertakings which bring content from third-party suppliers to users ‘*using a variety of digital software, channels, and devices*’.¹⁶⁰ Broadly speaking, digital

¹⁵⁴ YouTube, which started as a peer video upload website, now provides access to programming posted by mainstream broadcasters. See OECD (2013). *Competition Issues in Television and Broadcasting*, 2

¹⁵⁵ Ibid., 9-10. For more information on technology convergence and how it affects broadcasting see, for instance, EBU (2013). *Reply to the European Commission Green Paper – Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*. Retrieved from:

http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Hybrid/EBU_reply_to_Green_Paper_convergence_final.pdf

¹⁵⁶ For example, BBC news program Question Time is available on linear TV via BBC One, and on-demand via the BBC’s iPlayer (through which it can be streamed, watched on catch-up TV and downloaded). Video highlights of the program are made available on the BBC iPlayer, the BBC News and the BBC One websites. Finally, a text summarizing the content broadcast accompanies the video highlights. See <http://www.bbc.co.uk/programmes/b006t1q9>; <http://www.bbc.co.uk/iplayer/episode/b04v85qt/question-time-11122014>; <http://www.bbc.co.uk/iplayer/categories/news/highlights>, and <http://www.bbc.co.uk/programmes/b006t1q9>

¹⁵⁷ Doyle, G. (2010). *From Television to Multi-platform: Less from more or more for less?* *Convergence: The International Journal of Research into New Media Technologies*, 16(4), 432

¹⁵⁸ Ibid., 444

¹⁵⁹ Ibid., 446

¹⁶⁰ Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*, 25

intermediaries can be classified into four groups: search engines like Google and Bing, news aggregators like Yahoo, social media like Facebook, and digital stores like Apple.¹⁶¹

The markets in which digital intermediaries operate are highly concentrated¹⁶² for largely the same reasons traditional media markets have high concentration ratios. For example, the market for online search has high entry barriers, relating to, *inter alia*, hardware acquisition, web-indexing costs, IP patents and costs incurred in the development of algorithms.¹⁶³ Moreover, several, if not most, intermediaries operate as advertising-based media; the indirect network effects that are created as a result of their acting as two-sided platforms usually results in the market ‘tipping’ in favor of existing operators.¹⁶⁴ Entry barriers are higher in cases where a popular intermediary imposes long-term exclusivity agreements on its advertising partners.¹⁶⁵ Switching costs vary depending on the intermediary, but these also can prevent market entry. For example, if users have bought an iPad (Apple’s e-reader device), they are bound to use Apple’s store whenever they purchase online content such as news apps and e-books. This in turn creates lock-in effects.¹⁶⁶ Finally, the products that intermediaries offer such as search results and ‘news feeds’ are characterized by high fixed (mainly associated with the development of innovative technologies) and low distribution costs. As already seen, this characteristic encourages concentration because it allows the merged entity to reap economies of scale. The opportunity to achieve scale economies largely explains Google’s decision to acquire control of online ad services provider Doubleclick,¹⁶⁷ Apple’s decision to acquire audio

¹⁶¹ *Ibid.*, 6

¹⁶² For example, Google controls well above 90% of the general online search and general search advertising markets in the vast majority of Member States. See European Commission, *Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers*, MEMO/13/383, 25/04/2013, available at: [http://europa.eu/rapid/press-release MEMO-13-383_en.htm](http://europa.eu/rapid/press-release_MEMO-13-383_en.htm) In the UK, Facebook is ‘by far the most popular social networking site’ with an active audience reach of 66%. See Ofcom (2014). *Communications Market Report*, 277-8. This was in March 2014. The figure on active audience reach refers to desktop/laptop reach. However, Facebook’s mobile is also high (58%)

¹⁶³ Reference to these factors is made in Commission decision *Microsoft/Yahoo!*, Case COMP/M.5727 C (2010) 1077, paragraph 111. As for the total cost, Microsoft submitted in its comments that the capital expenditure required to enter the market is approximately USD 1 000 million in hardware and USD 1 000 million in human capital and several billions of dollars to develop and update the algorithm

¹⁶⁴ See Commission decision *Google/Doubleclick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraph 290: ‘Given that online advertising is a two-sided market characterized by network effects, scale and access to user data are important ingredients of success. Through the foreclosure strategies, the merged entity would deny sufficient scale and liquidity or, in other words, the ability to find easily and quickly a counterpart with which to trade , to competing networks which would consequently be weakened. As the network of the merged entity would become larger and "information-richer", it would attract more publishers and more advertisers up to the point where the market would "tip" in favour of the network of the merged entity, enabling it to raise the price of its offering’. The full text of the decision is available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

¹⁶⁵ Google has entered into exclusive agreements with its ad partners. See, for instance, European Commission (2014, February). *Statement on the Google investigation* (made by former Competition Commissioner Almunia). Retrieved from: [http://europa.eu/rapid/press-release SPEECH-14-93_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm)

¹⁶⁶ Foster, R. (2012), *supra n.* 158, 32

¹⁶⁷ Commission decision *Google/Doubleclick*, Case COMP/M. 4731 [2008] OJ C 184/6

product designer Beats¹⁶⁸ and, more recently, Facebook's decision to acquire popular communications app Whatsapp.¹⁶⁹

Broadly speaking, digital intermediaries do not create content as traditional media organizations do.¹⁷⁰ Nor are they yet generating significant advertising revenues for news providers, which means that we (still) cannot establish a direct and causal relationship between intermediaries and high-quality investigative journalism.¹⁷¹ However, in an environment where content is abundant and attention scarce, the process of discovering content is becoming increasingly challenging. Digital intermediaries play a major role in facilitating this process. For example, news aggregators and search engines provide access to a wide range of news material from an abundance of different sources that could not have easily been consulted in the analogue landscape.¹⁷² Social media may be used as a source of news traffic.¹⁷³ Digital stores create new opportunities for news providers which may develop and make available on these platforms applications that offer access to their packages of branded news and commentary.¹⁷⁴ However, these benefits can be realized *if* intermediaries are indeed used as a tool to search for alternative sources *and if* they indeed facilitate wide and open access to content, two assumptions that can be questioned.

In respect of the role of digital intermediaries in facilitating exposure to diverse sources and ideas, Hindman asks: are digital intermediaries 'strong gatekeepers, with a great deal of autonomous influence in directing Web traffic?' Or are they 'simply mediators, mirroring existing institutions?'¹⁷⁵

¹⁶⁸ Commission decision *Apple/Beats*, Case COMP/M.7290, [2014] OJ C 260/8, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7290_20140725_20310_3804651_EN.pdf

¹⁶⁹ Commission decision, Case COMP/M. 7217, *Facebook/Whatsapp* [2014] OJ C 417/2, available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

¹⁷⁰ Foster (arguably correctly) draws a distinction between news aggregators and the other three types of digital intermediaries. He explains that: 'While the former present a carefully curated package of news and are similar in many ways to print newspapers of old, the latter position themselves as gateways to an almost unlimited amount of content from many different suppliers. While the former present plurality challenges which are similar to those associated with established media, the latter are rather different animals with potentially different implications for plurality'. See Foster, R. (2012), *supra n.* 158, 28

¹⁷¹ *Ibid.*, 24

¹⁷² *Ibid.*, 18 and 26. For an example of the positive impact of the consumption of a range of different news sources, also known as multi-sourcing, on media pluralism see p. 20. However, the figures to which Foster refers must be interpreted with caution. For example, on several occasions, Ofcom found that the news websites UK citizens consult belong to the traditional media organizations that citizens consult in the offline world. See *infra n.* 174. As Foster himself notes, in a 2010 report, Ofcom showed that, in terms of share of page views and minutes, the top 50 news sites belong to old media news brands. See Ofcom (2010), *supra n.* 19. Moreover, using two or more online news sources is not an improvement if the news websites consulted are owned by the same provider. As already discussed above, in many Member States it is difficult for citizens to check whether this is the case because media companies are not required to publish their ownership structure

¹⁷³ For examples see *ibid.*, 20. However, Foster correctly notes that the news stories shared on these outlets mainly originate from mainstream sources. For example, according to Ofcom (2012). *Communications Market Report*, the three most popular news sites whose stories were shared on Facebook and Twitter were the online versions of The Daily Mail, The Guardian and BBC News (see pp. 275-6)

¹⁷⁴ *Ibid.*, 27

¹⁷⁵ Hindman, M. (2008), *supra n.* 123, 80

The answer is ‘both’ and performance of each of these two functions has different implications for media pluralism.

Starting from their role as ‘simple mediators’, I already mentioned that digital intermediaries undoubtedly make a significant contribution to the creation of a media environment where diverse information can be easily identified and accessed. However, this does not necessarily mean that citizens have taken advantage of the (theoretically) endless opportunities these platforms offer: Recent research shows that online users are inclined to consume content produced by established media organizations instead of actively looking for online content that may complement their traditional media experience. For example, Ofcom found that, in 2014, the three most popular news websites among laptop and desktop audiences in the UK were the websites of traditional media organizations (The Daily Mail, The Guardian and BBC News).¹⁷⁶ Similar remarks can be made with regard to online news consumption on a global level: according to data published by comScore, while 644 million people worldwide accessed online newspaper sites in October 2012 (this is nearly half of the total internet population), the most read online newspapers were the online versions of The Daily Mail, The New York Times and The Guardian.¹⁷⁷ These figures must be considered against the fact that content delivered by non-mainstream media, including and especially websites for political advocacy and prominent political blogs, ‘get only a tiny fraction of the attention that traditional news outlets receive’.¹⁷⁸ The conclusion to draw here is that, as long as established providers control the market for news provision,¹⁷⁹ alternative content may drown in the ocean of content abundance.¹⁸⁰ Therefore, to the extent that audiences are prone to concentrate around the online content provided by traditional media, intermediaries end up ‘mirroring existing institutions’, rather than serving as platforms used to discover new sources.

As regards their role as ‘gatekeepers with autonomous influence in directing web traffic’, Foster identifies four broad areas in which their activities may have negative consequences for pluralism: a) Their control of what may be considered as distribution bottlenecks through which

¹⁷⁶ Ofcom (2014). *Communications Market Report*, 282. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMR.pdf

¹⁷⁷ Radwanick, S. *Most Read Online Newspapers in the World: Mail Online, New York Times and The Guardian*. The Guardian, 12 December 2012. Retrieved from: <http://www.comscore.com/2012/12/most-read-online-newspapers-in-the-world-mail-online-new-york-times-and-the-guardian/>

¹⁷⁸ Hindman, M. (2008), *supra n.* 123, 80-81

¹⁷⁹ Arsenault, A.H. and Manuel Castells (2008), *supra n.* 80,719

¹⁸⁰ Hindman, M. (2008), *supra n.* 123, 18. Baker discusses the influence that blogs may exercise and notes respectively that ‘as long as traditional news and cultural media continue to dominate, as they do now, in performing (even if inadequately) their traditional roles, the mere possibility of this development has no obvious bearing on existing issues of concentration’. See Baker, C.E. (2007), *supra n.* 142, 100

users, especially younger generations, access content; b) The editorial-like judgments they make about the content they link to or carry (e.g. they select and display content ‘relevant’ to the user’s query, decide which sources of news to feature prominently, etc.); c) Their role in shaping future economic models for news provision (e.g. they enable disaggregation of news content, which makes it increasingly difficult for news providers to generate ad revenues), and d) Their inclination and ability to set the political agenda (e.g. when they invest in media in their own right).¹⁸¹ This classification grasps the main areas where pluralism concerns relating to intermediaries’ behavior have arisen thus far. Let’s take search engines and news content by way of example. Search engines in general and Google in particular play a key role in channeling news to Europeans: search is the dominant usage on the Internet,¹⁸² general search engines seem to be the intermediaries that citizens use the most to find news stories,¹⁸³ and Google controls over 90% of the general online search market in most Member States.¹⁸⁴ Starting from its role as a *distribution bottleneck*, several news providers maintain that Google exercises excessive control over the way in which they reach online users. More particularly, news providers that operate pay walls claim that, unless they agree to some of their content being made available for free via Google Search, they automatically lose visibility in Google’s search results.¹⁸⁵ If this is indeed the case, then Google artificially limits the number of sources that are actually available in the market. This practice could also be a concern if pay walls become essential for the *economic viability of news provision*.¹⁸⁶ An issue related to the above is how integration between intermediaries can affect diversity. For example, Italian newspaper and magazine publishers alleged that Google’s news aggregator, Google News, was free-riding on their content and that, if they extracted their publications from the aggregator, they would be excluded from Google Search altogether.¹⁸⁷ To the extent that they prevent news providers from directing traffic to their websites or deprive them of the ability to generate ad revenues, such ‘retaliatory’ practices may harm pluralism in the long run. Elements of *editorial-like* judgments made by search engines are present in, for instance, the presentation of their search results or the design of their algorithms.¹⁸⁸ For example, a search engine may sell high positions on the list of search results or

¹⁸¹ Foster, R. (2012), *supra n.* 158, 6-7

¹⁸² Helberger, N. *et al.* (2012), *supra n.* 116, 50

¹⁸³ Foster, R. (2012), *supra n.* 158, 24. See also European Commission. *Digital Agenda for Europe - Scoreboard 2012*, 104, according to which the European Internet audience using a search platform to obtain information amounts to 71%. The Scoreboard is available at: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/KKAH12001ENN-PDFWEB_1.pdf

¹⁸⁴ See *supra n.* 160

¹⁸⁵ Foster, R. (2012), *supra n.* 158, 31

¹⁸⁶ *Ibid.*, 39

¹⁸⁷ In 2010, the Italian communications regulator adopted a commitments decision with respect to Google’s alleged tying between Google Search and Google News. A summary of the case with the commitments that were found adequate to address AGCom’s concerns is available at: <http://www.agcm.it/stampa/news/5194-a420-as787-antitrust-accetta-impegni-di-google-e-chiede-al-parlamento-di-adeguare-le-norme-sul-diritto-dautore.html>

¹⁸⁸ Foster, R. (2012), *supra n.* 158, 34

priority-index the pages of partners so that the latter rank higher than non-partner sites.¹⁸⁹ As a result, visibility is ensured for the news providers that paid, but not necessarily for those that may be providing more accurate or higher quality content. Search engines also make editorial-like judgments when they decide how to profile their own services vis-à-vis the services offered by their competitors.¹⁹⁰ For example, search engines may decide to downgrade search results of competing services and grant preferential treatment to their own services. This issue is currently being examined by the Commission in the context of an antitrust investigation into how Google displays search results of websites competing with it in neighboring search markets.¹⁹¹ This case concerns the possible exclusion of competing *price comparison* websites from general online search, in other words, websites providing content that is not essential to consume in order to make informed decisions about who to vote. However, Google, among other intermediaries, has been expanding into content markets,¹⁹² thereby having the incentive to downgrade competing news services. Moreover, given that there exist substantial information asymmetries between search engines and online users, and because users believe that searching through search engines is reliable,¹⁹³ Google arguably also has the ability to reduce visibility of competing news services. The impact of downgrading on competition is still not clear. However, were this practice to produce exclusionary effects, it could harm pluralism. Finally, an experiment that was recently conducted by Epstein and Robertson shows that were search engines to *promote a certain political agenda*, downgrading could prove as harmful as interfering with the editorial policies of a newspaper; the experiment in question shows that downgrading search results influences voters' preferences and may ultimately affect election results.¹⁹⁴

The above analysis makes clear that the proliferation of sources and content does not automatically ensure pluralism. It is against the background of off- and on-line concentration, which

¹⁸⁹ van Eijk, N. (2009). *Search Engines, the New Bottleneck for Content Access*, 141-156. In Preissel, B., Justus Haucap and Peter Curwen (eds.), *Telecommunication Markets: Drivers and Impediments*. Berlin: Springer-Verlag

¹⁹⁰ Foster, R. (2012), *supra n.* 158, 34

¹⁹¹ See European Commission. *Antitrust: Commission probes allegations of antitrust violations by Google*. Press Release IP/10/1624. Retrieved from: http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en

¹⁹² For example, Yahoo has its own news service, Google owns the most popular news aggregation service on the web and America On Line (AOL), a U.S. search portal, acquired control of The Huffington Post, a popular news blog. See, for instance, AOL/Huffington Post. *AOL Agrees To Acquire The Huffington Post*. 7 February 2011, The Huffington Post. Retrieved from: http://www.huffingtonpost.com/2011/02/07/aol-huffington-post_n_819375.html, and Peters, J. Y. and Verne G. Kopytoff. *Betting on News, AOL Is Buying The Huffington Post*. 7 February 2011, The New York Times. Retrieved from: http://www.nytimes.com/2011/02/07/business/media/07aol.html?_r=0

¹⁹³ On this issue see Rainie L. and Jeremy Shermak (2005). *Search Engine Use November 2005*, Technical report. Washington, D.C.: PEW Internet & American Life Project

¹⁹⁴ Epstein, R. and Ronald E. Robertson (2013, May). *Democracy at Risk: Manipulating Search Rankings Can Shift Voting Preferences Substantially Without Voter Awareness*. American Institute for Behavioral Research and Technology Working Paper Series/Summary of a paper presented at the 25th annual meeting of the Association for Psychological Science, Washington, D.C. Retrieved from: http://www.fraw.org.uk/files/politics/epstein_robertson_2013.pdf

may weaken democracy in many ways (some of which are already known and studied, whereas others are new and still shady), that arguments on the decreasing importance of powerful media organizations in the public opinion formation process must be carefully considered. Accordingly, policymakers should realize that ‘communicative abundance alone does not render questions about the distribution of communicative power and political voice obsolete, but only reconfigures them in a more complex form’.¹⁹⁵

4. Assumption no. 2: The citizens will act (consume diverse content) and interact (create and distribute content that strengthens democracy)

As previously mentioned, traditional media policymaking is rooted in the passive consumption theory according to which audiences are powerless to resist the persuasive messages that media carry. In the linear age, the consumer was thought of as an impotent receiver whose ability to choose was limited to ‘switching between different predefined program packages’.¹⁹⁶ However, related regulation is currently undergoing significant changes. For example, as discussed above, the relaxation of ownership restrictions that took place in several Member States has largely been based on the wide array of content that consumers may now access.¹⁹⁷ This is probably the most blatant example, but certainly not the only sign suggesting that the tide has turned. For example, in its 2011-2013 Strategy Statement, the Broadcasting Authority of Ireland notes that new technologies herald a new era in which ‘[r]ather than being passive consumers’, audiences can ‘*critique broadcasting content*’.¹⁹⁸ Similarly, the European Commission’s Broadcasting Communication lays down that ‘[t]he traditional passive consumption model has been gradually turning into [...] *control over content by consumers*’ [emphasis added].¹⁹⁹ In the same vein, in its 2010 Annual Report, the Dutch media regulator states that citizens now ‘have a certain responsibility in *finding their way* in the media landscape and *consulting different voices*’ [emphasis added].²⁰⁰ These statements are indicia that there is a gradual shift to a regulatory model that is assigning more duties to the individuals. However, without suggesting that traditional media regulation is (always or still) appropriate to address pluralism concerns relating to exposure diversity, the conditions for this shift to take place have arguably not matured yet. This is so mainly for three reasons: first, content may be abundant, but attention is

¹⁹⁵ Karppinen, K. (2009), *supra n.* 117, 160

¹⁹⁶ Valcke, P. (2011), *supra n.* 1, 304

¹⁹⁷ Open Society Foundations (2012), *supra n.* 102, 2

¹⁹⁸ Broadcasting Authority of Ireland (2010). *Strategy Statement 2011-2013*, 22. Retrieved from: http://www.bai.ie/wordpress/wp-content/uploads/BAI_Strategy_2011-13_v2ENG.pdf

¹⁹⁹ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 5

²⁰⁰ Commissariat voor de media (2011), *supra n.* 33, 91

scarce. This reality distorts the communication process and deeply affects the quality of content that media organizations produce. Second, the ability to control what type of content they are exposed to allows individuals to create a private information universe. This may impair the free flow of information and eventually weaken social cohesion. Third, Europeans do not create content that contributes to better public governance, at least not as much as was originally anticipated.

Before I discuss the above three issues, it is important to point out that, for Europeans to consume content that is made available online and to engage actively in public discourse that takes place in the online arena (e.g. create a blog, post comments on newspapers' sites, etc.), a fundamental requirement has not been met yet. Achieving exposure diversity naturally presupposes access to the content that media outlets have to offer. While in the traditional media environment access *per se* is easy in that, broadly speaking, it only requires buying a newspaper or switching on the TV or the radio, access to online information is far more complicated because it depends on various parameters, including the motivation to use a computer, access to the Internet and skills to look for and choose content of interest. Entering the communicative abundance era does not mean that citizens are ready to benefit from the variety of output that may be found online. To the contrary, recent data published by Eurostat shows that new technologies may have caught many off-guard; almost 20% of Europeans have never used the Internet, while in eight Member States this amount is close to or exceeds 30% of the population.²⁰¹ It is also worth noting that only 12% of those Europeans who do use the Internet have a high level of basic Internet skills.²⁰² It is clear from the above considerations that to achieve other, more challenging conditions, including the ability to work with the necessary hardware and software, identify and process information, and ultimately engage in online political activity, there is still a long way to go. But, for the sake of the issues I raise below, let's assume that all Europeans have access to and use the Internet. Does this mean that they automatically choose to be exposed to diverse content or produce content to interact with others in ways that strengthen citizenship?

4.1. The citizens will act responsively by consuming diverse content

4.1.1. Content abundance = Attention scarcity

²⁰¹ I refer to Croatia, Italy, Greece, Romania, Bulgaria, Cyprus, Poland, Portugal and Romania. See <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tin00093&plugin=1>. The same statistical findings also point out that there are 62 regions across the European Union where only 55% or fewer individuals are regular users of the Internet. See http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Information_society_statistics_at_regional_level

²⁰² Meaning that they have carried 5-6 of the following Internet related activities: use a search engine to find information; send an e-mail with attached files; post messages to chat rooms, newsgroups or any online discussion forum; use the Internet to make telephone calls; use peer-to-peer file sharing for exchanging movies, music etc.; create a web page. See <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tsdsc470&language=en>

Levels of exposure diversity were undoubtedly higher in the analog landscape than in the digital media environment. As discussed above, in traditional media markets, output was scarce and hence consumers could be expected to ‘bump into’ information they did not initially demand.²⁰³ This is no longer the case, for in the digital media ecosystem content is abundant and attention scarce. This reality has created two effects. The first relates to how much attention audiences pay to the content they are (voluntarily or involuntarily) exposed to and the second has to do with how the market responds to the audiences’ behavior.

On the demand-side, starting from how much attention we pay to the content we are exposed to, one of the most striking examples about media consumption today is that the use of one medium is not inversely proportional to the use of others. More particularly, while regular Internet usage has been increasing across Europe,²⁰⁴ TV usage has not decreased.²⁰⁵ How is that possible? Audiences are engaging in media multi-tasking: 50% of Europe’s online audience uses the Internet while watching TV.²⁰⁶ Simultaneous media use must be considered alongside the fact that almost 70% of online activity is not related to the TV program that is being watched.²⁰⁷ This online activity includes emailing, general web surfing, social networking, watching other video content and reading the news.²⁰⁸ This means that the vast majority of multi-taskers do not complement their viewing experience by gathering more information about the content being broadcast but rather engage in a different media experience. It goes without saying that media multi-tasking distorts the communication process, the effectiveness of which depends not only on whether the message that is being transmitted is received, but also on whether the receiver has actually made sense of the message in question and reflected on its content. In other words, simultaneous media use leads to an information overload that ‘exceeds the interpretative capacity of the subject’.²⁰⁹

However, even when consumers use only one medium, this does not ensure exposure to diverse content. In an environment where content is scarce and attention abundant, more content increases

²⁰³ Goodman, E. (2004), *supra n.* 30, 1457

²⁰⁴ See <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tin00091&plugin=1>

²⁰⁵ European Commission (2013), *supra n.* 104, 5

²⁰⁶ And 16% of all time spent watching TV is done while using the Internet. In some countries such as France and the UK, the figures on simultaneous media use exceed 60%. For more information see *Simultaneous media use rises in Europe*. Warc.com, 01 June 2012. Retrieved from: http://www.warc.com/Content/News/Simultaneous_media_use_rises_in_Europe.content?ID=fed4dca7-bca7-44b6-b42a-dbf941b155c2

²⁰⁷ IAB (2013). *Mediascope Europe 2012 Pan-European Launch Presentation Summary*, pp. 16 *et seq.* Retrieved from: http://www.iabeurope.eu/files/6713/8720/0955/MEDIASCOPE_2012_PAN-EUROPEAN_SUMMARY_LAUNCH_PRESENTATION_public.pdf

²⁰⁸ Microsoft (2009). *Meet Europe’s media multi-taskers*, 6

²⁰⁹ Stevenson, N. (1995). *Understanding Media Cultures. Social Theory and Mass Communication*, 157. Thousand Oaks, CA: Sage Publications

the diversity of items individuals are aware of.²¹⁰ Once information becomes abundant though, attention is essentially drawn to a smaller set of sources. But, as information is an experience good and may therefore be evaluated only after it has passed the perceptual filter, the items that are chosen to form part of this smaller set of sources are not selected on the basis of the content they contain, but on the basis of the content users *think* they contain.²¹¹ This explains why ‘in an information-rich economy there is no guarantee that the perceived items are the best possible items’.²¹²

On the supply-side, how does attention scarcity affect the content offer? First, it creates entry barriers. As long as content is scarce and attention abundant, a content creator who has an original idea has good chances to reach the user she addresses because there are still entries on the user’s mind.²¹³ These chances are significantly reduced in a content abundant-attention scarcity market because the entries on the user’s mind are exhausted.²¹⁴ Second, content abundance results in price reductions (simple economics of supply and demand where prices fall when the supply curve shifts outward).²¹⁵ Attention, however, is becoming scarce and hence more and more valuable.²¹⁶ In other words, competition focuses less on price (evidence of this is the amount of content that is now made available for free) and more on the audience’s perception filter. To pass the perception filter, media suppliers seek to capture the audiences’ attention either by privileging the sexy, violent and vulgar²¹⁷ or by forcing the audiences to relate to their brands (read: excessive investments in brand promotion and star power).²¹⁸ News providers in particular, no longer having the luxury of spending time applying themselves to additional fact-gathering or explaining the facts more critically, favor fast exposure over refined analysis.²¹⁹ This makes it difficult for audiences to absorb and reflect on the news content they consume.²²⁰

²¹⁰ Falkinger, J. (2005). *Attention Economies*. CESifo Working Paper, No. 1079, 26. Retrieved from: <https://ideas.repec.org/p/ces/ceswps/1079.html>

²¹¹ Ibid., 26

²¹² Ibid., 27

²¹³ Ibid., 26

²¹⁴ Ibid.

²¹⁵ Bardoel, J. and Jan van Cuilenberg (2008), *supra n. 70*, 130-131

²¹⁶ For more on the attention economy see, for instance, Simon, Herbert A. (1971). *Designing Organizations for an Information-rich World*. In Greenberger, M. (ed.), *Computers, Communications, and the Public Interest*, 38-52. Baltimore: John Hopkins Press. (Cited after reprint in: Simon, H.A. (1982). *Models of bounded rationality. Volume 2: Behavioural Economics and Business Organization*, Cambridge/Massachusetts: MIT Press). For more on the attention economy see, for instance, Hargittai, E. (2004). *The Changing Online Landscape: From Free-for-All to Commercial Gatekeeping*, 66-76. In Day, P. and D. Schuler (eds.), *Community Practice in the Network Society: Local Actions/Global Interaction*. New York: Routledge

²¹⁷ Goodman, E. (2004), *supra n. 30*, 1460

²¹⁸ See Haque, U. *The Attention Economy*. 08 November 2005, Bubblegeneration.com. Retrieved from: <http://www.bubblegeneration.com/2005/11/attention-economy-across-consumer.cfm> As Haque puts it, ‘each marketing dollar [is now] chasing a smaller and smaller return on attention, just to keep margins constant’

²¹⁹ Goodman, E. (2004), *supra n. 30*, 1460

²²⁰ Ibid.

4.1.2. The ‘Daily Me’ Culture

What about the content which consumers choose to be exposed to when they engage in a more meaningful media experience? I mentioned above that one of the main changes brought about by digital technologies and to which policy and regulatory texts are increasingly referring is the ability to exercise control over content. The freedom to determine what type and how much content to consume is one of the two reasons (the other reason being content abundance) why the Audiovisual Media Services Directive establishes a lighter regulatory regime for on-demand services vis-à-vis traditional broadcasting.²²¹ This approach seems to imply that the individual is in the position to create a ‘healthy varied diet’.

Instead of a ‘healthy varied diet’, however, the ability to exercise control over content may have created what Nicholas Negroponte called in the early days of the digital revolution ‘the Daily Me’, that is, a communications package that is individually designed, with each item selected in advance.²²² The use of personal video recorders, pay-per-view television, news aggregators and other similar services that aim to deliver tailored information²²³ are indicative of the users’ eagerness to personalize as much as possible the content they consume on a daily basis.²²⁴ This habit creates a culture of content customization that dis-incentivizes citizens from discovering content which they did not originally seek and which does not necessarily fit their existing dispositions. Critical of this trend, democratic theorist Habermas notes that ‘the rise of millions of fragmented chat rooms across the world [...] leads to the fragmentation of *large but politically focused mass audiences into a huge number of isolated issue publics*’ [emphasis added].²²⁵ Following the same line of reasoning, political philosopher Mouffe takes the view that new media ‘are making it possible to *only read and listen to things that completely reinforce what you believe in*’ [emphasis added].²²⁶ In other words, new technologies create the conditions for a private information universe that may facilitate exposure to ‘more’, except in this case ‘more’ may mean ‘more of the same’.

²²¹ Audiovisual Media Services Directive, Recital (58)

²²² Sunstein, C. (2007). *Republic.com 2.0*, 4. Princeton, NJ: Princeton University Press, referring to Negroponte, N. (1995). *Being Digital*, 153. New York: Knopf

²²³ See, for instance, individual.com which ‘offers the Web’s largest collection of business, financial, industry, trade and company-specific news and information uniquely personalized to deliver better targeted, better customized and more relevant news and information to the business professional’, at: http://www.individual.com/odc/h_idc.html

²²⁴ For more examples on personalized consumption of media products see Sunstein, C. (2007), *supra n.* 220, 1-18

²²⁵ Habermas, J. (2006). *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*. *Communication Theory*, 16(4), 423

²²⁶ Carpentier, N. and B. Cammaerts (2006). *Hegemony, Democracy, Agonism, and Journalism. An Interview with Chantal Mouffe*. *Journalism Studies* 7(6), 968. For a different view on the impact of new media on democracy see, for instance, Rogers, R. (2004). *Information Politics on the Web*. Cambridge, MA: The MIT Press, and McNair, B. (2006). *Cultural Chaos – Journalism, News and Power in a Globalised World*. London: Routledge

‘*What’s the harm in it?*’ one might ask. If the individual wishes to learn more about what interests her the most and share her opinions with others that have similar viewpoints, she can go ahead and do it. The answer to this question, however, is not as straightforward as it may seem. ‘The Daily Me’ culture may have far-reaching effects on pluralism and ultimately democracy. These effects become clear if we think of how social cohesion, a prerequisite for democracy,²²⁷ relates to exposure to different opinions: It has long been acknowledged that a society that aspires to be cohesive must not seek to transform heterogeneity into homogeneity but to embrace diversity in all its facets (e.g. religious, ethnic, cultural, political etc.).²²⁸ Rather than a meeting of the minds, social cohesion refers to the creation of a *de facto* solidarity that is built among the various members of a community. As Dahrendorf *et al.* put it, ‘[s]ocial cohesion should not be thought of as harmony, but as a condition of lively civil societies held together by a framework of citizenship’.²²⁹ In this sense, social cohesion has been proven to be strongly linked to better public service delivery, financial accountability, political stability, educational attainment and economic prosperity.²³⁰ Therefore, in order to ensure the well-being of its members, a society must work towards creating a framework which reduces disparities, avoids social fractures²³¹ and establishes strong social ties among the groups that form it.²³²

The relationship between media and social cohesion can be seen from two different angles: media can be either ‘centripetal’, promoting integration, or ‘centrifugal’, encouraging division.²³³ If the effect of new technologies is indeed the creation of an information micro-mundus at the expense

²²⁷ On the link between social cohesion and democracy see, for instance, Henning, C. and Karin Renblad (2009). *Perspectives on Empowerment, Social Cohesion and Democracy – An International Anthology*. Jönköping: School of Health Sciences, Jönköping University

²²⁸ In *West Virginia State Bd. Of Educ. v. Barnette*, 319 US 624 (1943), the US Supreme Court stroke down a state law demanding children to salute the American flag on the grounds that ‘[c]ompulsory unification of opinion achieves only the unanimity of the graveyard’. In *VGT Vereinigegen Tierfabriken v. Switzerland* (2), which dealt with the question whether the refusal to broadcast a provocative commercial on industrial animal production and animal experiments violates freedom of expression as enshrined in Article 10 of the ECHR, the Court found that the principle is ‘applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society’. See ECtHR 28 June 2001, *VGT Vereinigegen Tierfabriken v. Switzerland*, paragraph 66.

²²⁹ Dahrendorf, R., F. Field and C. Hayman (1995). *Report on Wealth Creation and Social Cohesion in a Free Society* (the Dahrendorf Report), 34. London: Commission on Wealth Creation and Social Cohesion

²³⁰ Foa, R. *The Economic Rationale for Social Cohesion: Cross-Country Evidence*, 1. Paper presented at the International Conference on Social Cohesion and Development, 20 and 21 January 2011. Retrieved from: <http://www.oecd.org/dev/pgd/46908575.pdf> See also Sarikakis, K. (2007). *Mediating Social Cohesion: Media and cultural policy in the European Union and Canada*. European Studies, 24, 68

²³¹ Council of Europe (2008). *Report of high-level task force on social cohesion in the 21st century - Towards an active, fair and socially cohesive Europe*. TFSC (2007) 31E

²³² For a comprehensive overview of the notion of social cohesion see Noll, H.H. (2009, December). *The Impact of Cultural and Citizenship Education on Social Cohesion*. Input Statement The Impact of Cultural and Citizenship Education on Social Cohesion: Chances – Challenges – Changes, Vilnius, Lithuania

²³³ McQuail, D. (2010). *McQuail’s Mass Communication Theory* (6th edition), 90. London: Sage (summary of academic debates on the relationship between media and social order)

of the free flow of information, then media inevitably becomes ‘centrifugal’. This poisons one of the main functions that media are expected to perform in and for a democracy, namely to expose the views of and the problems facing each and every group of the society they are meant to serve and to advance a culture of common understanding.²³⁴ Failure to perform this function results in what Sunstein calls group polarization,²³⁵ which occurs when citizens choose to cage themselves in ‘echo chambers’ or ‘information cocoons’ in order to avoid listening to dissenting voices.²³⁶ Customized media consumption may then become an instrument used by radical groups to breed hostility towards those with conflicting opinions.²³⁷

By pointing out that content personalization may have a negative impact on democracy in order to illustrate that the ability to control our own media universe does not necessarily lead to exposure diversity, I do not seek to undermine the contribution digital media can make to the advancement of social cohesion. To the extent that they bring together people who share the same beliefs, digital media may also serve as a platform through which views that would otherwise not have found their way to the audiences manage to reach the public. To quote the EU High Level Group on Media Freedom and Pluralism, ‘[t]he media are part and parcel of the overall social fabric of society and may either help or hinder communication and mutual understanding between different parts of it, fostering or suppressing democratic debate, as the case may be’.²³⁸ Opinions about whether ‘the Daily Me’ culture enhances diversity or not are polarized²³⁹ whereas the findings of relevant empirical research are either inconclusive²⁴⁰ or interpreted in opposing ways.²⁴¹ Therefore, we cannot

²³⁴ Drawing on this role, in its report ‘A free and pluralistic media to sustain European democracy’, the High Level Group on Media Freedom and Pluralism called upon the Member States to have independent media councils with a politically and culturally balanced and socially diverse membership. See p. 7. The report is available at: <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

²³⁵ Sunstein, C. (2003). *Why Societies Need Dissent*, 111-144. Cambridge MA: Harvard University Press

²³⁶ Sunstein, C. (2007), *supra n.* 220, 46-96

²³⁷ See Hamelink, C. (1997). *Media, Ethnic Conflict and Culpability*. In Servaes, J. & Lie, R. (eds.). *Media in Transition*. Leuven/Amersfoort: Acco

²³⁸ High Level Group on Media Freedom and Pluralism (2013), *supra n.* 232, 11

²³⁹ See, for instance, Pariser, E. (2011). *The Filter Bubble: What the Internet is Hiding from You*. New York: Penguin Press, and Berners-Lee, T. *Long Live the Web: A call for continued open standards and neutrality*. 22 November 2010, Scientific American. Retrieved from: <http://www.scientificamerican.com/article/long-live-the-web/> Both Pariser and Berners-Lee believe that personalized search has an adverse effect on exposure to conflicting ideas. Compare their views against Foster, R. [(2012) (*supra n.* 158, 22)] who argues that personalization does not prevent users from seeking a diversity of voices

²⁴⁰ See, for instance, Boukes, M., Hajo G. Boomgaarden, Marjolein Moorman and Claes H. De Vreese (2014). *News With an Attitude: Assessing the Mechanisms Underlying the Effects of Opinionated News*. *Journal of Mass Communication and Society* 17(3), 354-378

²⁴¹ See, for instance, how the results of the 2012 on the State of the News Media Report that was prepared by the Pew Research Center Project for Excellence in Journalism concerning, *inter alia*, the role of social media in facilitating exposure to diverse sources/ideas have been interpreted by the European Commission: ‘Much has been said about the use of social networks as a major driver of news, but recent research in the US has shown that this is not the case as only 9% of adults get news very often through social networks and the large majority of them still go to news websites, use keyword search or get news through a news organizing web site or application’. Compare the Commission’s view against Foster’s interpretation of whether social media create a ‘filter bubble’ or not: ‘Recent research carried out in the US by the Pew Research Center concludes, for example, that social media are currently more used as an additional source of news rather than as a replacement source, hence widening not narrowing the ‘filter’. For example, 71% of those who ever follow news on Facebook (and 76% on Twitter) also get news somewhat or very often from a news organization’s

draw safe conclusions as to the extent to which personalized communication has created marginalization.²⁴² It is true, however, that we have already witnessed cases that show how audience polarization may be used to cultivate fanaticism and anarchy as well as the potential it has to destroy the social tissue. In Europe, for instance, extremist groups have been using new media to recruit members or advance their propaganda²⁴³ with their ‘groups of friends’ calling for violence, discrimination against communities of different ethnicities and religions, and segregation.²⁴⁴ These examples illustrate why concerns relating to the personalized content consumption paradigm may not have been exaggerated after all.

4.2. The citizens will interact (create and distribute content that strengthens democracy)

As previously noted, digitization and improvements in computing and wireless technologies have heralded a new era in which the role of the individual in the communication process is undergoing significant changes. The citizens may now set up outlets such as blogs and wikis, and influence and/or comment on the content provided by well-established media organizations by giving feedback to editors via, for instance, emails, test screenings and focus groups. Individuals are no longer powerless eyeballs, but may actively participate in the dissemination of information on issues of public concern, a function that was, until recently, reserved to professional journalists. Indeed, user-generated or user-created content (UGC and UCC respectively), that is, content produced and made available over the Internet ‘outside of professional routines and practices’,²⁴⁵ may promote a more diverse and transparent media system; users may, for instance, create content that complements or even questions the accuracy of the content provided by mainstream media.²⁴⁶

website or app. Twitter scored relatively well in providing news which users felt they would never have found elsewhere’. See European Commission (2012), *Digital Agenda for Europe – Scoreboard 2012*, 28 and Foster, R. (2012), *supra n.* 158, 22

²⁴² Karppinen, K. (2009), *supra n.* 117, 163

²⁴³ For an overview of examples of online extremist narratives see, for instance, Radicalization Awareness Network (2012). *Proposed Policy Recommendations for the High Level Conference*. Retrieved from: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/ran-high-level-conference/docs/proposed_policy_recommendations_ran_at_en.pdf

²⁴⁴ See, for instance, Dimitrova, S. *EC recommends measures to curb violent extremism*. SETimes, 04 February 2013. Retrieved from: http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/02/04/feature-01 See also Gaydazhieva, S. *Link between Internet and extremism*, say experts. 29 January 2013, New Europe. Retrieved from: <http://www.neurope.eu/article/link-between-internet-and-extremism-say-experts>

²⁴⁵ OECD (2007). *Participative Web: User-Created Content*, 4. Retrieved from: <http://www.oecd.org/internet/interneteconomy/38393115.pdf>

²⁴⁶ Newman, N. (2009). *The rise of social media and its impact on mainstream journalism: A study of how newspapers and broadcasters in the UK and US are responding to a wave of participatory social media, and a historic shift in control towards individual consumers*. Oxford Reuters Institute for the Study of Journalism Working Paper, 5 (summarizing the literature regarding the impact of UGC on mainstream media). Retrieved from: https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/The_rise_of_social_media_and_its_impact_on_mainstream_journalism.pdf

In certain cases, UGC has had extreme democratic significance. One of the most prominent examples is the Arab Spring movement: Facebook and Twitter allowed citizen journalists to communicate the atrocities of suppressive regimes in the Arab World, spread awareness about and publicize protests aiming to bring down longtime political systems, even when leading media organizations were blocked.²⁴⁷ The Arab Social Media Report, prepared by the Dubai School of Government, shows that the primary purpose of social media use during the uprisings for 55% of the population of the Arab world was to spread information around the globe about the uprisings, whereas for 66% it was to raise awareness inside the country on the causes of the revolutions.²⁴⁸ Another striking example of citizen journalism is Wikileaks. Started by Australian activist Julian Assange, WikiLeaks operates as an online, not-for-profit organization that publishes leaks of confidential information of interest to the public, among which are included classified documents relating to wars, detention and torture, spying and (counter-) intelligence and government and corporate conspiracies.²⁴⁹ Engaging in discovering and reporting on corporate and political mishandlings transforms individuals into community-serving citizens, a transformation which, in the absence of new media, could not easily occur.²⁵⁰ However, in the EU, UGC has not reached its democratic potential yet. In a report which was published in 2012 and which deals with, *inter alia*, Internet usage in the EU, the Commission laments that in the year of the ‘Indignados’ and the Arab Spring, only 10% of Europeans participated in online consultations and voting to define civic or political matters.²⁵¹ Engagement in online political activities does not seem to have increased since 2011; to the contrary, according to Eurostat, in 2013, only 8% of Europeans used the Internet to take part in online consultations and voting.²⁵² Equally disappointing were the findings of empirical research on user involvement with media production in national markets.²⁵³ For instance, a study prepared by the Cardiff School of Journalism, Media and Cultural Studies showed that, in the period

²⁴⁷ For the role of social media in the organization of the Arab Spring protests see, for instance, Huang, C. *Facebook and Twitter key to Arab Spring uprisings: report*. The National, 06 June 2011. Retrieved from: <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report>

²⁴⁸ Dubai School of Government (2011). *Arab Social Media Report*, Vol. 1 No. 2, 8

²⁴⁹ See <http://wikileaks.org/About.html> Wikileaks became internationally famous for detailing correspondence between the U.S. State department and its diplomatic missions around the world, numbering around 250,000 cables. For more information see, for instance, Stein, S. *Gibbs On Legal Action Against WikiLeaks: 'I Wouldn't Rule Anything Out'*. 29 November 2010, The Huffington Post. Retrieved from: http://www.huffingtonpost.com/2010/11/29/gibbs-on-legal-action-aga_n_789311.html and Fantz, A. *See yourself as the next Assange? Good luck*. 30 June 2012, CNN. Retrieved from: <http://edition.cnn.com/2012/06/29/world/future-leaking-online/index.html> WikiLeaks is placed among many other similar initiatives, for instance, www.opensecrets.org, the website of the Center for Responsive Politics, a nonprofit research group that tracks money in politics and its effects on elections and public policy and the POGO project (Project on Government Oversight, www.pogo.org), a non-partisan non-profit organization which investigates and exposes systemic abuses of power, mismanagement and subservience by the U.S. government to powerful special interests

²⁵⁰ For more examples on the impact of UGC on politics see OECD (2007), *supra n.* 243, 36-37

²⁵¹ European Commission (2012). *A vibrant single market*, 28. Retrieved from: <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/KKAH12001ENN-chap2-PDFWEB-2.pdf>

²⁵² Retrieved from: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tin00129&plugin=1>

²⁵³ For an overview of relevant empirical studies that have been conducted thus far see Milioni, D., Konstantinos Vadratsikas and Venetia Papa (2012). *Their two cents worth': Exploring user agency in readers' comments in online news media*. *Observatorio (OBS) Journal*, 6(3), 24-26

2007-2008, only 4% of the British public contributed content to a news media website.²⁵⁴ Another study focusing on the Greek media landscape concluded that, in 2011, only 3% of users' comments enriched content by providing original, unreported information to mainstream media, and that on very few occasions users broadened the media agenda through their comments.²⁵⁵

The above must be considered alongside the findings of the *Report on User-Created Content: Supporting a Participative Information Society*, which reveals that the three main reasons why users are registered with social networking sites are to message their friends, upload their photos and listen to music.²⁵⁶ Naturally, this type of usage determines the nature of UGC, whose impact on culture and democracy has been discussed by many contemporary social thinkers.²⁵⁷ Keen, for instance, is of the view that:

'YouTube eclipses even the blogs in the inanity and absurdity of its content. [...] The site is an infinite gallery of amateur movies showing poor fools dancing, singing, eating, washing, shopping, driving, cleaning, sleeping, or just staring into their computers. [...] In a flattened, editor-free world where independent videographers, podcasters, and bloggers can post their amateurish creations at will, and no one is being paid to check their credentials or evaluate their material, media is vulnerable to untrustworthy content of every stripe'.²⁵⁸

When placed alongside the findings of the empirical research conducted thus far, Keen's observations point to the main issues that must be taken into account when arguing (or, even worse, basing a regulatory instrument on the assumption) that the ability to create and distribute content has transformed the passive consumer into a perfectly conscious citizen. First, UGC may take different forms, including forms that awaken the audiences' lowest instincts. In this case, UGC cannot be expected to contribute to the mission of the media to provide content that advances self-development, an essential ingredient for effective citizenship and in general for behaviors that strengthen democracy.²⁵⁹ Second, where UGC indeed feeds established media organizations with important unreported information, it may only complement rather than replace the latter which verify the accuracy of the content.²⁶⁰

²⁵⁴ Wardle, C. and Andrew Williams (2008). *ugc@thebbc. Understanding its impact upon contributors, non-contributors, and BBC News*. Cardiff School of Journalism, Media and Cultural Studies. The final report is available at: http://www.cardiff.ac.uk/jomec/resources/UserGeneratedContent_ClaireWardle.pdf

²⁵⁵ Milioni, D., et al. (2012), *supra n.* 251, 35

²⁵⁶ Helberger, N., et al. (2012), *supra n.* 116, 67

²⁵⁷ See, for instance, Baker, C.E. (2007), *supra n.* 142; Sunstein, C. (2007), *supra n.* 220, and Carr, N.G. (2010). *The Shallows: What the Internet Is Doing to Our Brains*. New York City: W. W. Norton & Company

²⁵⁸ Keen, A. (2007). *The cult of the amateur*, 5, 16 and 19. London: Nicholas Brealey Publishing

²⁵⁹ Chickering, A. R. (2008). *Strengthening democracy and personal development through community engagement*. New Directions for Adult and Continuing Education, 118, 87-95

²⁶⁰ Newman, N. (2009), *supra n.* 244, 2. Newman conducted empirical research discussing the impact of UGC on British media and reports that in many cases traditional media organizations received a significant amount of false information which was deliberately posted to influence coverage of the events or the debate they generated

The extent to which audience empowerment advances pluralism is still difficult to define. More research is undoubtedly needed to examine this phenomenon in order to define relevant policy priorities.²⁶¹ What the above analysis makes clear, however, is that it is not reasonable to believe that the individual has been mutated from a set of powerless eyeballs in a fully enlightened and vigilant citizen. As Helberger puts it, ‘ill-advised is the idea that governments can simply shift the responsibility for qualitative and diverse information away from the suppliers onto the [...] consumers’.²⁶²

5. Conclusions

While the discussion concerning the extent to which the effects of digital technologies on media pluralism have been positive is still unsettled, the above analysis makes clear that concerns over its protection have by no means been rendered obsolete. ‘Old gatekeepers’ dominate the European marketplace, both because traditional media still occupy a central position in media consumption and because existing firms have managed to reposition and solidify their presence in digital content markets. Technological developments may have lowered entry barriers, but money, reputation and the large customer base that goes with them are still important to attract eyeballs. Moreover, new businesses that have emerged with the advent of the Internet, including and especially digital intermediaries, operate in ways that may disrupt the fair and free flow of information by introducing artificial forms of scarcity. In view of the above, a numerical increase in diversity has not remedied communicative inequalities resulting from concentration of ownership. To the contrary, the ways in which off and online concentration are now mingled to affect the amount and type of content to which citizens are exposed are more difficult to define which in turn makes the concerns that arise more challenging to address.

Furthermore, it was seen that the wide array of information citizens now have at their fingertips or the ability to exercise control over content does not guarantee that they will choose to be exposed to diverse ideas. Individuals are increasingly engaging in simultaneous media use, a consumption pattern that prevents them from meaningfully engaging with the messages they receive. They may also be creating a private information micro-mundus where they speak only with others that think

²⁶¹ As was pointed out by the Council of Europe, ‘[i]t would [...] be useful to explore the use and creation of media by the audience, which is changing with the new technologies, and *examine if it is nowadays enough to offer what has traditionally been considered important information for a democracy*’ [emphasis added]. See Council of Europe (2009). *Methodology for monitoring media concentration and media content diversity*. Report prepared by the Group of Specialists on Media Diversity (MC-S-MD), 13

²⁶² Helberger, N. (2008), *From Eyeball to Creator – Toying with Audience Empowerment in the Audiovisual Media Service Directive*. *Entertainment Law Review* 6, 134-5

alike. To the extent that it isolates other viewpoints, control over content cannot be expected to advance pluralism. As to whether European audiences use digital media in ways that strengthen citizenship, this is hardly supported by empirical evidence.

To sum up, it is not safe to assume that media pluralism is an almost natural outcome of the digital media environment. Instead of gradually adopting a hands-off approach, policymakers, each within its field of competence, should carefully reflect on the threats that both old and new gatekeepers pose to pluralism and create a framework within which marginalized viewpoints reach the audiences and audiences become more responsive to diversity.

Chapter 3 – EU Competition Law and Media Pluralism: Is pluralism a market access equivalent, a restriction of competition, or maybe something else?

1. Introduction

The previous Chapter examined whether digital technologies have rendered concerns over media pluralism obsolete. Having analyzed the conditions that reflect the current state of European media markets, the Chapter concluded that, alongside issues that policymakers attempted to remedy in the past such as concentration of ownership, which remain pervasive, new perils posed by undertakings that operate in the online universe have emerged. At the EU level, cases that have given rise to pluralism concerns have traditionally fallen under *competition law*. This is so for the following three reasons, which have been discussed in Chapter 1. First, Article 7 TEU, which entitles the EU to take action in cases where there is a clear risk of a serious breach or a serious and persistent breach of media pluralism has had no practical significance. Equally negligible has been the role of Article 21(4) of the Merger Regulation,¹ which allows the Member States to take appropriate measures to protect media pluralism in cases where a concentration that has been cleared by the Commission raises the concern that the involved undertakings may hold significant opinion-forming power post-merger. Finally, due to competence limitations in the media domain, no pan-European sector-specific legislation applies to concentrations which do not pose threats to competition but which are likely to harm media pluralism.

What can or must the Directorate-General for Competition of the Commission do if it is called upon to examine a case that raises concerns over media pluralism? Primary EU law neither explicitly excludes the possibility that pluralism may impact the application of the EU competition rules nor remains silent on the issue; Article 167(4) TFEU provides that the Commission must take media pluralism into account in the definition and implementation of the EU competition policy and Article 11(2) of the Charter of Fundamental Rights of the EU imposes on the Commission the duty to ‘respect’ media pluralism. However, these provisions do not explain how competition may be balanced against pluralism considerations in cases of conflict.

As a result of the above, the relationship between EU competition law and media pluralism has been rather uneasy. The Commission itself has supported contradictory ideas about whether and if so,

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1

how the application of the former may safeguard the latter. Over the past twenty years, it has moved from boldly stating that competition law prevents ‘a degree of cumulative control or participation in media companies which might endanger the existence of a wide spectrum of views and opinions in the media markets’² to openly rejecting a conception of competition law that is concerned with pluralism considerations.³ The Commission’s decisional practice reflects this contradiction, thereby lacking consistency. Moreover, whether the Commission has indeed disregarded pluralism in recent cases is debatable, for some of the decisions it has adopted suggest otherwise.

This Chapter will explore whether, and if so to what extent, EU competition law, as interpreted and applied by the Commission, has contributed to maintaining media pluralism. To this end, I shall examine how the Commission’s perceptions have filtered into its decisional practice. The Commission seems to have adopted two different approaches: it has regarded media pluralism either as an almost spontaneous result of unhindered market access, or as a value the protection of which would require restrictions of competition that it believes is not entitled to allow. The Chapter argues that these two approaches, which will be discussed in Parts 2 and 3 respectively, are not solid and have fallen short of protecting both competition and pluralism. But, applying EU competition law in a way that delivers pluralism-friendly results may go beyond the Commission’s existing predispositions. Part 4 identifies a third approach to the relationship between competition and pluralism which appears to have more potential than the other two, for it may lead to competition decisions that are more accurate *and* pluralism-friendly without giving rise to controversies over competence.

2. Media pluralism as a result of unhindered market access

On several occasions, the Commission has taken the stance that media pluralism is an almost spontaneous result of the undistorted functioning of the markets. For example, in the Issues Paper for the Liverpool Audiovisual Conference, the Commission states that ‘[t]he application of European competition law plays an important role in [...] *ensuring market access* for new entrants. **Thus**, [...] *competition policy can make an important contribution to maintaining and to developing media pluralism*, both in traditional television markets and in new upcoming markets’ [emphasis added].⁴

² European Commission. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European audiovisual regulatory policy*, COM (2003) 784 final, 8

³ Commission decision *NewsCorp/BSkyB*, Case COMP/M. 5932 [2011] OJ C37/2, paragraphs 306-309

⁴ European Commission (2005). *Issues paper for the Liverpool Audiovisual Conference: Media pluralism – What should be the European Union’s role?*, 2. Brussels: DG Information Society and Media

This is repeated verbatim in the Commission’s Staff Working Document on Media Pluralism in the Member States of the EU⁵ and, as a policy priority, it is reflected in several merger and antitrust decisions. These decisions can be divided into two categories. First, there have been decisions where the Commission was limited to noting that, since the transaction under scrutiny did not raise any foreclosure concerns, diversity could not be harmed.⁶ Second, there have been cases where the Commission found that the involved undertakings would have the ability and incentive to foreclose the affected markets, but instead of adopting a prohibition decision, it attempted to address related concerns through ‘access’ remedies.⁷ In these decisions, which concerned traditional and emerging (e.g. Internet Protocol television, Over-The-Top content markets, etc.) broadcasting markets, ‘access’ has come to mean almost exclusively ‘access to the market for the acquisition of premium content’, that is, content that has the ability to attract mass audiences such as box-office blockbusters and major sports events.⁸ The implications of the first category of decisions for pluralism have already been examined in Chapter 2 where I discussed extensively why it is not correct to assume that keeping the markets open to competition will produce a pluralism-friendly outcome; traditional and new media markets have high entry barriers and, even if diverse suppliers do enter the market, this cannot be expected to automatically guarantee content and exposure diversity.⁹ Therefore, the analysis below will focus on the reasoning adopted in decisions falling under the second category. More particularly, I shall study whether the commitments that were made legally binding on undertakings marketing rights to premium content have indeed facilitated market access as well as the relationship between these remedies and media pluralism.

2.1. Ensuring access to premium content as a means to protect *undistorted competition*

Premium content is undoubtedly a valuable input, for its transmission may generate significant advertising revenues on which the survival of media firms largely depends. For example, sports programming is of high value to advertisers and hence to content distributors because it is particularly appealing to men who are in the age groups of 16 to 20 and 35 to 40; compared to other consumer groups, young men have a less fixed spending pattern and are therefore more likely to try

⁵ Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 7

⁶ See, for instance, Commission decision *Bertelsmann/Planeta/Circulo*, Case COMP/M.5838 [2010] OJ C 228/3, paragraphs 16, 39, 49, 57 and 59; Commission decision *HBO/ Ziggo/ HBO Nederland*, Case No COMP/M.6369 [2012] OJ C 72/2, paragraph 53, and Commission decision *Bertelsmann/KKR*, Case COMP/M.5533 [2009] OJ C 240/01, paragraph 79

⁷ These access remedies will be discussed below in Part 3 as well as in Chapter 3, Part 3 and Chapter 6, Part 5

⁸ See the ‘Media’ Section of the website of DG Competition: ‘Access to content is crucial to enable competition in media markets. This applies to infrastructure, platforms and devices (satellite, cable and terrestrial networks, TV sets, PCs, mobile devices)’, available at: http://ec.europa.eu/competition/sectors/media/overview_en.html

⁹ Chapter 1, Part 3

new products and services.¹⁰ More particularly, football, a mass attractive sport with high viewing figures, seems to be the most effective tool to address this group of the population which does not, as a rule, watch much television.¹¹ There are several examples illustrating how the possession (or lack thereof) of this type of content may affect market structures. For example, in the early 1990s, after acquiring the exclusive rights to the English Premier League, Sky was transformed from a loss-making company to a very profitable one.¹² Sky, which ‘has built its business [...] on the back of live top football’,¹³ has dominated the UK pay-TV market ever since. In December 2005, Premiere, the German media group, lost 42% of its market value and a large part of its subscriber base after it released a statement that it had not managed to purchase the rights to the Bundesliga whereas the new Bundesliga licensee Unity/Arena attracted over 900,000 subscribers within a few months.¹⁴ Likewise, seven years of growth turned to a substantial decrease in subscriber numbers for TPS in France upon losing its broadcast rights to Ligue 1 matches.¹⁵

While in theory ensuring access to premium content seems appropriate to address some of the issues undercutting competition in the media markets, such as the indirect network effects created by exclusive transmission and the resulting downward spirals that lead to quasi-monopolistic or oligopolistic market structures, the analysis that follows will show that the Commission’s interventions have done little to nothing to protect undistorted competition. Three problems seem to have arisen. First, the Commission has made choices that have fallen short of rendering access to the market for the acquisition of premium content easier. Second, in implementing these choices, the Commission seems to have moved beyond what is permissible under EU competition law. Third, the Commission’s tolerance towards certain practices related to the marketing¹⁶ of rights to premium content is based on erroneous assumptions. I shall attempt to demonstrate the above by examining the

¹⁰ See Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 73. See also Commission decision *Eurovision* (Case IV/32.150) [2000] OJ L151/18, paragraph 50: ‘pay-TV broadcasters, particularly in France, the United Kingdom and Spain have discovered that having attractive sporting events is an enormously motivating factor in recruiting subscribers, in particular young males with disposable income’

¹¹ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 74

¹² Ariño, M. (2005). *Regulation and Competition in European Broadcasting. A study of pluralism through access*, 222. PhD thesis. Florence: European University Institute

¹³ Gibson, O., *Premier League lands £3bn TV rights bonanza from Sky and BT*, published on The Guardian on 13/06/2012, available at: <http://www.theguardian.com/media/2012/jun/13/premier-league-tv-rights-3-billion-sky-bt>

¹⁴ Hatton, C., Christoph Wagner and Hector Armengod (2007). *Fair Play: How Competition Authorities have Regulated the Sale of Football Media Rights in Europe*, European Competition Law Review, 28(6), 346

¹⁵ Ofcom (2009). *Pay TV Phase Three Document: Proposed Remedies*, paragraph 3.31. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/summary/paytv_condoc.pdf

¹⁶ On the practice the Commission developed in the area of joint acquisition of rights to premium content see, for instance, Van Rompuy, B. and Karen Donders (2013). *The EBU’s Eurovision System Governing the Joint Buying of Sports Broadcasting Rights: Unfinished Competition Business*. Competition Law Review, 9(1), 7-28; Van Rompuy, B. and Karen Donders (2012). *Competition Law, Sports, and Public Service Broadcasting: The Legal Complexity and Political Sensitivity of Measuring Market Distortion and Public Value*. Journal of Media Law 4(2), 213-228, and Herold, A. (2002). *Rules Governing the Acquisition by Third Parties of Television Rights for Sporting Events under Eurovision in Breach of the European Competition Law*. 7 International Journal of Communications Law and Policy, 1-9

Commission's decisional practice in the area of joint selling of broadcast rights to sports events and in particular football.¹⁷

2.1.1. Joint selling of rights to major sports events: Have 'access to premium content' remedies facilitated market access?

In the Netherlands,¹⁸ Spain¹⁹ and Portugal,²⁰ broadcast rights to football matches are sold by the football clubs individually. But the general trend across Europe has been the implementation of a joint selling model, whereby a national association/federation is assigned by the various clubs the task of selling the rights to the matches of the competition for the national championship concerned.²¹ International competitions such as the UEFA Champions League²² and the World Cup²³ are also controlled by single entities that trade the rights on behalf of the participants.

The first case in this area that was examined by the Commission concerned the central marketing of broadcast rights to the UEFA Champions League.²⁴ Initially, the Commission refused to grant a negative clearance as well as an exemption under Article 101(3) TFEU because UEFA would sell all the free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years.²⁵ This commercial policy was found to reduce output and eliminate price

¹⁷ It should be noted that access to a valuable input in general and access to premium content in particular is a cross-cutting theme in this thesis. The access to premium content remedies the Commission has imposed on media undertakings that acquire exclusive rights from football associations and then sell them to competing content providers will also be discussed in Chapters 3 and 6 which discuss the relevant decisional practice in the areas of merger and State aid control respectively and which reach similar conclusions regarding the ineffectiveness of access remedies. In this Chapter we focus on joint selling by football associations, that is, concentration at the rights holder (not the licensees) level. As will be seen in greater detail below and in Chapters 3 and 6, the Commission's tolerance towards concentration at the upstream level adversely affected competition in downstream broadcasting and neighboring content markets. On the practice the Commission developed in the area of access to premium films see, for instance, Ariño, M. (2005), *supra* n. 12, 261-271

¹⁸ In the Netherlands, broadcast rights are sold on the basis of the 'home right game' model whereby each football club is allowed to sell the rights to the matches played at its stadium. Dutch football clubs have been employing this model since the national competition authority considered that joint selling should be regarded as a price-fixing arrangement which does not qualify for an exemption. See Comisión Nacional de la Competencia (CNC) (2008). *Informe sobre la competencia en los mercados de adquisición y explotación de derechos audiovisuales de fútbol en España*, fn. 58

¹⁹ *Ibid.*, see in particular pp. 22 *et seq.* In Spain, the visiting club must grant an authorization to the home team for the rights to the game to be sold to a media provider

²⁰ See Peeters, T. *Competitive balance in European football leagues*. 14 August 2012, Football Perspectives. Retrieved from: <http://footballperspectives.org/competitive-balance-european-football-leagues>

²¹ Ariño, M. (2005), *supra* n. 12, 233. For example, the Federazione Italiana Giuoco Calcio (FIGC) is responsible for selling the rights to the Italian Campionato, the Football Association Premium League (FAPL) sells the rights to the UK Premium League, the Deutsche Fußball Liga GmbH is the federation charged with selling the rights to the German Bundesliga whereas rights to the French Ligue are sold by Ligue de Football Professionnel (LFP). Note that in Italy, it is the legislator that has introduced collective trading. Before 2007, the rights to the Italian Campionato would be marketed on an individual basis

²² See, for instance, UEFA Champions League (2014). *Media content rights sales: UEFA Champions League/UEFA Super Cup*. Retrieved from:

http://www.uefa.org/MultimediaFiles/Download/Publications/competitions/Marketing/01/96/76/90/1967690_DOWNLOAD.pdf

²³ See FIFA's website at: <http://www.fifa.com/aboutfifa/organisation/tv/salesdistribution.html>

²⁴ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25

²⁵ European Commission (2001, July). *Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League*. Press Release IP/01/1043. Retrieved from: http://europa.eu/rapid/press-release_IP-01-1043_en.htm?locale=it

competition.²⁶ Following negotiations with the Commission, UEFA introduced changes to its collective selling scheme that were considered appropriate to address the concerns the Commission had identified throughout its investigation. These changes can be summarized as follows:

- The media rights were split into fourteen smaller packages;
- Contrary to the previous arrangement, the individual clubs would have the right to exploit deferred rights as well as certain rights that were previously sold exclusively by UEFA;
- All media rights would be made available, including those rights UEFA was reluctant to sell such as Internet and UMTS rights, and
- The media rights contracts would be awarded for a period not exceeding three years through a public bidding procedure.²⁷

The same approach was adopted in the *German Football League* (Deutschen Fußball Liga, DFL)²⁸ and in the *English Football Association Premier League* (FAPL);²⁹ the Commission exempted the agreements upon the condition that rights would be broken down into several packages that could only be acquired on the basis of a transparent and non-discriminatory bidding procedure, previously unexploited rights would be made available on the market, contracts with media operators would not exceed three seasons, and individual clubs would retain the right to sell certain rights.³⁰

The above remedies proved to be ineffective. For example, FAPL segmented the rights for the 2004-2007 seasons into four packages, all packages, however, were ultimately acquired by Sky.³¹ A similar scenario has recently emerged in Germany. In January 2012, the Bundeskartellamt accepted DFL's commitment to divide the rights into more than one package.³² Yet, this did not prevent Sky Deutschland from purchasing the exclusive rights to the Bundesliga for pay-TV, IPTV and mobile

²⁶ European Commission (2002, June). *Commission welcomes UEFA's new policy for selling the media rights to the Champions League*, Press Release IP/02/806. Retrieved from: http://europa.eu/rapid/press-release_IP-02-806_en.htm?locale=it

²⁷ Ibid.

²⁸ Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46

²⁹ Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173), [2006] OJ L 176/104

³⁰ European Commission (2003, July). *New marketing system for Bundesliga broadcasting rights*. Press Release IP/03/1106. Retrieved from: http://europa.eu/rapid/press-release_IP-03-1106_en.htm?locale=it; Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46, Annex, paragraphs 2.1. *et seq.*; Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453, *Joint selling of the media rights of the FA Premier League on an exclusive basis* [2004] OJ C 115/02, paragraphs 16 *et seq.* On the practice the Commission developed in the area of joint selling rights and in particular on whether the relevant decision-making has benefited the consumer see Lefever, K. and Ben Van Rompuy (2009) *Ensuring Access to Sports Content: 10 Years of Intervention. Time to Celebrate?* Journal of Media Law, 1(2), 243-268

³¹ Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453, *Joint selling of the media rights of the FA Premier League on an exclusive basis* [2004] OJ C 115/02, paragraphs 10 and 11

³² European Competition Network. *Brief 02/2012*. Retrieved from: http://ec.europa.eu/competition/ecn/brief/02_2012/brief_02_2012.pdf p. 6

for the 2013-2017 seasons.³³ Therefore, despite what the Commission expected, these arrangements did not ‘enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain [premium sports] content’.³⁴

Stricter remedies have also failed to achieve this goal. For example, because Sky acquired all of the Premier League packages for the 2004-2007 seasons during the Commission’s investigation, FAPL further undertook to specify in the invitations to future tenders that no single operator would be entitled to acquire all of the live audiovisual packages (no single buyer obligation).³⁵ The no single buyer obligation may have resulted in Setanta entering the market, but this was of little value. Sky won the rights to five of the six packages (the maximum available to a single bidder) whereas Setanta purchased the rights to the remaining package, ‘generally recognized to be the least attractive’.³⁶ Moreover, Setanta did not manage to exert effective competitive constraints on Sky; in June 2009, it went into administration and its rights were awarded to ESPN, which concluded a wholesale deal with Sky for distribution of the package on Sky’s DSat platform.³⁷ As a result, Setanta customers were ultimately forced to buy a Sky subscription.³⁸ The above examples illustrate why concerns over distortions of competition in traditional broadcasting markets that arise from joint selling agreements are not likely to be addressed through unbundling obligations.³⁹

The Commission’s intervention does not appear to have been particularly helpful for the opening up of neighboring broadcasting markets either.⁴⁰ For example, *UEFA Champions League* lays down that UEFA or individual football clubs ‘may choose to provide’ video content themselves or via ISPs,⁴¹ thereby leaving it up to the parties to the agreement to decide whether or not to offer to other suppliers the rights for online transmission. Moreover, the decision stipulates that, if either UEFA or the clubs sell the rights to other providers, the video content concerned can be distributed one and a half hours after the match ends, that is to say, as from midnight of the night of the match.⁴²

³³ See Briel, R. *Sky Deutschland wins all live Bundesliga rights*. 18 April 2012, Broadband TV News. Retrieved from: <http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/>

³⁴ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 171

³⁵ Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173), [2006] OJ L 176/104, paragraph 3.2.

³⁶ Ofcom (2009), *supra n. 15*, paragraph 2.53

³⁷ *Ibid.*, paragraph 1.17., fn. 42

³⁸ *Ibid.*, paragraph 12.40

³⁹ Ariño, M. (2005), *supra n. 12*, 242

⁴⁰ Again, contrary to the Commission’s expectations. See European Commission (2002, June), *supra n. 26*: the remedies ‘will allow clubs to develop some of the rights with their fan base and will give an impulse to the emerging new media markets such as the Internet and UMTS services’

⁴¹ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 42

⁴² *Ibid.*, paragraph 40

These time limitations, which clearly favor traditional broadcasters,⁴³ discourage new firms from penetrating emerging content markets because they devalue the acquired input; sports events may attract large audiences only if their result remains unknown, i.e. if the competition is broadcast live.⁴⁴ Finally, it should be borne in mind that, even if the Commission designs access remedies on a platform neutral basis, premium content is very expensive. Put simply, antitrust intervention does not necessarily guarantee that a new entrant, which has not built a loyal customer base yet, will have the financial resources to successfully bid for the rights. This may go partway towards explaining why, with very few exceptions, the vast majority of media companies that acquired the rights to the UEFA Champions League for the seasons 2012-2013 and 2014-2015 are well-established broadcasting organizations.⁴⁵

2.1.2. Do the Commission's interventions go beyond what is permissible under EU competition law?

The Commission seems to believe that premium content is an 'essential facility', that is, an input which competitors cannot duplicate feasibly or economically and access to which is necessary in order to effectively compete. For example, in *Vivendi*, the Commission noted that the attractiveness of pay-TV depends on the availability of sports rights, thereby making access to this content 'essential',⁴⁶ whereas in *NewsCorp/Telepiù*, it referred to football content as 'a *stand-alone driver* for pay-TV operators' [emphasis added].⁴⁷ The remedies imposed upon exclusive acquirers/broadcasters, most notably the obligation to sublicense, also suggest a 'veiled application of

⁴³ Note that, with respect to Universal Mobile Telecommunications System (UMTS) operators, the decision provides that video content must be made available five minutes after the action has taken place (see paragraph 44). This distinction between other online providers and UMTS operators is unjustified and arguably violates the platform neutrality principle. The Commission seems to have acknowledged the shortcomings of this approach in *FAPL* where it imposed the same embargo on both UMTS and Internet providers. See Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453, *Joint selling of the media rights of the FA Premier League on an exclusive basis* [2004] OJ C 115/02, paragraphs 26 and 28. Note also that UEFA has clarified that it offers its media content rights 'on a platform neutral basis'. Even so, however, it is well-known media organizations that have traditionally acquired access to these rights. See *infra n.* 45. On more information on the *rationales* for and how the Commission's choices in these cases have affected new media providers see, for instance, Lefever, K. (2012). *New Media and Sport: International Legal Aspects*, 145-157. The Hague: T.M.C. Asser Press. On the Commission's views on this issue see, for instance, Schaub, A. *Sports and Competition: Broadcasting rights for sports events*, 6. Speech delivered in Madrid, 26 February 2002. Retrieved from: http://ec.europa.eu/competition/speeches/text/sp2002_008_en.pdf

⁴⁴ See, for instance, Agcom (2010). *Libro bianco sui contenuti*, 88: 'Gli eventi sportivi, infatti, pur essendo a utilità immediata (*l'attrattività è in funzione della contemporaneità della fruizione e perde valore nel tempo rispetto agli altri contenuti pregiati come i film*) sono in grado di valorizzare la programmazione televisiva favorendo il confezionamento di palinsesti e offerte a pagamento ad elevata *audience*' [emphasis added]. Retrieved from: <http://www.agcom.it/default.aspx?message=visualizzadocument&DocID=5558>

⁴⁵ See UEFA (2012). *Media content rights sales: UEFA Champions League/UEFA Super Cup*. Retrieved from: http://www.uefa.org/MultimediaFiles/Download/Publications/competitions/Marketing/01/55/41/62/1554162_DOWNLOAD.pdf

⁴⁶ Commission decision *Vivendi/Canal+/Seagram*, Case No COMP/M.2050 [2000] OJ C 311/3, paragraph 21

⁴⁷ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 66. Similarly, in *BiB*, it stated that an entrant into the pay-TV market requires 'above all, premium film and sports channels. These are *the basics* around which other channels can be offered to subscribers' [emphasis added] See Commission decision *British Interactive Broadcasting/Open*, Case IV/36.539 [1999] OJ 312/1, paragraph 72

the refusal to supply line of case-law'.⁴⁸ However, an analysis of this case law will demonstrate that the treatment of the exercise of broadcast sports rights on an exclusive basis as an abusive refusal to deal stretches the limits of competition law in an unreasonable manner.

Probably the first case concerning a refusal to supply is *Commercial Solvents* where the Court ruled that a firm in a dominant position in the market in raw materials and which, with the object of reserving such raw materials for manufacturing its own derivatives, refused to supply a customer that itself was a manufacturer of these derivatives, acted in violation of Article 102 TFEU.⁴⁹ The Court followed the same approach in *Télémarketing*.⁵⁰ Yet, these two judgments did not clarify whether, and if so under what conditions, the duty of a dominant firm to deal could be extended to a duty to license in cases where the firm in question held an Intellectual Property Right (IPR) entitling it to exclusive exploitation.⁵¹

This issue was first tackled in *Volvo*⁵² concerning the refusal by the proprietor of a design right covering car body panels to license third parties to sell products incorporating the protected design. In this case, the Court ruled that in the *primary* market for which a dominant undertaking has a monopoly owning to its own IP, the exclusive right to produce or sell should be fully respected.⁵³ However, the ways in which the IPR is exercised in *secondary* markets may, in certain exceptional circumstances, be an abuse.⁵⁴ The boundaries beyond which the exercise of exclusive IPRs may violate EU competition law were dealt with in more detail in *Magill*, a case concerning the refusal of three Irish broadcasters to license their program listings to a weekly TV guide.⁵⁵ In *Magill*, the Court held that, for the refusal to supply a competitor operating in an ancillary market to be regarded as an abuse under Article 102 TFEU, the following three requirements must be met cumulatively.⁵⁶ First,

⁴⁸ Ibáñez Colomo, P. (2006). *Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector*. Research Papers in Law, 07/2006, Global Competition Law Centre, 20

⁴⁹ ECJ, Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223, paragraph 25. In this case, the manufacturer of a raw material for ethambutol, a pharmaceutical product used to treat tuberculosis, refused to supply a long-standing customer which depended on the material for commercial survival as a producer of the drug

⁵⁰ ECJ, Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261. In this case, a television station subjected the sale of broadcasting time for any telemarketing operation to the use of the telephone number of an exclusive advertising agent belonging to the same group thereby excluding other telemarketing undertakings

⁵¹ Anderman, S. and Hedvig Schmidt (2011). *EU Competition Law and Intellectual Property Rights – The Regulation of Innovation* (2nd edition), 95. Oxford: Oxford University Press

⁵² ECJ, Case 238/87 *Volvo v. Veng (UK)* [1988] ECR 6211

⁵³ *Ibid.*, paragraph 8

⁵⁴ *Ibid.*, paragraph 9. The Court gave three examples of conduct that may be viewed as abusive: a. the arbitrary refusal to supply spare parts to independent repairers; b. the fixing of prices for spare parts at an unfair level, and c. a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation

⁵⁵ ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefís Eireann (RTE) and Independent Television Publications Ltd. v. Commission* [1995] ECR I-743

⁵⁶ *Ibid.*, paragraph 2

the refusal must prevent the appearance of a new product which the dominant firm does not offer and for which there is potential consumer demand.⁵⁷ This requirement is fulfilled if there is no actual or potential substitute for the new product and the raw material which the dominant firm possesses is indispensable for its creation.⁵⁸ Second, there must be no objective justification for the refusal.⁵⁹ And third, the refusal must result in excluding potential competition in the secondary market.⁶⁰

As regards football associations, the problem that arises from the application of the above case law to their decision to exploit the event on an exclusive basis does not have to do with the fact that broadcast sports rights are not IPRs; it has long been accepted that *Coditel II*, where the Court ruled that a contract involving an exclusive license to exhibit a film (or any other assignment of copyright) is not a *per se* infringement of EU competition law,⁶¹ applies to arrangements governing the granting of exclusive rights to sports events whereby a third party (the broadcaster) is allowed to access land or property (the stadium).⁶² Moreover, *Oscar Bronner*, which concerned a refusal to access a nationwide newspaper home-delivery scheme, left the door open for an application of the *Magill* test to cases where no IPRs are involved. However, from *Commercial Solvents* to *Magill* to *Oscar Bronner*, the (actual or potential) effect of the dominant firm's conduct was the elimination of competition in *secondary* markets. In the case at hand, these would be the downstream broadcasting markets for audiences and advertisers where football associations are not, as a rule, active.⁶³ In view of the above, the duty to divide the rights into several packages and the no single buyer obligation imposed on these undertakings seem to go beyond what is permitted by the relevant case law.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, paragraphs 52-54

⁵⁹ *Ibid.*, paragraph 2. See also paragraphs 39 *et seq.* The mere possession of an IPR is not an objective justification for exclusionary behavior. Examples of acceptable justifications include poor creditworthiness, safety, etc. See Anderman, S. and Hedvig Schmidt (2011), *supra n.* 51, 104

⁶⁰ ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission*, [1995] ECR I-743, paragraphs 54-56

⁶¹ ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381. The Court ruled that the exercise of a copyright may only amount to a violation where 'there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the characteristics of that market', see paragraph 17

⁶² Ibáñez Colomo, P. (2006), *supra n.* 48, 3 referring to Wachtmeister, A. M. (1998), *Broadcasting of sports events and Competition law*. Competition Policy Newsletter, 2, 23

⁶³ While this is gradually changing as a result of convergence and the lower costs that the distribution of sports content entails, football federations and clubs are not full-fledged competitors of companies operating in broadcasting markets. For example, federations or individual clubs have their own websites through which they provide information on the clubs' performance, highlights of the matches, etc. However, very few associations or clubs have launched their own channels and, even in these cases, they continue to sell the rights to the matches concerned to media companies. For more information on the expansion of federations and clubs into media markets see Lefever, K. (2012), *supra n.* 43, 12-20

As regards exclusive acquirers/broadcasters and their obligation to sublicense,⁶⁴ the first question that arises is whether the above case law applies in cases where the competitive advantage of the firm is not the result of its own IP.⁶⁵ This can be answered in the affirmative mainly for three reasons. First, a duty to deal would not facilitate free riding, for the sub-licensees pay the broadcaster/licensee a large amount of money to acquire the rights concerned.⁶⁶ Second, broadcasters/licensees may be equated with the rights owners for the purposes of Article 102 TFEU because the licensees are the entities with which competitors in the downstream markets enter in negotiations in order to conclude an access agreement. Finally, denying access to content that has been acquired in the *primary* (upstream) market for the acquisition of free and pay-TV rights may create distortions of competition in the *secondary* (downstream) markets for audiences and advertisers. In other words, the alleged abuse may adversely affect ancillary markets. This is in line with *Volvo*.

If it is accepted that the refusal to supply case law may indeed apply to broadcasters that possess content which they themselves have not produced, the question arises as to whether the new product condition⁶⁷ set by *Magill* is met here. This is a requirement that the Court has interpreted in a rather flexible manner. For example, in *Microsoft*, the company claimed that it could not be compelled to share interface information on the grounds that, instead of providing a new product, competitors would be merely replicating MS Windows server operating systems. The Commission, however, argued that competitors could use the interface information to develop advanced versions of their own products. The Commission provided convincing evidence demonstrating that, absent the refusal, the competitors' work group server operating systems could be better than those of Microsoft with respect to, *inter alia*, the reliability/availability of the system and the security included in the server operating system, two characteristics to which consumers attached particular importance.⁶⁸ The Court upheld the Commission's finding and concluded that Microsoft's refusal was not a refusal to allow duplication but a 'refusal to allow follow-on innovation',⁶⁹ which is caught by Article 102(b)

⁶⁴ This remedy was imposed by the Commission in, e.g. decision *NewsCorp/Teletipiù*, Case COMP/M.2876 [2004] OJ L 110/73 (see paragraph 225). The impact of the remedies imposed in *NewsCorp/Teletipiù* on the development of the Italian market will be discussed in more detail in Chapter 3. For an overview of the sublicensing mechanisms that were imposed by national competition authorities across the EU see Ofcom (2009). *Wholesale must-offer remedies: International examples*

⁶⁵ Ibáñez Colomo, P. (2006), *supra n.* 48, 22

⁶⁶ Note that the Commission is usually 'immune' to related arguments even in cases involving products the creation of which was based on extensive R&D efforts. See, for example, Commission decision 84/233/EEC of 18 April 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.849 IBM personal computer) [1984] OJ L 118/24

⁶⁷ There is still some confusion as to whether this requirement must be met in the first place. In *IMS Health*, the Court held that, in the light of the specific circumstances of that case, the criteria set by *Magill* were 'sufficient' to establish whether an abuse of dominant had taken place thereby implying that other tests may also apply. See ECJ, Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, [2004] ECR I-5039, paragraphs 37-38 and 48-49

⁶⁸ CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraph 652

⁶⁹ *Ibid.*, paragraphs 630 *et seq.*

TFEU.⁷⁰ In cases involving exclusive broadcast rights, and in particular in its assessments of whether the exercise of these rights may reduce product variety or adversely affect innovation, the Commission has not been as diligent as it was in *Microsoft*. The Commission has repeatedly taken the stance that ensuring access to premium content automatically results in more choice for the viewer.⁷¹ Yet, as already explained in Chapter 2, transmission of premium content and the resulting advertising revenues do not necessarily lead to the production and/or distribution of more original content. Thus, it is not axiomatic that only by reducing or eliminating exclusivity can ‘new’ content emerge.

Moreover, as already mentioned, in *Magill*, the Court established that preventing the creation of a new product is abusive on condition that there is no actual or potential substitute for the product and that the raw material the dominant firm possesses is indispensable.⁷² There are strong doubts as to whether premium sports content fulfills these two criteria. First, as regards non-substitutability, even if there is sports content with highly inelastic demand such as the Wimbledon finals, the Olympic Games and the World Cup finals,⁷³ this does not mean that *every* popular sports event has such unique attributes that excludes other competitions as attractive alternatives. This is particularly so when there is more than one event that may achieve high viewing figures, reach an identifiable audience targeted by the same advertisers, and develop a certain brand image.⁷⁴ As regards indispensability, in *Oscar Bronner* the Court explained that this condition is satisfied if there are no technical, legal and economic obstacles of making it impossible or even unreasonably difficult for

⁷⁰ Ibid., paragraph 647. The Court concluded that the *Magill* and *IMS Health* new product rule ‘cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article [102(b) TFEU]. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development’

⁷¹ For example, in *Bertelsmann/Kirch/Premiere*, the Commission stated that ‘[a]n alternative program platform can [...] be built up only by somebody who has access to premium content so that he can offer a promising bouquet’. See Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 48. Similarly, in *TPS* it noted that that ‘[i]t is universally acknowledged that films and sporting events are the two most popular pay-TV products. It is necessary to have the corresponding rights in order to put together programs that are sufficiently attractive to persuade potential subscribers’. See Commission decision 1999/242/EC – *TPS* [1999] OJ L 90/6, paragraph 34

⁷² It is worth noting that in *Tiercé Ladbroke*, which concerned the request by a Belgian owner of betting shops to be granted access to televised transmissions of French horse races, the Court left the door open for this test to be applied independently of the first: ‘The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 [now Article 102] unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers’. CFI, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923, paragraph 131. Note also that in *Oscar Bronner* the Court does not refer to the new product requirement, but only to the indispensability and the substitutability requirements. See ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 41. Thus, depending on how one reads the above judgments, these requirements may either complement or replace the new product condition

⁷³ See, for instance, Commission decision *Eurovision*, Case IV/32.150 [2000] OJ L151/18, paragraph 42 and Commission decision 2001/478/EC *UEFA Broadcasting Regulations* [2001] OJ L 171/12, paragraph 28

⁷⁴ Toft, T. (2003). *Football: joint selling of media rights*. *Competition Policy Newsletter*, 3, 49

another to replicate the product or service under consideration.⁷⁵ In our case, it would indeed be impossible to duplicate a certain match. However, it is questionable whether such a strict interpretation is desirable in competition assessments in media markets where almost every product, from a TV series to a film to an interview of a particular artist, would qualify as a product ‘impossible to replicate’, thereby constituting a separate product market.

2.1.3. The efficiencies joint selling agreements are believed to create: Has the Commission got it all wrong?

That the remedies the Commission imposed in order to reduce the scope and duration of exclusivity seem to move beyond what is permissible under EU competition law, combined with the fact that these remedies fell short of ensuring access to the rights concerned, is a strong indication that the concerns that should be addressed by a competition authority are not those relating to the exclusive terms of exploitation, but those arising from a concentrated wholesale market.⁷⁶ Hence, instead of dealing with the issue at a later stage by establishing legally questionable and ineffective obligations, the Commission should rather consider re-adjusting its approach to joint selling agreements.

There are valid reasons to believe that joint selling agreements do not really generate the efficiencies based on which the Commission has granted exemptions under Article 101(3) TFEU. For example, in terms of improvements in the distribution of the content concerned, the Commission found that collective bargaining might result in more operators, including smaller providers, purchasing the rights to the content concerned.⁷⁷ Yet, it was seen above that the joint selling model has not prevented Sky from acquiring the most attractive or all of the FAPL and DFL packages in the UK and Germany respectively. The Commission has also argued that collective selling improves distribution on the grounds that it creates a single point of sale, thereby reducing transaction costs.⁷⁸ It is, however, doubtful whether the creation of a single point of sale outweighs the harm to competition in the affected markets, for the concentration of the bargaining power in the hands of the federations has led to excessive pricing *and* to an increase in media concentration.⁷⁹

⁷⁵ ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 44

⁷⁶ Ariño, M. (2005), *supra* n. 12, 277

⁷⁷ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 171

⁷⁸ *Ibid.*, paragraphs 148-9

⁷⁹ Parlasca, S. and Stefan Szymanski (2002). *The Negative Effects of Central Marketing of Football Television Rights on Fans, Media Concentration and Small Clubs*. *Zeitschrift für Betriebswirtschaft*, 4, 83-104

As regards benefits to the consumers, the Commission has repeatedly taken the stance that, under an individual selling scheme, the viewers would need to subscribe with more than one pay-TV operator in order to watch the entire competition.⁸⁰ However, there is no guarantee that consumers will not have to incur this additional cost under a joint selling model. A good example is the no single buyer obligation imposed on FAPL which forced Sky customers to purchase the Setanta subscription at a price of at least GB £9.99 per month in order to be able to access all of the FAPL matches.⁸¹

With respect to improvements in production, an argument which is usually put forward in these cases is that football federations employ the financial solidarity model whereby revenues are redistributed to finance the poorer teams.⁸² It is thought that cross-subsidization of weaker clubs facilitates the purchase of new players, thereby making these clubs more competitive vis-à-vis their stronger rivals.⁸³ Yet, a financial solidarity model may also apply to individual selling arrangements. In such a scenario, the commercialization of the media rights on a club-by-club basis does not hinder the competitive balance of the sport.⁸⁴ The Commission has further claimed that the fact that collective bargaining aggregates the media products of football clubs into one media product covering the league as a whole establishes the reputation of a brand because a homogeneous presentation increases the attractiveness for both the viewer and the clubs.⁸⁵ But, individual selling agreements have also managed to create powerful brands, the most prominent example being *La Liga Española*. In the 2011-12 season, La Liga had an average *attendance* of 30,275 for league matches,

⁸⁰ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 172. This is also an assumption made by national competition authorities. See, for instance, CNC (2008), *supra n.* 18, 94: 'Debe recordarse que en nuestro país, a diferencia de los modelos de venta centralizada, con respecto a cada jornada de Liga el 100% de la oferta audiovisual de partidos en directo de Primera División es accesible para el consumidor a través de, como mucho, la suscripción a la plataforma vía satélite, y el 90% de ella en caso de que el consumidor se suscriba a otra de las plataformas. La explotación individual y la segmentación por paquetes, en un contexto de explotación de los mismos en exclusiva, implica que el consumidor no puede acceder a la oferta futbolística (ni a los mejores partidos de la jornada) mediante la suscripción a una sola plataforma en los mismos términos que en la actualidad'

⁸¹ Ofcom (2009), *supra n.* 15, paragraph 12.40

⁸² For more details on the financial solidarity model see European Professional Football Leagues (2010). *Financial Solidarity at Leagues and European level*. Retrieved from: http://www.epfl-europeanleagues.com/files/EPFL_Financial_Solidarity_at_Leagues_and_European_Level.pdf

⁸³ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraphs 164-165; Commission (2007). *White Paper on Sport* COM 391 final, 17; European Commission (1999). *Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework* (the Helsinki Report on Sports), 9. Retrieved from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF>

⁸⁴ Tonazzi, A. (2002). *Competition Policy and the commercialization of sport broadcasting rights: the decision of the Italian Competition Authority*. International Journal of the Economics of Business 10(1), 17-34. See also Falconieri, S., Frederic Palomino and Jozsef Sakovics (2004). *Collective versus Individual Sale of TV Rights in League Sports*. Journal of the European Economic Association 2(5), 833-862. Falconieri *et al.* have compared the welfare effects of collective and individual selling by analyzing the impact on bargaining power, prices and the scope of potential free-riding by the poorer teams, and conclude that under certain circumstances, individual selling can be more profitable

⁸⁵ Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraphs 154 *et seq.*

which is the third-highest of any professional association football league in the world.⁸⁶ Moreover, the first division (Primera División) of La Liga is currently first in the UEFA rankings of European leagues in terms of *performances* in European competitions over a five-year period, ahead of the English Premier League and Germany's Bundesliga.⁸⁷ With respect to *income generated by media rights*, La Liga generated €709.6 million for the season 2012-13, beating Bundesliga, the rights to which, as already seen, are sold on a collective basis.⁸⁸

The Spanish example indicates that individual selling may benefit a sports competition. Moreover, if competition is not eliminated in the upstream market, there is the likelihood that an increased number of operators will successfully bid for the broadcast rights: to my knowledge, Spain is currently the only case of a large European market where rights to the major national football competition have been acquired by three media companies, two pay-TV operators and one free-to-air broadcaster (Digital+, GolT and Cuatro). In the UK and Germany, one provider clearly dominates the market for the acquisition of premium sports content. More particularly, in the UK, Sky was a monopsonist for nearly twenty years and only recently another firm, BT, managed to win certain rights to FAPL matches.⁸⁹ In Germany, as previously mentioned, Sky Deutschland secured the live rights to all Bundesliga games in pay-TV, IPTV and mobile, whereas in the free-to-air segment, public broadcaster ARD acquired the rights to only seven live matches per season.⁹⁰

It should be borne in mind that dismantling collective selling schemes is not a panacea. This solution does not fully remove the concern that broadcast sports rights will be acquired by one or a handful of powerful media firms. However, if considered alongside the analysis carried out above, which concluded that prohibiting the exercise of rights to premium content on an exclusive basis is a rather intrusive option for EU competition law, it is strongly doubted whether the Commission's access to premium content policy may indeed protect and promote competition, both in traditional broadcasting markets and in emerging content markets.

2.2 Ensuring access to premium content as a means to protect *media pluralism*

⁸⁶ See Pudasaini, P. *Top 10 Sports Leagues With the Highest Attendance Per Game*. 21 March 2014, The Richest.com. Retrieved from: <http://www.therichest.com/sports/top-10-sports-leagues-with-the-highest-average-per-game-attendance-in-the-world/5/> For more details see Soccer STATS 2014/2015 at: <http://www.soccerstats.com/attendance.asp?league=spain>

⁸⁷ See UEFA's website at: <http://www.uefa.com/memberassociations/uefarankings/club/>

⁸⁸ See *Sports Media Consumption Data*. 10 December 2013, SportBusiness.com. Retrieved from: <http://www.sportbusiness.com/tv-sports-markets/sports-media-consumption-data>

⁸⁹ Sky retained most of the rights, securing 116 matches per season from 2013-14 against BT which won the rights to 38 games. See Gibson, O. (2012), *supra n.* 13

⁹⁰ See Briel, R. (2012), *supra n.* 33

The contribution of the Commission's efforts to ensuring access to premium content is questionable, not only from a competition but also from a pluralism perspective. First, premium content, be it an UEFA Champions League match, the World Cup finals or a Hollywood film, is the same irrespective of whether it is provided by a well-established media organization or a new entrant. Second, ensuring that more than one company acquires this content does not necessarily incentivize the provision of more original or marginalized content that has the capacity to advance democracy. For example, it was a *sports* broadcaster (Setanta) that managed to purchase the license to exploit certain football rights as a result of the no single buyer remedy imposed on FAPL.⁹¹ Third, and related to the above, the argument that the acquisition of premium content allows providers to promote their overall program, thereby leading to the exposure of the audiences to content that strengthens citizenship, is weak. As Ladeur observes somewhat cynically, 'the likelihood that a spectator may acquire an interest in political background information by watching top sporting events is perhaps not particularly high'.⁹² Finally, as already mentioned, even if the Commission intervenes to limit the scope and duration of an exclusive contract between the rights holder and a media provider, this does not mean that a smaller competitor has at its disposal the financial resources to successfully bid for the rights after the contract in question expires. Hence, ensuring access to premium content does not necessarily guarantee media pluralism. Where it indeed allows new entrants or established firms to build or maintain a customer base respectively, it *may* cater to supply diversity. However, the connection with content and exposure diversity is far more uncertain.

In light of the above, the practice the Commission has developed in the media sector to ensure market access seems to be, from a competition perspective, ineffective and, from a pluralism angle, theoretically unfounded.

3. Media pluralism as a restriction of competition

As previously noted, the Commission has occasionally stated that, in applying EU competition law, its greatest contribution to addressing pluralism concerns consists in its interventions to ensure that market access is not hindered. But, what position has the Commission taken in cases where it found that keeping the affected markets open to competition would not necessarily remedy these concerns? This part will explore whether the Commission has attempted to reconcile competition and

⁹¹ Ofcom (2009), *supra* n. 15, paragraph 2.53

⁹² Ladeur, K. H. (2004). *Guaranteeing the Programming Mandate of Public Broadcasters and Restraints on Private Broadcasters' Programmes in Multimedia Conditions*, German Law Journal 5(8), 915

media pluralism in cases of conflict and whether, and if so to what extent, pluralism can justify restrictions of competition. Where appropriate, I will refer to cases that do not involve pluralism-specific concerns.

Recent decisional practice shows that the Commission has been keen to distance itself from values which, in its view, are irreconcilable with the value of undistorted competition and which could be harmed as a result of a transaction it examined. For example, in *NewsCorp/BSkyB*, the Commission scrutinized a concentration by which News Corporation⁹³ would acquire sole control of BSkyB.⁹⁴ In addition to the possible anti-competitive effects it was likely to create,⁹⁵ the proposed concentration also raised major pluralism concerns. More particularly, it was feared that, if the transaction were approved, it would give media entrepreneur Rupert Murdoch a dangerous level of control of the UK media.⁹⁶ The Commission was limited to noting that relevant issues are for the UK authorities to address under Article 21(4)⁹⁷ of the Merger Regulation⁹⁸ and decided to approve the concentration on the grounds that it did not raise serious doubts as to its compatibility with the common market.⁹⁹ The Commission followed a similar approach in *Google/DoubleClick*, which dealt with the acquisition by Google of rival online advertising services provider Doubleclick.¹⁰⁰ In this case, several market participants and civil society groups voiced concerns about the combination of the databases held by Google and Doubleclick.¹⁰¹ It was argued that, as a result of the merger, users' privacy could be undermined because the combination of the databases in question would increase the power of the merging firms to track customer online behavior and use it for advertising purposes.¹⁰² The Commission cleared the concentration for the reason that it was not likely to significantly impede effective competition in the common market and that, irrespective of the approval of the merger, the merging parties were obliged to respect in their day-to-day business EU and national privacy regulation.¹⁰³

⁹³ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 3

⁹⁴ *Ibid.*, paragraphs 1 and 4

⁹⁵ *Ibid.*, paragraph 28

⁹⁶ See, Ofcom (2010). *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78516/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf

⁹⁷ See Chapter 1, fn. 89

⁹⁸ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 309

⁹⁹ *Ibid.*, paragraph 310

¹⁰⁰ Commission decision *Google/DoubleClick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraph 1

¹⁰¹ Brockhoff, J., Bertrand Jehanno, Vera Pozzato, Carl-Christian Buhr, Peter Eberl, and Penelope Papandropoulos (2008). *Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines*, Competition Policy Newsletter, 2, 59

¹⁰² *Ibid.*

¹⁰³ Commission decision *Google/DoubleClick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraph 368

The Commission has not always disassociated competition from other public policies. To the contrary, in the past, non-competition policy considerations have significantly influenced the outcome of competition decisions.¹⁰⁴ For example, agreements were granted an exemption under Article 101(3) TFEU¹⁰⁵ on the grounds that the anti-competitive concerns they raised could be outweighed by, *inter alia*, their contribution to employment stabilization¹⁰⁶ or pollution reduction.¹⁰⁷ A similar reasoning can be traced to old decisions in the media sector.¹⁰⁸ For instance, in *EBU/Eurovision*, the Commission decided that the agreement entitling the members of the European Broadcasting Union, a professional association of broadcasting organizations, to participate in a system of joint acquisition of television rights, justified an exemption under Article 101(3) TFEU on the basis that it enabled EBU members ‘to provide a broader range of sports programs, including minority sports and sports programs with education, cultural or humanitarian content, that they cannot show on their national generalist channels’.¹⁰⁹ Another notable example is a series of concentrations in the broadcasting sector that were blocked throughout the 1990s.¹¹⁰ Embedded in the relevant prohibition decisions is the belief that the strict application of competition rules may not only protect competitive market structures in the media but ‘also contribute to maintaining plurality in this sensitive sector’.¹¹¹

Newscorp/BSkyB and *Google/Doublick* are illustrative of the process of modernization of EU competition law. This modernization process, which started almost twenty years ago and which was largely influenced by changes in the U.S. antitrust policy prompted by a general acceptance of the law and economics analysis of the ‘Chicago School’,¹¹² includes two components.¹¹³ The first

¹⁰⁴ For instance, Tonwley estimates that, between 1993 and 1 May 2004, when Regulation 1/2003 on the modernization of the rules implementing Articles 101 and 102 TFEU started to apply, non-economic considerations were decisive in over 32% of formal Commission decisions that were adopted under Article 101(3) TFEU. See Townley, C. (2009). *Article 81 EC and Public Policy*, 5-6. Oxford: Hart Publishing

¹⁰⁵ For a comprehensive overview of how public policy concerns were taken into account by the Commission in the application of Article 101(3) TFEU see Monti, G. (2002). *Article 81 EC and Public Policy*. Common Market Law Review 39(5), 1057-1099

¹⁰⁶ See, for instance, Decision of the Commission of the European Communities of 15 December 1975 relating to a procedure under Article 85 of the EEC treaty (IV/847 – SABA) [1976] OJ L 28/19. The Commission’s decision was later upheld by the Court. See ECJ, Case 26/76, *Metro-SB Großmärkte GmbH & Co. KG v. Commission of the European Communities* [1977] ECR 1875, paragraph 43. The same approach was followed in Commission decision of 12 December 1983, relating to a proceeding under Article 85 of the EEC Treaty [1983] OJ L 376/22. The Court upheld the Commission’s decision. See ECJ, Case 42/84, *Remia and others v. Commission* [1985] ECR 2545, paragraph 42

¹⁰⁷ See, for example, Commission decision *Philips/Osram*, IV/34.252 [1994] OJ L 378/37, paragraph 27 and Commission decision *CECED*, 2000/475/EC [2000] OJ L 187/47, paragraphs 47-51 and 55-57

¹⁰⁸ For a comprehensive overview of the Commission decisions in the media sector where non-economic concerns were decisive see Arino, M. (2005), *supra n. 12*, 139-144

¹⁰⁹ Commission decision 93/403/EEC *EBU/Eurovision system* (Case IV/32.150) [1993] OJ L 179/23, paragraph 62. This decision was subsequently annulled by the Court. See CFI, Joined Cases T-528, 542, 543 & 546/93 *Métropole télévision SA and others v. Commission* [1996] ECR II-649

¹¹⁰ These decisions will be analyzed in Chapter 3

¹¹¹ Harcourt, A. (2005). *The European Union and the Regulation of the Media Markets*, 51. Manchester: Manchester University Press

¹¹² Anderman, S. (2007). *The Interface between Intellectual Property Rights and Competition Policy*, 7. Cambridge: Cambridge University Press

¹¹³ Gerber, D. J. (2008). *Two forms of Modernization in European Competition Law*. Fordham International Law Journal 31(5), 1247

involves a narrowing of the objectives of competition law; the new conception of competition law posits that economic efficiency and consumer welfare, as understood by neoclassical economics, are the guiding principles of EU competition policy.¹¹⁴ The second, which follows from the first, posits that formal economic methodology is the central organizing structure for applying competition law.¹¹⁵ Together, these two components are commonly referred to as the ‘more economic approach’.¹¹⁶

There is already a large body of literature discussing the objectives of EU competition law in general and the shift to a more economic approach in particular.¹¹⁷ While conflicting views pull in many different directions, broadly speaking, at one end of the spectrum are those that argue that interference from other policies that have thus far influenced competition law should be eliminated altogether.¹¹⁸ EU competition law, they say, should be allowed to become ‘as in the U.S.A., antitrust law pure and simple’.¹¹⁹ As regards media pluralism specifically, it is not clear, so the argument goes, why competition law ‘should suffer from such concerns, in particular at a time where the Commission seems to have reached a clear stance on the aims of competition policy’.¹²⁰ At the other end of the spectrum are those that maintain that competition law should be enforced by reference to media pluralism. Advocates of this latter view suggest that an obligation to conduct an assessment of the effects of the concentration on media pluralism be incorporated into the Merger Regulation.¹²¹ They recommend the establishment of a specialist body that would advise the Competition Directorate-General on the pluralism-specific issues to which the concentration in question would give rise.¹²²

¹¹⁴ See Lowe, P., *Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?* Speech given at the 13th International Conference on Competition and 14th European Competition Day, Munich, 27 March 2007

¹¹⁵ Gerber, D. J. (2007), *supra n.* 113

¹¹⁶ *Ibid.*

¹¹⁷ See, for instance, Akman, P. (2009). *Consumer Welfare and Article 102 EC: Practice and Rhetoric*. *World Competition* 32, 71-90; Akman, P. (2009). *Searching for the Long-Lost Soul of Article 82 EC*. *Oxford Journal of Legal Studies* 29 (2), 267-303; Andriychuk, O. (2010). *Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process*. *European Competition Journal* 6(3), 575-610; Drexler, J., Kerber, W. Podszun, R. (eds.) (2010). *Competition Policy and the Economic Approach – Foundations and Limitations*. Cheltenham: Edward Elgar; Lovdahl-Gormsen, L. (2007). *The Conflict Between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC*. *European Competition Journal* 3(2), 329-344; Odudu, O. (2010). *The Wider Concerns of Competition Law*, *Oxford Journal of Legal Studies* 30(3), 599-613, and Zimmer, D. (ed.) (2012). *The Goals of Competition Law*, Cheltenham: Edward Elgar

¹¹⁸ See, for instance, Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press, Section 1.3., and Bishop, S. and Mike Walker (2002). *The Economics of EC Competition Law* (2nd edition) 23-27. London: Sweet and Maxwell

¹¹⁹ Amato, G. (1997). *Antitrust and The Bounds of Power – The Dilemma of Liberal Democracy in the History of the Market*, 116. Oxford: Hart Publishing

¹²⁰ Ibáñez Colomo, P. (2006), *supra n.* 48, 26

¹²¹ See, for instance, Craufurd-Smith (2004). *Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship*, *European Law Review*, 29(5), 669; Ariño, M. (2005), *supra n.* 12, 405-410, and Komorek, E. (2013). *Media Pluralism and European Union*, 281-283. Alphen aan den Rijn: Kluwer Law International

¹²² *Ibid.*

These opposite views are arguably equally problematic. On the one hand, competition law cannot be solely concerned with efficiency and welfare considerations. From a teleological perspective, competition has never been referred to in the EU Treaties as an objective in its own right. To the contrary, competition was embedded in primary EU law right from the start as one of the key *instruments* towards the objective of European integration in general and the completion of the single market in particular.¹²³ That competition is a means to an end, rather than an end in itself, continues to hold true in the post-Lisbon era.¹²⁴ The Court of Justice has repeatedly favored this teleological interpretation, holding that Articles 101 and 102 TFEU should be implemented in light of the overall objectives of the Union.¹²⁵ A literal interpretation of the Treaties leads to the same conclusion. More particularly, the Treaty on the Functioning of the European Union includes several ‘cross-sectional’¹²⁶ provisions that establish that non-economic considerations relating to environmental¹²⁷ and consumer protection,¹²⁸ employment,¹²⁹ human health, education, adequate social protection, social exclusion, training,¹³⁰ development cooperation,¹³¹ welfare of animals,¹³² economic, social and territorial social cohesion¹³³ and, of particular relevance for this study, cultural

¹²³ Jones, A. and Brenda Sufirin (2014). *EU Competition Law - Texts, Cases and Materials* (5th edition), 35-40, Oxford: OUP

¹²⁴ It bears noting that neither the Treaty on European Union nor the Treaty on the Functioning of the European Union replicate Article 3(f) of the Treaty of Rome which established that one of the main activities through which the Community should fulfill the objectives laid down in Article 2 EEC consisted in ‘*the institution of a system ensuring that competition in the common market is not distorted*’. In the context of the amendments introduced by the Lisbon Treaty, the principle of undistorted competition was transferred to a Protocol (Protocol No. 27 on the Internal market and Competition [2008] OJ C 115/309 and Article 3 TEU now lays down in broad terms that one of the Union’s tasks is the establishment of an internal market. This does not mean that the Union attaches less importance to competition now than before; Article 51 TEU explicitly states that the Protocol forms ‘an integral part’ of the Treaties. The Court of Justice has also ruled that moving the principle of undistorted competition to a Protocol has no legal consequence (see Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527. However, the fact that the Protocol repeats almost verbatim Article 3(f) of the Treaty of Rome corroborates the view that competition continues to be a means to serve the internal market

¹²⁵ Van Rompuy, B. (2012). *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?*, 219. Alphen aan den Rijn: Kluwer Law International, referring to ECJ, Joined Cases 56 and 58/64, *Consten SA and Grundig-Verkaufs GmbH v. Commission of the European Economic Community* [1966] ECR 299, 340; ECJ, Case 32/65, *Italian Republic v. Council and Commission* [1966] ECR 234, 405; ECJ, Joined Cases 41 and 44/70, *NV International Fruit Company and others v. Commission* [1971] ECR 411, paragraphs 86-89; ECJ, Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, paragraphs 23-24; ECJ, Case 229/83, *Leclerc/Au blé vert* [1985] ECR 1, paragraph 8, and ECJ, Case 26/76, *Metro-SB Großmärkte GmbH & Co. KG v. Commission of the European Communities* [1977] ECR 1875, paragraph 20

¹²⁶ Monti, G. (2002), *supra n.* 105, 1069 noting that this term is used mostly by German scholars (see fn. 48)

¹²⁷ Article 11 TFEU: ‘Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development’

¹²⁸ Article 12 TFEU: ‘Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities’

¹²⁹ Article 147(2) TFEU: ‘The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities’

¹³⁰ Article 9 TFEU: ‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’; Article 168(1) TFEU: ‘A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’

¹³¹ Article 208(1) TFEU: ‘Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action’

¹³² Article 13 TFEU: ‘In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage’

¹³³ Article 175 TFEU: ‘The formulation and implementation of the Union’s policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement’

diversity,¹³⁴ must be ‘integrated’, ‘ensured’ or ‘taken into consideration’ in the definition of other Union policies and activities, including EU competition enforcement. Article 7 TFEU, introduced by the Lisbon Treaty, solidifies this need for coherence by establishing a general obligation of the EU to ‘ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’. As a matter of law, the extent to which these cross-sectional clauses impact the application of the EU competition rules is not clear.¹³⁵ It can be noted that the wording of some cross-sectional provisions is stronger than others.¹³⁶ For example, under Article 168(1) TFEU, in its action under other provisions of the Treaties, the Union is obliged to ‘ensure’ a ‘high level’ of human health whereas pursuant to Article 167(4) TFEU the Union is bound to ‘take cultural aspects into account’. The wording of the latter suggests a weaker level of integration than the one required by the former.¹³⁷ However, Article 167(4) TFEU, albeit loosely drafted, cannot be rendered devoid of any mandatory effect. In other words, the duty it enshrines cannot be disregarded altogether when applying the EU competition provisions of the Treaty; Article 167(4) TFEU and similar cross-sectional clauses require compromise.¹³⁸ The Court of Justice has traditionally supported this interpretation, corroborating the position that the EU competition policy cannot be implemented in a vacuum, that is to say, completely detached from other EU values.¹³⁹ On the other hand, rendering undistorted competition dependent on the protection of media pluralism is not appropriate either. Article 167 TFEU lacks both a strong wording to support the counter-argument *and* direct effect.¹⁴⁰ Competition rules, however, are directly applicable and in a higher position in the hierarchy of the priorities of the Union ‘in view of the generality of their reach, the strength of their wording, and their close link with essential objectives of the EU’.¹⁴¹ Even under the

¹³⁴ Article 167(4) TFEU: ‘The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures’

¹³⁵ Van Rompuy, B. (2012), *supra n.* 125, 220

¹³⁶ Ariño, M. (2005), *supra n.* 12, 141. For a detailed comparison of these clauses, including the different ways in which they were implemented, see Psychogiopoulou, E. (2008). *The Integration of Cultural Considerations in EU Law and Policies*, 61-84. Leiden: Martinus Nijhoff Publishers

¹³⁷ Van Rompuy, B. (2012), *supra n.* 125, 225

¹³⁸ *Ibid.* referring to Kingston, S. (2010). *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*. *European Law Journal*, 16(6), 789; Casey, D. (2009). *Disintegration: Environmental Protection and Article 81 EC*, *European Law Journal* 15(3), 367; Townley (2009), *supra n.* 104, 55, 62-63; Schweitzer, H. (2007). *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81*, 5. EUI Working Paper, No. 2007/32; Psychogiopoulou, E. (2006). *The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?* *European Law Journal*, 12(5), 585; Lafferty W. M. and Eivind Hovden (2003). *Environmental Policy Integration: Towards an Analytical Framework*. *Environmental Politics* 12(1), 16, and Sevenster, H.G. and Hans Vedder (2000). *Integreren or concurren?* *De rol van niet-mededingingsbelangen, in het bijzonder milieubescherming, in het kartelbeleid*, Tijdschrift voor Europees en Economisch Recht 2(1), 4-5. For a different view see, for instance, Komninos, A. P. (2005). *Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC*. The University of Oxford Centre for Competition Law and Policy Working Paper, No. 08/05, and Odudu, O. (2006). *The Boundaries of EC Competition Law: The Scope of Article 81*, 158-174. Oxford: OUP

¹³⁹ Townley, C. (2009), *supra n.* 104, 55-86. Note that the Commission has been severely criticized for supporting in its Guidelines on Article 101(3) TFEU an interpretation that seeks to marginalize non-competition policy considerations, which clearly goes against this case-law

¹⁴⁰ Van Rompuy, B. (2012), *supra n.* 125, 225

¹⁴¹ *Ibid.* referring to Cruz, J. B. (2002). *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, 63-66. Oxford: Hart Publishing

broadest reasonable interpretation, concerns over media pluralism cannot override competition considerations in cases of conflict. Hence, the proposal to build into the Merger Regulation a requirement to conduct a fully-fledged analysis of the effects of a transaction on media pluralism, with a view to prohibiting concentrations which are posing pluralism concerns but which are not likely to distort competition, seems to go beyond what EU law sanctions.

An interpretation that would seem sound in terms of law and policy is in between the two extremes outlined above, a position which many have already advocated.¹⁴² As regards the question of whether, and if so to what extent, the Commission should take into account non-economic considerations when deciding whether an anti-competitive agreement qualifies for an exemption under Article 101(3) TFEU, Monti, for example, maintains that ‘an agreement which contributes to a Community policy but is inefficient, or partitions the common market, should not be exempted [...] but an agreement which results in increased efficiency *and* which contributes to other Community goals is exempted because the combination of these two benefits outweighs the restriction of competition’.¹⁴³ Monti and other commentators¹⁴⁴ convincingly contend that under this interpretation neither unnecessary restrictions of competition are accepted nor are the cross-sectional clauses rendered devoid of any legal effect.¹⁴⁵ But, many, including those same commentators that argue in favor of a moderate approach,¹⁴⁶ have expressed skepticism about whether the above proposed interpretation applies to the cross-sectional clause on culture. More particularly, it has been asserted that the Commission’s task to take cultural aspects into account under Article 167(4) TFEU should be read as a *renvoi* to the laws of the Member States.¹⁴⁷ Due to the Union’s quasi non-existent competence to regulate culture, so the argument goes, the only plausible interpretation of Article 167(4) TFEU is ‘respect for the national legislator’s political discretion’.¹⁴⁸ While competence limitations cannot be overlooked,¹⁴⁹ this argument is not ultimately conclusive. Even if the stronger wording of other cross-sectional clauses allows for the non-economic goals they pursue to be weighed more heavily against undistorted competition, there is arguably some room for cultural, including media, policy considerations to be taken into account in the application of the EU

¹⁴² See, *supra* n. 138

¹⁴³ Monti, G. (2002), *supra* n. 105, 1070

¹⁴⁴ See, for instance, Wesseling, R. (2000). *The Modernization of Antitrust Law*. Oxford: Hart Publishing, and Van Rompuy, B. (2012), *supra* n. 125, 403

¹⁴⁵ Monti, G. (2002), *supra* n. 105, 1070-1

¹⁴⁶ *Ibid.*, 1084

¹⁴⁷ Schmid, C. U. *Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws, Reconstruction of the Dispute on Book Price Fixing*. *European Review of Private Law*, 8, 164

¹⁴⁸ *Ibid.*

¹⁴⁹ As already discussed in detail in Chapter 1, Article 167(5) TFEU explicitly excludes the adoption of a harmonizing instrument protecting media pluralism and Article 6 TFEU limits the Union’s relevant legislative competence to actions that solely support, supplement and coordinate the actions taken by the Member States

competition rules: in several instances, the Court has been asked to rule on the compatibility with the internal market of national measures that aimed at safeguarding media pluralism. In these cases, the Court refused to read media pluralism within one of the narrowly interpreted grounds for justification laid down in Article 52 TFEU.¹⁵⁰ It has, however, acknowledged that a media policy may constitute an overriding requirement relating to the general interest, thereby justifying restrictions on the freedom to provide services.¹⁵¹ In other words, in interpreting the provisions on free movement, the Court has attempted to strike a balance. It should also be noted that the Note from the Praesidium that drafted the Charter of Fundamental Rights of the EU explains that Article 11(2), which establishes the EU's negative duty to abstain from taking action that would undermine media pluralism, is to be interpreted in light of the aforementioned case law¹⁵² which, as already seen, implies that the conflict must be resolved by compromise. The question then arises as to whether we should adopt a different approach to the interpretation of restrictions on competition introduced by arrangements that could potentially enhance media pluralism. The Treaties would not seem to support this, for free movement and competition are equally important for the achievement of the internal market.

The main conclusion to draw from the above analysis is that a teleological and literal interpretation of the Treaties may support the argument that media pluralism concerns can justify restrictions of competition. However, it should be borne in mind that the extent to which pluralism concerns can affect the outcome of a competition decision is fairly limited. Article 167(4) TFEU has no direct effect and post-Lisbon the EU continues to have limited competence to regulate this area.¹⁵³ As a result, the legal basis for the resolution of any conflict by compromise, albeit existent, remains rather thin.

4. Media pluralism considerations as an integral part of competition assessments: Rethinking 'competition' and 'competence' in the media

It was seen above that in recent years the Commission has taken the stance that, in cases where preventing market foreclosure is not sufficient to remedy concerns over media pluralism, it lacks the

¹⁵⁰ See, for instance, ECJ, Case 352/85, *Bond van Adverteerders v. Netherlands*, [1988] ECR 2085, paragraphs 31 *et seq.* and ECJ, Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6757, paragraphs 7 *et seq.*

¹⁵¹ See, for instance, ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, [1991], ECR I-4007, paragraphs 23-29; ECJ, Case C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands* [1991] ECR I-4069, paragraphs 29-31, and ECJ, Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487, paragraphs 9-13

¹⁵² Praesidium of the Convention which drafted the Charter of Fundamental Rights of the EU (2000). *Text of the explanations relating to the complete text of the Charter as set out in Charte 4487/00 Convent 50*, 14. Retrieved from: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

¹⁵³ As already mentioned in Chapter 1, even if post-Lisbon the Charter of Fundamental Rights has been made legally binding on the EU institutions, Article 51(2) explicitly states that the Charter 'does not establish any new power' for the Union.

competence to examine these concerns further.¹⁵⁴ Competence limitations, however, were not the only reason put forward in justification of this approach. This is illustrated by *Newscorp/BSkyB* where the Commission stated that the scope and purpose of competition and pluralism assessments ‘are very different’,¹⁵⁵ clearly implying that a pluralism review would have led to findings different from those in its decision.¹⁵⁶ However, contrary to the Commission’s opinion, these two types of analyses are not irreconcilable. In this part I shall attempt to demonstrate a) that the objectives of and legal frameworks for competition and pluralism assessments may, but do not always, produce different outcomes, and b) that, if the EU competition rules are properly adapted to the particularities of media markets, competition assessments may deliver pluralism-friendly results.

4.1. Why can competition and media pluralism assessments lead to different outcomes?

The goals of and rules underpinning competition and media pluralism reviews may produce different, even opposing, outcomes. This is so for at least three reasons. First, concentration as prohibited by media regulation, and concentration as a competition concern, do not necessarily coincide as normative concepts.¹⁵⁷ The accumulation of significant market power is not a breach of EU competition law; Article 102 TFEU does not prevent an undertaking from acquiring and holding, on its own merits, a dominant position but only the abuse thereof.¹⁵⁸ Yet, from a pluralism perspective, centralization of market power, which is the presumed equivalent of opinion forming power, would be sufficient to trigger the application of media ownership restrictions.¹⁵⁹ Nevertheless, there are examples illustrating that in some cases concentration is not understood very differently under the two regimes. As already extensively discussed in Chapter 2, certain policymakers have recently abolished media-specific ownership rules. For example, in the Netherlands, media mergers are now examined under general competition law.¹⁶⁰ In cases where ownership rules still apply,¹⁶¹ the market share thresholds, above which it is inferred that media firms hold appreciable opinion forming power, do not always differ from market share thresholds that could suggest that the firms concerned

¹⁵⁴ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 306

¹⁵⁵ *Ibid.*, paragraph 307

¹⁵⁶ *Ibid.*, paragraph 309

¹⁵⁷ Ariño, M. (2005), *supra n. 12*, 384

¹⁵⁸ See, for instance, ECJ, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 24; ECJ, Case 322/81, *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, paragraph 57, and ECJ, Joined Cases C- 395/96 P and C- 396/96 P *Compagnie maritime belge transports and Others v Commission* [2000] ECR I- 1365, paragraph 37

¹⁵⁹ Ariño, M. (2005), *supra n. 12*, 385

¹⁶⁰ Commissariat voor de media (2011). *Media Monitor – The Dutch Media in 2010*, 6

¹⁶¹ And this is the case with the vast majority of Member States. However, in most cases, the rules require the media company concerned to control at least 25% of the market. For an overview of the restrictions that apply in each Member State see European Commission (2009). *Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-based Approach*. Annex III-Country Reports

have the ability and incentive to distort competition. For example, on the one hand, the Greek law on media concentration lays down that a media undertaking may not hold more than 35% of the market in which it operates.¹⁶² In Germany, this threshold is set at 30%.¹⁶³ On the other hand, in exercising merger control, which resembles media ownership control in that the decision to oppose a merger is based on the *likelihood* that the concentration under scrutiny will grant the merging parties the power to engage in undesirable practices, the Commission has occasionally found that market shares between 25% and 35%, that would be held by the involved undertakings post-merger, were an indication that the transaction could significantly impede effective competition.¹⁶⁴ These examples illustrate that, unless an undertaking becomes dominant as a result of internal growth, which for competition purposes would not in itself trigger an intervention against the undertaking concerned but which for pluralism purposes would be forbidden, there may be cases where action to address concentration under the two frameworks would not necessarily go in different directions.

Second, it has been contended that competition and pluralism assessments are likely to produce different outcomes for the reason that competition law protects competition whereas regulation in support of media pluralism protects competitors.¹⁶⁵ However, what or whom EU competition law protects is not entirely clear, for the case law and the Commission's decisional practice are ambiguous on this matter. More particularly, and especially in the past, the Commission seems to have used competition policy to safeguard competitors. This policy, which is also referred to as a policy of 'economic freedom',¹⁶⁶ supports the idea that individuals should be allowed to participate in the market unobstructed from the economic power held by other market participants.¹⁶⁷ The influence it has exercised on the Commission is exemplified by documents where explicit references to individual economic freedom as a goal of EU competition law is made,¹⁶⁸ as well as by policy and legislative action that was driven by the aim to protect competitors rather than rivalry as a value in

¹⁶² Law No. 3592/2007 of 19/07/2007 on Media Concentration and Licensing Procedures [2007] Official Gazette 161/3371, Article 3(3). It should be noted that this restriction applies to mono-media concentration

¹⁶³ This is expressed in terms of the audience share of all viewers. Interstate Broadcasting Treaty (2009), Article 26(2). Retrieved from: <http://www.uni-muenster.de/ITMCATR/wp-content/uploads/2009/05/Interstate-Treaty-on-Broadcasting.pdf>

¹⁶⁴ See, for instance, Commission decision 1999/674/EC *Rewel/Meinl*, Case IV/M.1221 [1999] OJ L 274/1, paragraphs 98-114; Commission decision *Nestlé/Ralston Purina*, Case COMP/M.2337 [2001] OJ C 239/7, paragraphs 44-47. The Block Exemption Regulation on the application of Article 101(3) TFEU to certain categories of vertical agreements. is based on a similar presumption. More particularly, the Regulation provides that the exemption from the rules on competition applies on condition that the market shares held by the parties to the agreement do not exceed 30% of the relevant market on which each party operates. See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1, Article 3(1)

¹⁶⁵ Ariño, M. (2005), *supra n. 12*, 385

¹⁶⁶ Jones, A. and Brenda Sufirin (2014), *supra n. 123*, 17

¹⁶⁷ *Ibid.*

¹⁶⁸ See, for instance, Commission (1986). *Annual Report on Competition Policy 1985*, 11: Effective competition 'preserves the freedom and right of initiative of the individual economic operators and it fosters the spirit of enterprise. [...] Competition policy should ensure that the abusive use of market power by a few does not undermine the rights of the many'

itself. For example, the Commission has exempted certain types of agreements from general prohibitions on restrictive practices with a view to offering SMEs the opportunity to compete with larger firms.¹⁶⁹ More recently, the EU institutions appear to advocate the position that a restriction of competition is not equivalent to a restriction of the parties' individual freedom. In addition to statements made by the Commission,¹⁷⁰ this is illustrated by the shift underpinning the refusal to supply case law: In the late 1980s and early 1990s, the Commission adopted a broad interpretation of the term 'abusive refusal to supply', whereby companies which held a dominant position and which refused to grant to their competitors access to a valuable input were deemed to act in violation of Article 102 TFEU.¹⁷¹ In recent times, however, as already seen above, stricter tests have been introduced that limited the scope of Article 102 TFEU in cases of refusal to deal.¹⁷² Yet, at least in the media domain, the issue remains unsettled; the imposition of remedies that seek to ensure access to premium content does not protect the process of competition but competing content providers, for otherwise the Commission would allow the company that made the highest bid to transmit the acquired content on an exclusive basis without requiring it to share the content with its rivals.¹⁷³

Finally, and arguably more fundamentally, competition and pluralism reviews may lead to different outcomes because the 'public interest' they seek to protect is not the same.¹⁷⁴ On the one hand, for the purposes of competition, the public interest is primarily understood as the 'satisfaction of consumer preferences'.¹⁷⁵ The audience member as consumer has traditionally been perceived as 'someone who measures quality in terms of quantity, maximum pleasure and price'.¹⁷⁶ Audiences as

¹⁶⁹ See, for instance, Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty [1979] OJ C 1/2, paragraph 1; Commission notice concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community [1997] OJ C 372/13, paragraph 19; Commission (EEC) Regulation No 67/67 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements [1967] OJ 57/849; Commission (EEC) Regulation No 2349/84 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements [1984] OJ L 219/15, corrected by [1985] OJ L 13/34

¹⁷⁰ See, for instance, European Commission (2013, April). *Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers: 'The Commission does not act to protect competitors as such, but to preserve the competitive process for the benefit of consumers. It acts only when there is harm to competition with negative effects on consumers, in particular in terms of reduced choice and less innovation'* [emphasis added]. Retrieved from: http://europa.eu/rapid/press-release_MEMO-13-383_en.htm

¹⁷¹ See, for instance, Commission decision *Sealink/B&I-Holyhead* [1992] 5 Common Market Law Review, 255

¹⁷² See, for instance, CFI, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923; ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791; ECJ, Joined cases T-374/1994, T-375/1994, T-384/1994 and T-388/1994, *European Night Services and others v. Commission of the European Communities* [1998] ECR II-3141. For more information on this paradigm shift and the conditions introduced by the more restrictive case law see, for instance, van den Bergh, R. and Peter Camesasca (2006). *European Competition Law and Economics – A Comparative Perspective*, 274-276. Antwerpen, Groningen, Oxford: Intersentia-Hart Publishing

¹⁷³ See, for instance, Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 171: These arrangements should 'enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain UEFA Champions League content'

¹⁷⁴ Ariño, M. (2005), *supra n.* 12, 384

¹⁷⁵ *Ibid.*

¹⁷⁶ Helberger, N. (2008). *From eyeball to creator – toying with audience empowerment in the Audiovisual Media Service Directive*, 5. University of Amsterdam, Institute for Information Law, Working Paper. Retrieved from: <http://www.ivir.nl/publicaties/download/239>, also published in Entertainment Law Review, 6, 128-137

consumers are solely concerned with serving their individual needs and preferences,¹⁷⁷ and hence tend to focus on a limited amount of content that reflects these needs and preferences.¹⁷⁸ Along this line, the consumer can get the content she wants at a low price through open and competitive markets¹⁷⁹ and effective competition enforcement. On the other hand, for the purposes of pluralism, the public interest is understood as the collective benefit that results from an informed and cohesive citizenry.¹⁸⁰ The audience member as citizen has an interest in having the media perform functions that are vital for a well-functioning democracy (e.g. provide accurate and unbiased information about matters of common concern, control the power holders,¹⁸¹ cover issues relating to ethnic minorities, etc.).¹⁸² This interest is protected through the effective exercise of freedom of expression,¹⁸³ which is enshrined in Article 10 ECHR, the Constitutions of the Member States, Article 11 CFREU, and media-specific regulation.¹⁸⁴

Yet, the nature of this distinction is not absolute, and not only because we are both consumers and citizens.¹⁸⁵ The EU competition rules have occasionally been interpreted and applied in order to serve a ‘public interest’ that went beyond the accommodation of ‘consumer interests’, as defined above. For example, in *CECED*, an agreement which bound the parties to refrain from producing washing machines that did not meet the energy efficiency standards they had agreed upon,¹⁸⁶ the Commission decided that the consumer benefit condition set by Article 101(3) TFEU was fulfilled on the grounds that:

‘the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. *Such environmental benefits for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*’ [emphasis added].¹⁸⁷

The 2006 Leniency Notice, which sets out the framework for rewarding cooperation by undertakings which are or have been party to cartels, states that ‘[t]he interests of consumers *and* citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those

¹⁷⁷ Hasebrink, U. (2011). *Giving the audience a voice: The role of research in making media regulation more responsive to the needs of the audience*. Journal of Information Policy, 1, 324

¹⁷⁸ Harrison, J. and Lorna Woods (2007). *European Broadcasting Law and Policy*, 9. Cambridge: Cambridge University Press

¹⁷⁹ Lefever, K. (2012), *supra n.* 43, 78

¹⁸⁰ Ariño, M. (2005), *supra n.* 12, 384

¹⁸¹ Nieminen, H. and Josef Trappel (2011). *Media serving democracy*, 141-143. In Trappel, J., Werner A. Meier, Leen D’Haenens, Jeanette Steemer and Barbara Thomass (eds.). *Media in Europe Today*. Bristol: Intellect

¹⁸² Hasebrink, U. (2011), *supra n.* 177, 324

¹⁸³ Lefever, K. (2012), *supra n.* 43, 79

¹⁸⁴ Related to this issue see also Karppinen, K. and Halvard Moe (2014). *What we talk about when we talk about ‘the market’: Conceptual contestation in contemporary media policy research*. Journal of Information Policy, 4, 327-341

¹⁸⁵ Harrison, J. and Lorna Woods (2007), *supra n.* 178, 8

¹⁸⁶ Commission decision 2000/475/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case IV.F.1/36.718, *CECED* [2000] OJ L 187/47, paragraph 30

¹⁸⁷ *Ibid.*, paragraph 56

undertakings that enable the Commission to detect and prohibit such practices’ [emphasis added].¹⁸⁸ In *Konkurrensverket v. TeliaSonera*, the Court ruled that the function of the competition rules is ‘to prevent competition from being distorted *to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union*’ [emphasis added].¹⁸⁹ By referring to these examples, I do not attempt to argue that the concept of consumer interest can be stretched to an extent that encompasses all that is of concern to the audience member as citizen. For example, the citizen may benefit from rules preventing journalists from holding a political mandate, but this is not a conflict of interest that can be addressed by EU competition law. However, in all the above cases, the Commission and the Court understand that competition law is in a public interest that embraces but is not confined to consumer satisfaction, that is to say, they endorse the idea that competition law may deliver a collective outcome that is not necessarily the sum of individual gains.

It is made clear from the above considerations that the purpose of, and legal frameworks for, competition and pluralism reviews may be at odds from the outset, but, depending on how EU competition law is interpreted, convergent outcomes cannot be excluded.

4.2. Can EU competition assessments deliver pluralism-friendly results?

The focus of competition assessments and the scope of pluralism reviews are different for the reason that an authority entrusted with deciding on the impact of a conduct or transaction on pluralism has the power to examine whether the firms or individuals under scrutiny may misrepresent facts, marginalize opposing viewpoints, and control the political agenda, in violation of the applicable media laws and principles. For example, in assessing the likely effects of the *Newscorp/BSkyB* deal on media pluralism, Ofcom examined, *inter alia*, whether Newscorp would interfere with Sky News’ editorial policies and whether existing regulatory safeguards, such as impartiality requirements on TV broadcast news, were sufficient to ensure no undue influence on Sky News’ independence.¹⁹⁰ The EU competition watchdog is not entitled to carry out these tasks. Does this, however, exclude a pluralism-friendly interpretation of the competition rules? The answer is no, especially if this interpretation allows the Commission to reach more accurate competition decisions. As will be seen in greater detail below, the Commission has ignored the possibilities of a pluralism-friendly competition analysis that is based on neither controversial and ineffective access remedies

¹⁸⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/11, paragraph 3

¹⁸⁹ ECJ, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 22

¹⁹⁰ Ofcom (2010), *supra n. 96*, pp. 70 *et seq.*

nor disproportionate restrictions of competition for the following two reasons. First, it seems to have adopted a narrow understanding of the concept of ‘competition’ in media markets. Second, in several instances, and more particularly in numerous State aid cases, the Commission appears to have unjustifiably narrowed its competence in areas where it clearly had the power to act. Each of the above two approaches has negative implications for media pluralism *and* competition.

4.2.1. The Commission’s narrow understanding of ‘competition’ in the media

In applying the EU competition rules to media markets, the Commission has disregarded altogether parameters of competition that drive demand for content. For example, the Commission has maintained that assessments of mergers affecting the media sector focus on checking ‘*whether there is [...] the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger*’ [emphasis added].¹⁹¹ Yet, competition is not only about prices, as a number of policy documents binding on the Commission rightly point out. For example, as already mentioned in Chapter 1, the (Horizontal and Non-Horizontal) Merger Guidelines lay down that the Commission’s mission consists in preventing mergers that would be likely to significantly increase the market power of firms, and explain that an increase in market power refers to ‘the ability of one or more undertakings to profitably increase prices, *reduce output, choice or quality of goods and services or diminish innovation*’ [emphasis added].¹⁹² This is repeated verbatim in several other documents in which the Commission provides guidance on how it applies EU competition law,¹⁹³ including the Guidelines on Vertical Restraints¹⁹⁴ and the Guidance on the Commission’s enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.¹⁹⁵

¹⁹¹ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 307

¹⁹² Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 8 and Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraph 10

¹⁹³ For example, the Guidelines on Horizontal Co-operation Agreements illustrate how various forms of co-operation agreements between actual or potential competitors can positively or adversely affect product quality or variety. *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ C 11/1. See, for instance, paragraphs 183, 185 and 190. The Notice on Market Definition provides instructions on how quality characteristics can inform the relevant market definition analysis. See Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, paragraph 22

¹⁹⁴ Commission Guidelines on Vertical Restraints [2010] OJ C 130/1. See, for instance, paragraph 91

¹⁹⁵ The Commission states in its Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (paragraph 11) [2009] OJ C 45/2 that it ‘considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant. *In this Communication, the expression ‘increase prices’ includes the power to maintain prices above the competitive level and is used as short-hand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers*’ [emphasis added]. Similarly, the *Guidelines on the Application of Article 101(3) TFEU* (paragraph 16) [2004] OJ C 101/08 lay down that ‘[a]greements between undertakings are caught by the prohibition rule of Article 101(1) when they are likely to have an appreciable *adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation*’ [emphasis added].

The non-price dimensions of competition seem to have played a major role in the Commission's decisional practice in several sectors on various occasions. For example, the Commission has occasionally been based on quality as a feature of product differentiation in order to delineate the boundaries of the relevant product market(s).¹⁹⁶ In *UPS/TNT*, the Commission distinguished express services from slower services on the grounds that customers that need to be sure that the items they ship will reach their destination within one day are not willing to switch to slower services as a result of a price increase.¹⁹⁷ Based on this distinction, the Commission found that the merging firms were close competitors and decided to block the notified transaction because it would have reduced the number of significant players in the market for express services to only 3 or 2.¹⁹⁸ In *Unilever/Sara Lee*, the Commission concluded that the merging parties' deodorant brands *Dove* and *Sanex* were substitutable because they shared the same skin-caring attributes.¹⁹⁹ This concentration was approved subject to, *inter alia*, the condition that Unilever would not enter the affected markets with the *Sanex* brand.²⁰⁰ In *Universal/EMI*, the Commission found that recorded music in physical format and recorded music in digital format belong to separate markets because they have different sound quality.²⁰¹ Having defined the relevant markets in this way, the Commission concluded that the transaction would grant the merged entity the ability to extract onerous licensing terms from digital retailers²⁰² and adopted a clearance decision after the entity undertook to divest a significant part of its digital repertoire.²⁰³ The Commission has also used quality standards as a parameter against which it assessed supply-side substitutability. For example, in *Amcors/Alcan*, the Commission found that, within the flexible packaging market, pharmaceutical flexible packaging should be regarded as a separate market for the reason that it is characterized by high hygiene requirements and highly risk-averse customers.²⁰⁴ The concentration was approved subject to the condition that Amcor would divest its main operation for pharmaceutical flexible packaging.²⁰⁵

Originality, variety and quality considerations have influenced decisions not only because they

¹⁹⁶ OECD (2013). *The Role and Measurement of Quality in Competition Analysis*, 79. Retrieved from: <http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>

¹⁹⁷ European Commission (2013, January). *Mergers: Commission blocks proposed acquisition of TNT Express by UPS*. Press Release IP 13/68. Retrieved from: http://europa.eu/rapid/press-release_IP-13-68_en.htm

¹⁹⁸ *Ibid.*

¹⁹⁹ Commission decision *Unilever/Sara Lee Body Care*, Case COMP/M.5658 [2012] OJ C 23/10, paragraphs 579 *et seq.*

²⁰⁰ *Ibid.*, paragraph 1388

²⁰¹ Commission decision *Universal Music Group/EMI Music*, Case No. COMP/M.6458 [2012] OJ C 220/8, paragraph 127

²⁰² *Ibid.*, paragraph 636

²⁰³ *Ibid.*, paragraphs 826 *et seq.* and 880 *et seq.*

²⁰⁴ Commission decision *Amcors/Alcan*, Case COMP/M. 5599 [2010] OJ C 35/1, at paragraphs 23 and 137 *et seq.* These characteristics were also indications that the barriers to entry into that market are particularly high (see paragraphs 101-104)

²⁰⁵ *Ibid.*, paragraphs 128 *et seq.*

led to narrower market definitions, but also because they were taken into account in the assessment of the effects of a merger transaction or unilateral conduct on competition. For example, in *Intel/McAfee*, one of the main concerns was the possible foreclosure of competing providers of anti-virus software by Intel degrading interoperability of its hardware with other security solutions than the acquired McAfee products.²⁰⁶ The Commission found that lack of interoperability would negatively impact the affected markets, ‘in particular with regard to innovation and choice’.²⁰⁷ The same conclusion was reached in *Microsoft* concerning the impact of tying Windows Media Player and Windows PCs on the delivery of content over the Internet and on multimedia software.²⁰⁸ Similarly, in *Intel*, the Commission concluded that, absent the exclusionary pricing practices in which Intel had engaged, customers would have had ‘a wider quality choice’.²⁰⁹

However, the non-price dimensions of competition seem to have played little or no role in the Commission’s decisional practice in the media sector. For our purposes, relevant decisions can be divided into two categories. First, there have been decisions where the Commission shows a clear preference for price competition. For example, in assessing mergers affecting free-to-air TV (i.e. advertising-financed television) markets, the Commission has repeatedly taken the stance that, even though the audiences’ preferences are ‘an important indicator of the attractiveness and acceptance of the broadcasting channels’,²¹⁰ the exercise of market definition should consist in identifying the effective alternative sources of supply for the advertisers on the grounds that the viewers do not pay for the content broadcast.²¹¹ As a result, merger decisions in the broadcasting sector have been limited to discussing the effects of the concentration under scrutiny on advertising prices.²¹² Similar remarks can be made with respect to decisions in the book publishing sector. Parties to fixed book pricing agreements, which establish that booksellers shall sell books at the price that is set by the

²⁰⁶ Commission decision *Intel/McAfee*, Case COMP/M. 5984 [2011] OJ C 98/1, at paragraphs 154 *et seq.*

²⁰⁷ *Ibid.*, paragraph 172. Note that in this case the Commission imposed upon Intel a wide range of commitments to ensure that no technical tying of Intel hardware and McAfee security solutions would occur (see paragraphs 301 *et seq.* and 341 *et seq.*)

²⁰⁸ Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final, paragraphs 782 and 1067

²⁰⁹ Commission decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel), D (2009) 3726 final, paragraph 1603

²¹⁰ See, for instance, Commission decision *RTL/Veronica/Endemol (HMG)*, Case IV/M.553 [1996] OJ L 124/32, paragraph 20

²¹¹ Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, paragraph 13. See, for instance, Commission decisions *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73 paragraph 24; *NewsCorp/BSkyB*, Case COMP/M. 5932 [2011] OJ C37/2 paragraph 97; *SFR/Télé 2*, Case COMP/M.4504, [2007] OJ L 316/57, paragraph 45; *Newscorp/Premiere*, Case COMP/M.5121, [2008] OJ C 219/4, paragraph 19; *Telenor/Canal+/Canal Digital*, Case COMP/C.2/38.287, [2003] OJ C 149/10 paragraph 28; Commission Decision *BSkyB/Kirch Pay-TV*, Case COMP/JV.37, [2000] OJ C 110/45, paragraph 24; Commission Decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993, [1999] OJ L 053/1, paragraph 18, and *Kirch/Richemont/Multichoice/Telepiù*, Case IV/M.584, [1995] OJ C 129/6, paragraph 15

²¹² Note that lack of willingness to accept arguments that a transaction may produce negative non-price effects is also evidenced in cases in the online search sector. See Commission decision *Microsoft/Yahoo!*, Case COMP/M.5727 [2010] D/2118, paragraphs 214-226: while the Commission discussed in more detail non-price effects, and in particular whether the merged entity could lower the quality of organic search by degrading the relevance of search results or reduce the variety of search results post-merger, it cleared the transaction on the basis that these concerns were not likely to materialize

publisher that produced them, occasionally put forward the argument that the agreement under consideration qualified for an exemption under Article 101(3) TFEU *inter alia* because it enabled publishers to cross-subsidize less popular titles through the profits they made on fast-selling books.²¹³ As a result, the parties claimed, the agreement led to a wider range of books made available on the market, thereby allowing consumers to receive a fair share of the benefits resulting from the agreement.²¹⁴ The Commission rejected this argument on the basis that, even if a variety of titles is to be regarded as benefiting the consumers, the price of the product is the key element in their decision to purchase a book.²¹⁵

Second, there have been decisions where the Commission has made incidental references to quality, variety or originality as features of product differentiation, but these features have not influenced the outcome of the decisions concerned. For example, in merger decisions in the newspaper sector, the Commission has repeatedly noted that the market for national daily newspapers might be divided into smaller markets according to the editorial line of newspapers or the quality of the publications (e.g. quality press as opposed to tabloids).²¹⁶ Nevertheless, in these cases, the Commission meticulously avoided delineating the boundaries of the markets affected by the transaction,²¹⁷ whereas, to my knowledge, in none of these decisions was quality degradation or reduction in ‘editorial’ competition post-merger taken into account. Likewise, non-price dimensions of competition in news provision relating to consumption habits that have emerged over the past few years, including the use of digital devices or news applications, have occasionally been mentioned but they had no impact whatsoever on the final decision.²¹⁸

Placing an excessive focus on prices or, even worse, ignoring the non-price dimensions of competition in the media altogether translates into a decision that fails to adapt ‘to the particular facts and circumstances of each case’.²¹⁹ In a case in the media sector, these particular facts and

²¹³ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraph 50

²¹⁴ *Ibid.*, paragraph 54

²¹⁵ *Ibid.*, paragraph 55

²¹⁶ Commission decision *Gruner + Jahr/Financial Times/JV*, Case No. IV/ M. 1455, paragraph 17 [1999] OJ C 80/5. The text of the decision is available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1455_en.pdf; Commission decision *Wegener/PCM/JV*, Case No. COMP/M. 3817 [2005] C 191/3, paragraph 10; Commission decision *Newspaper Publishing*, Case No. IV/M. 423, paragraph 18 [1994] OJ C 85/5, and Commission decision *Recoletos/Unedisa*, Case No. IV/M. 1401 [1999] OJ C 73/6, paragraph 18

²¹⁷ Commission decision *Recoletos/Unedisa*, Case No. IV/M. 1401 [1999] OJ C 73/6, paragraph 28; Commission decision *Newspaper Publishing*, Case No. IV/M. 423, paragraph 18 [1994] OJ C 85/5, paragraphs 13-16; Commission decision *Wegener/PCM/JV*, Case No. COMP/M. 3817 [2005] C 191/3, paragraph 20, and Commission decision *Gruner + Jahr/Financial Times/JV*, Case No. IV/ M. 1455, paragraph 17 [1999] OJ C 80/5, paragraph 20

²¹⁸ See, for instance, Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraphs 207-216

²¹⁹ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 5

circumstances are at least the following: An abundance of undertakings operating in today's information economy such as free-to-air broadcasters, online search engines and news aggregators which offer content for free. Furthermore, content consumers are not 'strongly homogeneous', i.e. they have neither the same single interest nor the same array of interests and identical preferences through that array.²²⁰ Even in cases where the provider charges for the content it distributes, consumer interests are more relevant than price. For example, if a pay-per-view subscriber wants to be entertained but does not like football, it is highly unlikely that she will purchase access to a football match because the match is cheaper than a movie. Finally, there are media markets, most notably in the publishing sector, where demand is highly price inelastic.²²¹ As the Commission has occasionally noted, 'out of the factors motivating readers to purchase a particular newspaper, *price is not the first factor*, and only one out of several important factors influencing purchasing decisions and determining customer loyalty. *The perceived political stance of a newspaper, family heritage, social-economic factors and the type of content are more important factors*' [emphasis added].²²² The above characteristics provide sufficient proof that, from a viewer/end-user/reader perspective, price is not the main demand-driver. As a result, a competition analysis that is mainly or solely concerned with prices disregards key elements that determine substitutability, ultimately jeopardizing the accuracy of the decision.

A similar conclusion can be reached with respect to the other drawback I identified above, that is, the Commission's insistence on adopting decisions that are based on inconclusive market definitions or remain stuck to consumption patterns that do not reflect the current state of play in media supply and usage. A good example is *Newscorp/BSkyB*, already discussed above in various contexts. In this case, the Commission noted that one of the broad markets affected by the transaction was newspaper publishing²²³ (where Newscorp was particularly active) without, however, discussing whether consumers regard news delivered by print publications as substitutable with news delivered by other content providers. Instead, the Commission preferred to refer to the conclusions of market definitions that had determined merger decisions it adopted throughout the 1990s.²²⁴ News consumption, however, has undergone significant change since then. For example, newspapers and broadcasters, including Sky, have moved online, competing for the same audiences and

²²⁰ OECD (2003). *Policy Roundtable on Media Mergers*, 43

²²¹ See, for instance, Joint Research Center (2012). *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry*, 24. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC69881.pdf>

²²² Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 231

²²³ *Ibid.*, paragraph 28

²²⁴ *Ibid.*, paragraph 214

advertisers.²²⁵ Moreover, the question of whether, and if so to what extent, the provision of news content online exerted competitive constraints on print newspapers was left open on the grounds that the transaction would not raise any competitive concerns under any of the alternative product market definitions considered.²²⁶ This, however, is highly questionable for at least two reasons. First, the data on which the Commission based this conclusion could support the opposite. More particularly, according to the Commission's findings, even under the broadest possible definition, which would include print newspapers and online news websites, the entity would hold between 35% and 55% of the UK market post-merger.²²⁷ The Commission's Merger Guidelines lay down that these market shares could be an indication that the concentration may impede effective competition.²²⁸ Second, measurements of the impact of the merger on the UK news market, which took account of the audience share and reach of the involved undertakings within individual platforms (e.g. papers, TV, radio, online) *and* cross-platform usage,²²⁹ led Ofcom to conclude that the merged entity would hold a strong position with respect to the consumption of news content across all media.²³⁰ Attached to arguably outdated market definitions and having abstained from delving into current news substitutability-related issues, the Commission ignored altogether any horizontal effects the merger was likely to create.

Narrow-minded or incomplete assessments of the parameters that determine demand and supply in media markets have a negative impact on both competition and pluralism. As regards supply-side considerations, from a competition perspective, it can be clearly inferred from the above analysis that the approach the Commission has followed thus far inherently entails the risk that the adopted decisions are based on erroneous findings that range from flawed market definitions to underestimating the market power of the undertakings under scrutiny. This has been exemplified by the factors that should play a role in the definition of the news markets affected by *NewsCorp/BSkyB*

²²⁵ For a comprehensive overview of the changes that the market for news provision has undergone over the past years see, for instance, Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*

²²⁶ *Ibid.*, paragraph 216. The alternative product market definitions considered were the following: The market for news content as a broad market, which could be further divided into a market for print newspapers and a market for online news services; a market for print newspapers v. a market for paid-for online news services; a market for news delivery through new digital devices v. print v. online newspapers

²²⁷ *Ibid.*, see Tables 2 and 4

²²⁸ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 17. Note that, with respect to the other markets possibly affected by the transaction, no clear data were provided. For example, the Commission does not distinguish between paid-for online news services and free news services. See Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, Table 5

²²⁹ Ofcom (2010), *supra n.* 96, paragraph 5.17

²³⁰ *Ibid.*, paragraph 5.32. It should be noted that Ofcom's analysis discussed the pluralism issues the transaction raised. However, it was heavily based on methodologies employed in competition law (e.g. degree of substitutability between different platforms, media, and providers). Moreover, the metrics on which Ofcom based its analysis, including audience share and reach, are measures that can (and arguably should) be used in competition cases involving free content markets, e.g. free-to-air television. These issues will be examined in more detail in Chapter 3

against those factors on which the Commission based its decision. The same decision offers another similar example that illustrates the implications for pluralism. In this case, the Commission divided the upstream broadcasting market for the acquisition of content into the market for sports events, the market for premium films, and the market for *other TV* content, without, however, specifying what it meant by ‘other TV content’.²³¹ This term may include different types of content such as news, documentaries and TV series, which, from the viewers’ perspective, serve different purposes and could therefore imply the existence of narrower market segments.²³² If the Commission had conducted the market definition exercise properly, and if the analysis had concluded that the market for the acquisition of news content was a separate market, it would have been able to examine concerns over distortions of competition in the affected news markets. It is not excluded that under a more meticulous approach the Commission could have found that the merger could afford the parties a greater ability to bid for and win wholesale news deals.²³³ The acquisition of significant market power to consistently outbid competitors in upstream markets is a valid competition concern and has influenced the outcome of merger decisions in several instances.²³⁴ The finding that the merging firms could foreclose upstream news markets could lead to the imposition of remedies, such as the divestment of news assets,²³⁵ to ensure that competition for news content is not eliminated. This would clearly have positive spillover effects on media pluralism, for the sale of these assets to a provider that is structurally independent from the merged entity would reduce the parties’ opinion forming power.

As regards the demand side, from a competition perspective, the Commission’s decisional practice arguably falls short of serving the audience member as consumer for the reason that it equates consumer welfare with consumer surplus. Consumer welfare, defined as ‘the individual

²³¹ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 30

²³² This is a possibility the Commission considered but did not discuss in detail in other cases. See, for instance, Commission decision *TPS*, Case No COMP/JV.57, [2002] OJ C 137/23, paragraph 16 where it considered whether the market for pay-TV channels should be further segmented by thematic content (such as premium, sports, movies, news, youth channels, etc.). For a U.S. perspective of how markets have been (or should be) defined on the basis of genre/type see, for instance, Nesvold, P. (1996). *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*. Fordham Intellectual Property, Media and Entertainment Law Journal 6(2), 781-869

²³³ This was an issue that Ofcom considered in the assessment of the same transaction. See Ofcom (2010), *supra n.* 96, 14

²³⁴ For examples in the media sector see Chapter 3, Part 3.a.

²³⁵ *Ibid.*, 90. This was a solution that was proposed by stakeholders that responded to Ofcom’s consultation regarding the NewsCorp/BSkyB deal. Structural remedies are fairly common in EU merger practice. For recent merger decisions where structural remedies were imposed see, for instance, European Commission (2014, July). *Mergers: Commission clears acquisition of E-Plus by Telefónica Deutschland, subject to conditions*. Press Release IP 14/771. Retrieved from: http://europa.eu/rapid/press-release_IP-14-771_en.htm, and European Commission (2014, May). *Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions*. Press Release IP 14/607. Retrieved from: http://europa.eu/rapid/press-release_IP-14-607_en.htm On the issue of structural remedies in EU merger control see, for instance, Wand, W. (2011). *Structural Remedies in EU Antitrust and Merger Control*. World Competition 34(4), 571-596, and Papandropoulos, P. and Alessandro Tajana (2006). *The Merger Remedies Study—In Divestiture We Trust?* European Competition Law Review 27(8), 443-454

benefit derived from the consumption of goods and services',²³⁶ is a normative concept broader than consumer surplus, which represents the difference between the buyers' reservation price (the maximum price a consumer is willing to pay for a product) and the market price.²³⁷ Irrespective of whether consumer welfare is the ultimate objective that EU competition enforcement pursues or one of the results it is intended to deliver,²³⁸ it was demonstrated above that consumer surplus is one, and perhaps not the most relevant benchmark against which to measure consumer satisfaction. Moreover, as already mentioned above, in cases of markets offering content for free (online search, free-to-air TV, online news...), the Commission focuses on the anti-competitive effects that may arise in the advertising markets concerned on the grounds that the viewers/users do not pay for the content they receive. This inevitably leads to an assessment that ignores the impact on the non-price dimensions of competition. If one accepts that demand-side considerations relating to content quality and variety are features of product differentiation that determine competition in the media, then non-price effects should also be measured for the purposes of a competition analysis. This is far from unordinary; the above overview of Commission decisions involving a wide range of products, from deodorants to software to postal services, clearly shows that the EU competition rules are sufficiently flexible to allow for an interpretation that seeks to protect non-price competition. It is submitted that, were the Commission willing to take these factors into account as it did in cases in other sectors, and to be guided by a definition of consumer welfare that takes account of the specificities of demand in media markets, the outcome of competition decisions would not only be more accurate, but also more friendly to pluralism. This is because the analysis would manage to grasp certain quantitative and qualitative dimensions of diversity, as defined in Chapter 2. The potential of EU competition law for a pluralism-friendly interpretation that is based on sound economic principles is illustrated by an old decision,²³⁹ *United International Pictures (UIP)*, which concerned the creation of a joint venture, UIP, by three Hollywood studios. The object of UIP would be the distribution and licensing on an exclusive basis of feature motion pictures produced by the involved studios.²⁴⁰ Based on the finding

²³⁶ OECD (1993). *Glossary of Industrial Organization Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the OECD Directorate for Financial, Fiscal and Enterprise Affairs. Retrieved from: <http://stats.oecd.org/glossary/detail.asp?ID=3177>

²³⁷ Jones, A. and Brenda Sufrin (2014), *supra n.* 123, 4-5

²³⁸ See, for instance, CFI, Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-1601, paragraph 115; CFI, Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission* [2006] ECR II-2969, paragraph 118, and compare against ECJ, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v. Commission* [2009] ECR I-9291, paragraphs 59-60; CFI, Case T-461/07, *Visa Europe and Visa International Service v. Commission*, paragraph 126 ECR II-1729, and ECJ, Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 22. The last three cases suggest that the ultimate objective of EU competition law is the protection of competition, not consumer welfare

²³⁹ A more recent example is Commission decision *Lagardère/Natexis/VUP*, Case No COMP/M.2978 [2004] OJ L125/54 where the Commission discussed the effects of vertical integration on the diversity of books produced and distributed by the merged entity. For an overview of this case see Psychogiopoulou, E. (2008), *supra n.* 136, 277-279

²⁴⁰ Commission decision, *United International Pictures (UIP)* [1989] OJ L 226/25, paragraph 7

that UIP's parent companies accounted for almost a quarter of the gross-box office receipts from feature films and because the parties were among the largest film distributors within the EU,²⁴¹ the Commission feared that the agreement could foreclose the market to competing content. The Commission exempted the agreement subject to conditions that aimed at preventing the above from happening. For example, UIP and the parent companies agreed to make themselves available to produce, finance, acquire distribution rights to, and distribute feature films of third parties in the EU.²⁴² To allow the Commission to check compliance with related obligations, the parties committed to maintain records that showed the titles of local products of third parties produced, financed or distributed by UIP, and the identity of local product for which a formal written offer was made by third parties to UIP for production, financing or distribution.²⁴³ Remedies intended to ensure that competition for content is not eliminated may rest upon an entirely economic foundation. It was discussed in detail that vertically integrated media undertakings like UIP may decrease diversity either by granting to their own products preferential treatment (in order to eliminate competition) or by distributing popular content in as many markets and across as many platforms as possible (in order to maximize profit). These remedies, however, also embrace pluralism, for they allow content produced by suppliers independent from the parties to the agreement to find its way to the audiences. Given the positive implications for non-price competition and pluralism, it is unfortunate that this approach has been abandoned in recent cases.

4.2.2. A narrow perception of 'competence' in the media

As previously noted, the second approach to the application of EU competition law in media markets which has led to outcomes that are undesirable from a competition and a pluralism perspective is the Commission's narrow perception of *competence* to address non-price concerns. For the avoidance of confusion, *Newscorp/BSkyB* and *Google/DoubleClick* do not epitomize the approach discussed here. This is because, as I concluded in the part discussing how the Commission may address conflicts between competition considerations and non-economic considerations, the latter may not supersede the former. In other words, the Commission would not be entitled to ban the aforementioned mergers on public interest grounds. Examples that illustrate the Commission's narrow perception of competence are State aid decisions in the media, and in particular the broadcasting sector, because in these cases pluralism considerations can justify restrictions of competition *without* depending on the efficiencies that the aid measure is likely to generate. More

²⁴¹ Ibid., paragraph 43

²⁴² Ibid., paragraph 27

²⁴³ Ibid., paragraph 32

particularly, State aid is generally prohibited by EU law,²⁴⁴ but aid measures in support of public broadcasting services, which have traditionally been regarded as Services of General Economic Interest,²⁴⁵ that is, services that deliver outcomes for the overall public good,²⁴⁶ may qualify for an exemption from the rules on competition because the Treaty has made express provision.²⁴⁷ In our case, this means that the Member States which entrust media organizations with providing quality and varied programming in order to safeguard media pluralism²⁴⁸ and which, for the performance of this mission, grants aid to these organizations, are entitled to request for a derogation from the general State aid prohibition. State aid is not assessed against the effects on competition only, but also against a social welfare standard,²⁴⁹ which, in addition to economic considerations, takes into account the equity objectives which the measure pursues.²⁵⁰ In the case of public service media, those equity objectives consist in, e.g., offering the society, including disadvantaged groups such as low-income citizens that may not afford to pay TV subscriptions, access to information, providing content that addresses the needs of cultural and linguistic minorities, etc.²⁵¹ The Member States are free to define and organize the public service remit in a way that best reflects the needs of the society which the measure is meant to serve²⁵² and the Commission's State aid control is limited to ensuring that the measure does not allow the beneficiary of the aid to misuse the public funds in order to distort competition.²⁵³

²⁴⁴ Treaty on the Functioning of the European Union [2012] OJ C 326/1, Article 107(1), which reads as follows: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'

²⁴⁵ The State aid practice the Commission has developed in the broadcasting sector will be examined in detail in Chapter 7

²⁴⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 3. Retrieved from: http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf

²⁴⁷ Treaty on the Functioning of the European Union [2012] OJ C 326/1, Article 106(2) TFEU and Protocol No. 29 (the Amsterdam Protocol on Public Service Broadcasting). The Protocol reads as follows: 'The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'

²⁴⁸ For an overview of public service obligations PSBs are required to discharge see, for instance, Katsirea, I. (2008). *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States*. Alphen aan den Rijn: Kluwer Law International

²⁴⁹ The Commission explains that '[s]ocial welfare takes into account not only the sum of consumers' and producers' surpluses, but also how welfare is distributed across countries and citizens. Social welfare thus integrates efficiency elements (i.e. by looking at how much wealth is created by affecting consumers' and/or producers' surpluses) as well as equity elements (i.e. by looking at how this wealth is divided between Member States and citizens). A social welfare standard takes into account all the effects that may be generated by the aid'. See European Commission (not dated), *Common Principles for an Economic Assessment of the Compatibility of State Aid Under Article 87(3)*. Retrieved from: http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf

²⁵⁰ Economic Advisory Group for Competition Policy (2006). *Services of General Economic Interest*. Retrieved from: http://ec.europa.eu/competition/state_aid/legislation/sgei.pdf

²⁵¹ These objectives are determined by each Member State individually. For more information regarding how a selected set of Member States defined the equity objectives public broadcasters are required to attain see *supra* n. 248

²⁵² See Protocol No. 29 (the Amsterdam Protocol on Public Service Broadcasting), *supra* n. 247

²⁵³ For an overview of how the Commission believes State aid rules apply to public service media see Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1

As a result of the above, in assessing whether aids in support of public service broadcasting are compatible with the common market, the Commission may neither determine the nature of the services at which the aids are directed nor base its decisions on purely economic considerations. Yet, even within these strict competence limits, the Commission has not used all the means it has at its disposal to ensure that the public broadcaster will indeed meet the diversity or quality standards that justify the exemption from the general State aid prohibition. For example, it is established case law that, while the Commission may not evaluate whether the public broadcaster respects any code for the treatment of controversial subjects with due accuracy and impartiality²⁵⁴ or decide whether the service provided by the broadcaster is ‘value for money’,²⁵⁵ it may control whether there exists a body independent from the public provider that checks compliance with the public service mandate.²⁵⁶ Nevertheless, on several occasions, despite obvious conflicts of interest, the Commission hesitated to declare incompatible with the common market measures that allow the managing bodies of the public broadcaster to examine delivery of the public service mission and/or to deal with the complaints of commercial competitors that these obligations have not been met.²⁵⁷

In cases where the Commission fails to address the loopholes left open by an aid measure, concerns over both competition and pluralism are raised. From a competition perspective, if the management is not structurally independent from the supervisory body, the public broadcaster has both the ability and incentive to engage in anti-competitive practices, which may range from undercutting prices in the advertising markets to emptying the market for the acquisition of premium content²⁵⁸ to cross-subsidizing commercial activities that do not fulfill a public service mission, to the detriment of private competitors. Similarly, in cases where the bodies deciding on the complaints filed by competitors are not independent from the public broadcaster, there are no adequate guarantees that the redress system will lead to the imposition of appropriate remedies in cases of failure to comply, thereby running the risk of being unfair vis-à-vis commercial undertakings.²⁵⁹ From a pluralism perspective, in the absence of a supervisor that is at arm’s length from the provider,

²⁵⁴ ECJ, Case T-442/03, *SIC v. Commission* [2008] ECR II-1161, paragraph 213

²⁵⁵ See CFI, Joined Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)*, [2010] ECR II-3397, paragraph 141. See also CFI, Case T-275/11 *Télévision française 1 (TF1) v. European Commission* (not yet reported), paragraphs 130, 133-4 and 138

²⁵⁶ This stems from *ibid.*, paragraph 233. See also paragraphs 225 *et seq.* See also Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 54

²⁵⁷ See, for instance, Commission decision N631/2001, *BBC License Fee*, N631/2001 [2003] OJ C23/3, paragraphs 2 and 4 and BBC Charter (1997), Article 8(3), and Commission decision E3/2005, *Financing of public service broadcasters in Germany* [2007] C185/1, paragraphs 255-6, 24 and 372. For more information see Chapter 7, Part 4

²⁵⁸ This has been a major issue in several Member States. See, for example, Commission decision E 8/2006, *Public financing of public service broadcaster VRT*, [2008] OJ C 143/3, paragraph 57, and Commission decision E2/2008, *Financing of the Austrian public service broadcaster ORF* [2009] OJ C309/1, paragraph 3

²⁵⁹ This remains an issue in, among others, the UK and Germany, see *supra n.* 257

there is a strong likelihood that pluralism-related public service obligations will not be respected. For example, the period 2005-2006, the Austrian and Irish public broadcasters failed to comply with content diversity quotas.²⁶⁰ In that period those controlling compliance with the diversity quotas were internal bodies of the broadcasters.²⁶¹

The main conclusion to draw from the above analysis is that EU competition law has the potential to protect the readers/viewers/users in a way which goes beyond existing predispositions *and* which respects the boundaries of EU competence.

5. Conclusions

This Chapter sought to assess whether EU competition law, as interpreted and applied by the Commission, has contributed to the protection of media pluralism. It was seen that the Commission has adopted two different approaches to this issue. Under the first, media pluralism has been regarded as an almost spontaneous result delivered by unhindered market access. Under the second, pluralism has been treated as a value the protection of which would require restrictions of competition that, due to competence limitations, the Commission believes is not entitled to allow. The Chapter extensively discussed the practice the Commission has developed under both approaches and, having identified several shortcomings that involve the implementation of ineffective access policies and an inconsistent (and, to some extent, unjustifiably restrictive) interpretation of the Treaties, concluded that the Commission's interventions have not been particularly beneficial to pluralism.

The analysis, however, was not limited to the discussion of the Commission's existing predisposition towards the relationship between competition and pluralism; a third approach whereby pluralism-related considerations form an integral part of a competition assessment was also identified. By studying the factors that influenced the Commission's decisions on several occasions, I attempted to demonstrate that the Commission's understanding of how competition law applies to the media markets has certain *lacunae* that may first and foremost imperil the accuracy of competition

²⁶⁰ See Biggam, R. (2009). *Public Broadcasting and State Aid in the New Media Environment – Is There A Need to Update the European Commission Broadcasting Communication, and Do 'Public Value Tests' Resolve Long-Running Competition Issues?*, 172. In Pauwels, C., Harri Kalimo, Karen Donders and Ben Van Rompuy (eds.). *Rethinking European Media and Communications Policy*. Brussels: VUB Press, and Commission Staff Working Document (2008). *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Eighth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC 'Television without Frontiers', as amended by Directive 97/36/EC, for the period 2005- 2006*, see pp. 127 and 86, SEC(2008) 2310, available at: [http://aei.pitt.edu/42776/1/SEC_\(2008\)_2310.pdf](http://aei.pitt.edu/42776/1/SEC_(2008)_2310.pdf)

²⁶¹ These issues will be discussed in more detail in Chapter 7, Part 4

decisions. I maintained that, were the Commission willing to fill these *lacunae* by developing a framework which grasps the particularities of media markets and which makes full use of the toolbox it has at its disposal, the decisions would also deliver a more pluralism-friendly outcome. The Chapters that follow are devoted to identifying the drawbacks of the Commission's decisional practice in the media and to exploring the potential of this third approach to the role of competition enforcement in safeguarding pluralism.

Chapter 4 – EU merger control in the broadcasting sector

1. Introduction

One of the first steps in answering the question of how EU competition law can be applied so as to take account of media pluralism was to demonstrate that digital technologies have not remedied concerns relating to concentration of ownership across the European Union. This, I said, is largely due to the central position that horizontally and/or vertically integrated traditional media organizations occupy within the European media market. More particularly, traditional media still play a major role in content consumption. For example, television is the most popular medium in the EU and radio the second most popular.¹ In addition, consumers are attached to traditional providers. Empirical research on demand-side concentration in the news market has shown that citizens are still inclined to consume content distributed by ‘old’ media outlets whilst refraining from looking for alternative online content to complement their traditional media experience.² Finally, the fact that the same content can be easily distributed in the new media ecosystem makes it fairly easy for traditional media firms to expand into and dominate emerging markets.

Having argued in the previous Chapter that EU competition law is flexible enough to prevent concentration-related risks for pluralism, this Chapter will examine the role that EU merger control can play in ensuring that significant power does not end up in the hands of a few entities ‘controlling’ broadcasting markets. In the case at hand, ‘control’ is understood as control of the acquired entity and, by extension, of an asset that shapes market structures such as premium content and distribution platforms.

The Chapter focuses on mergers in the broadcasting industry because, as I have already explained in Chapter 1, the decisional practice the Commission has developed under each of the four pillars of competition law will be examined by reference to a specific sector in order to reflect a business strategy, practice, pricing model, or revenue mechanism that has been a major (competition and media) policy matter in the sector concerned. In broadcasting, mergers and acquisitions have had a broad appeal due to the significant economies of scale and scope that broadcasters can achieve by integrating with other firms that operate at the same or at different levels of the supply chain.

¹ European Commission (2012). *Media use in the European Union 2011*, 5. Retrieved from: http://ec.europa.eu/public_opinion/archives/eb/eb76/eb76_media_en.pdf

² See, for instance, Hindman, M. (2008) *The Myth of Digital Democracy*. Princeton, NJ: Princeton University Press

Integration has undoubtedly been more attractive to TV providers than it has been to providers of other traditional media. A vivid illustration of this latter point is that, at the time of writing, 115 transactions in the broadcasting sector have sought EU regulatory approval³ whereas in the newspapers/journals/periodicals sector only fourteen transactions have been notified to the Commission.⁴ For our purposes, it further bears noting that, by virtue of the fact that mergers and acquisitions have been very popular in broadcasting markets and because TV remains the foremost source of information in Europe,⁵ the likelihood that ownership concentration may lead to a distorted public discourse, where certain opinions are silenced or improperly represented, seems to be greater in mergers of a Union dimension affecting TV markets than in mergers affecting other traditional media.

This Chapter shall attempt to assess merger decisions and the applicable legal framework against the main claims that were put forward in Chapter 3, namely that by ignoring the particular characteristics of media markets the practice the Commission has developed in media markets may have fallen short of protecting both competition and media pluralism, and that EU competition law can be applied in a way which may lead to competition decisions that are more accurate and pluralism-friendly without stretching the Treaty boundaries.

The Chapter is structured as follows: I will begin by examining how the Commission has defined the relevant product markets in cases involving free-to-air broadcasters, arguing that failing to take account of the viewers' market falls short of grasping the demand-side substitution dynamics of markets where content is provided for free (Part 2). I then make a critical analysis of how the Commission has occasionally assessed the effects of the merger on the broadcasting markets concerned. I argue that, as opposed to its current, more permissive, stance towards integration, the restrictive approach it had adopted in earlier cases was far more appropriate to protect both competition and pluralism. I demonstrate this by examining the impact of prohibition decisions on the development of broadcasting markets and compare it against that of the remedies subject to which more recent mergers were cleared (Part 3). Part 4 inquires into how pluralism-specific considerations can be injected into each step of a merger analysis by means of examples.

³ Search by NACE code on DG Competition's website. Retrieved from: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

⁴ Ibid., see http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

⁵ According to the European Commission, most European households have a television set and the average European watches up to 4 hours a day. See, for instance, http://ec.europa.eu/avpolicy/index_en.htm *Radio and the Internet follow, see supra, n. 1*

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

In decisions dealing with mergers affecting the retail distribution of broadcasting services, the Commission finds that the key parameter to define the relevant markets is the revenue model used by program suppliers.⁶ Thus, according to the Commission, in the case of free-to-air (FTA) TV (i.e., advertising-financed television), even if the audiences' preferences are 'an important indicator of the attractiveness and acceptance of the broadcasting channels', the exercise of market definition should consist in identifying the effective alternative sources of supply for the advertisers, not the viewers.⁷

Focusing on advertising markets is justified, the Commission says, on the grounds that there is no trade relationship between the broadcaster and the viewer.⁸ However, the Commission's perception of trade is mistaken because there are transactions that have an economic value without necessarily entailing the exchange of products or services for money.⁹ In FTA TV, there appears to be a transaction whereby, on the one hand, the broadcaster offers content to the consumer (which the consumer values because, by accessing the content, she gets informed, educated or entertained), and on the other hand the consumer provides access to herself, i.e. her attention, to the broadcaster (which the broadcaster values because eyeballs are necessary to generate advertising revenues).¹⁰ Hence, if trade is defined in a broad manner as the act of exchanging one's goods or services for goods or services that someone else offers to cover a – what seems to be rather common and increasingly popular – type of transaction in today's information economy,¹¹ an exchange of content for attention 'can properly be termed trade'.¹² Accordingly, there is a market for audiences to define. In this

⁶ See, for instance, Commission decisions *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 24; *NewsCorp/BSkyB*, Case COMP/M. 5932 [2011] OJ C37/2, paragraph 97; *SFR/Télé 2*, Case COMP/M.4504, [2007] OJ L 316/57, paragraph 45; *Newscorp/Premiere*, Case COMP/M.5121, [2008] OJ C 219/4, paragraph 19; *Telenor/Canal+/Canal Digital*, Case COMP/C.2/38.287, [2003] OJ C 149/10, paragraph 28; *BSkyB/Kirch Pay-TV*, Case COMP/JV.37, [2000] OJ C 110/45, paragraph 24; *Bertelsmann/Kirch/Premiere*, Case IV/M.993, [1999] OJ L 053/1, paragraph 18 and *Kirch/Richemont/Multichoice/Telepiù*, Case IV/M.584, [1995] OJ C 129/6, paragraph 15

⁷ See, for instance, Commission decision *RTL/Veronica/Endemol (HMG)*, Case IV/M.553 [1996] OJ L 124/32, paragraph 20

⁸ See *supra* n. 6

⁹ Polverino, F. (2012). *Hunting the Wild Geese: Competition Analysis in a World of 'Free'*, 547. In Ghidini, G., Piergaetano Marchetti, Marcello Clarich and Fabiana di Porto (eds.). *Concorrenza e Mercato*. Roma: Giuffrè Editore. For a comprehensive overview of how "free product markets" impact competition enforcement see Gal, M. and D. L. Rubinfeld (2015). *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*. NYU Center for Law, Economics and Organization Working Paper Series, Working Paper No. 14-44. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529425#%23

¹⁰ Europe Economics (2002). *Market Definition in the Media Sector: Economic Issues. Report for the European Commission, DG Competition*, 42. See also Stucke, M. and Allen Grunes (2001). *Antitrust and the Marketplace of Ideas*. *Antitrust Law Journal* 69 (1), 297

¹¹ An abundance of services from email accounts to music videos to flight price comparison are provided in exchange for attention

¹² Europe Economics (2002), *supra* n. 10, 44. The importance of attention as a rivalrous good may have increased now with the advent of digital media but the emergence of an attention economy was pointed out as early as 1971 by Herbert A. Simon who noted that in a content-abundant economy, a new problem of scarcity arises: '[w]hat information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention, and a need to allocate that attention efficiently among the overabundance of information sources that might consume it'. Simon, H. A. (1971). *Designing Organizations for an*

market, basic economic principles apply: a) audiences incur some cost in watching TV, that is, the opportunity cost of the time spent in front of the TV set or the opportunity cost of the time spent watching the programs of a particular broadcaster and b) attention is a scarce resource because the interpretative capacity of the individual is not infinite.¹³ It follows logically from the above that broadcasters compete for eyeballs by seeking to offer attractive content.¹⁴

The market for viewers' attention must be defined for the purposes of competition law for mainly two reasons. First, the relevant advertising market does not indicate which is the viewers' market affected by the merger. Broadcast programming and advertising space are different products serving different purposes. On the one hand, viewers will seek to use their 'time budget' efficiently by accessing content that fulfills their need to be informed about current affairs, desire to be entertained, etc. Advertisers, on the other hand, will seek to use their marketing budget efficiently by purchasing the attention of the largest possible audience. In other words, advertisers will show little to no interest in minority-taste programming.¹⁵ Audience size is not the only parameter responsible for the divergence between advertiser and viewer preferences. In addition to mass audiences, advertisers will seek to buy 'viewer attention adjusted for the likelihood that the viewer will buy the goods and services being advertised'.¹⁶ Baker convincingly demonstrates that advertisers opt for 'light' programming, whilst avoiding 'content that offends or takes a position on a controversial issue' because they 'want the surrounding content to promote a frame of mind that leaves [...] viewers most open to advertising messages'.¹⁷ As is clear from the above, programs that are regarded as substitutes by the advertisers are not necessarily representative of viewers' interests.

Second, the market for free-to-air TV is a two-sided market.¹⁸ It was explained in Chapter 2 that a two-sided market is a market in which '1) two sets of agents interact through an intermediary

Information-rich World, 38-52. In Greenberger, M. (ed.). *Computers, Communications, and the Public Interest*. Baltimore: John Hopkins Press. (Cited after reprint in: H.A. Simon (1982). *Models of bounded rationality. Volume 2: Behavioural Economics and Business Organization*. Cambridge, MA: MIT Press). For more on the attention economy see, for instance, Hargittai, E. (2004). *The Changing Online Landscape: From Free-for-All to Commercial Gatekeeping*, 66-76. In Day, P. and Doug Schuler (eds.). *Community Practice in the Network Society: Local Actions/Global Interaction*. New York: Routledge, and Falkinger, J. (2005). *Attention Economies*, CESifo Working Paper, No. 1079, available at: <https://ideas.repec.org/p/ces/ceswps/1079.html>

¹³ Goldhaber, M. H. (1997). *The Attention Economy and the Net*. 7 March 1997, In *First Monday* 2(4). Retrieved from: <http://firstmonday.org/article/view/519/440>, and Davenport, T. H. and John C. Beck (2001). *The Attention Economy: Understanding the New Currency of Business*, 11. Boston: Harvard Business School Press

¹⁴ Europe Economics (2002), *supra n.* 10, 44

¹⁵ Owen, B.M. and Steven Wildman (1992). *Video Economics*, 91-92. Cambridge, MA: Harvard University Press

¹⁶ Goodman, E. (2004). *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*. Berkeley Technology Law Journal, 19, 1425

¹⁷ Baker, E. C. (1992). *Advertising and a Democratic Press*. U. PA. L. REV. 140, 2153, 2156. For more on the commodification of the audiences see, for instance, Streeter, T. (1996). *Selling the Air: A Critique of the Policy of Commercial Broadcasting in the United States*. Chicago, IL: University of Chicago Press

¹⁸ See, for instance, Rochet, J.C. and J. Tirole (2003). *Platform Competition in Two-sided Markets*. Journal of the of the European Economic Association, 1, 990-1029; Argentesi, E. and Lapo Filistrucchi (2007). *Estimating market power in a two-sided market: The*

or platform, and 2) the decisions of each set of agents affects the outcomes of the other set of agents'.¹⁹ Two-sided platforms arise in cases in which there are externalities and in which transaction costs do not allow the two sets of agents to address the externality directly.²⁰ The platform is the intermediary that solves the externality by minimizing the costs that a transaction between entities belonging to these groups of agents would entail.²¹ The type of two-sided markets in which FTA broadcasters are active is advertising-based media. As mentioned above, advertising-based media use the content they provide to attract audiences and then sell access to these audiences to advertisers.²² Where a viewer ended up buying the advertised product, the broadcaster facilitated the completion of a transaction that would not have taken place otherwise.

The profit-maximizing logic of a two-sided intermediary is different from that of one-sided businesses²³ because, in addition to the costs that it must bear to operate the platform and the demand for the two different types of products it offers, the intermediary must also take into account the interdependence between the two different types of consumers it targets.²⁴ In our case, advertising prices depend on whether there are other broadcasters attracting viewers with the same demographic profile *and* on how viewers react to advertising. But, while identifying which broadcasters appeal to the audiences that advertisers aim to reach is a rather straightforward exercise, the way in which advertisers and viewers interact with each other is not self-evident. On the one hand, it is quite clear that the more viewers watch the content broadcast, the more attractive the platform becomes for advertisers because a large user base increases the possibilities for value-creating exchanges. On the other hand, it is not clear whether audiences appreciate ads. If they wish to purchase a given product, the more ads they watch, the more likely it is that they will find the product that fits their preferences.²⁵ If, however, they are not interested in buying anything, transmitting too many ads may cause their dissatisfaction and force them to switch to another broadcaster or even discourage them

case of newspapers. Journal of Applied Econometrics, 22(7), 1247-1266; Kaiser, U. and Julian Wright (2006). *Price Structure in two-sided markets: Evidence from the magazine industry*. International Journal of Industrial Organization, 24, 1-28

¹⁹ Rysman, M. (2009). *The Economics of Two-sided Markets*. Journal of Economic Perspectives, 23(3), 125

²⁰ Evans, D.S. and Richard Schmalensee (2007). *Industrial Organization of Markets with Two-Sided Platforms*. Competition Policy International, 3, 154

²¹ OECD (2009). *Policy Roundtable Report on Two-Sided Markets*, 11-12. Retrieved from: <http://www.oecd.org/daf/competition/44445730.pdf>

²² Evans, D.S. and Richard Schmalensee (2007), *supra n.* 20, 155

²³ For the problems that arise from the application of a traditional one-sided logic to two-sided markets see Wright, J. (2003). *One-Sided Logic in Two-Sided Markets*. Review of Network Economics, 3(1), 44-64

²⁴ Evans, D.S. (2009). *Two-Sided Market Definition*, 7. In ABA Section of Antitrust Law. *Market Definition in Antitrust: Theory and Case Studies*

²⁵ See Evans, D. S. (2008). *Competition and Regulatory Policy for Multi-sided Platforms with Applications to the Web Economy*. Concurrences, 2, 57-62

from watching TV. Alternatively, they may simply choose to ignore ads.²⁶ In this case, putting up with the advertisements may be perceived as the ‘price’ that viewers pay to access the broadcaster’s programming.

The above remarks indicate the existence of indirect network effects between the advertisers and the viewers. Determining whether these effects are positive or negative is necessary²⁷ to understand whether or not the broadcaster faces effective constraints. For instance, based on the above, on the advertisers’ side there is a positive network effect. Yet, it is hard to tell whether on the viewers’ side the network effect is positive or negative. How would the answer to this question affect the competition assessment in the case of a merger involving FTA broadcasters? If the users dislike ads and the merged entity decides to increase the advertising/content ratio, the viewers may switch to an alternative broadcaster. This other broadcaster should be regarded as a competitor that is capable of constraining the merging parties’ behavior.²⁸ Network effects between the two sides should also be measured. In the above example, network effects may be large enough to create a downward spiral (the more ads, the less viewers, the less viewers, the less advertisers...), ultimately weakening the broadcaster’s market position. In view of the above, a competition analysis that focuses on the level of advertising rates fails to take account of the demand-side substitution dynamics of FTA TV markets; as opposed to what the Commission implies, demand in FTA markets is not driven solely by low advertising prices, for advertisers also care about reaching sizeable audiences that are likely to buy their products. Similarly, from a viewer perspective, attention, i.e. the ‘price’ audiences are willing to pay, depends on both the content provided by the broadcaster *and* the amount of time devoted to the transmission of ads.

This approach, whereby the relevant product market for free access TV is defined by reference to the contractual arrangements between the broadcaster and the advertisers, essentially aims to protect price competition without regard for content competition. From a pluralism perspective, this has an impact on both the variety and quality of the programs broadcast. More particularly, as

²⁶ In other words, in this case, the broadcaster internalizes the cost of viewing ads by providing free content. See Evans, D. S. and Richard Schmalensee (2008). *The Industrial Organization of Markets with Two-Sided Platforms*, 670-1. In Collins, W.D. (ed.). *Issues in Competition Law and Policy*. Chicago: American Bar Association

²⁷ Filistrucchi, L., Damien Geradin, Eric van Damme, E. and Pauline Affeldt (2012). *Market Definition in Two-Sided Markets: Theory and Practice*, 9. TILEC Discussion Paper No. 2013-009. Available through SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850 Filistrucchi *et al.* explain that ‘positive indirect network effects occur when the value obtained by one group of customers increases with the number of customers (or, more generally, the demand) of the other group’ whereas ‘negative indirect network effects occur [...] when the value obtained by one group of customers decreases with the number of customers (or, more generally, the demand) of the other group’

²⁸ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/03, paragraph 2

previously seen, in a merger between FTA broadcasters, the SSNIP test will be based on a price charged to an advertiser that prefers content capable of both reaching a large audience and boosting its buying mood. As a result, the demand-side substitutability analysis leads to an assessment that ignores the effects of the merger on niche programming or programming that generates disputes, is ‘too depressing’ or ‘too serious’.²⁹ Moreover, post-merger, the firms may decide to increase the advertising/content ratio.³⁰ The resulting increase in ad space may lead to price reductions (simple economics of supply and demand where prices fall when the supply curve shifts outward). Under the approach currently followed, the merged entity’s behavior would not raise anti-competitive concerns; to the contrary, it would be found to promote price competition. Similarly, no competition problems would be identified if the merging parties started to use the same programming across different channels as a means to reduce production costs.³¹ Hence, this type of analysis fully neglects content quality and variety reductions (this issue will be discussed in more detail in Parts 3 and 4).

3. Competitive assessment

3.1. Shift from platform competition at any cost to regulated consolidation of the market

Since the Merger Regulation entered into force, the Commission has refused to clear five concentrations in the broadcasting sector.³² What these five cases have in common is that the notified operations involved broadcasters, content and infrastructure providers, thus raising vertical integration concerns.³³ In these decisions, the Commission found that the undertakings concerned were already holding or would hold as a result of the transaction significant market power, which in turn would result in the merged entity sealing off the affected markets. For instance, the first prohibited concentration, *MSG Media Service*, concerned the creation of a joint venture by Bertelsmann, a German media group with holdings in commercial television, Kirch, the leading

²⁹ Sunstein, C. (2000). *Television and the Public Interest*. California Law Review 88(2), 515 referring to Baker, E. C. (1992), *supra n.* 17, 2153-4

³⁰ Note that the advertising limits under the version of the Audiovisual Media Services Directive [2010] OJ L 332/27 are fairly relaxed: broadcasters are entitled to interrupt their programming every 30 minutes provided that the proportion of the spots within a given clock hour does not exceed 20%. This means that broadcasters may devote up to 12 mins/hour to advertising (see Articles 20(2) and 23(1))

³¹ OECD (2003). *Policy Roundtable Report on Media Mergers*, 25

³² Reference is made to Commission decisions *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1; *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4; *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1; *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20; *RTL/Veronica/Endemol (HMG)*, Case IV/M.553 [1996] OJ L 124/32

³³ For an overview of these and other mergers that fell under Commission scrutiny see, for instance, Nikolinakos, N. (2006). *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT sectors*, 138-161. Alphen aan den Rijn: Kluwer Law International, and Nitsche, I. (2001). *Broadcasting in the European Union. The Role of Public Interest in Competition Analysis*, 111-124. Alphen aan den Rijn: Kluwer Law International

German supplier of feature films and television programming, also active in commercial television, and Deutsche Telekom, the German telecommunications incumbent.³⁴ The object of the joint venture would be the technical and administrative handling of mainly pay-TV services and the provision of the necessary technical infrastructure for the supply of such services.³⁵ The relevant markets identified by the Commission were the market for technical and administrative services for pay-TV suppliers, the market for pay-TV and the market for cable television networks.³⁶ In its competitive assessment, the Commission was mainly concerned with MSG's first-mover advantage, which was likely to create a long-term monopoly in the market for technical and administrative services for pay-TV in Germany and further strengthen the position of Bertelsmann and Kirch in the market for the retail distribution of pay-TV services.³⁷ With respect to the above, the Commission noted that suppliers wishing to enter the pay-TV market following digitalization would be forced to take the relevant technical and administrative services from a company controlled by competitors that were already in a leading position.³⁸ Additionally, it feared that the concentration would have adverse effects on the market for cable networks. The Commission found that the administrative practice regarding the granting of authorizations to establish the required reception equipment largely protected Telekom from competition.³⁹ In its view, even if this practice were abandoned, cable network operators would find it difficult to compete with Telekom.⁴⁰ There was, in particular, the risk that private operators could not access the program licensed by Bertelsmann and Kirch, which the Commission considered necessary for the creation of attractive program packages, or could purchase it only on unfavorable conditions.⁴¹ Based on the above, the Commission concluded that the concentration would probably wall off all three markets and decided to ban the transaction.⁴²

An approach similar to the one followed in *MSG Media Service* was adopted in the assessment of the other four prohibited operations. The Commission's reasoning in all these decisions is underpinned by its willingness to ensure inter-platform competition at any cost.⁴³ In spite of not being entirely certain about how the markets concerned were likely to evolve, the Commission took a strict stance against vertical integration and did not hesitate to sacrifice the provision of new services

³⁴ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraphs 1 and 5-7

³⁵ *Ibid.*, paragraph 8

³⁶ *Ibid.*, paragraph 19

³⁷ *Ibid.*, paragraph 55 et seq.

³⁸ *Ibid.*, paragraph 82

³⁹ *Ibid.*, paragraph 93

⁴⁰ *Ibid.*, paragraph 92

⁴¹ *Ibid.*, paragraph 93

⁴² *Ibid.*, paragraph 102

⁴³ Ariño, M. (2005). *Regulation and Competition in European Broadcasting. A study of pluralism through access*, 111. PhD thesis. Florence: European University Institute

in the short run so as to guarantee that a variety of suppliers could operate in these markets in the long run.⁴⁴ Indeed, vertical integration in the media markets may have several anti-competitive effects, for '[i]f the content provider is dominant, a competing carrier might be unable to obtain enough valuable content in the appropriate language to offer a satisfactory selection of channels and programs. If the carrier is dominant, a competing provider might be unable to find satisfactory alternative broadcasters'.⁴⁵ The Commission's determination to prevent market foreclosure resulting from vertical integration is also demonstrated by the fact that in all the above cases the parties to the transactions proposed undertakings that were rejected on the grounds that they were 'mere pledges of conduct',⁴⁶ 'meaningless',⁴⁷ 'insufficient',⁴⁸ or 'inadequate'⁴⁹ to address the competition problems that arose.

This set of negative decisions represents more than 20% of all transactions the Commission has blocked thus far.⁵⁰ Yet, this does not mean that the Commission has treated concentration in the broadcasting sector more restrictively than in other industries. These transactions were notified to the Commission when the Commissioner responsible for competition policy within the European Union was Karel Van Miert. Instilled in these decisions is Van Miert's belief that the strict application of competition rules may not only protect competitive market structures in the media but 'also contribute to maintaining plurality in this sensitive sector'.⁵¹ But the Commission's eagerness to ensure inter-platform competition at any cost has since undergone significant change. Since May 1998,⁵² the Commission has given the green light to all notified transactions in the broadcasting sector, several of which subject to (structural and/or behavioral) conditions.⁵³

A good example of the Commission's apparently more permissive approach towards consolidation is *Vivendi/Canal+/Seagram* in which the Commission was asked to assess the

⁴⁴ Harrison, J. and Lorna Woods (2007). *European Broadcasting Law and Policy*, 164. Cambridge: Cambridge University Press

⁴⁵ Temple Lang, J. (1997). *Media, multimedia and European Community antitrust law*. Fordham International Law Journal, 21(4), 1359. Retrieved from: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1569&context=ilj>

⁴⁶ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 99

⁴⁷ Commission decision *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4, paragraph 65

⁴⁸ See Commission decisions *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20 paragraph 154 and *RTL/Veronica/Endemol (HMG)*, Case IV/M.553 [1996] OJ L 124/32, paragraph 112

⁴⁹ Commission Decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 155

⁵⁰ According to the Merger Statistics Table published by the Commission, from 21 September 1990 to 31 October 2014, a total of 24 operations have been rejected. The table is available at: <http://ec.europa.eu/competition/mergers/statistics.pdf>

⁵¹ Harcourt, A. (2005). *The European Union and the Regulation of the Media Markets*, 51. Manchester: Manchester University Press

⁵² Last in the series of prohibited operations previously discussed were Commission decisions *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4 and *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1 (both of them adopted on 27/05/1998)

⁵³ According to a search by NACE code, since May 1998, the Commission has adopted in the information and communication sectors 29 decisions subject to commitments, 20 under Article 6(1)(b) and 9 under Article 8(2). However, these numbers must be seen with caution as Commission Decision *BSkyB/Kirch Pay-TV* adopted in 2000 which the concentration compatible with the common market under Article 6(1)(b), does not appear in the Commission's list

acquisition of Seagram (active in different segments of the entertainment business and owner of Universal, one of the six Hollywood studios), by Vivendi (active in, *inter alia*, cinema and television through equity interests in Canal+ and BSkyB, two leading pay-TV operators, and a majority stake in CDCA, which holds film catalogues and licenses broadcasting rights to French channels).⁵⁴ In its analysis, the Commission found that the concentration would result in a company with the world's largest film library, the second largest library of TV programming in the EEA and the first acquirer of output deals signed with US studios.⁵⁵ The Commission also noted that, as a result of structural and other⁵⁶ links between Vivendi or Universal and other Hollywood majors, Canal+ was likely to have preferential access to movie rights.⁵⁷ In spite of the above, the Commission approved the operation. An amalgamation of behavioral and structural commitments proposed by the parties was found to eliminate the anti-competitive concerns that the concentration raised. For instance, Vivendi undertook to divest its entire stake in BSkyB and not to grant to Canal+ the first-window rights covering more than 50% of Universal's production, thereby leaving the remaining 50% to other operators.⁵⁸

Another example is the high-profile (horizontal) merger *NewsCorp/Telepiù* dealing with a concentration by which media conglomerate News Corporation, operating at all tiers in the broadcast supply chain (e.g. production and distribution of motion pictures and TV programming, production and distribution of advertising products and services, the development of digital broadcasting, the development of conditional access and subscriber management systems, the creation and distribution of on-line programming, etc.) would acquire control, via a special purpose vehicle company, of the Italian pay-TVs Telepiù and Stream.⁵⁹ Under the proposed transaction, Telepiù and Stream would merge their activities in a combined Direct-to-Home (DTH) satellite platform in which Telecom Italia, the Italian telecom incumbent, would hold a minority stake.⁶⁰ While the Commission found that the merged entity would have a monopoly as regards the DTH means of transmission and would also have all the possibilities and economic incentives to foreclose actual and potential competitors wishing to enter the market through the same or other means of transmission,⁶¹ it declared the concentration compatible with the common market subject to a number of behavioral and structural

⁵⁴ Commission Decision *Vivendi/Canal+/Seagram*, Case COMP/M. 2050 [2000] C 311/03, paragraphs 1 and 4-8

⁵⁵ *Ibid.*, paragraph 15

⁵⁶ *Ibid.*, paragraph 49. For example, Universal constituted a significant partner in the then growing segment of films co-financed by several studios, including MGM and Paramount

⁵⁷ *Ibid.*, paragraph 49

⁵⁸ *Ibid.*, at pp. 20 and 22

⁵⁹ Commission Decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraphs 1 and 7-9

⁶⁰ *Ibid.*, paragraph 1

⁶¹ *Ibid.*, paragraph 140

remedies. For instance, News Corporation committed to waive exclusive rights for pay-per-view, video on demand and near video on demand on all platforms and not to conclude contracts exceeding the duration of two years with football clubs and of three years with film studios. The decision also established News Corporation's obligation to offer third parties, on an unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform would offer such premium contents to its retail customers. Telepiù undertook to divest its digital and analogue terrestrial broadcasting assets and not to enter into any further digital terrestrial television activities, neither as network nor as retail operator.⁶²

Similarly, the Commission decided to clear the acquisition by BSKyB of a stake in Kirch despite its concerns that the concentration would result in Kirch acquiring significant power in the German pay-TV market resulting from the influx of financial resources from BSKyB.⁶³ The transaction was approved upon the condition that the parties would respect a bundle of (behavioral) commitments proposed to the Commission. More particularly, Kirch committed to offer to all interested third parties, on a fair, reasonable and non-discriminatory basis, access to its technical platform.⁶⁴ BSKyB and Kirch also undertook that, in the event they acquired rights for the exploitation of a major live international sports event on a multi-national basis, they would not give to one another the status of preferred bidder for such rights by granting, for instance, a right of first negotiation, first refusal or first offer.⁶⁵ This condition was imposed so as to address the possible adverse effects on the market for the acquisition of TV rights to pan-European sports events.⁶⁶

A package of behavioral commitments was also accepted in the more recent *SFR/Télé 2* decision dealing with the plans of SFR, jointly controlled by Vivendi and Vodafone, to acquire sole control of the Internet access and fixed telephone business of Télé 2.⁶⁷ The Commission feared that, as a result of the proposed project, Vivendi would have the ability and incentive to grant to its SFR/Télé2 subsidiary preferential access to the television content it had in its possession.⁶⁸ Such conduct could lead to a severe weakening of other DSL operators, both in the downstream distribution market and in the upstream market, for the acquisition of television content.⁶⁹ In order to

⁶² Ibid., paragraph 225, (c), (d), (i), (g) and (k)

⁶³ Commission Decision *BSkyB/Kirch Pay-TV* Case COMP/JV.37 [2000] OJ C 110/45. See in particular paragraphs 1, 5-7, 9, 51 and 80

⁶⁴ Ibid., at p. 20

⁶⁵ Ibid., at p. 25

⁶⁶ Ibid., see, in particular, paragraphs 90 *et seq.*

⁶⁷ Commission decision *SFR/Télé 2 France*, Case No COMP M.4504 [2007] OJ L 316/57, paragraphs 1, 6 and 7

⁶⁸ Ibid., see paras 92 *et seq.*

⁶⁹ Ibid., paragraph 101

eliminate these concerns, Vivendi committed to offer its channels to all DSL operators on normal market terms, which could not be less favorable than those provided to SFR. With a view to ensuring an adequate monitoring of this undertaking, Vivendi was asked to keep separate accounts for each channel distributed wholesale in this way.⁷⁰

This move from inter-platform to regulated consolidation suggests that the Commission has gradually succumbed to the natural tendency of the industry towards concentration. The Commission, commentators say, has become increasingly ‘aware of the reasons that lead companies to seek further integration’⁷¹ and has therefore decided to adopt an approach that heralds ‘a new era of realistic appraisal of the underlying financial conditions in which the sector operates’.⁷² This logic is ill-advised. While there is little doubt that the Commission must adapt its assessments to the particular facts and circumstances of each case, this does not mean that the latter, including and especially a natural tendency towards integration, should render EU merger control devoid of substance. The analysis that follows will demonstrate that the Commission’s leniency combined with remedies that fell short of capturing media market dynamics have harmed consumer welfare and that, in retrospect, despite its *lacunae*, the reasoning it applied to the prohibited operations discussed above was far more adequate to protect competition and pluralism.

3.2. Ensuring market access = Pluralistic and/or competitive broadcasting markets?

While the shift from inter-platform competition to regulated consolidation marks a significant policy change, the objective under both approaches is the same: Market access should not be prevented as a result of the notified transaction. In the first case, the Commission pursues this objective by prohibiting concentrations that would confer an unparalleled first-mover advantage on the merged entity. In the second case, the Commission seeks to guarantee that the merger does not deter access to key elements, namely premium content and infrastructure, which allow broadcasters to effectively compete.⁷³ In both cases, the underlying assumption is that broadcasters that do not fall within the sphere of influence of one of the merging firms will be able to undertake activities in the

⁷⁰ *Ibid.*, paragraph 117

⁷¹ Mendes-Perreira, M. (2003). *Vertical and horizontal integration in the media sector and EU competition law*, 10. Paper presented at the Workshop *The ICT and Media Sectors within the EU Policy Framework*, Brussels, 7 April 2003. Retrieved from: http://ec.europa.eu/competition/speeches/text/sp2003_009_en.pdf

⁷² Alexiadis, P. and Miranda Cole (2004). *Revisiting Competition Law and Regulatory Analyses of Consolidations in the Communications Sector*, 14. Financier Worldwide, Industry Sector Review: Technology, Media & Telecommunications 2004. Retrieved from: http://www.gibsondunn.com/fstore/documents/pubs/Alexiadis_Comm_Sector_Comp_Law.pdf See also Nikolinakos, N. (2006), *supra n.* 33, 170

⁷³ This is the Commission’s main concern when assessing mergers in the media sector. See, for instance, http://ec.europa.eu/competition/sectors/media/overview_en.html See also Mendes-Perreira (2003), *supra n.* 71, 12

affected markets. For example, the Commission refused to clear *Bertelsmann/Kirch/Premiere*, which concerned the plans of CLT-UFA and Kirch to merge their digital television activities in Germany into the Premiere venture,⁷⁴ on the grounds that other ‘providers of digital pay-TV and multimedia services [would] be unable to develop freely and without restriction’.⁷⁵ Similarly, in the approved *NewsCorp/Telepiù*, it explained that, if the merged undertakings restricted access to premium content, ‘competitors [would] not be in a position to create an alternative successful pay-TV platform’.⁷⁶ The Commission seems to imply that market access, guaranteed either through a negative decision or through a conditional clearance, caters to supply diversity.⁷⁷

Under both approaches, the effects of a concentration on content diversity have largely been marginalized. For instance, in *NSD*, the Commission was limited to noting that the operation would lead to ‘less variety in the offer to Nordic TV households’.⁷⁸ In *Bertelsmann/Kirch/Premiere*, it mentioned that a horizontally integrated undertaking active in both the pay- and free-to-air TV markets could negatively influence the attractiveness and range of programs in each of the two segments.⁷⁹ However, these and other similar remarks are incidental rather than parts of a full-fledged analysis of whether the transaction would adversely affect minority-taste, assorted and/or high value programming. The reasoning behind these decisions seems to be based on the premise that such programming is a natural outcome of supply diversity. For instance, in *NewsCorp/Telepiù*, in its assessment of the impact of the merger on the market for the acquisition of TV channels, the Commission observed that, ‘should the merged entity decide to [...] exert its monopsonist power to such an extent that some TV channel providers exit the market [...], consumers would enjoy a greatly reduced variety of products and freedom of choice’ [emphasis added].⁸⁰

Two problems arise from the Commission’s merger practice in the broadcasting sector as described above. The first is related to the assumption that content diversity derives from supply

⁷⁴ Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 1

⁷⁵ *Ibid.*, paragraph 122

⁷⁶ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 184

⁷⁷ The Commission has supported this position in several policy documents. See, for instance, European Commission (2005). *Issues Paper for the Liverpool Audiovisual Conference Media Pluralism - What should be the European Union’s role?*, 2, and Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 7

⁷⁸ Commission decision *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20, paragraph 151

⁷⁹ Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993, [1999] OJ L 053/1. See in particular paragraphs 87-88: ‘the more varied and attractive the programs offered by the free broadcasters, the less incentive there is for viewers to subscribe to pay-TV as well. [...] The attractiveness of a channel is largely dependent on the program rights available to it. When a television operator has a leading position in pay-TV and free-TV, and also holds the main program rights for free-TV and pay-TV he is in a position to control the interaction between free- and pay-TV’

⁸⁰ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 173

diversity and the second regards the imposition of remedies imposed in the post-van Miert era that did not manage to ensure market access.

The assumption that supply diversity will guarantee content diversity is weak. The main reasons explaining why in media markets the former does not necessarily lead to the latter have already been discussed in Chapter 2.⁸¹ With respect to the broadcasting sector, the following features are particularly counterproductive to a varied programming even in markets where several channel distributors are active: first, as I explained above, the use of advertising results in programming which seeks to attract mass audiences and promote materialism.

Second, TV content produced in-house has, as a rule, high first-copy costs. For example, HBO's *Game of Thrones* costs an average of \$6 million per episode.⁸² Acquired content is also very expensive. For instance, for a high-cost drama series, the BBC pays the independent producer an average of GB £700k - £900k per hour.⁸³ In Germany, Sky currently pays the Bundesliga a licence fee of €485.7 million per season⁸⁴ whereas in the UK, Premier League rights cost BSkyB GB £760m per year.⁸⁵ Transaction costs related to rights clearance are high too. A major broadcaster negotiates approximately 70,000 contracts per year with rights holders.⁸⁶

Third, as opposed to production or purchase of attractive content, distribution of TV programming is fairly cheap, and even more so with technology convergence. It was explained in Chapter 2 that previously different communication infrastructures now use the same transport protocols. This means that television broadcasts can currently be delivered on multiple platforms

⁸¹ As discussed in detail in Chapter 1, this is also an assumption that seems to have underpinned regulation in support of media pluralism. For an overview see, for instance, Napoli, P.M. (2011). *Exposure diversity reconsidered*. Journal of Information Policy, 1, 246-259, and Valcke, P. (2011). *Looking For the User in Media Pluralism Regulation: Unraveling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation*. Journal of Information Policy, 1, 294-5. Note that content diversity may be further undermined by factors that were examined in detail in Chapter 2, Parts 3.4.1. and 3.4.2.

⁸² Garofalo, A. 'Game Of Thrones' Big Budgets Bring Huge Success; How HBO Series Makes Money With High Cost Per Episode. 14 August 2014, International Business Times. Retrieved from: <http://www.ibtimes.com/game-thrones-big-budgets-bring-huge-success-how-hbo-series-makes-money-high-cost-episode-1658966>

⁸³ BBC Tariff Prices for Independents. Retrieved from: <http://www.bbc.co.uk/commissioning/tv/how-we-work/business-requirements/tariff-ranges.shtml>

⁸⁴ These fees cover the period from 2013 until 2016. See Briel, R. *Sky Deutschland wins all live Bundesliga rights*. 18 April 2012, Broadband TV News. Retrieved from: <http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/>

⁸⁵ As with the Bundesliga-Sky arrangements, these fees cover the period from 2013 until 2016. See Pearce, J. *Premier League rights sold to BT and BSkyB for £3bn*. 13 June 2012, the BBC. Retrieved from: <http://www.bbc.com/news/business-18430036>

⁸⁶ See <http://www3.ebu.ch/advocacy/initiatives/copyright> Note that, compared against other costs incurred in the daily operations of a channel, including maintenance and insurance, creation or acquisition of programming is by far the broadcasters' greatest expense. See, for instance, BBC (2003). *Facts and Figures*, 2. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/psb/responses/mceihil_annex.pdf See also Herbert, U. *Commercialising sport: Understanding the TV Rights debate*. Speech delivered in Barcelona, 2 October 2003. Retrieved from: http://europa.eu.int/comm/competition/speeches/text/sp2003_024_en.pdf

with significantly less cost.⁸⁷ Besides terrestrial, direct-to-home satellite and cable networks, TV programming is also available on Internet Protocol television, offered by telecommunication providers over managed networks with high quality of service, and Over-The-Top (OTT) television, provided by the content owners themselves (e.g. the BBC iPlayer, Hulu, YouTube,⁸⁸ etc.) without the ISP or network operator controlling viewer access.⁸⁹ As a result, the same content can be delivered on multiple devices (e.g. traditional TV set, tablets and smartphones) and in several formats (e.g. linear transmission, catch-up and on-demand).

Finally, content is a product with highly uncertain consumer demand. There is little doubt that the success of a film, series or anchorman depends on viewer preferences that are not easy to predict. This is not just common sense, but an empirically verified hypothesis. For example, De Vany and Walls tested the assumption that the variance of the probability distribution of movie outcomes is infinite by developing a model that makes distribution conditional on a list of choice variables that may alter the location of the distribution's probability mass.⁹⁰ After applying their model to a sample of 2,015 movies, De Vany and Walls concluded that it is impossible to determine the parameters that make a movie successful. Factors such as release strategies, budget and aggressive marketing made no difference, since no pattern could be identified. This finding illustrates why content production (or acquisition) is a very risky undertaking.⁹¹

High production and low distribution costs and uncertain consumer demand create 'biases in favor of programming that mimics existing programming successes and/or that holds out the promise of a long and extended life [...]. In either case, the programming produced may systematically shortchange niche audiences'.⁹² In view of the above, market access should not be regarded as a vehicle for content diversity.

⁸⁷ Pavlik, J. (2005). *Understanding Convergence and Digital Broadcasting Technologies for the Twenty-First Century*, 142. NHK Broadcasting Studies. Retrieved from: https://www.nhk.or.jp/bunken/english/reports/pdf/05_no4_08.pdf

⁸⁸ YouTube, which started as a peer video upload website, now provides access to programming posted by mainstream broadcasters. See OECD (2013). *Competition Issues in Television and Broadcasting*, 2

⁸⁹ *Ibid.*, 9-10. For more information on technology convergence and how it affects broadcasting see, for instance, EBU (2013). *Reply to the European Commission Green Paper – Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*. Retrieved from: http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Hybrid/EBU_reply_to_Green_Paper_convergence_final.pdf

⁹⁰ De Vany, A. and W. David Walls (1999). *Uncertainty in the Movie Industry: Does Star Power Reduce the Terror of the Box Office?* Paper presented at the annual meeting of the American Economic Association, New York, January 1999. Retrieved from: <http://pages.stern.nyu.edu/~wgreene/entertainmentandmedia/Devany&Walls.pdf>

⁹¹ Goodman, E. (2004), *supra n.* 16, 1435

⁹² *Ibid.*

As regards access remedies imposed in the post-van Miert era, these were poorly conceived and hence inadequate to keep the markets affected by the transaction open to competition. Take as an example the commitments that were made legally binding in order to ensure access to premium content. As already seen, the merging parties occasionally undertook to reduce the duration of exclusivity contracts with rights holders. The *rationale* behind this solution is that the acquiring entity will not be able to force its rivals to exit the market permanently whilst being granted a certain amount of time to recoup the investment. However, a loosely defined obligation whereby auctions for the content rights must be organized every x years is not sufficient to guarantee that the rights will be purchased by a different provider. Premium content is very expensive and antitrust intervention to limit the contract length does not necessarily mean that a smaller competitor will have the financial resources to successfully bid for the rights after the contract expires. For example, as already seen in Chapter 3, the Commission decision dealing with the TV rights to the *English Football Association Premier League* (FAPL) provides that related agreements shall be concluded for a period not exceeding three seasons.⁹³ This, however, did not prevent Sky from successfully bidding for the rights in every single auction that was organized after the decision was adopted.⁹⁴ Interestingly, the prohibition decisions discussed above were partly based on the concern that, even after termination of their output deals for pay-TV rights with film studios, the merging parties, given their financial strength, were most likely to acquire those rights for another term.⁹⁵

Another remedy imposed on the merging parties with a view to guaranteeing access to premium content is the duty to sublicense rights acquired on an exclusive basis. However, these sublicensing schemes have been far from a success story. The difficulties that competitors have encountered in their attempt to acquire premium content will be illustrated through an analysis of the wholesale must-offer mechanism, subject to which the *Newscorp/Telepiù* merger was cleared.

How is premium content sublicensed? In *Newscorp/Telepiù*, the merged entity undertook to offer to third parties the right to distribute premium content on the basis of the *retail minus*

⁹³ Commission decision *Joint Selling of the Media Rights of the FA Premier League (FAPL)*, Case COMP/C.2/38.173 [2006] OJ L 176/104, paragraph 16

⁹⁴ In fact, Sky Sports has been broadcasting the Premier League to UK TV viewing audiences since the launch of the league in 1992. See Harris, C. *BSkyB Retains Majority of TV Rights to Premier League On UK TV For 2013-16*. 13 June 2012, World Soccer Talk. Retrieved from: <http://worldsoccertalk.com/2012/06/13/bskyb-retains-majority-of-tv-rights-to-premier-league-on-uk-tv-for-2013-16/> For recent developments see Williams, C. *Virgin Media urges Ofcom crackdown on Premier League TV prices*. 30 September 2014, The Telegraph. Retrieved from: <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/11131139/Virgin-Media-urges-Ofcom-crackdown-on-Premier-League-TV-prices.html>

⁹⁵ See, for instance, Commission decisions *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraphs 49-50, and *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4, paragraphs 31-32

principle.⁹⁶ This is a principle whereby the wholesale price is calculated as the retail price charged by the sub-licensor minus the cost of an efficient undertaking.⁹⁷ For retail minus pricing to protect competition, it is necessary that the sub-licensor face competitive pressure. If not, a retail minus mechanism does not prevent it from charging excessive retail prices (which automatically translate into excessive wholesale prices).⁹⁸ In *Newscorp/Telepiù*, the competitive analysis had concluded that the merged entity would acquire a near-monopoly position in the pay-TV market, thus having both the ability and economic incentives to foreclose competitors by raising rivals' costs.⁹⁹ It is therefore odd that the Commission found that, in the case of Sky, a sublicensing scheme based on the retail minus pricing principle would allow other pay-TV operators 'to access premium contents which would otherwise be too costly for them to purchase directly'.¹⁰⁰ If the Commission carefully weighed the position Sky would hold in the market post-merger against the condition under which retail minus pricing can be an effective means to safeguard competition, it could have predicted what happened one year after the decision was adopted: following complaints by competitors, the Italian media regulator, AGCom, intervened to change Sky's method of calculating the 'minus' because its wholesale offers were unsustainable.¹⁰¹

What is sublicensed? Problems arise if content that is indeed 'premium' is excluded from the scope of the wholesale must-offer regime, thereby allowing the incumbent to empty content markets, including emerging content markets. In the case of *Newscorp/Telepiù*, the Commission left out the 'basic packages' carrying several popular channels (e.g. MTV and Discovery) and US series (e.g. Desperate Housewives and Lost).¹⁰² Following the decision, Sky went on to sign a series of exclusive agreements with these basic package channels.¹⁰³ As a result, this content, which, according to former IPTV provider Fastweb, was the main reason for becoming a pay-TV subscriber for 70% of the viewers,¹⁰⁴ was not available to other pay-TV operators. This may go part way towards

⁹⁶ Commission decision *Newscorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, see Section 10 of the Commitments, pp. 8-11

⁹⁷ For more details on the method applied in *Newscorp/Telepiù* see Section 10 of the Commitments, paragraphs 10.5. and 10.6.

⁹⁸ ERG (2009). *Report on price consistency in upstream broadband markets*, 15. Retrieved from: [http://www.erg.eu/streaming/ERG_\(09\)_21_ERG_Report_on_price_consistency_in_upstream_bb_markets.pdf?contentId=546067&fileId=ATTACHED_FILE](http://www.erg.eu/streaming/ERG_(09)_21_ERG_Report_on_price_consistency_in_upstream_bb_markets.pdf?contentId=546067&fileId=ATTACHED_FILE) See also Geradin, D. (2005). *Access to content by new media platforms: A review of the competition law problems*. European Law Review 30 (1), 84. On the inadequacy of retail minus mechanisms to protect competition see also Geradin, D. and Michel Kerf (2003). *Controlling Market Power in Telecommunications: Antitrust vs Sector-specific Regulation*. Oxford: OUP

⁹⁹ Commission decision *Newscorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, paragraph 140

¹⁰⁰ *Ibid.*, paragraph 246

¹⁰¹ See Agcom (2004). *Delibera N. 360/04/CONS*. Retrieved from: <http://www.agcom.it/documents/10179/538769/Delibera+360-04-CONS/7b5b88af-14bc-4915-b264-dd1ca75e2ff9?version=1.0&targetExtension=pdf> In this case, e.Biscom argued that the price charged by Sky Italia was too high and asked a 50% discount on the retail price. AGCom agreed with e.Biscom and imposed on Sky the obligation to modify its wholesale offer as follows: The minus value of the six packages subject to the must-offer regime must be between 51.6% (the most expensive package) and 62.6% (the cheapest packages) of the retail price of the premium package. See paragraph 3, at p. 20 of Agcom's decision

¹⁰² Ofcom (2009). *Wholesale must-offer remedies: International examples*, 9

¹⁰³ *Ibid.*, 14

¹⁰⁴ *Ibid.*

explaining why the Italian IPTV market¹⁰⁵ collapsed a few years later. In the second half of 2012, Wind and Fastweb, finding themselves unable to create a sustainable customer base, closed their IPTV services.¹⁰⁶ Moreover, Sky Italia is reportedly not incentivized to expand into IPTV, which further reduces the likelihood of viewers switching from DTH to IPTV.¹⁰⁷ This shows that, in addition to distortions of competition, an ill-designed sublicensing mechanism may also have a chilling effect on innovation (IPTV delivers better picture and sound quality and has richer functionality¹⁰⁸ than DTH).

When is premium content sublicensed? In *Newscorp/Telepiù*, the Commission does not set a deadline by which Sky must grant access to the rights. The decision lays down that the wholesale offer ‘shall be made on reasonable terms and conditions (including, without limitation, reasonable provision as to notice periods’,¹⁰⁹ but without explaining what is meant by ‘reasonable’. Again, this is not enough to prevent the incumbent from engaging in anti-competitive practices. Furthermore, introducing a binding arbitration system does not fully address the concerns that may arise from failure to comply with the obligation to sublicense content within a ‘reasonable’ time frame; an alternative dispute resolution mechanism is undoubtedly faster than regular court proceedings, however, recourse to arbitration does not mean that the dispute will be resolved overnight. For example, it took the International Court of Arbitration two years to decide whether the FIFA World Cup was must-offer content¹¹⁰ and AGCom another two to conclude whether Sky implemented its cost-allocation strategies on a discriminatory basis.¹¹¹

But, what best illustrates the limitations of this mechanism is that, long before the commitments expired, IPTV operators and Sky Italia abandoned the wholesale must-offer and signed unregulated commercial agreements whereby IPTV players would act as Sky distributors and be remunerated on

¹⁰⁵ In 2008, the aggregate market share of all telecoms operators providing pay-TV services was 3.7% whereas Sky Italia controlled 88.8% of the market. See Commission decision *Newscorp/Telepiù*, Case No COMP/M.2876 C(2010) 4976 final, paragraph 31. In 2009, Fastweb had 200,000 subscribers, a figure which was nowhere near Sky’s 4.4 million. See Ofcom (2009), *supra n.* 102, 7

¹⁰⁶ Retrieved from: <http://mavise.obs.coe.int/country?id=18>

¹⁰⁷ Ofcom (2009), *supra n.* 102,15

¹⁰⁸ *Ibid.* For example, IPTV has the ability to provide on-demand content channel and interactive content applications

¹⁰⁹ Commission decision *Newscorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, Section 10.4. of the Commitments

¹¹⁰ In *Newscorp/Telepiù*, the combined platform undertook not to make any exclusivity arrangements for means of transmission other than DTH in future agreements concerning *worldwide sports rights* (see *Newscorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, Section 8.1. of the Commitments). In November 2008, Sky purchased from RAI the transmission rights for pay-TV on all platforms, including DTT, of the FIFA World Cup. In February 2010, RTI, the broadcast media subsidiary of the Mediaset group, brought a complaint before the International Court of Arbitration (ICC) arguing that Sky had violated the above obligation. The ICC held that the FIFA media rights were not covered by the commitments on the grounds that the event did not have the capacity to generate a ‘regular’ customer base (and hence constant revenues) and did not therefore qualify as ‘premium content’. See Agcom (2013). *A429 - RTI/SKY-Mondiali di Calcio, Provvedimento n. 24325*, paragraphs 17 and 19

¹¹¹ See Agcom (2010). *A407- Conto TV/Sky Italia, Provvedimento n. 21316*, paragraph 6. This decision will be discussed in more detail in Part 4

the basis of a revenue-sharing model.¹¹² Sky Italia would bill the viewer directly and own the customer relationship.¹¹³ Apparently, these arrangements also fell short of boosting competition because, as already seen, two of the three IPTV providers (Fastweb, Wind and Telecom Italia) were forced to exit the market in 2012.

With respect to pluralism, I explained in Chapter 3 that the contribution of a competition policy facilitating access to premium content to the protection of media pluralism should not be overestimated. *Newscorp/Telepiù* is a vivid illustration of this point in that the competitor that seems to have been favored by the remedies the most is Mediaset. This is because the merged entity, Sky Italia, committed not to develop activities on DTT,¹¹⁴ which Mediaset penetrated after the decision was adopted¹¹⁵ and has controlled ever since.¹¹⁶ Being the leading commercial FTA broadcaster, Mediaset has the deep pockets to acquire premium content and provide an offer alternative to that of Sky. Mediaset is, however, owned by Silvio Berlusconi, known for controlling the group's editorial policies in order to advance his own political and commercial interests.¹¹⁷

In view of the above, the merger practice the Commission has developed in the broadcasting sector seems to have fallen short of protecting both media pluralism *and* competition.

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

The Commission may have regard to public policy considerations when it is called upon to assess whether a concentration between media undertakings is compatible or not with the common market. Insofar as the media sector is concerned, the legal basis for integrating such considerations into a competition analysis is Article 167(4) TFEU, which envisages the Commission's duty to take cultural aspects into account when action is taken in the framework of other Union policies, as well

¹¹² This was based on the number of subscribers and the value of the acquired package. See Ofcom (2009), *supra n.* 102, 15

¹¹³ *Ibid.*

¹¹⁴ Commission decision *Newscorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, Section 10.4. of the Commitments. Note that, following Sky's request to revise this commitment, the Commission lifted the obligation in 2010 and allowed Sky Italia to apply for an authorization with the competent Italian authorities for the award of one DTT mux. See Commission decision *Newscorp/Telepiù*, Case No COMP/M.2876 C(2010) 4976 final

¹¹⁵ Ofcom (2009), *supra n.* 102, 7

¹¹⁶ Commission decision *Newscorp/Telepiù*, Case No COMP/M.2876 C(2010) 4976 final, paragraphs 31-32

¹¹⁷ See, for instance, EU Network of Independent Experts on Fundamental Rights (2004). *Synthesis Report: Conclusions and Recommendations on the situation of fundamental rights in the European Union and its Member States in 2003*, 40; (2005). *Synthesis Report: Conclusions and Recommendations on the situation of fundamental rights in the European Union and its Member States in 2004*, 62, and (2006). *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2005*, 109. The first two reports are available at: http://ec.europa.eu/justice/fundamental-rights/document/index_en.htm whereas the third is available at: <http://www.statewatch.org/news/2006/jun/EU-funrights-report05.pdf>

as Article 11(2) CFREU, which establishes the obligation to respect freedom and pluralism of the media. In addition to these provisions of constitutional character, Article 2(1)(b) of the Merger Regulation lays down that the Commission must consider the development of technical progress and the interests of the intermediate and ultimate consumers when scrutinizing a merger. The question which therefore arises and seeks an answer in this section is whether, and if so how and to what extent, the Commission has made use of the above provisions so as to protect, in its assessment of mergers affecting the broadcasting sector, Union values other than (price) competition. The cases discussed below mainly concern transactions affecting the broadcasting markets. However, where appropriate, reference is also made to decisions dealing with concentrations in other sectors of the media industry to complement the analysis.

3.3.1. Public policy considerations under Article 2(1)(b) of the Merger Regulation: Development of technical progress and consumer interests

In *Bertelsmann/Kirch/Premiere*, the parties to the merger argued that the proposed project, the creation of a digital pay-TV program and marketing platform using the d-box technology,¹¹⁸ required a significant investment. According to the parties, it was only by joining forces that the infrastructure necessary for the breakthrough of digital television in Germany could be established.¹¹⁹ If the operation were approved, the parties said, it would promote technical progress. In the Commission's view, however, it was extremely doubtful whether the merger would indeed have a positive impact on technical progress because the transaction was likely to seal off the (then nascent) pay-TV market.¹²⁰ The Commission further noted that, even if the project could contribute to technical progress, this was irrelevant under Article 2(1)(b) because the criterion of technical progress contained therein 'is subject to the proviso that it does not form an obstacle to competition'.¹²¹ Based on the above, it decided to reject the parties' argument. The Commission had reached the same conclusion in *MSG Media Service*, the earlier unsuccessful attempt of Bertelsmann and Kirch to solidify their presence in the German pay-TV market.¹²²

¹¹⁸ Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 8

¹¹⁹ *Ibid.*, paragraph 119

¹²⁰ *Ibid.*, paragraph 122

¹²¹ *Ibid.*

Commission Decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 100: while '[i]t is true that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress [...] the reference to this criterion in Article 2(1)(b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition'. Commission Decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 100

The first problem with the above reasoning is that it renders Article 2(1)(b) devoid of substance. It is built on ‘a contradiction in terms, for it would impose the interpretation that [...] the presence of economic and technical progress would be unnecessary to authorize a transaction in the absence of anticompetitive effects’.¹²³ This interpretation has justifiably been criticized by commentators and practitioners alike because it deprives the parties to a concentration of the ability to put forward any dynamic efficiency claims.¹²⁴ The second problem arising from the above decisions is that no reliable economic data were relied upon to assess whether or not the notified operation could enhance technical progress. For example, in *MSG Media Service*, the Commission based its conclusion on a series of opinions of competing enterprises surveyed; unsurprisingly, competitors stated that, if the concentration were cleared, ‘they would have to review and possibly abandon existing plans or thoughts on future pay-TV supply in the digital television area’.¹²⁵ Instead of deriving this conclusion from competitors’ views, which have ‘limited, if any, evidentiary value’, the Commission should have attempted to establish the causality link between the impact of the new entity on the ability and incentive of other companies to penetrate the affected market and how this impact could obstruct the rapid acceptance of digital television.¹²⁶

It is not excluded that a rational interpretation of Article 2(1)(b) or a detailed economic analysis could have led to the same conclusion, that is, that the merger would likely harm both technical progress and competition. It bears noting that the decision to ban these mergers was not wrong, if for other reasons. We have already seen that the prohibitions were largely based on the assumption that vertical integration combined with an unparalleled first-mover advantage would grant the merged entity the ability and incentive to foreclose the market for pay-TV. It was on the basis of these foreclosure concerns that the Commission rejected the parties’ argument that it was only by pooling their resources that the infrastructure necessary for the breakthrough of digital pay-TV television in Germany could be established.¹²⁷ The way the market developed proved the Commission right. Bertelsmann (now part of the RTL Group)¹²⁸ is still alive and kicking in both free-to-air and pay-TV.¹²⁹ Deutsche Telekom has been very successful in the IPTV segment where it faces competition

¹²³ Lascowska, M. (2013). *Dynamic Efficiencies and Technological Progress in EC Merger Control*. The University of Oxford, Centre for Competition Law and Policy Working Paper CCLP (L) 29, 5. The paper is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336956

¹²⁴ Butorac Malnar, V. (2008). *The Role of Efficiencies in Merger Control: Comparative EU-USA Perspective*. *Zb. Prav.fak. Sveuc. Rij.*, 29(2), 864-5

¹²⁵ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 101

¹²⁶ Lascowska, M. (2013), *supra n.* 123, 6. Lascowska convincingly argues that the assessment of whether the merging parties in *Bertelsmann/Kirch/Premiere* can contribute to technical progress also lacks a sound economic reasoning, see in particular pp. 9-11

¹²⁷ See Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 119

¹²⁸ Note that in 2000 Bertelsmann CLT-UFA merged with Pearson TV and became the RTL group. See http://www.rtlgroup.com/www/htm/AboutUs_History.aspx

¹²⁹ <http://mavise.obs.coe.int/company?id=2093>

from Vodafone.¹³⁰ In 2010, an SES Astra subsidiary launched the HD+ program package which is becoming increasingly popular,¹³¹ thus possibly having the capacity to exercise constraints on Sky Deutschland (former Kirch)¹³² and RTL. Finally, it is worth mentioning that, in the period following the prohibition decisions, the average prices for pay-TV in Germany were significantly lower than in several other European countries.¹³³

Compared against *MSG Media Service* and *Bertelsmann/Kirch/Premiere*, the Commission follows an apparently more permissive approach in *NewsCorp/Telepiù*. This latter case did not concern the development of technical progress, but the interests of end consumers. As already mentioned, the Commission found that the concentration would lead to the creation of a near-monopoly in the pay-TV market in Italy¹³⁴ and that the conditions for the transaction to qualify as ‘rescue merger’ due to the financial difficulties faced by Stream were not fulfilled.¹³⁵ Nevertheless, the Commission concluded that the authorization of the merger, subject to conditions, would be more beneficial to consumers than a disruption caused by a potential closure of Stream.¹³⁶ A factor influencing the Commission’s decision seems to have been that neither Stream nor Telepiù had been profitable. It was therefore likely that one of them would exit the market anyway, resulting in the market being controlled by an unregulated monopolist. Put simply, the Commission felt that ‘regulated’ consolidation was less detrimental to (actual or potential) pay-TV subscribers.¹³⁷ However, it reached this conclusion without making any reference to Article 2(1)(b) and, most importantly, without substantiating in which way the consumers would be worse off if Stream went bankrupt. While the wording of the decision indicates that the Commission took into account the interests of end-users as an exception to competition, it is difficult to determine to what extent consumer protection factored into its decision to clear the merger.

Considering how the market evolved post-merger, the outcome of the decision appears to have harmed rather than improved consumer welfare. As already seen, Sky, which still controls the pay-TV market, has engaged in practices which seem to have deprived consumers of innovative services

¹³⁰ <http://mavise.obs.coe.int/country?id=2>

¹³¹ *Ibid.* This package was available free of charge in its first year and now offers 24 encrypted commercial channels and 29 unencrypted HD channels. According to SES, within three years after its launch, HD+ had been activated in 1.1 million households.

¹³² Note that in 2008 Premiere AG (former Kirch) was acquired by News Corporation

¹³³ Padilla, J., Matthew Bennett and Wim Koevoets. *Pay-TV prices in Europe - An Econometric Analysis*, 6. London, 18/06/2007. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/market_invest_paytv/annexes/annex1.pdf

¹³⁴ Commission decision *NewsCorp/Telepiù* Case COMP/M.2876 [2004] OJ L 110/73, paragraph 114

¹³⁵ *Ibid.*, paragraph 205 *et seq.*

¹³⁶ *Ibid.*, paragraph 221

¹³⁷ Nikolinakos, N. (2006), *supra n.* 33, 168

(e.g. IPTV packages). Moreover, in the period following the decision, pay-TV prices in Italy were the second highest in Europe.¹³⁸

3.3.2. Media pluralism and cultural diversity considerations

In *MSG Media Service*, the Commission seems to have taken account of the concerns related to the concentration of significant (opinion-forming) power in the hands of one media owner. In assessing the competitive constraints that potential competitors could exert on the merged entity, the Commission noted that

‘[t]he only currently known company wishing to offer in Germany similar services to those to be provided by MSG is Selco [...]. Selco is a joint venture between the private television broadcaster PRO 7 (50.1 %) and News Corporation Ltd (49.9 %), which belongs to the Murdoch group. [...] It should [...] be noted that **47.7 % of the shares in PRO 7 are held by Mr Thomas Kirch, the son of the owner of the Kirch group.** [...] **PRO 7 therefore should probably be included at least in the sphere of influence of the Kirch group.** Against this background it is hardly to be expected that Selco will enter into active competition against MSG’ [emphasis added].¹³⁹

National regulatory instruments in support of media pluralism adopt the same approach. For example, Article 5(3) of Greek Law 3592/2007 on media concentration provides that the rules established therein apply to both the person in ‘control’ of a media undertaking and her family members.¹⁴⁰ But, achieving the same objective as a regulatory tool aiming to protect media pluralism does not imply that the Commission’s reasoning in *MSG* cannot be grounded on economic principles. In other words, this approach should not necessarily be regarded as an exception to competition. For example, it is a commonly accepted principle that a vertically integrated company enjoying significant market power will have the ability and incentive to favor its own upstream or downstream services.¹⁴¹ The same logic may apply by analogy to the situation in which two undertakings are controlled by two persons that are connected by blood or marriage. Moreover, including Pro7 in the sphere of influence of the Kirch group is supported by the Merger Regulation, which defines the concept of ‘control’ in a flexible and broad manner. More particularly, Article 3(2) lays down that ‘control shall be constituted by rights, contracts *or any other means which*, either separately or in combination and *having regard to the considerations of fact* or law *involved, confer the possibility of exercising decisive*

¹³⁸ Padilla, J., Matthew Bennett and Wim Koevoets (2007), *supra* n. 133

¹³⁹ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 65

¹⁴⁰ Law No. 3592/2007 of 19/07/2007 on Media Concentration and Licensing Procedures, Official Gazette, No. 161, at p. 3371. See in particular Article 5(3)(a) and (b): *Έλεγχος υφίσταται όταν φυσικό ή νομικό πρόσωπο, που συμμετέχει και σε άλλο ηλεκτρονικό μέσο ενημέρωσης της αυτής μορφής, επηρεάζει με οποιονδήποτε τρόπο ουσιαστικά τη λήψη αποφάσεων της επιχείρησης σχετικά με τον τρόπο διοίκησης και την εν γένει λειτουργία της. [...] Οι ανωτέρω προϋποθέσεις ελέγχου ισχύουν και για τους συζύγους και τους συγγενείς σε ευθεία γραμμή απεριορίστως και εκ πλαγίου μέχρι και τρίτου βαθμού εξ αίματος ή εξ αγχιστείας*

¹⁴¹ See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraphs 31 et seq.

influence on an undertaking’ [emphasis added].¹⁴² Even if the son of Kirch was not a majority stakeholder in Pro7, the 47.7% of shares he held in the company was, based on existing case law, enough to consider that he (and, by analogy, his father) was in control of Pro7.¹⁴³ The Commission would have reached the same conclusion by examining the coordinated effects to which the concentration could give rise. Pursuant to the Horizontal Merger Guidelines, coordination may take various forms, including market division, for instance by customer characteristics.¹⁴⁴ In this case, market division arrangements seem to have taken place. As opposed to the merging firms, Pro7 would only market *foreign-language* programs in Germany and, according to the information available to the Commission at the time of the decision, it was not planning to engage in the provision of TV content in the German language, but rather to keep operating ‘in a niche market with a limited subscriber base’.¹⁴⁵ The above analysis clearly illustrates that, if the Commission is willing to apply competition law in a pluralism-friendly manner, it can do so without necessarily deviating from an economics-based analysis.

In recent years, the Commission has disassociated merger control from pluralism and cultural diversity considerations. Two examples of this arguably rigid application of competition law are *NewsCorp/BSkyB* and *NBC/Comcast*.¹⁴⁶ The former has already been extensively discussed in Chapter 3.¹⁴⁷ For our purposes here, it bears repeating that, in addition to the possible anti-competitive effects it was likely to create,¹⁴⁸ the proposed concentration also raised major pluralism concerns. More particularly, it was feared that, if the transaction were approved, it would give media entrepreneur, Rupert Murdoch, a dangerous level of control of the UK media.¹⁴⁹ The Commission was limited to noting that relevant issues are for the UK authorities to address under Article 21(4)¹⁵⁰ of the Merger Regulation¹⁵¹ and decided to approve the concentration on the grounds that it did not

¹⁴² In an equally flexible and broad manner, Article 3(3)(b) provides that ‘control is acquired by persons or undertakings which: (a) are holders of the rights or entitled to rights under the contracts concerned; or (b) *while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom*’

¹⁴³ In cases concerning the application of the EU Merger Regulation to minority shareholdings of between 25.96% and 36.9% can confer de facto sole control on an undertaking. I refer to percentages because the decision does not give any details on Kirch’s son voting and other rights in Pro7

¹⁴⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 40

¹⁴⁵ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 65

¹⁴⁶ Commission decision *Comcast/ NBC Universal*, Case No COMP/M.5779 [2010] OJ C228/2

¹⁴⁷ See Part 3

¹⁴⁸ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 28

¹⁴⁹ See, Ofcom (2010). *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*. Retrieved from:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78516/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf

¹⁵⁰ See Chapter 1, fn. 89

¹⁵¹ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 309

raise serious doubts as to its compatibility with the common market.¹⁵² In *NBC/Comcast*, the Commission was called upon to decide whether the creation of a joint venture by Comcast (a cable network operator which is also involved in the licensing of TV programming and TV channels to pay-TV operators and in the production of motion pictures and TV programs) and NBCU (a global media and entertainment company, active in the development, production, marketing and distribution of entertainment, news and information) is compatible with the common market.¹⁵³ After a brief analysis of the structure of the affected markets, the Commission concluded that the notified operation would not have any significant impact as regards the availability of TV content and was therefore unlikely to harm cultural diversity.¹⁵⁴ The reasoning that led to this conclusion is problematic for three reasons: first, the Commission seems to accept the parties' argument that the transaction should be approved because, as a result of the significant growth in the number of new TV channels across Europe, there has been an increase in the demand for new content. However, as was already seen above and in Chapter 2, an increase in the number of TV channels is neither an indication that the market is competitive (e.g. the channels may be owned by the same group) nor an incentive to provide original content. Second, the Commission appears to accept the parties' claim that European TV program producers are strong competitors *inter alia* because, under the Audiovisual Media Services Directive, broadcasters are required to reserve the majority of their broadcasting time for European works. The assumption that European TV program producers exert competitive constraints on their US counterparts due to the European works quota rule is unfounded. As explained in Chapter 1, from a cultural diversity perspective, this rule is ill-designed because it imposes no quality requirements.¹⁵⁵ Third, the Commission refrains from considering the effects of the concentration on cultural diversity. The conclusion that the latter is not threatened as a result of the creation of the joint venture is derived from the finding that the transaction will not significantly impede effective competition.¹⁵⁶ The Commission followed this approach in several other cases, including *HBO/Ziggo*,¹⁵⁷ *Bertelsmann/Planeta/Circulo*¹⁵⁸ and *Bertelsmann/KKR*.¹⁵⁹ There have also been cases such as *SFR/Télé 2*¹⁶⁰ and *Unitymedia/LGE*¹⁶¹ where no mention of cultural diversity is

¹⁵² *Ibid.*, paragraph 310

¹⁵³ *Ibid.*, paragraphs 2-6

¹⁵⁴ *Ibid.*, paragraph 44

¹⁵⁵ See Chapter, Part 2.b. 'Existing internal market instruments that include provisions that are specifically aimed at safeguarding media pluralism'

¹⁵⁶ *Ibid.*, paragraphs 36 et seq.

¹⁵⁷ Commission decision *HBO/ Ziggo/ HBO Nederland*, Case No COMP/M.6369 [2012] OJ C 72/2, paragraph 53

¹⁵⁸ Commission decision *Bertelsmann/Planeta/Circulo*, Case COMP/M.5838 [2010] OJ C 228/3, see in particular, paragraphs 39, 49, 57 and 59

¹⁵⁹ Commission decision *Bertelsmann/KKR*, Case COMP/M.5533 [2009] OJ C 240/01. See in particular paragraph 79

¹⁶⁰ Commission decision *SFR/Télé 2*, Case COMP M. 4504 [2007] OJ L 316/57

¹⁶¹ Commission decision *Liberty Global Europe/Unitymedia*, Case COMP/M. 5734 [2010] OJ C36/1

made. Mere or no references to this value in the assessment of a merger affecting cultural industries renders Article 167(4) TFEU devoid of any mandatory effect.¹⁶²

The above analysis sufficiently proves that public policy considerations have, at best, played limited to no role in determining the outcome of a merger decision. The approach followed in *NBC/Comcast*, suggests that the Commission perceives cultural diversity as a spontaneous result delivered by the undistorted functioning of the markets, objectives whose realization depends on the outcome of market forces. In *Newscorp/Telepiù*, the interests of the consumers seem to have been taken into account as an exception to competition policy but the Commission abstained from conducting a detailed assessment to substantiate this finding and therefore the extent to which such interests determined the outcome of the decision is not quantifiable. Lately, the Commission seems eager to distance itself from the protection of objectives that it does not consider relevant to EU merger control, including media pluralism, the *Newcorp/BSkyB* decision being the most prominent example of this approach.

4. Rethinking the Commission's merger practice in the broadcasting sector: Exercising merger control in a pluralism-friendly manner

Moving from theory to practice, this section will examine how pluralism-specific considerations can be integrated into each step of the assessment of a merger affecting the broadcasting sector. I will use the example of a concentration involving two free-to-air broadcasters. However, as I will explain in more detail below, the suggestions made throughout this section are also appropriate for the assessment of mergers involving other players that provide content for free as well as for the assessment of mergers affecting markets that entail the exchange of content for money.

4.1. Market definition in the assessment of mergers affecting FTA TV markets: What is the relevant viewers' market?

As discussed above, in the case of a merger affecting free-to-air TV markets, the Commission is willing to identify the advertising markets affected by the transaction but not the relevant audience markets. The argument it puts forward to explain this approach is that, in the absence of a trade relationship between the broadcaster and the viewers, there is no market to define. This argument, I

¹⁶² The problems that arise from this approach have been examined in Chapter 3, Part 3

say, is unconvincing on the grounds that viewers' attention is a valuable input and a scarce resource allocated between broadcasters through competition. Hence, there is a market for audiences, which must be defined for the purposes of competition law for at least two reasons. First, content that advertisers regard as substitutable is not a proxy for content that viewers regard as substitutable. Second, FTA TV is a two-sided platform exhibiting indirect network effects that need to be defined and measured because the interdependence between the two demands exercises competitive constraints on the broadcaster that affect the outcome of the decision. In view of the above, the exercise of market definition should consist in identifying the effective alternative sources of supply for both the advertisers *and* the viewers.

The fact that in the case of FTA TV there is no exchange of money, i.e. no benchmark price against which to apply the hypothetical price increase to run a traditional SSNIP test, is not a valid reason for refusing to define the viewers' markets affected by the notified transaction. The instruments used to exercise merger control must be flexible enough to be able to grasp dimensions of competition that are relevant to the market under scrutiny. In its notice on the definition of the relevant market for the purposes of Community competition law, the Commission itself notes that '[t]here is a range of evidence permitting an assessment of the extent to which substitution would take place [...], *depending very much on the characteristics and specificity of the industry and products or services that are being examined*. The same type of evidence may be of no importance in other cases' [emphasis added].¹⁶³ As the example that follows will illustrate, if adjusted to the particularities of free content markets, a SSNIP test has the capacity to identify what are the viewers' switching rates and how they affect competition.

In the case of a traditional application of the SSNIP test, the first step would consist in examining how consumers would react to price increases. In our case, however, content is provided for free. We may overcome this barrier by asking what viewers would do if there was a change in quality rather than price.¹⁶⁴ A widely accepted quality indicator in FTA TV that could be used to conduct the substitutability assessment is the amount of time devoted to the transmission of advertisements. The assumption that viewers dislike advertising has been verified by empirical studies.¹⁶⁵ On this basis, it is possible to run a hypothetical monopolist test by considering the likely

¹⁶³ Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, paragraph 25

¹⁶⁴ Europe Economics (2002), *supra n.* 10, 88

¹⁶⁵ See, for instance, Wilbur, K. C. (2008). *A Two-Sided, Empirical Model of Television Advertising and Viewing Markets*. Marketing Science, 27 (3), 356-378, and Jeziorski, P. (2011). *Merger enforcement in two-sided markets*. Working Paper, John Hopkins University

effects of a small but significant increase in the number of advertising minutes per hour, keeping other broadcasters' content constant.¹⁶⁶ If this change leads viewers to watch more of the other available channels, this would imply that the broadcaster competes in a wider viewer market which includes these other channels. If this change, however, leads viewers to spend less time watching television, this would indicate that the hypothetical monopolist holds significant power in attracting viewers to its content.¹⁶⁷

This type of analysis need not be limited to one quality parameter. The 'stated preferences' method, and more particularly conjoint analysis, may lead to a more nearly complete assessment of the viewer-side constraints exerted on the broadcasters concerned. Conjoint analysis 'confronts respondents with hypothetical choices among different products, which are carefully made different on different aspects while keeping constant the others'.¹⁶⁸ It is in essence a SSNIP test that takes account of more than one dimension of competition. For example, in the case of ad markets, a conjoint analysis may ask advertisers which broadcaster they would prefer if they had to choose between two broadcasters that charge the same price but appeal to viewers with different demographic profiles and vice versa.¹⁶⁹ In the case of the viewers' market, in addition to the amount of time devoted to the transmission of advertisements, variables that may be used to conduct a conjoint analysis include content variety, the availability of programming, i.e. whether the broadcaster makes its programming available when the consumer wants to see it (e.g. through catch-up TV or archive),¹⁷⁰ and even the introduction of a subscription fee.¹⁷¹

This market definition analysis would largely depend on data collected with consumer surveys. The Commission itself acknowledges that surveys on usage patterns and attitudes are an appropriate instrument to establish whether an economically significant proportion of consumers considers two products as substitutable¹⁷² and has relied on their results in merger investigations, but unfortunately, only on a few occasions.¹⁷³

¹⁶⁶ Europe Economics (2002), *supra n.* 10, 89

¹⁶⁷ *Ibid.*

¹⁶⁸ Filistrucchi, L., Damien Geradin and Eric van Damme (2012). *Identifying two-sided markets*, 15. Discussion Paper, TILEC DP 2012-008

¹⁶⁹ *Ibid.*

¹⁷⁰ Csorgo, L. and Ian Munro (2011). *Market Definition Issues for Audio and Audio-Visual Distribution Products and Services in a Digital Environment, A Report Prepared for the Canadian Radio-television and Telecommunications Commission*. Retrieved from: http://www.crtc.gc.ca/eng/publications/reports/rp110215.htm#_ftn7 Comparable parameters were used in *Universal/EMI* where the Commission based the assessment of whether recorded music in physical format is a substitute for recorded music in digital format on characteristics such as sound quality, usage restrictions and the art work (covers, booklets and lyrics). See Commission decision *Universal Music Group/EMI Music*, Case No. COMP/M.6458, [2012] OJ C 220/8, paragraph 127

¹⁷¹ YouTube is introducing subscription fees for content without ads: <http://www.sfgate.com/technology/article/YouTube-will-start-charging-to-see-music-videos-5706889.php>

¹⁷² See, for instance, Commission notice on the definition of relevant market for the purposes of Community competition law [1997]

The proposed method has several advantages. First, as opposed to qualitative techniques,¹⁷⁴ a conjoint analysis would not simply define the nature of the indirect network effects between the viewers and the advertisers, but would further allow the Commission to measure their size, thus leading to a more accurate assessment of the competitive constraints exerted on the merging parties.¹⁷⁵ Moreover, consumer surveys may play a major role in informing the substitutability assessment in cases where econometric data such as diversion ratio estimates are not available.¹⁷⁶ Even in cases where econometric analyses were available,¹⁷⁷ consumer surveys have proved useful for complementing or testing the validity of their results.¹⁷⁸

These consumer surveys can be conducted by the parties to the transaction or by the Commission itself. If the survey is conducted by the parties, the report should include detailed information about how the research was carried out.¹⁷⁹ This would allow the Commission to check whether the parties committed errors or made choices that may have produced biased results. For example, in the case concerning the joint venture between BBC, Channel Four and ITV relating to the video on demand sector (Project Kangaroo), the results of the survey conducted by the parties were (correctly) not relied upon by the Competition Commission because, contrary to the small price increases logic underpinning the SSNIP test, consumers were asked what they would do if content prices increased by as much as 200%.¹⁸⁰ If the Commission takes the initiative to commission its own

OJ C 372/3, paragraph, 41; Commission (EU) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3, paragraph 29; DG Competition (2010). *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Article 101 and 102 TFEU and in Merger Cases*. Staff Working Paper. Retrieved from: http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf

¹⁷³ See, for instance, Commission decisions *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6; *KLM/Martinair*, Case COMP/M. 5141 [2009] C 51/4; *Pernod Ricard/V&S*, Case COMP/M. 5114 OJ [2008] C 219/5; *Lufthansa/SN Airholding*, Case COMP/M. 5335 OJ [2009] C 295/8; *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6 (the full text of the decision is available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf) and *Statoilhydro/Conocophillips*, Case COMP/M. 4919 OJ [2009] C 201/06 (the full text of the decision is available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4919_20081021_20600_en.pdf)

¹⁷⁴ Take the example of deductive reasoning which is premised on a logical assumption. In the case of advertising-financed TV, we would take for granted that viewers dislike advertising. This would be correct but we would be unable to draw any conclusions on the size of the network effects. For an overview of the qualitative methods that may be employed when defining two-sided markets see Filistrucchi, L. *et al.* (2012), *supra n.* 168, 12-15

¹⁷⁵ *Ibid.*, 13-15

¹⁷⁶ See OECD (2011). *Economic Evidence in Merger Analysis*, 255: ‘The diversion ratio from product A to product B measures the proportion of the sales of product A lost due to a price increase of A’. In our case, it would be an increase in advertising minutes per hour or any other negative change in quality

¹⁷⁷ This was, for instance, the case in Commission decisions *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6. While the Commission found the econometric analysis useful, it also found it incomplete because it did ‘not address the loss in potential competition between the merging parties, nor competition on factors other than price, such as frequencies, advertising or ancillary services’. See OECD (2011), *supra n.* 176, 258

¹⁷⁸ DG Competition (2010), *supra n.* 172, paragraph 30

¹⁷⁹ *Ibid.*, paragraph 39

¹⁸⁰ Competition Commission (2009). *A report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector*, paragraph 4.10: ‘The survey carried out by the parties was intended to inform our understanding of the substitutability of UK and non-UK content. However, in our view the results might

consumer survey, it would need to grasp the most relevant demand parameters prior to conducting the interviews. To this end, interested third parties, i.e. the consumers, should have a say in the questionnaire design and instruments of data collection.¹⁸¹ In the case of the viewers market, an interested third party which could help the Commission choose relevant variables or more generally provide useful information on consumption habits in the media markets affected by the merger is EURALVA, an alliance of national associations representing the interest of listeners and viewers of broadcasting.¹⁸²

This approach has certain drawbacks, most notably the possibility for a divergence between stated and real preferences;¹⁸³ if what consumers say they prefer is different from what they actually prefer, the surveys, no matter how well designed, will produce inaccurate findings. This obstacle, however, can be overcome by running a ‘revealed preferences’ study. The revealed preferences method is based on ‘data on the actual behavior of market participants as well as the estimation of demand for the two sides of the market’.¹⁸⁴ For example, to measure demand on the advertisers’ side, it would be necessary to collect data on advertising rates, the quantity of advertising slots and the demographic profile of the viewers to which a broadcaster appeals.¹⁸⁵ On the viewers’ side, we could measure the volume of consumption (minutes of watching TV), reach (the percentage of people who are exposed to a broadcaster in a given period of time), the amount of time the broadcaster in question devotes to advertising, and multi-sourcing (the average number of broadcasters that viewers used in a given period of time).¹⁸⁶ In each Member State there is at least one company (e.g. Nielsen, GfK, TNS, etc.) providing audience measurement services and, in most cases, broadcasters have

overestimate actual switching for [...] [c]onsumers were asked about their likely responses to relatively large increases in the price of UK TV archive content relative to other options. They were asked how they would respond if UK TV archive content, instead of being free, cost £0.50, and how they would respond if prices increased from £0.50 to £1.50, while the price of other options (such as non-UK TV content) was variously free or cost £0.50. This makes it difficult to interpret the results of the survey within the context of the SSNIP test, which is based on proportionately small price increases.’ Retrieved from: http://webarchive.nationalarchives.gov.uk/20140402141250/http://competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/543 See also OFT (2008). *Completed acquisition by Global Radio UK Limited of GCap Media plc*, paragraph 201

¹⁸¹ The Commission itself notes in its *Staff Working Document (SWD) on Best Practices for the submission of economic evidence in competition cases* that, if it decides to run a survey, it is appropriate to consult interested third parties. See DG Competition (2010), *supra n. 172*, fn. 30. While this SWD does not define the term ‘interested third parties’, the document outlining DG Competition’s best practices on the conduct of merger control proceedings explicitly refers to consumer associations as third persons whose views the Commission welcomes throughout a merger investigation. See DG Competition (2004). *Best practices on the conduct of merger control proceedings*, paragraph 34, available at: <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf> The legal basis is Article 16(3) of Commission Regulation (EC) No 802/2004 the implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ [2004] L 133/1.

¹⁸² <http://www.euralva.org/wordpress/>

¹⁸³ Camesasca, P.D., Maarten Meulenbelt, Thomas Chellingsworth, Ief Daems and Julie Vandebucche (2009). *The Dutch Yellow Pages Merger Case—2-1 Will Go!* European Competition Law Review 30(1), 7 referring to Louviere, J.J., D.A. Hensher and J.D. Swait (2000). *Stated choice methods: Analysis and applications*. Cambridge: Cambridge University Press

¹⁸⁴ Filistrucchi, L. *et al.* (2012), *supra n. 168*, 17

¹⁸⁵ *Ibid.*

¹⁸⁶ Ofcom (2012). *Measuring media plurality*, 19-20

access to (their own *and* their competitors’) audience behavior-related data. Under Article 11(1) of the Merger Regulation, the Commission may, by simple request or decision, obtain the above data from the merging broadcasters, the broadcasters’ competitors and other relevant parties as it sees fit.¹⁸⁷

While one may argue that the Commission has only ninety working days to decide whether or not to approve a merger,¹⁸⁸ the methodology applied to the prohibition decision concerning the proposed acquisition of sole control by Ryanair of Aer Lingus clearly shows that the proposed analysis is not only defensible in theory but also workable in practice. To assess demand-side substitutability, the Commission conducted consumer surveys at Dublin airport. Where data regarding distances and travelling times derived from the responses to the questionnaire were incomplete or manifestly questionable, the Commission obtained the information it needed from websites providing mapping and route planning services.¹⁸⁹ The Commission also took into account the views of airports and of Member States’ civil aviation authorities that were expressed during the course of the investigation, *after* comparing them against the results of reports such authorities made independently of the proposed transaction.¹⁹⁰ The Commission complemented its analysis with other data, including the estimated proportion of leisure passengers on a route, the impact of the regulatory framework on substitutability, the merging parties’ marketing practices and the results of a price correlation analysis it conducted during the investigation.¹⁹¹

One might ask whether the proposed method can really make a difference. The answer is yes, a big one. The approach the Commission followed in *Newscorp/BSkyB* illustrates why its lack of interest in examining substitutability from a viewer’s perspective is likely to lead to erroneous or incomplete market definitions that may ultimately affect the outcome of the decision. For example, in this case, the Commission avoided defining the market for audiences, implicitly assuming that viewers are indifferent to advertising.¹⁹² Adopting the Commission’s reasoning would mean accepting that a broadcaster may raise ad prices and/or increase the advertising/content ratio without worrying about viewers switching to another provider. However, as previously mentioned, empirical

¹⁸⁷ See also DG Competition (2004), *supra n.* 181, paragraphs 26-28

¹⁸⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/10J L 24/1, Article 10(3)

¹⁸⁹ Commission decision *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6, paragraph 99(1)

¹⁹⁰ *Ibid.*, at (3)

¹⁹¹ *Ibid.*, at (4)-(8)

¹⁹² Filistrucchi, L. *et al.* (2012), *supra n.* 168 fn. 54

studies have found that demand for advertising affects demand for content because audiences dislike advertising.¹⁹³

In *Newscorp/BSkyB*, the Commission also found that the market for the provision of broadcasting services to end-users in the UK and Ireland encompasses all technical means of distribution, including satellite, DTT and IPTV.¹⁹⁴ It based this finding on the replies given by content distributors, not viewers.¹⁹⁵ However, in its report on the same transaction, Ofcom found that IPTV was not (and is unlikely to become in the near future), a traditional TV substitute. Ofcom's conclusion was based on TV content viewing habits.¹⁹⁶

Failure to take account of what type of content audiences regard as interchangeable may also lead to the definition of the relevant product market in a broad manner, thus making it less likely to find that the merger will adversely affect competition. For example, in *Newscorp/BSkyB*, the Commission made a distinction between the market for sports events, the market for premium films and the market for *other TV content* without, however, specifying what it meant by 'other TV content'.¹⁹⁷ It simply referred to documentaries and TV series as examples of the types of content covered by that category.¹⁹⁸ Unsurprisingly, the Commission found that neither News Corporation nor BSkyB were holding significant market power in the markets for sale and acquisition of other TV content respectively.¹⁹⁹ However, in its report on Project Kangaroo, the Competition Commission, largely based on consumer survey results, concluded that the market for TV content was further subdivided into different markets on the basis of form, availability, origin and genre as follows:

'(a) Short form vs long form. Short-form video includes clips from longer videos or short video clips uploaded by users (user-generated content). Long-form content refers to full-length material.'

¹⁹³ Wilbur, K. C. (2008), *supra n.* 165

¹⁹⁴ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, see paragraphs 100 *et seq.*

¹⁹⁵ *Ibid.*, paragraph 104

¹⁹⁶ Ofcom (2010). *Report on public interest test on the proposed acquisition of British Sky Broadcasting Group plc by News Corporation*, paragraph A2.267. Retrieved from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78516/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf Another report reaching the same conclusion is Ofcom (2012). *Securing long term benefits from scarce low frequency spectrum*, 6. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/uhf-strategy/statement/UHF_statement.pdf

¹⁹⁷ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 30

¹⁹⁸ *Ibid.*

¹⁹⁹ For a detailed discussion of the approach to market definition the Commission followed in this case and its implications for competition and media pluralism see Chapter 3, Part 4, *The Commission's narrow understanding of 'competition' in the media*

(b) *Catch-up vs archive. Catch-up content is made available soon after it is first broadcast on linear TV (generally within hours and for up to 30 days). Archive content is content that is no longer available within the catch-up window.*

(c) *Content of UK origin vs content of non-UK, primarily US, origin*

(d) *Genre (including drama, entertainment, comedy, sport, news, etc.)*.²⁰⁰

It bears noting that, while in several decisions the Commission has considered sub-dividing the market²⁰¹ in a way similar to the above, it has meticulously left open the question of whether the market for TV content should be further segmented.²⁰²

The above analysis convincingly demonstrates that the Commission can and must define the relevant viewers' market in cases involving FTA broadcasters. This is becoming more pressing and imperative because, with the advent of digital media, public broadcasters are increasingly getting involved in projects aiming to deliver free content on new distribution platforms. For example, in the UK, BBC Worldwide partnered with *inter alia* ITV, Channel 4 and Channel 5 and created a digital terrestrial TV/on-demand platform called YouView.²⁰³ The platform is free-to-air and offers broadcasting content (channels and VOD) separately either on the main YouView guide, which does *not* carry advertising,²⁰⁴ or through personal portal sites.²⁰⁵ A similar platform involving public broadcasters ARD and ZDF was also envisaged by German operators.²⁰⁶ As hybrid distribution platforms constantly emerge, the Commission may soon be called upon to clear a transaction in

²⁰⁰ Competition Commission (2009), *supra n.* 180, paragraph 2.6. For more details see paragraphs 4.15 *et seq.* Similar remarks can be made about the different approaches followed by the European Commission and the Conseil de la Concurrence concerning the French broadcasting market. See Commission decision of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty, Case No IV/36.237 [1999] OJ L 90/6, paragraphs 34-36 (the Commission refrained from delineating the boundaries of the market for the acquisition of sports and film rights) and compare against *Décision n° 98-D-70 du 24 novembre 1998 relative à la saisine des sociétés Multivision et Télévision Par Satellite (TPS) dans le secteur des droits de diffusion audiovisuelle* (see p. 17) where the Conseil de la Concurrence, based on a study submitted by the Conseil supérieur de l'audiovisuel (CSA) on film consumption that concluded that the offer of American films does not fulfill the needs of French audience, divided the market into two segments, namely the market for French films and the market for American films

²⁰¹ See, for instance, *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 63 where it considers dividing the market for films in a market for US-produced films and a market for European films, and Commission decision *TPS*, Case No COMP/JV.57 [2002] OJ C 137/23, paragraph 16 where it considered whether the market for pay-TV channels should be further segmented by thematic content (such as premium, sports, movies, news, youth channels, etc.)

²⁰² See Commission *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 66; Commission decision *News Corp/Premiere*, Case No COMP/M.5121 [2008] OJ C 219/4, paragraph 35, and Commission decision *TPS*, Case No COMP/JV.57, [2002] OJ C 137/23, paragraph 16

²⁰³ <http://www.youview.com/>

²⁰⁴ McCabe, M. *YouView will encourage competition, says chief*. 16 September 2010, MediaWeek. Retrieved from: <http://www.mediaweek.co.uk/article/1028931/youview-will-encourage-competition-says-chief>

²⁰⁵ Bania, K. and Richard Burnley (2014). *Co-operation between broadcasters in the new media age: Rethinking national competition policy*. *European Competition Law Review* 35(5), 220

²⁰⁶ However, the transaction failed to get regulatory approval by the German competition authority, Bundeskartellamt. For more information on this project see, for instance, Krieger, J. *ARD and ZDF establish VOD portal*. 25 April 2012, RapidTVNews. Retrieved from: <http://www.rapidtvnews.com/index.php/2012042521488/ard-and-zdf-establish-german-vod-portal.html>; Briel, R. (2012), *supra n.* 84, and Bundeskartellamt *ARD/ZDF Online Platform "Germany's Gold" raises competition concerns*. Press Release of 11/03/2013. Retrieved from: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/11_03_2013_Germanys-Gold.html

which broadcasters, entirely or partly financed through license fees, participate. In this case, an examination of whether the new platform will have the ability and incentive to raise advertising prices post-merger can hardly produce accurate conclusions on whether the platform will indeed have the power to distort competition. But the suggestions made above are by no means limited to the broadcasting sector. Most companies in today's digital media economy are advertising-based. Hence, if properly adapted to the particularities of each case,²⁰⁷ the proposed approach to market definition may be used in competition cases involving undertakings that provide free content in exchange for attention, including online search engines such as Google and Bing, news aggregators such as Feedly and Google News, social networking sites like Facebook and LinkedIn, etc.

The proposed methods may (and, arguably, should) also be used in cases of two-sided markets where audiences are required to pay to access the platform. For example, in mergers affecting the pay-TV markets, the Commission has referred to the level of subscriptions that viewers are willing to pay as a key parameter to define the markets affected by the merger.²⁰⁸ However, pay-TV programming is sold in bundles of several channels and, as a result, audiences are not able to indicate their preferences for a particular channel or for a specific program provided by that channel.²⁰⁹ This criterion leads to a substitutability analysis that has the main drawback of market definition in FTA TV markets, that is, a focus on ad prices casts a shadow on the audience's voice. Taking viewers' interests into account as suggested above would address this problem.²¹⁰

4.2. Competitive assessment: How can the effects on content diversity and quality be measured?

In Part 3, I mentioned that the Commission refrained from discussing the likely adverse effects of a concentration on content diversity and quality. I also demonstrated why its assumption that supply diversity will deliver varied and high-value content is ill-founded. In this section, I attempt to

²⁰⁷ For example, in the case of search engines, variables to conduct a conjoint analysis could be the amount of ads displayed alongside the search results, the relevance of the search results and the introduction of a subscription fee to use the search engine. In the case of free newspapers, it may be that readers are indifferent to advertising because they can easily avoid it. In this case, we may ignore the two-sidedness of the market on the advertisers' side, i.e. the presence of a readers' side does not constrain a newspaper's ability to increase advertising prices. See Filistrucchi, L. *et al.* (2012), *supra n.* 168, 13

²⁰⁸ See *supra n.* 6

²⁰⁹ Goodman, E. (2004), *supra n.* 16, 1426

²¹⁰ Note that the Commission has acknowledged that viewers' interests should be taken into account when defining the relevant pay-TV markets. However, it largely refrained from conducting a detailed analysis of the factors that shape the provision of pay-TV services from the audiences' perspective. For example, in *Newscorp/BSkyB* and *SFR/Tele2*, it based the assessment on replies given by distributors (the platforms carrying the content) and TV channel suppliers, not the subscribers themselves. See Commission decision *Newscorp/BSkyB*, Case COMP/5932 [2011] OJ C 37/02, paragraph 46, fn. 35 and Commission decision *SFR/Télé 2 France*, Case COMP/M.4504 [2007] OJ L 316/57, paragraphs 98-104 respectively

show how theory and practice can guide the Commission in incorporating related considerations into its merger decisions in the broadcasting industry.

The argument that the impact of a concentration on content diversity should not be marginalized is not democracy rhetoric. In Chapter 3 it was extensively discussed that competition in media markets has several non-price dimensions, including variety and quality.²¹¹ Naturally, assessing whether a merger will have adverse effects on non-price competition is a question of fact that cannot be determined in the abstract. However, developing a framework within which this assessment can be conducted is far from an impossible task. For example, the question of whether a merger is likely to reduce content diversity can be answered by reference to the importance of fixed costs. The higher these costs are, the more the new entity will be incentivized to provide the same content over all its constituent parts.²¹² For instance, provided that both of them continue to exist post-merger, two broadcasters attracting viewers with the same demographic profiles can be expected to depend on the same content (e.g. a successful TV series) or the same content provider (e.g. a news agency) to generate audiences. This assumption is based on sector-specific economics; we have already seen that in media markets in general and in broadcasting markets in particular content creation (or acquisition) is very expensive but distribution fairly cheap. In their attempt to rationalize resources, the broadcasters are highly likely to seize the opportunity to exploit large economies of scale. Content diversity reductions may also be linked to the incentive to preempt entry into the market.²¹³ This incentive is particularly strong in the case of new media markets because they involve significant network effects, thus being vulnerable to tipping in favor of the first-mover.²¹⁴ Pre-emption becomes easier in cases where the merging parties control access to a valuable input such as premium content. As seen above, the Commission partly based its early prohibition decisions dealing with mergers affecting the then nascent pay-TV market on this concern,²¹⁵ and rightly so. Market data needed to conduct an analysis, as suggested above, are not difficult to collect from the merging

²¹¹ See Chapter 3, Part 4

²¹² OECD (2003), *supra n.* 31, 44

²¹³ *Ibid.*

²¹⁴ *Ibid.*, 40

²¹⁵ See, for instance, MSG Media Service, paragraphs 56 and 62: ‘experience in other countries shows that pay-TV suppliers or cable network operators are the most likely suppliers of technical and administrative services for pay-TV. [...]As the only supplier of pay-TV so far, Bertelsmann/Kirch already have, through Premiere, a subscriber base which they can also use in future digital pay-TV. The parties object in this respect that Premiere’s subscriber base would not be sufficient to ensure a pay-back on the investment in MSG. This may be true. However, the risk of investment in a digital infrastructure is significantly reduced if the service provider can build on a subscriber base of analog pay-TV customers. Each competitor of MSG would have to build on a subscriber base which the pay-TV suppliers handled by them would have to first acquire. Competitors of Bertelsmann/Kirch on the market for pay-TV would, in contrast to the parent companies of Premiere, have to start from scratch. The same applies to potential competitors of MSG in the area of technical and administrative services’

parties, their competitors, other interested third parties (e.g. companies operating upstream such as news wholesalers), and publicly available sources.

As regards quality, one may argue that this depends on the idiosyncrasy of each viewer and that, as a result, no meaningful analysis of the quality of the content offered or the provider itself can take place in a merger decision. Indeed, quality is a subjective variable. However, subjective does not mean immeasurable. The approach followed in the prohibition decision concerning the proposed acquisition of sole control by Ryanair of Aer Lingus is a good example illustrating how related considerations can inform a competition analysis. Based on the results of the consumer survey conducted at Dublin airport, the Commission decided to ban the transaction *inter alia* because the elimination of competition between the two air carriers would ‘result in a reduction of service quality’ and ‘of choice between service models’.²¹⁶ Similar to *Ryanair/Aer Lingus*, the Commission can integrate degradation of quality into the theory of harm with reference to parameters to which viewers, not the merging parties or their competitors, attach particular importance.

Another example exemplifying an economics-based approach that seeks to understand the impact of a concentration on non-price competition is *Universal/EMI*, where the Commission found that the notified transaction would adversely affect the development of emerging online platforms and their ability to geographically expand into various digital markets, ultimately depriving EU consumers of innovative services.²¹⁷ This was likely to materialize, the Commission said, because the concentration would grant the merged entity the ability and incentive to extract more onerous licensing terms from these platforms. The link between an entity that may leverage its combined size in relation to its customers/platforms that bring new ways to consume music and the potential harm to innovation is rather straightforward. What deserves a closer look is the approach the Commission followed to determine whether the entity would, as a result of the merger, acquire the power to engage in exploitative practices that could produce this negative effect. In the event, the Commission conducted an econometric analysis which used the retail revenue share as the measure of each company’s size in a given country/platform/period triplet. This retail revenue share was a measure adjusted to the quality of the record company’s repertoire.²¹⁸ To control for repertoire quality, the Commission took account of variables such as the chart position of each track, age (months since first

²¹⁶ Commission decision *Ryanair/Aer Lingus*, Case COMP/M. 4439 [2007] OJ C 10/6, paragraph 497. For the role that quality aspects played in the Commission’s decision see paragraphs 492 *et seq.*

²¹⁷ Commission decision *Universal Music Group/EMI Music*, Case No. COMP/M.6458 [2012] OJ C 220/8, paragraph 636

²¹⁸ *Ibid.*, *Summary of the Economic Analysis*, paragraph 20

scale) and the proportion of hits (top fifty songs) in each company's repertoire.²¹⁹ Using the above method, the Commission found that the proposed transaction would increase by 10-20% the entity's share and that, due to the resulting increase in its product line, the entity would likely be able to impose disadvantageous commercial conditions to its digital customers.²²⁰

The Commission may conduct an analysis similar to the one in *Universal/EMI* in order to check whether a merger between two broadcasters would grant the merged entity the ability and incentive to extract better terms and conditions from independent TV content producers. Qualitative criteria that may be used with a view to measuring the broadcaster's program quality have been suggested by the Copé Commission, a committee of experts appointed by the French government to examine the role that public television should play in the digital era. These criteria comprise measurement of the program's audience and of its derivatives on all platforms/networks and on a long-time period, and measurement of the usage rate (percentage of persons having accessed at least once a program offered by the broadcaster on a given period).²²¹ Depending on the resulting increase in the size of the broadcasters' repertoire, the Commission may be led to the conclusion that, as a result of the merger, the entity may exert significant bargaining power vis-à-vis production companies to which it is not structurally linked, thus potentially depriving viewers of original content.

The above analysis inevitably gives rise to the following question: if the Commission found that the merger could have a negative impact on diversity or quality, would that be a good enough reason to prohibit (or attach conditions to) the merger concerned? The answer to this question depends on several parameters. But, if the need to conduct a balancing exercise indeed arises, there is no *a priori* reason why price reductions should prevail over diversity reductions. Consider again a merger between two FTA broadcasters. Post-merger, the broadcasters will be less restrained than before in increasing the advertising/content ratio (bad for quality). An increase in that ratio would lead to an increased supply of advertising space and a possible ad price reduction (good for price competition).²²² The likely positive effects on price competition should be carefully considered against the overall market structure (i.e., concentration levels) and the popularity of the merged entity. Moreover, the possible ad price reduction is subject to the condition that both broadcasters

²¹⁹ Ibid., paragraph 46, at p. 328

²²⁰ Ibid., paragraph 614

²²¹ Commission pour la nouvelle télévision publique (2008). *Rapport Présenté au Président de la République par Jean-François Copé le 25 juin 2008*, 15. Retrieved from: http://www.culture.gouv.fr/culture/actualites/dossiers/Rapport_Cope/rapport_commission.pdf

²²² OECD (2003), *supra* n. 31, 25

will continue to operate post-merger. For example, if the acquiring entity plans to shut down the acquired outlet to eliminate competition or if the parties intend to merge their broadcasting operations (as was, for instance, the case with Stream and Telepiù in *Newscorp/Telepiù*) no ad space increase and hence no ad price reduction can be expected. If both broadcasters remain active post-merger, and assuming that ad prices may decrease, the final effect would depend on whether the merger could result in an increase in the prices of advertised products.²²³

4.3. Structural and behavioral commitments: Designing remedies that protect supply and content diversity

As already seen in Part 3, one of the most common remedies imposed on undertakings involved in transactions affecting the broadcasting sector has been the obligation to sublicense premium content. Following the analysis of how these mechanisms were designed and implemented, I reached the conclusion that they did not manage to ensure that competition (and pluralism) would not be adversely affected post-merger. I shall now demonstrate that this conclusion is equally valid for other commitments the Commission has occasionally accepted and make some proposals to address their *lacunae*.

Structural remedies alone may not address foreclosure or ownership concentration concerns in the case of a merger involving a vertically integrated undertaking.²²⁴ Put simply, the parties' commitment to divest assets does little to nothing if it fails to take account of the purchaser's (or any other competitor's) dependence on the seller in an upstream or downstream market.²²⁵ Even if it does, an ill-designed obligation to behave in a certain way in that other market is unlikely to resolve the issue. For example, as already seen, in *Newscorp/Telepiù*, Telepiù undertook to divest its digital terrestrial broadcasting assets and not to enter into any further digital terrestrial television activities, neither as network nor as retail operator.²²⁶ However, the merged entity was not prevented from controlling the market for the acquisition of premium content in *all* distribution platforms, including DTT, as a wholesaler.²²⁷ As we have already seen, the wholesale offer mechanism has created several hurdles.

²²³ Ibid.

²²⁴ Note that the vast majority of concentrations notified to the Commission that affect the broadcasting markets involve companies that are active on several levels of the supply chain

²²⁵ European Commission (2005). *Merger Remedies Study*, 23. Retrieved from: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf

²²⁶ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 225(k)

²²⁷ Ibid., at (g)

Related to the above, a duty to divest assets in a market where there is no overlap between the merging parties is only partly appropriate to eliminate concerns over market foreclosure. In *NewsCorp/Telepiù*, both Stream and Telepiù operated as pay-TV broadcasters via DTH, but only Telepiù broadcast on DTT.²²⁸ There may have been a good reason why Telepiù was asked to sell its DTT assets, the reason being that otherwise the merger would bring both platforms under Sky's control on a lasting basis, but there was no structural remedy concerning the satellite platform, which the merged entity would clearly control post-merger. Instead of divestiture, the Commission accepted the parties' proposal to grant access to new DTH entrants through a 'cost-oriented non-discriminatory formula based on directly attributable costs of the services, a share of relevant technical costs (fixed and common costs) and a reasonable return over an appropriate period'.²²⁹ This loosely defined obligation led to Sky Italia imposing onerous access conditions. More particularly, absent any specifications on behalf of the Commission on how the 'common costs' related to the use of the platform should be calculated, Sky opted for a method that was based on the 'expected benefit' third parties would accrue from using the platform.²³⁰ This 'expected benefit' was a percentage of the revenue generated from the sale of subscriptions or, in the case of pay-per-view, events.²³¹ This method raised two concerns: first, it established a causal link between the wholesale price charged by Sky and the retail price charged by competitors. In other words, it made the wholesale price dependent on the type of content transmitted, not on the effective use of the platform.²³² Second, it required third parties to provide Sky with sales volumes data, i.e. commercially sensitive information.²³³ Following a lengthy investigation, AGCom decided to modify Sky's method in a way that the wholesale price would reflect the cost Sky would bear in the daily management of the platform.

Furthermore, even when certain aspects of an access mechanism are sufficiently precise or unambiguous, this does not mean that the merged entity will not breach the commitments it made to the Commission with a view to granting preferential treatment to its own subsidiaries. In the above example, in clear violation of the obligation established in the decision,²³⁴ Sky refrained from implementing and maintaining accounting separation between its broadcasting, retail distribution and

²²⁸ Ibid., paragraphs 8 and 9

²²⁹ Ibid., paragraph 225(h)

²³⁰ AGCom (2010). *A407- CONTO TV/SKY ITALIA, Provvedimento n. 21316*, paragraph 8. See also *Delibera n. 233/09/CONS*, paragraphs 24 *et seq.*

²³¹ AGCom (2010), *A407- CONTO TV/SKY ITALIA, Provvedimento n. 21316*, paragraph 8

²³² Ibid., paragraph 21

²³³ Ibid., paragraph 22

²³⁴ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, Commitments Section, paragraph 10.6

platform operations,²³⁵ thus making it impossible to examine whether it respected the arm's length principle. AGCom had to intervene again to ensure that Sky complied with accounting separation-transparency obligations.²³⁶

The above findings are consistent with the Commission's Merger Remedies Study, which concludes that remedies aiming to grant access to IPRs or know-how have deterred rather than encouraged market entry, the prices charged by the wholesaler being 'the single most essential element affecting the effectiveness of licensing remedies'.²³⁷ In its report concerning the wholesale premium content packages supplied by Sky in the UK, Ofcom made similar remarks.²³⁸

In light of the above, we may draw the following conclusions: with respect to behavioral commitments, theory says and experience shows that they do not reduce the incentive to act anti-competitively. This means that access remedies must be described in as much detail as possible to reduce the firms' ability to engage in exclusionary practices post-merger. For example, in the case of wholesale must-offer regimes, the pricing method applied by the incumbent should be clearly defined and assessed prior to merger clearance.²³⁹ As for the scope of the sublicensing mechanism, this should be determined by reference to the type of content (e.g. major sports competitions, Hollywood first-run movies, etc.) rather than channels. We have already seen that in *Newscorp/Telepiù* the exclusion of 'basic' package channels carrying premium content from the scheme resulted in Sky concluding a series of exclusive agreements with these channels,²⁴⁰ thus making them unavailable to other pay-TV operators, including operators active on platforms into which Sky was not planning to expand. In France and Spain, inclusion of channels in the sublicensing scheme led to the merged entity reducing the investment in those channels, thereby making them less attractive to competitors.²⁴¹ Finally, it bears noting that the EU merger control toolbox provides the Commission with two apparatuses that could be used to improve the effectiveness of access remedies. First, if the parties fail to act in accordance with the commitments they made to get the merger cleared, the Commission may impose fines.²⁴² Second, in the case of access remedies, 'which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption

²³⁵ AGCom (2010). *A407- CONTO TV/SKY ITALIA, Provvedimento n. 21316*, paragraph 58

²³⁶ *Ibid.*

²³⁷ European Commission (2005), *supra n. 225*, 118

²³⁸ Ofcom (2010). *Competition issues in premium pay-TV movies*, p. 61, paragraph 6.26. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/movies_reference/summary/moviescondoc.pdf

²³⁹ European Commission (2005), *supra n. 225*, 120

²⁴⁰ Ofcom (2009), *supra n. 102*, 14

²⁴¹ *Ibid.*, 4

²⁴² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1, Article 14(2)(d)

of the [...] decision', the Commission has the power to modify or substitute the commitments that have failed to achieve their objective.²⁴³ These two possibilities have largely been ignored to date.

As already seen, access to premium content remedies do not guarantee that content diversity will not be adversely affected post-merger. Hence, if, following the approach proposed above, the Commission finds that a concentration is likely to have a negative impact on non-price competition, other undertakings should be preferred in order to alleviate concerns arising from diversity reductions. Establishing behavioral obligations with a view to preserving competition in the content market is not as inconceivable as one might think. For example, in *Canal+/TPS*, in order to ensure that the quality of certain channels carried by the merging parties would not be reduced post-merger, the Conseil de la Concurrence imposed on the merging firms the obligation to broadcast 50% of these channels' total transmission time films that were not available on another channel.²⁴⁴ In the case of vertical mergers or mergers involving firms that are already vertically integrated, the entity should be required to acquire content from producers that have no structural links to the merging parties. The flipside of the remedy proposed in *Vivendi/Canal+/Seagram* could be an option here. As mentioned above, to get the merger approved, Vivendi undertook not to grant Canal+ the first-window rights covering more than 50% of the production of Universal Studios,²⁴⁵ implying that Universal would need to conclude acquisition agreements with other content providers for the remaining 50% of first-window rights. I have already demonstrated that this type of remedy may be ineffective because the obligation to sell does not guarantee acquisition by other firms. In fact, the parties to the transaction were not bound by this obligation in cases where there was 'no competing offer at fair market value for all or part of the balance of Universal's film production'.²⁴⁶ A duty to acquire content from independent producers would address the concerns identified above; it would limit the ability to close competitors in the downstream market and result in the distribution of content that would not necessarily carry the editorial stamp of the merging parties.

With respect to the design of structural remedies, the most important issue consists in what should be divested. Structural remedies must first and foremost concern assets that the parties own in the market where there is substantial overlap.²⁴⁷ Moreover, the divested activities must consist of

²⁴³ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paragraph 74

²⁴⁴ Ofcom (2009), *supra n.* 102, 21

²⁴⁵ Commission Decision *Vivendi/Canal+/Seagram*, Case COMP/M. 2050 [2000] C 311/03, at p. 20

²⁴⁶ *Ibid.*

²⁴⁷ In its Merger Remedies Study the Commission found that 'less than overlap' divestiture commitments have been 'ineffective or risky'. See European Commission (2005), p. 38, paragraph 34 noting that '[r]esults from "less than the overlap" divestiture remedies suggest that such remedies were often ineffective or risky'

viable businesses, including businesses that need to be carved out from a party's business, which, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. This should be borne in mind if the merger is likely to affect the market for news provision. Even if they attract audiences, from a revenue perspective, news outlets are more often than not 'loss-making entities owned by broader, profitable media companies, so there is no guarantee that the loss-making news outlet that might be ordered to be sold out would find a buyer'.²⁴⁸ If substantial overlap is found in the market for news provision and the entity is not likely to find a credible purchaser, the proposal that was made in the assessment of the NewsCorp/BSkyB merger investigation by the UK authorities can be considered here. In brief, the proposal was that Sky News would start to operate as an independent public limited company. Its shares would be distributed amongst the existing shareholders of Sky in line with their existing shareholdings. As a result, post-merger, Sky News' structure would remain as if the concentration had not happened.²⁴⁹ While this remedy would not result in the acquisition of the outlet by a provider that is not linked to the merged entity, it would at least not lead to a more concentrated market for news provision post-merger.

5. Conclusions

The objective of this Chapter was to examine the role that EU merger control has played/may play in ensuring that significant (market and opinion-forming) power is not concentrated in only a handful of traditional media owners. For that purpose, I examined the reasoning the Commission developed in merger decisions in the broadcasting sector. Some decisions were adopted several years ago and this has allowed me to assess the impact of a number of decisions on the affected markets. After identifying the drawbacks of the relevant decisional practice, I inquired whether the applicable legal framework may be interpreted and applied in a way that leads to a more complete assessment of the effects of a concentration on competition post-merger and explored to what extent my proposed approach might also benefit pluralism. In light of the results of the study of these cases and, based on the theoretical framework I developed throughout this Chapter and Chapters 2 and 3, the following conclusions can be drawn.

²⁴⁸ BBC Response to Ofcom's Invitation to Comment on Measuring Media Plurality (2012), 12. Retrieved from: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/responses/bbc.pdf>

²⁴⁹ Department for Culture, Media and Sport (2011). *Notice on consultation on the proposed acquisition by News Corporation of up to 60.9% of British Broadcasting Group Plc-Undertakings given by News Corporation pursuant to paragraph 3 of Schedule 2 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003*, 2

As regards market definition, identifying the relevant viewers' market and examining how viewers and advertisers interact with each other will allow the Commission to accurately measure the competitive constraints exerted on the merged entity. However, the proposed approach to market definition, which is largely based on consumer surveys, will also allow viewers to explain what their preferences are. From a pluralism perspective, this is a step forward because content appealing to advertisers, i.e. content that can attract large audiences and promote materialism, is not representative of the viewers' interests. As a result, exposure diversity, the dimension of pluralism which concerns the amount and type of content audiences access and/or would like to engage with, is taken into account. Moreover, because there is a direct link between market definition and the theory of harm that is formulated in assessing possible anti-competitive behavior post-merger, defining the markets by reference to the content viewers regard as substitutable leaves room for considering the impact of the merger on more niche programming, thereby potentially leading to a more content diversity-friendly outcome. Content diversity may also be enhanced if the Commission abandons the assumption that supply diversity will guarantee a broad range of programming to choose from and accepts that the parameters of non-price competition in media markets are equally, if not more, important than price competition. Finally, with respect to remedies, the problems that have arisen in the implementation of must-offer mechanisms, such as loosely constructed pricing methods or inadequate definitions of the term 'premium content', may provide guidance in the design of similar schemes in the future with a view to avoiding opportunistic interpretations on the part of the merged entity that will attempt to game the commitments to its advantage. However, I have expressed strong doubts about the effectiveness of behavioral remedies that seek to ensure access to infrastructure or attractive content. If properly designed, structural remedies are far more appropriate to address both competition and pluralism concerns. From a competition perspective, compared against access remedies, structural solutions have been far more successful; the Commission's Merger Remedies Study, which analyzed forty decisions adopted in the five year period 1996-2000,²⁵⁰ found that, in the cases where structural remedies were imposed on the merging parties, '94% of the divested businesses were still operating and therefore exercising some degree of competitive constraint on the merged entity'.²⁵¹ Structural commitments are also more appropriate to protect pluralism because the sale of the divested business to a provider that is not structurally linked to the merged entity reduces the merging parties' opinion-forming power, thereby safeguarding supply diversity.

²⁵⁰ European Commission (2005), *supra n.* 225, 11

²⁵¹ *Ibid.*, 128

Chapter 5 – Antitrust control in print and digital publishing

1. Introduction

The previous Chapter dealt with mergers and acquisitions in the broadcasting sector. It was seen that, due to the significant economies of scale and scope broadcasters can achieve by integrating with other firms that operate at the same or at different levels of the supply chain, mergers and acquisitions have been a rather common business strategy in television. Consolidation has not had the same appeal to newspaper and book publishers; in the publishing industry, two popular business strategies have been Resale Price Maintenance (hereinafter RPM) governing trade in print titles and, more recently, RPM-based agency governing trade in digital publications. The connecting thread remains the application of EU competition law to media undertakings that are in control of an asset or parameter that may somehow affect competition in the markets concerned. But, while in television this is control of the acquired entity, in the case of books and newspapers it is control over price.

RPM in publishing refers to an arrangement whereby the publisher sets the retail prices of the titles it produces and the retailer is not permitted to offer discounts or any other forms of promotion unless the publisher explicitly grants its authorization. RPM is a very controversial issue from both a competition and a media pluralism perspective. Conflicting views on the pros and cons of this pricing model pull in many different directions. For example, as regards competition, opponents maintain that the ban on price competition eliminates the incentive for dynamic efficiencies whereas proponents argue that the protected profit margin encourages market entry. With respect to media pluralism, opponents say that the ban on price competition deprives readers of the ability to buy publications at lower prices and proponents claim that the protected profit margin protects and promotes supply and content diversity. Empirical research dealing with the impact of RPM on either competition or media pluralism is scarce, which is why we are still in limbo over the effects fixed prices may generate.

The picture is equally complex when we discuss the legal aspects of RPM as a business model employed to sell content. In some Member States, laws establishing an exemption from the general competition rules apply on the grounds that fixed prices help advance pluralism in print publishing.¹

¹ See, for instance, the Spanish Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas Publicado en BOE núm. 150 de 23 de Junio de 2007, Preámbulo: ‘La regulación sobre la comercialización del libro y publicaciones afines parte de la convicción de que se ofrece un producto que es más que una mera mercancía: se trata de un soporte físico que contiene la plasmación del pensamiento humano, la ciencia y la creación literaria, posibilitando ese acto trascendental y único para la especie humana, que es la

At EU level and in Member States where no RPM laws apply, agreements establishing fixed prices are presumed to be caught by Article 101(1) TFEU (or the national equivalent), but it is generally accepted that the parties may put forward efficiencies under Article 101(3) TFEU (or the national equivalent). Naturally, this has created a legal patchwork. For example, in Germany, news publishers fixing the retail prices of their titles benefit from a derogation from the Act Against Restraints of Competition² whereas in the Netherlands they enjoy no such privilege.³ National Competition Authorities (NCAs) and the EU institutions have approached this issue in different ways. For example, the Dutch⁴ and Irish⁵ NCAs have dismantled the respective national RPM systems governing trade in newspapers whereas in the UK the scheme has been treated favorably.⁶ At the EU level, the Commission has been permissive towards RPM for newspapers⁷ whereas it appears to have taken a strict stance on RPM for books.⁸ The Court has been sympathetic to RPM arrangements by reason of both the contribution newspaper publishing can make to media pluralism⁹ and the role of books in protecting cultural unity between linguistically homogeneous areas.¹⁰ This legal patchwork is not a problem because it leads to opposing outcomes across the EU. It is a problem because, as already mentioned, there is not enough evidence (including and especially studies dealing with the

lectura. *La difusión de esas creaciones, su valor cultural y su pluralidad requieren una cierta garantía tanto en el control de calidad del texto como en su comercialización para que puedan ser accesibles al mayor número de potenciales lectores*’ [emphasis added]. For the Member States where RPM laws for books still apply see Joint Research Center (2012a). *Technical Report on Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry*, fn. 198. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC76642.pdf> Note, however, that in Greece this law was recently abolished. In the generalized adoption of fixed prices for newspapers see, for instance, Kjolby, H. (2008). *Denmark*, 145-178. In Yamey, B. S. (ed.) *Resale Price Maintenance. A Comparative American-European Perspective* (3rd Edition), 157. New Brunswick: Aldine Transaction, and OECD (1997). *Policy Roundtable on Resale Price Maintenance*

² Act Against Restraints of Competition in the version published on 15 July 2005 (Bundesgesetzblatt (Federal Law Gazette) I, page 2114; 2009 I page 3850), as last amended by Article 3 of the Act of 26 July 2011 (Federal Law Gazette I, page 1554), paragraph 30. Retrieved from: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html

³ Netherlands Competition Authority (1999). *NMa and DTe Annual Report*, 59

⁴ *Ibid.*

⁵ Irish Competition Authority (2003, December). *Newspapers to amend business practices considered anti-competitive by The Competition Authority*. Retrieved from: [http://www.tca.ie/images/uploaded/documents/2003-12-13%20News%20Release%20\(Newspapers\).pdf](http://www.tca.ie/images/uploaded/documents/2003-12-13%20News%20Release%20(Newspapers).pdf) The decisions relating to this case are available at: <http://www.tca.ie/EN/News--Publications/News-Releases/Newspapers-to-amend-business-practices-considered-anticompetitive-by-The-Competition-Authority.aspx>

⁶ Office of Fair Trading (2008a). *Newspaper and magazine distribution-Opinion of the Office of Fair Trading - guidance to facilitate self-assessment under the Competition Act 1998*

⁷ Commission Notice pursuant to Article 19 (3) of Regulation No 17 concerning *Agence et Messageries de la Presse*, Case IV/31.609 [1987] OJ C 164/02

⁸ See Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, and Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association - Net Book Agreements) [1989] OJ L22/12

⁹ ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015

¹⁰ ECJ, Case C-360/92, *The Publishers Association v. Commission* [1995] ECR I-23, paragraph 44. In this latter judgment, the Court condemned the Commission for not having carefully considered whether the agreement concerned was essential to promote cultural unity between the UK and Ireland, in which case it could be eligible for exemption under Article 101(3) TFEU. Sadly, we cannot assess the impact of this judgment on the reasoning that the Commission would have adopted in the examination of the RPM agreements the second time around: one month before the ruling, publishing house Hodder Headline withdrew from the agreement, a move that heralded the collapse of the RPM mechanism. After most of the major publishers pulled out of the NBA, the system was dismantled and the Commission did not bother to adopt a new decision. For more information see McDonald, M. *Collapse of Net Book Agreement within months*. 26 December 1994, *The Independent*. Retrieved from: <http://www.independent.co.uk/news/uk/collapse-of-net-book-agreement-within-months-collapse-1388530.html>, and The Booksellers Association (2011). *Reports Library RPM-Book Sales in the UK*

particularities of each national market) suggesting whether RPM leads to higher prices and, if this is indeed the case, whether it stimulates non-price competition, thereby outweighing the harm that results from higher prices.

As regards RPM-based agency, this model was first introduced by Apple and major book publishers in 2010. It has since become an attractive strategy for the sale of digital content services that range from e-books to apps, including news apps, to newspaper subscriptions. It bears noting that, while often finding themselves in a weaker bargaining position, this model has been embraced by book and newspaper publishers alike. Insofar as the legal status of RPM-based agencies is concerned, the issues that arise go far beyond the controversies of fixed prices. Under certain conditions, an agency contract falls outside Article 101(1) TFEU.¹¹ In such cases, agencies with an RPM element are different from ‘traditional’ RPM agreements in terms of competition enforcement. However, the case law is far from clear as to the conditions under which an agency relationship may indeed benefit from antitrust immunity. The particularities of digital markets and the inclusion in agency contracts of provisions that may be at odds with an agency structure that would otherwise qualify for immunity add to the already existing ambivalence.

It is clear from the above considerations that, while the focus of the analysis will be on EU competition law, the issues that will be examined throughout this Chapter go beyond a) the application of Article 101 TFEU to print and digital publishing, and b) the Commission’s approach to RPM as a pricing strategy in the media. First, the issue of fixed prices for publications is currently in a state of flux across Europe. In Greece, the RPM law for books was recently abolished¹² whereas the French legislator has extended its applicability to digital books.¹³ What such legislative initiatives appear to lack is a sound economic foundation. Hence, in discussing whether, and if so under what conditions, RPM may benefit from an exemption under Article 101(3) TFEU, I shall attempt to develop a framework within which national legislators may assess whether an RPM scheme may indeed lead to the pluralism-friendly outcome it is intended to deliver. Second, although the Commission now seldom dedicates its resources to enforcement in this field, a number of NCAs,

¹¹ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 18

¹² Venizelos, T. *Greece to liberalize fixed system of book pricing*. 18 March 2014, Press TV News. Retrieved from: <https://www.youtube.com/watch?v=cTeRM3Kj-x0>

¹³ Loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique, Version consolidée au 09 avril 2015. Retrieved from: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000024082056>

which – post-modernization of EU competition law – may pursue infringements of Article 101 TFEU,¹⁴ have often taken cases involving RPM arrangements for the sale of publications.¹⁵

Following the same approach as in Chapter 4, this Chapter seeks to test the main claims that were put forward in Chapter 3, namely that by failing to take due account of the particular characteristics of the markets concerned, the Commission's practice imperils the accuracy of competition decisions and that, if properly applied, EU competition law may lead to a pluralism-friendly outcome without giving rise to controversies over competence.

The Chapter is structured as follows: Part 2 discusses how Article 101(3) TFEU may be interpreted to ensure that RPM agreements that may foster non-price competition and, by extension, media pluralism benefit from the exemption. To this end, I examine the approach followed in *VBBB/VBVB* because this is the only decision in which the Commission conducted a complete assessment of the arguments that are commonly put forward in support of RPM. Building around the reasoning the Commission adopted in *VBBB/VBVB*, I shall attempt to clarify the conditions under which RPM may deliver the efficiencies that are relevant for our purposes. Part 3 discusses antitrust control in digital publishing. The analysis will revolve around the *E-books* case,¹⁶ which concerns the agency agreements signed between Apple and major publishers for the sale of e-books. This case is important to discuss for mainly three reasons. First, from a competition perspective, these agreements were the first (and so far the only) of their kind that fell under the Commission's antitrust microscope. Second, and related to the above, the arrangements between Apple and the involved publishers that were scrutinized by the Commission, including and especially the 70/30 revenue sharing rule¹⁷ and retail parity Most-Favored-Nation (hereinafter MFN) clauses,¹⁸ have apparently had an industry-wide appeal. Therefore, the decision raises issues that are not limited to the facts of that particular case. Third, as already discussed in Chapter 2, Apple, as a digital intermediary, may

¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

¹⁵ See, for instance, Joint Research Center (2012a), *supra n.* 1, 81 for action taken by the Swedish competition authority. See also Danish Competition and Consumer Authority (2006, March). *Publishers right to fix book prices considerably reduced*. Retrieved from: <http://en.kfst.dk/Indhold-KFST/English/Decisions/20062903-Publishers-right-to-fix-book-prices-considerably-reduced?tc=97B735EA5AB44503BC0991771AF3120D> and *supra ns.* 3-6 for action taken by other competition authorities. See also *infra n.* 216 for recent cases involving online retailers

¹⁶ Commission decision of 12/12/2012 addressed to: Hachette Livre SA, HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C., Georg von Holtzbrinck GmbH & Co. KG, Verlagsgruppe Georg von Holtzbrinck GmbH, Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc., Apple, Inc. relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version)

¹⁷ See, for instance, Foros, Ø., Hans Jarle Kind Greg Shaffer (2013). *Turning the Page on Business Formats for Digital Platforms: Does Apple's Agency Model Soften Competition?* 1-2. CESIFO Working Paper No. 4362. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317715

¹⁸ See *infra* Part 3.b.

affect media pluralism by shaping economic models for news publishing.¹⁹ Since agency was first introduced by Apple and later on adopted by news publishers, it is essential that we discuss the potential impact of this business strategy on news provision. Part 4 discusses the Commission's approach in *Sammelrevers*,²⁰ which dealt with an RPM agreement governing trade in German-language books and other print products and in which the Commission attempted to resolve a conflict between (price) competition and (what it thought would be beneficial to) book diversity in a rather unconventional manner.

Two Notes to the Reader:

1. Prior to delving into the issues that were outlined above, it bears clarifying for methodological purposes why this Chapter deals with both books and newspapers. It was mentioned in Chapter 2 that, when we refer to media pluralism as a prerequisite for democracy, news is perhaps more relevant than other types of content. However, it was also explained that if we restricted our analysis to cases that deal exclusively with news provision, we would fall short of grasping in its full extent the impact that the application of the EU competition rules has had on media pluralism, including news provision. For example, while the Commission has not examined mergers between thematic news channels, it assessed a large number of mergers involving generalist free-to-air channels that provide news and/or pay-TV operators that provide bouquets with news channels. As will be seen in greater detail below, the same applies to books and newspapers; the Commission's decisional practice concerns almost exclusively book publishing, but the arguments in support of and against RPM as a means to protect pluralism in newspaper publishing are essentially the same. Moreover, as opposed to RPM for the sale of newspapers, there is a wealth of literature examining RPM for books. The Chapter will attempt to properly adjust the relevant economic arguments to the particularities of news markets and shed some light on a largely neglected topic, that is, why RPM has been regarded as beneficial to news provision.

2. Some background information on the use of books and newspapers and changes in the value chain will allow the reader to better understand the issues that will be discussed throughout the Chapter:

¹⁹ See Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*, 6-7
²⁰ Commission Notice pursuant to Article 19(3) of Council Regulation No 17 concerning an application for negative clearance or exemption under Article 81(3) of the EC Treaty, Cases COMP/34.657, *Sammelrevers* and COMP/35.245 to 35.251, *Einzelrevers* [2000] OJ C 162/8

Books Book reading occupies a central position in content consumption; it is currently the second most popular cultural activity among EU citizens.²¹ It should be noted that when we discuss book reading in Europe, we mainly refer to the traditional print book. As opposed to the U.S., where one in four consumers now buys e-books, in the EU, e-books account for only 3% of total sales.²² The traditional value chain remains to a large extent unchallenged. Upstream, self-publishing is in its nascent stages but publishing houses, which have traditionally been responsible for, *inter alia*, the editing, presentation, pricing and promotion of the book, are still ‘at the core of the business’.²³ Downstream, publishers started to use their own websites as a distribution method, however, they are unlikely to engage in aggressive competition with brick-and-mortar stores because it is not in their interest to destabilize the consumers’ preferred purchase channel.²⁴ The main disruption concerns the growth of large chains such as Fnac and online distributors, most notably Amazon. This has shifted market power away from the publishers to retailers; the latter are not only in the position to extract more onerous conditions from the former (e.g. in respect of storage expenses),²⁵ but they also have access to reader data which they do not share. This raises issues in cases where the retailer is integrated with another publisher because it provides a valuable insight into consumption preferences and allows the firm to establish a profitable relationship with the readership.

Newspapers In Europe, in terms of media use, written press comes fourth (after television, radio and the Internet), but more than one third of Europeans continue to read the paper every day, or almost every day.²⁶ Newspapers still make a significant contribution to news dissemination; ‘they provide space for opinion, in-depth analysis and a reflection on recent events [...] helping citizens understand issues’.²⁷ Contrary to the book market, the traditional value chain has been significantly disrupted. With the advent of the Internet, newspaper publishers have suffered significant revenue losses. This is largely attributed to advertisers preferring behavioral targeting, which means that newspapers now have to compete with a much wider range of firms, including real estate, dating and

²¹ Ernst and Young (2014). *Creating Growth. Measuring cultural and creative markets in the EU*, 31. Retrieved from: [http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/\\$FILE/Creating-Growth.pdf](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf)

²² Ibid., 32; For more information see Joint Research Center (2012a) *supra n. 1*, 16. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC76642.pdf>

²³ Joint Research Center (2012a), *supra n. 1*, 14

²⁴ Ibid., 75

²⁵ Ibid., 71; For the importance the publishing trade attaches to this data see Rimm, A. M. (2014). *Conditions and Survival: Views on the Concentration of Ownership and Vertical Integration in German and Swedish Publishing*. *Publishing Research Quarterly*, 30(1), 77-92

²⁶ European Commission (2013). *Media Use in the European Union*, 8. Note that the importance citizens attach to newspapers is akin to radio and the Internet. See Ofcom (2012). *Measuring Media Plurality*, 14. Retrieved from: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>

²⁷ Ibid., 12

job recruitment portals.²⁸ Moreover, due to the vast amount of information currently available on the Internet for free, consumers are not amenable to pay for online news content.²⁹ As a result of the above two realities, over the past few years, newspapers have been actively searching for a successful business model in the online news segment.

2. Resale Price Maintenance: A conduit for non-price competition in print product markets?

As already discussed in the Introduction, Resale Price Maintenance has been a popular business model in the print product industry. By Resale Price Maintenance we refer to agreements or practices that have ‘as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum resale price to be observed by the buyer’.³⁰ In EU competition law, RPM has been treated as a ‘hardcore restriction’, that is, a restriction of competition ‘by object’³¹ which, as such, results in the exclusion of the agreement from the scope of application of the Block Exemption Regulation.³² In cases where an RPM clause is contained in the agreement, that agreement is presumed to be caught by Article 101(1) TFEU, but it is established case law that parties to *any* agreement may plead an efficiency defense under Article 101(3) TFEU in an individual case.³³

The discussion over the effects of RPM on competition is far from settled. Proponents mainly contend that, while it eliminates intra-brand *price* competition, RPM promotes intra-brand *service* competition, eliminates the risk of free-riding on another distributor’s investments to improve quality of service, protects the image of luxury goods, which, if subject to aggressive price competition would lose value, and addresses the problem of double marginalization.³⁴ Opponents argue, *inter alia*, that RPM facilitates horizontal collusion both upstream and downstream and, because it prevents any form of price competition (discounts, promotional offers, etc.), it does not allow

²⁸ Joint Research Center (2012b). *Technical Report on Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry*, 6. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC69881.pdf>

²⁹ *Ibid.*

³⁰ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 48

³¹ See, for instance, Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1, Article 4(a) of the BER; ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015; ECJ, Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 00353; Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 23

³² Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 47

³³ *Ibid.*, paragraph 60; CFI, Case T-168/2001, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-2969, paragraphs 247-252

³⁴ Petit, N. and David Henry (2010). *Vertical Restraints under EU Competition Law: Conceptual Foundations and Practical Framework*, 9-10 SSRN Working Paper. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724891

distributors to engage in price discrimination which may result in output increases and cost savings that may be passed on to the consumer in the form of lower prices.³⁵ But, empirical research discussing the positive or negative effects of RPM on competition is scarce. Relevant studies cover a fairly limited number of issues relating to RPM and focus on only a few sectors, which does not allow us to draw a general and definitive conclusion.

The discourse surrounding the impact of RPM on media pluralism is equally unsettled. Advocates claim that fixed prices mitigate the risks associated with newspaper and book publishing and, in doing so, they allow publishers to make available on the market a broad range of print products, including slow-moving esoteric books and new newspaper titles, thereby contributing to content diversity. It is also argued that the protected profit margin resulting from RPM encourages small publishers and independent non-integrated retailers to penetrate the market, thus increasing supply diversity. Opponents mainly argue that RPM does not benefit media pluralism because it deprives customers of the ability to buy content at lower prices. However, again, robust empirical research testing the above claims is scarce and, where it exists, incomplete. For example, in the late 1990s, the UK book market switched from fixed to free pricing. Empirical findings demonstrate that following the dismantlement of the RPM system the number of books published increased.³⁶ Yet, no systematic content analysis was carried out that addressed the question of whether the number of titles represented more diversity (e.g. did the number of titles by genre increase or did the publishers focus on sentimental novels?). Cross-country comparative studies, that is, studies comparing markets with RPM against markets with free prices, have also failed to reach definitive conclusions.³⁷ The consumer of print products is another big mystery. For example, to date, there are no studies on the price elasticity of demand for books, but only some studies on the price elasticity of the *total* demand for books.³⁸ These latter provide some insight into whether books are interchangeable with other media products³⁹ but say nothing about substitutability *within* the book market. Moreover, the lack of rigorous empirical research results in fragmentary knowledge about consumption habits such as brand loyalty, genre preferences, etc. Bookstores, especially large book chains, engage in gathering data about their customers, but this information is, naturally, not publicly available. As a result, there

³⁵ Ibid., 8-9

³⁶ Bennett, M., Amelia Fletcher, Emanuele Giovannetti and David Stallibrass (2010). *Resale Price Maintenance: Explaining the controversy, and small steps towards a more nuanced policy*. Fordham International Law Journal 33, 1295

³⁷ Appelman, M. and Marcel Canoy (2002). *Horses for Courses: Why Europe should not harmonize its book policies*. De Economist 150(5), 592

³⁸ Canoy, M., Jan C. van Ours and Frederick van der Ploeg (2005). *The Economics of Books*. CESifo Working Paper No. 1414, 12. Retrieved from: <https://ideas.repec.org/p/ces/ceswps/1414.html>

³⁹ Ibid.

is still significant uncertainty about substitutability on the demand side and hence about whether RPM enhances or harms exposure diversity.

In this section, I shall examine whether, and if so under what conditions an RPM agreement governing trade in books or newspapers may indeed deliver non-price efficiencies which can lead to an exemption under Article 101(3) TFEU and which can be beneficial for media pluralism. This analysis shall be conducted in the light of *VBBB/VBVB*.⁴⁰ This case concerned an RPM agreement which provided that Dutch and Belgian publishers would fix the retail price of the titles they produced and that booksellers would not offer any discounts except in cases where this was explicitly allowed by the publishers.⁴¹ The focus of my analysis is on *VBBB/VBVB* because this is the only decision in the print publishing sector where the Commission conducted a fully-fledged assessment of whether all four conditions laid down in Article 101(3) TFEU were met. *Sammelrevers*,⁴² which dealt with an RPM agreement governing trade in books and magazines between Germany and Austria (this decision raised other issues which will be discussed in more detail in Part 4 of this Chapter), and *Agence et Messageries de la Presse*,⁴³ which concerned an RPM system for the sale of Belgian and foreign newspapers in Belgium, are clearance notices, lacking a detailed analysis of the factors that led to granting the exemption. In *Net Book Agreement*,⁴⁴ a decision on the RPM mechanism governing trade in books between the UK and Ireland, the Commission assessed only whether the agreements concerned were indispensable to alleviate administrative burdens on publishers (e.g. whether, absent fixed prices, it would not be practicable for publishers to give notice to every bookstore of the publishers' individual conditions of sale) and therefore the decision does not reflect the Commission's position on the role of RPM as a conduit for non-price competition.

From the outset it bears noting that, in *VBBB/VBVB*, the parties did not provide sufficient evidence to substantiate that the first condition under Article 101(3) TFEU, namely that the agreement improves production and/or distribution, was met. Therefore, the Commission correctly found that the arrangements could not benefit from the exemption. Despite the fact that it was not

⁴⁰ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36

⁴¹ *Ibid.*, paragraph 9

⁴² Commission Notice pursuant to Article 19(3) of Council Regulation No 17 concerning an application for negative clearance or exemption under Article 81(3) of the EC Treaty, Cases COMP/34.657, *Sammelrevers* and COMP/35.245 to 35.251, *Einzelrevers* [2000] OJ C 162/8

⁴³ Commission Notice pursuant to Article 19 (3) of Regulation No 17 concerning Case IV/31.609, *Agence et Messageries de la Presse* [1987] OJ C 164/02

⁴⁴ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36 and Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association - Net Book Agreements) [1989] OJ L22/12

required to examine whether the other three conditions set by Article 101(3) TFEU were fulfilled (the four conditions laid down in Article 101(3) TFEU must be met cumulatively), the Commission went on to conduct a complete assessment because it considered it useful to discuss ‘*certain aspects of collective resale price maintenance in general*’.⁴⁵ Hence, the positions the Commission takes in *VBBB/VBVB* are not limited to the facts of that particular case.

2.1. Can RPM contribute to improvements in the production and distribution of print products?

As already mentioned, the first condition of Article 101(3) TFEU requires that the agreement contribute to ‘improving the production or distribution of goods’. Pursuant to the Guidelines on the application of Article 101(3) TFEU, the aim of the analysis is to determine what are the objective efficiencies⁴⁶ created by the agreement and their economic importance.⁴⁷ The Guidelines explicitly state that, in addition to cost efficiencies, parties may put forward efficiencies of a qualitative nature.⁴⁸ It bears noting that the wording of the Guidelines does not suggest a preference for cost efficiencies. To the contrary, the Commission acknowledges that in several instances ‘the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature. Depending on the individual case such efficiencies may therefore be of equal or greater importance than cost efficiencies’.⁴⁹ This fits nicely media markets because, as already explained in Chapter 3, price is not the main parameter driving demand for content. In our case, as already indicated, the publishing trade has traditionally contended that RPM arrangements protect and promote non-price competition in the form of a broad range of titles and a variety of publishers and retailers serving the consumer. It is noted that, for the purposes of this thesis, a broad range of titles would be a reflection of content diversity whereas a variety of publishers and retailers a reflection of supply diversity and that the term non-price competition that is used throughout this Chapter refers to both these pluralism-friendly outcomes.

The following analysis will examine whether RPM may indeed stimulate non-price competition in print publishing and how open the Commission has been to related arguments.

⁴⁵ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 48

⁴⁶ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 49. According to established case law ‘only objective benefits can be taken into account. This means that efficiencies are not assessed from the subjective point of view of the parties’

⁴⁷ *Ibid.*, paragraph 50

⁴⁸ *Ibid.*, paragraph 59

⁴⁹ *Ibid.*, paragraph 69

In *VBBB/VBVB*, the parties argued that the agreement allowed publishers to offer a wide variety of titles, including less popular books.⁵⁰ With fixed prices, the parties said, the publishers, especially smaller houses that sought to fill market niches, were certain that retailers would be willing to stock and promote low-demand books that entailed high inventory costs.⁵¹ In the publishing trade, this is usually referred to as the *inventory hypothesis*.⁵² Related to the above, the parties also maintained that the agreement enabled publishers and distributors alike to subsidize works of literary merit that were unlikely to cover their production and storage costs out of the profits they made from bestsellers.⁵³ This is commonly referred to as the *cross-subsidization hypothesis*. The Commission rejected the above claims by simply stating that ‘[a] publisher’s decision to offset to some extent the costs of titles that are not very attractive commercially against the profits made on those printed in large number is, ***in general, an individual, independent decision by each publisher*** when he sets his selling prices to the trade’ [emphasis added]⁵⁴ (note that the Commission did not address the argument regarding the retailers’ incentive to maintain and make available on the market slow-moving books). The general wording of the Commission’s answer suggests that it altogether dismisses the idea that RPM, as a pricing strategy, could somehow result in a broader range of books. However, this reply is arguably oversimplified: literary success is highly unpredictable,⁵⁵ which may discourage market players from investing in original projects. Fixed prices may offset the associated risks. This is based on economic theory on the efficiencies on RPM and in particular on the demand uncertainty theory whereby, in cases of uncertain consumer demand, manufacturers are willing to take risks more easily if they are permitted to set a minimum price for their products.⁵⁶ Since the profit margin is protected, so the argument goes, manufacturers are sure that distributors will order inventories before the uncertainty is resolved.⁵⁷ In the book context, this means that publishers may use the protected margin to promote esoteric titles, literary experiments and unknown authors.⁵⁸

⁵⁰ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraph 50

⁵¹ Ibid.

⁵² Appelman, M. and Marcel Canoy (2002), *supra n. 37*, 591

⁵³ Appelman, M. *Fixed book price*. In Towse, R. (ed.). *A Handbook of Cultural Economics*, 238. Cheltenham: Edward Edgar.

⁵⁴ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraph 51

⁵⁵ For an interesting analysis of why the success of a book cannot be predicted see Vanderbilt, T. *Why is literary fame so unpredictable?* 21 May 2012, The New Yorker. Retrieved from: <http://www.newyorker.com/books/page-turner/why-is-literary-fame-so-unpredictable>

⁵⁶ For an overview of the efficiencies brought about by RPM see, for instance, Peepercorn, L. (2008). *Resale price maintenance and its alleged efficiencies*. European Competition Journal 4(1), 201-212; Elzinga, K. G. and David E. Mills (2010). *Leegin and Procompetitive Resale Price Maintenance*. The Antitrust Bulletin 55(2), 349-379, and Petit, N. and David Henry (2010), *supra n. 34*

⁵⁷ Deneckere, R., H.P. Marvel, and J. Peck (1997). *Demand Uncertainty and Price Maintenance: Mark-downs as Destructive Competition*. American Economic Review, 87 (4), 634

⁵⁸ International Publishers Association (2014). *Global Fixed Book Price Report*, 3. Retrieved from: <http://www.snel.org.br/wp-content/themes/snel/docs/Material/global.pdf>

It bears noting, however, that the Commission's decision to reject the parties' claim, albeit lacking solid economic foundations, was not, in and of itself, erroneous. The efficiencies to be generated by the agreement under scrutiny 'must be derived from empirical data and facts not just economic theory'.⁵⁹ Or, as noted in the Guidelines, the information submitted by the parties must be 'verifiable' because otherwise there is not 'sufficient certainty that the efficiencies have materialized or are likely to materialize'.⁶⁰ In the case of cross-subsidies, for example, fixed prices *per se* do not reduce the incentive to fund or carry titles that fill a safe middle ground⁶¹ and hence, absent any data of whether, and if so how, cross-subsidization takes place⁶² (e.g. a clause in the agreement which binds the retailers to display an *x* amount of slow-moving books for a certain period of time and proof that the clause is effectively enforced), it is not possible to establish a direct and causal relationship⁶³ between the RPM agreement and the array of books placed on the market. In *VBBB/VBVB*, it appears that the parties did not provide any evidence to substantiate how the collective fixed pricing system they had set up advanced the production and distribution of Dutch-language titles. Consequently, even if the Commission had been open to the argument that RPM may generate this efficiency, it would not have been able to determine whether the arrangements under scrutiny had indeed delivered the claimed result.⁶⁴

The inventory hypothesis may hold not only in cases of products with uncertain consumer demand, but also in cases of products with little to no scrap value.⁶⁵ In situations where it is known in advance that the value of the traded asset will be insignificant or nil at the end of its useful life, RPM enables the manufacturer to take the revenue risk of supplying it. This is particularly relevant for the newspaper sector.⁶⁶ Publishers print newspapers as late as possible (between 22:30 and 03:00) in order to make sure that they have not left out the latest news, especially late breaking news.⁶⁷ Newspapers are delivered to wholesalers between 03:00 and 04:00 and subsequently to retailers

⁵⁹ Jones, A. and Brenda Sufrin (2014). *EU Competition Law - Texts, Cases and Materials* (5th Edition), 253. Oxford: OUP

⁶⁰ European Commission. *Guidelines on the Application of Article 101(3) TFEU* [2004] OJ C 101/08, paragraph 56

⁶¹ Appelman, M. and Marcel Canoy (2002), *supra n. 37*, 590; Gippini-Fournier, E. (2010). *Resale Price Maintenance in the EU: in statu quo ante bellum?* SSRN Working Paper, 15. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476443 Also available in Hawk, B. (ed.). *Annual Proceedings of the 36th Annual Conference on International Antitrust Law and Policy-Fordham Corporate Law Institute*, 515-549. Huntington, NY: Juris Publishing

⁶² van der Ploeg, F. (2004). *Beyond the Dogma of the Fixed Book Price Agreement*. *Journal of Cultural Economics* 288, 16

⁶³ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 53

⁶⁴ Failure to submit empirical data in support of the argument that RPM improved production by contributing to better editorial content appears to have been of the main reasons why the Dutch competition authority dismantled in the late 1990s the fixed pricing mechanism established by the Netherlands Daily Newspaper Association. See Netherlands Competition Authority (1999), *supra n. 3*, 59

⁶⁵ Deneckere, R., H.P. Marvel, and J. Peck (1997), *supra n. 57*, 634

⁶⁶ Office of Fair Trading (2008a), *supra n. 6*, paragraph 3.4.

⁶⁷ *Ibid.*

between 05:00 and 07:00.⁶⁸ The vast majority of newspapers are bought before 10:00, which demands that distribution take place within tight time limits, for ‘those copies left unsold at the end of the day are effectively worthless’.⁶⁹ In this case, fixed prices may be regarded as a means to mitigate the financial risks that arise from unsold copies.⁷⁰ In an opinion concerning the compatibility of the UK newspaper distribution system with the Competition Act, the Office of Fair Trading (OFT) embraced the inventory hypothesis, noting that with a distribution system based on RPM newspaper publishers are certain that retailers will be willing to sell their new titles or, in cases where publishers want to use availability as a promotional instrument to boost circulation, to take additional copies of an already existing title.⁷¹

In *VBBB/VBVB*, the parties also argued that their RPM arrangements improved distribution by contributing to the preservation of an extensive network of retailers.⁷² This claim has validity in economic terms because the protected profit margin ensured through RPM shields small bookshops from large retailers that can afford to engage in a race to the bottom on price.⁷³ The Commission, however, rejected this claim on the grounds that, even if an RPM agreement somehow contributes to the widespread supply of books at the retail level, overall it has a negative impact on distribution because it bans price competition. According to the Commission, ‘*[t]his is particularly damaging since [...] competition on the price of individual titles within the distributive trade is an important means of rationalizing and improving the distribution system*’.⁷⁴ This reply embodies one of the main criticisms of RPM, that is, fixed prices eliminate the retailers’ incentive for efficiencies in the form of innovation.⁷⁵ This is illustrated by the following example: a bookseller wishes to promote the sales of audio books that her store offers. She decides to create a space with the necessary equipment where readers can seat and listen to the book of their choice. However, to generate the resources necessary in order to undertake this investment, the bookseller needs to increase sales. One way to increase sales is to reduce book prices. Under an RPM system, the bookseller, deprived of the right to offer

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015, paragraph 46

⁷¹ Office of Fair Trading (2008a), *supra n.* 6, 3.10

⁷² Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, inferred from paragraph 51

⁷³ Appelman, M. and Marcel Canoy (2002), *supra n.* 37, 591

⁷⁴ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 53

⁷⁵ Orbach, B. Y. (2008). *Antitrust Vertical Myopia: The Allure of High Prices*. Arizona Law Review 50, 270; Lao, M. (2009). *Resale price maintenance: A reassessment of its competitive harms and benefits*. SSRN Working Paper, 16. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434984 Also in Drexl, J., Warren S. Grimes, Clifford A. Jones, Rudolph J. R. Peritz and Edward T. Swaine (eds.) (2011). *More common ground for International Competition Law?* 59-85. Cheltenham Glos, UK: Edward Elgar; Appelman, M. and Marcel Canoy (2002), *supra n.* 37, 593; Ringstad, V. (2004). *On the cultural blessings of fixed book prices*. International Journal of Cultural Policy, 10 (3), 356

discounts, does not manage to boost sales of either traditional or new products. But, this is only one side to the story; improvements in distribution in the form of increased sales may originate from price reductions *as much as* from an extensive network of retailers. This is because demand for a product does not depend solely on price, but also on the amount of outlets offering the product.⁷⁶ That is, ‘the price-demand schedule for a product shifts outward if the number of retailers carrying the product increases [because] [...] the inconvenience of shopping is reduced when retail density is higher’.⁷⁷ The same logic would apply to newsstands. Again, however, moving from theory to practice, the parties to *VBBB/VBVB* do not appear to have provided the Commission with any factual data in order to substantiate their claim.

The final argument raised by the parties in *VBBB/VBVB* was that RPM allowed retailers to provide ancillary services to the public, including placing orders for individual customers.⁷⁸ In RPM literature this is also referred to as *the service hypothesis* or *elimination of free-riding*. Proponents of RPM maintain that, in cases where a distributor provides some sort of service on behalf of the producer that entails certain costs for the distributor, there is a risk that, absent fixed prices, distributors which do not provide the service will offer discounts and win over customers that benefited from the extra efforts of that other distributor.⁷⁹ In our case, a concern would be that a retailer employed and trained staff to inform the reader about the books it carries, but the reader ended up buying the book from the cheapest bookstore. If this materializes, the distributor no longer has the incentive to provide the service, adversely affecting both producers and consumers.⁸⁰ This argument, however, is not particularly relevant for book or newspaper publishing because ‘service’ does not appear to influence the consumers’ purchase decisions. Empirical research suggests that, in-store, most books are discovered on the shelves or on a promotional stand⁸¹ whereas newspapers, as already discussed in Chapter 1, have, as a rule, a very loyal and dedicated readership which depends on factors such as political preferences and the type of content (e.g. tabloid v. quality) and not on the

⁷⁶ Appelman, M. and Marcel Canoy (2002), *supra n.* 37, 590-591

⁷⁷ *Ibid.*, 591 referring to Verouden, V. C. H. M. (2001). *Essays in Antitrust Economics*. PhD thesis. Tilburg: CentER, Center for Economic Research

⁷⁸ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 50

⁷⁹ Bennett, M., *et al.* (2010), *supra n.* 36, 1289

⁸⁰ *Ibid.* For an overview of the free riding theories in support of RPM see Orbach, B. Y. (2008), *supra n.* 75, 271-274. For a critical view on free riding as a justification for RPM see Lao, M. (2008). *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, 196-231. In Pitofsky, R. (ed.). *How the Chicago School Overshot the Mark: Effect of Conservative Economic Analysis on U.S. Antitrust*. Oxford: OUP

⁸¹ For recent research on book consumption patterns see, for instance, BNC Research (2013). *The Canadian Book Consumer*, 6. Retrieved from: http://www.booknetcanada.ca/storage/BNC_Coast_to_Coast.pdf

newsstand retailers' suggestions. In view of the above, the Commission rightly set this allegation aside.⁸²

2.2. Is RPM indispensable to produce and distribute a wide range of books and/or to ensure an extensive network of retailers?

Assuming that an RPM agreement may indeed improve the production and distribution of books (and the above section demonstrated that this argument may be supported by economic theory), the parties would still need to demonstrate that the ban on price competition is, according to Article 101(3) TFEU, 'indispensable' to the attainment of the claimed efficiencies. The Guidelines on the application of Article 101(3) TFEU lay down that, in examining whether this condition is met, the main determinant is whether or not the agreement '[makes] it possible to perform the activity in question more efficiently than would likely have been the case *in the absence of the agreement or the restriction concerned*' [emphasis added].⁸³ The Guidelines further note that, in making this assessment, due regard must be had to the context in which the agreement operates and in particular '*the market conditions and business realities facing the parties to the agreement*'.⁸⁴ Applying the above to fixed book pricing arrangements, the factual data submitted by the parties should be examined in light of a) whether the qualitative efficiencies which fixed prices may generate, namely a broad range of books and an extensive network of suppliers, may also be realized under a free pricing system, and b) the market circumstances under which the parties operate.

As regards the first element, it bears noting that the Commission has forcefully denied that a wide variety of books, including more literary creations, cannot be attained under a free pricing system. More particularly, in *VBBB/VBVB*, it stated that, for publishers to be able to pursue more risky ventures, 'there is no need for a system under which the resale price of every book is set by the publisher right down to the final stage of distribution'.⁸⁵ Aside from the fact that it provided no further explanations supporting this finding, the Commission also fell short of considering book-specific economics: books have high fixed but low marginal costs.⁸⁶ Fixed costs include authors' advances, costs incurred in the editorial, production and distribution processes (e.g. proof reading, cover design, typesetting, copy-editing, order processing, warehouse management, physical

⁸² Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 54

⁸³ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 74

⁸⁴ *Ibid.*, paragraph 75

⁸⁵ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 51

⁸⁶ Canoy, M. *et al.* (2005), *supra n.* 38, 11

transportation, storage expenses, etc.), and marketing/advertising costs.⁸⁷ In recent years, developments such as new prepress technologies have lowered some of these costs,⁸⁸ but creating a print book remains a rather expensive undertaking. In view of the above, a logic similar to that governing broadcast content applies to the book market: demand uncertainty combined with high fixed and low marginal costs incentivize publishers and booksellers to focus on titles that have the capacity to attract a mass readership. In a free pricing system, it is safer to opt for easily digestible content within one of the most widely preferred genres, such as romance, crime or science fiction,⁸⁹ that is more likely to recoup the initial investment and earn a profit than invest in controversial books written by unknown authors. This may go partway towards explaining the conclusion reached by a study of the European book market that one of the main weaknesses of the sector is that ‘a large number of new products are created that are very similar to previous products. Major product innovations happen more rarely and this has conditioned the culture of the publishing industry’.⁹⁰ Empirical evidence suggests that free prices may not be able to deliver an extensive network of retailers either. For example, in the UK, following the switch from fixed to free prices, the market shares of supermarkets and other large discount stores rose dramatically at the expense of independent bookstores, a large number of which were forced to exit the market.⁹¹ The theoretical explanation for this is pretty straightforward: large multiple retailers have the incentive to engage in aggressive price competition in order to either attract new clientele or promote the other (non-print) products they offer. These entities may even decide to sell books below cost; they can afford to engage in this pricing strategy because they can cross-subsidize related losses out of the profits they make from those other products. A race to the bottom on price is not, however, a strategy that will necessarily pay off for the small independents. Surely, one may contend (and this is one of the oft-repeated arguments against RPM) that a free pricing system does nothing more than obligate non-efficient retailers to exit the market. However, it should be borne in mind that this comes at a ‘price’; large multiple retailers have traditionally focused on a very limited array of books, mostly, if not exclusively, on bestsellers,⁹² because they want to sell volume, not variety.⁹³

⁸⁷ Joint Research Center (2012a), *supra n. 1*, 74, 61 and 14. Retrieved from:

<http://is.jrc.ec.europa.eu/pages/ISG/documents/BookReportwithcovers.pdf>

⁸⁸ Turku School of Economics and Business Administration (2005). *Publishing Market Watch Final Report*. Prepared for DG Enterprise, European Commission, 70

⁸⁹ On which genres are currently most popular see, for instance, Stewart, T. *Which 5 Book Genres Make The Most Money?* 31 January 2014, The Richest. Retrieved from: <http://www.therichest.com/rich-list/which-5-book-genres-make-the-most-money/?view=all>

⁹⁰ Turku School of Economics and Business Administration (2005), *supra n. 88*, 70

⁹¹ Office of Fair Trading (2008b). *An evaluation of the impact upon productivity of ending resale price maintenance on books*. Report prepared for the OFT by the Centre for Competition Policy at University of East Anglia, 43-44

⁹² *Ibid.*, fn. 52

⁹³ *Ibid.* See also Canoy, M. *et al.* (2005), *supra n. 38*, 11

As regards the second element of the indispensability assessment identified above, that is, the market conditions facing the parties, Appelman and Canoy, who conducted empirical research on the effects of both free and fixed prices on the book markets of several Member States, identify the following three characteristics that, for our purposes, may determine whether RPM is indispensable. The first is ‘language size’, which refers to the number of people speaking the language in which the book is written.⁹⁴ Language size determines the size of the risk associated with the decision to publish and market a book; a widely spoken language mitigates this risk because if the book turns out a success, publishers and booksellers may achieve significant economies of scale.⁹⁵ The second is population density.⁹⁶ In States such as Finland, Ireland or Greece, which are sparsely populated, it is unlikely to have a large retail network catering to demand, including and especially demand in remote areas, unless the profit margin of booksellers is protected.⁹⁷ Finally, and related to the above, population density may not matter if readers buy books online.⁹⁸ Broadly speaking, population density would still be relevant across the EU, for at least two reasons. While Internet penetration and online consumption vary from country to country, in several Member States more than 40% of the population has never purchased a good online.⁹⁹ Moreover, as mentioned above, brick-and-mortar bookstores remain Europeans’ preferred purchase channel.

The picture is slightly different and apparently less complex in the case of newspapers where it seems that ‘the economic risks’¹⁰⁰ as a ‘business reality facing the parties’ would play the most important role in the indispensability assessment. The perishability of newspapers is a peculiarity that the production and distribution system of other media does not have and the argument commonly raised is that RPM is necessary to ensure that an extensive network of retailers will be able to serve readers, including and especially those residing in remote areas in the territory covered by the agreement. This claim is particularly likely to hold in cases where RPM imposed on retailers is combined with an obligation to supply low-demand outlets imposed on wholesalers.¹⁰¹ It bears noting that from *Binon*, a preliminary ruling concerning, *inter alia*, a series of RPM agreements governing trade in newspapers in Belgium, it may be inferred that both the Court and the Commission were

⁹⁴ Appelman, M. and Marcel Canoy (2002), *supra n.* 37, 595

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ On population density in the Member States see http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_r_d3dens&lang=en

⁹⁸ Appelman, M. and Marcel Canoy (2002), *supra n.* 37, 595

⁹⁹ Retrieved from: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

¹⁰⁰ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 80

¹⁰¹ This is, for instance, the case in the UK. See Office of Fair Trading (2008a), *supra n.* 6, paragraphs 4.54 *et seq.*

largely sympathetic to the perishable nature of newspapers and associated costs as a factor that would determine the indispensability assessment in relevant cases.¹⁰²

2.3. Can RPM benefit the readership?

For an agreement restrictive of competition to be eligible for an exemption under Article 101(3) TFEU, consumers must receive a fair share of the resulting benefits. Based on the relevant case law, the Guidelines explain that ‘*the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition*’.¹⁰³ The Guidelines explicitly refer to quality improvements and product variety as forms of consumer pass-on that must be considered in the analysis.¹⁰⁴ As already mentioned, cost efficiencies are not given preference over qualitative efficiencies in the assessment of the first condition of Article 101(3) TFEU, and a reading of the Guidelines’ paragraphs that describe how the Commission would conduct an analysis of whether the ‘consumer benefit’ criterion is fulfilled suggest the same thing. However, whether the Commission has been willing to accept that an RPM agreement (or any other agreement for that matter¹⁰⁵) may generate consumer gains other than lower prices is questionable. More particularly, in *VBBB/VBVB*, the Commission gives the following reply to the argument that RPM passes a variety of books on to the consumer:

‘[E]ven if a wide range of titles [...] [is] to be regarded as benefiting the consumer, the consumer generally cannot benefit from the advantages of any rationalization that takes place in the book trade. [...] **Since the price of the product is, for many consumers, an important element in their decision to purchase – and this applies to books as much as to other products – [...] the consumer is not receiving a fair share**’ [emphasis added].¹⁰⁶

¹⁰² ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015, paragraphs 43 and 46

¹⁰³ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 85

¹⁰⁴ *Ibid.*, paragraph 102 *et seq.*

¹⁰⁵ The Commission has been reluctant to accept qualitative efficiencies. See, for instance, Commission decision *Trans-Atlantic Conference Agreement*, Case No IV/35.134, [1999] OJ L95/1, paragraph 410. Even in cases where it did acknowledge that the agreement could improve quality, it found that the resulting benefit could not outweigh the overall harm to competition. See, for instance, Commission decision of 23 May 2013 addressed to Air Canada, United Airlines Inc., and Deutsche Lufthansa AG relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union *Star Alliance*, Case AT. 39595, paragraphs 78-79. Retrieved from: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf Also note that the Commission has not been willing to accept arguments that RPM agreements qualify for an exemption under Article 101(3) TFEU. See Commission decision of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty, Case COMP.F.1/35.918 *JCB* [2002] OJ L 69/1; Commission decision of 5 July 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty, Case COMP.F.1/36.516, *Nathan-Bricolux* [2001] L 54/1; Commission decision of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty, Case COMP/F-2/36.693, *Volkswagen* [2001] L 262/14; Commission decision of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/37.975, *Yamaha* [not published], and European Commission (2002). Press Release IP/02/916. *Commission clears B&W Loudspeakers distribution system after company deletes hard-core violations*. Retrieved from: http://europa.eu/rapid/press-release_IP-02-916_en.htm?locale=en

¹⁰⁶ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB) [1982] OJ L 52/36, paragraphs 54-55

This finding is based on two assumptions: First, that fixed prices are higher than those that retailers would charge if they were allowed to offer discounts. And second, that price is the main demand driver in book markets. Both assumptions are arguably equally problematic.

As regards the assumption that RPM forces consumers to pay more than they would have under a free pricing system, intuitively, one might say that this makes sense; once demand uncertainty is resolved and the product turns out a success, customers are charged the ‘high’ fixed price.¹⁰⁷ If the product turns out to be a failure, customers are still charged the ‘high’ fixed prices because retailers are prevented from lowering prices.¹⁰⁸ Following this line of reasoning, the argument that RPM may enhance consumer welfare in the form of surplus would not hold under any circumstances. However, the impact of RPM on consumer surplus is not so straightforward. While studies have shown that RPM results in higher prices,¹⁰⁹ we may still not draw any definitive conclusions because these studies have tested the price effects of RPM in a very limited number of industries.¹¹⁰ The most compelling piece of evidence that their findings should not be generalized and/or that they do not necessarily apply to our case is the conclusion reached by Fishwick in his *ex ante/ex post* study of the UK book market: Fishwick showed that after the collapse of the RPM system prices increased.¹¹¹ It is submitted that, in cases involving RPM, instead of directly assuming that an RPM agreement reduces consumer surplus, it would be more appropriate to examine whether the publishers’ incentives to pass on benefits in the form of lower prices are stronger than the incentives of distributors. For example, in the opinion referred to above concerning the compatibility of the UK newspaper distribution system with the Competition Act, the OFT noted that there are at least two elements supporting the position that publishers’ control over price may translate into lower prices for the consumer.¹¹² First, the newspaper market is two-sided. This means in practice that, in deciding whether or not to charge higher prices, distributors will only consider the profit margin they will forego as a result of a subsequent fall in sales.¹¹³ But, a fall in sales would make the paper less attractive to advertisers,

¹⁰⁷ Lao, M. (2009), *supra n. 75*, 27

¹⁰⁸ *Ibid.*

¹⁰⁹ For studies suggesting or finding that RPM results in lower prices see, for instance, Areeda, P. E. and Herbert Hovenkamp (2004). *Antitrust Law* (2nd Edition), 1604b, 40. New York: Aspen Publishers; Steiner, R. L. (1991). *Sylvania Economics - A Critique*. *Antitrust Law Journal* 60(1), 56; Overstreet, T. R. (1983). *Resale Price Maintenance: Economic Theories and Empirical Evidence*, 160. FTC Bureau of Economics Staff Report; Mueller, W. F. (1989). *The Sealy Restraints: Restrictions on Free Riding or Output?* *Wisconsin Law Review* 1255; Brief for WS Comanor and FM Scherer as Amici Curiae Supporting Neither Party, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), 2007 WL 173679, and Scherer, F.M. (2005). *Comment on Cooper et al.’s ‘Vertical Restrictions and Antitrust Policy’*. *Competition Policy International*, 1(2), 71-74. Retrieved from: <http://www2.owen.vanderbilt.edu/lukefroeb/froeb.papers/Vertical/2005.CPI.scherer.pdf>

¹¹⁰ Lao, M. (2009), *supra n. 75*, 34

¹¹¹ Fishwick, F. (2008). *Book Prices in the UK Since the End of Resale Price Maintenance*. *International Journal of the Economics of Business*, 15 (3), 359-377

¹¹² Office of Fair Trading (2008a), *supra n. 6*, 4.77

¹¹³ *Ibid.*, paragraph 4.78

thereby negatively affecting ad revenues.¹¹⁴ Hence, compared against distributors, publishers are more likely to lower prices because, to maximize profit, they take account of both circulation *and* ad revenues.¹¹⁵ This hypothesis was supported by empirical evidence gathered by the OFT, which suggested that the main concern of retailers in regard to fixed prices was that they were prevented from *increasing* prices.¹¹⁶ In the case of books, while the market is not two-sided, it cannot be excluded that publisher and retailer incentives are not aligned. If publishers have an interest in charging less (e.g. because the more books they sell, the more reputable the house becomes, the more reputable the house becomes, the more authors or literary agents the house attracts....) than booksellers, then RPM may lead to lower prices for the consumer. Second, the OFT said, retailers may not be incentivized to cut prices in cases where consumers are not willing to switch from one outlet to another.¹¹⁷ This is so in cases where consumers do not wish to travel all the way to another outlet (e.g. a small newsstand may be closer to their home than a hypermarket offering discounts) or simply because they do not wish to change consumption habits.¹¹⁸ This latter element could apply to books in cases of sparsely populated areas and/or in cases where consumers do not regard purchase through the online distribution channel as substitutable with purchase at brick-and-mortar stores. Again, if the publisher is interested in boosting an increase in sales and the bookseller is able to extract monopoly profits from the readers, RPM may lead to lower prices.¹¹⁹ It should also be borne in mind that the studies referred to above have not demonstrated that RPM indeed harms consumer welfare, because they have not dealt with whether consumers received benefits that compensated for the higher prices.¹²⁰ In our case, an extensive network of retailers could, for instance, minimize the opportunity costs consumers would incur absent the RPM arrangements. Widespread availability could also lead to an increase in sales (i.e. more profits for the publishers) which in turn could result in higher quality.¹²¹ And, finally, retailers carrying a variety of titles would give the consumers more choice. Even if the RPM agreement under scrutiny were likely to lead to higher prices, we would still need to check whether this harm is outweighed by the aforementioned benefits.¹²²

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid., paragraph 4.79

¹¹⁸ Ibid.

¹¹⁹ Ibid., paragraph 4.80.

¹²⁰ Lao, M. (2009), *supra n. 75*, 13

¹²¹ For example, Gabszewicz *et al.* found that, in the case of newspapers, sales and quality are positively correlated. See Gabszewicz, J., Paolo, G. Garella, and Nathalie Sonnac (2007). *Newspapers' Market Shares and the Theory of the Circulation Spiral*. Information Economics and Policy 19 (3-4), 405-413

¹²² Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 85

With respect to the second assumption underpinning the Commission’s assessment of whether the ‘consumer benefit’ criterion was met in *VBBB/VBVB*, that is, that price is the key element in the reader’s decision to purchase a book, it is far from obvious whether this is indeed the case, for several other factors seem relevant for determining demand-side substitutability. For example, in book economics literature, it is an oft-repeated saying that the opportunity cost of consuming a book is usually greater than the price of the book.¹²³ Other parameters include publisher/author loyalty,¹²⁴ and format (e.g. large v. pocket format).¹²⁵ But, most importantly, prices do not appear to be the decisive factor in regard to purchase because books, as goods, are not homogeneous. Nor are consumer interests.¹²⁶ As the Commission itself noted in the *Candover/Cinven/Bertelsmann* merger decision, ‘[f]rom a demand-side point of view it is rare that two different publications be viewed as perfect substitutes. There usually are differences in the coverage, comprehensiveness and content provided by two different publications. [...] Therefore, **consumers will rarely substitute one publication for another in reaction to their relative prices**’ [emphasis added].¹²⁷ Related to the above, it is generally assumed that popular books are price elastic¹²⁸ because they appeal to a broad audience, including low-income groups, whereas slow-moving titles are price inelastic because consumers either belong to high income groups or need to buy these titles for professional or academic purposes.¹²⁹ While this makes sense at first, even this assumption is open to debate. For example, if a *Lord of the Rings* book is out, the consumer wants to buy *that* book and it is highly unlikely that in such cases she will be price sensitive. Finally, it bears repeating that there are no studies dealing with the price elasticity of demand for either popular or more esoteric titles,¹³⁰ that is, empirical research has not verified the above assumption yet.

Similar remarks can be made in respect of newspapers. In this case, the purchase decision may depend on the ‘political stance of a newspaper, family heritage, social-economic factors and the type

¹²³ Canoy, M. *et al.* (2005), *supra n.* 38, 11

¹²⁴ Lee, E. and Byungtae Lee (2013, June). *Dynamics of Price Elasticity Over Time: Evidence from the E-Book Industry*. PACIS Proceedings. Paper 124, 3-4

¹²⁵ For a distinction between large and pocket-format titles see, for instance, Commission decision *Lagardère/Natexis/VUP*, Case No COMP/M.2978 [2004] OJ L125/54, paragraphs 95 *et seq.*

¹²⁶ OECD (2003). *Policy Roundtable on Media Mergers*, 43

¹²⁷ Commission decision *Candover/Cinven/Bertelsmann-Springer*, Case COMP/M.3197 [2003] C207/10, paragraph 13

¹²⁸ Note that the Guidelines explicitly refer to elasticity of demand as one of the factors to take into account when assessing whether the consumer benefit criterion is met. See Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 96

¹²⁹ Canoy, M. *et al.* (2005), *supra n.* 38, 12

¹³⁰ *Ibid.*

of content' rather than on price.¹³¹ While price elasticity varies from newspaper to newspaper,¹³² there is evidence suggesting that in many cases demand is highly inelastic.¹³³

Since robust empirical research regarding demand-side substitutability is lacking, and given the heterogeneity of the book and newspaper markets across the EU, issues regarding reading habits, the importance consumers attach to price, and how they prioritize the factors that determine their decision to purchase should be considered on a case-by-case basis and related questions should be answered by the readership itself through qualitative research such as consumer surveys. The contribution of qualitative research to improving the accuracy of substitutability and competitive assessments has already been illustrated in Chapter 4.

2.4. Does RPM eliminate competition?

The final condition of Article 101(3) TFEU requires that the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. In *VBBB/VBVB*, in assessing whether this condition is met, the Commission first noted that dimensions of competition such as stocking, specialization, service offered and ordering facilities should be regarded as secondary to price competition and that, since the agreement between the two associations prevented retailers from offering discounts to their customers, competition was eliminated in the affected market.¹³⁴ Second, with a view to rebutting the parties' argument that publishers participating in the RPM system compete with one another within individual categories of books, the Commission took the stance that competition of this type is restricted to a small number of titles or series.¹³⁵ More particularly, it noted that:

‘As a rule most *books are completely original works*, written by an author following his inspiration at the time of writing. *They cannot be compared with one another*. In a number of cases, certainly, it is not the author's subjective creativity which is the principal feature, but rather the objective information which the book is intended to convey. *Books covering the same ground can therefore to some extent be regarded as substitutes, and may thus constitute a single market. But these works account for only a limited share of the total number of books in the market*’ [emphasis added].¹³⁶

The contradiction that arises here is obvious: While on the one hand, the Commission finds that parameters of competition related to the quality of book or the service offered by bookstores are not

¹³¹ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 231

¹³² Doyle, G. (2002). *Understanding Media Economics*, 129. London: Sage Publications

¹³³ Ibid.. See also Joint Research Center (2012b), *supra n.* 28, 24

¹³⁴ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (*IV/428-VBBB/VBVB*) [1982] OJ L 52/36, paragraphs 61-62

¹³⁵ Ibid.

¹³⁶ Ibid.

as important as price, on the other hand, it notes that books with a high elasticity of demand represent a small percentage of the books sold. However (and this applies to *VBBB/VBVB* as much as it does to books in general), since competition on the upstream level is driven by the originality of the content produced by the author and price competition is relevant for a limited number of books that have close substitutes (e.g. dictionaries, travel guides, etc.),¹³⁷ then an RPM agreement would not seem to result in an elimination of competition in a substantial part of the products under consideration. Adjusted accordingly, a similar argument may be raised in the case of newspapers: where demand depends on factors such as the editorial position of the title, the agreement would fulfill the fourth condition laid down in Article 101(3) TFEU. The clearance notice the Commission adopted in *Agence et Messageries de la Presse*¹³⁸ suggests that, despite a ban on price competition, related arrangements may qualify for an exemption.

The above analysis shows that Article 101(3) TFEU is flexible enough to allow for the non-price dimensions of competition to be taken into account in cases concerning RPM agreements for the sale of print products. Moreover, and relevant for the purposes of this thesis, economic theory supports the argument that, depending on the specific conditions of the market examined (e.g. the perishable nature of newspapers, language size, population density, etc.), RPM may be both appropriate and essential to deliver qualitative efficiencies in the form of a wide variety of titles or an extensive network of retailers, thereby remedying certain challenges facing media pluralism in the publishing sector, including and especially marginalization of low-demand content.

3. Antitrust Control in Digital Publishing: The Agency Model

The Commission decisions that concern RPM agreements governing print products were adopted between 1981 and 2002. Following *Sammelrevers*,¹³⁹ the most recent of these decisions, competition issues relating to agreements that establish fixed prices for books and newspapers went dormant for about eight years when, in early 2010, arrangements made between book publishers and digital store Apple revived the debate. These arrangements, which were the first of their kind that fell under the Commission's antitrust microscope, were similar to those discussed above in that the publishers concerned set the prices for the e-books sold on Apple's iBookstore and Apple was not

¹³⁷ van der Ploeg, F. (2004), *supra n.* 62, 13

¹³⁸ Commission Notice pursuant to Article 19 (3) of Regulation No 17 concerning Case IV/31.609, *Agence et Messageries de la Presse* [1987] OJ C 164/02

¹³⁹ Commission Notice pursuant to Article 19(3) of Council Regulation No 17 concerning an application for negative clearance or exemption under Article 81(3) of the EC Treaty, Cases COMP/34.657, *Sammelrevers* and COMP/35.245 to 35.251, *Einzelrevers* [2000] OJ C 162/8

allowed to offer any discounts.¹⁴⁰ However, the agreements between Apple and the involved publishers were substantially different from ‘traditional’ RPM agreements in terms of the business model that was employed by the parties, namely the agency model, under which the retailer does not buy the content that is the contract service but acts as an intermediary between the provider and the end-consumer. For our purposes, agency agreements in general and the E-books case in particular are important to discuss for mainly three reasons.

First, as regards competition issues, agency agreements such as those in the case at hand raise questions that go far beyond the controversies of fixed prices. More particularly, under certain conditions, an agency contract, including any restrictions ‘by object’ it may contain, fall outside Article 101(1) TFEU.¹⁴¹ By contrast, as seen above, ‘traditional’ RPM agreements between a brick-and-mortar bookstore and a publisher are presumed to be caught by Article 101(1) TFEU and, to comply with EU competition law, they must fulfill all four requirements set by Article 101(3) TFEU. Hence, agencies with an RPM element are distinct from ‘traditional’ RPM agreements insofar as competition enforcement is concerned. Furthermore, and related to the above, the case law is far from clear as to the conditions under which an agency relationship may indeed benefit from antitrust immunity. The particularities of digital markets and the inclusion in agency contracts of provisions that may be at odds with a ‘genuine’ agency structure add to the already existing ambivalence.

Second, with respect to media pluralism, as already mentioned in Chapter 2, digital stores act as intermediaries between the publisher and the readership.¹⁴² In Chapter 2, we also saw that one of the main areas in which the activities of intermediaries may affect media pluralism is the shaping of economic models for news publishing.¹⁴³ Given that, over the past few years, newspaper publishers have engaged in a quest for a successful business model that is key to the survival of high quality journalism, we cannot refrain from discussing the possible implications of the agency model (first used by Apple and major book publishers and subsequently adopted by other powerful online retailers¹⁴⁴ and newspaper publishers¹⁴⁵) for the future of news provision.

¹⁴⁰ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), fn. 4 and paragraphs 31 and 36

¹⁴¹ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 18

¹⁴² Foster, R. (2012), *supra n.* 19, 25

¹⁴³ *Ibid.*, 6-7

¹⁴⁴ For example, in the e-book sector, Apple may have been the first but it certainly is not the only firm to use agency; major digital retailers such as Amazon, Barnes & Noble, Kobo and Sony also entered into agency agreements with publishers. See, for instance, Campbell, L. *Harper Collins and Hachette UK Refine Agency Model*. 3 April 2013, The Bookseller. Retrieved from: <http://www.thebookseller.com/news/hc-and-hachette-uk-refine-agency-model>; Department of Justice (2012). *Civil Action No.1: 12-CV-2826, United States of America v. Apple Inc., Hachette Book Group Inc., Harper Collins Publishers Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC d/b/a MacMillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA) Inc. and Simon & Schuster Inc., Comments of Barnes & Noble on the proposed final judgment*, 3. Retrieved from: <http://www.justice.gov/atr/cases/apple/comments/atc-0097.pdf>; Whithall, Z. *Kobo switches to agency terms with major U.S.*

Third, while in the commitments decision it adopted the Commission focused on the collusion aspects of the case, that is, the allegedly unlawful coordination between the undertakings concerned, the arrangements between Apple and the involved publishers, including and especially the 70/30 revenue sharing rule¹⁴⁶ and retail parity MFNs,¹⁴⁷ have apparently influenced agreements concluded between other entities marketing content online. Since the commitments that were made legally binding concern the above arrangements, the decision hints at how the Commission may treat related issues in the future and provides the basis for an analysis of the framework within which antitrust control of online agencies should be conducted.

3.1. The E-Books case: the facts and the outcome

The E-books case concerns the allegedly¹⁴⁸ anti-competitive conduct of Apple and publishers¹⁴⁹ Hachette, HarperCollins, Penguin,¹⁵⁰ Macmillan and Simon & Schuster (hereinafter collectively referred to as the Publishers) in respect of the sale of e-books to consumers. The facts of this case may be summarized as follows: in January 2010, the Publishers signed agency agreements with Apple governing the sales of their e-books in the US. Under these agreements, the Publishers would set the prices for e-books made available on Apple's iBookstore whereas Apple would be remunerated by payment of a commission equal to 30% of the retail price paid by consumers.¹⁵¹ This

publishers. 1 April 2010, Quill & Quire. Retrieved from: <http://www.quillandquire.com/omni/kobo-switches-to-agency-terms-with-major-us-publishers/>, and Jones, P. *Amazon, Sony agree to agency deals over e-books in US*. 1 April 2010, The Bookseller. Retrieved from: <http://www.thebookseller.com/news/amazon-sony-agree-agency-deals-over-e-books-us.html> Apple apparently asks all app software developers selling through the iStore to agree on 'standard' agency terms. See Foster, R. (2012), *supra n.* 19, 31. The same seems to apply to Google. See: <https://support.google.com/googleplay/android-developer/answer/112622?hl=en>

¹⁴⁵ See, for instance, Kahn, J. *Cue on agency model: 'I don't think you understand. We can't treat newspapers or magazines any differently than we treat Farm Ville*. 23 April 2012, 9to5Mac. Retrieved from: <http://9to5mac.com/2012/04/23/cue-on-agency-model-i-dont-think-you-understand-we-cant-treat-newspapers-or-magazines-any-differently-than-we-treat-farmville/>

¹⁴⁶ See, for instance, Fors, Ø., *et al.* (2013), *supra n.* 17, 1-2

¹⁴⁷ See *infra*, Part 3.b.

¹⁴⁸ 'Allegedly' anti-competitive conduct because, as opposed to a prohibition decision, a commitments decision makes the commitments binding without concluding 'whether there was or still is an infringement'. See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, paragraph 117

¹⁴⁹ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 1

¹⁵⁰ It is noted that the commitments decision, which will be discussed in more detail below, is not addressed to Penguin because the latter had not proposed any commitments that could address the Commission's concerns. Commitments Decision, p. 7, fn. 2 clarifies that: "The Commission also opened proceedings against Pearson plc ('Pearson'). Pearson is the parent company of the Penguin group ("Penguin"), one of the largest English-language trade book publishers in the world. Pearson was, however, not an addressee of the Preliminary Assessment. The Commission is still examining Pearson's conduct and its compatibility with Article 101 of the Treaty. Pearson remains, therefore, a party to the proceedings in case COMP/39.847/E-Books". However, in practice, since Apple undertook to terminate agency agreements it had concluded with the Publishers prior to the decision, its contractual relationship with Pearson came to an end (see paragraph 105). A few months after the adoption of this decision, Pearson proposed commitments which were essentially the same as those offered by the other Publishers involved in the case. After they were market tested, these commitments were accepted by the Commission. See Commission decision of 25/07/2013 addressed to: Penguin Random House Limited (formerly The Penguin Publishing Company Limited) and Penguin Group (USA), LLC (formerly Penguin Group (USA), Inc.) - relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847/E-Books C(2013) 4750

¹⁵¹ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), fn. 4 and paragraphs 31 and 36

contractual relationship was substantially different from the one the Publishers had established with Amazon in 2007 when, after Amazon launched its e-reader Kindle, demand for e-books significantly increased.¹⁵² More particularly, prior to signing the agreements with Apple, the Publishers sold e-books to retailers, including Amazon, under the wholesale model.¹⁵³ Under this model, e-books are sold to the retailers at a wholesale price below the suggested retail price set by publishers.¹⁵⁴ In the case at hand, wholesale prices were up to 50% of the e-book list price.¹⁵⁵ The key element of wholesale agreements is that retailers are free to determine the retail prices charged to consumers.¹⁵⁶ Between March and December 2010, the Publishers initiated negotiations with Apple regarding sales of e-books under the agency model in the United Kingdom, France and Germany.¹⁵⁷ The agreements, which were signed shortly thereafter, were very similar to the US contracts:¹⁵⁸ in addition to the 70/30 revenue sharing rule explained above, all agreements included maximum retail price grids for newly released e-books¹⁵⁹ and a retail parity MFN clause.¹⁶⁰ This MFN clause provided that, if another retailer sold a particular e-book at a lower price, including in cases where that retailer was party to a wholesale agreement, the Publisher was bound to lower the retail price of the e-book in the iBookstore to match that other lower price.¹⁶¹ The retail parity MFN arrangements between Apple and the Publishers eventually forced Amazon to switch to agency.¹⁶²

In March 2011,¹⁶³ the Commission confirmed that it had initiated inspections at the premises of firms active in the e-book market.¹⁶⁴ Based on the results of these inspections, the Commission decided to open formal antitrust proceedings to investigate whether the Publishers had engaged in practices violating EU competition law.¹⁶⁵ Throughout its inquiry, the Commission concentrated on the collusion aspects of the case. The Commission placed particular emphasis on the exchange of contacts between the Publishers which, concerned about Amazon's heavy discounts policy,

¹⁵² Ibid., paragraph 18

¹⁵³ Ibid., paragraph 19

¹⁵⁴ Ibid., paragraph 20

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., paragraph 21

¹⁵⁷ Ibid., paragraph 40

¹⁵⁸ Ibid., paras. 41 *et seq.*

¹⁵⁹ Ibid., paragraph 32

¹⁶⁰ Ibid., paragraph 31

¹⁶¹ Ibid.

¹⁶² Ibid., paragraphs 38-9

¹⁶³ Note that an investigation into whether the agreements between the Publishers and Apple had breached competition rules had been initiated by the UK Office of Fair Trading two months earlier. However, with a view to avoiding duplication of the investigation, the OFT closed the case and the Commission took over. The documents relating to the OFT's investigation are available at: <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/e-books>

¹⁶⁴ European Commission (2011, March). Antitrust: Commission confirms unannounced inspections in the e-book publishing sector. MEMO/11/126. Retrieved from: http://europa.eu/rapid/press-release_MEMO-11-126_en.htm?locale=en

¹⁶⁵ European Commission (2011, December). *Antitrust: Commission opens formal proceedings to investigate sales of e-books*. Press Release IP/11/1509. Retrieved from: http://europa.eu/rapid/press-release_IP-11-1509_en.htm

reportedly came together to coordinate the pricing terms of the agreements signed with Apple.¹⁶⁶ According to the Commission, Apple played a major role in this attempt by ensuring that each of the Publishers knew that the others were negotiating with it on the same pricing conditions.¹⁶⁷ This coordination gave strong indications that the Publishers and Apple ‘*engaged in a concerted practice with the object of raising retail prices of e-books in the EEA or preventing the emergence of lower prices in the EEA for e-books, in breach of Article 101(1) TFEU*’.¹⁶⁸ In subsequent discussions with the Commission, the parties proposed undertakings which, following a market test, were considered appropriate to address the Commission’s concerns and, as such, led to the adoption of a commitments decision.¹⁶⁹

The undertakings that were made legally binding on the Publishers and Apple were the following:

- The Publishers and Apple committed to terminate the agency agreements that were concluded as a result of the coordinating behavior.¹⁷⁰
- For a period of five years, each of the Publishers and Apple undertook not to enter into any agreement for the sale of e-books that contains an MFN clause.¹⁷¹ Apple further committed to inform all publishers with which it had an agency agreement that it would not enforce the MFN clause included therein.¹⁷²
- For a two-year (*‘cooling-off’*) period, each of the Publishers undertook not to restrict a retailer’s ability to set retail prices of e-books.¹⁷³ However, it was clarified in the decision that both the Publishers and Apple remained free to enter into agency agreements.¹⁷⁴ If they indeed opted for agency, the Publishers would not restrict the retailer’s freedom to reduce retail prices ‘by an aggregate amount equal to the total commission the publisher pays to the e-book retailer, over a period of at least one year [...] and/or to use that amount to offer any other forms of promotions’.¹⁷⁵ In fact, shortly after the commitments decision was adopted, Harper Collins, Hachette, Simon

¹⁶⁶ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraphs 22-23

¹⁶⁷ *Ibid.*, paragraphs 33-34

¹⁶⁸ European Commission. Final Report of the Hearing Officer COMP/39.847 – E-Books [2013] OJ C 73/06, paragraph 4. Retrieved from: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XX0313\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XX0313(02)&from=EN)

¹⁶⁹ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 5

¹⁷⁰ *Ibid.*, paragraphs 97 and 130

¹⁷¹ *Ibid.*, paragraphs 101, 102 and 106

¹⁷² *Ibid.*, paragraph 107

¹⁷³ *Ibid.*, paragraph 99

¹⁷⁴ *Ibid.*, paragraph 153

¹⁷⁵ *Ibid.*, paragraph 100

& Schuster¹⁷⁶ and Macmillan¹⁷⁷ reportedly concluded agency agreements with Amazon.¹⁷⁸

3.2. The E-Books decision: The question left unanswered and an assessment of the accepted undertakings

In the commitments decision, the Commission carefully avoided taking a stance on the agency agreements concluded between Apple and the publishers *absent the concerted practice*. While this issue was raised by interested stakeholders in the context of the market test that took place prior to the final assessment of the undertakings proposed by the Publishers, the Commission was limited to noting that its concerns ‘do not relate to the legitimate use of the agency model for the sale of e-books’.¹⁷⁹ In strict procedural terms, the Commission was not bound to assess whether these agreements (or the agency model as a business strategy in general) were aligned with EU competition law. The Commission enjoys a large margin of discretion in defining the scope of an antitrust investigation¹⁸⁰ and, since it decided to focus on the *way* in which the Publishers had switched to agency rather than on the *content* of the agreements, the commitments procedure essentially sought to identify the most adequate solution to restore the conditions of competition that existed prior to the possible concerted practice. However, in effect, the Commission has more often than not given its opinion on issues it was not required to address in its decisions, formulating competition policy through the back door. For example, as already mentioned, in *VBBB/VBVB*, after finding that the agreement did not contribute to improvements in the production or distribution of books, it considered it ‘*useful to look more closely at the parties’ arguments in relation to all the conditions of Article [101(3) TFEU], although it is [...] unnecessary to consider whether an agreement satisfies all the conditions of Article [101(3) TFEU] when it has already been found to fail one of those conditions’ [emphasis added]*.¹⁸¹ Since the agency model is gaining popularity in the Internet economy in general and in the media industry in particular, it is much to be lamented that the

¹⁷⁶ Pilkington, M. *Simon & Schuster Adopts Refined Agency Pricing with Amazon UK*. 29 April 2013, The Good E-reader. Retrieved from: <http://goodereader.com/blog/electronic-readers/simonschuster-adopts-refined-agency-pricing-with-amazon-uk>

¹⁷⁷ Shaffi, S. *Macmillan US does agency deal with Amazon*. 18 December 2014, The Bookseller. Retrieved from: <http://www.thebookseller.com/news/macmillan-us-does-agency-deal-amazon>

¹⁷⁸ Campbell, L. *Harper Collins and Hachette UK Refine Agency Model*. 3 April 2013, The Bookseller. Retrieved from: <http://www.thebookseller.com/news/hc-and-hachette-uk-refine-agency-model>

¹⁷⁹ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 153. Note that, while the Commission does not seem willing to condemn the agency model, it is not willing to embrace it either. In making the commitments binding, it stated that the undertakings ‘would eliminate a significant financial incentive for other publishers to have other retailers under the agency model’ (see paragraph 133)

¹⁸⁰ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6, paragraphs 17 *et seq.*

¹⁸¹ Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 48

Commission did not grasp the opportunity to clarify the rather blurred lines of the legal framework that applies to businesses entering into an agency contract. In our case, it is far from clear whether, and if so under what conditions, *individual* agency agreements, that is, *agreements without elements of cartel conduct*,¹⁸² may be regarded as ‘genuine’ agency structures, thereby rendering Article 101(1) TFEU inapplicable. In this section, I shall attempt to answer this question and explore, in light of the prevailing market conditions, the implications for media pluralism were individual agency arrangements to be granted antitrust immunity. In doing so, I will also seek to assess whether the commitments that were made legally binding were indeed appropriate to address the concerns which the arrangements between the Publishers and Apple raised.

3.2.1. Could agency agreements between online retailers and content providers be regarded as ‘genuine’ agency agreements?

Pursuant to the Guidelines on Vertical Restraints, ‘an agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the purchase of goods or services, or sale of goods or services by the principal’.¹⁸³ From a commercial perspective, agency is a very attractive structure. Principals, especially those who are considering entering new markets, do not need to establish a distribution network using their own resources, whereas agents, who do not buy the principals’ products but are solely bound to conclude contracts on their behalf, face significantly lower barriers to entry than other types of distributors.¹⁸⁴ Agency agreements are not caught by Article 101(1) TFEU;¹⁸⁵ it is established case law that since the agent follows the principal’s instructions and thus acts ‘like a commercial employee, [it] forms an economic unit with this undertaking’.¹⁸⁶ The underlying rationale for the exception is rather straightforward. Article 101 TFEU applies to agreements ‘between’ undertakings, not entities that operate ‘within’ the same

¹⁸² It should be noted that, even in cases of ‘genuine’ agency, Article 101(1) TFEU *may* apply if the agency facilitates (hub-and-spoke) collusion. See Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 20, which notes that this is the case ‘when a number of principals use the same agents [...] to collude on marketing strategy or to exchange sensitive market information between the principals’. Similarly, the Commission Guidelines on Horizontal Cooperation Agreements note that competition law may be violated in cases of information exchange ‘indirectly through [...] a third party such as a market research organization or through the companies’ suppliers or retailers’. See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 55. On the issue of hub-and-spoke collusion see, for instance, Odudu, O. (2011). *Indirect Information Exchange: The Constituent Elements of Hub-And-Spoke Collusion*. European Competition Law Journal, 7(2), 205-242

¹⁸³ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 12

¹⁸⁴ See Geradin, D., Anne Layne-Farrar, and Nicolas Petit (2012). *EU Competition Law and Economics*, paragraph 3.13. Oxford: OUP

¹⁸⁵ *Ibid.*, paragraph 18

¹⁸⁶ ECJ, Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Coöperatieve Vereniging ‘Suiker Unie’ UA and others v Commission of the European Communities* [1975] ECR-1663, paragraph 480

undertaking (this is commonly referred to as the ‘single economic entity’ doctrine).¹⁸⁷ To make this assessment, ‘formal separation of two companies resulting from their having distinct legal identity, is not decisive. The test is whether or not there is *unity in their conduct on the market*’ [emphasis added].¹⁸⁸ If the incentives of principal and agent are indeed aligned, then the agency structure is akin to a vertically integrated firm.¹⁸⁹ As a result, clauses restrictive of competition, including ‘hardcore’ restrictions such as the assignment of exclusive territories and resale price maintenance, escape Article 101(1) TFEU¹⁹⁰ provided they form part of a ‘genuine’ agency arrangement. But, while the legal *implications* of establishing an agency relationship have long been clear,¹⁹¹ the *conditions* under which agency agreements may benefit from antitrust immunity have been rather ambiguous.

The first (and – what seems to be in current practice – decisive) condition relates to the allocation of commercial and financial risks; where the agent assumes no such risks, it is deemed to be a genuine agent.¹⁹² Two criteria appear to be the key factors to determine this. First, ownership of the contract goods should not be vested in the agent and second, the agent should not bear any direct or indirect risks in respect of the contracts concluded by itself on behalf of the principal, including transport costs, advertising costs, liability vis-à-vis third parties and liability vis-à-vis the principal for customers’ non-performance.¹⁹³ Determining whether the ‘risk’ criterion is met is not a straightforward exercise, for the relevant case law has produced rather contradictory outcomes. For example, one issue that is still unsettled concerns the risks which the principal requires the agent to undertake in closely related markets. In *Daimler Chrysler*, the Court held that qualifying as a genuine agent for the sale of the principal’s goods or services (sale of new cars) does not depend on whether the principal commands the agent to bear risks in other, neighboring markets (provision of after-sales servicing and performance of guarantee work on vehicles).¹⁹⁴ This approach is contrasted with the one the Court followed in *VAG Leasing* where, in assessing the applicability of Article 101(1) to the

¹⁸⁷ For an overview of the relevant case see Odudu, O. and David Bailey (2014). *The Single Economic Entity Doctrine in EU Competition Law*. Common Market Law Review, 51, 1721-1758

¹⁸⁸ CFI, Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, paragraph 85

¹⁸⁹ Bennett, M. (2013, June). *Online Platforms: Retailers, Genuine Agents or None of the Above?*, 4. Competition Policy International. Retrieved from: <https://www.competitionpolicyinternational.com/assets/Uploads/EuropeJune.pdf>

¹⁹⁰ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 18

¹⁹¹ The Commission affirmed the special regime that agency agreements enjoy as early as 1962. See Commission Notice on Exclusive Dealing Contracts with Commercial Agents [1962] OJ 139/2921

¹⁹² See, for instance, Commission Notice on Exclusive Dealing Contracts with Commercial Agents [1962] OJ 139/2921, paragraph 1; ECJ, Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Coöperatieve Vereniging ‘Suiker Unie’ UA and others v Commission of the European Communities* [1975] ECR-1663, paragraphs 482 and 541; ECJ, Case C-266/93, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paragraph 19; Commission Guidelines on Vertical Restraints [2000] OJ C 291/01, paragraphs 13-15; Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraphs 13-15

¹⁹³ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 16. The Guidelines distinguish between contract-specific, market-specific and other risks. For the relevant definitions see paragraph 14

¹⁹⁴ CFI, Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, paragraphs 66 and 81-120

arrangements between Volkswagen and its dealers which acted as agents leasing Volkswagen vehicles, it took account of the fact that the latter were obliged by the former to provide after-sales services.¹⁹⁵ Another question that still seeks an answer is whether some risks may be borne by the agent without related obligations jeopardizing the qualification of the relationship as a genuine agency. For instance, in its 1962 Notice on Exclusive Dealing Contracts with Commercial Agents, the Commission noted that agents could assume the *del credere* guarantee¹⁹⁶ whereby ‘the agent acts not only as a salesperson or broker for the principal, but also as a guarantor of the credit extended to the buyer’.¹⁹⁷ Yet, in *VAG Leasing* the Court adopted a more stringent approach, holding that the agents should not ‘bear **any** of the risks resulting from the contracts negotiated on behalf of the principal’ [emphasis added].¹⁹⁸ The Guidelines on Vertical Restraints, which state that Article 101(1) TFEU does not apply if the agent ‘bears **only insignificant** risks’ [emphasis added]¹⁹⁹ are thereby not particularly helpful in resolving this controversy.

The second criterion is ‘integration’ of the agent with the principal’s business. More particularly, for an agency agreement to render Article 101(1) TFEU inapplicable, the agent should ‘neither undertake nor engage in activities proper to an independent trader’.²⁰⁰ This criterion, which is also referred to as criterion of economic dependence, excludes from the favorable regime cases where the agent enjoys significant commercial autonomy, acting in the name of various principals or developing simultaneously other commercial activities.²⁰¹ However, there is uncertainty over the extent to which this condition has been embraced by either the Court or the Commission. In the past, Court rulings and Commission decisions have largely been based on whether the agent acted as an ‘integral part’ of the principal.²⁰² In recent years, the main focus has been on how risks are

¹⁹⁵ ECJ, Case C-266/93, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paragraphs 19-21

¹⁹⁶ Commission Notice on Exclusive Dealing Contracts with Commercial Agents [1962] OJ 139/2921, paragraph 1

¹⁹⁷ Retrieved from: <http://www.investopedia.com/terms/d/del-credere-agency.asp>

¹⁹⁸ ECJ, Case C-266/93, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paragraph 19. In a more recent case the Court ruled that ‘the fact that the intermediary bears *only a negligible share of the risks* does not render Article 85 [now Article 101] of the Treaty applicable’ [emphasis added]. See ECJ, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA* [2006] ECR I-11987, paragraph 61

¹⁹⁹ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 15

²⁰⁰ Commission Notice on Exclusive Dealing Contracts with Commercial Agents, OJ 1962 139/2921, paragraph 1

²⁰¹ Lianos, I. (2007). *Commercial Agency Agreements, Vertical Restraints, and the Limits of Article 81(1) EC: Between Hierarchies and Networks*. *Journal of Competition Law and Economics*, 3(4), 632

²⁰² See, for instance, ECJ, Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Coöperatieve Vereniging ‘Suiker Unie’ UA and others v Commission of the European Communities* [1975] ECR-1663, paragraphs 545-546: The Court based its ruling on the fact that ‘the agents in question are large business houses, which at the same time as they distribute sugar for the account of the applicant [...], undertake a very considerable amount of business for their own account [...], in particular in the field of exports to third countries [...] Thus, these representatives are authorized to act as independent dealers in those transactions’. See also Case C-311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1985] ECR I-3801 which was a case of multiple agency (travel agent acting on behalf of several tour operators): ‘A travel agent [...] must be regarded as an independent agent who provides services on an entirely independent basis. He sells travels organized by a large number of different tour operators and a tour operator sells travel through a very large number of agents [...] A travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator’s undertaking’ (paragraph 20). A similar reasoning has also been adopted by the Commission. See, for instance, Commission decision 73/109/EC, *European Sugar Industry* [1973] OJ L 140/17

allocated.²⁰³ Yet, the relevant case law still makes references to the role of the agent as an ‘auxiliary organ’²⁰⁴ and has occasionally focused on the fact that the agent did not have the power to alter retail prices as a valid indication that the agent had ‘no authority to act independently of the principal’.²⁰⁵ These considerations suggest that the ‘integration’ criterion has not been abandoned altogether.

Putting the above analysis into the context of publishing, the following question seeks an answer: could agency agreements between online platforms and content providers, such as those concluded between Apple and the Publishers, fall outside Article 101(1) TFEU? Starting from the condition that the agent should be integrated with the principal’s business, we cannot predict with certainty how the Commission would deal with the fact that Apple (or any other multi-sided retailer) sells the books of more than one publisher or that Apple develops in parallel a considerable amount of other activities for its own account (e.g. sale of e-readers, sale of apps, etc.). The Commission may state in its Guidelines that an entity may qualify as an agent irrespective of whether it acts in the name of one or more principals,²⁰⁶ but as previously mentioned, its decisional practice is not entirely immune to ‘economic dependence’ considerations. With respect to risk, without access to the agreements concerned, we cannot say whether Apple assumed any responsibilities that would render Article 101(1) TFEU inapplicable²⁰⁷ (note that the commitments decision is not helpful in that regard, because it is limited to the description of certain pricing terms of the agreements). For now, we may only conjecture whether or not Apple could be perceived as a ‘genuine agent’ for the purposes of EU competition law: in principle, a narrow interpretation of the above two criteria would lead to the conclusion that Article 101(1) TFEU applies. In addition to the fact that this is a case involving a retailer that operates to a large extent independently of one single publisher, Apple also seems to have incurred some costs in promoting the Publishers’ e-books. For example, it has created an instrument, the Widget Builder, which allows publishers to increase sales of their books on the iBookstore by adding interactive widgets to their websites and blogs.²⁰⁸ If the creation of this and other similar instruments were an obligation under the agency agreement signed with the Publishers, this could be

²⁰³ For a comprehensive overview of the evolution of the relevant case law see, for instance, Zhang, A. H. (2013). *Toward an Economic Approach to Agency Agreements*. *Journal of Competition Law and Economics*, 9(3), 565-570, and Lianos, I. (2007), *supra* n. 201, 631-648

²⁰⁴ See, for instance, ECJ, Case C-266/93, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paragraph 19; ECJ, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA* [2006] ECR I-11987, paragraphs 42-44. It should be noted that these judgments are somewhat misleading in that they make reference to the ‘integration’ criterion without, however, addressing the question of whether the criterion is actually met. The focus in both cases is on risk allocation

²⁰⁵ See CFI, Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, paragraphs 92-93. For an overview of this judgment see Jones, A. and Brenda Sufrin (2008). *EC Competition Law* (3rd Edition), 687-688. Oxford: OUP

²⁰⁶ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 13

²⁰⁷ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), see in particular paragraphs 31 *et seq.*

²⁰⁸ See <http://widgets.itunes.apple.com/builder/> For further investments Apple has made to promote e-authors and publishers see: <http://www.apple.com/support/mac-apps/ibooksauthor/>

regarded as an ‘investment in sales promotion’,²⁰⁹ which, according to the Guidelines, is a type of risk that should not be borne by the agent for the agreement to escape Article 101(1) TFEU. Nevertheless, it is questionable whether such a narrow interpretation serves the purposes for which the special regime for agencies has been established in the first place. Excluding from said regime multiple agencies²¹⁰ or cases where the agent develops a strategy to market the principal’s products²¹¹ would likely result in preventing most agency arrangements from qualifying for immunity. In the case of online agency agreements, such as those signed between Apple and the Publishers, it should be borne in mind that the content provider holds control over both ownership of the content (the agent/digital store does not purchase the IPRs to the content concerned)²¹² and price. Moreover, given the digital nature of the e-books, the agent does not need to incur any transport or storage costs. Finally, customers’ non-performance is irrelevant as a financial risk in online markets because the consumers’ debit or credit cards are, broadly speaking, charged at the moment of purchase.

However, an assessment of whether Article 101(1) TFEU is inapplicable cannot be restricted to examining whether there are clauses in the agreement from which it may be inferred that the agent does not act as an extension of the will of the principal or that it needs to incur costs that a ‘commercial employee’ would not have to bear. There may be other clauses in the agreement that give rise to competition concerns. This explains why the Guidelines make a distinction between ‘the conditions of sale or purchase of the contract goods or services’ and ‘provisions which concern the relationship between the agent and the principal’.²¹³ These latter may ‘infringe Article 101(1) TFEU if they lead to or contribute to a (cumulative) foreclosure effect’.²¹⁴ Whether the agreement indeed contains provisions that raise competition issues can of course be determined only on a case-by-case basis. That is to say, the conclusion will depend on the specific arrangements made in the context of a particular agency agreement. But, one type of clause which deserves our attention because it has been introduced in all online agency agreements that have received antitrust scrutiny thus far,²¹⁵ including, as already mentioned, those between Apple and the Publishers, is a variation of the MFN clause, namely the retail parity MFN. Prior to examining the peculiarity of the retail parity MFN and why its

²⁰⁹ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 16(e)

²¹⁰ Lianos, I. (2007), *supra n.* 201, 634

²¹¹ Bennett, M. (2013, June), *supra n.* 189, 8-9

²¹² *Ibid.*

²¹³ Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paragraph 19

²¹⁴ *Ibid.*

²¹⁵ See, for instance, OFT (2013, November). *Investigation into suspected anti-competitive arrangements by Amazon relating to online retail*. Retrieved from: <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/online-retail/>; Bundeskartellamt (2013, November). *Amazon abandons price parity clauses for good*. Retrieved from: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html

inclusion may determine whether the agreement qualifies for immunity, it is best to examine what a ‘typical’ MFN is and its potential impact on competition.

‘Typical’ MFNs establish the seller’s obligation ‘not to offer more favorable prices to other customers’²¹⁶ (for the avoidance of confusion, in our case, the seller would be the principal and the customer the agent and the terms seller/principal/publisher on the one hand and customer/agent/retailer on the other are used interchangeably). Every time the principal offers an agent a discount, it is obliged to extend the same offer to all other agents. In theory, typical MFN clauses may produce both pro- and anti-competitive effects. As regards the latter, MFN clauses may reduce or eliminate the incentive of the principal to offer potential agents better deals, thereby discouraging market entry in downstream markets.²¹⁷ MFN provisions may also result in an increase in market power downstream; an agent with significant bargaining power does not benefit solely from the conditions that are the outcome of the negotiations it itself conducted with the principal, but also from any favorable conditions that any other agent managed to obtain.²¹⁸ This may push competing agents out of the market.²¹⁹ In addition, in case MFNs apply industry-wide, they may chill competition upstream. Since every time they decide to reduce prices for one agent they are required to repay the difference to all other agents, principals are incentivized to compete less aggressively knowing that rivals are bound by the same duty.²²⁰ With respect to positive effects, it is usually contended that, in cases of perishable products, MFNs may address problems relating to transaction delays; instead of waiting for the quality of the product to worsen and hence the price to drop, an MFN eliminates the agents’ incentive to put off the order.²²¹ This in turn allows the principal to allocate its resources more efficiently.²²² MFNs may also resolve the ‘hold up’ problem, which arises in cases where the agent is deterred from entering the market because it fears that the principal will act opportunistically by engaging in rent-seeking behavior.²²³ An MFN encourages the agent to make the contract-specific investment required to penetrate the downstream market because it provides it

²¹⁶ Vanderborre, I. and Michael J. Frese (2014). *Most Favored Nation Clauses Revisited*. *European Competition Law Review*, 12, 588. On the anticompetitive effects of MFNs see also Hemphill, S. C. and Tim Wu (2013). *Parallel Exclusion*. *Yale Law Journal*, 122, 1182-1253. On the anticompetitive effects of MFNs on (traditional and emerging) broadcasting markets see Toth, B. (2013). *How parallel Most-Favored Nation Clauses in the Television Industry Exclude Competitors and Stifle Innovation*. *The Columbia Science and Technology Law Review*, 15, 194-234

²¹⁷ Vanderborre, I. and Michael J. Frese (2014), *supra n.*, 589

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Baker, J. B. and Judith A. Chevalier (2013). *The Competitive Consequences of Most-Favored-Nation Provisions*. *Antitrust Magazine*, 27(2), 22-24

²²¹ Vanderborre, I. and Michael J. Frese (2014), *supra n.* 216, 589; Baker, J. B. and Judith A. Chevalier (2013), *supra n.* 220, 21

²²² *Ibid.*

²²³ *Ibid.*

with some certainty that the principal will not free ride on its investment, offering subsequent entrants better deals.²²⁴ This may be a way to open up risky or new markets and hence to promote innovation.

It is questionable whether the efficiencies put forward in favor of MFNs apply to media content. The ‘perishability’ argument is somewhat irrelevant due to the digital and durable nature of the content that is the contract service. Even if we were to limit this justification to certain types of media content that have a short life cycle, most notably news and football matches, the ‘perishability’ argument could logically be accepted in cases where the incentive of the principal to sell the product is greater than that of the agent because the last minute price drops from which the latter benefits outweigh any quality deterioration that may have resulted from delaying the transaction. However, in the case of ‘perishable’ media content, the incentives of principal and agent are aligned because end-consumers are interested in immediate fruition. As for the argument that, by assuring the agent that it will recoup its investments, an MFN clause is needed to resolve the hold up problem. This is also weak in our case; creating a website is not expensive whereas, in the case of already established retailers, the relevant contract-specific investments (e.g. text editing, online advertising, etc.) are, as a rule, not particularly high. This issue was recently addressed in a decision adopted by the Bundeskartellamt concerning the MFN contained in an agency agreement between German hotels and an online booking portal.²²⁵ The Bundeskartellamt, arguably correctly, rejected the portal’s argument that room price differences across platforms would eliminate its incentives to improve service quality on the grounds that the investments made by the portal were fairly limited and, as a result, the free riding problem was quasi non-existent.²²⁶

Even if one were more open to accepting that ‘typical’ MFNs may produce certain pro-competitive effects, it would seem difficult to find any objective efficiency rationale for retail parity MFNs. As already mentioned above, under these clauses it is agreed that in case another retailer (including a non-agent) offers a lower retail price for a particular product, the principal must lower the price of the product to match that other price.²²⁷ The peculiarity of these MFNs is comprehensively explained by the US Department of Justice in the complaint it launched against Apple and the Publishers. The relevant paragraph of the complaint reads as follows:

²²⁴ Ibid.

²²⁵ Bundeskartellamt (2013). *HRS-Hotel Reservation Service Robert Ragge GmbH*. B.9 - 66/10. Retrieved from: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=2 For a brief overview of this case see The Bundeskartellamt (2013). *Annual Report*, 35. Retrieved from: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2013.pdf?__blob=publicationFile&v=3

²²⁶ Ibid. paragraphs 5.2. *et seq.*

²²⁷ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 31

*‘That provision was not structured like a standard MFN in favor of a retailer, ensuring Apple that it would receive the best available wholesale price. Nor did the MFN ensure Apple that the Publisher Defendants would not set a higher retail price on the iBookstore than they set on other websites where they controlled retail prices. Instead, the MFN here required each publisher to guarantee that it would lower the retail price of each e-book in Apple’s iBookstore to match the lowest price offered by any other retailer, even if the Publisher Defendant did not control that other retailer’s ultimate consumer price. That is, instead of an MFN designed to protect Apple’s ability to compete, this MFN was designed to protect Apple from having to compete on price at all, while still maintaining Apple’s 30 percent margin’.*²²⁸

Retail parity MFNs are fundamentally different from a typical MFN clause. As opposed to the latter, the former restrict the agent’s freedom to offer the product at lower prices. Retail parity MFNs must also be distinguished from RPM for at least two reasons. First, contrary to RPM, the price of the contract good is not set once-off by the seller but is controlled by online retailers as the latter see fit.²²⁹ This means in practice that a powerful retailer may determine the price at which the contract good is sold at any given moment and can maneuver that price to increase its fee.²³⁰ Second, RPM may be limited to one or a few retailers whereas a retail parity MFN is a disguised form of *collective* RPM.²³¹ In other words, it explicitly introduces a ‘horizontal element to an otherwise vertical agreement’.²³² For the above reasons, there is a consensus among economists that the anti-competitive effects of retail parity MFNs ‘may go beyond the harm that any RPM may result in’.²³³ With that said, it is not surprising that the investigations opened by the OFT and the Bundeskartellamt into Amazon’s retail parity MFNs have led to the retailer removing the clause *indefinitely*.²³⁴ In both cases, the concerns expressed were the same as those discussed above, namely the explicit horizontal element introduced by the agreements, market entry deterrence, softening of competition upstream and higher retail prices.²³⁵ It should be noted that the Commission opted for the same solution in an older case concerning the MFN clauses contained in agreements between the Hollywood majors and European pay-TV operators, which provided that the studios were entitled to

²²⁸ Department of Justice (2012). Case 1:12-cv-02826-UA United States of America v. Apple Inc; Hachette Book Group; Harper Collins Publishers Inc; Penguin Group (USA) Inc; Simon and Schuster Inc, United States District Court, Southern District of New York), (Complaint), paragraph 65. Retrieved from: <http://www.justice.gov/atr/cases/f282100/282135.pdf> See also Spencer, G. *Understanding The Agency Model And The DOJ’s Allegations Against Apple And Those Publishers*. 12 April 2012, Mac Stories: ‘the iBooks Store would *always* have the e-book at the cheapest price. If that meant the price was below what it cost to produce, the publisher would take the loss, not Apple –they would still get their 30% cut’. Retrieved from: <http://www.macstories.net/stories/understanding-the-agency-model-and-the-doj-s-allegations-against-apple-and-those-publishers/>

²²⁹ OECD (2003). *Policy Roundtable on Vertical Restraints for Online Sales*, 7. Retrieved from: <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>

²³⁰ *Ibid.*

²³¹ *Ibid.*, 149

²³² *Ibid.*

²³³ *Ibid.*, 148

²³⁴ See Bundeskartellamt (2013), *supra n.* 225, paragraph 256 and OFT (2013, November), *supra n.* 215

²³⁵ European Competition Network (2013, May). *ECN Brief*. Retrieved from: http://ec.europa.eu/competition/ecn/brief/05_2013/amaz_deuk.pdf

enjoy the most favorable conditions agreed with a pay-TV provider and any one of them.²³⁶ That is, any increase agreed with the studio automatically resulted in parallel increases in the prices of the other studios.²³⁷ Again, these clauses were withdrawn on an indefinite basis. In view of the unlikelihood that MFNs in general and retail parity MFNs in particular will produce any positive effects on competition in book markets, the Commission's decision, which suggests that after a five-year period publishers may include MFNs in the agreements they conclude with online retailers, is somewhat confusing.

In conclusion, an agency agreement between an online retailer selling media content on behalf of a provider may in principle be regarded as 'genuine' mainly because the retailer does not need to acquire the IPRs to the content prior to making it available to end-customers or to incur storage or transport costs. However, this is only the first step of the test that an agency agreement must pass to benefit from immunity. The assessment of whether Article 101(1) TFEU applies goes beyond that first step because the agreement may shape the relationship between the agent(s) and the principal in a way that harms competition. Retail parity MFNs are one such example.

3.2.2. Granting antitrust immunity to agencies: Then what?

So far, we have seen that, absent any provisions that may distort competition there are legitimate grounds for granting immunity to RPM-based agencies. The question that inevitably arises is the following: if we were to treat these arrangements favorably, what would be the impact on the market and what would be the implications for media pluralism given the current business realities? I shall answer this question by looking into possible price and non-price effects. From the outset it should be noted that it is too soon to draw any definitive conclusion. Only time and empirical research will tell whether the arguments that are raised below indeed hold.

Genuine Agency and price effects The impact of the agency model on prices is a hotly contested and largely unsettled issue. In the E-books case, the Commission took the preliminary view that the Publishers concluded the agency agreements with Apple in order to increase prices but, since this was a commitments decision, proof substantiating this view was not provided.²³⁸ On the other side of the Atlantic, the Court of the Southern District of New York found that within a few weeks of

²³⁶ European Commission (2004, October). *Commission closes investigation into contracts of six Hollywood studios with European pay-TV's*. Press Release IP/04/1314. Retrieved from: http://europa.eu/rapid/press-release_IP-04-1314_en.htm

²³⁷ Ibid.

²³⁸ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 32

switching to agency (voluntarily or otherwise), the prices of e-books produced by the Publishers increased.²³⁹ However, this finding concerns the defendants' books only²⁴⁰ and it may well be attributed to the cartel, not the agency model *per se*. It further bears noting that looking at price effects immediately after the industry adopts agency may lead to erroneous conclusions. Johnson, for example, examined the effects of the agency model on pricing when there is consumer lock-in, which may occur in the e-book market because a consumer is tied to a particular book reading device, and found that switching to agency may lead to higher prices for e-books initially but eventually prices decrease, similar to the wholesale model.²⁴¹ Foros *et al.* reach a similar conclusion, albeit from a different perspective, that of the current market structure; their model shows that, under the prevailing e-book market conditions where the degree of competition is higher upstream than downstream, prices would be lower *with* rather than without an industry-wide adoption of the agency mechanism.²⁴²

The premise that agency may lead to lower prices may hold if we also take into account the interplay with the market for print books, which is something Johnson and Foros *et al.* intentionally refrained from considering²⁴³ but which Abhishek *et al.* examined. More particularly, Abhishek *et al.* convincingly argue that when e-sales have a negative impact on sales through the traditional channel²⁴⁴ the publisher has the incentive to limit e-sales.²⁴⁵ Therefore, if a wholesale arrangement is made, the publisher will set a high wholesale price for the agent which will ultimately result in higher prices.²⁴⁶ This will reduce negative spillover effects in the offline channel but will aggravate double

²³⁹ 'The increases at Amazon within roughly two weeks of moving to agency amounted to an average per unit e-book retail price increase of 14.2% for their New Releases, 42.7% for their NYT Bestsellers, and 18.6% across all of the Publisher Defendants' e-books'. United States Southern District of New York (2013). *United States v. Apple Inc. et al.* Case 1:12-cv-02826-DLC Document 326, 94. Retrieved from: <http://www.justice.gov/atr/cases/f299200/299275.pdf>

²⁴⁰ Associations of authors that were not in a contractual relationship with the Publishers maintained that, following the adoption of agency by Apple, prices of their books fell. See, for instance, Coker, M. *Does Agency Pricing Lead to Higher Book Prices?* 28 March 2012, Smashwords. Retrieved from: <http://blog.smashwords.com/2012/03/does-agency-pricing-lead-to-higher-book.html>

²⁴¹ Johnson, J. P. (2013). *The Agency and Wholesale Models in Electronic Content Markets*, 1-2. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126808

²⁴² Foros, Ø., *et al.* (2013), *supra n.* 17, 10-14. Note that they assume that the principal fixes the retail price at which the agent sells the contract good and that the agreement establishes a 70/30 revenue sharing rule, which are provisions identical to the agreements made between Apple and the Publishers

²⁴³ *Ibid.*, 3

²⁴⁴ Note that the issue of how e-book sales affect sales at the brick-and-mortar stores is far from settled. There are numerous studies suggesting that sales in the e-channel have a negative impact on sales through the traditional distribution network. See, for instance, Brynjolfsson, E., Yu J. Hu, and Mohammad S. Rahman (2009). *Battle of the Retail Channels: How Product Selection and Geography Drive Cross-Channel Competition*. Management Science, 55(11), 1755–1765, and Goolsbee, A. (2001). *Competition in the Computer Industry: Online versus Retail*. The Journal of Industrial Economics, 49(4), 487–499. Other studies reach the opposite conclusion. See, for instance Smith, M. D. and Rahul Telang (2010). *Piracy or Promotion? The Impact of Broadband Internet Penetration on DVD Sales*. Information Economics and Policy, 22(4), 289–298. Special Issue: Digital Piracy. And certain studies suggest that the effect of online sales on sales through the traditional network may be positive but insignificant. See, for instance, Hilton, J. and David Wiley (2010). *The Short-Term Influence of Free Digital Versions of Books on Print Sales*. BYU Faculty Publications. Paper 1358. Retrieved from: <http://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2357&context=facpub>

²⁴⁵ Abhishek, V. Kinshuk Jerath and Z. John Zhang (2015). *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 17. SSRN Working Paper. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013720

²⁴⁶ *Ibid.*,

marginalization²⁴⁷ in the online channel.²⁴⁸ By contrast, under agency, the principal has the incentive to charge lower prices because with agency the higher the retail price, the higher the commission it has to pay the agent.²⁴⁹ This leads to the agency structure being more efficient²⁵⁰ and ultimately to lower prices for the end consumer.²⁵¹

Genuine Agency and non-price effects in the book market Starting from the upstream markets, authors appear to earn more with agency rather than with a wholesale model. The usual revenue sharing under agency is 40/30/30 (40% for the author, 30% for the publisher and the remaining 30% for the retailer) whereas under Amazon's wholesale arrangements the revenue split used to be 8/32/60.²⁵² Higher royalties may encourage market entry on behalf of new authors, including indie authors, stimulate creativity and eventually lead to an increase in the range of titles that are made available to consumers.²⁵³

Moreover, because the publisher controls price, agency may address concerns relating to heavy discount strategies, which powerful retailers are not prevented from following under a wholesale deal. This is also referred to as 'the 9.99 problem' raised by Amazon's pricing before it switched to agency. More particularly, as soon as it launched its e-reader Kindle, and in an attempt to boost sales of the device in order to ensure consumer lock-in,²⁵⁴ Amazon began offering e-books, including newly released English-language bestsellers, for US \$9.99.²⁵⁵ This price was not only substantially below the retail price proposed by the Publishers, but also below the wholesale price at which Amazon was buying the e-books.²⁵⁶ The effects of this practice on book consumption are not clear but the argument may be raised that, with Amazon charging such low prices, consumers may refrain from buying content that costs more because this is what they expect *any* title to cost. Put simply, this practice may devalue the book as a literary creation and marginalize well-researched works or more

²⁴⁷ For an analysis of the effects of double marginalization on innovative products see Shen, W. (2012). *Examining Double Marginalization Effect for Innovative Product Supply Chain*. International Journal of Operations Research and Information Systems, 3(1), 37-52

²⁴⁸ Abhishek, V. Kinshuk Jerath and Z. John Zhang (2015), *supra n.* 245, 17

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Note that Condorelli *et al.* reach the same conclusion. See Condorelli, D. Andrea Galeotti and Vasiliki Skreta (2013). *Selling Through Referrals*. NYU Working Paper No. 2451/31774. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260874

²⁵² OECD (2012). *E-books: Developments and Policy Considerations*, 29 and 27. OECD Digital Economy Papers, No. 208

²⁵³ Epstein, R. *Not Proven: The DoJ Suit Against Apple for Ebook Pricing*. 10 April 2014, Ricochet. Retrieved from: <https://ricochet.com/archives/not-proven-the-doj-suit-against-apple-for-ebook-pricing/>

²⁵⁴ Joint Research Center (2012a), *supra n.* 1, 73

²⁵⁵ In 2011, Amazon's Kindle store offered 950,000 eBook titles, of which 800,000 would cost \$9.99 or less. See Wischenbart, R. *The Global eBook Market. Current Conditions and Future Projections*, 5. Retrieved from: http://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/000/522-1.pdf

²⁵⁶ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 22

esoteric titles. Furthermore, if e-books cost substantially less than hardcover versions, publishers face pressure to reduce prices of print books.²⁵⁷ This may result in lower prices for the consumers, but as I have already explained, a race to the bottom on price has a negative impact on content diversity.

As regards downstream markets, in cases where online sales have adverse effects on sales through the traditional channel, agency may stimulate competition between retailers. This is so not only because the publisher is likely to charge lower prices than it would have with wholesale, but also because, as already seen, RPM, by protecting the distributor's profit margin, encourages market entry. Moreover, to the extent that it contributes to the survival of brick-and-mortar bookstores or the survival of the traditional product in and of itself, control over prices would be to the benefit of the majority of consumers, including younger generations that seem to prefer print to e-books.²⁵⁸

Genuine Agency and non-price effects in the news market As already mentioned, one of the main areas in which the activities of digital stores may impact media pluralism is the shaping of news economics, that is to say, the ways in which they may affect the ability of newspaper publishers to earn (advertising and subscription) revenues. Hence, when we discuss the non-price pluralism-specific effects of granting immunity to 'genuine' agency arrangements the question that arises is whether these arrangements may somehow interfere negatively with the publishers' ability to generate the financial resources necessary to invest in high quality journalism. The answer is likely no, for mainly three reasons. First, previous revenue models have been far from successful. For example, certain publishers have attempted to introduce pay-walls, however, this model was quickly abandoned because the earnings from subscriptions could not make up for the drop in advertising revenues that followed the massive loss of audiences.²⁵⁹ Other publishers, in an effort to reduce the high fixed costs that the production and distribution of newspapers entails, decided to go online-only.²⁶⁰ Yet, this also proved a risky undertaking. For instance, Thurman and Myllylahti examined the switch to online-only of Finnish financial newspaper *Talouselämä* and found that, while the title managed to reduce costs by 50%, revenues diminished by 75%.²⁶¹ The adoption of the agency model, combined with the introduction of tablets and new generations of e-readers, which make digital

²⁵⁷ Department of Justice (2012), *supra n.* 228, 9

²⁵⁸ See, for instance, Bury, L. *Young adult readers 'prefer printed to ebooks'*. 25 November 2013, The Guardian. Retrieved from: <http://www.theguardian.com/books/2013/nov/25/young-adult-readers-prefer-printed-ebooks> and Robb, A. *92 Percent of College Students Prefer Reading Print Books to E-Readers*. 14 January 2015, New Republic. Retrieved from: <http://www.newrepublic.com/article/120765/naomi-barons-words-onscreen-fate-reading-digital-world>

²⁵⁹ Joint Research Center (2012b), *supra n.* 28, 8

²⁶⁰ *Ibid.*, 24

²⁶¹ *Ibid.*

newspapers more appealing to the readership,²⁶² has opened up a new market for publishers and evidence suggests that agency has been the first ever viable income-generating strategy for online news provision.²⁶³ Second, compared against an emerging and – what appears to be – efficient charging mechanism set up by the *Financial Times*, agency has a distinctive advantage. More particularly, instead of entering into a contractual relationship with Apple under the ‘standard’ (70/30) agency terms, the *Financial Times* created a web-based product using HTML5, which is accessible via any smartphone web browser.²⁶⁴ While this allows the publishers to establish a direct relationship with the readership, it is an expensive alternative (it entails significant software development and subscriber management costs) which not all news providers can afford.²⁶⁵ It bears repeating that not having to incur the costs that the establishment of a full-grown distribution network would require is what makes agency so attractive. Third, in the case of a ‘genuine’ RPM-based agency, publishers maintain control over price and – absent MFNs – are not forced to forego potential revenues.

One might say that, given consumer lock-in, which results from the fact that the content digital stores provide is tied to the hardware devices they manufacture, and given the popularity of certain digital stores, which creates direct network effects, there may arise concerns for pluralism in terms of revenue losses because powerful retailers use their strong bargaining position vis-à-vis news publishers. In other words, newspapers are to some extent forced to accept the conditions those retailers set in order to reach the readership that uses the tablets and e-readers the latter produce. Following this line of reasoning, if those retailers used their position to extract more onerous conditions from the publishers, pluralism concerns would arise long before the same issue became a competition concern under Article 102 TFEU (*if* it ever became a competition concern). However, saying that, if agency agreements between popular digital retailers and news publishers were granted immunity, this would harm media pluralism on the grounds that the retailers would have the upper hand in the negotiation would – at least for now – be a stretch; it was seen above that the agency model has benefited rather than harmed news publishers. Nor does the fact that a digital store is in a strong negotiating position define whether the agency is indeed ‘genuine’, because once the terms have been agreed upon, the agent may well act as if it were the principal’s employee. Thus, ‘in considering bargaining power [as a factor determining whether an undertaking is a genuine agent or

²⁶² Ibid., 8

²⁶³ Ibid., 65. See also Foster, R. (2012), *supra* n. 19, 39

²⁶⁴ Foster, R. (2012), *supra* n. 19, 31 referring to Smith, P. *Fts Mobile Web App Shows Apples Are Not the Only Fruit*. 8 June 2011, [Themediabriefing.com](http://www.themediabriefing.com), and Prodhan, G. *FT Pulls its App from the Apple Store*. 31 August 2011, Reuters. Retrieved from: <http://www.reuters.com/article/2011/08/31/us-apple-ft-idUSTRE77U1O020110831>

²⁶⁵ Ibid.

not] one must be careful not to conflate any bargaining power before the agreement with the ability to act independently once the agreement has been entered into'.²⁶⁶

In summary, in the current market conditions, granting immunity to agency agreements²⁶⁷ which allow the provider to fix the retail price of the content and which introduce a revenue sharing arrangement that contributes to the viability of both principal and agent is more likely to enhance rather than negatively affect media pluralism.

Would non-pure agencies be different? The above conclusion could be altered in the case of non-pure agency agreements²⁶⁸ under which 'the agent cannot be validly prevented from passing on part or all of its commission payment to the customer in order to reduce the effective sale price paid by the customer for the product'.²⁶⁹ As already indicated above, the establishment of a non-pure agency for a period of two years was the third and final commitment that was made legally binding on the undertakings involved in the E-books cartel.²⁷⁰ This is arguably not an optimal solution because powerful digital stores with significant resources at their disposal have the ability and incentive to forego their commission altogether. To the extent that it reinforces downstream concentration, this structure may produce exclusionary effects. This should be considered alongside the fact that, unlike powerful US retailers, domestic firms operating in Member States where RPM laws apply are not allowed to offer discounts.²⁷¹ Given these regulatory conditions and the relevant markets' tendency to concentration, a non-pure agency would not seem appropriate to ensure a competitive market outcome.

²⁶⁶ Bennett, M. (2013, June), *supra n.* 189, 7

²⁶⁷ Note that, even if for one reason or another an RPM-based agency does not qualify as a 'genuine' agency relationship, the agreement may still qualify for an exemption under Article 101(3) TFEU. The economic studies cited in this part of the Chapter pinpoint the factors that must be considered in an assessment under Article 101(3) to ensure that the non-price dimensions of competition that are relevant for our purposes are sufficiently taken into account

²⁶⁸ Note that the case law and the Commission's decisional practice are not entirely clear as to whether an agreement which allows the agent to forego its commission qualifies as a genuine agency or not. For example, in *Daimler Chrysler* the Court held that, provided that the agent is not required to forego its commission, the agreement concerned falls outside Article 101(1) TFEU. See CFI, Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, paragraph 99. In *ASBL*, the Court ruled that agreements prohibiting agents from sharing their commission are incompatible with Article 101(1) TFEU but where the agent acts on behalf of many principals it is not a genuine agent. See ECJ, Case C-311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1985] ECR I-3801, paragraphs 20 and 24. In the E-books case, the Commission imposed on the Publishers the obligation not to restrict the agent's freedom to reduce retail prices 'by an aggregate amount equal to the total commission the publisher pays to the e-book retailer [...] for a period of two years' [emphasis added]. It may be inferred from this time restriction that, upon expiry of the commitments, the Publishers may prevent the retailer from foregoing its commission. See Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraph 100

²⁶⁹ Van Beal, I. and Jean-François Bellis (2005). *Competition Law of the European Community* (4th Edition), 229. Aphen aan den Rijn: Kluwer Law International

²⁷⁰ Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraphs 99-100

²⁷¹ *Ibid.*, paragraph 120

4. Sammelrevers: Media pluralism as a restriction of competition

As already discussed in Chapter 3, the Commission has occasionally (especially in the past) attempted to reconcile competition and non-economic values by accepting restrictions of competition to the benefit of those other values.²⁷² In the publishing sector, the case where the Commission appears to have made a considerable allowance for restrictions of competition as a means to protect pluralism is *Sammelrevers*,²⁷³ which dealt with an RPM agreement governing trade in German-language books and other print products. The main issue was whether an RPM system confined to the territory of a Member State had no effect on trade, thereby rendering Article 101(1) TFEU inapplicable. *Sammelrevers* deserves a closer look because the approach the Commission followed in this case is a rather unorthodox and arguably illegitimate way to address conflicts between competition and pluralism. For the avoidance of confusion, it must be noted from the outset that a case with facts similar to those of *Sammelrevers* should be distinguished from cases of genuine agency discussed above in that in situations of genuine agency the contractual relationship is granted immunity *because* it does not harm competition, *not despite* the harm to competition.

4.1. Could Sammelrevers indeed escape antitrust scrutiny?

In 1993, Austrian and German publishers filed an application to the Commission for negative clearance or, alternatively, for exemption under Article 101(3) TFEU apropos their RPM agreements

²⁷² In Chapter 2 it was demonstrated that this is one of the Commission's two approaches to dealing with the relationship between competition and media pluralism. It is worth mentioning briefly that, in the book publishing sector, the other approach (pluralism as a result of unhindered market access) was followed in *Bertelsmann/Planeta/Circulo* where the Commission was limited to noting that, since the transaction under scrutiny did not raise any foreclosure concerns, diversity could not be harmed. See Case COMP/M.5838 [2010] OJ C 228/3, paragraphs 16, 39, 49. A criticism of this approach and its implications for non-price competition and media pluralism took place in Chapter 2, Part 2. The E-books commitments decision makes reference to cultural diversity, but it is clear that the value had no impact whatsoever on the Commission's assessment of the commitments. See Commission decision Case COMP/AT.39847 *E-books*, C(2012) 9288 (consolidated version), paragraphs 127 and 152. In the other two antitrust decisions in the book publishing sector, namely *VBBB/VBVB* and Net Book Agreement, the parties claimed that the agreements were eligible for exemption under Article 101(3) TFEU on the grounds that they protected the cultural and linguistic unity between the Netherlands and Flanders and between the UK and Ireland respectively, but the Commission rejected the argument in both cases (See Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 60 and Commission decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association - Net Book Agreements) [1989] OJ L22/12, paragraph 43). It further bears noting that in merger decisions in the book publishing sector (the Commission has adopted 11 merger decisions in the book publishing sector which are available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result) and in antitrust and merger decisions in newspaper and magazine publishing, there is generally no mention of cultural diversity or media pluralism (the Commission has adopted 15 merger decisions in newspaper and magazines publishing and no decisions under the antitrust provisions. These decisions are available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result). In newspaper publishing, the only exceptions are Commission decision *NewsCorp/BSkyB*, Case COMP/M. 5932 [2011] OJ C37/2, and Commission decision, Case No IV/M.423, *Newspaper Publishing* [1994] OJ C 85/5. Both these decisions have already been discussed in Chapter 3, Parts 3 and 4.

²⁷³ Commission notice pursuant to Article 19(3) of Council Regulation No 17 concerning an application for negative clearance or exemption under Article 81(3) of the EC Treaty, Cases COMP/34.657, *Sammelrevers* and COMP/35.245 to 35.251, *Einzelreverse* OJ [2000] OJ C 162/8

covering books in Austria and Germany, also known as *Sammelrevers* system.²⁷⁴ In 2000, the notifying parties sent the Commission a modified version of *Sammelrevers*²⁷⁵ which lifted the cross-border element of the mechanism.²⁷⁶ As a result of this amendment, the RPM agreements between German publishers and Austrian booksellers on the one hand and Austrian publishers and German booksellers on the other were annulled.²⁷⁷ Subsequently, the Commission issued a notice clearing the new *Sammelrevers* system on the grounds that, while the agreements embodied therein restricted price competition,²⁷⁸ they would not have any appreciable effect on trade between Member States in the sense of Article 101(1) TFEU.²⁷⁹ This was so, the Commission said, because the system would only apply to the sale of books of German publishing houses by German booksellers to final consumers in Germany and because it would not restrict price competition for books re-imported into Germany.²⁸⁰ However, a few months later, after receiving complaints by Internet booksellers established outside of Germany that German publishers and book wholesalers refused to supply them in order to prevent direct cross-border sales at a price lower than the fixed price set by *Sammelrevers* members, the Commission re-opened proceedings.²⁸¹ Based on the preliminary results of its investigation, the Commission noted that the agreement ‘[had] been applied in a way that [continued] to have an effect on trade’.²⁸² In subsequent discussions with the Commission, German publishers and booksellers made the commitment to refrain from raising obstacles to direct cross-border selling, which resulted in a negative clearance comfort letter in March 2002.²⁸³

The preliminary conclusion that *Sammelrevers* had produced an effect on trade could have led to a decision finding that a violation of Article 101(1) had taken place. Under such circumstances, the Commission has the power to impose on the entities concerned fines that may amount to 10% of the total turnover of each firm involved in the infringement.²⁸⁴ Considering that the second clearance was subject to the same condition as the first (i.e. that the German FBP arrangements would not affect

²⁷⁴ Ibid., paragraph 1. Note that publishers of non-Member States (Switzerland, China, the Czech Republic and the United States of America) were also parties to the agreement (see paragraph 2)

²⁷⁵ Ibid., paragraph 2

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid., paragraphs 11 and 12

²⁷⁹ Ibid., paragraph 13

²⁸⁰ Ibid. This was subject to the condition that the exportation and re-importation of these books was not solely aimed at evading the system

²⁸¹ European Commission (2001, July). *Commission re-opens proceedings concerning the German system of fixed book prices because of its effects on cross-border Internet bookselling*. Press Release IP/01/1035. Retrieved from: http://europa.eu/rapid/press-release_IP-01-1035_en.htm?locale=it

²⁸² Ibid.

²⁸³ DG Competition (2002, June). *Commission ends competition proceedings regarding German book price fixing agreements following acceptance of an undertaking on cross-border sales*. Competition Policy Newsletter 2, 35-37. Retrieved from: http://ec.europa.eu/competition/publications/cpn/2002_2_35.pdf

²⁸⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 (now 101) and 82 (now 102) of the Treaty, [2003] OJ L1/1, Articles 7 and 23(2)

direct cross-border sales),²⁸⁵ the following questions inevitably arise: since in its second attempt to restore competition in the market for German-language books the Commission accepted a behavioral undertaking that did not manage to address the problem the first time around, and since in both decisions the Commission refused to subject the agreement to antitrust scrutiny, does *Sammelrevers* indicate a high degree of tolerance towards ‘purely national’ FBP agreements? If so, is the approach followed in *Sammelrevers* a good path to follow in cases of conflict between competition and media pluralism?

In order to answer the first question, we need to examine how the appreciable effect on trade criterion, the fulfillment of which would trigger Article 101(1) TFEU in this case, has generally been applied and then assess the Commission’s approach in *Sammelrevers* in light of the political and economic context in which this particular decision was adopted. As already mentioned, for an agreement restrictive of competition to be caught by Article 101(1) TFEU, it must be capable of appreciably affecting trade between Member States. This is a jurisdictional condition that defines the scope of application of EU competition law.²⁸⁶ In the application of this condition three elements need to be addressed, namely the notion ‘may affect’, the notion of ‘appreciability’, and the notion of ‘trade between Member States’.²⁸⁷ The Commission lays down in its Guidelines on the Effect on Trade Concept the principles developed by EU Courts in respect of the interpretation of these terms.²⁸⁸ Under a standard test applied by the Court of Justice, the notion ‘may affect’ suggests that ‘it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States’.²⁸⁹ For the ‘pattern of trade’ to be influenced, trade need not be negatively affected, that is, the Union may establish jurisdiction also when the arrangements are likely to lead to an increase in trade.²⁹⁰ The notion of ‘appreciability’ is the quantitative dimension of the effect on trade condition in that it restricts EU jurisdiction to

²⁸⁵ Cases COMP/34.657 - *Sammelrevers* and COMP/35.245 to 35.251 – *Einzelreverse*, OJ [2000] C 162/08, para. 10

²⁸⁶ Commission Notice. *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* OJ [2004] C 101/7, paragraph 12, referring to ECJ, Joined Cases 56 and 58/64, *Consten SA and Grundig-Verkaufs GmbH v. Commission of the European Economic Community* [1966] ECR 299, 340, and to ECJ, Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223

²⁸⁷ *Ibid.*, paragraph 18

²⁸⁸ *Ibid.*, paragraph 3

²⁸⁹ *Ibid.*, paragraph 23, referring to ECJ, Case 172/80, *Züchner* [1981] ECR 2021, footnote 11; ECJ, Case 319/82, *Kerpen & Kerpen* [1983] ECR 4173; ECJ, Joined Cases 240/82 and others, *Stichting Sigarettenindustrie* [1985] ECR 3831, paragraph 48; CFI, Joined Cases T-25/95 and others, *Cimenteries CBR* [2000] ECR II-491, paragraph 3930. The ‘pattern of trade’ test is further explained in paragraphs 24-43 of the Guidelines

²⁹⁰ *Ibid.*, paragraph 34, referring to CFI, Case T-141/89, *Tréfileurope* [1995] ECR II-791; CFI, Case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)* [1995] ECR II-289, and Commission decision Commission decision of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty, Case COMP/F-2/36.693, *Volkswagen* [2001] OJ L 262/14

agreements that may produce effects ‘of a certain magnitude’.²⁹¹ Each case is assessed on an individual basis by reference to parameters such as the nature of the agreement and the position that the involved undertakings hold in the relevant product market.²⁹² For example, agreements that are by nature capable of appreciably affecting trade are those that may affect imports or exports or cover several Member States.²⁹³ As regards the position of the parties in the affected market(s), there exist no pre-established rules, but the Commission usually applies presumptions based on market shares and aggregate annual turnovers.²⁹⁴ Finally, the notion of ‘trade between Member States’ does not imply that the agreement under examination must be implemented in several Member States. Trade between Member States may be affected also in cases where the relevant market is national in scope,²⁹⁵ provided that there is ‘an impact on cross-border economic activity involving at least two Member States’.²⁹⁶

Two remarks can be made with respect to the above. First, it is clear that the effect on trade concept has been interpreted in a rather broad manner; EU competition law will apply even if the agreement binds undertakings that operate in the territory of one Member State and irrespective of whether the effect is actual or potential, positive or negative. It is therefore not surprising that in very few cases this condition was found not to be fulfilled.²⁹⁷ Second, had the Commission applied the principles set out in the aforementioned Guidelines, *Sammelrevers* would not have escaped Article 101(1) TFEU. More particularly, according to the relevant case law, cartels and vertical agreements covering a single Member State are ‘by nature’ capable of affecting intra-Union trade in that they may partition the common market by raising obstacles to the economic penetration which the Treaty aspires to achieve.²⁹⁸ In *Sammelrevers*, it was clear that the parties could prevent retailers from other Member States from selling books to German consumers at low prices, for they had the incentive to ensure the sustainability of the price level introduced by the RPM mechanism.²⁹⁹ It is accepted that, in cases of arrangements that may by their very nature impact trade between Member States, it is not necessary to define the relevant product market and the market shares held by the involved

²⁹¹ Ibid., paragraph 44

²⁹² Ibid., paragraphs 44, 45 and 50

²⁹³ Ibid., paragraph 48

²⁹⁴ Ibid., paragraphs 50-57

²⁹⁵ Ibid., paragraph 22

²⁹⁶ Ibid., paragraph 21

²⁹⁷ See, for instance, ECJ, Joined Cases C-215/96 and C-216/96, *Carlo Bagnasco and others v. Banca Popolare di Novara soc. coop. arl. (BNP) and Cassa di Risparmio di Genova e Imperia SpA (Carige)* [1999] ECR I-135. In this case, the Court ruled that the pattern of trade would not be affected, see paragraphs 47 *et seq.* See also ECJ, Case 28/77, *Tepea BV v. Commission* [1978] ECR 1391. In this case, the Court ruled that the ‘appreciability’ requirement was not met, see paragraphs 46-48

²⁹⁸ Commission Notice. *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* OJ [2004] C 101/7, paragraphs 78 and 86

²⁹⁹ Ibid., paragraph 88

undertakings in order to assess whether the appreciability requirement is met.³⁰⁰ It may, however, be necessary to take account of the possible aggregate effects of parallel networks of similar or identical agreements.³⁰¹ The Guidelines lay down that ‘[e]ven if a single agreement or network of agreements is not capable of appreciably affecting trade between Member States, the effect of parallel networks of agreements, taken as a whole, may be capable of doing so’.³⁰² In our case, while in theory the system did not hinder price competition, in that neither publishers nor booksellers were obliged to enter into an RPM contractual relationship, in practice almost all market players participated in the system.³⁰³ Moreover, since most German-language books were published in Germany, the mechanism also governed a substantial proportion of the trade of such titles. Were the above realities to be taken into account, the Commission would have inevitably been led to the conclusion that, as a result of *Sammelrevers*, the parties could appreciably affect trade in the (wholesale and retail) markets for German-language books.

That the Commission has been overly permissive in this case is further illustrated by comparing the analysis in *Sammelrevers* against the assessment of whether the effect on trade is met in other cases.³⁰⁴ A good example is *British interactive Broadcasting (BiB)*, a decision concerning the creation of a Joint Venture (JV), the purpose of which would be the provision of digital interactive television services.³⁰⁵ While the JV agreement provided that BiB’s activities would be confined to the UK territory, the Commission found that the agreement could have an effect on trade.³⁰⁶ This was so, the Commission said, for at least three reasons. First, due to continuous developments in the market for digital interactive services, it was highly likely that the technical difficulties associated with offering these services to consumers in other Member States would be overcome in the near future.³⁰⁷ Second, BSkyB, one of the parent companies,³⁰⁸ was already present in the Irish market; since there were no linguistic barriers between the UK and Ireland, it could not be excluded that BiB’s services would soon be made available to Irish consumers.³⁰⁹ Finally, even if BSkyB did not expand into other

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid., paragraph 49

³⁰³ Appelman, M. and Marcel Canoy (2002), *supra n. 37*, 588

³⁰⁴ See, for instance, ECJ, Case 8/72, *Vereeniging v. Commission* [1972] ECR 977, paragraphs 28-29. This case concerns a different sector but greatly resembles the facts of *Sammelrevers*: A Dutch trade association (in which most Dutch cement dealers participated) recommended the prices at which its members would sell in the Netherlands. The parties claimed that, as the arrangement did not apply to exports, it did not affect trade between Member States. The Court, however, rejected this argument on the grounds that ‘[a]n agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis’

³⁰⁵ Commission decision *British Interactive Broadcasting/Open*, Case IV/36.539 [1999] OJ L 312/1, paragraph 2

³⁰⁶ Ibid., 153 *et seq.*

³⁰⁷ Ibid.

³⁰⁸ Ibid., paragraph 1

³⁰⁹ Ibid., paragraph 155

markets, the agreement could still affect trade between Member States for the reason that non-UK competitors would not be able to rely on the investments of BiB's parent companies.³¹⁰ This latter conclusion was reached after the Commission examined the clauses of the JV agreement,³¹¹ which established, *inter alia*, the parent companies' obligation to refrain from holding more than 20% in a competing company.³¹² It is submitted that the Commission could have approached *Sammelrevers* with a similar insight; the first clearance notice was issued one month *after* the e-commerce Directive (on which the Commission had been working since 1997³¹³) was adopted with a view to enabling 'European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce'.³¹⁴ It was therefore far from difficult to predict how a national cartel could inhibit the development of the then emerging market for online book retailing.

Yet, the Commission's persistence to grant immunity to this particular arrangement should not be regarded as a turning point in its decisional practice. In other words, this decision does not suggest that the Commission has thereby established a favorable antitrust regime for 'purely national' RPM agreements in order to enable them to achieve non-economic pluralism-specific objectives in spite of the anti-competitive effects they are likely to create. The approach followed in *Sammelrevers* is largely explained by the fact that the German legislator was planning to adopt a national law on fixed book prices, a parameter that the Commission took into account when it adopted its commitments decision.³¹⁵ It is established case law that the Member States may enact RPM laws provided that they do not raise obstacles to the free movement of goods.³¹⁶ With that said, the decision to clear *Sammelrevers* on the grounds that the system was incapable of affecting trade between Member States should be regarded as a temporary solution (aimed at ensuring a smooth transition from the RPM system that private actors had set up to an RPM system that would be established by the State) rather than a case of lenient competition enforcement. In subsequent cases, the Commission applied

³¹⁰ *Ibid.*, paragraph 156

³¹¹ An approach whereby the specific economic and legal context of the agreement under scrutiny is examined was followed by the Court in ECJ, Case C-234/89, *Delimitis v. Henninger Bräu AG* [1991] ECR I-935. See in particular paragraphs 19 *et seq.*

³¹² *Ibid.*

³¹³ See, for instance, European Commission (1997, April). Press Release IP/97/313. *Electronic Commerce: Commission presents framework for future action*. Retrieved from: http://europa.eu/rapid/press-release_IP-97-313_en.htm?locale=it For more information on the preparatory stage see the Commission's website at: http://ec.europa.eu/internal_market/e-commerce/directive/

³¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1, Recital (3)

³¹⁵ DG Competition (2002). *Commission ends competition proceedings regarding German book price fixing agreements following acceptance of an undertaking on cross-border sales*. Competition Policy Newsletter, Issue 2. Retrieved from: http://ec.europa.eu/competition/publications/cpn/2002_2_35.pdf See in particular paragraph 7 of the Undertaking (attached to the Newsletter) which reads as follows: 'This Undertaking is only valid during the maintenance in force of the *Sammelrevers* 2000 governing the retail price maintenance of books and other printed products in Germany. As soon as the *Sammelrevers* is repealed by State measures governing the retail price maintenance this Undertaking ceases its validity'

³¹⁶ See, for instance, ECJ, Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v SARL 'Au blé vert' and others* [1985] ECR I; ECJ, Case C-9/99, *Echirrolles Distribution SA v Association du Dauphiné and Others* [2000] ECR I-8207

the principles enunciated in the Guidelines, as discussed above.³¹⁷ For example, in a case regarding funding arrangements for RTVE, the Commission rejected the argument put forward by the party to the proceedings that there could be no effect on trade because RTVE would not broadcast outside of Spain and because it was not planning to export programming in other Member States.³¹⁸

4.2. Is *Sammelrevers* a good path to follow in order to resolve conflicts between competition and pluralism?

For the purposes of this thesis, we need to answer the question of whether, in cases of conflict between competition and media pluralism, we should advocate for an approach similar to that adopted by the Commission in *Sammelrevers*. The answer is no, for at least three reasons. The first has to do with how non-economic pluralism-specific concerns should be taken into account in the application of EU competition rules. The Commission's second decision clearing *Sammelrevers* was accompanied by the following statement made by the then Commissioner responsible for Competition Policy Mario Monti: '*By clearing the German price fixing system the Commission, in a perspective of subsidiarity, also takes account of the national interest in maintaining these systems which are aimed at preserving cultural and linguistic diversity in Europe*'.³¹⁹ This statement implies that the application of Article 101(1) TFEU is contingent on the protection of the non-economic values enshrined in Article 167(4) TFEU. However, as was already discussed in detail in Chapter 3, neither an interpretation of the Treaties nor the Court's case law support the argument that, in cases of tension between competition considerations and considerations relating to cultural, including media, policies, the former may supersede the latter. Second, finding that a condition set by Article 101(1) TFEU is not met when it is actually met in order to 'protect' agreements restrictive of competition that are intended to enhance other public policy objectives would undermine legal certainty; in such cases, there would be considerable ambivalence about the reasons why and the extent to which these other public policies factored into the Commission's decision to render EU competition law inapplicable. For example, in *Sammelrevers*, Monti's statement was the only indication that cultural

³¹⁷ I traced one inconsistency in recent practice. See Commission decision, Case COMP/39771, *Restrictions concerning ELT books*, paragraph 17: '[Y]our complaint is limited to conduct directed towards your business operations, all of which are located in Greece. In particular, you allege that you are unable to purchase books for your company in Greece from the publishers' distributors situated outside of Greece. The main effects of the alleged infringement therefore relate to Greece, i.e. one single Member State, whereas the Commission is generally well placed to deal with infringements that relate to three or more Member States'

³¹⁸ Commission decision on the State aid scheme No C 38/2009 (ex NN 58/2009) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) C (2010) 4925 final, paragraph 42. For the avoidance of confusion, the effect on trade criterion in State aid cases has been interpreted in a way similar to the one in which it has been interpreted in antitrust cases. See, for instance, ECJ, Case C-75/97, *Maribel bis/ter* [1999] ECR I-3671, paragraph 47 and ECJ, Case C-310/99, *Italy v. Commission* [2002] ECR I-2289

³¹⁹ European Commission (2002, March). *Commission accepts undertaking in competition proceedings regarding German book price fixing*. Press Release IP/02/461. Retrieved from: http://europa.eu/rapid/press-release_IP-02-461_en.htm

and linguistic diversity took precedence over competition. In light of the above, the reasoning in *Sammelrevers* is arguably an opaque and unlawful method to address non-economic concerns in the implementation of the EU competition policy. It is submitted that the possible benefits of an RPM arrangement for pluralism should rather be considered under Article 101(3) TFEU, for otherwise it would be fairly easy for the parties to bypass antitrust law (as in *Sammelrevers*, they could simply commit not to engage in anti-competitive practices against undertakings providing the same print products from other Member States). The approach proposed here was followed by the Court in *Binon*³²⁰ where it was held that if an agreement between publishers of newspapers and periodicals and distributors includes arrangements which ‘by definition’ restrict competition,³²¹ Article 101(1) TFEU applies, and that if ‘the fixing of the retail price by publishers constitutes [...] the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission *must take account of those factors when examining an agreement for the purposes of Article [101](3)*’ [emphasis added].³²² Balancing restrictions of competition against non-economic concerns under the umbrella of Article 101(3) TFEU³²³ is a more transparent method than the adoption of a notice stating that the agreement is not subject to antitrust scrutiny and does not result in granting immunity in cases where competition concerns exist or are likely to arise.³²⁴ Third, and related to the above, as extensively discussed throughout this Chapter, RPM is not necessarily beneficial for media pluralism. In fact, absent a series of conditions, RPM may be to the detriment of pluralism. Conducting an analysis under Article 101(3) TFEU within the framework that was proposed in Part 2 of this Chapter would allow the Commission to check whether RPM might indeed produce positive effects on media pluralism in the form of qualitative efficiencies.

The three reasons that are put forward as to why in cases of conflict between competition and pluralism we should not defend an approach similar to that adopted by the Commission in *Sammelrevers* lend further support to one of the claims put forward in Chapter 3, namely that strict competition enforcement that takes due account of the particularities of the media markets under

³²⁰ ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015

³²¹ Note that, although the case concerned mainly the ‘selective distribution’ aspects of the case, it is relevant for our case because the selective distribution system introduced quantitative restrictions which are subject to Article 101(1) TFEU. See *ibid.*, paragraph 29

³²² *Ibid.*, paragraph 46. Note that the same path was followed by the Commission in *VBBB/VBVB*. In this case, the parties claimed that the effect on trade criterion was not fulfilled because the agreement applied to a linguistically homogeneous area and was intended to protect cultural unity, however, the Commission –arguably rightly so– rejected the claim on the grounds that it would otherwise ‘diminish the applicability’ of Article 101(1) TFEU. See Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraph 44

³²³ For more information on the issue of resolution of conflict through exclusion and resolution of conflict through compromise and an analysis of the very few cases where exclusion was preferred over compromise see Van Rompuy, B. (2012). *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?*, 219-229. Alphen aan den Rijn: Kluwer Law International

³²⁴ Monti, G. (2007). *EC Competition Law*, 105. Cambridge: Cambridge University Press

scrutiny has more potential than the approaches to the relationship between the two values the Commission has followed to date, including the acceptance of arbitrary restrictions to competition.³²⁵

5. Conclusions

This Chapter examined two popular business models that have been employed to sell books and newspapers, that is, RPM for print titles and RPM-based agency for digital publications. It assessed the Commission's practice in publishing markets against the claims that were put forward in Chapter 3, namely that by failing to adapt competition enforcement to the particular characteristics of the media market under scrutiny, competition decisions may lack a sound reasoning and that, if properly applied, EU competition law may lead to an outcome that is of benefit to pluralism. These claims were tested against the three issues to which the application of Article 101 to publishing markets has given rise to date, that is, whether RPM agreements qualify for an exemption under Article 101(3) TFEU (*VBBB/VBVB*), whether RPM agreements benefit from immunity from Article 101 in spite of their harming competition (*Sammelrevers*), and whether RPM-based agency agreements qualify for immunity from Article 101 on the grounds that they do not harm competition (*E-books*).

As regards the first issue, an exhaustive analysis of *VBBB/VBVB* provides sufficient proof that the Commission has paid little to no attention to sector-specific economics. Ignoring altogether features such as demand uncertainty and the tendency to content homogenization, the Commission based its decision on the contestable assumptions that RPM leads to higher prices and that readers prefer lower prices to variety. After making an overview of book and newspaper economics, the Chapter showed that RPM might confer several non-price benefits upon the readership; provided that certain market conditions are fulfilled, an RPM agreement may deliver qualitative efficiencies in the form of, *inter alia*, a broad range of titles and an extensive network of retailers, thereby contributing to the preservation of content and supply diversity.³²⁶ These efficiencies may be realized *without* necessarily involving higher retail prices.

³²⁵ See Chapter 3, Part 3

³²⁶ Note that, naturally, as technology advances, some of the efficiency justifications that are put forward in support of RPM will become irrelevant. For example, print-on-demand equipment, which currently delivers an inferior product, will gradually replace traditional printing processes and significantly reduce storage costs. When this happens, the retailers' cross-subsidization argument is unlikely to hold. On print-on-demand technology see, for instance, Snow, D. O. *Print-on-Demand: the best bridge between new technologies and established markets*. Booktech – The Magazine for Publishers (January-February 2001). Retrieved from: <http://www.u-publish.com/pod2.htm> On a recent dispute between Amazon and small publishers regarding the use of print-on-demand equipment see Miller, J. *Amazon accused of 'bullying' smaller UK publishers*. 26 June 2014, BBC News. Retrieved from: <http://www.bbc.com/news/technology-27994314>

The approach followed in *Sammelrevers*, where the Commission declared Article 101 inapplicable to a ‘purely national’ RPM agreement, is problematic for a number of reasons. Clearing an RPM agreement on the grounds that granting antitrust immunity protects media pluralism goes beyond what is allowed by the Treaties. As extensively discussed in Chapter 3, in cases of conflict between competition considerations and considerations relating to media pluralism, the former may not supersede the latter. This approach further undermines legal certainty and transparency, two principles that should guide the implementation of EU competition law, including and especially in cases where the Commission attempts to conduct a competition assessment in a way that resolves tensions between competition and another public policy value. But, most importantly, given that RPM is not a *condicio sine qua non* for the preservation of media pluralism, refraining from examining whether the agreement concerned may indeed generate the (qualitative) efficiencies it is meant to deliver may run counter to pluralism.

Finally, insofar as online agencies are concerned, in the *E-books* case, the Commission avoided taking a position on whether the arrangements between Apple and major book publishers, which have had an industry-wide appeal, come within the scope of Article 101. Nonetheless, the Chapter examined in detail the characteristics of RPM-based agency and concluded that, provided that the agreements under scrutiny are free of clauses that may give rise to competition concerns, there are plausible arguments supporting why they should benefit from antitrust immunity. Contrary to traditional RPM agreements, agents do not need to buy the content that is the contract service and, to the extent that the incentives of digital stores and publishers remain aligned after the contract is concluded, the retailer may well be regarded as the extension of the will of the publisher. Interestingly, in the prevailing market conditions, granting the immunity is *not* likely to harm media pluralism, thus lending further support to the point raised in Chapter 3 that competition and media pluralism are to a great extent reconcilable; the analysis illustrated that digital stores have opened up a market for authors, who apparently receive more favorable conditions now than they did in the past and get to decide on the price of the books with which they wish to be introduced to the readership. With respect to the role of digital stores in shaping the economics of news provision, the agency model that was introduced by Apple appears to have been the first successful charging mechanism for newspaper subscriptions and is far cheaper than other alternatives that are currently available. Hence, the adoption of the agency model by digital retailers appears to have produced a positive impact on pluralism. Would the same conclusion apply to business practices affecting the economics of news provision in which other digital intermediaries such as search engines and news aggregators engage? Or, does the fact that digital retailers have enabled news publishers to generate revenues in online

markets preclude that they may behave in ways that adversely affect media pluralism? Maybe not. But the issues raised by the above two questions are not directly related to pricing strategies and will be examined in detail in the next Chapter.

Chapter 6 – Digital Intermediaries and Article 102 TFEU: The Case of Google

1. Introduction

The previous Chapter studied, *inter alia*, the role of a category of digital intermediaries, namely digital stores, in shaping media markets. It did so by examining the effects of the RPM-based agency model, initially introduced by Apple and major book publishers and later on adopted by other key players, on the economics of news provision. As already seen in Chapter 2, molding the future of news provision is one of the main areas that illustrate the role that digital intermediaries may play in harming or promoting media pluralism.

Moving away from Article 101 TFEU but remaining within the confines of antitrust, this Chapter will discuss issues that relate to the application of Article 102 TFEU to digital intermediaries. In addition to practices affecting *news economics*, this Chapter will examine other types of conduct potentially beneficial or damaging to media pluralism that were mentioned in Chapter 2,¹ namely the *editorial-like judgments* digital intermediaries perform in selecting, ranking and displaying information and practices in which they engage in their role as *distribution bottlenecks*. To this end, the Chapter will use as a case study the Commission's investigation into Google's alleged abuse of dominance in general online search,² which is ongoing at the time of writing. The Google antitrust case has been chosen mainly for two reasons. First, this is the first (and so far the only) case where the Commission has dealt with anti-competitive unilateral conduct in markets where digital intermediaries operate. As a result, it sheds light on the intricacies of the markets in question and illustrates the challenges with which the Commission has to cope in reaching a decision. Second, the allegations against Google are numerous, ranging from the anti-competitive use of third-party content to algorithm manipulation to restrictions on data portability. The issues that arise from these practices cover the full spectrum of the aforementioned types of conduct. For example, insofar as the impact on *news economics* is concerned, one of the complaints concerns the copying and display of parts of news articles in Google's news aggregation platform, Google News. A complaint that exemplifies the role of an intermediary as a *distribution bottleneck* concerns Google's retaliation practices whereby news providers that object to the use of their stories on the Google News website are excluded from Google's services altogether, including general search

¹ See Part 3.b.

² European Commission (2010, November). *Antitrust: Commission probes allegations of antitrust violations by Google*. Press Release IP/10/1624. Retrieved from: http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en

results. Finally, with respect to *editorial-like judgments*, allegations have been made that Google has been deliberately demoting competing websites whilst granting preferential treatment to its own content.

Similar to Chapters 4 and 5, this Chapter discusses the application of EU competition law to undertakings that control an asset or parameter that affects competition. In Chapter 4 it was control of the acquired entity, whereas in Chapter 5 it was control over the retail price of newspaper and book titles. In the case at hand, it is control of a popular information gateway, namely Google's search engine, which Google allegedly uses to expand into and dominate adjacent markets such as news aggregation and vertical search markets.

Consistently with the direction followed in assessing the Commission's practice in broadcasting and publishing markets, this Chapter seeks to establish whether the Commission has made proper use of the EU competition law toolbox to address the issues it has identified throughout its investigation and if not, to explore whether, if properly applied, Article 102 may address concerns over media pluralism in the affected markets. The Chapter is structured as follows: Part 2 makes an overview of the facts of the case and exposes the reader to the main aspects of Google's business model. Part 3 examines the allegations that concern the possible impact of Google's conduct on the economics of news provision. Part 4 explores allegations related to Google's role as a distribution bottleneck, namely retaliatory practices that affect the news markets, restrictions of data portability, and the exploitative gathering and processing of user data. Part 5 focuses on the editorial-like judgments which Google performs, that is, the discriminatory practices which allegedly divert traffic from competing websites to Google's content.

2. Google under the European antitrust microscope: The scope of the Commission's investigation

On November 30, 2010, the European Commission announced that it decided to initiate an investigation into allegations that Google has abused its dominant position in the online search market, in violation of Article 102 TFEU.³ The decision to open a formal investigation was based on complaints launched by Foundem, a UK price comparison website, Ciao, a German price comparison

³ Ibid.

website and Microsoft subsidiary, and eJustice, a French legal portal.⁴ All three complainants are vertical search engines. These are distinct from general search engines in that, instead of indexing large portions of the Internet through a web crawler,⁵ they index content by reference to a specific topic, location, and/or industry.⁶ Google is a general search engine, but, over the past few years it has expanded into neighboring vertical search markets such as product and flight price comparison. Complainants argue that Google has abused its dominant position in general online search with the aim to push competing services out of vertical search markets.⁷ Before discussing in more detail what this complaint is about, it is essential to explain some key aspects of Google's business model.

Google Search is an advertising-based medium which means that it supplies search results for free and that its revenues come from advertising. Google delivers two types of results, namely unpaid results and paid results/sponsored links. The unpaid results, which are also known as 'natural', 'organic' or 'algorithmic' results, are the results that are returned based on 'the natural indexing of the Web site'.⁸ The paid results or sponsored links are third party advertisements displayed at the top and at the right hand side of Google's search results page.⁹ Google sells this ad space through its auction-based advertising platform, AdWords.¹⁰ After creating a Google account, the advertiser chooses keywords that are words or phrases relevant to its business.¹¹ The position that an advertiser is allocated in the list of paid search results depends on the bid the advertiser makes for a given keyword and its 'Quality Score'.¹² The Quality Score is an approximate calculation of how relevant the advertiser's ads, keywords and website are to a person seeing the ad.¹³ It is determined by several factors such as the keyword's past click-through rate (i.e., how often that keyword led to clicks on the ad), the quality of the landing page (i.e., how relevant, transparent, and easy-to-navigate the advertiser's website is) and geographic performance (i.e., how successful the advertiser's account has been in the regions it is targeting).¹⁴ The price an advertiser must pay Google is the bid that it made for a keyword multiplied by its Quality Score.¹⁵

⁴ European Commission. Case AT.39740, *Google Search*. All relevant documentation is available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

⁵ Commission decision *Microsoft/Yahoo!*, Case No COMP/M.5727 C(2010) 1077, paragraph 31

⁶ Definition retrieved from: http://www.pcmag.com/encyclopedia_term/0,1237,t=vertical+search+engine&i=57892,00.asp

⁷ European Commission (2010, November), *supra n. 2*

⁸ Definition retrieved from: http://www.webopedia.com/TERM/N/natural_search.html

⁹ European Commission (2010, November), *supra n. 2*

¹⁰ See <http://support.google.com/adwords/bin/answer.py?hl=en&answer=1704410>

¹¹ For more information see on the process see: https://accounts.google.com/ServiceLogin?service=adwords&hl=en_US<mpl=jfk&continue=https://adwords.google.com/um/gaiaauth?apt%3DNone%26ltmpl%3Djfk&passive=86400&sacu=1&sarp=1&sourceid=awo&subid=ww-en-et-awhp_nelsontest_con

¹² Information retrieved from: <http://support.google.com/adwords/bin/answer.py?hl=en&answer=2454010>

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Varian, H. (2010, March). *Search Advertising With Google: Quality Score Explanation by Google Chief Economist*. Retrieved from: http://www.youtube.com/watch?v=qwuUe5kq_O8

Going back to the antitrust investigation, complainants allege that Google has been lowering the ranking of their websites in the list of organic results, whilst ensuring prominent display for its own services.¹⁶ Moreover, they accuse Google of manipulating paid search results by downgrading the Quality Score of their services.¹⁷

In addition to the above, the Commission is concerned about the exclusivity obligations that Google imposes on its advertising partners. As regards advertising with AdWords, Google appears to restrict advertisers to exporting ad campaign data into competing platforms, including general search engines.¹⁸ The other concern relates to how Google does business as an intermediary in the online advertising market. In *Google/DoubleClick*, the Commission explains that ‘intermediaries pool advertising space made available for sale by publishers [i.e. website owners] and advertisers wishing to buy advertising space and facilitate the matching between the supply of ad space and the demand for ad space to place ads’.¹⁹ Google provides intermediation services through its AdSense platform: website owners make ad spaces available by pasting ad codes on their sites, and advertisers bid for their ads to be displayed in these spaces.²⁰ According to the information that is currently publicly available, Google imposes upon the website owners the obligation to acquire most, if not all, of their advertisements from Google advertisers.²¹

The final concern has to do with ‘scraping’ third-party content. More particularly, Google copies material offered by other websites and uses it in its own offerings without seeking permission from the websites concerned.²² For example, Google copies parts of news articles which it displays in its news aggregation platform, Google News.

To sum up, the Commission finds that Google’s conduct raises concerns as regards the following practices:²³

¹⁶ European Commission (2010, November), *supra n. 2*

¹⁷ *Ibid.*

¹⁸ European Commission (2012, May). Speech/12/372. *Statement of VP Almunia on the Google antitrust investigation*. Retrieved from: http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm

¹⁹ Commission decision *Google/DoubleClick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraph 18

²⁰ Information retrieved from: <http://www.google.com/adsense/start/>

²¹ European Commission (2010, November), *supra n. 2*

²² European Commission (2014a, February). *Antitrust: Commission obtains from Google comparable display of specialized search rivals - Frequently asked questions*. Retrieved from: http://europa.eu/rapid/press-release_MEMO-14-87_en.htm?locale=en

²³ Note that since 2010 other companies filed complaints similar to those initially raised by Foundem. See, for instance, Microsoft (March, 2011). *Adding our Voice to Concerns about Search in Europe*. Retrieved from: <http://blogs.microsoft.com/on-the-issues/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe/> However, to my knowledge, the Commission has not released information about the number or the identity of the complainants

- Manipulation of general search results, which may produce exclusionary effects in markets adjacent to general online search;
- Exclusivity restrictions imposed on advertisers and web publishers, possibly foreclosing advertising markets, and
- Scraping third-party content, potentially reducing competitors' incentive to innovate.

The Commission initially stated that it would follow a commitments procedure on the grounds that, compared against 'a more adversarial path',²⁴ this process was more appropriate 'to swiftly restore competitive conditions on a [fast-moving] market'.²⁵ However, at the time of writing, no decision has been adopted on this matter. Google has already proposed commitments three times:²⁶ the first two proposals were expressly rejected. In February 2014, the Commission announced that the third set of undertakings submitted by Google was 'capable of addressing' its concerns.²⁷ But, in April 2015, that is, more than one year later, in a controversial move, the Commission stated that it decided to send Google a Statement of Objections which relates to the allegations on preferential treatment *only* and that this 'does not in any way prejudice the outcome of the Commission's investigation' into Google's conduct as regards the other issues'.²⁸ While there is considerable uncertainty as to how the case will evolve, the above statement implies that, as regards the allegations on scraping and exclusivity, the Commission may still be considering the adoption of a commitments decision on the basis of the final set of undertakings proposed by Google.

Having explained the conduct that is being investigated and how the Commission may proceed in the future, two remarks should be made regarding the scope of my analysis. First, the Chapter will not examine the concerns that arise from the restrictions imposed on web publishers. Currently, there is not sufficient factual information that would allow me to engage in an assessment of the agreements concerned. Suffice it to say that, from the statements the Commission has made on certain occasions, the scope of these restrictions appears to be wide ranging (publishers are bound to

²⁴ European Commission (2014b, February). *Statement on the Google investigation*. Retrieved from: http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm

²⁵ European Commission (2013, April). *MEMO: Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers*. Retrieved from: http://europa.eu/rapid/press-release_MEMO-13-383_en.htm

²⁶ See Google (2013, April). *Commitments in Case COMP/C-3/39.740 - Foundem and others*. Retrieved from: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf; Google (2013, October). *Commitments in Case COMP/C-3/39.740 - Foundem and others*. Retrieved from: <http://www.consumerwatchdog.org/resources/googlesettlement102113.pdf>, and Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*. Retrieved from: http://docs.dpaq.de/6448-google_commitments_full.pdf

²⁷ European Commission (2014a, February), *supra* n. 22

²⁸ European Commission (2015, April). *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*. Retrieved from: http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm

acquire ‘all or most of their online search advertisements from Google’²⁹). It may be inferred from these statements that the restrictions in question amount to ‘exclusive purchasing’ deals, which may breach Article 102 TFEU if they ‘have the effect of preventing the entry or expansion of competing undertakings’.³⁰ Second, given that the Commission left the door open for a commitments decision to be adopted with respect to scraping and data portability, restrictions on the basis of the most recent proposals submitted by Google, I shall examine whether the suggested undertakings are indeed appropriate to alleviate the concerns to which they give rise. Since the commitments related to preferential treatment were rejected, they will not be included in the analysis.

3. Scraping third-party content: Feed aggregators and Article 102 TFEU

As already discussed in Chapter 2, digital intermediaries may impact media pluralism by, *inter alia*, affecting the ability of news providers to generate (advertising and subscription) revenues. Chapter 5 examined the effects that the agency model has had on newspaper publishing and concluded that in light of current business realities, these effects appear to be positive; evidence suggests that the agency model has been the first viable income-generating strategy for online news provision.³¹ Moreover, even if publishers usually find themselves in a weaker bargaining position, vis-à-vis the digital retailers that provide access to the audiences that are locked in to the hardware devices they manufacture, publishers maintain control over price *and* ownership of the content that is made available to the readership whilst getting 70% of the retail proceeds.³² This section will discuss how another category of intermediaries, namely news aggregators, may affect the publishers’ ability to generate the financial resources that are necessary to gather and report news. I will focus on the practice on which the very existence of news feed aggregators depends, that is, ‘scraping’ of third party content, which, as already mentioned, the Commission is currently investigating in the context

²⁹ European Commission (2013, April), *supra n. 25*

³⁰ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 34. On the parameters the Commission would take into account to conduct an assessment of exclusive purchasing deals see paragraphs 33 *et seq.* of the Guidance. It is worth mentioning that, in addition to preventing web publishers from doing business with competing search engines, Google appears to have concluded a series of exclusivity agreements with a number of key players in markets adjacent to online search that may have had far-reaching effects on competition. For example, Google has signed exclusivity agreements with a number of popular web-browsers such as Safari, Firefox, and Opera in order to become the default search engine. While competitors brought this issue to the attention of the Commission, the latter apparently decided not to include related deals in its investigation. For more information on the competitors’ allegations see ICOMP (2013, January). *Complaint of ICOMP against Google, Inc. under Article 101 TFEU, pursuant to Article 7 of Regulation 9EC) No 1/2003*. Retrieved from: <http://www.i-comp.org/wp-content/uploads/2014/01/AnnexesICOMPMarketTestSubmission310513.pdf>

³¹ Joint Research Center (2012). *Technical Report on Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry*, 65. Retrieved from: <http://ftp.jrc.es/EURdoc/JRC69881.pdf>

³² See Chapter 5, Part 3.b.

of the Google antitrust case.³³ For our purposes, ‘scraping’ refers to the act of copying the headline and (usually) small excerpts of a news story (commonly referred to as ‘snippets’) without remunerating the news outlet that has written the story.

The term news aggregator refers to ‘a website that takes information from multiple sources and displays it in a single space’.³⁴ News aggregators resemble traditional news providers more than other digital intermediaries; they choose the information that reaches the readership³⁵ and some of them run their own news production operations.³⁶ While they may take various forms,³⁷ ‘feed’ aggregators such as Google News and Yahoo! News are the most common type. A feed aggregator ‘contains material from a number of websites organized into various “feeds”, typically arranged by source, topic, or story’.³⁸ Feed aggregators usually ‘display the headline of a story and, sometimes, the first few lines of the story’s lede, with a link to where the rest of the story appears on the original website’.³⁹ The business models of feed aggregators vary. For example, Google News⁴⁰ is ad-free whereas Yahoo! News⁴¹ is ad-based. In terms of use, while the majority of users still go directly to branded sites to read news,⁴² in several Member States news aggregators are the second most popular means of finding news online.⁴³

The emergence and increasing use of news aggregators has sparked a hot debate over how ‘scraping’ may affect news supply and consumption. Proponents claim that aggregators are beneficial to content providers in that they divert traffic to the original websites, thereby allowing them to reach new audiences and increase ad revenues.⁴⁴ It is also said that even in cases where news aggregators do not divert traffic to the source, they may increase brand awareness, which ‘may be more valuable to the producer than any resulting decrease in revenue’.⁴⁵ Opponents, including and especially news

³³ European Commission (2013, April), *supra n. 25*

³⁴ Isbell, K. (2010). *The Rise of the News Aggregator: Legal Implications and Best Practices*, 2. The Berkman Center for Internet and Society at Harvard University Research Publication No. 2010-10

³⁵ On how news aggregation works in practice see, for instance, Anderson, C. W. (2010). *What Aggregators Do: Rhetoric, Practice, and Cultures of Digital and Analog Evidence in Web-Era Journalism*. Paper Submitted to the 12th International Symposium for Online Journalism Austin, Texas, April 2-3. Retrieved from: <https://online.journalism.utexas.edu/2011/papers/Anderson2011.pdf>

³⁶ Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*, 25

³⁷ Other categories are specialty aggregators, blog aggregators, and user-curated aggregators. For their definitions and the ways in which they operate see Isbell, K. (2010.) *supra n. 34*, 2-5

³⁸ *Ibid.*, 2

³⁹ *Ibid.*

⁴⁰ <http://news.google.com/>

⁴¹ <http://news.yahoo.com/>

⁴² On the phenomenon of demand-side concentration see Chapter 2, 3.b.

⁴³ Ofcom (2013). *International Communications Market Report*, Figure 1.57. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/icmr/ICMR_2013_final.pdf

⁴⁴ Lee, A. M. and Hsiang Iris Chyi (2015). *The Rise of Online News Aggregators: Consumption and Competition*. *International Journal on Media Management*, 17(1), 4

⁴⁵ McDonnell, J. C. (2012). *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation*. *Northwestern Journal of Technology and Intellectual Property*, 10(3), 256

providers, claim that news aggregators do nothing but steal from media organizations that spend significant amounts of money to gather facts and report them. As Rupert Murdoch famously put it, ‘producing journalism is expensive. We invest tremendous resources in our project from technology to our salaries. To aggregate stories is not fair use.⁴⁶ To be impolite, it is theft’ [footnote added].⁴⁷ Since the audiences get all the information they need by reading the first few lines of the story, so the argument goes, they have no interest whatsoever in accessing the full text.⁴⁸ However, the results of empirical research on the impact of aggregation on news providers are mixed. Some found that a significant proportion of online news consumers scan the headlines without clicking through to the original websites,⁴⁹ whereas others found that news aggregators and traditional news media outlets are in a symbiotic, non-competitive relationship.⁵⁰ Hence, the issue of whether news aggregation substitutes or complements news outlets is, at the time of writing this thesis, far from settled.

Prior to delving into the intricacies of competition law, I must underline that, while determining whether news aggregators are substitutes for or complements to news outlets is key to understanding how they may influence the future of news provision, the ways in which they may affect the demand side of the market, namely the readership, and media pluralism is a far more complex issue. On the one hand, those aggregators that license content from news agencies and produce their own news reports contribute to supply and content diversity. Moreover, to the extent that they facilitate and (one may say encourage) active multi-sourcing,⁵¹ they enhance exposure diversity. On the other hand, one may question whether news aggregators indeed engage the readership in a meaningful media

⁴⁶ Fair use is a term used in copyright law; if usage of third party content fulfills the conditions of fair use, the usage does not amount to a copyright infringement

⁴⁷ Bunz, M. *Rupert Murdoch: ‘There’s no such thing as a free news story’*. 1 December 2009, The Guardian. Retrieved from: <http://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news>

⁴⁸ See, for instance, European Press Publishers (2014). *Press Publishers’ Response to Google’s Third Commitments Proposal*. European Commission’s Competition Investigation of Google - AT.39.740, 10

⁴⁹ See, for instance, Wauters, R. *44% Of Google News Visitors Scan Headlines, Don’t Click Through*. 19 January 2010, Techcrunch. Retrieved from: <http://techcrunch.com/2010/01/19/outsell-google-news/> Two studies examined the effects of incorporating local news links to Google News on visits to local news outlets. The first study, conducted by Athey and Mobius, concluded that, while visits to local news outlets initially increase, they are reduced over time and ultimately users rely on Google News exclusively to consume local news. The second, conducted by George, finds that total visits increase by less than 1% and that, as a result, adding local news links to Google News is unlikely to ‘have an economically meaningful impact on local news outlets’. Athey, S. and Markus Mobius (2012). *The Impact of News Aggregators on Internet News Consumption: The Case of Localization*. Working Paper. Retrieved from: https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Athey_Impact_News_Aggregators_on_Internet_News_Consumption.pdf and

George, L. (2013). *Local News Online: Aggregators, Geo-Targeting and the Market for Local News*, 27. Time Warner Cable Research Program on Digital Communications. Report Series Winter 2013. Retrieved from: http://www.twcresearchprogram.com/pdf/TWC_George_Report.pdf

⁵⁰ See, for instance, Lee, A. M. and Hsiang Iris Chyi (2015), *supra n. 44*; Yang, M. J., and Hsiang Iris Chyi (2011). *Competing with whom? Where? And why (not)? An empirical study of U.S. online newspapers’ competition dynamics*. Journal of Media Business Studies, 8(4), 59–74; Huang, J. S., Yang, M. J., and Hsiang Iris Chyi (2013). *Friend or foe? Examining the relationship between news portals and newspaper sites in Taiwan*. Chinese Journal of Communication, 6(1), 103–119. For a different perspective of how the existence of a news aggregator may affect competition among newspapers see Esfahani, N. N. and Don-Shin Jeon (2013). *News Aggregators and Competition Among Newspapers in the Internet*. IDEI Working Paper, n. 770

⁵¹ Foster, R. (2012), *supra n. 36*, 25

experience. To put it bluntly, what makes the reader more knowledgeable? Scanning the ledes of the stories of ten different news outlets or reading the full story distributed by one single provider? And how do news aggregators, which facilitate (if not dictate) news customization, affect one's vision of the world? Attention scarcity and content personalization, and, more particularly, their possible effects on news consumption and media pluralism have been explored in Chapter 1⁵² and are undoubtedly worthy of further empirical research.

3.1. News aggregation and EU competition law

From the very outset, it bears noting that the practice of scraping raises both competition and copyright issues. Given the focus of this thesis on EU competition law, this section will explore the former (but without altogether ignoring the latter). Two remarks must be made here. First, at *EU* level, there are no statutory provisions for the copyright protection of headlines and small excerpts of news stories. The EU Copyright Directive imposes on the Member States the obligation to harmonize their national laws for three types of works, namely computer programs, databases and photographs.⁵³ As a result, the question of whether headlines and small excerpts are copyrightable is answered by the national legislator or judge, depending on the criteria that each Member State has set to determine whether a work is 'original' and thus deserving of protection. Second, copyright law does not preempt EU competition law. The Union has exclusive competence in this latter area and, unlike the harmonizing copyright rules that are established by means of a Directive,⁵⁴ EU competition rules are directly applicable and in a higher position in the hierarchy of EU norms. It goes without saying that the same applies to 'purely' national copyright laws.⁵⁵

This section will build around the above two issues from two different perspectives. First, irrespective of whether news outlets benefit from copyright protection in the Member State(s) where they operate (*irrespective* because action taken to cease a copyright infringement does not preclude action under EU competition law), and bearing in mind that the ability of news outlets to generate revenues is key to the production of high quality investigative journalism, does EU competition law equip them with any tools to prevent aggregators from using their content? Second, bearing in mind

⁵² See Part 4.a.

⁵³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Articles 1.3, 3.1. and 6

⁵⁴ Our approach would not be different even if one accepted that the *Infopaq* judgment has so far-reaching effects that it extends the copyright protection afforded under the EU Copyright Directive to newspaper articles. See ECJ, Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

⁵⁵ See, for instance, ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann e Independent Television Publications Ltd. v. Comission*, [1995] ECR I-743 and CJEU, Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083

that news aggregators may bring added value to the readership and assuming that headlines and small excerpts are protected by copyright, does EU competition law equip aggregators with any tools⁵⁶ to force publishers to grant access to their content?

3.1.1. Can EU competition law help publishers prevent news aggregators from scraping their content?

The question that seeks an answer here is whether a news aggregator which uses the headlines and the first few lines of a news story without remunerating the undertaking that produced the story in question violates EU competition law. To my knowledge, no case with comparable facts has fallen under the EU antitrust microscope thus far. In certain States in the US, cases brought by news publishers that allege that a firm has engaged in anti-competitive behavior by copying their content without their permission have been dealt with under the Hot News Misappropriation doctrine. The Hot News Misappropriation doctrine emerged as early as 1918 in *International News Service v. Associated Press*, a judgment rendered by the US Supreme Court.⁵⁷ International News Service (INS) and the Associated Press, two organizations consisting of newspapers published throughout the United States, were competing ‘in the gathering and distribution of news and its publication for profit’.⁵⁸ INS bribed employees of AP members to furnish news prior to publication and copy news from early editions of AP newspapers which it would subsequently sell, either bodily or after re-writing it.⁵⁹ Interestingly, the Court noted that it would ‘spend no time’ upon the question of application of the Copyright Act on the grounds that the case turned upon ‘the question of what is unfair competition business’.⁶⁰ This latter question, the Court said, should be answered with due regard to the nature and conditions of the business concerned.⁶¹ The Court held that AP gathered news at the cost of ‘organization, skill, labor, and money’⁶² and that, unless it benefited from a

⁵⁶ Note that, from a copyright law perspective, Article 5 of the Copyright Directive allows Member States to provide for exceptions or limitations to the rights enshrined in Articles 2 and 3 the Directive. The derogation laid down in Article 5(3)(c) seems at first sight relevant here. This provision reads as follows: ‘[the Member State may exempt] reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible’. However, this is not a powerful tool in the hands of news aggregators, not least because in several Member States reproduction under the provisions implementing Article 5(3)(c) is allowed only by ‘the press’, that is, newspapers or other ‘similar’ media organizations. For more on this issue see Xalabarder, R. (2011). *Google News and Copyright*. In Lopez-Tarruella, A. (ed.), *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, 145

⁵⁷ *International News Service v. Associated Press*, 248 U.S. 215 (1918)

⁵⁸ *Ibid.*, 229

⁵⁹ *Ibid.*, 234-236

⁶⁰ *Ibid.*, 236

⁶¹ *Ibid.*, 248

⁶² *Ibid.*

‘quasi-property right in the results of its enterprise as against a rival in the same business’,⁶³ it would no longer have the incentive to offer this ‘extremely useful’ service to the readers.⁶⁴ Based on the above, the Court ruled that INS’ practices harmed AP’s business ‘*precisely at the point where the profit [was] to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not*’.⁶⁵ The Hot News Misappropriation has been endorsed by five States thus far, where it forms part of unfair competition law.⁶⁶ Courts in these States have expanded the doctrine and further elaborated upon the conditions for its application.⁶⁷ In the leading judgment *National Basketball Association v. Motorola*,⁶⁸ which concerned a complaint brought by the National Basketball Association (NBA) against Motorola for selling a paging device that supplied ‘real-time’ NBA scores,⁶⁹ the Second Circuit laid down the following five conditions under which the doctrine may apply:

- (i) a plaintiff generates or gathers information at a cost;*
- (ii) the information is time-sensitive;*
- (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts;*
- (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and*
- (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened’ [emphasis added].⁷⁰*

In the US, the rise and increasing popularity of news aggregators have prompted a feverish debate over whether the Hot News Misappropriation tort, as exemplified by *NBA*, should also cover their activities.⁷¹ At the time of writing, views are polarized and, while proposals have been put forward to federalize the tort,⁷² Congress has not taken any relevant initiative so far.

Given the lack of any relevant case law in the EU, could the elements set out in *NBA* be founded on EU competition law principles, thereby providing news outlets active in the EU with a means to impede aggregators from scraping their content? For the avoidance of confusion, I am not

⁶³ *Ibid.*, 234

⁶⁴ *Ibid.*, 235

⁶⁵ *Ibid.*, 240

⁶⁶ Reference is made to New York, Pennsylvania, Missouri, California, and Illinois. See McDonnell, J. C. (2012), *supra n.* 45, 256 and 262. On the hot news misappropriation doctrine and the relevant U.S. case law see also Rosenfeld, S. (2014). *How Far Will News Organizations Go to Take the “Lede?” Hot News Misappropriation in the Digital Age*. Berkeley Journal of Entertainment and Sports Law, 3(1), 86-92; Tan, W. A. (2013). Montgomery, S. W. (2012). *Extra!! Extra!!: The Viability of the Hot News Misappropriation Claim Is in Jeopardy*. Loyola L.A. Entertainment Law Review 32, 365-398; Schmidt, E. P. (2011). *Hot News Misappropriation in the Internet Age*. Journal on Telecommunications and High Technology Law, 9, 313-343; Beaton, G. D. (2012). *The Cold Reality of the Ineffective Hot News Remedy, and the Case for Contract*. Columbia Law Review 112, 2068-2109

⁶⁷ McDonnell, J. C. (2012), *supra n.* 45, 260

⁶⁸ *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 41 U.S.P.Q.2d (BNA) 1585 (2d Cir. 1997)

⁶⁹ *Ibid.*, paragraphs 2 and 5

⁷⁰ *Ibid.*, paragraph 16

⁷¹ On developments in recent case law and relevant literature see *supra n.* 66

⁷² See, for instance, McDonnell, J. C. (2012), *supra n.* 45, 273 referring to Deutsch, A. L. (2010). *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*. In Advanced Seminar on Copyright Law, (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 1003, 2010), 511

suggesting importing the *NBA* test into EU competition law as such. Because the facts between *NBA* and the Google case are very similar, the criteria the Second Circuit established in this judgment may serve as useful indicators; the test would still need to be adapted to the standards set by EU competition law.

We should start our analysis by noting that in the US a news provider may invoke violations under Hot News Misappropriation without the defendant enjoying ‘monopoly power’.⁷³ In EU competition law, however, the only provision that may apply to a case with comparable facts is Article 102 TFEU. Hence, in addition to any evidence supporting their complaint that an abuse has taken place, news providers would need to demonstrate that a news aggregator such as Google News is in a dominant position in the affected market. At EU level, decisional practice does not shed light on this or closely related issues because, as already discussed in Chapter 3, the Commission has more often than not refrained from completing the market definition exercise in decisions concerning news provision.⁷⁴ National courts have not been particularly helpful either. For example, in *Copiepresse*, which dealt with, *inter alia*, the legitimacy of the use by Google News of snippets of articles produced by French and German-speaking Belgian publishers, the Brussels Appeal Court refused to ‘[dwell] on the twists and turns on competition law, notably [...] market definition’.⁷⁵ As explained in detail in Chapter 2, this approach may jeopardize the accuracy of the decision, adversely affecting both competition and media pluralism. In the case at hand, from a statement the Commission made on, *inter alia*, the scraping allegations, it may be inferred that it is inclined to think that Google News and online news websites are competitors.⁷⁶ However, as will be seen below, this is not so straightforward. Hence, were a commitments decision to be adopted (i.e., a decision where the Commission would not need to conduct a full-fledged market definition analysis), remedies may penalize Google News even if it is not active in the same market as news publishers, possibly to the detriment of innovation and consumer choice. It further bears noting that in this particular area, an additional problem arises, that of establishing that a copyright infringement has taken place. For example, in *Copiepresse*, the Court held that reading the headlines and the first few lines of a news story removed readers’ incentive to click through to the original websites,⁷⁷ without, however, basing

⁷³ Which would be the equivalent of ‘dominance’ under Article 102 TFEU. See Sherman act 15 U.S.C. § 2 (2000)

⁷⁴ Chapter 3, Part 4.b.

⁷⁵ Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999, No. 817, paragraph 62

⁷⁶ European Commission (2013, April), *supra n. 25*: ‘Google uses on its own specialized search services original material taken from the websites of its competitors’

⁷⁷ *Ibid.*, paragraph 28

this finding on any evidence.⁷⁸ Having assumed that Google News was a substitute for rather than a complement to the websites of news providers, the Court concluded that the use by Google News of headlines and excerpts could not be regarded as ‘reproduction for legitimate purposes’, thereby falling foul of copyright law.⁷⁹ Refraining from defining the market(s) affected by Google News’ practices may have led to an erroneous finding.⁸⁰ The Court was, arguably correctly, criticized on this point.⁸¹

The most recent Commission decision where the substitution dynamics in today’s news markets were considered (but not discussed in detail) is *Newscorp/BSkyB*.⁸² While not dealing with news aggregation, the brief analysis the Commission conducted raises some issues that are relevant here. For example, Newscorp submitted that the relevant product market is the market for the supply of print newspapers *and* online news services.⁸³ More particularly, Newscorp argued that print titles face significant competitive constraints from branded websites, including websites of established broadcasters such as the BBC, Internet portals such as Yahoo!, search engines and blogs.⁸⁴ In *Newscorp/BSkyB*, it was further mentioned that whether or not the provider charges for news might play a pivotal role in assessing demand-side substitutability. If so, print newspapers may be interchangeable with online paid-for services,⁸⁵ but not with online news content offered for free. The issue of whether online news provision is an alternative to print titles is still unresolved. While regulatory authorities tend to treat off- and on-line news as complements rather than substitutes,⁸⁶ empirical research has produced mixed outcomes.⁸⁷ As regards the distinction between paid-for and free news content, in the past, the Commission found that national dailies and free newspapers belong

⁷⁸ Docquir, P. F. and Bart Van Besien (2014). *Changing Conditions of Competition for Public Service and Commercial Media in Belgium: Implications for Media Independence*, 154. In Psychogiopoulou, E. *Media Policies Revisited. The Challenge for Media Freedom and Independence*. Hampshire, UK: Palgrave Macmillan

⁷⁹ Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999, No. 817, paragraphs 27-29 and 44

⁸⁰ This example illustrates another function that EU competition law may perform; tools used to assess demand-side substitutability may also inform an analysis under IP law

⁸¹ Xalabarder, R. (2011), *supra n.* 56, 160

⁸² Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2

⁸³ *Ibid.*, paragraph 207

⁸⁴ *Ibid.*, paragraph 209

⁸⁵ Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 211

⁸⁶ See, for instance, Ofcom (2012). *Measuring Media Plurality*, paragraph 4.3.: ‘TV, Radio, Newspapers, Online should not be seen as direct substitutes; rather, they complement each other in many ways’, and Federal Communications Commission – Waldman, S. and the Working Group on Information Needs of Communities (2011). *The Information Needs of Communities. The changing media landscape in a broadband age*: ‘[i]t may be premature to give a full-throated endorsement to new media platforms as a substitute for traditional media’. Retrieved from: <http://www.fcc.gov/info-needs-communities>

⁸⁷ See, for instance, Gentzkow, M. (2007). *Valuing New Goods in a Model with Complementarity: Online Newspapers*. The American Economic Review, 97(3), 713-744; De Waal, E., Klaus Schönbach and Edmund Lauf (2005). *Online newspapers: A substitute or complement for print newspapers and other information channels?* Communications: The European Journal of Communication Research, 30, 55-72; Filistrucchi, L. (2005). *The Impact of Internet on the Market for Daily Newspapers in Italy*. EUI Working Paper ECO No. 2005/12. Retrieved from: <http://cadmus.eui.eu/bitstream/handle/1814/3353/ECO2005-12.pdf>; Kaiser, U. and Hans Christian Kongsted (2005). *Do Magazines ‘Companion Websites’ Cannibalize the Demand for the Print Version?* Centre for Applied Microeconometrics - Institute of Economics University of Copenhagen Working Paper 2005-07. Retrieved from: http://academics.holycross.edu/files/econ_accounting/Knuff.pdf

to separate markets.⁸⁸ This distinction may be relevant in the online world. As already seen in Chapter 5, given the amount of information that is currently available online for free, users are not amenable to pay for content.⁸⁹ Of course, reaching conclusions on the above issues depends on a number of factors (e.g. Internet penetration and use, demographics, news consumption habits in the relevant market, etc.). Any decision would therefore require a fact-intensive analysis that takes account of the particularities of the market(s) under scrutiny. However, if we indeed define the market as broadly as suggested in *Newscorp/BSkyB* (market for the supply of news or market for paid-for v. market for free news content), Google News is unlikely to be found dominant.

But, one might also ask whether there is a distinct market for news consumers' attention, that is, a market for the supply of content (headlines and small excerpts) that attracts users to one or another website.⁹⁰ This should not be excluded. In Chapter 4, I extensively discussed why in cases where the consumer is not required to pay in order to access a content platform, a market for audiences may need to be defined for antitrust purposes. The main argument put forward in Chapter 3 is that limiting the market definition exercise to advertising markets is not a proxy for the market for audiences, for programs that are regarded as substitutes by the advertisers are not necessarily representative of viewers' interests. One could argue that this risk does not exist in the case of news aggregators because behavioral targeting is more effective than advertising with generalist TV channels, that is to say, in the online sphere, advertisers do not necessarily invest in the webpage that attracts the masses but may target each user individually depending on preferences that are revealed by her online history. This may apply to some extent to news aggregators that sell advertising space such as Yahoo! News. But, Google News is ad-free. Would that mean that services such as Google News are not relevant for a competition analysis? The answer is no. An undertaking may produce anti-competitive effects irrespective of the business model it uses to offer its products. Google 'monetizes' services offered for free by getting in return user data and this, as will be seen in greater detail below, may have implications for competition assessments in a way that is similar to the transaction described in Chapter 4, namely the exchange of content for attention. This is where the third condition set in *NBA*, namely that the firm misappropriating the content is in direct competition with news outlets, comes in. If we indeed follow the approach proposed here, then Google News and news providers could be competing in a market for (online) news consumers' attention. If so, Google

⁸⁸ See, for instance, Commission decision *Newspaper Publishing Case No IV/M.423* [1994] OJ C 85/5, paragraph 17 and Case IV/M.1401, Commission decision *Recoletos/Unedisa*, Case No. IV/M. 1401 [1999] OJ C 73/6, paragraph 29

⁸⁹ Joint Research Center (2012), *supra n.* 31, 6

⁹⁰ Note that this has been logic has been applied to cases concerning copyright infringements. See, for instance, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985)

News could be found to possess the market power required to trigger the application of Article 102 TFEU.

The first and second conditions imposed in *NBA* (information is gathered at a cost and news is time-sensitive) are both fairly easy to fulfill and reflect factors that have long been taken into account in EU competition law assessments. As regards the first, the Commission's Guidance Paper on the application of Article 102 TFEU lays down that the existence of high barriers to entry is a parameter for assessing the closure effects that the conduct of the dominant firm may generate.⁹¹ As discussed in detail in Chapter 2, the production of news content, which involves exceptionally high newsgathering costs, labor costs, etc.,⁹² is a rather expensive undertaking. With respect to the second condition, the Guidance Paper also lays down that, in examining foreclosure effects, the Commission will take into account the conditions of the market affected by the conduct. Applied to the newspaper industry, an argument echoing the US Supreme Court's approach in *INS* could be raised here; news has a short life cycle and a dominant news aggregator may harm competition to the extent that it negatively impacts a news provider's 'legitimate business precisely at the point where the profit is to be reaped'.⁹³ In Chapter 5, where I discussed the highly perishable nature of newspapers, I referred to cases indicating that the Commission and the Court were largely sympathetic to this particularity of news markets.⁹⁴

Fulfillment of the final two criteria, namely free-riding on the competitors' efforts and reduction or elimination of the incentive to compete as a result of the unlawful conduct, could, under certain conditions, support the claim that Google News has abused its position. In the EU, free-riding as behavior that raises anti-competitive concerns has mostly been dealt with in the literature regarding vertical restraints. For example, as already discussed in detail in Chapter 5, advocates of Resale Price Maintenance (RPM) contend that the obligation to sell at a retail price set by the manufacturer eliminates the risk of free-riding on a distributor's investments to improve quality of service.⁹⁵ As also seen in Chapter 5, proponents of Most-Favored-Nation clauses (MFNs) maintain

⁹¹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraphs 16-17 and 20

⁹² On this see Norton, S. W. and Will Norton Jr. (1986). *Economies of Scale and the New Technology of Daily Newspapers: A Survivor Analysis*. University of Nebraska – Lincoln College of Journalism & Mass Communications, Working Paper 6

⁹³ *International News Service v. Associated Press*, 240 U.S. 215 (1918)

⁹⁴ See Commission Notice pursuant to Article 19 (3) of Regulation No 17 concerning Case IV/31.609, *Agence et Messageries de la Presse* [1987] OJ C 164/02 and ECJ, Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015

⁹⁵ See, for instance, Petit, N. and David Henry (2010). *Vertical Restraints under EU Competition Law: Conceptual Foundations and Practical Framework*, 9-10 SSRN Working Paper. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724891; Peepercorn, L. (2008). *Resale price maintenance and its alleged efficiencies*. European Competition Journal 4(1), 201-212; Elzinga, K. G. and David E. Mills (2010). *Leegin and Procompetitive Resale Price Maintenance*; Gippini-Fournier, E. (2010). *Resale Price Maintenance in the EU: in statu quo ante bellum?* SSRN Working Paper, 15. Retrieved from:

that MFNs encourage a distributor to make the contract-specific investment required to penetrate a risky (downstream) market because it provides it with some certainty that the manufacturer will not free-ride on its efforts, offering subsequent entrants better deals in order to expand its distribution network.⁹⁶ In explaining under what conditions a restraint may fulfill the ‘indispensability’ condition under Article 101(3) TFEU, the Commission Guidelines give an example of an exclusive distribution agreement between a manufacturer and a distributor that undertakes, *inter alia*, to advertise the product, survey consumers and ensure quick delivery.⁹⁷ The Commission notes that a ban on active sales preventing other firms from selling into the territory of the distributor could be regarded as indispensable on the grounds that the latter would lack the motivation to sell the product if other firms could free-ride on its investments.⁹⁸ As regards the relationship between unilateral conduct and free-riding, Article 102 TFEU has occasionally been applied in a way that favored the *competitors* of the dominant firm rather than *competition* as a value in itself. I mentioned in Chapter 3 that in the late 1980s and early 1990s the Commission adopted a broad definition of the term ‘abusive refusal to supply’ whereby companies which held significant market power and which refused to grant access to an input they controlled were axiomatically deemed to act in violation of Article 102 TFEU.⁹⁹ This approach, which mainly aimed to liberalize former State monopolies,¹⁰⁰ was subsequently modified and stricter tests have been introduced that limited the scope of Article 102 TFEU.¹⁰¹ Yet, while the approach to complaints alleging abuses of dominance has undoubtedly gradually become more stringent, Petit and Neyrinck make a convincing case that, even in more recent case law such as *Microsoft*, Article 102 TFEU was instrumentalized in order to put competitors on a par with a dominant firm that possessed a valuable input, allowing competitors to free-ride to some extent on the dominant firm’s efforts.¹⁰² Indeed, as already seen in Chapter 3, the Court has interpreted

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476443 Also available in Hawk, B. (ed.). *Annual Proceedings of the 36th Annual Conference on International Antitrust Law and Policy-Fordham Corporate Law Institute*, 515-549. Huntington, NY: Juris Publishing

⁹⁶ See Vanderborre, I. and Michael J. Frese (2014). *Most Favored Nation Clauses Revisited*. *European Competition Law Review*, 12, 589, and Baker, J. B. and Judith A. Chevalier (2013). *The Competitive Consequences of Most-Favored-Nation Provisions*. *Antitrust Magazine*, 27(2), 20-21

⁹⁷ Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 82

⁹⁸ *Ibid.*

⁹⁹ See, for instance, Commission decision *Sealink/B&I-Holyhead* [1992] 5 *Common Market Law Review*, 255

¹⁰⁰ For more information on this issue see, for instance, van den Bergh, R. and Peter Camesasca (2006). *European Competition Law and Economics – A Comparative Perspective*, 274-6. Antwerpen, Groningen, Oxford: Intersentia-Hart Publishing.

¹⁰¹ See, for instance, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791; Joined cases T- 374/1994, T- 375/1994, T-384/1994 and T-388/1994, *European Night Services and others v. Commission of the European Communities* [1998] ECR II-3141 For more details on the case law and how it has been applied to the media sector see Chapter 2, Parts 2.a. and 4.a.

¹⁰² Petit, N. and Norman Neyrinck (2011). *Droit de la Concurrence et Instrumentalisation Parasitaire*, 10-16. Working Paper. Institut d’Etudes Juridiques Européennes, Université de Liège. Retrieved from: <http://orbi.ulg.ac.be/handle/2268/98911>

Microsoft's refusal to supply rather flexibly in order to ensure that competitors would be granted access to the input to which they sought access, namely interoperability information.¹⁰³

Adapting the above to the case at hand, we should first say that the thread joining the theories in favor of introducing restraints that seek to address this type of conduct is the concern that, absent the restraint, the incentive to penetrate a market, invest in risky projects, etc. would be either significantly reduced or altogether eliminated.¹⁰⁴ Similar remarks can be made with respect to the logic underpinning the decisional practice in cases of abuse of dominance. For example, as will be seen in greater detail below (Part 5), in *Microsoft*, the Commission has sought to ensure that the dominant firm's incentive to innovate would be preserved (Microsoft was not required to disclose source code but interoperability information, which is a less invasive alternative).¹⁰⁵ To ensure consistency with economic theory and the relevant case law, Google's free-riding could be regarded as abusive *if* it reduced or eliminated the incentive of newspapers to gather and report news. Here, one would need to check whether readers indeed replace news outlets with Google News, thereby potentially depriving the former of the ability to generate revenues. It bears noting that in the FTC proceedings, this issue created considerable tension between the Commissioners because, from the evidence submitted, it could be inferred that scraping *favoured* rather than harmed websites competing with Google. For example, in his (dissenting) statement, Commissioner Rosch noted that 'the investigation revealed that the alleged "victims" of Google's scraping were *not* injured: overall traffic to the alleged victims increased substantially while the alleged scraping was occurring and traffic to these websites from Google grew at an even faster rate'.¹⁰⁶ Google ultimately committed to refrain from scraping third-party content,¹⁰⁷ but, if the relevant data indeed lent support to Google's argument that no harm was done to competitors, it is questioned whether the FTC followed the right approach to this issue.

¹⁰³ CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraphs 630 *et seq.* See Chapter 3, Part 2.a. For a critical view on the Commission's approach in the Microsoft case see Jones, A. and Brenda Suffrin (2008). *EU Competition Law - Texts, Cases and Materials* (3rd Edition), 571-574. Oxford: OUP

¹⁰⁴ See, for instance, Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 82; Vanderborre, I. and Michael J. Frese (2014), *supra n.* 96, 589; Baker, J. B. and Judith A. Chevalier (2013), *supra n.* 96, 20, and Orbach, B. Y. (2008). *Antitrust Vertical Myopia: The Allure of High Prices*. Arizona Law Review 50, 276

¹⁰⁵ See *infra*, Part 4. On this issue see also Massadeh, A. A. (2011). *The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective*. UEA Working Paper Series 2011-AM-1 (see in particular pp. 20 *et seq.*)

¹⁰⁶ See Federal Trade Commission (2013b, January). *Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Google's Search Practices In the Matter of Google Inc.* FTC File No. 111-0163. Retrieved from: https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googles-search-practices/130103googlesearchstmt.pdf and Federal Trade Commission (2013c, January). *Statement of Commissioner Maureen K. Ohlhausen In the Matter of Google Inc.* FTC File No. 111-0163. Retrieved from: https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlesearchohlhausenstmt.pdf

¹⁰⁷ See Federal Trade Commission (2013a, January). *Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc.* FTC File Number 111-0163, fn. 2. Retrieved from: https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf

The above analysis shows that, provided that Google News holds a dominant position in the affected market, news providers could bring a complaint under Article 102 TFEU. However, a decision dealing with whether scraping amounts to an abuse should be based on proof demonstrating that copying and displaying snippets has indeed diverted traffic away from the publishers' websites on to the aggregating platform. In the absence of relevant evidence, the Commission would commit the error to punish a firm which a) has not harmed the complainants, and b) possibly brings added value to the readership.

3.1.2. Can publishers be forced to grant access to their content under EU competition law?

Assuming that news aggregators bring added value to the readership and that the headlines and small excerpts of a news story enjoy copyright protection, I shall also attempt to answer the flipside to the question posed above, that is, whether EU competition law equips news aggregators with any tools to force news outlets to license their content. As already indicated above, the issue of whether snippets of news articles are indeed copyrightable is still unsettled across the EU. Court rulings and recent legislative action in a handful of Member States suggest a tendency toward granting news publishers benefits of copyright protection.¹⁰⁸ Whether news scraping should qualify as a copyright infringement falls outside the scope of this thesis. Suffice it to say that granting news outlets exclusivity over snippets of articles which they produced and which are publicly available on the Internet has generated much controversy. Many have argued that snippets are not worthy of copyright protection and that the public authorities' move to regulate this area was an ill-founded attempt to 'milk' profitable US companies¹⁰⁹ that stretched the boundaries of IP law in an excessive manner.¹¹⁰ Hence, the below analysis is based on a premise that represents a recent trend that has emerged in

¹⁰⁸ See, for instance, Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999, No. 817, 52-55 and *infra ns.* 121 and 126

¹⁰⁹ See, for instance, Ibáñez Colomo, P. *The Spanish Google tax, or (twice) the perfect cartel*. 19 March 2014, Chillin' Competition. Retrieved from: <http://chillingcompetition.com/2014/03/19/the-spanish-google-tax-or-twice-the-perfect-cartel/>

¹¹⁰ See, for instance, Rosati, E. *Fordham Focus 9: News Aggregators and Fair Use*. 5 April 2013, The IPKat. Retrieved from: <http://ipkitten.blogspot.it/2013/04/fordham-focus-9-news-aggregators-and.html> Another case with a similar factual background is *NMPP v. Conseil de la Concurrence*, which concerned the refusal of NMPP, the largest press distributor in France, to grant access to its software system and database. The Cour de Cassation annulled a judgment of the Paris Court of Appeals that had upheld the decision of the Conseil de la Concurrence ordered NMPP, in the context of interim proceedings, to offer access to its system. NMPP's competitor had successfully argued before the Conseil de la Concurrence that, although it had at its disposal the necessary resources to design software with characteristics similar to those of NMPP, NMPP's software had become the industry "standard". See Conseil de la Concurrence Decision n. 03-MC-04 of December 22, 2003, *Messageries Lyonnaises de Presse* and Cour de Cassation, Judgment of February 12, 2004, *NMPP v. Conseil de la Concurrence*, BOCCRF n. 5 of May 4, 2004. For a brief analysis of this case see Georges, A. and Matteo F. Bay (2005). *Essential Facilities: A Doctrine Clearly in Need of Limiting Principles?* Intellectual Property & Technology Law Jour, 17(12), 1-4

copyright law across the EU, but this should not be understood to mean that the headline and the first few lines of the lede of a news story (should) enjoy copyright protection.

For our purposes, we assume that all or the vast majority of news outlets that produce the content to which content is sought jointly decide to refuse to supply Google News. In other words, we assume that news outlets enjoy a collective dominant position which is, *inter alia*, determined with reference to whether a group of undertakings ‘adopt the same conduct on the market’ concerned.¹¹¹ Albeit outside the boundaries of the EU, this has happened. In Brazil, newspapers collectively decided to opt out of Google News.¹¹²

Delineating the boundaries of the relevant market is, once again, key to answering the question at hand. Pursuant to the refusal to supply line of case law, if news outlets and news aggregators operate in the same market, news outlets may not be forced to license their content. In Chapter 2, it was seen that in *Volvo*,¹¹³ which concerned the refusal by the proprietor of a design right covering car body panels to license third parties to sell products incorporating the protected design, the Court ruled that in the *primary* market for which a dominant undertaking has a monopoly owing to its own IP, the exclusive right to produce or sell should be fully respected.¹¹⁴ As already discussed above, the issue of whether news aggregators compete with news outlets is still unsettled *and* dependent on the approach to market definition the Commission would adopt in such cases. If news aggregators and news outlets were found to operate in separate markets, the latter could, under certain conditions, be required to license their content. These conditions were dealt with in *Magill*, which concerned the refusal of three Irish broadcasters to license their program listings to a weekly TV guide.¹¹⁵ In *Magill*, the Court held that, unless there is an objective justification for the refusal (note that the mere possession of an IPR is not an objective justification for exclusionary behavior¹¹⁶), the dominant company must provide access to its input if the refusal prevents the creation of a new product and

¹¹¹ See ECJ, Case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-01477. For a comprehensive overview of the case law on collective dominance see Jones, A. and Brenda Sufrin (2008), *supra n.* 103, 918-935

¹¹² Fraga, I. *Brazilian newspapers leave Google News en masse*. 22 October 2012, Knight Center for Journalism in the Americas. Retrieved from: <https://knightcenter.utexas.edu/blog/00-11841-newspapers-say-their-boycott-turned-google-news-“deficient”-brazil-reiterate-request-p> I adopt this approach because saying that a single news outlet should be obliged to license snippets on the grounds that its content is, pursuant to the relevant case law, ‘indispensable’ for the operation of an aggregation platform would arguably be a stretch

¹¹³ ECJ, Case 238/87 *Volvo v. Veng (UK)* [1988] ECR 6211

¹¹⁴ *Ibid.*, paragraph 8

¹¹⁵ ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission* [1995] ECR I-743

¹¹⁶ Examples of acceptable justifications include poor creditworthiness, safety, etc. See Anderman, S. and Hedvig Schmidt (2011). *EU Competition Law and Intellectual Property Rights – The Regulation of Innovation* (Second Edition), 104. Oxford: Oxford University Press

results in excluding potential competition in the secondary market.¹¹⁷ A broad interpretation of the above criteria could lead to the conclusion that news aggregators requesting access to content produced by news outlets may pass the *Magill* test. A news aggregator such as Google News may qualify as a ‘new product’. As opposed to a news outlet’s website, Google News does not host the full text of the articles it aggregates¹¹⁸ and does not display the content of one source only. Moreover, news aggregators and news outlets may fulfill different needs of the readership. For example, a recent study found that online news consumers use aggregators ‘in apolitical ways’; in other words, they do not want to read opinionated news when they access a news aggregation platform¹¹⁹ (note that this parameter could also inform market definition). This is in sharp contrast to consumption of traditional titles which, as already seen, is often driven by political preferences.¹²⁰ And finally, assuming that news aggregators operate in a separate market, a refusal to supply would exclude downstream competition since the alternative (creating an *x* amount of news outlets to aggregate their content) would not only seem unfeasible but also invalidate the *raison d' être* of the service, that is, the aggregation of content provided by numerous news sources covering a wide variety of topics.

From a practical perspective, however, one may question whether establishing the duty to license will produce positive results. There is worrying evidence to suggest that this duty may create more problems than it solves. One way of testing this is to check what happened in cases where a licensing mechanism was established by means of regulation. For example, the Spanish legislator has recently introduced a law requiring news aggregators to pay (through AEDE, the Asociación de Editores de Diarios Españoles) news outlets a fee for the use of content produced by the latter.¹²¹ An important aspect of this law is that news outlets may not opt out of the regime, that is, they are not allowed to offer their content for free.¹²² Google exited the market shortly after the law was adopted and traffic to the news outlets’ websites was reportedly subsequently reduced by 10-15%.¹²³ AEDE

¹¹⁷ ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission*, [1995] ECR I-743, paragraphs 54-56

¹¹⁸ For differences among news aggregators see Huang, J. S., Yang, M. J., and Hsiang Iris Chyi (2013), *supra n. 50*, 4

¹¹⁹ Lee, A. M. and Hsiang Iris Chyi (2015), *supra n. 44*, 18

¹²⁰ See, for instance, Chapter 3, Part 4.b.

¹²¹ Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. [2014] BOE Núm. 268 Sec. I. Pág. 90404. Retrieved from: <http://www.boe.es/boe/dias/2014/11/05/pdfs/BOE-A-2014-11404.pdf>

¹²² *Ibid.*, Article 32(2), which reads as follows: ‘La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. *Este derecho será irrenunciable* y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual’ [emphasis added] On this see also García, R. R. *Google News solo volverá a España si la tasa por contenidos es voluntaria*. 12 December 2014, La Voz de Galicia. Retrieved from: http://www.lavozdeg Galicia.es/noticia/vidadigital/2014/12/12/google-news-solo-volvera-espana-tasa-contenidos-voluntaria/0003_201412G12P61991.htm

¹²³ D’Elia, D. *Google News Spagna Chiude? Traffico in Calo del 15%*. 17 December 2014, Tom’s Hardware. Retrieved from: <http://www.tomshw.it/news/google-news-spagna-chiude-traffico-in-calo-del-15-63176>

called upon the public authorities to take action¹²⁴ and, following a petition launched by opposition party PSOE, the law is currently under review by the Constitutional Court.¹²⁵ In Germany a similar law was introduced in 2013 which apparently also has been far from a success story; publishers reportedly voluntarily relinquished their right to payment from Google *only*.¹²⁶ In this scenario, the obligation to license burdens in effect smaller aggregators, thus impeding the development of a competitive news market.

A different path was followed in Belgium and France where the cases concerning scraping by Google News were settled before regulatory plans materialized. For example, in Belgium, a partnership was established whereby Google committed to, *inter alia*, contribute to the publishers' efforts to generate revenues via its various advertising services (AdWords, AdSense, AdExchange), increase the accessibility of the publishers' content through mobile platforms, and promote reader engagement through Google's social tools such as Google+ and YouTube.¹²⁷ In France, Google made a hefty contribution to a special fund in order to assist French media with increasing their presence on the Internet.¹²⁸ While it is probably too soon to say with certainty whether these initiatives will positively affect the future of news provision, at this stage, given the developments discussed above, they may be more appropriate than an obligation to license irrespective of whether the latter is imposed as a result of competition law proceedings or by means of regulation.

3.2. The remedies Google proposed to address the Commission's concerns regarding scraping: Going too far?

We are now turning to the assessment of the remedies proposed by Google in the pending antitrust case. In the document outlining the remedies concerned, Google undertook to provide publishers with a technical solution to a) prevent the display of *snippets* for their articles on Google

¹²⁴ Kassam, A. *Google News says 'adiós' to Spain in row over publishing fees*. 16 December 2014, The Guardian. Retrieved from: <http://www.theguardian.com/world/2014/dec/16/google-news-spain-publishing-fees-internet> On this issue see also *El cierre de Google News no impedirá al ciudadano el acceso a las noticias*. 13 December 2014, El Periódico. Retrieved from: <http://www.elperiodico.com/es/noticias/sociedad/cierre-google-news-espana-acceso-noticias-internet-3769029>, and Perpetuo, J. *El cierre de Google News y la libertad de información en España*. 11 December 2014, El Mundo. Retrieved from: <http://www.elmundo.es/blogs/elmundo/jaqueperpetuo/2014/12/11/el-cierre-de-google-news-y-la-libertad.html>

¹²⁵ See Koch, T. *La Ley de Propiedad Intelectual será juzgada por el Constitucional*. 5 March 2015, El País. Retrieved from: http://cultura.elpais.com/cultura/2015/03/05/actualidad/1425572373_653722.html

¹²⁶ Malcolm, J. *Google News Shuttered in Spain Thanks to 'Ancillary Copyright' Law*. 10 December 2014, Electronic Frontiers Foundation. Retrieved from: <https://www.eff.org/deeplinks/2014/12/google-news-shuts-shop-spain-thanks-ancillary-copyright-law> and Reda, J. *An EU-wide Google Tax in the Making?* 28 December 2014, Julia Reda. Retrieved from: <https://juliareda.eu/2014/10/an-eu-wide-google-tax-in-the-making/>

¹²⁷ Google (2012b, December). *Partnering with Belgian news publishers*. Retrieved from: <http://googlepolicyeurope.blogspot.it/2012/12/partnering-with-belgian-news-publishers.html>

¹²⁸ Kelly, A. *Google to pay 60 million euros into French media fund*. 8 January 2013, Reuters. Retrieved from: <http://www.reuters.com/article/2013/02/01/us-france-google-idUSBRE91011Z20130201>

News, but without preventing the display of result *links* to the articles on Google News, and b) specify on a webpage-by-webpage basis a particular date when certain articles should no longer be displayed on Google News.¹²⁹

As regards the first proposal,¹³⁰ one cannot help but wonder whether the remedy is going too far. From a competition perspective, in view of the remarks that were made above regarding the uncertainty surrounding the impact of news aggregation on the original websites, preventing the display of snippets may harm both Google News *and* the publishers. The doubts that were raised by FTC Commissioner Rosch are illustrative in this regard. From a media pluralism perspective, if the small excerpts indeed encourage the user to click through, then ‘dry’ links to articles may eventually drive consumers to consult the few branded websites they have always consulted. In other words, display of links *only* may ultimately result in discouraging users from discovering alternative sources of information.

The second commitment has to do with caching. Caching refers to the ‘copying and storing of data from a webpage on a server’s hard disk so that the page can be quickly retrieved by the same or a different user the next time that page is requested’.¹³¹ In our case, this means in practice that the user may access a story even after the publisher removed it from its site.¹³² It should be noted that the EU Copyright Directive¹³³ and the e-Commerce Directive¹³⁴ provide that caching is not a copyright infringement or an illegitimate restriction on the free movement of information society services respectively provided that it is ‘temporary’.¹³⁵ However, courts in France¹³⁶ and Belgium¹³⁷ rejected the argument that Google’s caching benefits from the exemptions introduced by (the laws transposing) the above Directives.¹³⁸ This may explain why Google offered the commitment as well

¹²⁹ Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 20 (c)

¹³⁰ Note that the proposed solution ‘borrows’ from copyright law. Courts seem to agree with the premise that ‘hyperlinking’ is not a copyright infringement. See, for instance, BGH, *Paperboy*, Judgment of 17.07.2003, I ZR 259/00. Available (in German) at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2003&Sort=3&Seite=5&client=3&anz=1706&pos=171&nr=27035> and CJEU, Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* [2014] (not yet reported)

¹³¹ Definition retrieved from: http://www.alrc.gov.au/publications/issues-paper/caching-indexing-and-other-internet-functions#_ftn55

¹³² Xalabarder, R. (2011), *supra n.* 56, 115

¹³³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Article 5(1)

¹³⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [2000] OJ L 178/1, Article 13

¹³⁵ Article 13 of the e-Commerce Directive poses some additional conditions that need to be fulfilled for cache storing to be legitimate

¹³⁶ Cour d’appel du Paris, *Société des Auteurs des arts visuels et de L’image Fixe (SAIF) v. Google France, S.A.R.L., and Google Inc.* Judgment of 26.01.2011, 08/13423, 8. Retrieved from: <http://juriscom.net/wp-content/documents/caparis20110126.pdf>

¹³⁷ Court of appeal of Brussels, *Google Inc. v. Copiepresse*, R. No. 2011/2999, No. 817, 52-55; Court of First Instance of Brussels, *Copiepresse v. Google*, No. 06/10.928/C, pp. 18 *et seq.*

¹³⁸ On the copyright issues that arose in these cases see Xalabarder, R. (2011), *supra n.* 56, 115 *et seq.*

as why the Commission was willing to accept it.¹³⁹ This approach may be understandable in that it seeks to introduce a solution with ‘harmonizing’ effects in order to avoid tension with domestic laws that may apply to Google. However, again, this commitment may be going too far. It would be difficult to understand what would be the anti-competitive effects on the publisher if the user were allowed to access an article as it appeared on the original website.

The main conclusion to draw from the above is that, under certain conditions, Article 102 TFEU may be invoked by news publishers and news aggregators alike, even if for diametrically opposed purposes. However, the analysis demonstrated that the Commission should intervene with caution. By accepting axiomatically that a news aggregator harms competition in news markets, the Commission runs the risk of penalizing a platform, the conduct of which is not capable of producing exclusionary effects and, by imposing on the aggregator concerned far-reaching obligations, it may deprive the readership of a service that offers convenient access to a variety of news content.¹⁴⁰ In the more extreme case of news aggregators seeking access to the content produced by news outlets, the Spanish and German experiences show that establishing a licensing duty may produce a less-than-desirable outcome.

4. Search engines as distribution bottlenecks: Retaliation, Exclusivity and Data Exploitation

Search engines are undoubtedly evolving into ‘*the most important gateway used to find content*’,¹⁴¹ including content that seeks to ensure an informed citizenry; in several Member States, search engines are the most popular means of discovering news online.¹⁴² While not *all* information is nosed out and indexed by search engines, the latter have undeniably broadened our knowledge of the world. To grasp the role they play in our lives, we may ask ourselves what we would do without them. Could we imagine an online universe where we would need to find links to websites that could possibly contain interesting content without a search engine assisting us with this daily activity? In view of what the alternative would be, it is easy to understand that, in their role as gatekeepers, search engines have made a significant contribution to creating an environment where information, including information on matters of common concern, is instantly and effortlessly available.

¹³⁹ European Commission (2014a, February), *supra n.* 22

¹⁴⁰ Foster, R. (2012), *supra n.* 36, 25

¹⁴¹ van Eijk, N. (2009). *Search Engines, the New Bottleneck for Content Access*, 141. In Preissel, B., Justus Haucap and Peter Curwen (eds.), *Telecommunication Markets: Drivers and Impediments*. Berlin: Springer-Verlag

¹⁴² See, for instance, Ofcom (2013). *International Communications Market Report*, Figure 1.58. Retrieved from: <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr13/international/icmr-1.58>

However, this gatekeeping role does not come without problems. As Foster puts it, ‘the fact that [search engines] are now an indispensable part of our lives also means that they have the potential to exert significant influence over public access to different types of content, including news’.¹⁴³ In other words, search engines are not only capable of facilitating the discovery of information we were previously not aware of, but also capable of behaving as bottlenecks, restricting the scope of content that is indeed available. In this latter case, the risk that the user may be prevented from consulting other sources of information is greater if the market is highly concentrated. In the EU, Google is by far the strongest player, holding market shares in general online search ‘well above 90%’ in most Member States¹⁴⁴ and the following two practices that are currently being investigated by the Commission illustrate how a dominant search engine may act as a bottleneck. First, Google appears to have engaged in ‘retaliation’ practices; it artificially reduces the information that is available on the web in cases where those providing the information concerned refuse to serve Google’s commercial interests in neighboring markets. The second area which illustrates how a search engine may act as an information bottleneck has to do with the gathering and processing of competitors’ and customers’, including online users’, data. More particularly, Google seems to restrict advertisers to transferring ad campaign data to other advertising platforms, thereby potentially preventing them from reaching audiences that use competing services. Moreover, Google collects and processes a vast amount of user data in order to provide search results that are largely based on the user’s individual search history.¹⁴⁵ While this is supposed to deliver results that best match the user’s query, it is unclear about whether Google processes data to bring an added value to the user or rather to direct her to information that primarily serves its own commercial interests.

Prior to discussing the above two practices in more detail, it should be noted that retaliation affects media pluralism in an obvious manner. The other practices, namely those related to the use of data, affect more generally access to information. Hence, the discussion, albeit undoubtedly relevant for our purposes, has a broader focus.

4.1. Retaliation affecting news markets

As already mentioned above, one of the main complaints put forward by news publishers consists in that those publishers that have objected to the display of their content in Google News

¹⁴³ Foster, R. (2012), *supra n.* 36, 26

¹⁴⁴ European Commission (2013, April), *supra n.* 25

¹⁴⁵ Note that this issue is not being investigated by the Commission

have been told by Google that the only way for their content not to appear on the News website would be to opt out of Google's services, including and especially Google's web search results.¹⁴⁶ Google's retaliatory practices could be considered abusive tying. From the statements made throughout the investigation, it may be inferred that the Commission's preliminary assessment was indeed driven by the three requirements which, pursuant to its Guidance Paper on the application of Article 102 TFEU, need to be fulfilled for a conduct to carry the 'tying' tag: a) the firm is in a dominant position in the tying market¹⁴⁷ ('Google is dominant in the European Economic Area (EEA) both in web search and search advertising'¹⁴⁸); b) the tying and tied products are two distinct products¹⁴⁹ (Google News is a 'specialized service'¹⁵⁰); and c) the tying practice is likely to lead to anti-competitive foreclosure¹⁵¹ (opting out is 'not a sustainable business option for most websites'¹⁵²). *If* broadly interpreted, the case law, as codified in the Guidance Paper, would support the argument that Google may be liable for tying. Usually, tying refers to a situation 'where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product)' [emphasis added].¹⁵³ News publishers are not, strictly speaking, required to 'purchase' Google News in order to 'purchase' access to Google Search. Moreover, while in the case of Google Search publishers could be regarded as 'customers', in the case of Google News they are suppliers of a valuable input. In view of the above, this is not a typical tying case. However, Google does make display in Search entirely conditional upon display in News and, where a news publisher does not allow the use of its content by the aggregating platform, the effects of Google's conduct are 'by definition' exclusionary (news publishers and Google do not compete in the general search market, but a finding of abuse does not depend on whether the anti-competitive effects are manifested in the tied or the tying market¹⁵⁴). Ultimately, even if one were reluctant to call this behavior 'tying', there is a plausible theory of harm here, that of leveraging: Google is using its market power in general online search to strengthen its position in an ancillary market, however that latter market is defined (see above on possible market definitions).

¹⁴⁶ European Commission (2013, April), *supra n. 25*

¹⁴⁷ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 50

¹⁴⁸ European Commission (2013, April), *supra n. 25*

¹⁴⁹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 50

¹⁵⁰ European Commission (2013, April), *supra n. 25*

¹⁵¹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 50

¹⁵² European Commission (2013, April), *supra n. 25*

¹⁵³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 48. Note that in EU competition law, the term 'customers' encompasses both final consumers as well as undertakings competing with the dominant firm in upstream or downstream markets

¹⁵⁴ *Ibid.*, paragraph 52. For a detailed analysis of how Google's behavior fulfills the 'tying' requirements see Edelman, B. (2014). *Leveraging Market Power Through Tying: Does Google Behave Anticompetitively?*, 15-17. Harvard Business School - Working Paper 14-112. Retrieved from: <http://hbswk.hbs.edu/item/7464.html>

To address the concerns associated with the retaliation practice, Google undertook to ensure that a news publisher's decision to opt out of Google News will not adversely affect the appearance of the publisher's website in search results delivered by Google Search. As will be seen in greater detail below, Google's suggestions fall short of providing news publishers with an effective opt out mechanism.

Opt out of what? In all three submissions, Google explicitly stated that, were a news outlet to opt out of Google News, this would have 'no material adverse impact on ranking in **Generic Search Results**' [emphasis added].¹⁵⁵ Yet, on no occasion did Google mention how a publisher's decision to opt out would affect the display of 'News Universals'. News Universals are news results that are displayed in a special block following a given query. For example, if a user types inside Google's Search Box 'Google EU antitrust investigation', she will receive, *inter alia*, results directing to DG Competition's website with information on the proceedings, analyses of whether Google should be charged with antitrust violations, and a block of two or three results which originate from the websites of news outlets and which include updates on the investigation. This block of results is labeled as 'News for [query]'. News Universals are prominently displayed and greatly resemble the Google News service—they contain the headline, sometimes the first few lines of the story, and a link to the story concerned.

The way in which the commitment is drafted would arguably give Google considerable room for maneuver in disputes that could possibly arise after the closing of the investigation. More particularly, in its submission, Google defines Generic Search Results as Search Results '**not restricted by design to one or a limited set of pre-defined content categories, such as news, product, local businesses, images, travel and video, and [...] returned in response to a query entered into a Google General Search Input Feature**' [emphasis added].¹⁵⁶ This definition would seem to free Google of the obligation to include in News Universals stories produced by news outlets that opt out of Google News.¹⁵⁷ Moreover, were news publishers to bring complaints after this remedy is made legally binding, Google could argue that this is how its Universal Search model is designed (note that

¹⁵⁵ Google (2013, April). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 19. Note that the second time around Google expanded the scope of the remedy to cover 'AdWords results', which remained intact in the third submission. See Google (2013, October). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 21 and Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 22

¹⁵⁶ *Ibid.*, 8

¹⁵⁷ European Press Publishers (2014, September). *Press Publishers' Response to Google's Third Commitments Proposal. European Commission's Competition Investigation of Google - AT.39.740*, 11-12

in May 2007, Google announced that it adopted a ‘Universal’ model whereby, following a query, the algorithm would search all of its content sources, for instance YouTube, Google News, Google Maps, etc., rank all the information in its possession and ‘deliver an integrated set of results’¹⁵⁸). If a news publisher opts out of the News service, so Google’s argument could go, then ‘by design’ it cannot be included in the News Universals block. The ways News Universals affect news consumption is admittedly far from clear. However, one cannot help but have mixed feelings about this remedy. If the prominent display of News Universals encourages users to click through the websites of (only or predominantly) those publishers that appear on Google News, then the commitment may introduce a different, albeit softer, form of retaliation, thereby falling short of addressing the main concern that arose in the context of the investigation, that is, the ‘forced’ link of Google News to Google Search. Unsurprisingly, news publishers criticized this proposal, maintaining that News Universals ‘attract most user attention [and, since] no publisher can afford to opt out of those results to protect its content from being used elsewhere’, the commitment is ‘at best useless’.¹⁵⁹

How to opt out? Google provided news outlets with two options. First, news outlets may fill in a web-based Notice Form where they state that they wish to opt out of the News service.¹⁶⁰ This proposal is both superfluous and highly likely to be ineffective: superfluous because apparently the Notice Form mechanism was in place long before the investigation.¹⁶¹ And likely to be ineffective because Google would cease displaying content on News ‘within 30 working days of receipt of a properly completed Notice Form’.¹⁶² As already explained, news is time sensitive and hence highly perishable. Thus, using the Notice Form is arguably not a viable solution for a news publisher that exercises the right to opt out. Alternatively, Google said it would ‘*maintain a specific robots exclusion protocol*’ that would allow publishers to exclude content from display in Google News.¹⁶³ For the sake of clarity, it bears noting that, a robots exclusion protocol, as a technical solution, has been available to websites for quite some time. In fact, the mere ability to use robots exclusion protocols has been one of the oft-repeated arguments put forward by Google in cases concerning copyright infringements, where it has contended that the fact that a website does not implement a robots exclusion protocol should be regarded as an ‘implied license’ to use the site’s content.¹⁶⁴ In the

¹⁵⁸Google (2007, May). *Google Begins Move to Universal Search*. Retrieved from: http://googlepress.blogspot.com/2007/05/google-begins-move-to-universal-search_16.html Arguably somewhat ironically, Google stated that ‘[t]he ultimate goal of universal search is to break down the silos of information that exist on the web and provide the very best answer every time a user enters a query’

¹⁵⁹ European Press Publishers (2014, September), *supra n.* 157, 11-12

¹⁶⁰ Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 11

¹⁶¹ Edelman, B. (2014), *supra n.* 154, 14

¹⁶² Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 12

¹⁶³ *Ibid.*, paragraph 20

¹⁶⁴ On this issue and relevant case law see Xalabarder, R. (2011), *supra n.* 56, 155

EU antitrust investigation, the publishers' complaint consisted in that Google would use a system whereby whichever website implemented the robots exclusion protocol to prevent display in News would automatically lose visibility in Google Search.¹⁶⁵ This may still be a problem since the commitments have not been made legally binding and, to my knowledge, Google has not taken any action on its own initiative to ensure that a website using an exclusion protocol for News will not be ostracized from generic search results.

What to opt out? In cases where they indeed use a robots exclusion protocol, publishers are entitled to opt out on a webpage-by-webpage basis. That is to say, in cases where a webpage contains several stories, the news outlet may not choose which stories it wants to see displayed in Google News. Google provided no explanations as to why the opt out should have such a wide scope.¹⁶⁶ However, the technical means supporting inclusion on an item-by-item basis seems to exist. For example, in the case dealing with the retaliation complaint brought by Italian publishers, AgCom, the Italian media regulator imposed upon Google the obligation to ensure that publishers are in the position 'to exclude specific articles or images'.¹⁶⁷

Retaliation, as manifested in the Google case, is a worrisome practice, possibly more worrisome than scraping in that, as opposed to the latter, the effects of the former are *per se* exclusionary. It is therefore inexplicable why the Commission appeared willing to accept the commitments proposed by Google which, as the above analysis showed, would be incapable of addressing the concerns to which they give rise.

4.2. Retention and Use of Data affecting advertisers and online users

The other area that illustrates the ways in which digital intermediaries may shape the architecture of information markets in their role as bottlenecks is the gathering and processing of competitors' and customers', including online users', data. In the case of Google, issues relating to

¹⁶⁵ Sullivan, D. *Debunking The Italian Newspapers' Antitrust Allegations Against Google*. 27 August 2009, Search Engine Land. Retrieved from: <http://searchengineland.com/deunking-the-italian-newspapers-antitrust-allegations-against-google-24698>

¹⁶⁶ Note that in the case of the Notice Form, the opt out would have an even wider scope, allowing website owners to opt out either for their entire domain or for one or some of their sub-domains. See Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 11

¹⁶⁷ AGCom. A420 - AS787. *Antitrust Accetta Impegni di Google e Chiede al Parlamento di Adeguare le Norme sul Diritto d'Autore*. 'Gli editori possono scegliere in particolare se consentire o meno l'accesso ai propri siti da parte di Google News, decidere di escludere selettivamente specifici articoli o immagini' [emphasis added]. Press Release of 17/01/2011. Retrieved from: <http://www.agcm.it/stampa/news/5194-a420-as787-antitrust-accetta-impegni-di-google-e-chiede-al-parlamento-di-adequare-le-norme-sul-diritto-d'autore.html> That this technical measure is possible can also be inferred from how Google proposes to display content of competing (e.g. travel and product) sites. Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 18

the collection and use of data arise in two contexts that will be examined in this section. First, Google has engaged in practices that restrict advertisers to exporting ad campaign data into competing advertising platforms. This in turn can be seen from two different perspectives. First, content providers, including news outlets, advertise with Google. If the restrictions introduced by Google lead to content providers advertising exclusively with Google, then Google may have prevented them from reaching the user base of other search engines. Second, data portability restrictions may significantly reduce the ability of other search engines to attract advertisers.

Data portability restrictions relate to a broader problem that arises in markets where digital intermediaries operate, namely the existence of high switching costs that may amount to customer lock-in. The degree of customer lock-in resulting from data portability restrictions will, *inter alia*, depend on the scope of the restrictions and the type of the intermediary. For example, in the case of digital retailers which manufacture the hardware devices to which their digital content stores are tied and which do not allow the user to transfer the acquired content to a competing device, customer lock-in appears to be high. In the case of social networks that provide users with the tools to export some (but not all) of their data into a competing network, customer lock-in is lower.

The second issue that relates to the use of data by powerful digital intermediaries is the (sensitive) information supplied by the online user to the intermediary. Digital intermediaries rely heavily on collecting and processing user data that reveals valuable information about consumer preferences and is used to serve a number of purposes, including targeted advertising. However, online users are not always aware of how intermediaries they use in their daily lives implement their privacy policies, that is, they are in limbo over the vast amount of data they (involuntarily or light-heartedly) unveil. Moreover, there is considerable uncertainty about whether the intermediary processes data to bring an added value to the user (e.g. ‘more relevant’ content) or rather to channel her to information that primarily serves its purpose to maximize profit. Consumer exploitation in this context may give grounds for antitrust intervention that seeks to increase transparency about the ways in which the collection and processing of data may affect the information to which online users are exposed.

4.2.1. Restrictions on Data Portability

Data portability may be defined as the data subject’s ability ‘to transfer data from one electronic processing system to and into another, without being prevented from doing so by the

controller'.¹⁶⁸ In the case at hand, advertisers licensing Google's Adwords Application Programming Interface (API),¹⁶⁹ an instrument that facilitates the management of an AdWords campaign,¹⁷⁰ are prevented from using tools offered by software developers that allow them to transfer ad campaign data, such as keywords, price and targeting information,¹⁷¹ to rival advertising platforms such as Microsoft's AdCenter.¹⁷²

Data portability restrictions raise barriers to substituting a service provider for another.¹⁷³ In antitrust parlance, they create switching costs,¹⁷⁴ that is, 'costs customers actually do or would incur from changing from [one] supplier of a good or service to another'.¹⁷⁵ Switching costs may become a competition issue if they are high enough to lock in the customer to a given provider.¹⁷⁶ In the case at hand, advertiser lock-in may push out of the market competing ad-based search engines or raise (the already high¹⁷⁷) barriers to entry,¹⁷⁸ thereby producing exclusionary effects. Moreover, were the restrictions concerned so stringent as to impede the creation of instruments that allow a more efficient use of ad campaign data, it could also be argued that Google harms innovation. Under this lens, Google's conduct may be caught by Article 102(b) TFEU, which prohibits firms in a dominant position to engage in practices that limit 'production, markets or technical development'.¹⁷⁹

¹⁶⁸ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, 9. The proposal refers to natural persons, but, for our purposes, we adopt a broader approach to the definition of 'data subjects' to also include undertakings

¹⁶⁹ An API is '[a] language and message format used by an application program to communicate with the operating system or some other control program such as a database management system (DBMS) or communications protocol'. Definition retrieved from: <http://www.pcmag.com/encyclopedia/term/37856/api>

¹⁷⁰ See <https://developers.google.com/adwords/api/>

¹⁷¹ Federal Trade Commission (2013, January). *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search*. Press Release. Retrieved from: <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>

¹⁷² European Commission (2014a, February), *supra n. 22*; European Commission (2013, April), *supra n. 25*, and European Commission (2010, November), *supra n. 2*

¹⁷³ Geradin, D. and Monika Kuschewsky (2013). *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, 10-11. SSRN Working Paper. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088

¹⁷⁴ On switching costs in new economy markets see, for instance, Edlin, A. S. and Robert G. Harris (2013). *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*. Yale Journal of Law and Technology, 15(2), 171-213

¹⁷⁵ Harris, R. G. *The Role of Switching Costs in the Markets for PC Operating Systems, Online Search, Internet Access and Mobile Service: Implications for Australian Competition and Consumer Protection Policy*, 3. Presented at the Conference on 'Competition in the Online Environment', 28 November 2012. Retrieved from: https://www.ipria.org/events/conf/Competition_Conference/Switching_Costs.pdf Note that switching costs may take various forms; they can, *inter alia*, be inherent (present in all markets) or strategic (created or raised by a competitor to reduce or eliminate the incentive to switch)

¹⁷⁶ Geradin, D. *Data Portability and EU Competition Law*, 3. Presented at the BITS conference, Brussels, 24 April 2014

¹⁷⁷ For an analysis see Chapter 1, Part 3.b.

¹⁷⁸ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 17

¹⁷⁹ Geradin, D. and Monika Kuschewsky (2013), *supra n. 173*, 11; Graef, I., Jeroen Verschakelen and Peggy Valcke (2014). *Putting the right to data portability into a competition law perspective*, 7. SSRN Working Paper. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416537

In view of the above, data portability may be an issue of concern to competition authorities. It bears noting that, while Google's conduct appears to be the first instance in which data portability restrictions were caught on the EU antitrust radar, distortions of competition that may arise from high switching costs are hardly new to competition law. The IBM commitments decision concerning IBM's refusal to supply interface information (impeding interoperability between its central processing unit and operation system and software developed by competing undertakings, thus locking in the customer to IBM products), which dates back to 1984, is illustrative in this regard.¹⁸⁰ Naturally, markets evolve and new factors come into play. Data has undoubtedly become a valuable input in today's digital economy. This is because, as will be seen in greater detail below, data provides new insights into customers' needs, thereby driving the development of new services. This has not passed unnoticed by the Commission. For example, former Competition Commissioner Almunia stated in a speech that 'a healthy competitive environment in [digital] markets requires that consumers can easily and cheaply transfer the data they uploaded in a service onto another service [...] [R]etention of these data should not serve as barriers to switching'.¹⁸¹ Similarly, in its Impact Assessment Report on the proposed General Data Protection Regulation, the Commission notes that '[p]ortability is a key factor for effective competition'.¹⁸²

Consequently, a remedy imposing the obligation to lift data portability restrictions is nothing more than an adaptation of competition law to the circumstances characterizing today's digital markets. But, while the imposition of the remedy as such is not controversial, a decision finding that a refusal to allow data portability amounts to an abuse can be, because the relevant assessment will undoubtedly involve examining and weighing complex technical parameters that will ultimately determine whether customers are indeed locked in to the products of the firm under scrutiny. At the time of writing this thesis, factual information about the restrictions imposed on advertisers is not publicly available. But, the wording of the remedy proposed by Google is very similar to that of the remedy made legally binding on the search giant in the US.¹⁸³ In order to provide the basis of a framework within which the switching costs incurred by advertisers using the AdWords platform

¹⁸⁰ European Commission (1984). *Fourteenth Report on Competition Policy*, 77-79. Retrieved from: http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4184822

¹⁸¹ Almunia, J. *Competition and personal data protection*. Speech given at the 'Privacy Platform event: Competition and Privacy in Markets of Data', 26/11/2012. Retrieved from: http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm

¹⁸² European Commission (2012). Commission Staff Working Paper. *Impact Assessment accompanying the General Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data* SEC (2012) 72 final, p. 28

¹⁸³ Compare Google (2012a, December). *Commitments Letter From Google Inc. to Chairman Leibowitz*, II (retrieved from: https://www.ftc.gov/system/files/documents/closing_letters/google-inc./130103googleletterchairmanleibowitz.pdf) and Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraphs 33 *et seq.*

may be assessed, I shall use the information about the contracts that were scrutinized by the FTC, speculatively inferring that the restrictions set on advertisers in the EU are analogous to those set on advertisers in the US.

As already indicated, in order to determine whether the customer is locked in to a service, one would need to measure ‘the cost of switching to a different service or adopting a new technology’.¹⁸⁴ Where the customer has entered into a contract with the provider concerned, one aspect that is key to calculating switching costs is the scope of restrictions introduced by the contract in question.¹⁸⁵ In the US, apparently, AdWords advertisers were allowed to use other advertising platforms, including APIs linked to those other platforms.¹⁸⁶ In other words, they were not bound by exclusive purchasing deals, which, as already seen, may make antitrust bells ring (especially if they involve a dominant firm). Moreover, and perhaps more importantly, advertisers were prevented from using third party tools *only*, that is, they were not prevented from developing their own data portability tools.¹⁸⁷ Finally, advertisers were allowed to transfer AdWords campaign data to a competing platform.¹⁸⁸ Referring to the above, FTC Commissioner Rosch maintained that the restrictions were limited in scope and that, as a result, Google should not be forced to eliminate them.¹⁸⁹ However, in order to determine the magnitude of switching costs, the analysis should go beyond the assessment of the contract entered into between Google and advertisers, for the lock-in may not necessarily be contractual. That is to say, the same restrictions may lead to *de facto* exclusivity. Therefore, even if not expressly restricted by contract, one would need to check whether it is feasible for an advertiser to develop its own data portability tool¹⁹⁰ or recreate another campaign (e.g. by inserting the data manually or by licensing a competing platform’s software¹⁹¹). If associated costs are high, advertisers, including and especially small firms, may be discouraged from advertising with another platform. Furthermore, Google has in place ‘Required Minimum Functionality Requirements’ with which advertisers developing their own portability tools must comply. Depending on how strict they are, these requirements could reduce or eliminate the incentive to multi-home campaigns.¹⁹² The same effect may be produced by harsh contractual termination provisions combined with

¹⁸⁴ Shy, O. (2001). *The Economics of Network Industries*, 4. Cambridge: Cambridge University Press

¹⁸⁵ *Ibid.*

¹⁸⁶ Federal Trade Commission (2013b, January), *supra n.* 106, 4

¹⁸⁷ *Ibid.*, 4-5

¹⁸⁸ *Ibid.*, 5

¹⁸⁹ *Ibid.*, 4-6

¹⁹⁰ Note that Google acknowledges that ‘[the AdWords API is a good option for advertisers who have a developer or programmer who has the technical skills’. However, it does provide with small advertisers the AdWords Editor tool. Information retrieved from: <https://support.google.com/adwords/answer/15235?hl=en>

¹⁹¹ Federal Trade Commission (2013b, January), *supra n.* 106, 5

¹⁹² ICOMP (2013, May). *Response to the Remedies Proposed by Google Inc. in Case COMP/C-3/39.740*, paragraph 203

ambivalence as to the conditions under which advertisers may exercise their contractual right to export data. For example, Google's competitors contend that the AdWords API conditions provide that: *'If you violate any part of this AdWords API Agreement [] your access to the AdWords API may be suspended or terminated without notice and you have no right to use the AdWords API'*.¹⁹³ According to competitors, in addition to introducing this 'draconian provision', the agreements deliberately do not clarify certain technical aspects (e.g. whether it is allowed to display aggregated campaign data).¹⁹⁴ If this were indeed the case, 'violation of any part of the AdWords API' would be subject to opportunistic interpretation.

However, deciding whether a remedy to lift data portability restrictions should be imposed on Google does not solely depend on the degree of switching costs, but also on what is the relevant market affected by the refusal to eliminate the restriction. In our case, it is not clear whether the relevant market is the broader (online) advertising market¹⁹⁵ or whether there is a distinct market for (online advertising platforms) APIs or even a separate sub-market for the AdWords API. This is an important question to answer because the AdWords API specifications, that is, 'all information and documentation Google provides specifying or concerning the AdWords API [...] and any Google-supplied implementations or methods of use of the AdWords API' is an IPR-protected asset¹⁹⁶ and, as already discussed, according to the relevant case law, in the *primary* market for which a dominant undertaking has a monopoly owing to its own IP, the exclusive right to produce or sell should be fully respected.¹⁹⁷ Hence, pursuant to the relevant case law,¹⁹⁸ Google should be forced to allow data portability enabled through third party tools if the market for the AdWords APIs or the market for (online advertising platforms) APIs (assuming these are two plausible market definitions) is the primary market and the advertising market is the ancillary market. It bears repeating that the Commission's practice and the Courts' case law concerning refusal to grant licenses for the use of inputs protected by IPRs,¹⁹⁹ including decisions and judgments dealing with a closely related issue,

¹⁹³ Ibid., 205

¹⁹⁴ Ibid., 204-205

¹⁹⁵ For possible market definitions in the online advertising sector see Commission decision *Google/DoubleClick*, Case COMP/M.4731 [2008] OJ C 184/6, paragraphs 44 *et seq.* On the broader issue of how competition authorities should define the relevant product markets in the online search sector see Zingales, N. (2013). *Product Market Definition in Online Search and Advertising*. *Competition Law Review*, 9(1), 29-47

¹⁹⁶ See <https://developers.google.com/adwords/api/docs/terms>

¹⁹⁷ ECJ, Case 238/87, *Volvo v. Veng (UK)* [1988] ECR 6211, paragraph 8

¹⁹⁸ Ibid. See also ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission* [1995] ECR I-743

¹⁹⁹ See, for instance, ECJ, Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* [2004] ECR I-5039 and *infra ns.* 200 and 201

namely interoperability, such as Microsoft²⁰⁰ and IBM,²⁰¹ were based on the same premise, that is, that the dominant firm under scrutiny was using its position in one market to strengthen its position (and possibly distort competition) in an ancillary market. Were we to interfere with the exercise of IPRs in primary markets, the incentive to innovate would arguably be significantly reduced. A good example that serves our purposes is Google Print Ads, a tool that was introduced to enable advertisers to buy *traditional* newspaper ads through the AdWords interface. Advertisers, including local firms, could use Print Ads²⁰² to identify newspapers that fit their needs and organize their campaigns accordingly. If a firm knows in advance that competitors that have not made the investments required (in the Print Ads example these would include e.g. establishing contacts with newspapers interested in participating in the platform, design and implementation of supporting software, etc.) to undertake such initiatives may free-ride on its efforts, then why should it bother to innovate in the first place?

Furthermore, if the relevant market is the (broader) advertising market, Google may still be found dominant, but establishing the duty to lift the restriction may not be necessary to address any foreclosure concerns that may arise. For example, in the US, search engine marketing firms and advertisers that were surveyed during the investigation stated that the API restriction did not play a role in their decision to choose advertising platform.²⁰³ In other words, this was not a factor determining demand-side substitutability.

The above remarks on the scope of data portability restrictions and possible market definitions lead to the following conclusion: if the costs of switching to another platform are low or if the market affected by the restrictions is the same market where Google exercises its API-related IPRs, then the duty to lift the restrictions is not proportionate to the allegedly unlawful conduct, namely that Google distorts the market for the AdWords APIs or the market for (online advertising platforms) APIs. If the affected market is the market for advertising and substitutability does not depend on the API restrictions, then the remedy is not necessary. Pursuant to Article 7 of Regulation 1/2003, ‘proportionality’ and ‘necessity’ are the two key conditions under which the Commission must assess

²⁰⁰ See CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, and Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final

²⁰¹ European Commission (1984), *supra n.* 180, 77-79

²⁰² While this does not alter the conclusion of the paragraph using the Print Ads example, note that Google discontinued the service two years after its launch

²⁰³ Federal Trade Commission (2013b, January), *supra n.* 106, fn. 11

and impose remedies²⁰⁴ and the above examples regarding data portability restrictions go partway toward explaining why in complex cases commitments decisions may fail to find the target.

Notwithstanding the possibility that the remedy likely to be imposed upon Google will be disproportionate and/or unnecessary, it should be noted that where customer lock-in concerns indeed arise, establishing the duty to lift data portability restrictions is a powerful tool in the hands of the Commission. This is illustrated by the scope of the remedy envisaged in the Google case, which provided that Google would delete clauses of the API terms that prevented software developers from offering functionalities that allowed advertisers to a) ‘*copy*’ campaign data between Google’s AdWords and non-Google advertising services and b) ‘*transmit*’ campaign data to non-Google advertising services.²⁰⁵ The wording of the commitment resembles greatly the wording of the proposal for a General Data Protection Regulation, which will soon replace the EU Data Protection Directive.²⁰⁶ The proposal provides that ‘the data subject shall have the right to obtain from the controller *a copy* of the provided personal data’ and that ‘the data shall be *transferred* directly from controller to controller’ where this is ‘technically feasible and available’ [emphasis added].²⁰⁷ The right to data portability applies in cases of copying and transfer of personal data, that is, ‘any information to an identified or identifiable natural person.’²⁰⁸ As the Google case clearly illustrates, a remedy imposed on a firm that violated the competition provisions is more far-reaching since it may also cover data that are not strictly ‘personal’.²⁰⁹ Hence, to the extent that the commitment protects the competitive process, EU competition law may address a regulatory gap, to the benefit of the user

²⁰⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

²⁰⁵ Google (2014, January). *Commitments in Case COMP/C-3/39.740 - Foundem and others*, paragraph 33

²⁰⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L 281/31

²⁰⁷ Note that this is an amendment introduced by the European Parliament. The Commission’s initial proposal did not subject the exercise of the right to transfer data to cases where this would be technically and feasible and available. See Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11, final and compare with European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), Article 15(2)(a). Also note that the right to data portability may have far-reaching and -some say- mostly adverse consequences for the consumer. For a comprehensive overview of the potential negative implications arising from establishing a right to data portability as envisaged by the EU legislator see Swire, P. and Yianni Lagos (2013). *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique*. Maryland Law Review, 72(2), 335-380

²⁰⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L 281/31, Article 2(a)

²⁰⁹ Graef, I., Jeroen Verschakelen and Peggy Valcke (2014), *supra n.* 179, 8. It goes without saying that remedies intended to lift data portability restrictions may not only concern advertisers and software developers, but also the online users. Google seems to have taken some steps to facilitate management of data extracted from email accounts and social networking tool Google+, but Facebook has been severely criticized over the data portability restrictions imposed on users. On the competition concerns that arise from Facebook’s practices related to data portability restrictions see Graef, I., Sih Yuliana Wahyuningtyas and Peggy Valcke. *Data Interoperability in Online Social Networks*. Paper presented at the International Workshop on Competition Policy and Regulation in Media and Telecommunications: Bridging Law and Economics, 23 and 24 May 2013, Tilburg

that will have, as a result, more choice. Moreover, fear of falling under the EU antitrust microscope for refusing to lift data portability restrictions may produce substantial deterrent effects that (at least for a dominant firm) are larger than those produced by the envisaged regulatory framework: under EU competition law, an undertaking which has abused its dominant position may be required to pay a fine up to 10% of its total turnover,²¹⁰ whereas under the proposed General Data Protection Regulation,²¹¹ an undertaking that falls short of respecting obligations to respect data portability may be required to pay a fine up to 5% of its turnover.²¹²

To sum up, data portability restrictions may (artificially) raise the switching costs consumers need to incur to change from one intermediary to another. Imposing on a powerful firm the duty to lift these restrictions is not only a manifestation of the flexibility of EU competition law to adapt to the specific circumstances of new economy markets, but also a useful tool in the hands of the Commission to ensure that consumer choice is not reduced. However, the switching costs must be carefully measured, for otherwise they may chill innovation, including the emergence of products that could contribute to the development of content markets.

4.2.2. Exploitative Gathering and Processing of User Data

As already mentioned, the second issue that relates to the use of data by powerful digital intermediaries is the collection and processing of information disclosed by the online user. User data is the ‘fuel’ of digital intermediaries,²¹³ including and especially advertising-based providers; user data enables a company like Google to strengthen its relationship with its advertising partners because, based on data disclosing user preferences, advertisers can ‘precisely target their audience by combining information regarding geographical location, time of day, areas of interest, previous purchasing record’²¹⁴ and so much more. Moreover, and besides delivering the promise for more effective advertising, intermediaries rely on user data to provide ‘more relevant’ search results. This relevance does not relate solely to the query, but also (and perhaps primarily) to the interests of a

²¹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 23(2)(a)

²¹¹ European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), Article 79(2a)(c)

²¹² Graef, I., Jeroen Verschakelen and Peggy Valcke (2014), *supra n.* 179, 8

²¹³ The importance of data in today’s economy is illustrated in an article from *The Economist* which, after making an overview of the vast amount of information that is currently available to firms, concludes that ‘[d]ata are becoming the new raw material of business: an economic input almost on a par with capital and labor’. See *The Economist*. *Data, data everywhere*. 25 February 2010. Retrieved from: <http://www.economist.com/node/15557443> Less than three years later after this article was published, former Competition Commissioner, Joaquín Almunia, would acknowledge that, due to the economic benefits they can bring to businesses, ‘the ability and the incentive of companies to gather, manipulate and trade personal data have never been stronger’. See *supra n.* 181

²¹⁴ Commission decision *Google/DoubleClick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraph 45

particular user. Customized results that are based on previous searches or information that matches consumer tastes, such as a catalogue on Amazon with ‘news apps you may like’, undoubtedly bring some value to the user. Yet, there exist significant information asymmetries: intermediaries have more often than not covered with a veil of secrecy the practices concerning data collection and processing, confusing consumers over how these practices may affect their content choices. These choices are (to some extent) determined by the inclinations of the users, but it is unclear whether they are predominantly driven by the intermediary itself, thereby resulting in serving the commercial interests of the former rather than the information needs of the latter. This latter issue is particularly relevant for our purposes because shady tactics surrounding the mechanisms that lead to the provision of content, including news content, that is based on the user’s digital communication history may prevent users from discovering alternative sources of information. In such cases, the user must be adequately informed of the parameters that determine the content that reaches her and be given the necessary instruments that would allow access to the information that is available in a non-personalized universe.²¹⁵ In this section I will demonstrate that Article 102 TFEU equips users with tools to tackle this problem.²¹⁶ While the collection and processing of data was not included in the Commission’s investigation, Google is an excellent case study that illustrates how far digital intermediaries can go to gather personal information as well as how far EU competition law can go to address information asymmetries associated with exploitative data-related practices. I will start the analysis by shedding some light on the ways in which Google harvests user data and will then turn to exploring action users may take under Article 102 TFEU.

4.2.2.1. How does Google harvest user data?

Google employs a variety of methods to gather and combine user data. First, insofar as general online search is concerned, typing queries in the Google Search Box feeds Google with data on, *inter alia*, our location, language, the URLs we visited, and date and time of the searches.²¹⁷ Google also checks whether we visited the website of one of Google’s advertising partners and how we interacted

²¹⁵ More broadly, on how personalized consumption habits may affect democracy see Chapter 1, Part 4.a.

²¹⁶ On the issue of anticompetitive gathering of data from a different perspective, that of competitors, see Geradin, D. and Monika Kuschewsky (2013), *supra n.* 173, 7-9. Note that, while this section focuses on the negative implications of data gathering for access to information, collection of data may also result in price discrimination. On this issue see Newman, N. (2014). *The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*. William Mitchell Law Review 40(2), 865-73. Retrieved from: <http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1568&context=wmlr> For a different view see Manne, G. A. and Ben Sperry. *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*. CPI Antitrust Chronicle, May 2015(2), 6-8

²¹⁷ The user implicitly grants her consent by agreeing to the terms of use of the search engine. Information retrieved from <http://www.google.com/intl/en/policies/privacy/> and <http://www.google.com/intl/en/policies/> For a comprehensive overview of the user data that Google collects see Dover, D. *The Evil Side of Google? Exploring Google’s User Data & nbsp Collection*. 24 June 2008, Moz Blog. Retrieved from: <http://www.seomoz.org/blog/the-evil-side-of-google-exploring-googles-user-data-collection>

with it (e.g. whether we purchased goods that Google's advertisers sell). By using the general search engine, Google is also able to identify our hardware model, operating system version, and mobile network information, including our phone number.²¹⁸ Second, Google also assembles a vast amount of information in cases where the consumer uses other services provided by Google for free such as Google Product Search, YouTube and Google Maps. Accordingly, Google has a clear idea about our favorite brands, music preferences and travel plans. Finally, Google can 'complete the profile' of its online users if the latter decide to use certain services they can access only if they hold a Google Account (e.g. Gmail). Registering with Google requires the user to provide data such as her name, email address, date of birth and gender.²¹⁹ Moreover, in 2005, Google introduced a 'personalized search' model whereby only signed-in users, that is users with a Google Account, would get, in response to their queries, results based on their web history.²²⁰ In 2009, Google announced that it extended the personalized search model to signed-out users worldwide. Google does this through the insertion of a cookie in the browser that allows it to personalize search results based on 180 days of search activity.²²¹ Google users may now access information that is not related to their previous queries only if they disable customizations based on search activity.²²² Finally, in March 2012, Google announced that it would modify its Privacy Policy, merging 60+ product-specific privacy policies and generalizing combination of data across services.²²³ This is why the terms of privacy of, for instance, Gmail, YouTube and Google Product Search redirect to the terms of privacy of Google Search.²²⁴ This means in practice that Google may use the data it acquires from all additional functionalities to further personalize the search results it delivers through its general search engine and vice versa.

4.2.2.2. Can users rely on Article 102 TFEU to tackle collection and processing of a vast amount of user data?

The first issue that needs to be addressed here is that of *locus standi*. Pursuant to Article 7(2) of Regulation 1/2003,²²⁵ 'natural or legal persons who can show a legitimate interest can bring a

²¹⁸ See <http://www.google.com/intl/en/policies/privacy/>

²¹⁹ See <https://accounts.google.com/SignUp?continue=https%3A%2F%2Faccounts.google.com%2FManageAccount>

²²⁰ Google (2005, June). *Search gets personal*. Retrieved from: <http://googleblog.blogspot.com/2005/06/search-gets-personal.html>

²²¹ Google (2009, December). *Personalized search for Everyone*. Retrieved from: <http://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>

²²² There is a small tool icon on the Google Search page. One needs to go to Web History and disable customizations based on search activity

²²³ Article 29 Data Protection Working Party (2012). *Letter Addressed to Google*, 1. Retrieved from: <http://www.cnil.fr/english/news-and-events/news/article/googles-new-privacy-policy-incomplete-information-and-uncontrolled-combination-of-data-across-ser/>

²²⁴ Information retrieved from: <http://www.google.com/intl/en/policies/privacy/>

²²⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

complaint' that a firm has acted in violation of Article 102 TFEU. The Commission and the Court²²⁶ have adopted a broad and flexible interpretation of the term 'persons with a legitimate interest',²²⁷ holding that 'individual consumers whose economic interests are directly and adversely affected insofar as they are buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest'.²²⁸ Consumer associations are also entitled to lodge complaints.²²⁹

In terms of procedure, an additional remark should be made as regards the burden of proof. Regulation 1/2003 lays down that it should be for the person 'alleging the infringement to prove the existence thereof to the required legal standard'.²³⁰ To this end, complainants are required to 'submit comprehensive information in relation to their complaint' such as documentation in support of their allegations and further information as to where additional documentation can be obtained by the Commission.²³¹ However, in its Notice on the Handling of Complaints under Articles 101 and 102 TFEU, the Commission explicitly states that where it deems appropriate it may waive this obligation.²³² The Commission explains that 'this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of'.²³³ The information submitted by a consumer association may lead to a full-blown investigation by the Commission.²³⁴ In view of the above, it is not only possible but also less fact-intensive for consumers to bring to the Commission's attention suspected infringements of Article 102 TFEU.

²²⁶ See, for instance, CFI, Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities* [1994] ECR II-285, paragraph 36; CFI, Joined cases T-213 and 214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities* [2001] II-03963. See in particular paragraph 114: 'The Court considers that a final customer who shows that his economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question has a legitimate interest within the meaning of Article 3 of Regulation No 17 in making an application or a complaint in order to seek a declaration from the Commission that Articles 81 EC and 82 EC have been infringed'. See also Commission decision of 9 December 1998 in Case IV/D-2/34.466, *Greek Ferries* [1999] OJ L 109/24, paragraph 1

²²⁷ Van Bael, I. (2011). *Due Process in EU Competition Proceedings*, 117. Alphen aan den Rijn: Kluwer Law International

²²⁸ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/05, paragraph 37

²²⁹ *Ibid.*

²³⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Recital (5)

²³¹ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/05, paragraph 31

²³² *Ibid.*

²³³ *Ibid.*, paragraph 31

²³⁴ *Ibid.*, paragraph 4

Yet, the question remains: could the collection and use of a vast amount of user data by a dominant firm be regarded as an abuse under Article 102 TFEU?²³⁵ Given that the practice concerned impacts consumers directly, that is to say, its effects are not manifested indirectly through foreclosure that may lead to consumer harm in the form of higher prices, lower quality, or less choice, the practice may amount to an exploitative abuse, defined as ‘conduct which is directly exploitative of consumers’.²³⁶ While the focus of the Commission’s practice has been on exclusionary abuses, it has long been established that ‘Article [102] can properly be applied, where appropriate, to situations in which a dominant undertaking’s behavior directly prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition’.²³⁷ As extensively discussed elsewhere, the Commission has been mainly concerned with prices. Hence, unsurprisingly, the example of exploitative behavior given in the Guidance Paper is that of a dominant firm ‘charging excessive prices’.²³⁸ However, it was explained in detail in Chapter 3 that in media markets there are many instances where a transaction does not involve the exchange of a service for money. In the case at hand, the transaction that is relevant for antitrust purposes involves the exchange of user data for access to Google’s platform(s). Accordingly, an undertaking that requires the user to disclose ‘excessive’ user data may, under certain conditions that will be examined below, be liable for exploitative abuse under Article 102 TFEU.²³⁹

But what could qualify as ‘excessive’ data?²⁴⁰ In relevant cases, the Court defined excessive prices as prices that have ‘no reasonable relation to the economic value of the product supplied’.²⁴¹ The Court further established a two-step test to determine ‘reasonableness’ which consists of an assessment of a) whether the profit margin is excessive, which ‘may be calculated by making a

²³⁵ From a different perspective, that is, whether Google should be forced to grant access to user data, see Graef, I., Sih Yuliana Wahyuningtyas and Peggy Valeke (2013), *supra n.* 209, 12-16

²³⁶ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 7

²³⁷ Commission decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 — 1998 Football World Cup) [2000] OJ L 5/55, paragraph 100; ECJ, Case C-6/72, *Continental Can* [1973] ECR 215, paragraph 26

²³⁸ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 7

²³⁹ Note that the a report produced by the EDPS suggests the same approach without, however, providing a framework within which the assessment of whether the collection and use of data may be regarded as ‘excessive’ for the purposes of Article 102 TFEU. See European Data Protection Supervisor (2014). *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, 29. Retrieved from: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf

²⁴⁰ Note that the only decision where concerns from access to user data (as a source of market power) were discussed is Commission decision *Google/DoubleClick*, Case COMP/M. 4731 [2008] OJ C 184/6, paragraphs 255 *et seq.* References to user data were also made in Commission decision *Facebook/Whatsapp*, Case COMP/M. 7217 [2014] OJ C 417/2, available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

²⁴¹ ECJ, Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, paragraph 250

comparison between the selling price of the product in question and its cost of production',²⁴² and b) (if the profit margin is indeed excessive) whether 'a price has been imposed which is either unfair in itself or when compared to competing products'.²⁴³ This test, albeit seemingly irrelevant, could be applied here: even if no monetary exchange takes place to access user data or the platform, economists are increasingly developing methodologies for calculating the value of personal information. For example, one method consists in conducting surveys and economic experiments with a view to determining the price that individuals would charge the platform in order to reveal the information concerned.²⁴⁴ Some of the results of empirical studies that have been conducted thus far are particularly relevant here.²⁴⁵ A common finding is that the data subjects' willingness to disclose information is highly dependent on context, including and especially the nature of information to which access is sought.²⁴⁶ For instance, a series of experiments conducted by Frog showed that users are particularly sensitive about their digital history such as their web browsing history and location-related information.²⁴⁷ Frog found that users would charge US \$50 *per entry* for disclosing this information.²⁴⁸ Other pieces of information such as the online advertising click history are less expensive (users would charge US \$3-6 per entry).²⁴⁹ An additional parameter that apparently determines the price the user would charge is the data controller. For example, participants in the experiments conducted by Frog replied that social networks are less trustworthy than banks.²⁵⁰ Methodologies have also been developed to calculate the data controller's profit. One profit indicator is '*profit per data record*', which 'represents the net profit (revenues minus costs) per data record

²⁴² Ibid., paragraph 251

²⁴³ Ibid., paragraph 252. For an example of how the Commission carried out this test see Commission decision, *Scandlines Sverige AB v Port of Helsingborg*, Case COMP/A.36.568/D3 [2006] CMLR 1298, paragraphs 145 *et seq.* On other judgments concerning excessive pricing see, for instance, ECJ, Case 26/75, *General Motors Continental NV v Commission of the European Communities* [1975] ECR 01367; Case 226/84, *British Leyland Public Limited Company v Commission* [1986] ECR 3263; Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECR 487. For an overview of this case law see Jones, A. and Brenda Sufin (2008), *supra n.* 103, 585-594

²⁴⁴ OECD (2013). *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value*, 29. Note that this would reflect the selling price users, i.e. not the dominant undertaking, would charge. But, the purchase price the dominant firm would be required to pay could inform the analysis of whether the price at which it 'sells' access to its platform is excessive

²⁴⁵ See, for instance, Spiekerman, S., Jens Grossklags, and Bettina Berendt (2002). *E-privacy in 2nd generation E-Commerce*. ACM Conference on Electronic Commerce (EC'01), Hrsg. ACM New York, 38-47. Tampa, Florida: ACM Press; Chellapa, R. and Raymond G. Sin (2005). *Personalization Versus Privacy: An Empirical Examination of the Online Consumers' Dilemma*. Information Technology and Management, 6(2-3), 181-202; Wathieu, L. and Allan Friedman (2005). *An Empirical Approach to Understanding Privacy Valuation*. Proceedings of the Fourth Workshop on the Economics of Information Security (WEIS '05); Cvrcek, D., Marek Kumpost, Vashek Matyas, and George Danezis (2006). *A Study On The Value Of Location Privacy*. Proceedings of Workshop on Privacy in the Electronic Society (WPES '06), 109-118; Hui, K. L., Hock Hai and Sang-Yong Tom Lee (2007). *The Value of Privacy Assurance: An Exploratory Field Experiment*. *MIS Quarterly*, 31(1), 19-33, and Acquisti, A., Leslie John, and George Loewenstein (2009). *What is Privacy Worth?* Working Paper Carnegie Mellon University. Retrieved from: http://pages.stern.nyu.edu/~bakos/wise/papers/wise2009-6a1_paper.pdf

²⁴⁶ OECD (2013), *supra n.* 244, 31

²⁴⁷ Ibid. referring to Frog Design (2011). *The Value of Personal Data: A Global Perspective*. Presentation at Mobile World Congress, February 2011

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

held by the firm'²⁵¹ (note that a record could be a specific piece of information such as the data subject's gender or the subject's full profile,²⁵² including name, address, age, employment, etc.). For example, the OECD estimates that in 2012 the value of an individual record for Facebook was US \$300.²⁵³ Of course, whether the profit margin is indeed excessive for the first condition of the test set by the Court to be fulfilled is a question of fact. Numerous factors would come into play in relevant assessments. In addition to 'traditional' benchmarks against which the profit margin is measured, such as the costs incurred by the firm in creating and maintaining the platform and the revenues it generates, the above examples illustrate that parameters such as the nature of information disclosed, the data included in a user's record, and the type of data controller are also relevant. As a result, profit margin valuations should include such variables.

With respect to the second condition, that is, that the price charged is 'unfair', thereby not having 'a reasonable relation to the economic value of the product supplied',²⁵⁴ the Commission finds that reasonableness should be assessed against the specific circumstances of the case, including non-cost factors that relate to demand.²⁵⁵ Since exploitative abuses in the form of collection and use of personal data have not fallen under the EU antitrust microscope thus far, Data Protection Law may provide some guidance here: Article 6(1)(b) of the Data Protection Directive lays down that personal data must be 'collected for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes'. In its Opinion on Purpose Limitation, the Article 29 Working Party states that incompatibility should be examined on the basis of, *inter alia*, 'the reasonable expectations of the data subjects at the time of collection'.²⁵⁶ Again, surveys can shed light on the users' reasonable expectations as to the use of their data. It should be underlined that this approach has *economic* foundations. The empirical studies referred to above found that the price users would charge is closely related to how they believe the data will be used by the controller.²⁵⁷

Clearly, the above analysis does not attempt to suggest a clear-cut standard against which we may assess whether an entity like Google, which gathers and uses a vast amount of personal information, engages in exploitative abuse for the purposes of Article 102 TFEU. It did, however,

²⁵¹ Ibid., 19

²⁵² Ibid., 18

²⁵³ Ibid., 22

²⁵⁴ ECJ, Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, paragraph 250

²⁵⁵ Commission decision *Scandlines Sverige AB v Port of Helsingborg*, Case COMP/A.36.568/D3 [2006] CMLR 1298, paragraph 232

²⁵⁶ Article 29 Working Party (2013). *Opinion 03/2013 on purpose limitation*, 13. Retrieved from: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

²⁵⁷ OECD (2013), *supra* n. 244, 32

demonstrate that economic tools that may be used to measure the value of user data and profits earned by firms heavily relying on the extraction of such data are available, thereby making it possible to carry out the two-step test designed by the Court. It further bears noting that by no means does the case law suggest that this test is the only means to determine excessiveness. As the Court put it in *United Brands*, the leading judgment on excessive pricing where the test was established, ‘other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair’.²⁵⁸

Having established that it is possible to create a framework within which one may examine whether the collection and use of personal information may be excessive, thereby violating Article 102 TFEU, I will now turn to a specific circumstance under which the Commission may intervene in order to address concerns related to data exploitation. More particularly, the case law appears to have established the condition that antitrust intervention is subject to the condition that the domestic sector-specific regulator has not taken action to remedy such concerns.²⁵⁹ This is also implied in the Guidance Paper where the Commission states that, in cases of exploitative abuse, it may act ‘*where the protection of consumers [...] cannot otherwise be adequately ensured*’.²⁶⁰ There are valid reasons for this approach; a regulator has expert knowledge and, broadly speaking, a clearly defined and specific mandate for dealing with the issues concerned. For our purposes, it bears noting that, over the past three years, data protection authorities across the EU have taken considerable steps towards Google’s data collection practices. As already mentioned, in 2012 Google adopted a new privacy policy which ‘[merged] many product-specific privacy policies and [generalized] combination of data across services’.²⁶¹ This move prompted a pan-European investigation by national Data Protection Authorities, coordinated within the framework of the Article 29 Working Party, which concluded that Google did not provide sufficient information to online users regarding the purposes and types of data it processed and clear tools that would enable users to control the combination of data.²⁶² A number of recommendations were addressed to Google, which undertook to take measures to increase the transparency of its data gathering and processing operations.²⁶³

²⁵⁸ ECJ, Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, paragraph 253

²⁵⁹ Jones, A. and Brenda Sufrin (2008), *supra n.* 103, fn. 500; Röller, L. H. (2007). *Exploitative Abuses*, 525-532. In Ehlermann, C. D. and Mel Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*. Oxford: Hart Publishing. Retrieved from: <http://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Roeller.pdf>

²⁶⁰ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraph 7

²⁶¹ Article 29 Data Protection Working Party (2012), *supra n.* 223, 1

²⁶² *Ibid.*, 1-2

²⁶³ See, for instance, Information Commissioner’s Office (2014). *Data Protection Act 1998 – Google Inc. Undertaking*. ICO Ref: ENF0492064. Retrieved from: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/01/google-to-change-privacy->

Had the regulator failed to intervene, there would be room for action under EU competition law. If Google were found to engage in exploitative abuse, certain commitments to remedy the abuse could come near to those made in the context of the data protection proceedings. For example, in the UK, Google undertook, *inter alia*, to explain in clear terms user rights, including their right to object to the combination of data (opt-out), ‘ensure that there is continued evaluation of the privacy impact of future changes to processing’, and ‘keep the content of the Privacy Policy and associated web content under review’.²⁶⁴ Transparency obligations are far from new in the realm of EU competition policy. In antitrust, a good example is the recent *VISA Europe*,²⁶⁵ which concerned multilaterally agreed interchange fees, that is, fees which are charged by a cardholder’s bank (the issuing bank) to a merchant’s bank (the acquiring bank) for each sales transaction made at a merchant outlet with a payment card.²⁶⁶ In this case, Visa Europe undertook to introduce certain transparency measures to protect the merchant (i.e., customer), including the establishment of a rule whereby the acquiring banks must ‘clearly break down, in their contracts and invoices’ the merchant service charges into all their components’.²⁶⁷ As regards continuing evaluation, in an abundance of decisions the merged entity or the antitrust offender undertook to appoint independent Monitoring Trustees to check compliance with the obligations imposed in the context of the proceedings.²⁶⁸ Naturally, some of the commitments imposed on Google (e.g. Google’s duty to ensure that publishers using Google products obtain the required consent) are data protection-specific and could only be imposed by a regulator.²⁶⁹ However, the above examples illustrate that competition law may easily adapt to the particularities of a case involving a dominant firm relying excessively on the collection and use of personal data.

5. Editorial-like judgments: Preferential treatment of one’s own services

[policy-after-ico-investigation/](http://www.garantepriacy.it/web/guest/home/docweb/-/docweb-display/docweb/2348801) For action taken by the Italian Data Protection Authority see: <http://www.garantepriacy.it/web/guest/home/docweb/-/docweb-display/docweb/2348801>

²⁶⁴ Information Commissioner’s Office (2014), *supra n.* 263, 6. On more details on the opt-out mechanism suggested by EU Data Protection Authorities see Article 29 Working Party (not dated). *Appendix – Google Privacy Policy: Main Findings and Recommendations*. Retrieved from: http://www.cnil.fr/fileadmin/documents/en/GOOGLE_PRIVACY_POLICY-RECOMMENDATIONS-FINAL-EN.pdf

²⁶⁵ Commission decision of 26.2.2014 addressed to: Visa Europe Limited relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case AT.39398, *VISA MIF*, C (2014) 1199 final, paragraph 33

²⁶⁶ Definition retrieved from: http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html

²⁶⁷ Commission decision *VISA MIF*, Case AT.39398 C (2014) 1199 final, paragraph 16

²⁶⁸ *Ibid.*, paragraph 34; See also Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, and Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final

²⁶⁹ Information Commissioner’s Office (2014), *supra n.* 263, 8

As already mentioned, other practices which digital intermediaries engage in and which may impact media pluralism and, more broadly, the fair and free flow of information, concern the editorial-like judgments they perform in selecting, ranking, and in making available the content to which online users are exposed. For example, search engines employ hundreds, if not thousands, of signals,²⁷⁰ which are criteria that range from how often a website updates its content to how much traffic the site generates to the number of keywords it contains that match the user's query.²⁷¹ These signals (to which the algorithm assigns different weights) determine the ranking of search results.²⁷² Apple subjects the apps that are sold through its iTunes Store to an approval process that is based on guidelines to which software developers must adhere.²⁷³ Amazon displays a list with the 'Editors' Picks', that is, books that Amazon editors propose to the readership.²⁷⁴ Facebook provides 'News Feeds', which is a 'constantly updating list of stories', including news stories, that are shared among users.²⁷⁵ While in some cases (e.g. guidelines on app approval) the factors that the intermediaries take into account to perform these editorial-like judgments are published by the intermediaries themselves, usually there is considerable vagueness and haziness over the parameters underpinning their decision whether, and if so how, they will display content.

A rather common factor motivating controversial editorial-like judgments is the promotion of the intermediaries' commercial interests.²⁷⁶ More particularly, integrated digital intermediaries have often been accused of granting to their own affiliates preferential treatment to ensure that their services are more visible (or the only one available), thereby increasing the likelihood that consumers will purchase (either with money or with attention) the content they provide. Depending on the type

²⁷⁰ Foundem (2012). *Remedy Proposals - An Outline of Proposed Remedies to Google's Anti-Competitive Manipulations of its Search Results and Ad Listings*, 10

²⁷¹ For examples of ranking signals that may affect Google's ranking see: <http://backlinko.com/google-ranking-factors>

²⁷² Foundem (2012), *supra n.* 270, 10

²⁷³ See <https://developer.apple.com/app-store/review/guidelines/>

²⁷⁴ See <http://www.amazon.com/Editors-Picks-Kindle-eBooks/b?ie=UTF8&node=353898011>

²⁷⁵ See <https://www.facebook.com/help/327131014036297/>

²⁷⁶ Note that the motivations underpinning editorial-like judgments vary. For example, in 2010, in a controversial move, Apple removed an app which provided instant access to the Wikileaks website. Apple said that it discontinued the service on the grounds that the app failed to comply with its guidelines which, provide, *inter alia*, that '[a]ny app that is defamatory, offensive, mean-spirited, or likely to place the targeted individual or group in harm's way will be rejected'. Apple reportedly declined to make any further comments that could shed some light on this decision. There are other examples of app rejection by Apple and other intermediaries that may be perceived as a form of quasi-censorship. These examples are, however, isolated (for now). For more information on the above see, for instance, Tsotsis, A. *Apple Removes WikiLeaks App From App Store*. 20 December 2010, Techcrunch. Retrieved from: <http://techcrunch.com/2010/12/20/apple-removes-wikileaks-app-from-app-store/>; Helft, M. *Why Apple Removed a WikiLeaks App*. 21 December 2010, The New York Times. Retrieved from: http://bits.blogs.nytimes.com/2010/12/21/why-apple-removed-wikileaks-app-from-its-store/?_r=0; The BBC. *Apple removes iPhone Wikileaks app from iTunes*. 22 December 2010. Retrieved from: <http://www.bbc.com/news/technology-12059577>; Kiss, J. *Apple pulls Wikileaks app, but Android apps remain*. 21 December 2010, The Guardian. Retrieved from: <http://www.theguardian.com/media/pda/2010/dec/21/apple-wikileaks-app>; Kiss, J. *Apple pulls Wikileaks app, but Android apps remain*. 21 December 2010, The Guardian. Retrieved from: <http://www.theguardian.com/media/pda/2010/dec/21/apple-wikileaks-app>, and Gokey, M. *Just say no - Apple and Google reject Flappy Bird Clones*. 17 February 2015, Techtimes. Retrieved from: <http://www.techtimes.com/articles/3526/20140217/just-say-no-apple-and-google-reject-flappy-bird-clones.htm>

of intermediary, this preferential treatment may be manifested in different ways. For example, Google makes sure that certain services it provides in markets neighboring general online search (e.g. price comparison services) are prominently displayed in the search results page, whilst refusing to apply to its own services penalties that determine ranking.²⁷⁷ Apple operates as both retailer selling content through its App Store and manufacturer of the hardware device to which the store is tied. While technology and apps in particular make it possible for example an iPad owner to purchase content using another store, Apple has been keen to take measures to prevent this from happening. For example, it has reportedly rejected the Sony Reader iPhone app, which would have allowed users to purchase and access e-books from the Sony Reader Store.²⁷⁸

There is little doubt that preferential treatment in general and prominent display in particular may affect consumer choice. This is as true in the online world as it is in traditional content markets. An example from the offline universe is the so-called ‘payola’, a common practice in the publishing trade which refers to an arrangement whereby the publisher pays the retailer²⁷⁹ to for example display the book in special areas such as tables near the entrance.²⁸⁰ Readers are generally inclined to buy ‘payola’ books because they link prominent display to success.²⁸¹ In online search, the overwhelming majority of users ‘never scroll past the first page of search results’²⁸² and evidence suggests that the first spot in Google’s first page drives more than a third²⁸³ of all traffic.²⁸⁴ Similarly, content that is in a prominent position in Facebook’s news feeds increases the likelihood of visibility.²⁸⁵

The degree to which editorial-like judgments performed by digital intermediaries may impact media pluralism will, of course, depend on various factors, including how successful these practices are in marginalizing competing content and the type of content that is downgraded or altogether excluded from the intermediary’s platform. For example, in a case similar to the removal of the Sony app from Apple’s App Store, iPad owners are locked out of potentially more diverse content made

²⁷⁷ These issues will be the focus of the analysis that follows

²⁷⁸ Helft, M. *Apple Moves to Tighten Control of App Store*. 1 February 2011, The New York Times. Retrieved from: http://www.nytimes.com/2011/02/01/technology/01apple.html?_r=0

²⁷⁹ Canoy, M., Jan C. van Ours and Frederick van der Ploeg (2005). *The Economics of Books*. CESifo Working Paper No. 1414, 16. Retrieved from: <https://ideas.repec.org/p/ces/ceswps/1414.html>

²⁸⁰ Commission decision *Lagardère/Natexis/VUP*, Case No COMP/M.2978 [2004] OJ L125/54, paragraph 672

²⁸¹ Cowen, T. (2000). *What Price Fame?*, 37. Cambridge, MA: Harvard University Press

²⁸² See, for instance, Siu, E. *24 Eye-Popping SEO Statistics*. 19 April 2012, Search Engine Journal. Retrieved from: <http://www.searchenginejournal.com/24-eye-popping-seo-statistics/42665/>

²⁸³ See, for instance, Goodwin, D. *Top Google Result Gets 36.4% of Clicks*. 21 April 2011, Search Engine Watch. Retrieved from: <http://searchenginewatch.com/sew/news/2049695/top-google-result-gets-364-clicks-study>

²⁸⁴ See also Sharp, E. *The first page of Google, by the Numbers*. 30 April 2014, Protofuse. Retrieved from: <http://www.protofuse.com/blog/first-page-of-google-by-the-numbers/>

²⁸⁵ For examples see Foster, R. (2012), *supra n.* 36, 36

available on the competing platform.²⁸⁶ In extreme cases, an intermediary that engages in discriminatory practices to promote a certain political agenda may impact the democratic process. As already mentioned in Chapter 1, an experiment that was conducted by Epstein and Robertson showed that the practice of downgrading may influence voters' preferences.²⁸⁷ While arguing that the editorial-like judgments digital intermediaries currently perform are capable of producing such drastic effects on opinion forming is probably a stretch, related issues will gain prominence, especially as intermediaries are increasingly expanding in (news) content markets (see, e.g. the acquisition by Amazon of The Washington Post²⁸⁸).

This section will deal with – what appears to be – the most common factor that motivates controversial editorial-like judgments, that is, the granting of preferential treatment to one's own services. More particularly, I shall attempt to answer the question whether, and if so under what conditions, an integrated firm that uses its dominant position in one market to favor the services it provides in an adjacent market is an antitrust offense. The analysis that follows focuses on the allegations against Google, however, the above examples clearly illustrate that the issue of preferential treatment has a much broader relevance for this thesis.

Discrimination, which for our purposes may be defined as 'any strategy implemented by an integrated firm that has the effect of raising the costs of rivals competing against an affiliated division on a neighboring market',²⁸⁹ may be caught by Article 102(c) TFEU. This provision lays down that an abuse of a dominant position may consist in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Prior to discussing whether, and if so under what conditions, Google's conduct may constitute a breach of Article 102(c) TFEU, it bears noting that preferential treatment of one's own products is hardly novel in EU law in general and EU competition law in particular. For example, in Chapter 3 we examined an abundance of merger cases where one of the Commission's main concerns consisted in that, as a result of the concentration, the acquired or acquiring firm would be granted preferential access to a

²⁸⁶ In a case similar to the removal of the Wikileaks app (see *supra n.* 276), users would be deprived of an additional tool that would allow access to content on matters of common concern and, perhaps more importantly, they would be prevented from financing a non-profit organization that acts as a watchdog over governments (US \$1 from every US \$1.99 sale of the app was directed to Wikileaks). Additional in that users would still be able to access directly the Wikileaks website.

²⁸⁷ Epstein, R. and Ronald E. Robertson (2013, May). *Democracy at Risk: Manipulating Search Rankings Can Shift Voting Preferences Substantially Without Voter Awareness*. American Institute for Behavioral Research and Technology Working Paper Series/Summary of a paper presented at the 25th annual meeting of the Association for Psychological Science, Washington, D.C. Retrieved from: http://www.fraw.org.uk/files/politics/epstein_robertson_2013.pdf

²⁸⁸ Farhi, P. *Washington Post to be sold to Jeff Bezos, the founder of Amazon*. 5 August 2013, The Washington Post. Retrieved from: http://www.washingtonpost.com/national/washington-post-to-be-sold-to-jeff-bezos/2013/08/05/ca537c9e-fe0c-11e2-9711-3708310f6f4d_story.html

²⁸⁹ Ibáñez Colomo, P. (2014). *Exclusionary Discrimination under Article 102 TFEU*. *Common Market Law Review*, 51, 146

valuable input owned (e.g. infrastructure) or licensed (e.g. premium content) by the merged entity. Where this concern arose, the Commission either blocked the merger in question or imposed upon the entity the obligation not to favor its affiliated divisions.²⁹⁰ In *NewsCorp/Telepiù*, for instance, Sky Italia undertook to offer competitors access to its satellite platform on the basis of transparent, fair, reasonable, *and* non-discriminatory terms.²⁹¹ Similar solutions were adopted in antitrust cases such as Microsoft.²⁹² In the field of State aid, on several occasions, public service broadcasters were required to take measures to ensure that they do business with their commercial subsidiaries at arm's length (e.g. transparency obligations guaranteeing that the public broadcaster has acted in line with the market economy investor principle²⁹³). In the regulatory realm, several instruments tackle preferential treatment. For example, the Regulation on Computerized Reservation Systems for air transport products provides that a vertically integrated system vendor, that is, an entity which distributes information regarding air carriers' flights and fares²⁹⁴ and which is owned or controlled by an air carrier, must treat other air carriers on a non-discriminatory basis.²⁹⁵ The Access Directive imposes the same obligation on vertically integrated operators of communications networks in order to ensure accessibility for competing radio and broadcasting services.²⁹⁶

Turning to abusive discrimination, we should first make some remarks as regards the scope of Article 102(c) TFEU. As already indicated, the provision refers to 'transactions'. If we were to define this term narrowly, the practices resulting in the prominent display of Google's services and/or the demotion of competing services would not seem to fall under the scope of Article 102(c) TFEU. Strictly speaking, there is no transaction between Google and competing specialized services. For example, Google pays neither its own vertical search engines nor its competitors to appear in its organic results. Moreover, while some competitors pay Google to be displayed prominently, most do not. But, it has been made clear throughout this thesis that the term transaction should not be defined

²⁹⁰ See Chapter 3, Parts 3 and 4.c.

²⁹¹ Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, Undertakings, paragraph 11.1

²⁹² Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final, paragraphs 1005-1009

²⁹³ This principle is now codified in Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 93. Related issues will be examined in more detail in Chapter 6

²⁹⁴ The European Parliament defines Computerized Reservation Systems as systems 'containing information about, inter alia, air carriers' schedules, availability, fares and related services with or without facilities through which reservations can be made or tickets may be issued to the extent that some or all of these services are made available to subscribers'. Retrieved from: http://www.europarl.europa.eu/workingpapers/tran/105/chap3_en.htm

²⁹⁵ Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems [1989] OJ L 220/1, Articles 2(d) and (e) and 7

²⁹⁶ 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) [2002] OJ L 108/7, Article 5(1)(b). There is also regulation in favor of preferential treatment where this is believed to be in the public interest. For example, the Access Directive allows Member States to take measures that aim to ensure that broadcasters carrying public service content are prominently displayed in the Electronic Program Guide. See Recital (10)

by reference to monetary exchanges only, for such a straightjacketed interpretation would not reflect how certain markets work in practice. Since Google uses its competitors to provide users with information relevant to their queries, and competing websites use Google to reach its large user base, there is an exchange of value that may be regarded as ‘transaction’ for the purposes of Article 102(c) TFEU. It further bears noting that the list outlining potential types of abuse that is included in Article 102 TFEU is not exhaustive and the Commission has not been reluctant to interpret the provision flexibly in order to punish forms of discrimination that did not carry all the elements set out in Article 102(c) TFEU. For example, in *Deutsche Post*, the Commission found that Article 102 TFEU applies to discrimination that affects the consumer directly, irrespective of whether or not there are competitors that, as a result of the conduct, are placed ‘at a competitive disadvantage’.²⁹⁷ Furthermore, while the relevant decisional practice and case law have been solely concerned with price discrimination,²⁹⁸ such as discounts,²⁹⁹ geographical price discrimination³⁰⁰ and delivered pricing³⁰¹ nothing in the wording of Article 102(c) TFEU implies that it would not apply to non-price discrimination. A teleological interpretation would be in line with this approach in that a dominant firm may place rivals ‘at a competitive disadvantage’ by engaging in non-price practices. For example, in the telecommunications sector, vertically integrated firms have occasionally placed firms competing in retail markets at a competitive disadvantage by degrading the quality of interconnection, thereby making them less attractive to consumers.³⁰² Finally, in some cases discrimination caught by Article 102(c) TFEU may be rather straightforward (e.g. a dominant firm charges its customers different prices for the same amount of units of the same product and competitors/customers are asked to pay significantly more than non-competitors/customers). In other cases, discriminatory conduct may be overt. For example, in *Portuguese Airports*, the airport operator would charge air carriers significantly higher (landing and take off) fees for international flights than it did for domestic flights.³⁰³ The Court ruled that this was discriminatory on the grounds that the services provided by the airport were the same irrespective of the point of origin or destination of

²⁹⁷ Commission decision *Deutsche Post AG - Interception of cross-border mail*, COMP/C-1/36.915 [2002] OJ L 331/40, paragraph 133

²⁹⁸ See, for instance, ECJ, Case C-18/93, *Corsica Ferries Italia Sri v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; CFI, Case T-229/94, *Deutsche Bahn AG v. Commission* [1997] ECR II-1689, and CFI, Case T-128/98, *Aéroports de Paris v. Commission* [2000] ECR II-3929

²⁹⁹ See, for instance, ECJ, Case C-163/99, *Portugal v. Commission. Landing Fees at Portuguese Airports* [2001] ECR I-2613

³⁰⁰ See, for instance, ECJ, Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207

³⁰¹ See, for instance, Commission decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar) [1988] OJ L 284/41

³⁰² For more on this issue see, for instance, Economides, N. (1998). *The incentive for non-price discrimination by an input monopolist*. *International Journal of Industrial Organization*, 16, 272

³⁰³ ECJ, Case C-163/99, *Portugal v. Commission. Landing Fees at Portuguese Airports* [2001] ECR I-2613, paragraphs 61 *et seq.*

flights and that the reduced prices clearly conferred an advantage on the Portuguese airlines, TAP and Portugalia, which operated more domestic than international routes.³⁰⁴

In the case at hand, the complaint regarding discrimination is two-fold. First, competitors say that Google engages in outright ‘self-preferencing’.³⁰⁵ For example, Google prominently displays its Universal Search results, that is, results from Google’s vertical search services that are blended into its web search. Second, Google refuses to apply to its own services rules it applies to competing websites. For example, Google generally demotes websites that copy content from other sites or that ‘systematically suffer from a lack of original content’.³⁰⁶ These rules appear to apply to all (but Google) websites irrespective of their purpose, including vertical search engines which are essentially based on aggregating content offered by other sites and which, broadly speaking, do not create their own content.³⁰⁷

Having clarified the scope of Article 102(c) TFEU and the allegations made against Google, I shall now attempt to identify the factors that should drive an analysis of whether discrimination amounts to an abuse. There appear to be two approaches to conducting relevant assessments. First, we could claim that an integrated firm that enjoys a dominant position is under a *general* obligation to treat affiliates and competitors on non-discriminatory terms.³⁰⁸ A literal interpretation of Article 102(c) TFEU would certainly favor this approach.³⁰⁹ The provision simply requires that ‘dissimilar conditions’ apply to ‘equivalent transactions’ and that the ‘competitive disadvantage’ at which competitors are placed be ascribed to the discriminatory conduct concerned.³¹⁰ This approach could also be supported by decisional practice and case law in the field of exclusionary conduct that set very low thresholds for establishing that an abuse has taken place. For example, several decisions and judgments were predominantly based on the presumed intent of the firm to push its competitors out of the market.³¹¹ In *AKZO*, for instance, the Court held that prices below average costs ‘must be regarded as abusive if they are determined as part of a *plan for eliminating a competitor*’ [emphasis added].³¹² Similarly, in *Tetra Pak*, the Commission found that the firm had ‘*deliberately*’ sold at a

³⁰⁴ Ibid., paragraph 66

³⁰⁵ Foundem (2012), *supra n.* 270, 2 *et seq.*

³⁰⁶ Foundem (2013). *Assessing the Legitimacy of a Google Penalty*, 3 *et seq.* Retrieved from: http://www.foundem.co.uk/Enabling_an_Anti-Demotion_Remeddy.pdf

³⁰⁷ Ibid.

³⁰⁸ Ibáñez Colomo, P. (2014), *supra n.* 289, 150

³⁰⁹ Ibid., 151

³¹⁰ Ibid.

³¹¹ Ibid., 151-152 referring to Commission decision of 29 July 1987 (IV/32.279 - BBI v. Boosey & Hawkes) [1987] OJ L 286/36, paragraph 19; Commission Decision of 18 July 1988 Case No IV/30.178 - Napier Brown v. British Sugar) [1988] OJ L 285/41, paragraph 62

³¹² ECJ, Case C-62/86, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-3359, paragraph 72

loss³¹³ ‘with the aim’ to eliminate competition.³¹⁴ Even if it can be backed by precedent, one must still ask whether establishing *ex ante* that integrated dominant firms are bound not to engage in discriminatory behavior, vis-à-vis their competitors, would be desirable. This approach has been criticized on the grounds that intent is not an accurate indicator of the *actual* impact of the conduct on the market.³¹⁵ In other words, so its opponents say, presumptions of intent run the risk of leading to erroneous outcomes, potentially punishing conduct that is not harmful. While persuasive, this argument is not ultimately conclusive. EU competition law is largely founded on presumptions *and this, in retrospect, is not necessarily a bad thing*. Let’s take the example of merger control in the context of which the Commission must assess whether, as a result of the concentration, the merged entity will not only have the ability but also *the incentive* to distort competition.³¹⁶ In Chapter 3, it was shown that a strict approach based on hypotheticals that the merging firms would be incentivized to act anti-competitively post-merger protected rather than harmed competition.³¹⁷ It was also demonstrated that, in recent years, the Commission’s permissiveness towards mergers did little to nothing to protect the competitive process. In fact, the adoption of less stringent criteria has not only led to the obvious, that is, higher concentration ratios, but in certain cases it harmed innovation and led to higher prices.³¹⁸ My analysis concerned broadcasting markets only, but if this is any indication of the (positive) role that presumptions of intent may play in avoiding distortions of competition in markets presenting similar characteristics (e.g. a natural tendency to concentration attributed to two-sidedness and the resulting network effects and downward spirals), then the scale would seem to tip in favor of a more cautious approach to how firms *may* behave. The Commission’s Merger Study, which analyzed forty decisions adopted in the five-year period 1996-2000³¹⁹ and from which we may clearly infer that behavioral remedies (that is to say, remedies that sought to temper the incentive to behave anti-competitively) have been far from a success story lend further support to the claim that if an integrated firm which enjoys market power were bound by a general obligation not to discriminate, this could be to the benefit of competition. The dominant firm could still defend itself by putting forward objective justifications³²⁰ or, in a way similar to the restraints ‘by object’

³¹³ Commission decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 - Tetra Pak II) [1992] OJ L72/1, paragraph 150

³¹⁴ *Ibid.*, paragraph 104. For other examples and a comprehensive overview of the role of intent in Article 102 cases see Akman, P. (2014). *The role of intent in the EU case law on abuse of dominance*. *European Law Review* 39(3), 316-337

³¹⁵ Ibáñez Colomo, P. (2014), *supra n.* 289, 153 and 155

³¹⁶ See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/7, paragraph 15 and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/3. See, for instance, paragraph 28

³¹⁷ Chapter 4, Parts 3.b. and 4.c.

³¹⁸ *Ibid.*

³¹⁹ European Commission (2005). *Merger Remedies Study*. Retrieved from: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf

³²⁰ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraphs 28-31. On a comprehensive analysis of how the notion of ‘objective justification

introduced by an agreement,³²¹ efficiencies in support of the discriminatory behavior in question.³²² Ultimately, whether presumed intent is better than other (higher) thresholds for establishing abuse may only be determined if one compared how markets evolved under the former standard as opposed to how markets developed under more relaxed standards. The above remarks should not be understood to mean that a finding of abuse based on presumptions of intent is devoid of drawbacks. Because finding abuse would (solely) rely on establishing that the conduct concerned contains elements of discrimination and on evidence suggesting that the firm embarked on the conduct in order to eliminate competition, competitors would probably find it easy to free-ride on the dominant firm's efforts. This could ultimately be to the detriment of innovation and consumer choice.

The second possible way to check whether preferential treatment of one's own services amounts to abusive discrimination would consist in a case-by-case assessment that measures the effects that the conduct under scrutiny produces or is likely to produce on competition.³²³ This would be in line with the more economics-based approach to competition analyses the Commission has been advocating for over the past few years and, compared against the above proposed method, complaints and decisions would need to be founded on more robust evidence. However, if we were indeed to go down this path, we would still need to identify a threshold above which it may be accepted that discrimination may produce exclusionary effects. Ibáñez Colomo convincingly argues that in such cases it would have to be shown that ceasing and desisting from engaging in discriminatory practices is 'indispensable' to operate in the affected market.³²⁴ Adopting the 'indispensability' criterion, he says, would be consistent with the case law concerning other strategies, such as refusal to supply, that essentially seek to achieve the same objective, namely leveraging,³²⁵ and it would also accord with the principle that only in exceptional circumstances a firm should be forced to deal with its rivals.³²⁶ Of course, 'indispensability' should be adapted to the specific circumstances of the case, not least because the relevant decisional practice and case law are rather inconsistent. For example, in *Magill*, which concerned refusal to license IPRs, the decisive

has been interpreted by the Court see Albors-Llorens, A. (2007). *The Role of Objective Justification and Efficiencies in the Application of Article 82 EC*. Common Market Law Review, 44, 1727–1761 and Loewenthal, P. J. (2005). *The defense of 'objective justification' in the application of Article 82 EC*. World Competition, 28, 455-477

³²¹ See Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 60; CFI, Case T-168/2001, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-2969, paragraphs 247-252

³²² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraphs 28-31

³²³ Ibáñez Colomo, P. (2014), *supra n.* 289, 155-156

³²⁴ *Ibid.*, 157

³²⁵ *Ibid.*, 156

³²⁶ *Ibid.*, 158

factor for establishing abuse was that the conduct prevented the appearance of a new product.³²⁷ As already mentioned, to reach this conclusion the Court took account of the fact that there was no substitute for the product for which there was potential consumer demand and that the raw material to which access was sought was indispensable for its creation.³²⁸ To put it simply, indispensability was integrated in the examination of whether competitors were seeking to offer a new product. This was not the direction the Court followed in *Tiercé Ladbroke*,³²⁹ which concerned the request by a Belgian owner of betting shops to be granted access to televised transmissions of French horse races. In this latter case, the Court ruled that the refusal to supply would be abusive if ‘it concerned a product or service which was *either essential* for the exercise of the activity in question, in that there was no real or potential substitute, *or was a new product* whose introduction might be prevented’ [emphasis added].³³⁰ In *Oscar Bronner*, which concerned access to a newspaper delivery scheme, the Court altogether refrained from referring to the new product requirement.³³¹ And in *Microsoft* the Commission found that the refusal to share the indispensable input, namely interoperability information, was not a refusal that prevented competitors from duplicating Microsoft’s (already existing) products, but a ‘refusal to allow follow-on innovation’, thereby preventing them from improving their own products.³³² In view of the above, there is considerable uncertainty over whether, and if so how big of, a role the provision of a ‘new’ or a ‘better’ product would play in determining that trading on a non-discriminatory basis is indispensable.

There are differences between the facts of the cases cited above and Google’s discriminatory practices. As regards the latter, it is *not access to the facility*, but *equitable access* that is sought. However, some of the parameters that influenced the outcome of the above decisions and judgments, including and especially the benchmarks against which indispensability was assessed, appear relevant here. For example, the fact that what competitors seek is not access to the algorithm (which would allow them to design their sites in a way that ensures prominent display), but non-discriminatory treatment (which would allow their services to somehow communicate with the algorithm in the same way that Google content does, thereby *potentially* appearing in a more prominent position) establishes a strong resemblance with cases concerning interoperability such as *Microsoft*. As already

³²⁷ ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Commission*, [1995] ECR I-743, paragraphs 54-56

³²⁸ *Ibid.*

³²⁹ CFI, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923

³³⁰ *Ibid.*, paragraph 131

³³¹ ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 41

³³² Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*) C (2004) 900 final, paragraphs 630 *et seq.*

mentioned, in this case the Commission did not focus on whether Microsoft's refusal prevented the creation of a new product, but on proving that, absent the refusal, the competitors' work group server operating systems could be better than Microsoft's with respect to, *inter alia*, the reliability of the system and security, two characteristics to which consumers attached particular importance.³³³ If the Commission followed the same approach in this case, it would need to establish that, in light of consumer preferences, the quality of competing websites (e.g. functionalities they offer, how easy they are to navigate, etc.) is higher than Google's services. Another factor which was decisive in *Microsoft* and which is linked to the Google case is the scope of measures (i.e., levels of intrusiveness) that are capable of striking a balance between the dominant firm's incentive to innovate and competitors' ability to effectively operate in the affected market, thus greasing the wheels of the competitive process. More particularly, Microsoft attempted to rebut its competitor's request to be granted access to the 'indispensable' input by arguing that the request was too invasive; Microsoft said that what the competitor asked was a disclosure of source code written by Microsoft and the right to copy or modify that source code in order to integrate it in its own products (this was referred to in the decision as 'implementation').³³⁴ Based on expert statements, the Commission drew a distinction between interface information and implementation, noting that 'an interface specification describes *what* an implementation must achieve, not *how* it achieves it'.³³⁵ The Commission was also keen to clarify that by no means did the decision 'contemplate ordering Microsoft to allow copying [...] by third parties'.³³⁶ If equal treatment does not require disclosure of the algorithm (competitors insistently argued that it wouldn't³³⁷), then antitrust intervention in the Google case would not seem to be as intrusive as in cases involving access to IPRs (or any other property rights). Yet another element that appears relevant here is a parameter that influenced the Court in *Tiercé Ladbroke*: the Court held that the televised transmission of French horse races to which the betting shops owner sought access '[was] **not indispensable, since** it [took] place after bets [were] placed, with the result that **its absence [did] not in itself affect the choices made by bettors and, accordingly, [could not] prevent bookmakers from pursuing their business**' [emphasis added].³³⁸ As already seen, prominent display that results from discrimination may *in itself* affect the choices made by online users and eventually impede competitors' ability to attract eyeballs, a key element in 'pursuing their business'.

³³³ The Commission's findings were upheld by the Court. See CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraph 652

³³⁴ Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*) C (2004) 900 final, paragraph 568

³³⁵ *Ibid.*, paragraph 570

³³⁶ *Ibid.*, paragraph 572

³³⁷ See, for instance, *Foundem* (2012), *supra* n. 270, 5

³³⁸ CFI, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923, paragraph 132

Finally, it should be noted that, while ‘indispensability’ has been subject to different interpretations, there is a common thread in all the above cases, namely the (additional) condition that the conduct concerned must further lead to the exclusion of competition in the affected market.³³⁹ That is to say, it would have to be shown that discrimination diverts significant traffic from competing sites to Google’s content.

As already mentioned, the Commission has not adopted a decision yet. Interestingly, however, from the statement of objections the Commission recently sent to Google, it may be inferred that its preliminary assessment that the search giant is abusing its dominant position was (at least, if not predominantly) grounded on a) the three parameters that were discussed above that would lend support to the argument that refraining from discriminating is ‘indispensable’ to compete and b) evidence suggesting exclusionary effects. In the relevant press release the Commission states, *inter alia*, that:

*‘Google systematically **positions and prominently displays** its comparison shopping service in its general search results pages, **irrespective of its merits** [...] Froogle, Google’s first comparison shopping service, did not benefit from any favorable treatment, and performed poorly.*

*The Statement of Objections takes the preliminary view that in order to remedy the conduct, Google should **treat its own comparison shopping service and those of rivals in the same way. This would not interfere with either the algorithms Google applies or how it designs its search results pages.** [...]*

Google’s conduct may [...] artificially divert traffic from rival comparison shopping services and hinder their ability to compete [...]

*As a result of Google’s **systematic favouring of its subsequent comparison shopping services** "Google Product Search" and "Google Shopping", both experienced **higher rates of growth**, to the detriment of rival comparison shopping services. [This] has a **negative impact on consumers and innovation**. It means that users do not necessarily see the most relevant comparison shopping results in response to their queries, and that incentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google’s product’ [emphasis added to the second phrase of the second paragraph].*

Were the Commission in the position to prove the above, it would appear that, even under a strict effects-based approach, whereby discrimination must be regarded as abusive *only if* refraining from granting preferential treatment to one’s own services is indispensable to compete, EU competition

³³⁹ See, for instance, CFI, Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923, paragraph 133; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 41; ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefís Éireann (RTE) and Independent Television Publications Ltd. v. Commission*, [1995] ECR I-743, paragraphs 54-56; Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C (2004) 900 final, paragraphs 585-589; ECJ, Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223, paragraph 25, and ECJ, Case 311/84, *Centre belge d’études de marché - Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicit  Benelux (IPB)* [1985] ECR 3261, paragraphs 26-27

law may serve as a tool to address concerns relating to how a dominant digital intermediary exercises its power to influence the information to which online users are exposed.

6. Conclusions

This Chapter discussed a number of issues that relate to the application of Article 102 TFEU to digital intermediaries. The Chapter used as a case study the Commission's ongoing investigation into Google's alleged abuse of dominance in general online search not only because at the time of writing this thesis *Google Search* is the only case where the Commission has been called upon to assess unilateral conduct in markets where digital intermediaries operate, but also because the complaints against Google give rise to a plethora of issues that illustrate the ways in which an intermediary with interests in several markets may impact competition and media pluralism; the allegations concern, *inter alia*, 'scraping' and retaliatory behavior that affect news markets, data portability restrictions that affect online advertising and search markets, and prominent display of Google's content in general search that may affect vertical search markets.

Similar to Chapters 4 and 5, the Chapter examined competition intervention in order to establish whether the Commission has made appropriate use of the tools it has at its disposal to address the competition issues it has identified during the Google investigation, and if not, to explore whether a proper application of Article 102 may remedy concerns over media pluralism in the affected markets. The following conclusions can be drawn from the analysis of the Commission's approach to the complaints against Google. First, as regards the question of how the case has been approached, the assessment of the proposed undertakings that are likely to be accepted by the Commission shows that, where a number of complex issues arise, a commitments decision may fail to find the target. As extensively discussed throughout the Chapter, certain undertakings were far-reaching and with potentially adverse effects on the markets concerned (scraping), some were poorly designed and hence highly likely to be ineffective (retaliation), and others simply unnecessary (data portability restrictions). This problem arises because in a commitments decision the Commission does not need to define relevant markets or measure the effects of the conduct under scrutiny. The implications of this approach for competition and media pluralism were discussed in detail in Chapter 3, where the *Newscorp/BSkyB* decision was used as an example that vividly illustrated how avoiding dealing with complicated matters might jeopardize the accuracy of a competition decision and possibly media pluralism. The same conclusions can be drawn with respect to Google. For example, the Commission is inclined to prevent Google from displaying snippets of newspaper articles on

Google News *without* having appraised the effects of scraping on the traffic of the newspapers' websites. If these effects are positive, there is no harm to competition. From a media pluralism perspective, if the small excerpts indeed encourage the users to click through, then preventing the display of snippets may eventually drive consumers to consult the few branded websites they have always consulted, ultimately dis-incentivizing them from discovering alternative sources of information.

Another issue concerns the management of the case in procedural terms. The Commission justified its decision to pursue the commitments route on the grounds that in fast moving markets, such as those at issue, the objective is 'to restore quickly the conditions for competition on the merits'.³⁴⁰ Yet, nearly five years after the Commission opened its probe, we are still waiting for the decision. Moving at such a slow pace renders the commitments procedure devoid of any benefit.³⁴¹ A veil of haziness hangs over the most recent development, namely the decision to send Google a Statement of Objections regarding the practice of preferential treatment. The Commission provided no explanations as to the reasons that prompted it to proceed in this way. In respect of this move, it bears noting that the Statement of Objections does not impose any legal deadlines on the Commission to complete the investigation concerned (and the Commission was eager to make that remark in the relevant press release³⁴²). Hence, it is not excluded that the case will be dragged on for several months, maybe years. In view of the above, it would be no exaggeration to say that this case was procedurally mishandled with adverse effects on both competition and media pluralism. As already discussed in Chapter 2, the affected markets have a natural tendency to concentration and, once it acquires a dominant position, the antitrust offender may be difficult to challenge. That is to say, the longer Google is allowed to act anti-competitively, the less likely it is that other firms will be able to exercise effective competitive constraints upon it. With respect to media pluralism, the fact that no measures have been taken yet to address retaliation practices illustrate how the Commission's setbacks may impact the newspapers' ability to reach Google's large user base.

That Article 102 has still not managed to address the issues which Google's conduct raises should be attributed to the Commission only. The Chapter showed that the provision offers multiple avenues for remedying concerns associated with the practices of a dominant digital intermediary. For

³⁴⁰ European Commission (2014a, February), *supra n. 22*

³⁴¹ It would no be an exaggeration to say that this violates the right of the firm that has allegedly breached the EU competition rules to have its affairs handled within a reasonable time, a right enshrined in the Charter of Fundamental Rights in the EU. Charter of Fundamental Rights of the European Union [2000] C 364/1, Article 41(1)

³⁴² European Commission (2015, April), *supra n. 28*

example, entities which compete with the intermediary in a neighboring market and provide better quality content services can rely on Article 102 to prevent the intermediary from granting preferential treatment to its own services. Users can also rely on Article 102 to address exploitative practices that largely affect their content choices. Adding to the above, in a recent Resolution the European Parliament notes the significant role that search engines play in ensuring access to information, draws attention to the adverse effects of concentration on the content to which consumers are exposed, and calls upon the Commission ‘to consider proposals aimed at unbundling search engines from other commercial services’.³⁴³ This was clearly referring to the market power Google enjoys in the EU and to the practices that are currently being investigated by the Commission.³⁴⁴ Albeit an extreme solution and subject to the condition that no behavioral remedy would be equally effective or less burdensome, breaking up a dominant company is possible under EU competition law.³⁴⁵ This is another manifestation of the tools that EU competition law offers to deal with ownership concentration.

With that said, a strict application of Article 102 may not manage to mitigate all the risks associated with how intermediaries behave to advance their own interests. Given how multi-layered and complex the structures of these companies are, it is difficult to conceive all the ways in which they may grant preferential treatment to their own content. As the Commission put it with insight in *MSG Media Service*, one of the oldest decisions in the broadcasting sector, there are innumerable possibilities of ‘hidden discrimination that exist in practice’, thereby making it impossible to prove that a dominant firm controlling access to a popular information gateway behaves neutrally vis-à-vis providers that compete with it in downstream markets.³⁴⁶ But maybe some of the harm caused by digital intermediaries that disrupt the fair and free flow of information may be overridden by the existence of strong and independent public service media organizations. This will be discussed in detail in the next and final Chapter of this thesis.

³⁴³ European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2013/2973 (RSP)). Retrieved from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0071+0+DOC+XML+V0//EN>

³⁴⁴ See, for instance, Kanter, J. *E.U. Parliament Passes Measure to Break Up Google in Symbolic Vote*. 27 November 2014, The New York Times. Retrieved from: http://www.nytimes.com/2014/11/28/business/international/google-european-union.html?_r=0

³⁴⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 7(1)

³⁴⁶ Commission decision *MSG Media Service*, Case IV/M.469 [1994] OJ L 364/1, paragraph 98

Chapter 7 – State aids in support of public service media

1. Introduction

The previous Chapters examined how the Commission exercises/may exercise merger and antitrust control in media markets. This Chapter will deal with the remaining pillar of EU competition law, that is, State aid control. In the same way as Chapters 4, 5 and 6, this Chapter discusses the application of EU competition law to undertakings that control assets that may affect competition in the markets where they operate. In the case at hand, the key issue is to determine how the Commission applies the State aid provisions of the Treaty to media undertakings that control public funds. To this end, I will thoroughly examine State aid decisions concerning advantages granted to public service broadcasters (hereinafter also referred to as PSBs or public broadcasters). I focus on this area mainly for three reasons. First, compared against other media undertakings that receive public funding, public service broadcasters are the most generously funded.¹ Second, State aid control in public service broadcasting is a major policy issue insofar as the application of State aid rules to media markets is concerned: the Commission has adopted thirty-eight decisions in the broadcasting sector² and only five in the newspaper publishing sector.³ Third, the granting of aids in support of PSBs has become an issue of great concern to undertakings other than commercial broadcasters; over the past few years, PSBs have expanded into new media markets, providing a variety of services from mobile news apps to catch-up TV to online advertising space. Therefore, they now directly compete with a wide range of content producers and distributors, including newspapers and IPTV providers. In view of the above, the likelihood that unlawful aids in support of certain media organizations will harm competition seems to be greater in cases of aid measures supporting public broadcasters than in cases of schemes supporting other media.

Pursuant to Article 107(1) TFEU, aid granted by a Member State which distorts or threatens to distort competition, insofar as it affects trade between Member States, shall be declared incompatible with EU law. However, Article 106(2) TFEU gives a derogation from this rule in cases where the aid

¹ Compare the amount of money dispersed in support PSBs against, e.g., those in support of newspapers. The State aid measures containing the relevant figures are available at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf (PSBs) and http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result (newspapers)

² A list with all State aid decisions concerning PSB schemes is available at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf To this list we must add the recently adopted decision that concerns the financing regime of Belgian broadcaster RTBF that has not been published yet. On this latter decision see European Commission (2014, May). *State aid: Commission approves amended financing regime of Belgian broadcaster RTBF*. Press Release. Retrieved from: http://europa.eu/rapid/press-release_IP-14-523_en.htm

³ A list with all State aid decisions concerning aid schemes in support of newspapers is available at: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result

measure supports the provision of a Service of General Economic Interest (hereinafter also referred to as SGEI), that is, a service that delivers outcomes in the overall public good.⁴ One of the main *rationales* for applying this derogation to PSBs is their presumed contribution to the protection and promotion of media pluralism.⁵ Under certain conditions, this contribution can be big. For example, if safeguards are in place to ensure the independence of the PSB from political and commercial forces, a PSB increases supply diversity. Moreover, all PSBs are obliged to provide a balanced and varied programming,⁶ including programming that is not ‘commercial’ enough to be offered by private, mostly advertising-based, providers. Provided that PSBs comply with this obligation, the public broadcasting system promotes content diversity. Finally, empirical research has demonstrated that viewing public rather than (or at least in addition to) commercial broadcasting is associated with higher levels of public affairs knowledge.⁷ Hence, public broadcasting may also increase exposure diversity.

However, an aid scheme supporting the provision of public broadcasting services does not automatically guarantee media pluralism. For example, in the absence of a mechanism ensuring that it delivers a wide range of programming, the PSB is no different from its commercial counterparts which, as seen in detail in Chapter 4, show little to no interest in minority-taste programming. In the absence of safeguards ensuring that it is independent from political actors, the PSB may become a pawn of the government that finances it. Finally, in the absence of a supervisory body that is entrusted with controlling whether its behavior is market-conform, the PSB may engage in exclusionary practices. For example, the PSB may unlawfully use the public money to undercut advertising prices or cross-subsidize commercial activities that deliver no public value. This may push other providers out of the market, thus harming supply diversity. Therefore, a properly implemented legal framework is needed to ensure that the PSB does not deviate from its mission to protect media pluralism. Otherwise, the harm to competition resulting from the advantage PSBs gain over their competitors does not qualify for an exemption under Article 106(2) TFEU, rendering the aid scheme incompatible with EU law.

⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A Quality Framework for Services of General Interest in Europe*, COM(2011) 900 final, 3. Retrieved from: http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf

⁵ See, for instance, the European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, [2010/2028 (INI)], and Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on public service broadcasting [1999] OJ C 30/1

⁶ For an overview of public service obligations PSBs are required to discharge see, for instance, Katsirea, I. (2008). *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States*. Alphen aan den Rijn: Kluwer Law International

⁷ See, for instance, Soroka, S., Blake Andrew, Toril Aalberg, Shanto Iyengar, James Curran, Sharon Coen, Kaori Hayashi, Paul Jones, Gianpetro Mazzoleni, June Woong Rhee, David Rowe and Rod Tiffen (2012). *Auntie Knows Best? Public Broadcasters and Current Affairs Knowledge*. *British Journal of Political Science*, 43(4), 1-21

The Commission, through the enforcement of the State aid rules, has played a crucial role in the creation of a framework aimed to minimize abuses that may take place in the provision of public broadcasting services: any new aid measure the Member States plan to adopt in order to support their PSBs must be notified to the Commission before it is implemented. The Commission is also the competent body to investigate private sector complaints concerning an existing aid scheme. As a result, the Commission has often injected into the relevant national schemes its own views about what may or may not be a ‘good’ broadcasting policy.

In line with the approach followed throughout the thesis, this Chapter will seek to establish whether the Commission has enforced State aid law in a way that benefits competition and if not, to what extent a proper application of the relevant State aid provisions would achieve that objective without the Commission acting *ultra vires*. It bears noting, however, that, compared against the action it may take under the other pillars of EU competition law, the Commission has a limited margin of discretion when assessing PSB schemes. This is because, pursuant to the principle of subsidiarity, the Member States are free to organize the public broadcasting system in accordance with the social, democratic and cultural needs of the society they serve. This does not prevent the Commission from applying to relevant schemes an evidence-based approach that is grounded on sound economic principles, but the Treaty undoubtedly sets tighter limits on the assessment of whether a PSB measure may harm competition. These limits are related to three areas that are key to every public broadcasting system, namely the definition of the public service remit, the supervisory system that has been established to monitor whether the PSB fulfills the remit in question, and the amount of money dispersed to support public service broadcasting.

As regards the first area, *the Commission may not interfere with how the Member States have defined the public service obligations the PSB is required to discharge*.⁸ For example, the Commission may not decide whether it is appropriate to use State funds to cover major sporting competitions. However, the Commission can examine whether the remit is so vague as to make it impossible to decide whether the service concerned could indeed be regarded as an SGEI, and check for manifest errors.⁹ A manifest error is deemed to have taken place if commercial activities are included in the public service remit, thereby allowing spillovers of the taxpayers’ money to activities

⁸ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 48

⁹ *Ibid.*, paragraph 39

that seek to crowd out private competitors. As regards the second area, *the Commission may not conduct evaluations of whether the provider complies with the qualitative standards set out in the public service remit*. For example, the Commission may not assess whether the PSB presents facts with due accuracy and impartiality. However, the Commission is entitled to control whether there is a supervisory system ensuring that these qualitative standards are met.¹⁰ Finally, as regards the third area, *the Commission has no power to carry out efficiency assessments when applying the State aid rules to a PSB service*,¹¹ i.e. it may not judge the ‘value for money’ attributes of the service under scrutiny. The Commission can, however, check whether the amount of money dispersed exceeds the net costs of the public service mission, thereby resulting in disproportionate distortions of competition that are not necessary for fulfilling the public service remit. It is made clear from the above considerations that State aid control in this area is a delicate balancing exercise that seeks to create the conditions under which public service media may perform their democracy-enhancing tasks without disproportionately distorting competition. This Chapter shall attempt to demonstrate that, in spite of the above limits, the Commission has not exhausted the means it has at its disposal to strike the right balance between public service and private media. To this end, it will compare the outcome of relevant decisions against the approach the Commission could have legitimately followed in each one of the above three areas, namely the definition of the public service (including online) remit, the supervisory systems of the Member States, and the assessments of whether State funds are proportionate to the costs incurred in the performance of the public service tasks.

The Chapter is structured as follows. Part 2 provides a brief overview of the EU legal framework that applies to PSBs. Part 3 examines the reasoning the Commission has developed in its attempt to ensure that not every service sought to be provided is swept under the rug of democratic, social and cultural justifications. Three questions will seek an answer: How broad can the public service remit be? How big of a role does universality play in declaring the aid measure compatible with the Treaty? Does the Commission have the power to ‘regulate’ a PSB that focuses excessively on the transmission of premium content programming? Part 4 discusses the Commission’s approach to assessing the conditions under which a supervisory system justifies a derogation from the rules on competition, and in particular the condition of independence. I will discuss ‘independence’ from three different angles: independence of the body entrusted with monitoring compliance with the public service tasks from the management of the PSB, independence of the body handling

¹⁰ CFI, Case T-442/03, *SIC v. Commission* [2008] ECR II-1161, paragraph 213

¹¹ See GCEU, Joined Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)* [2010] ECR II-3397, paragraph 141, and Case T-275/11 *Télévision française 1 (TF1) v. European Commission* (not yet reported), paragraphs 130, 133-4 and 138

competitors' complaints from the management of the PSB, and independence of the above bodies from political actors. Part 5 examines how diligent the Commission has been in assessing whether overcompensation has taken place. I look into how it dealt with financial transparency requirements the PSBs must fulfill, the financial monitoring mechanisms the Member States have set up, and the amount of money directed to premium content. Part 6 studies how the Commission has dealt with the Member States' decision to broaden the public service remit in a way that facilitates the expansion of PSBs into new media markets. More particularly, I thoroughly discuss its decision to impose upon several Member States the duty to conduct a prior evaluation procedure for new media services and subsequently examine whether the procedure has indeed been implemented by the Member States concerned.

2. The applicable legal framework: Article 106(2), the Amsterdam Protocol and the Broadcasting Communication

2.1. Primary EU law regulating public service broadcasting: The puzzling wording of Article 106(2) TFEU and the Amsterdam Protocol on Public Service Broadcasting

The Commission has treated aid granted to PSBs as State aid within the meaning of Article 107(1) TFEU.¹² This, however, does not mean that relevant aid measures are unacceptable under EU law. Public broadcasting services have traditionally been perceived as Services of General Economic Interest,¹³ which triggers the application of Article 106(2) TFEU.¹⁴ Article 106(2) TFEU provides an exemption from the rules on competition insofar as the application of these rules obstructs the performance of the tasks of the undertakings entrusted with delivering an SGEL. Yet, deciding whether this derogation applies to a public broadcaster is far from a straightforward exercise because Article 106 TFEU conveys a mixed message. While acknowledging that Member States may grant special rights to certain undertakings as a means to support the provision of services for the overall good of society, it also requires that the provision of such services do not affect trade to such an extent as would be contrary to Union principles, in particular the principle of undistorted

¹² For the purposes of this study, the application of Article 107 TFEU to the public broadcasting sector will not be examined in detail. For an example of how the Commission applies 107(1) TFEU to PSBs see Commission decision *State aid E 3/2005, Financing of public service broadcasters in Germany* [2007] C 185/1, paragraphs 141 *et seq.* The Commission has never made use of the exception provided for by Article 107(3)(d) TFEU which provides for an exception to the general State aid prohibition for measures aimed at promoting culture. For a detailed analysis of how Article 107 TFEU has been applied to PSBs see, for instance, Harrison, J. and Lorna Woods (2007). *European Broadcasting Law and Policy*, 290 *et seq.*, Cambridge: Cambridge University Press, and Antoniadis, A. (2006). *The Financing of Public Service Broadcasting*, 591 *et seq.* In Sanchez Rydelski, M. (ed.). *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*. London: Cameron May

¹³ See, for instance, ECJ, Case 155/73 *Sacchi* [1974] ECR 409, [1974] CMLR 177, paragraph 15; CFI, Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole Television SA, Reti Televisive Italiane SpA, Gestelevision Telecinco SA and Antena 3 de Television v. Commission* [1996] ECR II-649, [1996] 5 CMLR 386, paragraph 116

¹⁴ With the exception of Commission decision *BBC License Fee* [2003] OJ C 23/6, all other schemes supporting public broadcasting activities were declared compatible with the common market under Article 106(2) TFEU

competition.

Similar remarks can be made with respect to the interpretative Protocol on the System of Public Broadcasting in the Member States (hereinafter referred to as to the Amsterdam Protocol or the Protocol) introduced by the Treaty of Amsterdam.¹⁵ The Protocol endorses the role of public broadcasting in fulfilling the democratic, social and cultural needs of a given society as well as the need to preserve and promote media pluralism and explicitly provides that it is up to the Member States to define and organize the public service remit in a manner of their own choosing. However, it also lays down that State financing of broadcasting activities may not bring about distortions of competition that are not necessary for fulfilling the public service mission. Therefore, in the same way as the derogation under Article 106(2) TFEU, the Protocol does not go so far as to provide a full exemption from the Treaty rules.¹⁶

Both Article 106(2) TFEU and the Amsterdam Protocol demand in essence a balance between national interests and the Union interests but do not explain how this balance may be achieved. Pursuant to Article 106(3) TFEU, the Commission is the competent body to strike this balance.

2.2. The Broadcasting Communication: The Commission's view on what is a 'good' public broadcasting policy

The Commission assesses aid schemes in support of public service broadcasters on a case-by-case basis because it believes that State aid control must take due account of the heterogeneity characterizing the European public broadcasting landscape.¹⁷ Indeed, each public broadcasting system has developed in different historical and media policy contexts. This in turn has led to the creation of various models of public broadcasting across the Union that differ significantly in terms of the legal framework in which they operate, their financial organization, and the public service

¹⁵ 'The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty establishing the European Community: The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and insofar as such funding is granted to broadcasting organizations for the fulfillment of the public service remit, as conferred, defined and organized by each Member State, and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account'

¹⁶ It appears that the Member States feared expansion of Union competence in the media domain which can explain why they agreed on the adoption of a Protocol interpreting Article 106(2) TFEU rather than the introduction of a provision in its main text. See Harrison, J. and Lorna Woods (2007), *supra n. 12*, 295

¹⁷ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 41

mission they are expected to fulfill.¹⁸

Yet, on the basis of the case-by-case approach to public broadcasting schemes, the Commission gradually identified certain basic principles which, if respected, are considered to render the measure compatible with EU law. The Commission codified these principles into a soft-law instrument, the Broadcasting Communication, to help streamline the State aid review process and to provide legal certainty to interested stakeholders as to what is permissible and not permissible under State aid law. The first Broadcasting Communication started to apply in 2001.¹⁹ It was revised in 2009 to deal with issues that have arisen as a result of the expansion of public service broadcasters into new media markets.

The Broadcasting Communication refers to the three conditions set by Article 106(2) TFEU as interpreted by the Court and further explicates them. In providing guidance on how PSB schemes may be brought in line with EU law, it also outlines the limits (already described in the Introduction) within which the Commission may conduct an assessment under Article 106(2) TFEU. These three conditions are the following:

- a. The public broadcasting service must be a service of general economic interest, clearly defined as such by the Member State (definition);
- b. The broadcaster must be explicitly entrusted by the Member State with the provision of that service and there must be an effective monitoring mechanism ensuring that the public service obligations are complied with (entrustment and supervision);
- c. State financing must not exceed the net costs of the public service mission (proportionality).²⁰

A short note on the assessment procedure and the nature of PSB schemes: The three conditions set by Article 106(2) TFEU must be met cumulatively. Otherwise, the measure is in violation of EU law and, depending on whether the aid is ‘new’ or ‘existing’, the following three scenarios are possible:

¹⁸ For a comparative analysis of PSB systems see Katsirea, I. (2008), *supra n. 6*

¹⁹ Given the specific nature of public service broadcasting, the Commission had long stressed the need for a more consistent approach to the assessment of the relevant aid measures. Initiatives at European level can be traced back to 1998. See, for instance, European Commission DG IV (1998). *Discussion Paper: Application of Articles 90, section 2, 92 and 93 of the EC Treaty in the Broadcasting Sector*, and European Commission (1998). *Report from the High Level Group on Audiovisual Policy: the Digital Age: European Audiovisual Policy*. The Broadcasting Communication started to apply after two decisions had been adopted and several formal investigations in relevant aid schemes had been opened

²⁰ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 37

-In the case of ‘existing aid’, that is, aid which existed before the EEC Treaty came into force or before the Member State joined the EU, and provided that the Commission finds that the existing scheme does not meet one or more of the above three conditions, it proposes appropriate measures to the Member State concerned.²¹ If the Member State accepts the proposed measures, it is bound by its acceptance to implement them.²² If, however, the Member State refuses to comply with the proposed measures, the Commission may open a formal investigation and, where necessary, impose specific commitments to ensure that future aid is compatible with the Treaty.²³ It bears noting that, where the decision is on existing aid, the Commission is not entitled to order the recovery of aid already given, but will prevent the Member State from granting future aid.²⁴

-‘New aid’, that is, ‘aid schemes and individual aid, which is not existing aid’,²⁵ must be notified to the Commission in sufficient time by the Member State concerned.²⁶ If the Member State complies with the pre-notification requirement and the Commission finds that one or more of the above conditions is not met, the measure will be declared incompatible with EU law and the service sought to be provided may not be launched.

-If the aid is new and the Member State implements the unlawful scheme before the Commission adopts its decision, the Commission may order that aid to be recovered.²⁷

In the case of PSBs, the ‘existing aid’ procedure²⁸ is the most common because relevant aid schemes were introduced a long time ago.²⁹ Given that new aid that is incompatible with Article 106(2) TFEU needs to be repaid, the Member States have always attempted to convince the Commission that ad hoc PSB measures fall under the existing aid scheme and the Commission has been willing to accept this. As a result, new projects funded out of the license fee, including interactive learning materials³⁰ and thematic channels,³¹ have been regarded as services fulfilling the existing public service mandate.

²¹ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] L 83/1, Article 18(1)

²² Ibid., Article 19(1)

²³ Ibid., Article 19(2)

²⁴ For an overview of the procedures followed in State aid cases see: http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html

²⁵ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] L 83/1, Article 1(c)

²⁶ Ibid., Article 2(1)

²⁷ Ibid., Article 14

²⁸ See, for instance, Commission decision *State aid E 3/2005, Financing of public service broadcasters in Germany* [2007] C 185/1, paragraphs 200 *et seq.*

²⁹ For a detailed explanation of how the Commission applies the concept of existing aid to PSB schemes see Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraphs 25 *et seq.*

³⁰ Commission decision N37/2003, *BBC Digital Curriculum* [2003] OJ C 271/47, paragraphs 27 *et seq.*

³¹ Commission decision *State aid E 3/2005, Financing of public service broadcasters in Germany* [2007] C 185/1, paragraph 211

The analysis that follows examines the Commission's approach to assessing whether each one of the above three conditions is met and reflects on whether, as a result of the decisions it has adopted thus far, the right balance between public service and private media has been struck.

3. Clear and precise definition: Not a 'mission creep', but under what conditions?

3.1. How broad can the public service remit be?

The Commission does not have the power to dictate which programs are to be financed as an SGEI nor to question the quality or nature of a specific program.³² As already mentioned, with regards to the remit, the Member States must only ensure that the obligations the PSB is required to discharge are defined as clearly and precisely as possible. What does this mean in practice? When it comes to controlling the mandate, the Commission limits its assessment to two elements: first, it examines whether the terms in which the entrustment act are so vague as to make it difficult to decide whether the service concerned could indeed be regarded as an SGEI. Second, it checks for manifest errors,³³ that is, it evaluates whether the Member States have included in the remit commercial activities such as teleshopping and merchandising,³⁴ thereby facilitating spillovers of State funds to the provision of non-SGEIs. For example, if the mission of the PSB is to 'inform the individuals residing in the territory of X State', the Commission cannot tell with certainty whether the PSB may misuse State resources to provide e-commerce services. E-commerce may perform information functions, but it is widely accepted that it cannot be considered to meet, in the wording of the Protocol, 'the democratic, social and cultural needs' of the society the PSB is meant to serve.³⁵

As laid down in the Broadcasting Communication, an unambiguous and detailed definition of the public service remit fulfills the following threefold objective: the Commission can determine whether any abuses in the definition of the service as an SGEI have taken place, national bodies entrusted with supervising the PSB can control whether the latter complies with the obligation to provide a balanced and varied offer, and private undertakings can plan their activities.³⁶ Either as a tool enabling the competent authority to examine whether the PSB has acted unlawfully or as a guide for commercial operators, an entrustment act that includes a clear description of the mandate serves

³² Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 48

³³ Ibid., paragraph 39

³⁴ Ibid., paragraph 48

³⁵ Ibid.

³⁶ Ibid., paragraphs 45 and 46

one sole purpose, that is, it establishes certainty; certainty that the scheme under scrutiny qualifies for an exemption under Article 106(2) TFEU, certainty that the PSB respects and caters to the diverse needs of the individuals residing in the Member State concerned, and certainty that a commercial competitor can invest in an innovative project without fearing that the resulting competitive advantage will be offset by aids granted to the PSB.³⁷ In any of these three forms, certainty contributes to leveling the playing field between public and private media.

Simple as it may seem, assessing whether an aid scheme meets the ‘definition’ condition is not a straightforward exercise. To comply with the subsidiarity principle, the Commission is bound to accept extensive mandates.³⁸ But, to make room for private initiatives, it must also ensure that the mandate is so precise that it leaves no doubt as to whether a service provided by the entrusted operator is intended by the Member State to be included in the public service remit or not.³⁹ Moreover, due to the controversies that arise when ambiguous terms such as ‘democratic’, ‘cultural’ and ‘societal’ needs come to the fore when assessing whether PSB programming qualifies as an SGEI, a distinction between a service delivering public value and a commercial service is not always easy to make. On several occasions, the Commission has had to cope with broad public service remits (a legacy of the monopoly era), under the umbrella of which potentially fall all types of traditional broadcasting and new media services.

This part discusses the reasoning the Commission has developed in cases touching upon the definition of the public service mission. Through an analysis of several decisions the Commission has adopted thus far, I will show that, in its effort to ensure that not every service sought to be provided is swept under the rug of democratic, social and cultural justifications, it has more often than not been inconsistent as to the conditions under which the supply of a certain public broadcasting service does not constitute an abuse. These inconsistencies jeopardize the certainty that the requirement to provide a clear and precise definition of the remit pursues. The decisions were divided into three categories which correspond to the three different themes that I identified as the most appropriate to highlight the challenges facing the Commission in the attempt to balance competition and public broadcasting in the context of ‘definition’ assessments. More particularly, I explore how precise the public service remit must be to justify an exemption under Article 106(2) TFEU, the extent to which the

³⁷ Spector, D. (2007). *The economic policy of State aids: The assessment criteria*, 179-180. In Vivier, X. (ed.). *Competition Policy in the EU-Fifty Years on from the Treaty of Rome*. Oxford: OUP

³⁸ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 47

³⁹ *Ibid.*, paragraph 45

universality of the service under scrutiny plays a role in the approval of the scheme, and whether the Commission has occasionally made value judgments, acting *ultra vires*. I will discuss this latter issue by examining how the Commission dealt with the complaint that PSBs focused excessively on the coverage of sports events. For the avoidance of confusion, the question of how the Commission dealt with the definition of new media services as part of the public service remit will be discussed in Part 6.

3.1.1 Services ‘ancillary’ to the core broadcasting offer

In *BBC News 24*, the Commission was called upon to decide whether the State financing of an advertising-free news channel was compatible with the common market.⁴⁰ The BBC Charter provided that, in addition to the main public services, that is, sound and TV programs of information, education and entertainment, the corporation could provide, subject to the prior approval of the Secretary of State, other services ‘ancillary’ to the core public broadcasting offer.⁴¹ Based on the fact that BBC News 24 had been launched as an ancillary service, the complainant argued that the channel did not qualify for an exemption under Article 106(2) TFEU.⁴² The Commission replied that it lacks the power to pronounce on concepts used in national legislation,⁴³ underlying that its task is limited to ensuring that no abuses⁴⁴ have taken place in the definition of services which are assessed under Article 106(2) TFEU as SGEIs.⁴⁵ Subsequently, it took account of the mandate of the channel, which, as envisaged by the approval decision, would be the provision of a 24-hour news service, and concluded that the channel could be regarded as an SGEI on the grounds that it ‘would help to meet the democratic and social needs of a society [...] by allowing the coverage of a wider range of events and a more in-depth analysis of the events’.⁴⁶

The approach followed in *BBC News 24* is in sharp contrast to the one adopted in *BBC Digital Curriculum* dealing with the public financing of an online service aimed to provide interactive

⁴⁰ Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraphs 1 and 16

⁴¹ BBC Charter (1997). Article 3(a) and (b). The Charter is available at: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/archive/1997.pdf See also Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraph 5

⁴² Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraph 16(iii)

⁴³ *Ibid.*, paragraph 46

⁴⁴ According to Article 106(3) TFEU the Commission is entrusted with ensuring the application of the provisions laid down therein without leaving room for the involvement of other institutions or the Member States in performing that task. However, such an aggressive interpretation would not be welcomed by the Member States. Being one of the first decisions in the sector, *BBC News 24* follows a *via media* aimed at reconciling the conflicting interests involved hence the decision to focus on ‘manifest errors’ that may have taken place in the definition of the remit. For a more detailed discussion of these issues see Craufurd-Smith, R. (2001). *State Support for Public Service Broadcasting: The Position Under European Community Law*. Legal Issues of Economic Integration, 28, 14

⁴⁵ Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraph 47

⁴⁶ *Ibid.*, paragraph 49. See also paragraphs 50-51

learning materials to homes and schools.⁴⁷ The Commission had expressed doubts⁴⁸ about whether the Digital Curriculum, sought to be provided as an ancillary service,⁴⁹ was indeed covered by the BBC's remit; a decision declaring the aid measure compatible with the common market was adopted only after the UK proposed several undertakings to address the concerns related to the ambiguities that could have arisen when interpreting the entrustment act.⁵⁰ More particularly, the State authorities committed to ensure that the BBC would publish a Commissioning Plan fifteen months before the launch of the Digital Curriculum that would set out the subjects to be covered during the first five years of the service.⁵¹ The Plan would also be accompanied by explicit exclusion criteria with a view to providing clarity to users and commercial operators regarding the subjects that would not be provided by the BBC throughout the duration of the Plan.⁵² Any divergence from the scope of the Plan would be considered a breach of the entrustment act and hence a violation of the State aid rules.⁵³

Compared against *BBC News 24*, the approach followed in *BBC Digital Curriculum* seems to be more adequate to level the playing field between public service and private media. The BBC Agreement (the entrustment act that complements the Charter by providing more detail on how the BBC must deliver the public service mission) that was applicable at the time made no mention of the ancillary services⁵⁴ that could form part of the public broadcasting offer. The only reference to 'ancillary services' in UK legislation was the one made in the BBC Charter where they were defined as *public services whether or not broadcasting or program supply services that inform, educate and entertain*.⁵⁵ Yet, this is far from a clear and detailed description of the remit, for it is difficult, if not impossible, to think of content that may not carry the 'ancillary service' tag. It is worth noting that in *BBC News 24* the Commission lamented that the legal framework regulating public broadcasting left room for doubt as to what is defined as an ancillary service and what is not,⁵⁶ but granted the

⁴⁷ Commission decision *BBC Digital Curriculum*, N37/2003 [2003] OJ C 271/47, paragraph 4

⁴⁸ *Ibid.*, paragraph 43

⁴⁹ *Ibid.*, paragraph 18

⁵⁰ *Ibid.*, paragraph 43

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* This decision was also problematic because, in the assessment of whether the aid granted to support the provision of the Digital Curriculum was 'existing' or 'new', the Commission established a rather controversial criterion whereby the aid is considered to be existing only 'to the extent that it remains closely associated with the BBC's television and radio services'. See paragraph 36 of the decision. The requirement to plan activities in close relation to television and radio services is arguably in violation of the principle of subsidiarity and against the technology neutrality principle because it implies a dependence on specific platforms and technologies. For a discussion of this decision from that point of view see, for instance, Psychogiopoulou, E. (2006). *The Integration of Cultural Considerations in EU Law and Policies*, 321. PhD Thesis. Florence: European University Institute, and Harvey, S. (2010). *No Jam Tomorrow? State Aid Rules and the Legitimacy of Public Service Media: the Closure of the BBC's Digital Curriculum Project ('Jam')*, 3. Draft Paper for RIPE Conference, University of Westminster, London, 8-11 September

⁵⁴ See BBC Agreement (1996). Retrieved from: <http://www.bilderberg.org/bbchartr.htm>

⁵⁵ BBC Charter (1997), Article 3(a) and (b)

⁵⁶ Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraphs 69, 64 and 65

approval anyway.

The motivation underlying the Commission's contradictory approaches to how precise the description of ancillary services should be are not clear. The launch of both BBC News 24 and BBC Digital Curriculum rested on the same legal basis.⁵⁷ Both measures envisaged that the services would be offered free of charge and that they would not be fuelled by increases in the license fee paid by UK citizens.⁵⁸ Finally, both types of services, that is, thematic news channels⁵⁹ and digital learning materials,⁶⁰ were already available in the market. Given these similarities, accepting the broad definition of ancillary services in *BBC News 24*, whilst demanding a detailed description of the Digital Curriculum offer, falls short of achieving the certainty which compliance with the duty to delineate the public service obligations in clear and precise terms seeks to establish.

3.1.2. New channels forming part of the 'core' public broadcasting offer

In *BBC License Fee*, the Commission was asked to decide whether the launch by the BBC of nine digital channels was compatible with the common market.⁶¹ The BBC Charter that was applicable at the time laid down that the core public services of the BBC consisted in sound and TV programs of information, education and entertainment.⁶² Article 2(2) of the BBC Agreement expressly laid down that the corporation was expected to provide the core public services by means of two television and five radio program services available for general reception throughout the UK, an additional sound program service for general reception in each of Scotland and Northern Ireland respectively, and a number of local radio programs and two additional sound program services for general reception in Wales.⁶³ However, this provision left considerable room for manoeuvre as it also laid down that the BBC could, subject to the prior agreement of the Secretary of State, vary the number of the core public services.⁶⁴ Article 2(2) was the legal basis on which the launch of the new channels rested.⁶⁵ Similar to *BBC News 24* (where it remarked on the excessively broad definition of ancillary services), while lamenting that the Agreement and the Charter were not sufficiently clear about the conditions under which the BBC could provide the channels under scrutiny, the

⁵⁷ *Ibid.*, paragraph 46 and Commission decision *BBC Digital Curriculum*, N37/2003 [2003] OJ C 271/47, paragraph 18

⁵⁸ See, for instance, Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraph 53 and Commission decision *BBC Digital Curriculum*, N37/2003 [2003] OJ C 271/47, paragraph 40

⁵⁹ For example, Sky News was launched in 1989. See <http://mavise.obs.coe.int/channel?id=486>

⁶⁰ Commission decision *BBC Digital Curriculum*, N37/2003 [2003] OJ C 271/47, paragraphs 7 *et seq.*

⁶¹ Commission decision *BBC License Fee* [2003] OJ C 23/6, paragraphs 3 and 4

⁶² BBC Charter (1997), Article 3(a)

⁶³ BBC Agreement (1996), Article 2(2)

⁶⁴ *Ibid.*, Article 2(3)

⁶⁵ Commission decision *BBC License Fee* [2003] OJ C 23/6, paragraph 28

Commission found that no manifest errors had taken place in the definition of their mandate.⁶⁶

The BBC Charter and Agreement have been amended several times since these decisions were adopted.⁶⁷ However, the provisions that define the core and ancillary services the BBC is entitled to finance out of the license fee remain intact.⁶⁸ Considered alongside the State aid decisions dealing with PSB schemes of other Member States that will be examined below, the Commission's leniency seems to have played a role in the UK authorities' choice to refrain from describing the BBC's public service remit in more precise terms.

In more recent cases, the Commission has more strenuously tackled the uncertainty and abuses that may arise from broad public service mandates. An example illustrating this more restrictive approach is *Financing of public service broadcasters in Germany*,⁶⁹ concerning, *inter alia*, the definition of the remit of six digital channels provided by ARD and ZDF. The Interstate Broadcasting Treaty laid down that ARD and ZDF were entitled to offer, in addition to the main public service channels, additional digital channels subject to the condition that they had their focus on culture, information and education.⁷⁰ The Commission rejected the German authorities' argument that this general requirement was sufficiently precise, noting that 'without a clearer circumscription of what is meant by "culture, information and education" most program genres offered by public service broadcasters could be covered by these concepts'.⁷¹ The Commission pointed out the need for a framework ensuring that the mandate would be defined in a way that reflected '*the additional public value*' of the channels.⁷² The German authorities made the following two proposals which the Commission ultimately accepted:⁷³ first, they undertook to introduce in the Interstate Broadcasting Treaty program categories to determine what is meant by information, education and culture.⁷⁴ Second, they committed to legally oblige public broadcasters to develop a program concept specifying these different program categories.⁷⁵ The program concept would require a specific act of

⁶⁶ Ibid., paragraph 36

⁶⁷ For the amendments that have taken place see: http://www.bbc.co.uk/bbctrust/governance/regulatory_framework/charter_agreement.html

⁶⁸ BBC Charter (2006), Article 5(1) and (2). Retrieved from: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf For the definition of the term 'public services' in the Agreement see also BBC Agreement (2006), Article 11. No definition of ancillary services is included in the Agreement, which is available at: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf

⁶⁹ Commission decision *Financing of public service broadcasters in Germany*, State aid E 3/2005 [2007] C 185/1

⁷⁰ Ibid., paragraphs 51 and 88

⁷¹ Ibid., paragraph 227

⁷² Ibid.

⁷³ Ibid., paragraphs 358-361

⁷⁴ Ibid., paragraph 335

⁷⁵ Ibid., paragraph 336

entrustment.⁷⁶

The amendments the German authorities introduced to comply with the above two legally binding commitments were arguably an improvement in the German aid scheme. The following example illustrates why the current framework regulating definition of the remit increases certainty: before they launched the digital channels, public broadcasters committed to use them as a service complementing the content provided by the main channels⁷⁷ with a view to amplifying the balanced and varied programming they were expected to offer under the Interstate Broadcasting Treaty.⁷⁸ However, public broadcasters seem to have taken dishonest advantage of the vaguely worded duty to focus on information, education and culture,⁷⁹ using the digital channels for extensive sports transmissions.⁸⁰ Following the amendments to the Interstate Treaty, sports coverage is explicitly included in the ‘information program’ category.⁸¹ Moreover, in the context of the ‘program concept’ procedure, broadcasters are expected to determine in advance the profile of the channel, including the sports that will be covered. For instance, the program concept of EinsFestival, one of ARD’s digital channels whose programming was a bone of contention in the State aid case, explicitly provides that the channel will focus on the transmission of less popular sports events such as the sailing competition America’s Cup.⁸² It is submitted here that, while program concepts are drafted in broad terms, they are more detailed than an all-encompassing mission to focus on information, education and culture. This does not entirely eliminate the concern that public broadcasters may use the broad definition of the remit to act anti-competitively, but it is a step towards minimizing abuses that may take place in the interpretation of the entrustment act.

The Commission adopted the same approach in the assessment of the aid scheme supporting Austrian public broadcaster ORF. In 2005, Austria made an amendment to the law regulating ORF

⁷⁶ Ibid.

⁷⁷ Ibid., fn. 10

⁷⁸ Ibid., paragraph 16: ‘Pursuant to the general Interstate Treaty on Broadcasting (“Rundfunkstaatsvertrag”, RStV), public service broadcasters have the task (“Pflichtaufgabe”) to act as a medium and factor for individual and public opinion shaping through the production and distribution of radio and television programmes (§ 11 (1) first sentence RStV). Public service broadcasting has to provide in its offers and programmes an overview of the international, European, national and regional events in all areas of life. It shall contribute to international understanding, European integration and cohesion on the federal and regional level. Its programme shall serve information, education, advise and entertainment purposes. It shall offer in particular cultural programmes. Public service broadcasting needs to respect principles of impartiality and objectivity and shall take into account the plurality of opinion and ensure a balanced programme offer’

⁷⁹ Ibid., paragraph 22

⁸⁰ Ibid., paragraphs 122 and 227

⁸¹ See Interstate Broadcasting Treaty (2009), Article 2(14): ‘information’ means the following in particular: ‘news and current affairs, political information, economics, reports from abroad, religion, sport, regional information, society news, service and contemporary history’. The Treaty is available at: <http://www.uni-muenster.de/ITMCATR/wp-content/uploads/2009/05/Interstate-Treaty-on-Broadcasting.pdf>

⁸² *Programmkonzept Digitale Fernsehprogramme der ARD* (Program Concepts of Digital Television Channels of ARD), paragraph 4. Retrieved from: https://recht.nrw.de/lmi/owa/br_show_anlage?p_id=9246

which laid the way for the launch of a sports channel, Sport Plus.⁸³ However, the remit of the channel, as set out in the provision introduced in the ORF Law, simply followed the orientations already contained in ORF's general mandate,⁸⁴ which stipulated that the television programming should, *inter alia*, '**fully [inform] the general public about all important political, social, economic, cultural and sporting questions**' [emphasis added].⁸⁵ Similar to the German case discussed above, the Commission noted that the abstract wording of the new provision made it impossible to examine whether the public broadcaster was indeed entitled to finance a sports channel out of the license fee, and if so, which of the Austrian society's needs would be served by the channel and why these needs could not be satisfied as part of the existing program remit.⁸⁶ In order to address the Commission's concerns, Austria offered to set certain qualitative criteria that Sport Plus would need to meet in order to justify public expenditure such as the obligation to encourage appreciation of the audience for less known sports and their practice rules, increase the interest of the population in these sports and report about health-related sports aspects.⁸⁷

However, while the decisions relating to the Austrian and German PSB schemes may imply that the Commission has become less tolerant, it is still not entirely clear how it will deal with the launch of a thematic or generalist channel that is based on a loosely defined public service mission. For example, the Commission raised concerns similar to those in the ORF case in *State funding for Flemish public broadcaster VRT* concerning, *inter alia*, the compatibility of measures supporting sports channel Sporza.⁸⁸ While it noted that the general mandate of VRT to offer quality programming that focuses on information, education, culture and entertainment left room for doubt as to whether or not VRT could provide a channel focusing on sports content,⁸⁹ the Commission did not ask from the Flemish authorities to further specify Sporza's mission. Sporza is still active, covering a wide range of sports events, including major football and tennis competitions.⁹⁰

3.2. Is universality of the service sought to be provided as an SGEI important or not?

In *Chaîne Française d'Information Internationale* (hereinafter CFII) the Commission was asked

⁸³ Commission decision *Financing of the Austrian public service broadcaster ORF*, E2/2008 [2009] OJ C309/1, paragraph 9

⁸⁴ *Ibid.*, paragraph 132

⁸⁵ *Ibid.*, paragraph 18

⁸⁶ *Ibid.*, paragraph 146

⁸⁷ *Ibid.*, paragraph 194

⁸⁸ Commission decision *Public financing of public service broadcaster VRT*, E 8/2006 [2008] OJ C 143/1, paragraph 14

⁸⁹ *Ibid.*, paragraphs 10, 190 and fn. 138. '*La VRT assure une offre de qualité dans les secteurs de l'information, de la culture, de l'éducation et du divertissement. La VRT doit proposer en priorité des programmes informatifs et culturels axés sur les spectateurs et les auditeurs. Elle assurera en outre des programmes sportifs, des programmes éducatifs contemporains, des productions dramatiques propres et des programmes de distraction*'

⁹⁰ See <http://www.sporza.be/cm/sporza>

to assess the compatibility of a measure aiming to support the launch of an international news channel that would be broadcast overseas.⁹¹ In its assessment of whether an abuse in the definition of the remit took place, the Commission followed an approach somewhat different from the one adopted in other State aid decisions in the broadcasting sector. On the basis that CFII's mission would be to bring the French point of view on international news to foreign audiences,⁹² the Commission decided that there was not a strong enough link between the service sought to be provided and the fulfillment of the democratic, social and cultural needs of French society.⁹³ The characteristics of CFII, the Commission said, were not *de facto* problematic, but the State aid assessment should be based on Article 106 TFEU, not the Protocol or the guidelines laid down in the Broadcasting Communication.⁹⁴ In order to establish whether the service under scrutiny was correctly defined as an SGEI, the Commission referred to the French law that regulated public service media entities, which stated that their mission would, *inter alia*, be to promote the French culture and language.⁹⁵ Additionally, the Commission found that CFII's obligations, including the duty to disseminate pluralistic information or to offer a balanced programming, were described in detail in the entrustment act.⁹⁶ Applying this line of reasoning, the Commission concluded that the French authorities had not committed a manifest error in the definition of CFII's public mandate.⁹⁷

The Commission's reasoning in CFII is problematic for two reasons. First, the Protocol and the Broadcasting Communication are meant to interpret how Article 106 TFEU applies to the broadcasting sector. The decision to ignore them in this case is therefore somewhat confusing; the Protocol and the Communication neither contradict Article 106 TFEU nor introduce a logic different from the balancing exercise that is conducted in the examination of other aid schemes in support of SGEIs. Second, the Commission based its approval on Article 106(2) TFEU in spite of the fact that the service would not be broadcast in the French territory.⁹⁸ A universal service obligation, that is, the provision of a '*service throughout the national territory at affordable prices and on similar quality conditions*'⁹⁹ has often been a key parameter to the assessment of whether a service has correctly

⁹¹ Commission decision *Chaîne française d'information internationale*, N54/2005 [2005] OJ C 256/25, paragraph 8

⁹² European Commission *State aids: the Commission approves financing for the 'Chaîne française d'information internationale' (CFII)*. Press Release IP/05/689. Retrieved from: http://europa.eu/rapid/press-release_IP-05-689_en.htm

⁹³ Commission decision *Chaîne française d'information internationale*, N54/2005 [2005] OJ C 256/25, paragraph 40

⁹⁴ *Ibid.*

⁹⁵ It bears noting that CFII was not, strictly speaking, a public service organization of audiovisual communication. But, since it shared certain characteristics with this type of entities, including and especially the financing of its operations with State funds, the Commission considered it appropriate to refer to the provision laying down the mission of the undertaking that was defined in French as 'organisme du secteur public de la communication audiovisuelle'. See Commission decision *Chaîne française d'information internationale*, N54/2005 [2005] OJ C 256/25, paragraph 41

⁹⁶ *Ibid.*, paragraph 42

⁹⁷ *Ibid.*, paragraph 43

⁹⁸ *Ibid.*, paragraph 39

⁹⁹ Communication on Services of General Interest [2001] OJ C 17/04, paragraph 14

been defined as an SGEI.¹⁰⁰ The case law may not be entirely clear as to how big of a role universality plays in deciding whether the derogation under Article 106(2) TFEU applies,¹⁰¹ but even in cases where the Court ruled that a limited territorial or material application does not necessarily call into question the nature of a service as an SGEI,¹⁰² the service under scrutiny could at least be accessed by anyone living in the territory (or part thereof) of the State concerned.¹⁰³ As already mentioned, in the case at hand, the channel was created with the primary aim to target international audiences.¹⁰⁴ It may be argued that an international news channel intended to be broadcast abroad and now offering content also in English and Arabic¹⁰⁵ is more likely to strengthen the brand image of an organization rather than fulfill the needs of the taxpayers that fund it.¹⁰⁶ In view of the above, doubts are raised as to whether the CFII indeed qualified as an SGEI. This should not be understood to mean that a channel with CFII's mandate may not serve the democratic, social and cultural needs of non-French citizens, contribute to the protection of pluralism in the markets where it is broadcast and strengthen cultural diversity across the EU. But, if one of the main public service obligations of the channel was to expose foreign audiences to the French language and culture, the Commission could have granted an exemption under Article 107(3)(d) TFEU,¹⁰⁷ which allows for a derogation from the rules on competition if the aid measure under scrutiny aims to promote culture, and avoid the SGEI jargon which undermined legal certainty.

Finally, for our purposes, *CFII* should be compared against two older decisions where lack of

¹⁰⁰ See, for instance, ECJ, Case C-320/91, *Corbeau* [1993] ECR I-2563, paragraph 15: 'As regards the services at issue in the main proceedings, it cannot be disputed that the Régie des Postes is entrusted with a service of general economic interest consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation'. See also ECJ, Case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-01477, paragraphs 47 and 48: 'As regards the question whether an undertaking such as IJM has been entrusted with the operation of services of general interest, it should be borne in mind that it has been given the task, through the grant of a non-exclusive concession governed by public law, of ensuring the supply of electricity in part of the national territory. Such an undertaking must ensure that throughout the territory in respect of which the concession is granted, all consumers, whether local distributors or end-users, receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers'

¹⁰¹ Compare ECJ, Case C-320/91 *Corbeau*, paragraph 15 and ECJ Case C-393/92 *Almelo*, paragraphs 47 and 48 against CFI, Case T-289/03, *BUPA and Others v. Commission* [2008] ECR II-81, paragraph 186: 'As regards the universal nature of the PMI services, it must be noted at the outset that, contrary to the theory put forward by the applicants, it does not follow from Community law that, in order to be capable of being characterised as an SGEI, the service in question must constitute a universal service in the strict sense, such as the public social security scheme'

¹⁰² CFI, Case T-289/03, *BUPA and Others v. Commission* [2008] ECR II-81, paragraph 187

¹⁰³ *Ibid.*, paragraph 42

¹⁰⁴ Within the French territory, the channel would be marginally accessible by viewers that possessed special equipment (antenna satellite or decoder) permitting the receipt of the signal via satellite through which the channel would be broadcast in Europe. See Commission decision *Chaîne française d'information internationale*, N54/2005 [2005] OJ C 256/25, paragraph 39

¹⁰⁵ See http://www.france24.com/en/?&_suid=1421416480638033961083041504025

¹⁰⁶ Note that CFII was a partnership between commercial broadcaster TF1 and PSB France Télévision, see paragraph 4 of the decision. The channel is now wholly owned by the French government after TF1 and France Télévision sold their shares to *l'Audivisuel extérieur de la France* (a holding company owned by the French government)

¹⁰⁷ For a criticism of how inconsistently the Commission has applied this provision to the media sector see Harrison, J. and Lorna Woods (2007), *supra* n. 12, 305-306

universality was treated differently. In *BBC License Fee*, the scheme provided that the new channels would be digital.¹⁰⁸ Hence, they would not be made available for analogue transmission, which was at the time the most widely used method of distribution of broadcast programming. The Commission based its approval on ‘the explicit wider policy goal of the UK government to promote digital take-up leading to switchover by the whole population’.¹⁰⁹ The temporary nature of technical constraints, a result of which the public service was not immediately available to the whole population, was also key to declaring *BBC News 24* compatible with the common market.¹¹⁰ Post-CFII, we may not determine the degree to which universality will influence an exemption under Article 106(2) TFEU.

3.3. Sports coverage as part of the public service mandate: How much is too much?

Sports coverage has been a major bone of contention in State aid cases; in most cases dealing with general aid schemes in support of PSBs, complainants put forward the argument that PSBs were excessively focused on sports and that this was an indication that they deviated from their public service mission. The Commission first tackled this issue in a case relating to aid measures in support of the Dutch public service broadcasters. The Media Act, one of the two instruments regulating the broadcasting sector in the Netherlands,¹¹¹ laid down that sports coverage, including but not limited to competition and cup matches and international events, was part of the public service remit, without, however, predetermining the amount of total broadcasting time that should be devoted to sports.¹¹² Complainants claimed that public broadcasters broadcast too much sports (and too much football in particular), thereby falling short of fulfilling the different needs of Dutch society, whilst gaining considerable market share at the expense of private competitors.¹¹³ The Commission rejected the argument, finding that ‘[s]ports can be part of the public service mission of broadcasters and *a proportion of 10% of broadcasting time dedicated to sports is not inconsistent with the remit of offering a balanced and varied programming mix*’ [emphasis added].¹¹⁴

The amount of time that public broadcasters allot to sports programming is undoubtedly an issue to consider when discussing whether PSBs indeed protect media pluralism by providing a

¹⁰⁸ Commission decision *BBC License Fee*, N631/2001 [2002] OJ C 98/1, paragraph 4

¹⁰⁹ *Ibid.*, paragraph 30

¹¹⁰ Commission decision *BBC News 24*, NN 88/98 [2000] OJ C78/6, paragraph 60

¹¹¹ Commission Decision *Ad hoc financing of Dutch public service broadcasters* C 2/2004 [2006] OJ L49/1, paragraph 19

¹¹² *Ibid.*, paragraph 23

¹¹³ *Ibid.*, paragraph 120

¹¹⁴ *Ibid.*, paragraph 121

comprehensive range of content that informs and educates the citizens.¹¹⁵ Nevertheless, this is a (national) media policy issue rather than a concern the Commission has the power to address under the State aid rules. As already explained, it is outwith the Commission's competence to decide on the nature of the programming that is provided as an SGEI. If the mandate explicitly provides that the broadcaster must transmit sports events, the Commission may merely check for manifest errors, that is, control whether commercial activities such as the resale of sports rights¹¹⁶ and sponsoring have been included in the list of public service obligations.¹¹⁷ In view of the above, establishing a threshold above which the provision of sports programming would render the aid incompatible with the Treaty violates the Member States' freedom to design the public service mandate as they deem appropriate.¹¹⁸

The approach followed in the Dutch case is in conflict with the one adopted in an older decision concerning measures supporting Italian public broadcaster RAI: commercial broadcasters complained that RAI was behaving like a private operator because it was using 'major sporting events to boost already sizeable advertising revenues'.¹¹⁹ Without referring to sports in particular, the Commission found that the remit did not contain any abuses 'insofar as it [*did*] not explicitly include any commercial activities'.¹²⁰ The direction followed in the RAI case is more in line with the principle of subsidiarity.

In terms of methodology, the decision concerning the Dutch aid measures raises two problems. First, the Commission refrained from elaborating a reasoning which would explain why, in its view, a proportion of sports that does not exceed on average 10% of the overall broadcast time is not exorbitant. It seems that in the Dutch case (where this rule emerged), this finding was based on the established practice of the public broadcaster to devote a 9-11% of total broadcasting time to sports

¹¹⁵ For example, in 2006 the Irish public service provider spent more than 16% of total prime time (the daypart with most viewers and therefore where broadcasters generate most of their advertising revenues) on sports events (see Commission decision *State financing of RTE and TG4*, E4/2005 [2008] OJ C121/1, paragraph 20, Figure 4). Thus, an excessive focus on this genre could be regarded as an indication that public broadcasters are driven by commercial rather than cultural and social considerations when it comes to sports coverage. Note that this is not limited to cases where public television is funded partly through advertising; representatives of various public broadcasters across Europe have openly stated that they prioritize premium sports programming as a means to legitimize the license fee paid by the taxpayers. See Solberg, H.A. (2007). *Sports Broadcasting: Is it a Job for Public Service Broadcasters? – A Welfare Economic Perspective*. *Journal of Media Economics*, 20(4), 305

¹¹⁶ This is a commercial activity developed by TV2 Denmark, see Commission decision *Financing of TV2/Danmark*, C 2/2003 [2011] OJ L 340/1, paragraph 35

¹¹⁷ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 48. Commercial activities unlikely to substantiate the wording of the Amsterdam Protocol include advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games and merchandising

¹¹⁸ Van Rompuy, B. and Karen Donders (2012). *Competition Law, Sports, and Public Service Broadcasting: The Legal Complexity and Political Sensitivity of Measuring Market Distortion and Public Value*. *Journal of Media Law*, 4(2), 221-222

¹¹⁹ Commission decision *Ad-hoc payments to RAI*, C 62/1999 [2004] OJ L 119/1, paragraph 53

¹²⁰ *Ibid*, paragraph 117

programs.¹²¹ The Commission ‘transplanted’ this 10% limit in its decisions relating to the schemes supporting the German and Irish broadcasters.¹²² It did so without considering significant differences among these three markets (e.g. size, structure, position held by public broadcasters in the market for sports content, interest of national audiences in following certain sports events, etc.). Second, the Commission failed to take account of the fact that public broadcasters have been providing on-demand services.¹²³ It is therefore far from clear how private operators that consider filing a complaint with the Commission should calculate the total time the public broadcaster dedicated to sports when related content is offered in a non-linear fashion.¹²⁴

The main conclusion to draw from the above is that, while it may be tempting to advocate for EU intervention in cases where the provider focuses excessively on sports programming, the Commission does not have the power to establish to what extent sports must be included in the public service remit. However, this does not mean that the State aid rules do not grant the Commission the power to establish a practice that could result in public broadcasters directing the license fee to other genres. The Commission may address this issue by exercising effective control over the amount of money dispersed to acquire (the very expensive) broadcast rights to these events in the assessment of whether the proportionality criterion is met (discussed in more detail below).

The above analysis illustrates that striking a balance between the definitional freedom of the Member States and undistorted competition has not been an easy task. In certain cases, such as *BBC News 24* and *State funding for Flemish public broadcaster VRT*, the Commission did not exhaust the means it had at its disposal to ask for amendments to the definition of broad remits that arguably allow PSBs to expand beyond what the market thinks is permissible. In other cases, however, including those concerning the German and Austrian schemes, the Commission’s pressure seems to have prompted legislative changes that clarified to a certain degree what activities may or may not be performed by the PSBs. In cases concerning sports coverage, the Commission seems to have made value judgments of the services that may fulfill a public service mission, thereby moving beyond its competence limits. Most importantly, the Commission followed unjustifiably contradictory approaches to the conditions under which services provided by PSBs may be regarded as SGEIs, even in cases of services that were assessed in the light of the same legal framework (e.g. *BBC News*

¹²¹ Commission decision *Ad hoc financing of Dutch public service broadcasters*, C 2/2004 [2006] OJ L49/1, paragraph 23

¹²² Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraph 292 and Commission decision *State financing of RTE and TG4*, E4/2005 [2008] OJ C121/1, paragraph 87

¹²³ See, for instance, the BBC’s iPlayer: <http://www.bbc.co.uk/tv/programmes/genres/sport/schedules>

¹²⁴ Van Rompuy, B. and Karen Donders (2012), *supra n.* 118, 222

24 and *BBC Digital Curriculum*). As a result, the main goal that an unambiguous and detailed description of the mandate pursues, that is, certainty, has not been achieved yet.

4. Supervision

The Commission is not competent to conduct evaluations of whether the provider complies with its public service remit, including the qualitative standards set out in that remit. The Commission may solely control whether there is a supervisory system ensuring that the public service mission is delivered.¹²⁵ In line with the Amsterdam Protocol, the Broadcasting Communication lays down that it is up to the Member States to choose the monitoring mechanism to ensure effective supervision of the fulfillment of the mandate.¹²⁶ However, it also states that for supervision to be considered effective it should be exercised by a body independent from the public broadcaster.¹²⁷ This condition does not disproportionately interfere with the Member States' freedom to organize the public service as they see fit; since the Commission does not have the power to assess whether a public broadcaster offers a varied programming or whether it respects any code for the treatment of controversial subjects with accuracy and impartiality, calling upon the Member States to have a body that can perform this task in an unbiased manner seeks to establish a minimum guarantee of fairness vis-à-vis commercial providers.

Yet, the decisions the Commission has adopted thus far have not always been consistent with the 'independence' principle, thereby creating confusion as to when a supervisory system is 'good' enough to justify a derogation from the rules on competition. For example, in *BBC License Fee*,¹²⁸ the Commission found that the BBC Board of Governors (currently the BBC Trust) satisfied the requirement of effective supervision in spite of an evident conflict of interest; the then applicable BBC Charter provided that the Governors should, at all times, include the Chairman and Vice-Chairman of the BBC, both members of the BBC's Executive Board.¹²⁹ It bears noting that, despite the fact that several amendments have been introduced to the Charter after *BBC License Fee* was adopted, the Chairman of the BBC Trust can still be the Chairman of the BBC.¹³⁰ The Commission

¹²⁵ CFI, Case T-442/03, *SIC v. Commission* [2008] ECR II-1161, paragraph 213

¹²⁶ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 54

¹²⁷ *Ibid.*

¹²⁸ Commission decision *BBC License Fee* N631/2001 [2003] OJ C23/3, paragraphs 2 and 4. The full text of the decision is available at: http://ec.europa.eu/competition/state_aid/cases/136401/136401_438497_21_2.pdf

¹²⁹ See BBC Charter (1997), Article 8(3). Retrieved from: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/archive/1997.pdf

¹³⁰ See BBC Charter (2006), Article 10. Retrieved from: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf

took an equally permissive stance in the more recent case concerning the German PSB scheme. Initially, it had expressed strong doubts¹³¹ about how effective the control exercised by the Broadcasting Councils, internal bodies of the public broadcasters,¹³² was, but it ended up concluding that the supervision requirement was met.¹³³ The Commission appears to have followed a stricter approach in *State aid financing of Irish public broadcasters RTÉ and TNAG*. In this case, it found that the general aid scheme was not in line with the State aid provisions of the Treaty because the RTÉ Authority, the division monitoring delivery of the public service mission, was ‘not a control body independent from the RTÉ but rather an integral part of it’.¹³⁴ To address the Commission concerns, the Irish authorities committed to create an independent content regulator, the Broadcasting Authority of Ireland, which is responsible, *inter alia*, for safeguarding compliance with the public service contracts.¹³⁵ In view of the above discrepancies, private providers are not sure how the Commission will deal with concerns arising from the lack of independence of the body entrusted with supervising whether the public broadcaster’s programming complies with the diversity and quality requirements laid down in the entrustment act.

The Broadcasting Communication also states that independence is important to ensure that complaints launched by interested stakeholders will be handled on a non-discriminatory basis.¹³⁶ However, in practice, the Commission does not seem to have been particularly concerned with whether the redress systems that have been set up by the Member States can lead to the imposition of appropriate remedies in cases of failure to comply. For example, in Germany, third parties, including commercial providers, can file complaints with the Broadcasting Councils and ultimately with the respective Länder (*‘Rechtsaufsicht’*).¹³⁷ This mechanism is problematic because, in addition to the fact that they are granted limited power to exercise legal supervision of the public broadcasters, those exercising external control on the Länder level are often also members of the Broadcasting Councils.¹³⁸ In spite of the fact that this issue was brought to the Commission’s attention in the context of the State aid investigation, it was not addressed in the decision.¹³⁹ Similar concerns exist in the UK where fair trading complaints, i.e. complaints that the BBC has exploited its position as a

¹³¹ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraphs 255-6. The full text of the decision is available at: http://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf

¹³² *Ibid.*, paragraph 24

¹³³ *Ibid.*, paragraph 372

¹³⁴ Commission decision *State aid financing of RTÉ and TNAG (TG4)*, EA/2005 [2008] OJ C121/5, paragraph 97. The full text of the decision is available at: http://ec.europa.eu/competition/state_aid/cases/198587/198587_816753_152_2.pdf

¹³⁵ *Ibid.*, paragraph 151

¹³⁶ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 54

¹³⁷ *Ibid.*, paragraph 26

¹³⁸ *Ibid.*, paragraphs 124 and 256-258

¹³⁹ *Ibid.*, see in particular paragraphs 368-374

publicly funded body to secure special advantages in the market, are received and handled by the BBC's Fair Trading complaints panel which is appointed by the BBC's Executive¹⁴⁰. Surely, German and UK commercial operators are not prevented from ultimately introducing actions before the national courts¹⁴¹ or from submitting complaints to the competent competition authority.¹⁴² But this undermines the purpose of the State aid sector-specific rules that seek to establish a framework within which public broadcasters operate lawfully.

The Broadcasting Communication refers only to the independence of the monitoring bodies from *the management of the public broadcaster*.¹⁴³ However, we should also consider whether, in the context of State aid control, the Commission is entitled to call upon the Member States to design their systems in a way that the body conducting supervision is also *independent from political actors*. This is an issue that arises in cases where national laws lay down that the members of the monitoring body must be members of the Parliament (or appointed by the government) and that the individuals managing the PSB must be appointed by the government. The INDIREG Study, which was conducted on behalf of the European Commission with the aim to identify the key characteristics of an independent regulator in light of the AVMS Directive, defines independence as the condition in which the regulator is '*at arm's length from all relevant actors, especially in the political sphere (government, parliament, other political forces), but also from the regulated industry*'.¹⁴⁴ The Commission could adopt the same definition of independence in the assessment of a body that is required to monitor compliance with the PSB remit and this would arguably not violate the principle of subsidiarity. The (purely economic) argument may be raised that, in cases where the body responsible for controlling whether the PSB has misused public funds consists of members of the entity that both appoints the PSB's Executive Board or Director-General and fixes the license fee contributions, the PSB has the ability and incentive to ignore its public service mission. This is all the more so if the complaints regarding failure to respect the public service contracts are examined by the same body or individuals. Irrespective of whether the PSB may ignore the public mission to serve

¹⁴⁰ BBC (2014). *Complaints Framework - Procedure No. 2: Fair trading complaints and appeals procedures*, 3. Retrieved from: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/2014/complaints_fr_work_fair_trading.pdf Any appeals may be filed to the BBC Trust. Note, however, that any appeals relating to competition law may be filed to the competent competition authority

¹⁴¹ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraph 26

¹⁴² See, for instance, http://www.bbc.co.uk/bbctrust/governance/complaints_framework/fair_trading.html

¹⁴³ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 54

¹⁴⁴ Hans Bredow Institute for Media Research *et al.* (2011). *INDIREG Report on Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive*, 5. See also European Commission (2004). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. White Paper on Services of General Interest*, COM(2004) 374 final, paragraph 3.5: '*The implementation of [SGEI] principles generally requires the existence of independent regulators with clearly defined powers and duties [...]*'

political interests or to engage in anti-competitive practices, Article 106(2) TFEU may no longer apply because the PSB has the ability and incentive to refrain from providing the SGEL.

The suggested approach would not only contribute to a more transparent use of the State resources that are directed to PSBs, but also benefit media pluralism. History is full of examples of governments that have abused their power in cases where they were entitled to appoint the members of the supervisory body. In the UK, for example, governments, most notably the Thatcher government, would make sure that the BBC Board of Governors was composed of like-minded people.¹⁴⁵ This appointment pattern has very often led to violations of the BBC's editorial freedom.¹⁴⁶ Similar concerns also exist in Italy where a specific Parliamentary Commission, Vigilanza RAI, supervises the fulfillment of the public service mandate and appoints RAI's Executive Board.¹⁴⁷ In Germany, representatives of the political parties that participate in the Broadcasting Councils¹⁴⁸ reportedly act as members of the respective parties rather than as representatives of the German society as a whole.¹⁴⁹

5. Proportionality

The Commission has no power to carry out efficiency assessments when deciding whether a PSB scheme may be exempted under Article 106(2) TFEU.¹⁵⁰ However, the Commission can check whether the amount of money dispersed exceeds the net costs of the public service mission, thereby resulting in disproportionate distortions of competition that are not necessary for fulfilling the public service remit. However, to allow the Commission to conduct a meaningful proportionality analysis,

¹⁴⁵ Klug, F., Keir Starmer and Stuart Weir (1996). *The Three Pillars of Liberty: political rights and freedoms in the UK*, 182. London: Routledge

¹⁴⁶ Ibid. See also Dyson, K., Peter Humphreys, Ralph Negrine and Jean-Paul Simon (1988). *Broadcasting and New Media Policies in Western Europe*. London: Routledge, at p. 263 and Nicholls, T., Ron Southwell, William Houseley and Peter Block (2001). *Managing in the Media*, 44. Oxford: Focal Press

¹⁴⁷ Also note that RAI's President is appointed by the government. For an overview of the applicable legal framework see, for instance, Cavino, M. and Lucilla Conte (2013). *Il diritto pubblico*, 120-121. Santarcangelo di Romagna: Maggioli. For a criticism see, for instance, Giurato B., *Carlo Freccero: Bisogna separare la Rai dalla politica*. 7 June 2013, Lettera 43. Retrieved from: http://www.lettera43.it/cultura/carlo-freccero-bisogna-separare-la-rai-dalla-politica_4367598161.htm; Nicoli, S. *Vigilanza Rai: tra conflitti di interesse dei commissari e il solito peso di Berlusconi*. 7 June 2013, Il Fatto Quotidiano. Retrieved from: <http://www.ilfattoquotidiano.it/2013/06/08/vigilanza-rai-tra-conflitti-di-interesse-dei-commissari-e-solito-peso-di-b/619818/> and Zitelli, A. *Rai: ma quale servizio pubblico?* 18 June 2014, Valigia Blu. Retrieved from: <http://www.valigiablu.it/rai-ma-quale-servizio-pubblico/>

¹⁴⁸ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, fn. 12

¹⁴⁹ See ELIAMEP (2011). *MEDIADEM Case study report 'Does media policy promote media freedom and independence? The case of Germany'*, 22. Retrieved from: <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Germany.pdf> Note that the Broadcasting Councils also elect the Directors of ARD and ZDF. See Commission decision *Financing of public service broadcasters in Germany* E3/2005 [2007] C185/1, paragraph 24

¹⁵⁰ See GCEU, Joined Cases T-568/08 and T-573/08, *Métropole télévision (M6) and Télévision française 1 SA (TF1)* [2010] ECR II-3397, paragraph 141, and Case T-275/11 *Télévision française 1 (TF1) v. European Commission* (not yet reported), paragraphs 130, 133-4 and 138

the Member States must ensure that PSBs comply with the duty to keep separate accounts between public service and commercial activities, and – what appears to have been established in recent decisions – that a body independent from the PSB is responsible for checking whether the PSBs' behavior conforms to the market. Otherwise, it is questionable whether the balance sheets and accounting reports on which the Commission bases its proportionality analysis contain accurate data. As a result, prior to examining how the Commission dealt with allegations of overcompensation, I will discuss how it approached the above two issues.

5.1. Transparency in the use of State resources: Separation of accounts between public service and commercial activities

The Broadcasting Communication lays down that a clear and appropriate separation between public service and commercial operations, including and especially a separation of accounts, is a useful tool for defending justified compensation payments for democracy-enhancing general economic interest tasks.¹⁵¹ Separation of accounts is not simply a Commission recommendation addressed to those Member States with public broadcasters that develop commercial activities, but an obligation under the Directive on the transparency of financial relations between Member States and public undertakings (hereinafter Transparency Directive or Directive).¹⁵² Pursuant to Article 4 of the Transparency Directive, all public service and commercial costs and revenues must be correctly allocated on the basis of consistently applied and objectively justifiable cost-accounting principles that must be established beforehand.

While the role that separation of accounts can play in the examination of whether cross-subsidization of commercial activities has taken place is pretty straightforward, it took a long time before compliance with this obligation became an integral part of State aid assessments in the broadcasting sector. While the Transparency Directive was adopted in 1980,¹⁵³ it was only after 2000 that its provisions started to apply to public broadcasters.¹⁵⁴ Hence, it is questionable whether the proportionality criterion was actually met in several cases that concerned aid schemes assessed before

¹⁵¹ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 61

¹⁵² Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within special undertakings [2006], OJ L318/17, Recital 16

¹⁵³ Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, [1980] OJ L 195/35. See in particular Article 4(b)

¹⁵⁴ Commission Directive 2000/52/EC on the transparency of financial relations between Member States and public undertakings [2000] OJ L 193/75. See also European Commission (2000). *Commission approves rules on separation of accounts for public service providers*. Press Release IP/00/763. Retrieved from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/763&format=HTML&aged=1&language=EN&guiLanguage=en>

the 2000 version of the Directive entered into force. More questionable is the basis on which the Commission conducted its analyses; absent any accurate data about cost and revenue allocation, how accurate can the finding that the proportionality principle is respected be? Indeed, there were decisions in which the Commission lamented that the figures it used to calculate whether public broadcasters had been overcompensated were ‘only approximate’ because there was no clear distinction between the costs incurred in the operation of the public service and those incurred in the development of commercial activities.¹⁵⁵

Yet, even long after the amended version of the Directive entered into force, proportionality assessments remained difficult, if not impossible, to conduct. For example, until 2007, when the Commission adopted the decision dealing with the general aid scheme supporting the German public broadcasters, the State authorities still had not transposed the necessary legal provisions as regards separation of accounts.¹⁵⁶ Notably, the Directive had been transposed into national law,¹⁵⁷ but Germany refrained from applying its provisions to public broadcasters. During the State aid investigation, Germany went so far as to argue that public broadcasters did not fall under the scope of the Directive¹⁵⁸ despite the fact that the statements made by the Commission in the context of the amendments made in 2000 left no doubt as to whether public broadcasters would need to maintain separate accounts.¹⁵⁹ In the case dealing with the scheme supporting Irish RTÉ, the Commission was not able to verify whether RTÉ was engaging in cross-subsidization because, while the then applicable Broadcasting Act envisaged its duty to distinguish in its accounts between public service and commercial costs and revenues, it did not lay down any rules as regards cost allocation.¹⁶⁰

Germany and Ireland undertook to introduce legislation to ensure that public broadcasters comply with the requirements set by the Directive.¹⁶¹ Both Member States seem to have respected the commitments they made to the Commission. The Irish Broadcasting Act of 2009 established RTÉ’s

¹⁵⁵ See, for instance, Commission decision *Financing of Spanish national public broadcaster RTVE*, E8/2005 [2006] OJ C 239/17, fn. 12: ‘Esta cifra sólo es aproximada puesto que los costes de RTVE (que no se han tenido en cuenta para determinar los costes del servicio público) contienen costes de servicios (empleados, etc.) que también benefician a TVE. La falta de datos detallados en las cuentas y el hecho de que no se aplique una contabilidad analítica según lo exigido por la Directiva sobre transparencia y la Comunicación dificultan la determinación y la imputación exacta de estos costes’. The full text of the decision is available at: http://ec.europa.eu/competition/state_aid/cases/198590/198590_604955_69_2.pdf

¹⁵⁶ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraph 314

¹⁵⁷ See Gesetz zur Umsetzung der Richtlinie 2000/52/EG der Kommission vom 26. Juli 2000 zur Änderung der Richtlinie 80/723/EWG über die Transparenz der finanziellen Beziehungen zwischen den Mitgliedstaaten und den öffentlichen Unternehmen (Transparenzrichtlinie-Gesetz - TranspRLG), available at: <http://www.gesetze-im-internet.de/bundesrecht/transprlg/gesamt.pdf>

¹⁵⁸ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraph 73

¹⁵⁹ See European Commission (2000), *supra* n. 154

¹⁶⁰ Commission decision *State aid financing of RTÉ and TNAG (TG4)* E4/2005 [2008] OJ C121/5, paragraphs 106-107

¹⁶¹ Commission decision *Financing of public service broadcasters in Germany* E3/2005 [2007] C185/1, paragraphs 343 and 375 and Commission decision *State aid financing of RTÉ and TNAG (TG4)* E4/2005 [2008] OJ C121/5, paragraphs 154, 179 and 180

obligation to include in its annual accounting report a statement of the cost accounting principles and methods by which costs and revenues are assigned to public service and commercial activities.¹⁶² The German Interstate Broadcasting Treaty of 2009 explicitly laid down that if ARD and ZDF developed commercial activities separate accounting would be provided for.¹⁶³ These examples illustrate the role of State aid control in promoting greater transparency in the broadcasting sector, which in turn protects the interests of commercial operators and increases the likelihood that State funds will be directed to services that deliver public value. However, given that the deadline for the transposition of the Directive was 31/07/2001,¹⁶⁴ it is clear that the reform that was achieved as a result of State aid intervention was remarkably slow.¹⁶⁵

5.2. Who should be in charge of financial supervision?

In the past, the Commission followed a rather relaxed approach in relation to the supervisory systems the Member States had set up to prevent overcompensation. For example, in Portugal verification of compliance with the public service obligations was based on annual reports produced by an internal body of auditors.¹⁶⁶ Moreover, while Portuguese law also provided that an external audit had to be carried out each year, an audit statement did not systematically accompany the internal audit reports.¹⁶⁷ In spite of the above, the Commission found that an effective mechanism was in place to monitor whether Portuguese public broadcaster RTP received more funds than was necessary to fulfill the public service mission.¹⁶⁸ The decision was later overturned by the Court *inter alia* on the grounds that ‘the information in those reports suffered from an objective weakness of which the Commission was aware’.¹⁶⁹

In recent cases, the Commission has been more eager to ensure that the Member States ensure

¹⁶² Broadcasting Act 2009, Section 109. The text is available at: <http://www.irishstatutebook.ie/2009/en/act/pub/0018/sec0109.html>

¹⁶³ *Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty) in the version of the 12th Amendment to the Interstate Broadcasting Treaty dating from 18 December 2008 in force since 1 June 2009*, Article 16a(1). The Treaty is available at: <http://www.uni-muenster.de/ITMCA/TR/wp-content/uploads/2009/05/Interstate-Treaty-on-Broadcasting.pdf>

¹⁶⁴ See Commission Directive 2000/52/EC on the transparency of financial relations between Member States and public undertakings [2000] OJ L 193/75, Article 2

¹⁶⁵ Note that infringement proceedings may settle the issue in much less time than State aid investigations. For example, the Commission filed an action under Article 258 TFEU against Luxembourg for failure to transpose the Transparency Directive. This action was filed in July 2003 and the judgment was rendered in March 2004. See ECJ, Case C-314/03, *Commission v. Grand Duchy of Luxembourg* [2004] ECR I-2257. Initiation of infringement proceedings may also have a deterrent effect. See, for instance, European Commission (2008). *State aid: Italy, Luxembourg, Latvia and Slovak Republic implement Financial Transparency Directive in full; Commission closes infringement procedures*. Press Release IP/08/1040. Retrieved from: http://europa.eu/rapid/press-release_IP-08-1040_en.htm?locale=en

¹⁶⁶ Commission decision *Ad-hoc Payments to RTP*, ex NN 133/B/01, NN 85/B/2001 and NN 94/B/99 [2002] OJ 85/5, paragraph 178

¹⁶⁷ *Ibid.*, paragraph 180

¹⁶⁸ *Ibid.*, paragraph 181

¹⁶⁹ See CFI, Case T-442/03, *SIC v. Commission* [2008] ECR II-1161, paragraph 233. See also paragraphs 225 *et seq.*

that the proportionality criterion is met. For example, in the Austrian case, the Commission noted that the financial control system was not adequate *inter alia* because the audit committee which prepared ORF's annual accounts and reports was an internal body and because the Court of Auditors did not control the finances of ORF on a regular basis.¹⁷⁰ The Austrian authorities endeavored to envisage a system whereby monitoring would be exercised by an independent regulator that would guarantee that the public broadcaster does not sell advertising below the market value or purchase premium sports rights above the market price.¹⁷¹ Similarly, in the Irish case, the Commission found that there was no mechanism ensuring that RTÉ respected market principles, including compliance with the duty not to undercut prices on the advertising market, and the duty to respect the arm's length principle in all financial transactions between the public service broadcaster and commercial subsidiaries.¹⁷² Respect of these principles, the Commission said, should be subject to 'regular external control'.¹⁷³ The Irish authorities committed to set up a mechanism whereby an independent regulator would control on an annual and a five-year basis the fulfillment of the above obligations and, where overcompensation has taken place, adjust the level of public funding.¹⁷⁴

5.3. Determining whether overcompensation has taken place: How did the Commission deal with allegations that the PSB was emptying the market for sports content?

As already mentioned, in the context of a proportionality assessment, the Commission needs to examine whether public broadcasters engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission. Such distortions occur, for instance, in cases where the PSB uses State funds to empty the market for the acquisition of premium program rights.¹⁷⁵ The issue relating to the amount of money directed to the acquisition of premium content, and in particular sports rights, has been a major cause of conflict between PSBs and private operators. This is no big surprise given how expensive and important (to attract audiences and hence advertisers) premium content is.¹⁷⁶ Examining how the Commission dealt with relevant complaints is therefore a good example to illustrate how diligent it has been in assessing whether the proportionality criterion is met.

¹⁷⁰ Commission decision *Financing of the Austrian public service broadcaster ORF*, E2/2008 [2009] OJ C 309/1, paragraphs 173 and 53

¹⁷¹ *Ibid.*, paragraphs 222 and 225

¹⁷² Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C 121/5, paragraphs 117, 115, 127

¹⁷³ *Ibid.*, paragraph 128

¹⁷⁴ *Ibid.*, paragraph 183

¹⁷⁵ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraphs 92-97. Another example is failure to undertake commercial investments in line with the market economy investor principle (e.g. the undercutting of advertising prices)

¹⁷⁶ For an analysis of the Commission's practice in this area see Chapter 3, Part 2.a. and Chapter 4, Part 3.b.

In many cases, including those concerning the German, Flemish and Irish aid schemes, complainants argued that prices paid by public broadcasters for certain sports rights could not have been refinanced under normal market conditions, thereby indicating that they had spent more than was necessary to fulfill their mandate.¹⁷⁷ However, the Commission refrained from investigating these allegations. It is worth quoting its reply to Irish commercial broadcaster TV3: ‘The Commission would like to point out that the scope of the present procedure as outlined in the Article 17 letter covers the question of the public service remit as regards sports broadcasts [*and not the*] possible disproportionate effects on competition related to the scope of sports rights acquired by RTÉ [...]’.¹⁷⁸ But why in the assessment of the legitimacy of the general scheme did the Commission refuse to examine whether the State funds allocated to the acquisition of sports rights exceeded the net costs of the public service mission? This question has yet to be answered; despite the fact that it explicitly mentioned that the possible distortions of competition caused by the purchase of sports rights would be examined separately,¹⁷⁹ no other decision dealing with aid measures in support of public broadcasting in Ireland has been adopted since then.

As previously explained, according to the Amsterdam Protocol, the Member States are free to define the remit, including sports events coverage, on the basis of national cultural traditions, not the Commission’s demands.¹⁸⁰ However, this does not mean that spending exorbitant amounts of public monies with a view to crowding out commercial operators can be swept under the Amsterdam Protocol mantra. It is worth noting that, during the relevant Commission investigations, German public broadcasters had purchased the rights to, *inter alia*, the German Cup (DFB Pokal), the games of the national football team, the UEFA Cup, the EURO, the Olympic Games, the World Cup and the Tour de France.¹⁸¹ In Austria, the ORF generalist channels had acquired the broadcast rights to the Federal League, the World Cup, the Formula 1 and major skiing and tennis competitions.¹⁸² In the ‘minority sports’ sector, rights acquired by the sports channel, ORF Sport Plus, included the rights to American football, the biathlon world cup, and several ice hockey, golf, motor sport and sailing

¹⁷⁷ Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraph 130 and Commission decision *Public financing of public service broadcaster VRT*, E 8/2006 [2008] OJ C 143/, paragraph 57

¹⁷⁸ Commission decision *State aid financing of RTE and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, at fn. 6

¹⁷⁹ *Ibid.*

¹⁸⁰ In fact, the Commission has repeatedly stated that sports may perform social, cultural and educational functions which need to be taken into account under the competition provisions of the Treaty. See, for instance, Declaration (No 29) on Sport, annexed to the final act of the Treaty of Amsterdam [1997] OJ C 340/136, and Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, Presidency conclusions, Nice European Council, Meeting, 7, 8, 9 December 2000

¹⁸¹ Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraph 111

¹⁸² Commission decision *Financing of the Austrian public service broadcaster ORF*, E2/2008 [2009] OJ C309/1, paragraph 65

competitions.¹⁸³ By referring to these examples, I do not suggest that the purchase of rights to several sports events is sufficient to establish that overcompensation has taken place. In other words, sports rights acquisition does not necessarily imply that competition has been distorted. For example, public broadcasters have occasionally been awarded the broadcast rights to the Olympic Games in spite of the fact that they had not made the highest bid.¹⁸⁴ However, the concentration of a large amount of athletics events in the hands of public broadcasters or their consistently overbidding for premium sports rights could be an indication that the proportionality principle has been violated. Hence, the Commission needs to be more diligent when it comes to determining whether public funds used to buy sports rights constitute incompatible State aid.

Related to the above is the issue of whether State aid in support of the acquisition of *exclusive* sports rights are compatible with the Treaty, which was raised in the context of the investigation into the general scheme financing German public broadcasters. Private operators argued that buying exclusive rights with public money cannot benefit from the derogation under Article 106(2) TFEU for two reasons: first, exclusivity is not necessary to offer a wide range of programs.¹⁸⁵ Second, the purchase of exclusive rights is contrary to the principle of thriftiness, since a non-exclusive right would also satisfy the viewers' needs.¹⁸⁶ Again, the Commission did not proceed to an examination of these arguments; it merely noted that 'exclusivity is an accepted practice not only to maximize revenues, but also to be distinctive from other operators. Even though guaranteed State financing makes the choice of exclusivity by public service broadcasters less dependent on financial considerations, they would still seek exclusivity to attract large audiences and to promote their overall program'.¹⁸⁷

Acquiring exclusive sports rights with State funds is not *per se* contrary to Article 106(2) TFEU.¹⁸⁸ However, for the aids to be compatible with the Treaty, there must be evidence that the restrictions of competition resulting from the exclusivity are indispensable to the performance of the

¹⁸³ Ibid., paragraph 64. As a result of the launch of Sport Plus on 1 May 2006, sports broadcasting in 2006 was increased by one half compared to 2005. See paragraph 147 of the decision

¹⁸⁴ Van Rompuy, B. and Karen Donders (2013). *The EBU's Eurovision System Governing the Joint Buying of Sports Broadcasting Rights: Unfinished Competition Business*, Competition Law Review, 9(1), 22. This is because the IOC's policy is to give preference to operators which are required to fulfill universal service obligations under their contract with the State. This is explicitly laid down in the Olympic Charter. See in particular Article 48(1): 'The IOC takes all necessary steps in order to ensure the fullest coverage by the different media and the widest possible audience in the world for the Olympic Games'. The current Charter is available at: http://www.olympic.org/documents/olympic_charter_en.pdf

¹⁸⁵ Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraph 129

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., paragraph 294. The Commission repeats verbatim the German authorities' view. Compare this paragraph to paragraph 104 of the decision

¹⁸⁸ For an overview of the case law in the area of exclusive rights and State monopolies see Buendia-Sierra, J. L. (1999). *Exclusive Rights and State Monopolies under EC Law*. Oxford: OUP

public service tasks. This was addressed in *EBU/Eurovision* where the Court ruled that, instead of simple references to the mission public broadcasters must fulfill, the Commission should have based its finding upon a minimum of actual data that might have consisted of figures for the investment made and of specific calculations establishing a ratio between those investments and the potential gains from the transmission of sports events.¹⁸⁹ As Buendia Sierra correctly remarks, this judgment should be interpreted ‘as a message directed at the Commission [...] that has to undertake a detailed economic analysis before being able to conclude that a given restriction respects the principle of proportionality’.¹⁹⁰ Considered in light of *EBU/Eurovision*, the proportionality assessment in the German case should have consisted of balancing the amount of public money that had been spent to purchase sports rights against the accrued benefits, including advertising revenues generated as a result of sports coverage and the positive contribution of athletics events transmission to the quality and variety of the broadcaster’s overall programming (the conditions under which the amount of money directed to the acquisition of sports rights may be regarded as proportionate to the costs of the public service mission will be discussed in more detail below).

The Commission seems to have followed a stricter approach to the practice of the German public broadcasters to refrain from sublicensing sports rights that they could not use themselves (e.g. pay-TV rights). More particularly, the Commission noted that the holding back of unused rights which had been acquired on an exclusive basis resulted in market distortions that were unnecessary for the fulfillment of the public service mandate and could not therefore be justified under Article 106(2) TFEU.¹⁹¹ It warned that if Germany did not create a clear and transparent system guaranteeing that public broadcasters would offer third parties sublicenses for unused rights, the scheme would be declared incompatible with the common market.¹⁹² The German authorities committed to establish the public broadcasters’ obligation to set up a sublicensing mechanism that would clarify the notion of ‘unused’ rights.¹⁹³ In addition, for the scheme to be transparent, any offers of unused rights would be published over the Internet.¹⁹⁴ The Commission was satisfied with these undertakings.¹⁹⁵

Following the adoption of the decision, the German authorities took action to comply with the commitments they had made to the Commission. Unused rights were defined as follows: ‘Rights for

¹⁸⁹ CFI, Joined Cases T-528, 542, 543 & 546/93, *Métropole télévision SA and others v Commission* [1996] ECR II-649, paragraphs 118 *et seq.*

¹⁹⁰ See Buendia-Sierra (1999), *supra n.* 188, 326

¹⁹¹ Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraph 299

¹⁹² *Ibid.*, paragraph 321

¹⁹³ *Ibid.*, paragraph 355

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, paragraph 395

live transmission are considered unused if ARD and ZDF do not intend to make a live transmission of the event. Rights are not to be regarded as unused if ARD and ZDF intended but did not manage to transmit the event live due to technical difficulties'.¹⁹⁶ Moreover, they appointed an independent Trustee to monitor the effective implementation of the sublicensing scheme.¹⁹⁷ Yet, to my knowledge, no bids to purchase unused rights have been made thus far. In its 2007 report, the independent experts commission for the assessment of the public broadcasters' financial needs (Kommission zur Ermittlung des Finanzbedarfs der öffentlich-rechtlichen Rundfunkanstalten, hereinafter referred to as KEF) noted that the public broadcasters did not manage to sublicense unused rights because private broadcasters showed no interest in buying them.¹⁹⁸ This should not be understood to mean that commercial operators are no longer interested in the transmission of premium sports content. To the contrary, sports programming is still key to attracting German audiences.¹⁹⁹ The fact that it has never been implemented demonstrates that a sublicensing mechanism as the one envisaged in the German case is not adequate to open the market for sports rights acquisition to competition. There are mainly two reasons why this is the case: first, the scheme provides that access shall be granted to unused rights, that is, rights for the transmission of sports events that will not be broadcast live by ARD or ZDF. Clearly, ARD and ZDF have the incentive to keep for themselves the most attractive content and to sublicense rights to those events that have low consumer demand. Second, as explained in detail in Chapter 3, competitors that have traditionally acquired rights to major sports events are difficult to challenge. For example, in the most recent auction for the Bundesliga rights, in the free-to-air segment, ARD managed to acquire the rights to seven live matches per season whereas commercial broadcasters secured only some minor highlights.²⁰⁰

¹⁹⁶ See document entitled 'Transparency of the business policy of the public service broadcasters in the field of sports rights in line with the commitments made to the EU Commission under the EU State aid proceedings ARD/ZDF', paragraph II. 4. The document is available through the Sport A website at: http://www.sporta.de/media/Umsetzung_des_EU_Beihilfeverfahrens_im_Sport_EN.pdf

¹⁹⁷ See http://www.sporta.de/media/Trustee_Web_EN.pdf

¹⁹⁸ Kommission zur Ermittlung des Finanzbedarfs der öffentlich-rechtlichen Rundfunkanstalten. *Report of December 2007*, 144 and 188

¹⁹⁹ See, for instance, Deloitte (2014). *Report on Broadcast Sports Rights*, 1: In 2014 about three quarters of the total value of premium broadcast rights fees will be derived from 10 competitions, including Germany's Bundesliga. The Report is available at: <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Technology-Media-Telecommunications/gx-tmt-2014prediction-broadcast-sports-rights.pdf> Earlier, in December 2005, Premiere, the German media group, lost 42% of its market value and a large part of its subscriber base, after it released a statement that it had not managed to purchase the rights to the Bundesliga, while the new Bundesliga licensee Unity/Arena attracted over 900,000 subscribers in a few months' time. See Hatton, C., Christoph Wagner and Hector Armengod (2007). *Fair Play: How Competition Authorities have Regulated the Sale of Football Media Rights in Europe*. *European Competition Law Review*, 28(6), 346

²⁰⁰ The real winner was pay-TV operator Sky Deutschland which acquired the live rights to all Bundesliga matches. See Briel, R. *Sky Deutschland wins all live Bundesliga rights*. 18 April 2012, *Broadband TV News*. Retrieved from: <http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/>

Inevitably, the above analysis gives rise to the following question: if the transmission of sports content is a public service task, how should the Commission determine whether public broadcasters distort competition in the market for sports rights acquisition?

A good point of departure for examining whether the amount of compensation does not exceed the net costs of the public service mission is to determine whether the prices paid by the public broadcaster are far above market prices. To do so, we need to calculate the prices that private operators would be willing to pay. For example, in *Ad hoc financing of Dutch public broadcasters*, in an attempt to substantiate the claim that the bid made by the public provider for the rights to the 2002 Champions League was substantially higher than the one made by commercial operators,²⁰¹ CLT-UFA submitted a formula on the basis of which commercial broadcasters calculate the potential revenue which can be earned from the transmission of a certain sports event. This formula includes the expected growth of expenditure in the whole television market, the expectations regarding potential advertising revenue following meetings with advertisers, the impact of the transmission of the sports event on the market share of the licensee and the number of national football clubs participating in the event in question.²⁰² In light of technological developments, additional factors now need to be taken into account, for instance, whether the public broadcaster is, based on the entrustment act, entitled to expand into neighboring media markets, thereby having the incentive to exploit the sports content across different platforms (e.g. DTT, IPTV, etc.) using different distribution modalities (e.g. catch-up TV, archive TV, etc.). A consultation with the industry will undoubtedly allow the Commission to identify the parameters used in the model as well as the weight that should be given to each of them.

Once the market price is defined, it should be compared against the price paid by the public broadcaster but, since the transmission of sports events has traditionally been part of the PSB public service mission, the former does not need to match the latter. In other words, this should not be a strict application of the market economy investor principle, which needs to be respected in the development of purely commercial activities.²⁰³ However, the Commission should strike a balance between prices paid to acquire rights to programs of major importance to the public and prices paid to push competitors out of the market. This balance cannot be struck by determining *ex ante* an arbitrary threshold above which it is presumed that overcompensation has taken place. The issue of whether

²⁰¹ Commission Decision *Ad hoc financing of Dutch public service broadcasters*, C 2/2004 [2006] OJ L49/1, paragraphs 72 and 120

²⁰² *Ibid.*, fn. 28

²⁰³ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 93

public funds spent to acquire sports rights exceed the net costs of the public service mission should be assessed on a case-by-case basis by integrating in the proportionality analysis ‘measurable’ public interest considerations. One way to do that is to run consumer surveys that aim to gather data about whether, and if so to what extent, sports coverage is valued by the citizens that the broadcaster is meant to serve.²⁰⁴ For example, while the vast majority of the license fee payers may wish to watch the Olympic Games or the matches of the national football team on public (free-to-air) television, this is not so clear about competitions such as the UEFA Champions League or the Tour de France. The contribution that consumer surveys can make to informing a competition analysis and the role they may play in enhancing media pluralism by, *inter alia*, enhancing exposure diversity have already been discussed in Chapter 4, to which I refer.²⁰⁵ The approach proposed here moves within the competence limits of the balancing exercise the Commission must conduct when exercising State aid control in the broadcasting sector because it respects national cultural traditions with regards to sports events whilst ensuring that public broadcasters do not empty the market for premium content.

As for the acquisition of premium program rights on an exclusive basis, it was mentioned above that, for the exclusivity to justify the derogation from the rules on competition, the possible distortions of competition should be outweighed by the benefits accrued from transmission of the content concerned. These benefits can be both economic and non-economic. Economic benefits are translated into advertising revenues generated from the transmission of the sports event. These revenues will be taken into account for the purpose of calculating the net public service costs thereby reducing the public service compensation level.²⁰⁶ When it comes to measuring the non-economic benefits gained from sports events transmission, it must be borne in mind that exclusivity does not necessarily incentivize broadcasters to invest in diverse or more original content. To the contrary, acquisition of broadcast sports rights in most cases implies spending large amounts of money precisely because successful bidders are granted exclusivity. This may be to the detriment of a balanced and varied programming which public broadcasters are expected to provide.

²⁰⁴ As will be seen in greater detail below, a solution similar to the one proposed here has been adopted by the Commission in cases where public broadcasters intend to launch a new media service

²⁰⁵ See Chapter 4, Part 4. It is worth, however, making an additional remark with regard to State aid proceedings. As opposed to merger investigations, the Commission does not need to conclude a State aid investigation within strict time limits. See European Commission. *Code of Best Practice for the conduct of State aid control procedures* [2009] OJ C 136/04. Hence, if the Commission can conduct consumer surveys in merger cases, this means that it has plenty of time to do so also in the context of an Article 106(2) TFEU analysis

²⁰⁶ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 67

A detailed analysis of whether the proportionality criterion is met may go a long way towards keeping the market for the acquisition of premium sports content open to competition. It may be particularly beneficial for free-to-air television that has traditionally been dominated by public service providers insofar as sports coverage is concerned. In other words, if the Commission demonstrated the willingness to conduct thorough assessments that could lead to the conclusion that the public value created by the purchase of sports rights does not outweigh the harm to competition, public broadcasters might be forced to introduce reasonable limits to the amount of money they would be prepared to spend in order to acquire these rights. In their turn, these limits would allow commercial operators to outbid public broadcasters. An example is the Norwegian market where public broadcaster NRK traditionally broadcasts domestic football. When the rights covering the period 2006-2008 were auctioned, NRK found them to be too costly and did not make a bid. This decision resulted in the rights being acquired by commercial free-to-air broadcaster TV2.²⁰⁷ While not the outcome of State aid proceedings, this example illustrates why, to the extent that they afford a private operator the opportunity to access premium sports and hence attract audiences, expenditure ceilings may enhance supply diversity. Thriftiness in the acquisition of these rights may also promote content diversity. Solberg, who conducted empirical research in this area, found that public broadcasters which have engaged in aggressive strategies in the market for sports content have been forced to reduce programs that have the characteristics of merit goods and create positive externalities.²⁰⁸ On the contrary, other broadcasters, which have refrained from using the license fee to purchase rights to major sports events, have not lost their relevance to the public. One example is the BBC, which has not transmitted live football matches of the Premier League since 1988²⁰⁹ when broadcast rights to this competition started to be very expensive.²¹⁰

The above analysis shows that the assessments of whether the proportionality criterion is met have been rather superficial. For example, while having often referred to the role that premium content plays in driving audience demand, the Commission paid little to no attention to the complainants' claims that PSBs may have emptied the market for sports content. This, of course, should not be understood to mean that State aid control had no impact on the national PSB systems that were discussed above. To the contrary, it was seen that the Commission's intervention under the State aid rules has led to the application of the Transparency Directive to public broadcasters in

²⁰⁷ Solberg, H.A. (2007), *supra*. n. 115, 303

²⁰⁸ *Ibid.*, 302

²⁰⁹ *Ibid.*, 303

²¹⁰ For an overview of the reasons why prices of premium content in the UK skyrocketed see, for instance, Ibáñez Colomo, P. (2006). *Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector*. College of Europe Working Paper Series 7/2006

Germany and to the establishment of a clearly defined cost-allocation procedure in Ireland. These amendments reduce the ability and incentive to engage in anti-competitive practices, thus strengthening the overall legitimacy of the public broadcasting system. The same holds true for cases where, as a result of State aid proceedings, independent authorities have been established to exercise financial supervision. Overall, however, the Commission has by no means made full use of the State aid law toolkit to ensure that the public funds directed to PSBs are indeed limited to the net costs of the public service mission.

6. Defining the online remit: The introduction and implementation of the Amsterdam test

This part will examine the role that State aid control has played in the expansion of public broadcasters into new media markets where PSBs compete with a larger group of content providers. Hence, the research question is now reformulated into: has the right balance between public broadcasters and private operators, including newspapers, magazines, blogs and IPTV providers that are advertising and/or subscription-based been struck? To answer this question I will first examine how the Commission dealt with the diversification of the public broadcasting offer in State aid cases concerning the definition of the online remit, and in particular the decision to call upon the Member States to conduct an *ex ante* assessment, named ‘Amsterdam test’ (after the Amsterdam Protocol on PSB), of new media services sought to be provided by the public broadcaster. Subsequently, I will discuss whether Member States that undertook to introduce the Amsterdam test have indeed respected the commitments they made to the Commission and if so, whether the test has been effectively implemented.

The Amsterdam test was inspired by the BBC’s Public Value Test (PVT), which was introduced in UK legislation in 2006 as a means to better position the BBC’s role in the digital age.²¹¹ The BBC PVT consists of two parts, a Public Value Assessment, which is conducted by the BBC Trust,²¹² and a Market Impact Assessment, conducted by Ofcom.²¹³ The Trust studies the outcome of both procedures and approves the provision of the service if the impact on the market is sufficiently

²¹¹ The PVT was introduced alongside other changes that took place in the context of the BBC Charter review. For more information on the BBC Charter review see, for instance, UK Department for Culture, Media and Sport (2006). *A Public Service for all: the BBC in the digital age*. Retrieved from:

http://webarchive.nationalarchives.gov.uk/+http://www.bbccharterreview.org.uk/have_your_say/white_paper/bbc_whitepaper_march_06.pdf For more information on the reasons underlying the UK’s decision to introduce the PVT see Gibbons, T. (2009). *The Future of Public Service Content in the United Kingdom*. Journal of Media Law, 1(1), 1-13

²¹² The BBC Trust is the governing body of the BBC consisting of 12 Trustees and assisted by a team of independent experts, the Trust Unit. For more information on the BBC Trust see: http://www.bbc.co.uk/bbctrust/about/who_we_are/index.shtml

²¹³ BBC Trust (2007). *Public Value Test (PVT): Guidance on the conduct of the PVT*, 4

justified by the public value the new service is likely to create.²¹⁴ The reports of both the PVA and the MIA are published²¹⁵ for the sake of transparency, whereas the test also involves a consultation with interested stakeholders, including license fee payers.²¹⁶

Before the Amsterdam test was introduced in the 2009 Broadcasting Communication, negotiations in the context of State aid investigations had already led to the commitment by the Member States concerned to conduct an *ex ante* assessment. The first case in which the design and implementation of a prior evaluation procedure was made legally binding is the one dealing with the German PSB scheme.²¹⁷ The reasons that prompted the Commission to export the BBC PVT are not entirely clear. Two factors seem relevant though. First, in the beginning of the 2000s, the Commission started to receive a number of complaints against the financing of PSBs' online activities, which were allegedly not covered by the public service mandate thereby potentially distorting competition in the markets for online services.²¹⁸ Complainants were not only private broadcasters, but also cable operators²¹⁹ and newspaper associations.²²⁰ It was therefore obvious that as the PSB offer expanded into online markets, so did the group of competitors that were potentially affected by the relevant aid measures.²²¹ The UK was the only Member State that had, at the time, made legislative changes to reposition its PSB in new media markets. Second, the discussions with Germany about the possible introduction of an *ex ante* assessment for new media services appear to have coincided with Commission initiatives aimed to reform State aid policy. The State Aid Action Plan, a consultation document which was presented by the Commission in 2005 and initiated this reform, makes reference to 'higher predictability' and 'enhanced transparency' as some of the key elements of State aid policy modernization.²²² The BBC PVT, which is meant to assess the provision of services beforehand and which involves interested stakeholders, including competitors and taxpayers, seems appropriate to increase 'predictability' and 'transparency'. The Commission must

²¹⁴ Ibid., 18. Several criteria are taken into account in the context of the PVA, for instance whether the new service stimulates creativity and cultural excellence and whether it sustains citizenship and civil society. For more information on the factors that are considered in the framework of the PVA see *ibid.*, 13

²¹⁵ Ibid., 17

²¹⁶ Ibid., 12

²¹⁷ It is worth noting that when the Commission initiated the discussion about the need to establish an *ex ante* procedure to align the German PSB legal framework with Article 106(2) TFEU, the BBC PVT had not been implemented yet. This discussion started in 2005 whereas the first BBC PVT was conducted in 2007. See Donders, K. (2011). *The Public Value Test: A Reasoned Response or Panic Reaction?* In Donders, K. and Hallvard Moe (eds.). *Exporting the Public Value Test. The regulation of public broadcasters' new media services across Europe*. Göteborg: Nordicom

²¹⁸ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraphs 67 *et seq.*

²¹⁹ Ibid., paragraph 71

²²⁰ Commission decision E2/2008, *Financing of the Austrian public service broadcaster ORF* [2009] OJ C309/1, paragraph 1

²²¹ See, for instance, European Commission. *Press Release 'State aid: Commission consults on revised rules for state funding of public service broadcasting'*. Press Release IP/08/1626. Retrieved from: http://europa.eu/rapid/press-release_IP-08-1626_en.htm?locale=en

²²² European Commission. *State Aid Action Plan 2005: Less and better targeted state aid: a roadmap for state aid reform 2005 - 2009*, Consultation Document COM (2005) 107 final, 5-6

have therefore thought that an instrument similar to the BBC PVT could be a good option for streamlining the State aid review process in cases of PSB expansion into neighboring media markets.

Before I discuss in detail the issues that have arisen from the introduction and implementation of the Amsterdam test, I will outline the main steps of the procedure as it is described in the Broadcasting Communication and explain what services need to undergo the test to benefit from the derogation under Article 106(2) TFEU.

The Commission entrusts the Member States with setting up a mechanism whereby both the public value of the new service and its impact on the market must be appraised. The Commission refrains from providing detailed guidance on the public value assessment on the grounds that each Member State is in a better position to decide whether a new service substantiates the wording of the Amsterdam Protocol.²²³ As regards the effects on the market, the Commission refers to several factors that can be included in the analysis such as the existence of similar or substitutable offers, editorial competition, the market structure, the position of the public service broadcaster in the market, the level of competition and the potential impact on private initiatives.²²⁴ The Commission requires this market impact to be balanced against the public value of the service.²²⁵ The procedure must involve interested stakeholders by means of an open consultation.²²⁶

The Broadcasting Communication lays down that ‘significant new’ services must pass the Amsterdam test. It is up to the Member States to decide what qualifies as a ‘significant new’ service.²²⁷ For example, according to the Commission, the ‘new’ nature of the service may depend on its content, but also on the modalities of consumption.²²⁸ The ‘significance’ of the service may depend on the public funds required for its provision and the expected demand.²²⁹ If a significant new service passes the Amsterdam test, it does not need to be notified to the Commission as ‘new aid’²³⁰

²²³ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 86

²²⁴ *Ibid.*, paragraph 88

²²⁵ *Ibid.*

²²⁶ *Ibid.*, paragraph 87

²²⁷ *Ibid.*, paragraph 85

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*, paragraph 91. It is, however, not entirely clear whether the aid measure supporting the new service would qualify as existing or new aid. The Commission, arguably deliberately, refrained from addressing this issue in relevant decisions. For example, in the German case, it concluded that the new digital channels launched by ARD and ZDF were part of the existing remit, but conducted no analysis of whether new media services such as chats and online games provided the PSBs were new or existing aid. See, for instance, Commission decision *Financing of public service broadcasters in Germany*, State aid E 3/2005 [2007] C 185/1, paragraph 209 *et seq.* Similarly, the Broadcasting Communication, which includes a section explaining what qualifies as ‘existing aid’, does not clarify this issue (see paragraphs 25-31). While one could argue that a new service may imply ‘new aid’ and should therefore be notified to the Commission, it should also be borne in mind that, as a result of the commitments that they made in the context of the relevant State aid

(see above, Part 2). Of course, the Commission retains the right to verify, whenever it deems appropriate, whether Member States apply the test in line with the State aid rules. A final note on the scope of the Amsterdam test: the Commission leaves considerable room for services that do not need to go through an evaluation procedure. For example, the simultaneous transmission of TV news on other platforms²³¹ and the online offer of program-related content, that is, content that is limited to serving and supporting the TV programming,²³² may qualify as ‘existing aid’.

6.1. The Commission’s decision to import the BBC PVT: Stretching competence to address market and consumer needs?

The Commission’s decision to impose upon the Member States the obligation to design a prior evaluation procedure for the provision of new media services has been severely criticized on the grounds that it violates the right of the Member States to organize the public service remit as they see fit. More particularly, in the context of the consultation on the revision of the 2001 Broadcasting Communication, interested stakeholders argued that Article 106 TFEU does not establish the duty to conduct an *ex ante* assessment for new media services and that, as a result, an aid scheme that does not envisage a procedure that complies with the Commission’s instructions may not be declared incompatible with the common market.²³³

This argument is not convincing. Article 106(3) TFEU broadly lays down that the Commission is bound to ensure the application of the provisions of this Article and to address, where necessary,

proceedings, the Member States have made amendments to the provisions defining the public service remit. These provisions expressly lay down that the PSBs are entitled to have online offerings. This means in practice that, in case a complaint regarding a new service is filed with the Commission, the Member States will argue that the service in question was launched to fulfill the existing remit. And, as already explained in Part 2, the Commission has been willing to accept this argument. For example, in older cases such as *BBC Digital Curriculum*, which concerned new projects not included in the list of public services and which, similar to the ‘significant new service’ of the Amsterdam test, were subject to a separate act of entrustment, the Commission found that the services under scrutiny were part of the existing remit.

²³¹ *Ibid.*, fn. 51

²³² Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraph 209

²³³ See, for instance, European Federation of Journalists and European Region of UNI-MEI Global Union (2009). *Position on the Commission’s consultation on the second draft revised Broadcasting Communication*, 3; European Broadcasting Union (2009). *Review of the Communication from the Commission on the application of State aid rules to public service broadcasting-EBU Reply*, paragraph 14; Swedish Public Service Broadcasters (2009). *Response of the three Swedish Public Service Broadcasters, Sveriges Radio AB, Sveriges Television AB and Sveriges Utbildningsradio AB to the draft Broadcasting Communication of the European Commission*, 1. On the position of interesting stakeholders on the Commission’s lack of competence to introduce an *ex ante* assessment see also Italy (2009). *Proposta di comunicazione della Commissione relativa alla applicazione delle norme sugli aiuti di Stato al servizio pubblico di radiotelevisione*, 1 and 2; Malta (2009). *Malta’s Comments on the draft Communication from the Commission on the application of State Aid rules to public service broadcasting*, 1; BBC Trust (2009). *BBC Comments on the Draft Communication from the European Commission on the application of State aid rules to Public Service Broadcasting*, 4; Denmark (2009). *Reply to the Commission’s consultation on the draft communication on the application of State aid rules to public service broadcasting*, 2; EEA EFTA States (2009). *EEA EFTA Position on the draft communication on the application of State aid rules to public service broadcasting*, 2, and France (2009). *Révision de la communication de la Commission concernant l’application aux services publics de radiodiffusion des règles relatives aux aides d’Etat*, 2 and 3. The comments on the first and second drafts of the Broadcasting Communication are available at: http://ec.europa.eu/competition/consultations/2008_broadcasting/index.html and http://ec.europa.eu/competition/consultations/2009_broadcasting_review/

appropriate directives or decisions to the Member States so that aid measures in support of SGEIs are in line with the Treaty. Provided that one accepts that a legal norm must be construed consistently with present social and economic circumstances, and that ‘cross-mediality is a *sine-qua-non* for the future of public service media’,²³⁴ the wording of Article 106 TFEU is flexible enough to support the interpretation that the Commission has the power to call upon the Member States to introduce a prior evaluation procedure as a means to ensure that the operation of public service media does not disproportionately harm competition.

In addition to strong doubts about whether the Commission has moved beyond the sphere of its competence, concerns have been raised about whether the test can indeed make a positive contribution to the development of public service media. For example, the *ex ante* assessment of new services, conducted on a case-by-case basis, has been argued to introduce a market failure logic into public broadcasting which will inevitably lead to the marginalization of public broadcasting organizations.²³⁵ Related to the above, the view has been expressed that a case-by-case assessment, which must take account of existing offers, almost dictates how the online remit should be defined, thus undermining the public broadcasters’ editorial independence.²³⁶ Moreover, given how different the public broadcasting systems across the Union are, it has been questioned whether a uniform requirement to establish a prior evaluation procedure is appropriate;²³⁷ the BBC Public Value Test is said to have been designed for a specific organization that operates in a specific media market. As a result, it should not be imported into other Member States, in particular smaller Member States, which may lack the necessary resources to conduct the *ex ante* analysis.²³⁸

There are solid grounds for the above concerns. Yet, condemning the introduction of the Amsterdam test without placing it in the wider context in which its introduction was decided would obscure a full understanding of the needs of the consumers/citizens, public broadcasters and commercial operators. While not attempting to advocate for sweeping State aid controls in the broadcasting sector, a question is worth asking: in view of the financing of many new media services

²³⁴ Pauwels, C. *Television Beyond Frontiers: Reflections on public service broadcasting in a digital Europe*. 22 November 2010, Lecture given at the London School of Economics. Retrieved from: <http://www.youtube.com/watch?v=8wy1G1aFWnc>

²³⁵ Donders, K. (2009). *State Aid and Public Service Broadcasting. How future Proof is the Remit of Public Broadcasting Organizations?*, 206. In Pauwels, C., Harri Kalimo, Karen Donders and Ben Van Rompuy (eds.), *Rethinking European Media and Communications Policy*. Brussels: VUB Press

²³⁶ See, for instance, Czech Republic (2008). *Reply to the Commission’s Questionnaire ‘Revision of the Communication from the Commission on the application of State aid rules to public service broadcasting’*, 8. Retrieved from: http://ec.europa.eu/competition/state_aid/reform/comments_broadcasting/cs.pdf

²³⁷ See, for instance, Danish Broadcasting Corporation (2008). *Review of the Communication from the Commission on the application of State aid rules to public service broadcasting-The Reply of the Danish Broadcasting Corporation*, 21. Retrieved from: http://ec.europa.eu/competition/state_aid/reform/comments_broadcasting/dbc.pdf

²³⁸ See, for instance, European Broadcasting Union (2009), *supra*. n. 230, paragraph 18

out of the license fee, can a prior evaluation procedure contribute to a legitimate transition from public service broadcasting to public service media? This question may be answered as follows: a case-by-case assessment may increase transparency in the market. As a result, the launch of a new service is not based on all-encompassing remit definitions, but a specific act of entrustment. Hence, the test is in principle a useful tool for providing clarity to commercial providers regarding the services that may or may not be provided by the broadcaster, thereby establishing a degree of certainty. In Part 3.1. I have extensively discussed why certainty is key to leveling the playing field between public broadcasting and competition. Furthermore, taking account of existing commercial offers does not imply the introduction of a market failure approach to public broadcasting; similar commercial services are only one out of many parameters that determine whether the public broadcaster should provide the service or not. This parameter does not subject the provision of the service to market offers, but implies that the service must be *distinctive* enough to convey an added public value, which is one of the main rationales for financing a media organization out of State resources. As the report ‘*Public Broadcasting, Why? How?*’ prepared by the World Radio and Television Council states being distinctive ‘is not merely a matter of producing the type of programs other services are not interested in, aiming at audiences neglected by others, or dealing with subjects ignored by others. It is a matter of doing things differently, without excluding any genre’.²³⁹ Taking account of existing market offers is arguably an opportunity to ‘innovate, create new slots, new genres, set the pace in the audiovisual world and pull other broadcasting networks in their wake’.²⁴⁰ Finally, competitors are no longer limited to waiting for lengthy State aid proceedings to address their concerns. Through the consultation that forms part of the test, they may actively participate in the process leading to the decision approving or rejecting the scheme. If the test is indeed applied in a non-discriminatory manner and the concerns are well-founded, they will play a role in the balancing exercise conducted by the competent authorities. Finally, the test also envisages citizen participation in the consultation process. This novel aspect may stimulate citizen involvement in the formulation of public broadcasting policies, promoting exposure diversity.²⁴¹

Technological developments and the Member States’ affirmation that ‘the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age’²⁴² have

²³⁹ World Radio and Television Council (2000). *Public Broadcasting Why? How?*, 11. Retrieved from: <http://unesdoc.unesco.org/images/0012/001240/124058eo.pdf>

²⁴⁰ Ibid.

²⁴¹ See Donders, K. (2011), *supra n.* 217

²⁴² Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on public service broadcasting [1999] OJ C 30/1, paragraph 6

initiated the shift from public service broadcasting to public service media. This means that the areas in which public broadcasters operate have expanded. To the extent that the Amsterdam test can contribute to balancing public service media against a larger number of commercial content providers, competence disputes seem to get hold of the wrong end of the stick. Research should rather focus on whether the Member States that have made relevant commitments to the Commission have indeed implemented the Amsterdam test and if so, whether there are indications that the test has been a useful tool to reposition PSBs in digital markets in a more legitimate manner. The following section will attempt to answer these two questions, shedding some light on the issues that have arisen in the application of the Amsterdam Protocol in certain Member States.

6.2. How did the Member States attempt to reposition PSB in new media markets? The introduction and implementation of the *ex ante* test in Germany, Spain and Ireland

The above section discussed the Commission's decision to impose upon the Member States the obligation to introduce an *ex ante* evaluation procedure to ensure that the provision of a new media service by public broadcasters justifies a derogation from Article 106(2) TFEU. It concluded that the prior evaluation procedure may in principle be a dynamic tool of public sector governance. This section looks into whether three Member States, namely Germany, Spain and Ireland have introduced and applied the test and if so, to what extent implementation has been effective. These countries were selected for mainly two reasons. First, in all three cases, the Member States seem to have introduced the *ex ante* test in order to address concerns that were raised in the context of State aid proceedings. In other words, this was not a voluntary implementation. Therefore, this selection serves the purpose of the Chapter which looks into how State aid control may influence national public broadcasting policies that seek to, *inter alia*, protect media pluralism. Second, each Member State examined here represents each of the three models of media systems identified in the seminal study of Hallin and Mancini, that is, the North-Central European/Democratic Corporatist model (Germany), the Mediterranean/Polarized Pluralist model (Spain), and the North Atlantic/Liberal model (Ireland).²⁴³ Comparative studies of modern media policies of the EU Member States follow the same approach.²⁴⁴

This section will seek to answer the following questions: have the Member States complied

²⁴³ Hallin, D. C. and Paolo Mancini (2004). *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press. Having studied whether and if so, how the test has implemented in other countries, I acknowledge, however, that even in Member States belonging to same group different issues may arise. Reference to other States, where appropriate, will be made

²⁴⁴ See, for instance, CMPF (2013, December). *The CMPF selected the nine countries to conduct the pilot-implementation of the Media Pluralism Monitor*. The implementation is still underway: <http://cmpf.eu.eu/News/All/131211MPMninecountries.aspx>

with the requirements set by the Commission? If so, has the Amsterdam test managed to reposition public service broadcasting in new media markets in a manner that is in line with Article 106(2) TFEU? If not, what are the main drawbacks? Answering these questions is key to drawing conclusions on whether the Commission, through the enforcement of the State aid rules in cases dealing with the expansion of public broadcasters into new media markets, has indeed struck the desired balance between public service and private media. The analysis does not attempt to discuss all the issues that have arisen in the implementation of the three tests. It will, however, highlight some of the main concerns that emerged during their implementation and reflect on whether the decisions of the competent bodies establish a degree of fairness vis-à-vis commercial operators.

6.2.1. Germany: The Drei-Stufen test²⁴⁵

Since 2002, the Commission received a number of complaints against several aspects of the German scheme supporting public broadcasting services.²⁴⁶ The complainants alleged, *inter alia*, that online activities offered by ARD and ZDF were not covered by the public service remit.²⁴⁷ In December 2006, Germany submitted commitments to amend the scheme.²⁴⁸ More particularly, to address the Commission's concern that the lack of a clear and precise definition of the new media services that could form part of the remit could distort competition in online content markets,²⁴⁹ the German authorities proposed to introduce an evaluation procedure ensuring that a new media service sought to be provided by ARD or ZDF is assessed beforehand.²⁵⁰ Germany undertook to incorporate this procedure, also known as the *Drei-Stufen* (three-step) test, into the 12th Interstate Broadcasting Treaty,²⁵¹ the cornerstone of German broadcasting regulation.²⁵²

The amended Broadcasting Treaty expressly lays down that ARD and ZDF are entitled to offer *non-program related*²⁵³ *electronic information and communications services*,²⁵⁴ referred to as

²⁴⁵ For an analysis of how this procedure was implemented in other States that belong to the Democratic Corporatist model see, for instance, Donders, K. (2011). *Superficial Harmonization Versus One-Size-Fits-All: The Implementation of European State aid principles in Flanders and the Netherlands*. *Journal of Media Law*, 3(2), 237-261

²⁴⁶ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraph 1

²⁴⁷ *Ibid.*, paragraphs 68 and 70

²⁴⁸ *Ibid.*, paragraph 4

²⁴⁹ *Ibid.*, paragraphs 229-236

²⁵⁰ *Ibid.*, paragraph 327 *et seq.*

²⁵¹ Schulz, W., Thorsten Held, Stephan Dreyer and Thilo Wind (2008). *Regulation of Broadcasting and Internet Services in Germany. A brief overview*, 19. Working Papers of the Hans Bredow Institute, 2nd edition, No. 13. Retrieved from: http://www.hans-bredow-institut.de/webfm_send/124

²⁵² ELIAMEP (2010). *MEDIADEM Background Information Report on Media policies and Regulatory Practices in a selected set of European countries, the European Union and the Council of Europe: The case of Germany*, 19. Retrieved from: <http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/Germany.pdf>

²⁵³ 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), Article 11d(3). Retrieved from: <http://www.uni-muenster.de/ITMCATR/wp-content/uploads/2009/05/Interstate-Treaty-on-Broadcasting.pdf>

'telemidia', provided that they are necessary *'from a journalistic or editorial point of view'*.²⁵⁵ This is an improvement in the definition of the public service remit because, prior to the Commission's intervention, PSBs would base the supply of new media services such as traffic, weather and stock exchange data, chat rooms and telegames on the provision of the Interstate Broadcasting Treaty that allowed them to offer on online platforms only program-related content.²⁵⁶ Private operators were, arguably justifiably, dissatisfied with this practice.²⁵⁷ However, while clarifying that non-program related content is part of the public service mandate, the definition of telemidia is still broad. As already seen, an expansive remit is generally considered, in view of the interpretative provisions of the Amsterdam Protocol and the editorial independence of PSBs, legitimate under Article 106(2) TFEU.²⁵⁸ Yet, expansive does not mean vague; a loose definition in the Treaty means in practice that the protection of the interests of commercial operators, and in particular the certainty they must be able to enjoy to make investment decisions, depends on the effective implementation of the Drei-Stufen test, which requires a clear description of the significant new service concerned. As will be seen in greater detail below, it is questionable whether the Drei-Stufen test has indeed been effectively implemented.

Before discussing in detail the issues that arose in its implementation, two remarks need to be made as regards the scope of the Drei-Stufen test. First, under Article 11d of the Treaty, not all telemidia must undergo the prior evaluation procedure. More particularly, public broadcasters may provide their linear content (or content relating to a specific broadcast program) on demand for up to seven days following transmission.²⁵⁹ Events of major importance to society, including World Cup matches and matches of the 1st and the 2nd German football divisions, may be offered on demand for up to 24 hours after the event.²⁶⁰ Second, the Treaty lays down a list of services that may not be regarded as telemidia fulfilling the public service mandate. This list includes acquired feature films and acquired episodes of television series.²⁶¹ The time limits that apply to sports content and the exclusion of feature films and acquired TV series from the online public service remit imply that the German legislator has put a 'commercial' tag on premium content. It is unclear whether these

²⁵⁴ Ibid., Article 2(1)

²⁵⁵ Ibid., Article 11d(1)

²⁵⁶ Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraphs 214, 120, 18, 14 and fn. 4

²⁵⁷ See, for instance, paragraph 120 of the decision

²⁵⁸ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 47

²⁵⁹ See 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), Article 11(d)(1) and (2)

²⁶⁰ Ibid., Article 11(d)(1). Note that these time limits have also been criticized on the grounds that they are too short thereby preventing the license fee payers from accessing content they have already paid for. See Dörr, R. (2011). *The ZDF three-step test. A dynamic tool of governance*, 80. In Donders, K. and Hallvard Moe (eds.), *supra n. 241*

²⁶¹ 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), Article 11d(5)

limitations were introduced as a result of the negotiations that had taken place between the Commission and the German authorities. However, given that the amount of time and funds PSBs devoted and directed respectively to premium content was one of the main issues addressed in the decision, State aid control seems to have played a role in this legislative change. This is a positive development from both a competition and a pluralism perspective. From a competition perspective, commercial providers are certain about the activities PSBs may develop to attract mass audiences to their online content. From a pluralism perspective, aids in support of the expansion into new media markets must be directed to more original content.²⁶² Put simply, if public broadcasters wish to reposition online, they need to provide content other than Hollywood blockbusters and football matches.

All other new media services need to undergo the prior evaluation procedure. The *Drei-Stufen* test is established in Article 11f(4) of the Interstate Broadcasting Treaty, which reads as follows:

‘§4. For a planned new offer or the planned modification of an existing offer pursuant to (1), the broadcasting corporation must demonstrate to its competent council that the planned, new or modified offer is covered by its remit. Details shall be given on the following:

- 1. To what degree the offer conforms to the democratic, social and cultural needs of society,*
- 2. To what degree the offer contributes to editorial competition in a qualitative manner, and*
- 3. What financial expenditure is required for the offer.*

The details should also take into consideration the quantity and quality of the existing, freely accessible offers, the impact of the planned offer on the market and its function regarding the formation of opinion in the light of existing comparable offers including those of public service broadcasting. The expected duration of the offer must be specified.

§5. Prior to the realization of a new or modified offer, the competent council shall offer the opportunity to third parties to comment on the specifications pursuant to (4) in a suitable manner, especially via the Internet. Comments shall be possible for a minimum period of six weeks following publication of the planned offer. The competent council of the broadcasting corporation must analyze the comments received. For the purpose of preparing its decision, the competent council may commission opinions by independent experts at the expense of the respective broadcasting corporation; expert opinion must be sought regarding market impact. The name of the expert must be published. The expert may seek further information and comments; comments may be forwarded directly to the expert’.

²⁶² The general remit of German PSBs is defined in Article 11(1) of the Interstate Broadcasting Treaty which reads as follows: ‘[u]nder their remit, the public-service broadcasting corporations are to act as a medium and factor in the process of the formation of free individual and public opinion through the production and transmission of their offers, thereby serving the democratic, social and cultural needs of society. In their offers, the public service broadcasting corporations must provide a comprehensive overview of international, European, national and regional events in all major areas of life. In so doing, they shall further international understanding, European integration and the social cohesion on the federal and state levels. Their offers shall serve education, information, consultation and entertainment. They must in particular provide contributions on culture. Entertainment should also be provided in line with a public-service profile of offers’

The *Drei-Stufen* test was applied extensively following Germany's decision to subject to an evaluation procedure all online services that public broadcasters were already providing and would continue to provide after June 1, 2009 (when the 12th amendment to the Treaty entered into force).²⁶³ This process was concluded in August 2010 and proved to be a very costly exercise.²⁶⁴ Yet, even before the Treaty entered into force, there was a strong indication that the completion of the prior evaluation procedure would require considerable (State) resources to complete: In 2008, a *Drei-Stufen* test for a website for pre-school children, www.kikaninchen.de, was voluntarily implemented.²⁶⁵ The cost for the expert advice sought amounted to around €220,000.²⁶⁶ To state the obvious, this is far from a negligible public expenditure. However, this figure must also be considered against the fact that the production costs of *kikaninchen* were estimated at around €330,000.²⁶⁷ This raises the question of whether an *ex ante* assessment undermines one of the main objectives it seeks to achieve, that is, a more rational use of public funds directed to the performance of democracy-enhancing tasks. However, the high cost that the completion of the test entails is no big surprise. Let's now take a look at the other, less anticipated, issues that arose in the implementation of the *Drei-Stufen* test.

As already mentioned above, the first step of the *Drei-Stufen* test consists in identifying to what degree the offer conforms to the democratic, social and cultural needs of German society. The Interstate Broadcasting Treaty does not provide any further details on the parameters that may guide the Broadcasting Councils, the bodies entrusted with applying the test, when deciding whether or not the service fulfills the public service remit. Nor is this uncertainty resolved by the Treaty provision that defines the objectives that public broadcasters must pursue through the supply of telemedia; the telemedia offer is subject to the fulfillment of the vaguely worded mission 'to enable all groups of society to participate in the information society, offer orientation and foster technical and content media literacy for all generations and minorities'.²⁶⁸ Avoiding a straightjacketed delineation of the mandate, which may limit the potential of a public service media organization, and protecting the PSB's editorial freedom, a principle which in Germany is sacrosanct,²⁶⁹ seem to be the *rationales*

²⁶³ 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), fn. 25

²⁶⁴ This 'time consuming and costly' exercise was concluded in August 2010. See ELIAMEP (2011). *MEDIADEM Case study report 'Does media policy promote media freedom and independence? The case of Germany'*, 23. Retrieved from: <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Germany.pdf>

²⁶⁵ For a comprehensive overview see Katsirea, I. (2011). *The Three-Step Test – Three Steps Forwards or Backwards for Public Service Broadcasting in Germany?*, 59-67. In Donders, K. and Hallvard Moe (eds.), *supra n.* 241

²⁶⁶ See, for instance, Burhardt, K., *Dreistufiger Unsinn: Die Drei-Stufen-Tests gefährden die Glaubwürdigkeit der Medienaufsicht*. 9 March 2009, CARTA. Retrieved from: <http://carta.info/6097/dreistufiger-unsinn-drei-stufen-test/>

²⁶⁷ *Ibid.*

²⁶⁸ 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), Article 11d(3)

²⁶⁹ Article 5 of the German Constitution establishes freedom of the media. Additionally, the German Constitutional Court has stressed the right of public broadcasters to form their programming free from any State influence. See, for instance, BVerfG, BvR 2270/05

behind this potentially all-encompassing mandate. However, as I mentioned above, even if on a Treaty level a broad definition of the online remit is acceptable, on a specific entrustment act level, the new service must be defined in clear and precise terms. If not, this means that the legal framework fails to achieve certainty. A good example illustrating this problem is *NDR Mediathek*, a decision dealing with the provision of a live streaming and podcasting service.²⁷⁰ In this case, the Broadcasting Council found that the first condition set by the Drei-Stufen test was met on the grounds that the service, which included, *inter alia*, programming on politics, the economy and culture, constitutes a comprehensive offer to the population as a whole.²⁷¹ Applied in this way, the test hardly clarifies the online remit and falls short of addressing the problems that were identified by the Commission in the context of the State aid investigation.²⁷² The (admittedly provocative) argument may be raised that if the Broadcasting Council sweeps every service under the rug of ‘democratic’, ‘cultural’ or ‘social’ justifications without carefully considering the added value the service concerned may create, then the service may as well be launched without an *ex ante* assessment; spending public money in a superfluous manner would be avoided and the resources that would be used to conduct the assessment, including expensive market reports, could be used for other purposes.

As regards the requirements that must be fulfilled for the service to pass the second step, the Treaty stipulates that the offer must contribute to editorial competition in a qualitative manner. In examining whether this is the case, the Broadcasting Councils must consider, in the wording of Article 11f(4) of the Treaty, ‘the quantity and quality of the existing, freely available offers, the impact of the planned offer on the market and its function regarding the formation of opinion in the light of existing comparable offers including those of public service broadcasting’.²⁷³ It bears noting that while Germany committed to adopt a more detailed definition of the qualitative concept of ‘editorial competition’ than the one that was proposed to the Commission, Article 11f(4) of the Treaty repeats verbatim the relevant paragraph of the State aid decision.²⁷⁴ In the absence of any

from 11/09/2007. For an overview of the German legal framework applicable to PSBs see, for instance, Schulz, W. (2009). *The Legal Framework for Public Service Broadcasting in Germany: Procrustean Bed or Hammock?* Journal of Media Law, 1(2), 219-241

²⁷⁰ Rundfunkrat des Mitteldeutschen Rundfunks, Abschließende Beratung und Beschluss über das Angebot der NDR Mediathek, 27 March 2009, paragraph 2

²⁷¹ Ibid.

²⁷² Commission decision *Financing of public service broadcasters in Germany*, E3/2005 [2007] C185/1, paragraphs 229-236

²⁷³ 12th amendment to Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), Article 11f(4)

²⁷⁴ Commission decision E3/2005, *Financing of public service broadcasters in Germany* [2007] C185/1, paragraph 328 which reads as follows: ‘The Interstate Treaty will also contain a further explanation of the concept “editorial competition” (in the explanatory memorandum to the future Interstate Treaty), taking into account the following elements: the scope and quality of already existing freely available (*frei zugänglich*) offers and the relevant impact of the planned offer on the market; the relevance of the envisaged offer for opinion shaping (*meinungsbildende Funktion*)- which can also contain elements of entertainment - in light of overall already existing offers on the market’

guidelines on the elements that may be considered in the assessment of whether the second requirement of the Drei-Stufen test is met, decisions (or parts thereof) of the Broadcasting Councils have occasionally not been based on sound reasoning. For instance, in *Kikaninchen*, which, as already mentioned, concerned the launch of an Internet portal for pre-school children, disputes arose as to whether the fact that the service would be advertising-free was a quality parameter or not.²⁷⁵ The Broadcasting Council concluded that the lack of advertising was ‘immaterial as a matter of principle’.²⁷⁶ This ignores empirical research that has demonstrated that, in free-to-air television, viewers regard the lack of advertising and the amount of advertising minutes broadcast as key quality parameters.²⁷⁷

Moreover, Article 11f(4) of the Treaty does not include any instructions on how to balance the public value that the service under scrutiny is likely to create against its impact on the market. Again, there are indications that the Broadcasting Councils failed to fill the *lacunae* the German legislator left open: For example, in the case of *NDR Mediathek*, the analysis concluded that the provision of the service could generate effects on private VOD services, but that these effects would be outweighed by NDR Mediathek’s ‘quality’ characteristics,²⁷⁸ without, however, further substantiating which were these quality characteristics that could compensate for the harm to competition.²⁷⁹

With regard to whether the Broadcasting Councils, internal bodies of the ARD and ZDF, are indeed appropriate to carry out the *ex ante* assessment, I refer to Part 3.2. where I discuss in detail the conditions under which the supervision criterion is (or must be) regarded as fulfilled.

6.2.2. The ex ante test in Spain: From public service broadcasting to...public service broadcasting?

In 2009, the Spanish broadcasting system underwent significant reform following the government’s decision to abolish advertising and other commercial activities (e.g. teleshopping, pay-per-view services, etc.)²⁸⁰ developed by the Corporación de Radio y Televisión Española (hereinafter

²⁷⁵ Katsirea, I. (2011), *supra n.* 265, 62

²⁷⁶ Ibid. referring to Rundfunkrat des Mitteldutschen Rundfunks, Beschluss über die Genehmigung des neuen Angebots www.kikaninchen.de, 21 September 2009, 29

²⁷⁷ See, for instance, Wilbur, K. C. (2008). *A Two-Sided, Empirical Model of Television Advertising and Viewing Markets*. Marketing Science, 27 (3), 356-378 and Jeziorski, P. (2011). *Merger enforcement in two-sided markets*. Working Paper, John Hopkins University

²⁷⁸ Katsirea, I. (2011), *supra n.* 265, referring to Rundfunkrat des Mitteldutschen Rundfunks, Abschließende Beratung und Beschluss über sad Angebot der NDR Mediathek, paragraph 4

²⁷⁹ Katsirea, I. (2011), *supra n.* 265, 62

²⁸⁰ The Spanish authorities argued that the measure would safeguard the economic independence of the public broadcaster and that it would further relieve pressure from private undertakings because it would eliminate a potential source of market distortion. See Ley 8/2009, de financiación de la Corporación de Radio y Televisión Española, Boletín Oficial del Estado, 210, 31.8.2009, p. 74003,

RTVE) and to replace these sources of income by taxes on TV and telecommunications providers.²⁸¹ The Commission was called upon to decide on the compatibility of the measure introducing this tax-based funding system, Law 8/2009 of 28 August 2009 on financing RTVE.²⁸²

The Commission was particularly concerned with (and hence focused on) whether, following the reform of the financing system, Spain had established sufficient and adequate safeguards against a possible overcompensation.²⁸³ This is not surprising given the nature of the measure.²⁸⁴ However, some concerns about whether Spain had indeed taken appropriate measures to ensure that RTVE was not distorting online content markets were raised in the decision. More particularly, the Commission noted that on the basis of the information submitted by Spain in the context of the investigation, it could not examine whether the Spanish authorities had established a procedure for assessing beforehand the new services of RTVE.²⁸⁵ Spain argued that General Law 7/2010 of 31 March 2010 on Audiovisual Communication²⁸⁶ had introduced a prior evaluation procedure. Moreover, it undertook to establish an independent supervisory and regulatory body for public broadcasting, the State Council for Audiovisual Media, *Consejo Estatal de Medios Audiovisuales*, which would be in charge of implementing the procedure in question.²⁸⁷ Spain also mentioned that it planned to sign a program contract (*contrato-programa*) with RTVE by 1 November 2010 in which it would define in detail what would be regarded as ‘significant new service’.²⁸⁸ Relying on Spain’s submission, the Commission concluded that the State authorities complied with the obligation to establish an *ex ante* test, whereas the commitment to include in the revised contract a definition of the services that would need to undergo the test addressed the concerns relating to the lack of a clear and precise definition of RTVE’s online remit.²⁸⁹

Preamble, and Commission decision *New Tax-Based Funding System for Public Broadcasting in Spain*, C 38/2009 [2011] OJ L 1/9, paragraph 9

²⁸¹ European Commission. *State aid: Commission approves new tax-based funding system for Spanish public broadcaster RTVE*. Press Release IP/10/978. Retrieved from: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/978&format=HTML&aged=1&language=EN&guiLanguage=en>

²⁸² Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española, Boletín Oficial del Estado, 210, 31.8.2009, p. 74003

²⁸³ Commission decision *New Tax-Based Funding System for Public Broadcasting in Spain*, C 38/2009 [2011] OJ L 1/9, see in particular paragraphs 67-73. The other major concern was whether the new financing system was hypothecating the aid to the taxes. See paragraphs 19 *et seq.* and 61 *et seq.* of the decision

²⁸⁴ *Ibid.*, paragraph 74. Brevini argues that the focus on the purely economic elements of the measure ‘is in line with traditional European Commission decision-making on Southern public broadcasters, aiming to ensure more accountability, efficiency and sustainability’. See Brevini, B. (2011). *Ex Ante Assessments for Public Broadcasters in Southern Europe: Delayed Europeanization?*, 177. In Donders, K. and Hallvard Moe (eds.), *supra n.* 241

²⁸⁵ Commission decision *New Tax-Based Funding System for Public Broadcasting in Spain*, C 38/2009 [2011] OJ L 1/9, paragraphs 23 and 26

²⁸⁶ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, Official State Gazette 79, 1.4.2010, p. 30157

²⁸⁷ Commission decision *New Tax-Based Funding System for Public Broadcasting in Spain*, C 38/2009 [2011] OJ L 1/9, paragraph 75

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*, paragraph 76

The Commission's analysis of the Spanish legal framework was somewhat superficial. Article 41(3) of General Law 7/2010 on Audiovisual Communication, which introduced the *ex ante* test, reads as follows:

'[T]he competent audiovisual authorities shall assess whether new significant services are in line with the entrusted public service mission and whether their provision distorts competition in the audiovisual market. During the procedure, a consultation with the various stakeholders shall take place. The results of the consultation shall be published'.

This provision may outline the main steps of the prior evaluation procedure as described in the Broadcasting Communication, but it lays down no details on how the test is to be conducted, including the parameters that must be taken into consideration when evaluating the public value that the service is expected to deliver and the impact of the service on the affected markets, and establishes no timeframe within which the consultation must be completed. Compared against the German case which we discussed above, the Commission inexplicably follows a far more lenient approach to the measure allowing the Spanish PSB to expand into new media markets. It is also worth noting that the State Council for Audiovisual Media was never established. Almost two years after the conclusion of the State aid investigation, in the context of the reforms that took place to address the current financial crisis, the Spanish government announced that it would not set up the Council.²⁹⁰ Finally, the *contrato-programa*, the entrustment act which would, *inter alia*, define what constitutes a significant new service, and which the Spanish government undertook to sign by November 2010, has not been signed yet.²⁹¹ In view of the above, an implementation of the *ex ante* test in Spain is not likely to take place in the near future.²⁹²

6.2.3. Ireland: Public Value/Sectoral Impact Assessment

In March 1999, TV3, a commercial broadcaster, submitted a complaint to the Commission alleging, *inter alia*, that the aid measure in support of Irish public broadcaster RTÉ did not contain a

²⁹⁰ See, for instance, Gil, X. *El Gobierno siete millones de euros al anular la creación del Consejo Estatal de Medios Audiovisuales*. 22 January 2012, Voz Barcelona. Retrieved from: <http://www.vozbcn.com/2012/01/22/100013/gobierno-ahorrara-crear-cema/> The Council's tasks were absorbed by the National Commission for Markets and Competition, la *Comisión Nacional de Mercados y Competencia* or 'CNMC'). See Tzanaki, A. *Spain's CNMC: The Story So Far*. 17 June 2014, Competition Policy International. Retrieved from: <https://www.competitionpolicyinternational.com/spain-s-cnmc-the-story-so-far>

²⁹¹ See Comisión Mixta para las Relaciones con el Tribunal de Cuentas (2014). *Resolución de 8 de abril de 2014, aprobada por la Comisión Mixta para las Relaciones con el Tribunal de Cuentas, en relación con el Informe de fiscalización de la Corporación RTVE y sus Sociedades, correspondiente a los ejercicios comprendidos entre el 01/01/2010 y el 31/12/2011*, paragraphs 5.2. and 5.3, in Boletín Oficial del Estado, Núm. 161, Pág. 51635. Retrieved from: <http://www.boe.es/boe/dias/2014/07/03/pdfs/BOE-A-2014-6978.pdf>

²⁹² A similar remark can be made with respect to Italian public broadcaster RAI. The prior evaluation procedure has not been introduced in Italy yet. While the *Contratto di Servizio* (Service Contract), the entrustment act which is currently in force, lays down that RAI may expand its offer into new media markets in order to provide content fulfilling a public service mission it does not clarify what types of services RAI may offer as new services. See RAI *Contratto di Servizio* 2013-2015, Article 8(2), and point n) at p. 3

proper definition of the new media services the PSB was offering.²⁹³ The Commission upheld the complaint²⁹⁴ and, following negotiations, Ireland proposed to introduce a prior evaluation procedure for new audiovisual services.²⁹⁵ More particularly, Ireland committed to ensure that RTÉ's new audiovisual services would be subject to Ministerial consent prior to which the Minister would need to publicly consult with the PSB, other interested stakeholders and in particular the Broadcasting Authority of Ireland (BAI) as to the public value and sector impact assessment of the service concerned.²⁹⁶

Indeed, the amendments that were introduced after the State aid decision was adopted were in line with what was promised.²⁹⁷ Articles 100 and 103 of the Broadcasting Act, which lay down the parameters that the BAI and the Minister must consider when evaluating a new service, read as follows:

- '100. (1) The Authority [read: the BAI] shall, within 3 months of receiving a written request for advice from the Minister in respect of the sectoral impact of a proposal under this Part, prepare and submit such advice to the Minister.*
- (2) The Authority, in advising the Minister on the sectoral impact of a proposal under this Part, shall consider the following matters –*
- (a) the extent to which the proposal impacts on – (i) the availability, choice, quality and accessibility of services for audiences, and (ii) existing sectoral services,*
 - (b) the impact of the proposal on sectoral development, innovation and investment,*
 - (c) the impact of the proposal on related markets, and*
 - (d) such matters as the Authority may decide.*
- (3) In reviewing the sectoral impact of a proposal under this Part, the Authority shall consider such impacts as may arise within a 5 year period of the receipt of a written request for advice from the Minister under subsection (1). [...]*
- 103. (4) Where the Minister proposes to give his or her consent under this section, the Minister shall –*
- (a) consult with the corporation concerned and such other persons as he or she considers appropriate,*
 - (b) consult with the Authority as to the sectoral impact of a proposal under this section,*
 - (c) consider the public value of such proposal, and*
 - (d) publish in such manner as he or she considers appropriate a statement outlining the consultations that have been carried out [...]*
- (8) The Minister, in deciding on the public value of a proposal under this section shall consider the following matters –*
- (a) the importance of the proposal in respect of the pursuance of the public service objects of the corporation,*
 - (b) the compatibility of the proposal with the Council Directive and recommendations of the Council of Europe in respect of public service broadcasting,*

²⁹³ Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, paragraphs 1, 41, 43-44

²⁹⁴ *Ibid.*, see paragraphs 88 *et seq.*

²⁹⁵ *Ibid.*, paragraph 142 *et seq.*

²⁹⁶ *Ibid.*, paragraph 143

²⁹⁷ See paragraphs 149-150 of the decision and compare to Articles 100 and 103 of the Broadcasting Act, available at: <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0018.pdf>

- (c) the costs and revenues associated with the proposal and any impact on existing public service provision,
 - (d) the extent to which the proposal contributes to meeting the democratic, cultural, linguistic, educational, and social needs of Irish society, of individual groups within Irish society, and of Irish communities outside of the island of Ireland,
 - (e) the extent to which the proposed service will be accessible by the public,
 - (f) the extent to which the proposed service will reach under-served audiences,
 - (g) the contribution of the proposed service or activity to raising the level of familiarity of the general public, or of individual groups within Irish society, with new forms of services and technologies,
 - (h) the contribution of the proposal to media plurality, and (i) such matters as the Minister may decide.
- (9) The Minister may attach to any consent granted under this section such particular terms or conditions as he or she considers appropriate in the circumstances’.

Before discussing how the test was implemented in Ireland, we may note that, compared against the provisions introducing the *ex ante* test in Germany and in Spain, the above provisions are far more detailed. Hence, in the Irish case, *de jure* compliance with the commitment to incorporate into the PSB system a prior evaluation procedure seems to be in line with what the Commission had in mind when it decided to leave it up to the Member States to design a test that balances the public value of the service against its impact on the market. Let’s now see what happened with compliance *de facto*.

The first (and only) Public Value Test conducted in Ireland at the time of writing²⁹⁸ concerned the launch of a package of five services, which consisted of four digital television channels and a digital teletext service.²⁹⁹ The contribution that the *ex ante* test may make to increasing transparency and certainty is illustrated by the fact that RTÉ drafted a seventy-five page document which explained how the proposed services would satisfy each one of the criteria the Minister was expected to take into account in order to decide whether or not to approve the services.³⁰⁰ For example, to demonstrate that the amount of money directed to these services was a legitimate public expenditure, RTÉ conducted audience research and consultations which concluded that there would be demand for the new services.³⁰¹ Moreover, RTÉ attempted to explain the added public value the proposed services would create (e.g. with RTÉjr there would be a service for Irish children under the age of seven for the first time ever).³⁰² In certain areas, RTÉ’s proposals referred to general aspirations

²⁹⁸ For all relevant documents see: <http://www.dcenr.gov.ie/Broadcasting/Consents+for+new+RTE+Channels+and+Services/>

²⁹⁹ For a more detailed description of the new services see RTÉ (2010). *Public Value Test - Proposed RTÉ Channels and Services*, 3. Retrieved from: <http://www.dcenr.gov.ie/NR/rdonlyres/78AC6373-B3EE-4E17-92D8-A4A25E17F588/0/PVTDENR04OctRequest151110EDIT.pdf>

³⁰⁰ Ibid.

³⁰¹ Ibid., 4

³⁰² Ibid.

rather than concrete objectives,³⁰³ but, considered against the provision which was applicable prior to the State aid proceedings and which let RTÉ offer ‘any service (other than a broadcasting service) for the benefit of the public’,³⁰⁴ this proposal was arguably a step towards repositioning RTÉ in digital markets in a more legitimate manner.

The following tables contain the main *concerns* that were raised by Perspective (the independent consultancy instructed by the BAI to prepare a report on the public value and sectoral impact of the services),³⁰⁵ the BAI³⁰⁶ and interested stakeholders,³⁰⁷ the *suggestions* that were made to address them, and the proposals that the Minister ultimately accepted,³⁰⁸ making them *legally binding* on RTÉ.

Concerns	Perspective	BAI	Industry
If RTÉ makes services available on DTT only, the net neutrality principle is undermined and the public value reduced			
Lack of provision for any significant amount of new content			-
In some areas, proposals do not contain detailed commitments			-
RTÉ Plus, an exact replica of the RTÉ One mixed-genre service, does not deliver significant public value			-
The net cost of the proposition may have been understated			-
RTÉ Plus depends on content acquisition by other channels. This may become a ‘back door’ mechanism to build a more aggressively competitive channel			
News Now may build the online presence via the TV service, to the detriment of newspapers			
If advertising sold for the News Now online platform is visible via the video stream, it will distort competition in online news markets		-	
The provision of free content to consumers increases traffic to www.RTE.ie which, in turn, increases the appeal to			

³⁰³ Perspective (2010a). *Guidance on the Public Value of RTÉ’s proposed services*. A good example is the section addressing how the new services will contribute to media plurality in the Irish media landscape, 63-67. The report is available at: <http://www.dcenr.gov.ie/NR/rdonlyres/3C80AEA3-E82C-4214-ADB7-8475D91A4AF5/0/GuidanceonthePublicValue.pdf>

³⁰⁴ Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, paragraph 35

³⁰⁵ Perspective (2010a), *supra n. 303*, and Perspective (2010b). *An Assessment of the Sectoral Impact of RTÉ’s proposed channels and services*. Retrieved from: <http://www.dcenr.gov.ie/NR/rdonlyres/B57989B6-21FD-4DC2-A553-876D61E92EEE/0/Assessmentofthesectoralimpact.pdf>

³⁰⁶ Broadcasting Authority of Ireland (2010). *Sectoral Impact Assessment and Public Value Review*. Retrieved from: http://www.dcenr.gov.ie/NR/rdonlyres/9540DC81-FB55-4053-9CE7-4BDAAB198F96/0/20101222_SIAMinisterLtr_vfinal_AR.pdf

³⁰⁷ Irish Department of Communications, Energy and Natural Resources (2011a). *Submissions to Public Consultation on New RTÉ Service Proposals*. Retrieved from: <http://www.dcenr.gov.ie/NR/rdonlyres/1F85220F-B727-49C2-B34D-12AB767CAD07/0/submissionstopVTCconsultationDocumentfin.pdf>

³⁰⁸ Irish Department of Communications, Energy and Natural Resources (2011b). *New RTÉ Service Proposals - Results of Minister’s Analysis and Consideration*. Retrieved from: <http://www.dcenr.gov.ie/NR/rdonlyres/C349E873-5E7A-4925-BB21-73DCC9B0CF32/0/MinistersDecision.pdf>

advertisers			
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Proposals	Pers pective	BAI	Third parties (industry, citizens)	Accepted by the Minister
RTÉ could be pressed to commit more investment for new content on RTÉ News Now and RTÉ jr.			-	
RTÉ could be asked to explain how it would balance home produced and acquired content and to provide a timetable for implementation of relevant commitments			-	-
RTÉ Plus could be asked to commit to a more ambitious ratio of home produced to acquired content, especially in peak viewing times			-	RTÉ Plus was approved for a period of four years
RTÉ services should be made available across all platforms. RTÉ should be asked to provide more detailed cost projections to provide full comfort on roll out and implementation			-	
RTÉ could be required to first show programs on RTÉ One and show them on RTÉ Plus only after a specified time lag; RTÉ could be asked to introduce a limit to the percentage of imports shown within peak hours on RTÉ Plus			-	-
News Now approval could be made conditional on no visible advertising in the TV video stream		-		-
News Now could be required to provide outward links from its News Now site to third party news providers			-	-
RTÉ could be required to provide a budget cap for the online and TV versions of News Now			-	-
RTÉ News Now should carry no advertising, sponsorship or related commercial activity	-	-		
RTÉ News Now should provide subtitling, foreign language news bulletins and a forum for debate on current affairs, and increase coverage of the Oireachtas (House of Deputies and Senate)	-	-		

- ✓☐: The issue was raised by the actor to which each column corresponds
 - : The issue was not raised by the actor to which each column corresponds

The procedure that led to the Ministerial approval as well as the approval itself give some indication of the strengths and weaknesses of the Irish Public Value Test.

The above table makes clear that the Minister addressed only a few of the concerns that were raised by the BAI. This appears to be related to the fact that the Minister enjoys a wide margin of discretion in balancing the public value of the service against its market impact; the provisions introducing the prior evaluation procedure provide that the Minister must consult with the BAI, but is

not bound by the reports the regulator submits for his/her consideration.³⁰⁹ Not only is the Minister given sufficient room for manoeuvre in the evaluation of services, he is also in charge of appointing the RTÉ Chair and Board Members.³¹⁰ In view of the above, it is doubted whether the Minister, not being at arm's length from the PSB, is indeed the most appropriate person to level the playing field between public service and private media. Three further remarks are worth making here: first, the risk that the outcome of Ministerial decisions would not reflect fairness existed at the time of the State aid investigation (the provision entrusting the Minister with conducting the test is identical to the amendment the Irish authorities proposed to the Commission),³¹¹ but the Commission did not address the issue in the decision. Second, refraining from addressing the issue in the decision contradicts the Broadcasting Communication which explicitly lays down that the *ex ante* assessment 'would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members'.³¹² Third, as the example below will demonstrate, the Commission has sufficient grounds to call upon the Member States to ensure that the body conducting the *ex ante* test is independent from both the broadcaster *and* political actors, especially when the latter are involved in appointment procedures: interested stakeholders and the regulator were skeptical about the public value of the News Now channel. From RTÉ's proposal, it seemed that the channel would be a looped news service, merely repeating the news provided on the main RTÉ channels.³¹³ Participants in the procedure made concrete recommendations which were arguably appropriate to ensure that News Now would meaningfully contribute to the pursuance of RTÉ's objectives. More particularly, they suggested that News Now invest in new content and submit public value-related commitments, including specific scheduling promises and a timetable for their implementation.³¹⁴ The Minister approved the launch of News Now subject to the condition that the channel would provide 'more original content'.³¹⁵ The decision, however, neither provides guidance on how RTÉ would fulfill this condition nor refers to the parameters against which the BAI could monitor whether RTÉ indeed complied with this obligation. This example strengthens the argument put forward in Part 4 that 'independence' of the

³⁰⁹ Broadcasting Act 2009, Head 103(4)(a)

³¹⁰ See, for instance, Irish Department of Communications, Energy and Natural Resources. *Minister White nominates RTÉ Chair and Board Members*. Press Release of 04/11/2014. Retrieved from: <http://www.dcenr.gov.ie/Press+Releases/2014/Minister+White+nominates+RTÉ+Chair+and+Board+Members.htm>

³¹¹ See in particular Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, paragraphs 146 *et seq.* and compare with Broadcasting Act 2009, Head 103(4)(a)

³¹² Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 89

³¹³ Irish Department of Communications, Energy and Natural Resources (2011a), *supra n.* 307, 76

³¹⁴ Perspective (2010a), *supra n.* 300, 5

³¹⁵ Irish Department of Communications, Energy and Natural Resources (2011b), *supra n.* 308, 5

body conducting the *ex ante* test should be understood to mean independence from all forces that may undermine the legitimacy of the public broadcasting offer.

Similar remarks can be made with respect to the concerns expressed by the industry. For example, the association of Irish newspapers (National Newspapers of Ireland) put forward convincing arguments that if News Now, including the online exploitation of its content, provided advertising services the online news market would be badly hit.³¹⁶ The Minister may have approved the launch of the channel subject to the condition that News Now would not carry advertising,³¹⁷ but this should not imply that he took account of the newspapers' concerns: the condition concerned only the broadcast offer. This was not a significant modification to what was originally proposed by RTÉ, which suggested the introduction, to a limited extent, of some vignettes such as travel updates and entertainment news.³¹⁸ Moreover, no *ex ante* evaluation of the News Now mobile app, on which RTÉ apparently provides advertising services,³¹⁹ seems to have taken place. This app (launched in early 2010), which competes with newspapers in both the advertising and the readers' markets,³²⁰ is now 'Ireland's No. 1 news app, with over 1 million downloads'.³²¹ Surely, an application that provides free access to international and national news may fulfill RTÉ's public service obligations, including and especially the obligation to enhance media pluralism. However, the Broadcasting Act explicitly lays down that non-broadcast non-linear audiovisual media services must undergo the Public Value Test.³²² Moreover, the 2010 RTÉ Public Service Statement, a document which RTÉ is required to publish on an annual basis and which includes more specific commitments on how to deliver its public service mission,³²³ made no reference to a mobile app.³²⁴ Hence, the industry had legitimate grounds to request a prior evaluation procedure for the launch of this service.³²⁵ In any case, if that

³¹⁶ Irish Department of Communications, Energy and Natural Resources (2011a), *supra n.* 307, 54

³¹⁷ Irish Department of Communications, Energy and Natural Resources (2011b), *supra n.* 308, 10

³¹⁸ RTÉ (2010), *supra n.* 299, 92

³¹⁹ See <http://www.rte.ie/mediasales/digitalsales/advertising-channels/rte-news-now/>

³²⁰ First, the news mobile apps provided by News Now and the Irish newspapers are advertising-based, i.e. they can be downloaded for free. Second, while I do not have market data on substitutability, they appear to be interchangeable on the viewers' side. See, for instance, the description of the Independent.ie mobile app: 'Get instant access to extensive local, national and international news coverage from Independent.ie. The Independent.ie mobile app brings you quick, free, up-to-date access to breaking news, as well as quality'. See also the description of the Journal.ie mobile app: 'TheJournal.ie is the future of news in Ireland. The multi-award winning news website provides up-to-the-minute breaking news, all day, every day. We tell our stories through word, video, pictures, polls and readers' comments'. Compare these descriptions against the News Now App 'This free app offers all the latest national and international headlines, top stories, live news bulletins, latest sport results, entertainment updates, audio, video, weather & more'. Moreover, when downloading the app, the list with of 'Customers Also Bought' includes mobile news apps of broadcasters, not just newspapers. It therefore seems that mobile apps of news channels are demand-side substitutable also from the suppliers' perspective. See <https://itunes.apple.com/ie/app/irish-independent-news/id335158729?mt=8;> <https://itunes.apple.com/ie/app/thejournal.ie-news/id409359491?mt=8> and <https://play.google.com/store/apps/details?id=ie.rte.news&hl=en>

³²¹ See <http://www.rte.ie/extra/app/news-now/>

³²² Broadcasting Act, Article 114(1)(h). This app may not be regarded as 'ancillary' to the broadcasting service within the meaning of that provision because News Now is not part of the core broadcasting services as defined in (a), (d), (f) and (g)

³²³ Commission decision *State aid financing of RTÉ and TNAG (TG4)*, E4/2005 [2008] OJ C121/5, Paragraph 29

³²⁴ RTÉ (2010). *Public Service Statement*. Retrieved from: <http://www.rte.ie/documents/about/rte-pss-2010v1.pdf>

³²⁵ Irish Department of Communications, Energy and Natural Resources (2011a), *supra n.* 307, 56

assessment concluded that the service could have a major impact on the advertising market, the Minister could still approve it subject to the condition that it would not sell advertising space. As the Broadcasting Commission puts it, '[i]n the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer'.³²⁶

On a positive note, the *ex ante* test was completed in less than five months.³²⁷ This should be considered against the fact that it took the Commission nine years to complete the State aid investigation and is of significant importance because the assessment did not result in the proposed services losing their relevance to the public. It further bears noting that the requests or proposals of most citizens and civil society associations became conditions subject to which the approval was granted. For example, following their recommendations, the Minister asked RTÉ to include in RTÉ News Now increased coverage of the Oireachtas and to provide subtitling and foreign language news bulletins.³²⁸ The replies to the consultation submitted by citizens and civil society associations were less than twenty. While the opinions expressed were possibly not representative of Irish society as a whole, the fact that they played some role in the Minister's approval illustrates that the *ex ante* assessment, a result of a State aid decision, is a step towards a more democratic public broadcasting system that caters to the citizens' needs.

We may not tell with certainty whether the Amsterdam test may prove to be an efficient tool of public sector governance. There are Member States that do not seem to have implemented the test effectively. As the German and the Irish examples demonstrate, ineffective implementation translates into broad definitions of the service sought to be provided or the lack of independence of the body conducting the test. Transparency may have increased as a result of the test, but it is strongly doubted whether the concerns of private operators have been accommodated. Moreover, the Commission has not looked into whether the Member States indeed respected the commitments they made to have their PSB measures declared compatible with the Treaty. Finally, it bears noting that there are

³²⁶ Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paragraph 88

³²⁷ The PSB submitted the proposal in October 2010 and the Minister's decision was published in February 2011

³²⁸ Compare Irish Department of Communications, Energy and Natural Resources (2011b), *supra n.* 308, 8 with Irish Department of Communications, Energy and Natural Resources (2011a), *supra n.* 307, 8 and 68

Member States, most notably the Southern European Member States,³²⁹ which still struggle to reposition public broadcasting in the digital era.

The above analysis shows that striking the right balance between competition and public service media, a task which has traditionally been carried out by the Commission but which has recently been decentralized, is far from settled; the introduction of a clear-cut evaluation procedure as well as its effective implementation require reflection on the role of public broadcasting organizations in the current media landscape, legislative changes, considerable financial resources and expert bodies entrusted with conducting the relevant remit and financial controls.

Can we therefore say that the Amsterdam test is a useful instrument to strike the desired balance between competition and public service media? In principle, yes. However, several actors need to meaningfully contribute to the transition from public service broadcasting to public service media to achieve this objective. These actors are primarily the Member States' authorities and the public broadcasters themselves; the latter still need to reflect on how the diversification of the broadcasting offer serves a public mission and the former need to establish clear criteria under which such diversification may justify public expenditure. Where the national system does not create the above conditions, undermining the public service mission and unnecessarily distorting competition, the Commission should not neglect that 'subsidiarity does not mean a blank *cheque*. Someone has to assess the market impact and if Member States do not do it, the Commission would be obliged to carry out the full assessment itself under the Treaty rules'.³³⁰

7. Conclusions

This Chapter examined the role that State aid control may play in striking the right balance between competition and aid schemes in support of media organizations, to the benefit of rivalry and media pluralism. Similar to what Chapters 4, 5 and 6 attempted to do, the present Chapter sought to establish whether the Commission has enforced State aid law in a way that protects competition effectively and if not, to what extent a proper enforcement of the State aid provisions would also

³²⁹ See *supra*. for a remark on Italy. For developments in Greece see Bania, K. *Undermining democracy to save money: The unexpected and illegitimate closure of the Greek public service broadcaster*. 3 July 2013, Media Laws: Law and Policy of the Media in a Comparative Perspective. Retrieved from: <http://www.medialaws.eu/undermining-democracy-to-save-money-the-unexpected-and-illegitimate-closure-of-the-greek-public-service-broadcaster/>

³³⁰ European Commission (2008). *State aid: Commission consults on revised rules for state funding of public service broadcasting - frequently asked questions*. MEMO/08/671. Retrieved from: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/671&format=HTML&aged=1&language=EN&guiLanguage=en>

enhance media pluralism. The following conclusions can be drawn from the analysis of the practice the Commission has developed in assessing aid measures supporting public service media organizations.

In spite of the fact that the Commission has a limited margin of discretion in assessing whether a PSB distorts competition, it has not made full use of the tools it has at its disposal in order to level the playing field and to ensure that PSBs operate within a framework that obliges them to fulfill their public service remit. I reached this conclusion by comparing the outcomes of relevant decisions against the approach the Commission could have legitimately followed when examining whether each one of the conditions set by Article 106(2) TFEU are met. More particularly, as regards the mandate, I showed that, on several occasions, the Commission did not push for the introduction of amendments to broad remit definitions that allow PSBs to expand beyond what the market thinks is permissible. Moreover, the Commission appears to have been rather inconsistent as to the conditions under which PSBs may be considered to move within the limits of the entrustment act. This, I said, falls short of achieving the certainty that private competitors must enjoy to make investment decisions, thereby potentially depriving citizens of new content services. I reach a similar conclusion with respect to the approaches it has followed to establish whether the supervision criterion is met; it is still not clear whether the Commission believes that the body in charge of monitoring if the public service obligations are respected must be independent from the broadcaster or not. The analysis showed that not only should the Commission follow a less tolerant approach to aid schemes that do not explicitly provide that the broadcaster and the supervisory body should be structurally separated, but, to ensure that the PSB is indeed eligible for an exemption under Article 106(2) TFEU, it may also require the Member States to establish a mechanism that safeguards the supervisor's independence from political forces. As regards proportionality control, it appears that the Commission has not been particularly diligent in assessing whether overcompensation has taken place. I illustrated this latter point by discussing its superficial approach to private sector complaints that concerned the transmission by PSBs of major and multiple sports events and proposed an alternative approach that would be more appropriate to protect competition in the market for the acquisition of premium content. The same approach could also be a step towards guaranteeing that PSBs will comply with their obligation to provide a balanced and varied programming. The Commission's decision to impose upon the Member States the duty to conduct a prior evaluation procedure for new media services is probably the best example illustrating how far the Commission may go to reconcile public service media and competition, therefore increasing transparency in the market. However, the Commission's contribution to legitimizing the expansion of PSBs into new

media markets should not be exaggerated. The test has not been implemented effectively on a national level and the Commission has failed to do the necessary follow-ups. Were the Commission willing to follow the stricter approach that was put forward in this Chapter, State aid control would go a long way towards addressing certain shortcomings inherent in several public broadcasting systems (e.g. all-encompassing remits, political interference with the PSB's editorial policies, and mismanagement of public funds), ultimately serving both competition and media pluralism.

8. Conclusions

The objective

This study set out to explore to what extent EU competition enforcement can contribute to the protection of media pluralism, a value that has long been acknowledged as a condition for and a corollary of democracy.

EU law offers multiple avenues for supranational intervention, including the adoption of incentive measures under Article 167(5) TFEU, action against a Member State under Article 7 TEU, and the enactment of instruments containing provisions that seek to ensure that the internal market is not realized at the expense of media pluralism. The strengths and weaknesses of the aforementioned types of action have been extensively discussed in the scholarly literature. However, the potentiality held by EU competition law has received limited attention to date. Either due to the shift to a more economics-based approach that has taken place over the past few years or by virtue of the competence restrictions facing the Commission when dealing with the media, it is generally believed that EU competition law can do little to nothing to safeguard pluralism. But, EU competition law has been ascribed this negligible role without having examined whether the Commission has indeed managed to achieve its main goal, namely to protect undistorted competition, and if not, whether an alternative approach that respects the Treaty boundaries would first and foremost benefit competition and possibly, by extension, pluralism. The study aimed to fill this gap in the literature by attempting to answer the following three questions:

- a. Has the Commission applied EU competition law to media markets properly, that is, by duly taking account of the parameters that drive competition in the media *and* by using the full toolkit it has at its disposal?
- b. If not, what would be an alternative, proper application of EU competition law to media markets?
- c. Would this alternative form of competition enforcement deliver an outcome that is more pluralism-friendly?

The method

The study sought to answer the above three questions by examining how EU competition law has been and may be used in cases that concern some of the most widely used platforms through

which Europeans access information, such as television, newspapers and online search. The analysis attempted to cover the main issues the Commission has encountered in older, as well as more recent, cases under all four pillars of competition law, namely merger control, Article 101, Article 102, and State aid control. For that purpose, the decisional practice the Commission has developed in media markets in each pillar was assessed by reference to a specific sector in a way that reflects a business strategy (M&As in broadcasting), pricing model (RPM in books and newspapers), practice (algorithm manipulation, scraping, data portability restrictions) or revenue mechanism (State aid to public service media) that has been a major competition and media policy matter in the sector concerned. The common core issue in all the above cases was to determine how EU competition law has been or may be applied to an entity that controls an asset or factor, namely premium content, retail prices, a popular information gateway, and public funds, that may somehow affect competition and media pluralism in the affected sector.

Main findings

The main findings regarding the contribution of EU competition enforcement to the protection of media pluralism are Chapter-specific, that is, related to the provision and sector examined in each Chapter, and were summarized within the respective Chapters. Nonetheless, the following general conclusions arise from the analysis of the Commission's decisional practice as assessed against economic theory and the applicable legal framework.

First, in applying competition law to media markets, the Commission has ignored to a large extent sector-specific economics, including the two-sided nature of advertising-based media markets, demand uncertainty and the resulting tendency to content homogenization, the inelastic price demand for certain media products, and the heterogeneity of consumer preferences. This is mainly attributed to an unjustifiably strong focus on price competition, including and especially in cases where price is not the only and perhaps not the most relevant parameter that drives competition in the market concerned. The most notable examples illustrating this focus on price competition are the 'trade relationship' criterion, which guided the Commission in the definition of relevant markets in merger cases involving free-to-air broadcasters, and the assumption that price is the key element in the consumers' decision to purchase a book, which underpinned its reasoning in cases dealing with RPM agreements governing sale for print books. Failure to take account of the sector-specific economics imperils the accuracy of the competition decision, for it falls short of identifying and measuring the competitive constraints exercised on the entities concerned. As a result, the decision is condemned

from the outset for containing flaws that may range from neglecting an entire market that is relevant for a competition analysis (e.g. the market for audiences) to miscalculating the impact of the transaction or conduct concerned on (price *and* non-price) competition. This is also problematic from a media pluralism perspective. For example, in the case of free-to-air television,¹ the ‘trade relationship criterion’ leads to a decision that is limited to discussing the effects of the concentration on advertising prices whilst ignoring altogether the effects on the provision of niche programming, the latter being a key aspect of content diversity. Similarly, in the case of books, the assumption that consumers care more about price than they do about diversity results in a decision that has not properly assessed whether the RPM agreement might generate qualitative efficiencies in the form of a broad range of books or an extensive network of retailers, which would serve content and supply diversity respectively.

Second, it is striking that the Commission has avoided dealing with numerous issues that would determine the outcome of the decision. In the case of mergers in television, for example, it has identified a market for ‘other TV content’ that includes news, documentaries and TV series, that is, types of content that are not substitutable for one another. In the case of mergers in newspaper publishing, the Commission has refrained from considering whether online news providers exert competitive constraints on print newspapers. In *Google Search*, it appears inclined to accept remedies without having considered key legal and factual issues that should underpin their design. For example, it is likely that the Commission will prevent Google from displaying snippets of newspaper articles in Google News *without* having considered that the effects of ‘scraping’ on the traffic of the newspapers’ websites may be positive. In State aid assessments, despite obvious conflicts of interest, the Commission hesitated to declare incompatible with the common market certain measures that allow the managing body of the public broadcaster to monitor delivery of the public service mission.

Irrespective of the reasons that lie behind the Commission’s careless or lenient approach to complex and controversial matters, the effects are essentially the same as those resulting from failure to consider media-specific economics: the competition decision is based on inaccurate premises with negative implications for media pluralism. For example, in the case of broad market definitions in merger cases, the decision underestimates the market power of the undertakings under scrutiny. As a result, concentrations have been cleared despite the fact that the merged entity would have the ability and incentive to distort competition in the affected markets post-merger. As regards pluralism, where

¹ Or any other advertising-based market where content is provided for free and where indirect network effects between the advertiser and the consumer need to be taken into consideration

news provision is included in a broader market for ‘other content’ or where the market for news provision is not subdivided into smaller markets that would accurately reflect how citizens consume news nowadays, the decision will most likely not address issues that would deliver a pluralism-friendly outcome (e.g. the possible need to divest news assets due to the acquisition by the merged entity of significant power in news markets). In the same vein, an aid scheme that does not stipulate that the management of the public provider must be structurally independent from the supervisory body facilitates anti-competitive practices, which may range from undercutting prices in the advertising markets to cross-subsidizing commercial subsidiaries. With respect to media pluralism, in the absence of a supervisor that is at arm’s length from the provider, there is a strong likelihood that the latter will not respect its obligation to provide a balanced and varied programming.

The study, as synthesized above, challenged the reasoning underpinning the Commission’s decision-making, and, after identifying the loopholes that have been left open, it demonstrated that EU competition law offers plenty of tools which, if used, result in a decision that properly reflects the dynamics of media markets. Moreover, by comparing the drawbacks of the relevant practice against the pro-competitive results that could have been achieved had the Commission applied competition law properly, the study also showcased the potential contribution of competition enforcement to the protection of media pluralism. The study proposed, *inter alia*, a method on the basis of which the Commission may define the relevant free-to-air broadcasting markets (and other markets where content is provided for free) in a way that the decision mirrors the viewers’ (and not only the advertisers’) preferences, including niche programming. It further developed a theoretical framework within which the Commission may measure the effects of a transaction or conduct on non-price competition. By doing so, it shed light on the circumstances under which RPM agreements may deliver qualitative efficiencies in the form of a broad range of book and newspaper titles, the conditions under which a merger between broadcasters may adversely affect the variety or quality of the content broadcast, and the parameters against which to assess a number of business practices potentially harmful to competition and pluralism, such as demotion of competing content of higher quality, restrictions that prevent consumers from seamlessly switching from one content provider to another, and, where news markets are affected, interference with the ability of news outlets to generate (advertising and subscription) revenues. The study also developed a framework within which the Commission must conduct State aid assessments in order to ensure that the scheme under scrutiny is designed in a way that prevents the public service media organization concerned from unnecessarily restricting competition and from neglecting the duty to provide pluralistic programming. Drawing on the possibilities offered to the Commission by the applicable framework,

the study put forward a number of proposals for dealing with all-encompassing public service remits, lack of independence of the authority that checks compliance with the entrustment act, and inappropriate or quasi-non existent proportionality assessments.

Policy implication

The study identified two perceptions regarding the role of EU competition law in preserving media pluralism that have underpinned scholarly literature and the Commission's decisional practice. First, media pluralism has been seen as an almost spontaneous result of unhindered market access. Second, media pluralism has been treated as a public policy value that justifies restrictions of competition under Article 167(4) TFEU. As a result of the shift to a more economics-based approach, which posits that economic efficiency and consumer welfare are the guiding principles of EU competition policy and that concerns over other public policy values should be expelled from competition assessments, the second approach has been abandoned in recent years. While this policy change is arguably ill-founded, it is also true that the extent to which restrictions of competition may be accepted under Article 167(4) is very limited; under no circumstances could pluralism-related considerations supersede competition considerations, for this would be in violation of the Treaty. As regards market access, it is commonly contended that EU competition law contributes to media pluralism either through the prohibition of concentrations that would grant the merging firms significant power or through the imposition of access remedies. However, reality tells a different story. It is noteworthy that, over the past twenty years, the overwhelming majority of concentrations in the media sector were cleared unconditionally. Moreover, drawing on empirical evidence, the study demonstrated that in most cases access remedies are poorly designed and have been incapable of protecting undistorted competition; the analysis of how markets in certain Member States evolved following a series of access remedies that the Commission imposed on entities operating in broadcasting markets, and the appraisal of the remedies likely to be imposed upon Google are indicative of the flaws that are inherent in the Commission's access policy.

The theoretical arguments and empirical findings that pinpoint the weaknesses of the above two approaches suggest the need for policy amendments in the enforcement of EU competition law in media markets. The study raised a number of issues pointing to these weaknesses, such as the ineffectiveness of behavioral remedies and the adverse effects of joint selling schemes for the marketing of premium content. The impact of these limitations on the competitive process, combined

with the possible pro-competitive results that could be achieved by applying competition law as suggested throughout the study, set a sound basis for policy review in this area.

Recommendations for future research

The scale of the debate over how EU competition law is ‘properly’ applied to media markets is broad and multifaceted. It involves a number of different product and geographic markets, each of which has its own distinguishing features (size, structure, etc.). Moreover, new business models for the sale of media content have surfaced, the relationship between the consumer and the media content provider has undergone significant changes, and new (potentially anti-competitive) business practices have emerged. In view of the above, competition law is challenged in many respects. To produce sound policy strategies, there is need for more empirical and legal research which would allow further assessment of the various parameters that determine supply and demand in the modern media landscape. Exploring the following can facilitate the attainment of this goal:

a. Further empirical research on demand-side substitutability: One of the main drawbacks of the Commission’s practice that was identified by the present study is that it is not based on empirical data that would enable it to properly measure demand-side substitutability and assess the anti-competitive effects against what the consumer values the most. As a result, the outcome of relevant decisions was flawed on a number of occasions. Consumption patterns have changed over the past few years and so has the information economy. The user engages in multi-sourcing and media multitasking, attaches importance to functionalities that were not available a few years ago (e.g. availability of programming on catch-up TV), and may access content in exchange for personal data. These developments give rise to a number of questions that are relevant for a competition analysis, including whether the user is aware of information asymmetries between the provider and herself, what are the parameters that make a provider more attractive than others, etc. In view of the above, further empirical research on how the media content consumer reacts to changes in quality, variety, and price would undoubtedly benefit decision-making in this area.

b. Research on the role of privacy in the enforcement of EU competition law in data-driven markets: Exchange of personal data for content is increasingly becoming one of the most common ‘transactions’ in the modern information economy. In fact, many believe that data is the new raw material for business. But, what role has the accumulation of large reserves of data played in competition enforcement? While conducting this study, I noticed two issues that arise from the decisional practice that has been developed in competition cases touching upon

privacy. First, firms involved in these cases either ‘got away with a slap on the wrist’ or were unconditionally allowed to fulfill their consolidation plans. A major issue with this ‘light-handed’ approach relates to the fact that the Commission and other competition authorities around the globe largely ignored the economics of data-driven markets and the implications of data gathering and retention for a healthy competitive market. Second, while competition authorities make occasional references to data as a matter of concern to competition (e.g. as a source of market power or as an input leading to consumer lock-in), we have still not seen a complete competition analysis where use of personal data was indeed an issue to consider. To avoid controversy, competition authorities have preferred commitments decisions to a full-blown assessment, thereby significantly undermining legal certainty. Given the growing importance of access to personal data as a parameter driving competition in an abundance of markets (e.g. because it allows the provision of ‘personalized’ services) and the limited attention the arguably problematic practice that competent authorities have developed in this area, a study of how data-related considerations may impact competition assessments has become imperative.

c. Further empirical research on the impact of RPM on price and non-price competition: In Chapter 5, it was mentioned that, while economic theory supports the argument that RPM may generate a number of efficiencies, empirical research dealing with the impact of RPM on price and non-price competition is scarce. This topic is undoubtedly worthy of immediate attention and goes beyond the ‘proper’ application of Article 101 to media markets. National RPM policies are currently in a state of flux; certain Member States have recently abolished RPM laws whereas others have extended their applicability to digital titles. Moreover, NCAs are more and more taking cases involving RPM arrangements for the sale of publications. Hence, it is becoming increasingly important to resolve the uncertainty over the effects of fixed prices on the competitive process and media pluralism.

Limitations of EU competition law in safeguarding media pluralism and how to address them

The thesis put forward in the present study is neither that competition enforcement can remedy all the threats currently facing media pluralism nor that competition assessments may substitute pluralism reviews. The study identified the following four limitations, which can be mitigated if relevant assessments are conducted within the framework developed herein. First, competence restrictions prevent the Commission from taking action that would be to the benefit of media

pluralism *only*. For example, the Commission may not block a merger that does not raise competition concerns, but is likely to raise pluralism concerns. Nonetheless, if the Commission incorporates in its analysis variety and quality considerations and if it acknowledges that in many cases behavioral remedies will not manage to protect undistorted competition in the affected markets, there is a strong likelihood that the outcome of the decision will be friendly to pluralism. Second, there are weaknesses inherent in the design of EU competition law. For example, from a pluralism perspective, centralization of market power, which is the presumed equivalent of opinion forming power, would be sufficient to trigger the application of media ownership restrictions. Article 102 TFEU, however, does not prevent an undertaking from acquiring and holding, on its own merits, a dominant position but only the abuse thereof. Yet, it bears noting that in most cases this dominant position is not acquired through internal growth but through M&As and agreements with key market players that may contain exclusivity restrictions. By applying stricter criteria in exercising merger control and by keeping an eye on deals between powerful operators, which are no longer subject to notification, the Commission may go a long way towards addressing the acquisition of significant market power by a handful of entities that interfere with the free dissemination of information. Third, the focus of competition assessments and the scope of pluralism reviews are different. This is so for the reason that an authority entrusted with deciding on the impact of a conduct or transaction on pluralism has the power to examine whether the firms or individuals under scrutiny may misrepresent facts and marginalize opposing viewpoints, in violation of the applicable media laws and principles. The EU competition watchdog is not entitled to carry out these tasks. It may, however, design solutions that would greatly alleviate related concerns. For example, structural remedies, which have been particularly successful in stimulating competition, reduce opinion-forming power, thereby safeguarding supply diversity. The final limitation has to do with the fact that information markets are fast-moving, complex and with a natural tendency to concentration. Hence, by the time competition proceedings are concluded, the harm to competition and media pluralism may already be done. Given the central role that the Commission can play in setting the conditions under which these markets develop, it is crucial to monitor how the practices market players engage in may affect competition and consumer welfare. Addressing anti-competitive conduct at an early stage may significantly influence how these markets will evolve. It is worth noting that one of the main points raised in the Report prepared by the EU Media Futures Forum, an expert group assigned by the Commission to analyze the future of media in the EU, is that one of the major problems in digital content markets is the emergence of new, often fabricated by the market players themselves, barriers to entry. The Report urges competition authorities to ‘adjust to the fast changing world of the

Internet’ by keeping themselves up-to-date in order to be able to take ‘effective’ action whenever innovation is threatened.²

Concluding remark

Contrary to general belief, this study demonstrated that EU competition enforcement may go a long way towards protecting media pluralism without stretching the boundaries of the Treaty. It did so by challenging long-standing assumptions regarding the effectiveness of the Commission’s decisional practice, but also by showcasing how EU competition law may be instrumentalized to address problems that have emerged in more recent years. Given the likelihood that action with far-reaching implications under other branches of EU law is low, the normative suggestions put forward in this study may form the only realistic proposal on the contribution that the EU can make to safeguard diversity in the media.

² EU Media Futures Forum (2012). *Fast-forward Europe - 8 solutions to thrive in the digital world*, 4. Retrieved from: http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/forum_final_report_en.pdf

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