

# Television Pluralism and Diversity and the European Commission's Competition Policy – The Western European Experience

David Ward\*

## SUMMARY

*This article assesses the question of media concentration in the European Union (EU) in the context of the regulatory approaches taken by the Member States and the EU. It argues, despite common perceptions that the EU's approach to protecting media pluralism is governed by a purely market approach, it is also entrenched in a significant public interest basis. It argues that media concentration is increasing due to the weakening of a commitment as to the importance placed on the protection of media pluralism by the Member States. Subsequently national governments are supporting national champions and removing regulatory barriers for company growth in order to protect their own market players while at the same time enabling national companies to exploit even greater economies of scale by expanding into neighbouring countries both within the EU and outside of the area. At the same time the growth of the European Commission (EC) as a key regulator in the area of competition policy at the Community level has reshaped the scope of national regulation in this field. In this respect, a policy at the EU level has been to employ competition policy in order to support European Champions that are able to exploit greater size on the global market, but also to protect media pluralism on a national level by allowing media companies to expand in the different media markets across the common market zone.*

*These contrasting policy trajectories will be discussed by reviewing the ECs media related decisions, and the article will conclude that although individual Member States retain the right to enforce media concentration regulations under the merger regulation there appears to be little will on behalf of many of the major*

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\* David Ward, Director of the Centre for Media Policy and Development. 22 Collingwood House, 8-10 Clipstone Street, London, W1W 6BE, UK. E-mail: david.ward@cmpd.eu.com

*Member States to support media pluralism. This inevitably leaves a regulatory void between national and supranational regulatory spheres and the issue of media concentration is neglected in favour of companies and to the detriment of media pluralism.*

Key words: European Commission, media pluralism, regulatory approaches, television production, commercial television

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## **Introduction**

This article outlines the European Commission's (EC) approach to media competition and pluralism and assesses how the EC framework for media concentration fits together with national approaches to protecting media pluralism and analyses the West European experience in the interaction between the Member States and the EC's policies in this field. It is therefore concerned with structural pluralism and the perceived need to constantly maintain a diversity of actors and outlets in the television sector throughout Western Europe. The idea that the media sector should be diverse is underpinned by a belief that in a democratic society, it is important for all members to have access to a broad range of views and opinions to enable individuals to make an informed choice on a variety of public matters. In this sense the public policy instruments that are employed both at the European Union (EU) and Member State levels are vital in maintaining levels of diversity of pluralism in the media sector and changes in the character of the framework employed to regulate media concentration have a fundamental impact on concentration itself - a fairly obvious, but important point.

I want to suggest that there are fundamental problems in the current approach as the Member States introduce greater levels of liberalisation to support national champions that operate on global markets and the EC attempts to protect national pluralism by encouraging broadcasters to operate on a European level across markets. The architecture of such a complex system of national and European regulation suffers from a systemic weakness if the Member States do not provide sufficient legal provisions for media pluralism and the EC is limited in both its range and scope of instruments and legal remit to protect media pluralism against concentration. In such a system the Member States are responsible for regulating the growing media concentration on their individual markets and are the key force in regulatory shifts that have allowed media companies to expand by merger and acquisition, reducing the pluralism of these markets. They are therefore central both to the issue of media pluralism and concentration and will continue to be so in the coming years, despite arguments to the contrary.

At the same time, as media companies grow, there will be a far greater role for the EC as mergers or acquisitions reach the thresholds set out in the Merger Regulation (CEC, 2004) and therefore fall under the competence of the EC for investigation. In this context it is important to understand that the EC Merger Regulation is limited to competition issues and consumer interest and it does not deal

with pluralism over and above what is necessary to ensure open competition. The EC recognises the limits of its Merger Regulation and as a result there is a caveat in the Merger Regulation allowing Member States to introduce measures that guarantee a plural and diverse media sector as the primary regulatory instrument to protect the public's right to have access to a diverse range of media.

The first part of this article discusses the trends and instruments that are currently employed by a selection of Member States in order to regulate media concentration and outlines the actual levels of concentration in the television industry in a selection of countries. The second part outlines the EC's approach to market concentration. The article concludes with an assessment of where the liberalisation of ownership rules by the Member States is leading and what kind of public policy instruments will be the dominant tools in the future years.

### **National approaches to media concentration**

Traditional approaches to regulating media concentration and pluralism are premised on a human rights argument that contemporary citizenship is based on certain rights, and, one of these rights is to have access to a diverse and plural media sector. The argument has evolved from a long history in political thought that has established media pluralism as a fundamental component in the democratic structures of modern societies that is shared throughout the EU.

However, despite the underpinnings of the ideal of media pluralism having equal application across Europe, national approaches to media concentration differ significantly. The Member States employ a wide range of regulatory instruments that aim to guarantee media diversity and by this very fact attempt to militate against concentration of ownership. Although all West European countries have some provisions to ensure plural media markets, the methods used as well as the frameworks within which media concentration is regulated vary considerably. In a highly dynamic market this is a consequence of the diverse market conditions in the different countries and the different approaches taken to the media sector in general by policy-makers.

The instruments employed in Europe range from ceilings for market share that a broadcaster is allowed (and traditionally in Italy also financial ceilings) and diversity in terms of shareholders (France) to less media-specific rules that are built on the concept of retaining fair competition in markets. In some cases there are special provisions for mergers or acquisitions involving media companies (UK); in other cases the media fall within the same competition rules as any other industrial sector (Sweden).

Across Western Europe there are basically two models of media concentration regulation with most Member States employing some instruments in combination with one another. However, competition policy has become a growing part of this overall regulatory framework as any merger or acquisition in the media industry today involves a set of economic considerations of the impact on the nature of the market under review. Today, although a patchwork of different instruments are used to support media pluralism, competition policy has become the most prominent instrument across Western Europe, and it is becoming increasingly central as

West European countries look to adjust their regulatory frameworks to account for the perceived changes brought about by technological and economic developments.

Table 1: Overview of regulatory approaches to media concentration

Country	Press	Television	Radio	Cross-media
France	Thresholds Competition	Thresholds Competition	Thresholds Competition	Thresholds Competition
Germany	Thresholds Competition	Thresholds Competition	Thresholds Competition	Thresholds Competition
Italy	Thresholds Competition	Thresholds Competition	Thresholds Competition	Thresholds Competition
The Netherlands	Competition	Competition	Competition	Competition
UK	Competition	Competition	Competition	Thresholds

Source: Ward 2004

Another common trend is that over the past decade most Member States, if not all, have liberalised and relaxed their ownership restrictions that pertain to television or are in the process of doing so. These changes have been driven by three factors: technological developments, the liberalisation of the world economy and the changing nature of public policy. They have combined to reshape policy and partially shift the principles that have guided policy-making in the broadcasting sector that is most notably evident in the policies of the larger Member States in supporting national champions who are able to exploit the international television market place and thereby create opportunities in employment and economic growth for the individual Member States.

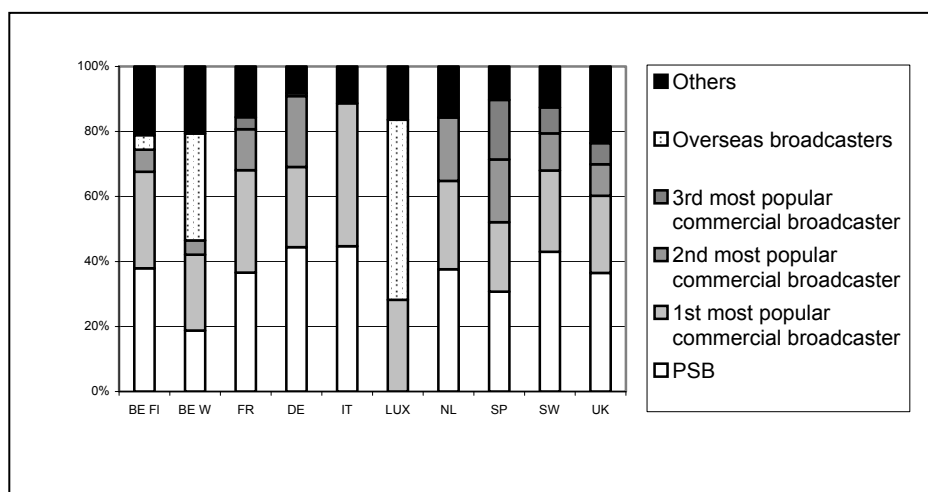
### Media concentration in Western Europe

Television concentration in Europe has grown at a rapid rate since the introduction of commercial television and the break up of the public service monopolies in the majority of European countries in the 1980s. In many respects, pluralism in the television sector has remained restricted due to the fact that spectrum has remained scarce even considering the growth of multichannel television households. Despite forecasts for a plethora of channels brought about through satellite and cable, the majority of multichannel television households in Europe receive fewer than 30 channels. Digitalisation remains underdeveloped in the majority of countries in Europe and only in the UK has it made a significant impact on the television landscape. Also, contrary to arguments that suggested multichannel television would solve the problem of media concentration, the existence of more channels has simply increased the power of a few corporations as they have either expanded their interests into other channels (RTL) or have control over im-

portant bottlenecks such as Electronic Programme Guides and conditional access systems (BSkyB). Large commercial broadcasting groups, which, in some cases, have become international players operating across the culture industries, have become significant players in the television markets of Europe.

These markets are extremely varied in terms of size and characteristics. Belgium and Luxembourg have highly internationalised markets with internal divisions reflecting linguistic divisions in their populations. Furthermore, Luxembourg is unique in that, due to the small size of its population, RTL has a government granted monopoly in the market with no domestic competition from other operators.

Chart 1: Television audience share of public and leading commercial television companies 2002/2003 in sample of EU Member States



Source: Ward 2004

Outside these linguistically divided markets a group of countries consisting of Italy followed by Germany, the Netherlands and Sweden demonstrate the highest degrees of concentration in the countries included in the chart above. From this group the duopoly in Italy represents the highest degree of concentration with two players RAI and Mediaset carving up the market on an almost equal basis. Finally, a third group consisting of the Flemish-speaking community of Belgium, of Spain and the UK have lesser degrees of concentration, although they remain highly concentrated.

The general trend in the markets that are not highly fragmented along linguistic lines is that the public service broadcaster plus two other major broadcasters dominate the market. The least degree of concentration in the television sector is in the UK where three main players – the BBC, ITV and Channel 4 – have a com-

bined market share of 69.9 per cent of the audience, making it the most plural market with a further 30.1 per cent of audience share commanded by other broadcasters, though this is mainly enjoyed by the fifth terrestrial channel, Channel Five, and the channels offered by BSkyB that somewhat increases the overall level of concentration.

All of these markets are therefore what economists would call highly concentrated and therefore represent oligopolies. The number of operators is seriously limited, not only by spectrum scarcity, but by the simple fact that the economics of television favour companies that enjoys large economies of scale.

### **The EU framework**

The importance of media diversity is set out in a number of EU texts that acknowledge the importance of the media in the democratic life of EU citizens, most importantly Article 11 of the Charter of Fundamental Rights of the European Union, which has been incorporated into the Constitutional Treaty.

Despite these acknowledgements in key Community texts the main tool employed by the EC to regulate media concentration is competition policy and the Merger Regulation that was modernised in 2004 to introduce procedural reform for dealing with mergers and acquisition cases (CEC, 1989, revised 1997 and 2004). The Competition Directorate is responsible for making rulings on market concentrations under Article 3 (1) (g) of the EC Treaty subject to review by the European Court of Justice. Based on the EC Treaty the Merger Regulation grants the EC powers to either intervene in, or request changes and conditions to clear a merger or acquisition, to clear a merger or acquisition, or to block and indeed reverse a merger or acquisition where it finds that there is a negative effect on competition in the relevant market.

In this sense the Competition Directorate has a very specific remit and its central principles in the area of competition are guided by the objective to ensure that price competition, wide consumer choice and developments in the market such as technological innovation support European economies and increase their competitiveness on the global market. In this respect, the rules are applied to all sectors equally, including the television industry. Undertakings involved in any proposed venture are obliged to give prior notification of concentrations where the parties to the proposed project have global sales revenue that crosses a set threshold. After consideration of the impact on the relevant market, the EC can clear the proposed deal, refer the proposal to the participants requesting amendments and conditions of acceptance, or reject the proposed venture as incompatible with the principles of the common market. The thresholds where a merger or acquisition qualifies for investigation by the EC are established according to Article 1, paragraph 2 (a & b) of the Merger Regulation 2004 as:

- An aggregate worldwide turnover of all the undertakings concerned of more than EUR 5 billion.
- An aggregate Community wide turnover of at least two of the undertakings concerned is more than EUR 250 million.

Whilst the principles set out in the Merger Regulation apply to all industries equally there is a caveat in the regulation that is designed to allow Member States to take appropriate measures to ensure that public interest issues that lie outside the scope of the Merger Regulation are adequately accounted for. Media pluralism is explicitly mentioned in this context as an area where a Member State may protect, as a legitimate interest, the diversity of the media (CEC, 2004, Article 21, paragraph 4). Under this regime Member States retain the right, under Community Law, to maintain a stricter regulatory framework to ensure media diversity is preserved.

Nevertheless, the EC has become increasingly central in deciding cases involving mergers and acquisitions as media companies have grown during the past decade and many of the largest media companies qualify for investigation due to their turnovers crossing the thresholds outlined above. As Table 2 illustrates the largest players in the European television market surpass the turnover threshold and therefore any mergers or acquisition that includes these companies automatically triggers a Community dimension and an EC investigation into the impact on competition of the proposed acquisition, merger or joint venture.

Table 2: Turnover of top television/media companies in Europe 2002

Company	Home base	Turnover € mil	Media share of turnover %	Media-related assets turnover € mil
Vivendi	FR	28,112	70	19,558
Bertelsmann	DE	18,312	80	14,612
ARD	DE	6,100	100	6,100
BBC	UK	5,383	100	5,383
RTL Group	DE	4,342	100	4,342
Lagardere	FR	13,216	28	3,746
BSkyB	UK	3,622	100	3,622
RAI	UK	2,700	100	2,700
TF1	FR	2,325	100	2,325
Mediaset	IT	2,316	100	2,316
Bonnier	SW	1,910	100	1,910

Source: Nordicom 2003

The Merger Regulation is therefore based on *ad hoc* investigations and there are no rules or ceilings set out for media concentration as have been employed traditionally in some of the Member States. It is also difficult, given the diversity of market characteristics in the Member States to envisage an alternative system other than the one currently employed by the EC, despite the fact that throughout the 1990s the EC worked on a Green Paper on media concentration that was eventually rejected by the Member States through the Council of Ministers. In the past decade there have been a growing number of merger cases referred to the EC either by Member States competition authorities or directly by the proposed partners in a venture. These cases have allowed the EC to build up precedents defining

the audiovisual market and as a result setting out certain parameters of acceptable concentrations across the European audiovisual markets.

### **The European Commission's Decisions**

These decisions broadly concern two types of cases: the first type addressing alliances between companies active in different geographic markets, and the second alliances between companies in the same geographic market.

#### **National markets**

The first kind of alliances which the EC has been called upon to assess are based on national television markets and occur either between actors in the same geographic market, who propose a venture: 1) between existing actors in the supply chain within an established market; 2) an alliance to exploit a new national market; 3) or a venture which increases competition in an existing market. In the latter two areas the EC has taken a positive approach, even granting derogations to competition rules to new entrants in markets where a large amount of risk or capital investment is involved (Ward, 2002, 2004). The EC has cleared most of these proposals as pro-competitive. It has however, blocked alliances where it has judged that the proposed merger under review would have a negative impact on, either the development of the market, or where it is likely to lead to the demise of the number of actors operating in a specific market.

The negative decisions that have been handed down by the EC in many respects lay down the logic and limits of its application of competition policy in this area. The first of these was the MSG Media Service proposal (CEC, 1994) the participants of which, informed the EC in June 1994 of a proposed joint venture between Bertelsmann, Deutsche Telekom and Taurus, a holding company of the Kirch Group. The venture between the leading actors, providing a range of communications services in Germany, was established with the intention of setting up a jointly owned independent company (MSG). The company proposed to provide a number of technical services including conditional access systems, subscription management services and content to support the development of pay-TV in Germany. Even though the company was a stand alone undertaking, and granted independence from the parties, the EC judged the venture amounted to a monopoly over pay-TV in Germany and based its objections on the fact that the resulting monopoly over pay-TV for the venture, would lead to the foreclosure of the market.

Four years later the EC also vetoed a similar proposal, once again in Germany, where CLT Ufa and Kirch, would have acquired joint control of Premiere pay-TV as well as Beta digital, the sister company of Kirch which developed and manufactured the d-box conditional access system. In a second part of the proposal CLT Ufa, Kirch and Deutsche Telekom would have taken over the company BetaResearch (CEC, 1999a). The EC demanded a whole gamut of concessions that would loosen the monopoly hold that the group would acquire through the joint venture, in very much the same way as the proposal four years previously would have. Although some of these were met, they were insufficient to convince the EC that a



long term monopoly position would not be achieved through the venture. It was eventually vetoed by the EC on the grounds of unacceptable dominance in the pay-TV market, which it concluded would lead to a dominant monopoly position for the parties, and exclude the possibility of new competitors entering the market in a similar manner as in the previous case.

The EC was unwilling to accept such a monopoly in this area and remained unconvinced by the argument presented by the interested parties. Short-term development of the digital platform was sacrificed to the importance that the EC placed on the long-term objective of competition between undertakings in the sector, where the establishment of a monopoly, which would automatically foreclose the market and exclude new competitors entering the market at a later date was seen to be the outcome of the joint venture.

The second merger case involving the media sector that has been rejected by the EC was concerned with a request by the Dutch authorities for the EC to examine a joint venture that formed the Holland Media Groep SA (HMG), which consisted of RTL 4, Vereniging Veronica Omroeporganisatie (HMG) and the independent producer Endemol Entertainment. The parties applied for clearance for the formation of a new company HMG with the intention to supply and package programmes to be broadcast by HMG, CLT and Veronica. The basic aim of the merger was to combine the resources of the three channels, whilst folding the independent production company Endemol into the company to supply the programming production base and thus preferential access for the channels to Endemol's programming (CEC, 1995).

The broadcasters involved in the venture all held significant positions in areas of the Dutch free-to-air television market with RTL commanding 26 per cent of overall audience market share. The EC estimated that RTL 3 and Veronica together held a significant share of the audience that would lead to a dominant venture in Dutch commercial television. Endemol, which is the largest independent production house in the EU also held a wide portfolio of programming and operated in the Netherlands, Germany, France, the UK and Spain, as well as in a number of other countries.

Concerns about the dominant position created by the new company HMG on the free-to-air television market were raised, especially in respect to the advertising market. The EC ruled that HMG, given the participants and arrangements, would obtain a dominant position in the television advertising market, with a share that was estimated to be as much as 60 per cent of the total market. The parties argued that the venture did not represent such a dominant position because of the presence of the commercial broadcaster SBS, which began transmitting in 1995. Such a strong competitor, it was argued by the partners in the joint venture, represented a serious competitor to HMG and therefore the alliance did not create a dominant individual actor. The EC disagreed, concluding, that due to CLT Ufa's already strong position in the market and with market forecast rates for advertising at eight per cent growth, the strengthening of its position through the merger would seriously inhibit the possibility of SBS developing a comparable market position. Therefore, HMG would enjoy a dominant market position and this would

seriously hinder the opportunity for new entrants to enter the market for free-to-air television services.

The EC reached the conclusion that the merger between the parties represented a concentration which created an unacceptable dominant position in the television advertising market in the Netherlands and furthermore led to the strengthening of Endemol in the market for independent Dutch language television production; a market of which, even before the merger, it already claimed a significant share. As a result it judged the proposed merger incompatible with the common market and Article 8 (3) in conjunction with Article 22 (3) of the Merger Regulation. Moreover, as HMG had already been set up, and the threat to competitive markets already established, the EC subsequently announced measures to restore satisfactory competition in these markets under Article 8 (4) of the Merger Regulation.

The EC advised the parties of the appropriate measures required to restore effective competition in the market for advertising and independent television production in the Netherlands. As a result, in 1996, the parties returned to the EC with a revised proposal, significantly without the Endemol component. The EC cleared the venture as compatible with the common market as the risk of market dominance in the advertising and programme production markets were significantly reduced by the revised plans. In a later decision the EC cleared the acquisition of Endemol by the Spanish company, Telefónica, the former state monopoly telecommunications company, (CEC, 2000a) where it was judged no significant market cross-over existed and dominance of a single market was not reinforced by the acquisition.

### **Pan-European markets**

The majority of EC decisions on alliances have been taken on ventures, which cover different geographic markets, which it sees as not posing competition problems due to the fact that there is little or no geographic overlap. A venture of this kind is perceived, according to the EC's approach, to increase competition in any one market rather than reduce market actors.

Therefore joint ventures like the Audiofina and Bertelsmann case, which resulted in the formation of CLT Ufa have been cleared on the basis that the participants operated on separate national markets (CEC, 1996). Although the creation of CLT Ufa/RTL represents the establishment of one of Europe's biggest broadcasters it is characterised by a spread across different markets and is, as a result, deemed pro-competitive rather than anti-competitive. Despite arguments to the contrary that suggested the establishment of CLT Ufa/RTL would lead to a dominant position throughout Europe, due to the competitive advantages conferred in areas such as programme acquisition rights, the EC concluded that because the sale of rights to television programmes was undertaken at a national level, the combination of resources in CLT Ufa/RTL was not sufficient to block the synergy.

The most striking evidence of the EC's pro-competitive understanding of pan-European mergers is with the Kirch/ Bertelsmann vetoes discussed above and the later clearance given to a proposed alliance between BSKyB and the Kirch Group (CEC, 2000b). The BSKyB/ Kirch proposal consisted of BSKyB acquiring 24 per

cent of the ill-fated KirchPayTV GmbH & Co. KgaA (Kirch TV) from Kirch Vermögensverwaltungs GmbH & Co. KG, the holding company for the Kirch Group. In combining the resources of the two companies, the venture would supposedly achieve a considerable position on the German market for BSkyB and reinforce the strong position enjoyed by Kirch through a bouquet of film and sports channels offered in a variety of packages under the brand name Premiere.

The case had obvious parallels with the earlier two cases in Germany that the EC had blocked. The central difference being that BSkyB did not hold a significant market presence in either the German pay-TV or free-to-air television markets. The decision has a number of features in common with the previous MSG proposals. However, a crucial difference was that unlike the MSG case both of the participants in the joint venture did not have a strong position on the relevant German market and in reality did not compete on the German market with one another. Whereas the MSG cases included the two most powerful German commercial broadcasters, the BSkyB/ Kirch proposal, although significantly reinforcing Kirch's position, was judged not to be anti-competitive to the extent that the market in question would exclude Bertelsmann or other actors from entering and competing in the market against Premiere.

At the time of the decision, Kirch was clearly struggling to build a subscriber base and to gain a market position against a highly competitive free-to-air television market that already provided an average of 30 channels via cable or satellite. BSkyB's interests in the German market in free-to-air broadcasting consisted of the channel TM3, and at the time of the proposed joint venture with Kirch BSkyB were negotiating to sell its stake in the channel. However, it held a considerable market position in other national markets, most notably in the UK.

It was argued by Kirch's competitors that the alliance would be detrimental to competition in the German pay-TV market as BSkyB was a potential new entrant and thus a potential competitor to the existing Kirch platform and by allowing the alliance such competition would be precluded. The EC judged however, that this was unlikely due to the commitments of BSkyB in developing a range of new services on their digital satellite platform in the UK. As a result BSkyB was unlikely to enter the German pay-TV market, and because its existing shares in the free-to-air channel did not compete with Kirch in the pay-TV market, the alliance was deemed pro-competitive.

The EC raised concerns over the conditional access system developed by the sister company of KirchPayTV, BetaResearch, as the system is a "closed decoder" so the opportunity for Kirch to foreclose the digital pay-TV market was significant. This was reinforced by the possibility raised by the alliance that both the expertise in marketing and the injection of revenues from BSkyB would bring about a dominant position in the German pay-TV market and raise barriers of entry. Due to this the EC stipulated the position would be tolerated on the condition that the d-box system, and therefore access to the digital platform, was open to other actors on a non-discriminatory basis.

A second reservation concerned the acquisition of programme rights by the new alliance. The two parties together presented an opportunity to exploit their joint position to acquire programme rights both in terms of collective purchasing

power and preferential selling to one another on the UK and German markets. However, as the EC defines markets as national in scope for the purposes of defining the framework for its decisions, this was dismissed.

Despite serious reservations the EC cleared the proposal, with the reasoning that because of the pre-existing strength of the free-to-air market the development of digital pay-TV was faced with significant obstacles and therefore would need the impetus and resources that the merger offered. This was on the strict condition that Kirch agreed to the establishment of fair and non-discriminatory access to the d-box and therefore access to the delivery platform for content providers and competitors.

The most significant case affecting the television industry in the past couple of years has been the EC's decision in 2003 to clear the takeover of Telepiù (owned by Vivendi) by its only competitor in the pay-TV market in Italy, News Corporation. News Corporation managed and held a 50 per cent stake in Stream, Telepiù's only competitor in the Pay-TV market, with Telecom Italia holding another 50 per cent (both companies had increased their shareholdings in the company since its establishment in 1993). The case posed difficult questions in a market that had seen the growth of powerful operators, but very slow development in multichannel television services and an extremely strong free-to-air television market dominated by RAI and Mediaset. The two satellite operators were leaking money and clearly had struggled to build a subscription base for their pay-TV services (in a manner similar to Kirch in Germany). Although the Italian competition authorities had previously blocked an attempted merger between the two operators in 2002 (Ward, 2002, 2004) the financial crisis at Vivendi and the poor performance of both operators eventually resulted in News Corporation making a takeover bid for Telepiù and proposing a merger of the two operators and a re-branding of the operator as Sky Italia.

The lack of any realistic alternative purchaser only compounded the problem facing the EC as News Corporation argued that the continued existence of two platforms would simply lead to its own platform, Stream, withdrawing from the market. This would leave a monopoly position for Telepiù, and the financial crisis of Vivendi raised the possibility of both operators closing down their services in Italy. News Corporation even suggested that the merger needed to be understood under the concept of a "Rescue Merger". It argued that without clearance of the takeover its own company Stream would file for bankruptcy and therefore the failing company defence' principle that the EC had employed in two previous decisions was applicable to the takeover of Telepiù, though in reverse as it would be Stream, its own company that closed its operations rather than the company "rescued" (CEC, 2003).

The end result would be a reduction of competition in the pay-TV market as either one or possibly both of the operators withdrew from the market. The EC cleared the takeover, but only with a strict set of conditions. These involved a whole raft of commitments by News Corporation to soften the impact on the market of the takeover, including an agreement by News Corporation as to the divestiture of Telepiù's digital terrestrial television interests and a commitment not to enter the digital terrestrial television market. It also requested that News Corpora-

tion provide a guarantee that the satellite platform and the conditional access system would be open to competitors on a non-discriminatory basis. There were also significant concessions on programme rights that the two companies held before the takeover to ensure that competitors had access. Although Sky Italia was therefore allowed to acquire a monopoly position on the Italian pay-TV market (as well as a monopsony in terms of the packaging of channels) the EC conditions, given the circumstances, probably stretched as far as they could in retaining competition in the television market.

### **Assessing the Overall Approach of the European Commission**

The cases above represent only a small number of cases that have been investigated by the EC under the Merger Regulation and most of the decisions that have included media companies have been positive. In sum this approach is favourable towards pro-competitive proposals where a new service or a new competitor is created through the venture. The framework developed by the Competition Directorate, to evaluate the consequences of either a joint venture or a merger between media companies, is based on the relevant or potential sources of supply on a market through a joint consideration of the market and the services offered to the consumer. To achieve this framework the EC defines the market where the activity has an impact, and subsequently by defining the market, the EC is able to assess the proposed venture based on market share. As a consequence, dominance by companies that hold strong positions in markets are accepted, as long as this is achieved through superior services and performance. Such dominance is not to be achieved through either a joint venture or merger. This same logic runs through the two German decisions involving Bertelsmann and Kirch and the original HMG decision. The EC has therefore employed competition policy to ensure competition in national markets remains open. At the same time it has looked positively on mergers and acquisitions where competition is increased either by a new entrant or new services on national markets.

The approach represents an innovative use of the common market in that it allows companies to develop certain economies of scale across markets. That technically, at least, relieves the pressure on national markets for these companies to expand in the domestic markets. In light of the degree of concentration in the national markets there is little room for some of the largest media companies to expand without seriously further threatening media pluralism. In this context the EC has found a novel method of encouraging the growth of media companies in the EU by allowing them to expand across European markets, whilst at the same time preventing them from expanding within individual national markets to an extent whereby competition is threatened. Whilst the EC has supported alliances in both new markets and separate geographic markets, the negative decisions it has made signify that the limits of permissible alliances are at the Member State level. Although national governments have been promoting national players by reducing their own regulations on media ownership, the EC has remained fairly constant in its decisions, attempting to promote pan-European market mergers rather than individual market concentrations.

The Italian case involving Stream and Telepiù represents an important shift, not so much in the EC's approach to competition, but in the current market for television services in the EU and the limits to current growth of platform competition as many Member States and commercial operators have employed business models and strategies that have failed to provide sustainable short term growth. The option the EC were faced with was to either clear the takeover or to block it and if it had chosen the latter the two platforms would have continued until the inevitable withdrawal of one or perhaps both operators at some point in the future. It is only with very strict conditions, which included deals on programme rights, access to the platform and a commitment not to roll out digital terrestrial services that the EC cleared the proposal.

The EC's role in media concentration is, however, limited. On one hand it only deals with mergers and acquisitions involving media companies that cross the Merger Regulation threshold. This ultimately means that an individual market can become extremely concentrated before a Community interest is invoked. In reality this means that only the big players in Europe fall within its remit. On the other hand, there is little that the EC envisages doing in terms of pluralism except for where it overlaps with competition policy. In this respect, although the Member States authority has been partially superseded by the EC when it comes to mergers and acquisitions of the largest media companies they remain the key actors in the regulation of media pluralism. Not only do they retain the right to enforce stricter measures to ensure media pluralism in their television markets under the rules of the Merger Regulation, but they are also the central agency that guarantees the right of their citizens to have access to a plural media. If media concentration levels are unacceptable then it is the Member States that have provided the conditions for greater concentration and it is also the Member States that determine the terms of regulatory trade with broadcasters.

## Conclusion

For the EC's framework to maintain pluralism it is necessary, under the principle of subsidiarity for the Member States to provide for media diversity and pluralism. The EC appears to recognise competition policy alone is not always either the most suitable or adequate mechanism to guarantee media pluralism and the Member States hold the right to impose stricter regulations to guarantee media pluralism beyond what competition alone can protect. Most mergers and acquisitions would also fall outside the scope of the EC's Merger Regulation, though increasingly all of the major players will qualify due to their growing turnovers.

The problem is that the Member States have, over the past decade, significantly liberalised their television sectors as a policy reaction to the changing environment for the industry and consumers. Ultimately, it is a failure of political vision and changes to public policy over the past decade will naturally affect the pluralism of the television systems across the EU. It should be stressed that this lack of foresight is very much the domain of the Member States.

This failure has crucial consequences for media pluralism and the framework that has been built both at the Member State level and the interaction between the

EU and the Member States. Without the political will of the Member States to protect media pluralism the current framework is simply inadequate. The EC might have acted to protect competition in individual markets by promoting pan-European strategies and providing negative decisions against mergers that have qualified for investigation on competition grounds that are perceived to threaten the pluralism on national markets, but the Member States have also been promoting their own national champions. Whilst the EC has had the luxury of playing an enabling role to support European champions the Member States have demonstrated far less vision. The main mechanism they have used to allow their companies to grow is a reduction of media ownership restrictions. This has inevitably resulted in growing consolidation, which today, is reaching the ceilings set for media pluralism, where ceilings exist and are adhered to. If current trends continue, once these ceilings have been met the law will simply become redundant or the Member States are likely to simply lift the ceilings or change the regulatory framework. Both ways pluralism will be the victim in this process and consolidation and industrial interests the victor.

On a final point, due to the fact that the EC has supported a policy of encouraging larger European companies to adopt pan-European strategies to exploit greater economies of scale by pursuing growth across the European markets, and at the same time protecting pluralism in individual national markets where cases qualify for investigation an unforeseen consequence of this policy is that it has left the markets in the new and old Member States vulnerable to the expansion of a handful of West European companies. Given the size of these companies today, the EC is likely to be central in deciding whether the acquisitions and expansion of these companies threatens pluralism on individual markets. As these companies will be entering new markets it is unlikely that the EC Merger Regulation will be employed to block these. Leaving a handful of large media conglomerates of the West in an even more powerful position. In the final analysis there is little the EC could do to protect media pluralism at the Member State level within the current framework and it is crucial that the Member States protect pluralism as without such a framework the foundations of Community policy are swept away under the current regulatory regime.

Member States are finding it more difficult to strike the balance between the needs of the public and of the industry. This lack of vision in public policy is leading to a changing approach to concentration and an increasing move to competition policy as the central instrument that Member States employ when deciding on a merger and acquisition case. The system is politically convenient as boundaries that have previously been established to protect pluralism have been swept aside and replaced with a far more flexible framework where the goal posts can be moved to suit the prevailing trends in the television industry and political sphere. If competition policy is inadequate at the Community level to fully protect pluralism in the television sector then it is certainly insufficient for dealing with media pluralism and diversity at the Member State level. In this respect, the Member States are increasingly failing to take advantage of their right to impose frameworks to guarantee that media concentration does not threaten media pluralism, and we can expect such concentration to increase.

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**David Ward**

## **Televizijski pluralizam i raznolikost i natjecateljska politika Europske Komisije – Zapadnoeuropsko iskustvo**

### **SAŽETAK**

Članak propituje medijsku koncentraciju u Europskoj uniji (EU) u kontekstu regulatornih pristupa koje su zauzele zemlje članice EU-a. Suprotstavlja se uobičajenom mišljenju da je pristup Unije zaštiti medijskog pluralizma vođen isključivo tržišnim pristupom, te ističe kako je on zasnovan i na javnom interesu. Smatra se da medijska koncentracija raste zbog slabljenja obveze i važnosti koju zemlje članice pridaju zaštiti medijskog pluralizma. Nacionalne vlade podržavaju nacionalne prvake i uklanjaju regulatorne prepreke u rastu kompanija kako bi istodobno zaštitile svoje tržišne igrače i omogućile nacionalnim kompanijama iskorištavanje većih ekonomija širenjem u susjedne zemlje, kako članice Unije tako i ostale. Istodobno, rast Europske Komisije (EC) koja je ključni regulator u području natjecateljske politike na razini Unije preoblikovao je obujam nacionalnih regulativa na tom polju. Takva politika Unije služila je kao okidač natjecateljske politike kako bi se podržalo europske prvake koji su sposobni iskorištavati veći dio globalnog tržišta i štititi medijski pluralizam na nacionalnoj razini, dozvoljavajući medijskim tvrkama da se šire u različitim medijima zajedničke tržišne zone.

Te suprotstavljene politike bit će razmatrane pregledom odluka Europske Komisije o medijima u Uniji, a članak će pokazati da iako pojedine članice zadržavaju

pravo jačanja regulativa o medijskoj koncentraciji, čini se da u situaciji preuzimanja većina članica nema snage da podupre medijski pluralizam. To nedvojbeno ostavlja regulatornu prazninu između nacionalnih i supranacionalnih regulatornih sfera, a pitanje medijske koncentracije se zanemaruje u korist kompanija i na štetu medijskog pluralizma.

Ključne riječi: Europska Komisija, medijski pluralizam, regulatorni pristup, televizijska proizvodnja, komercijalna televizija