

POLICY ROUNDTABLES

Regulation and Competition Issues in Broadcasting in the light of Convergence 1998

Introduction

The OECD Competition Committee debated regulation and competition issues in broadcasting in the light of convergence in October 1998. This document includes an executive summary, an analytical note by Mr. Darryl Biggar for the OECD and submissions from Australia, Canada, the Czech Republic, the European Commission, Finland, Italy, Japan, Korea, Mexico, Norway, the Slovak Republic, Sweden, Switzerland, the United Kingdom and the United States, as well as an aide-memoire of the discussion.

Overview

Digitalisation of information content and communication channels is bringing countries closer to the point where any information or entertainment content can be delivered down any communication channel. This convergence is breaking down the dividing lines between broadcasting, information technology and the media and has lead to an unprecedented wave of mergers.

This roundtable explored the implications of these developments for broadcasting regulation and competition enforcement. The technological processes of convergence are likely to have parallels in convergence of regulatory regimes. Broadcasting forms, such as television, that once received special treatment are increasingly regulated like other media. Competition concerns focus on access to the high bandwidth link to consumers (including the customer premises equipment or "set top box") and on access to key content, such as certain sporting events. Vertical arrangements or mergers between holders of these two types of bottlenecks and other firms in the broadcasting chain raise interesting and difficult challenges. How competition and regulatory authorities manage these bottlenecks is decisive for determining the degree of competition that will emerge in the long-run.

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REGULATION AND COMPETITION ISSUES IN BROADCASTING IN THE LIGHT OF CONVERGENCE

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Regulation and Competition Issues in Broadcasting in the light of convergence which was held by the Working Party n°2 of the Committee on Competition Law and Policy in October 1998.

This compilation, which is one of several published in a series named "Competition Policy Roundtables", is issued to bring information on this topic to the attention of a wider audience.

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les questions de concurrence et de réglementation de l'audiovisuel dans le contexte de la convergence qui s'est tenue en octobre 1998 dans le cadre du Groupe de travail n° 2 du Comité du droit et de la politique de la concurrence.

Cette compilation qui fait partie de la série intitulée "les tables rondes sur la politique de la concurrence" est diffusée pour porter à la connaissance d'un large public, les éléments d'information qui ont été réunis à cette occasion.

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EXECUTIVE SUMMARY

Note by the Secretariat

In the light of the written submissions, the background note and the oral discussion, the following points emerge:

(1) *Broadcasting lies at the intersection of, and therefore shares regulatory and competition issues with, both media and telecommunications. Broadcasting competes with other sources of media both to meet the information content demands of consumers and to provide audiences to advertisers. Broadcasting also shares with other media high fixed/low marginal costs of production and issues related to the protection of intellectual property. Broadcasting is distinguished from other media chiefly in the timeliness of (and the potential for interactivity with) the content provided. Timeliness is of particular importance in the broadcasting of sports and news. Important developments in the technology of broadcasting are fundamentally changing the nature of the broadcasting industry - away from analogue, one-way transmission towards digital, broad-band, interactive transmission.*

For the purposes of the roundtable broadcasting was defined as the business of the production of (possibly interactive) information content and its delivery over telecommunications services. Broadcasting forms part of, and competes with, a wider media industry. Like the wider media industry, broadcasting features economies of scale in production. Once a piece of content has been produced, the marginal cost of making that information available to another consumer is often close to or equal to zero. Information content is protected through intellectual property rights, which grant monopoly-like rights to the creator of the content. Like other forms of media, the demand for broadcasting derives from several sources, including consumers who wish to purchase access to information and interactive services (such as electronic commerce, home banking, etc.) and from firms and associations who wish to purchase access to consumers, in order to convey information (such as advertising).

Broadcasting is distinct from other forms of media in that it makes use of telecommunications services. These telecommunications services may involve either radio waves or a fixed-wire connection, may be one-directional or two-directional, digital or analogue and high or low bandwidth. Traditionally, broadcasting was predominantly radio based, one way and with a relatively limited bandwidth. There is a strong trend in broadcasting towards digital, high-bandwidth and two-way telecommunications.

(2) *Much traditional broadcasting was radio-based and relied entirely on advertising support. Economic theory suggests that where there is a limited amount of spectrum available, competition between broadcasters that rely entirely on advertiser support will not necessarily achieve public objectives of quality, diversity and efficiency. Such arguments have been used to justify a significant amount of regulation of traditional free-to-air broadcasting including strict licensing conditions, rules regarding content and subsidies to "public service" broadcasters.*

These regulations have in many countries, explicitly or implicitly restricted entry, to a greater extent even than is necessary due to spectrum scarcity. Many countries have a situation of rather limited competition in free-to-air television. Other regulatory restrictions, such as constraints on the quantity of advertising that can be aired can be seen as a response to a lack of effective competition.

These arguments for the regulation of free-to-air television do not apply to multi-channel pay television. When the number of available "channels" is essentially unlimited broadcasting raises no greater public policy content concerns than other media sectors. In particular, there is no greater economic basis for regulatory intervention to ensure diversity or to support "public service" broadcasting than in other media sectors. Accordingly, a number of countries noted that they do not regulate the entry or content of cable and satellite broadcasters.

The characteristics of traditional broadcasting gave rise to demands for regulation. Traditional broadcasting was radio based, un-encoded and operated within a fixed and somewhat limited amount of spectrum. Since the cost of encryption/decryption was prohibitive it was not possible to exclude consumers from receiving the signal, so this form of broadcasting was largely restricted to support from advertisers. In the presence of limits on the number of available channels, competition between free-to-air broadcasters does not necessarily maximise total welfare. These arguments have been used to support a significant amount of regulation of traditional broadcasting such as licensing requirements, regulatory rules regarding content and subsidies to certain broadcasters.

This regulation has, in many countries, acted explicitly or implicitly to restrict competition.[1] For example, many countries explicitly limit the number of free-to-air broadcasters, to a greater extent than justified by spectrum scarcity. For example, some countries noted that they have licensed only *one* private terrestrial broadcaster.[2]

The regulatory restrictions on competition can have a direct effect on the profitability of incumbent broadcasters and the quality of the products shown and may also limit the "pluralism" in the media sector. Countries which limit entry of new broadcasters also typically regulate the quantity and location of advertising which can be shown.[3] This may be an illustration of how one regulatory intervention (in this case a restriction on entry) can lead to the need for another regulatory intervention (in this case a regulation on the level of advertising, or regulations to promote pluralism). License requirements which impose quotas on certain types of programming may distort competition with less regulated media, such as pay television and especially the Internet. The EC notes:

> "In some Member States there is already an urgent need to simplify licensing procedures. In general, "traditional" procedures should be replaced by lighter, simpler systems operating in a graduated way as a function of the pervasiveness of the medium. ... The regulatory framework, in order to evolve without the need for constant adaptation and the consequent lack of legal security, should be more based on principles and consist of less detailed rules."

The arguments that support regulation of free-to-air broadcasters do not apply to pay or subscription broadcasting, especially when the viewer has a substantial choice of available sources of information. In this case, the public policy concerns over broadcasting are no greater than those that arise in other sectors of the media industry. In particular, the rationale for "public service" broadcasting is diminished. Accordingly, several countries noted that they do not

regulate cable and satellite broadcasting.[4] Several other countries do, however, continue to regulate the provision of cable and satellite services through, for example, requirements to demonstrate financial and technical capacity and by imposing license obligations on levels of investment and coverage.[5] Mexico also regulates prices, by setting price floors on the prices of services such as advertising. DGX of the European Commission notes that it is of the opinion that (in part as a result of the need to protect the European audiovisual industry against foreign imports) "the regulation of services providing content cannot be dealt with in purely economic terms".

(3) *As in other sectors, targeted regulatory intervention may be appropriate to control abuse of a dominant position. A dominant position may, in principle, arise at any of the broadcasting stages of production. Competition and regulatory concerns have primarily focused on dominance in the provision of certain content (especially sports) and dominance in retail distribution of broadcasting signals to consumers.*

Economies of scale and scope imply that relatively few consumers will have a choice of more than one or two fixed-wire links to a broadcasting (i.e., "cable") network. Although such networks face competition from radio-based services (such as satellite television) there is a real possibility that a local cable network will benefit from a dominant position. Similar concerns arise with respect to set-top-boxes (also called "conditional access systems"). A company in a dominant position may be able to use that dominant position to restrict competition in its own or another market. Some countries have taken regulatory action to ensure access by content providers to the systems of dominant cable operators and set-top-box providers.

The broadcasting sector may be divided into a number of separate "stages of production", from programme production, through programme packaging, wholesale distribution, retail distribution and customer terminal equipment. Many of the regulatory and competition issues that arise in broadcasting relate to preventing the creation or abuse of a dominant position in one of these stages of production.

In particular, significant competition concerns surround retail distribution of broadcasting content. There are relatively few different technological alternatives for the retail distribution of broadcast signals. The available approaches fall into two categories - wireless (or radio based) approaches, such as terrestrial or satellite broadcasting and fixed-wire (copper, coaxial or fibre-optical cable) approaches. Of these, generally speaking, the fixed-wire alternatives offer the important possibility of two-way communication. However, the economies of scale and scope in installing a fixed-wire or fibre-optic network are such that in the long run few households are likely to have the choice of more than one or two fixed-wire networks. A cable operator, therefore, may be able to exert a significant degree of market power in the market for high-bandwidth content delivery to its own customers.

Similarly, consumers are unlikely to purchase more than one "set top box" for the decoding of digital and/or satellite broadcasts. If the provider of such a box is able to ensure incompatibility with other broadcasts, a firm which acquires a dominant position in set-top boxes may be able to maintain that position by ensuring that certain key content is not available in a format compatible with rival set-top-box systems. It may achieve this through vertical integration with the key content or through exclusive vertical arrangements. The decision of a firm to provide an incompatible system versus a system which is based on commonly-agreed industry standards is a strategic decision which will depend upon many factors including the position of the firm in the

market. The Internet is an example of an infrastructure for which there is competition in the different stages as a result of the wide use of compatible or "open" standards.

In this context regulatory interventions may seek to (a) require or facilitate the development of standards (so that competition can develop in the different stages such as the provision of set-top boxes) and/or (b) require dominant vertically-integrated cable operators and set-top-box providers to provide access to competing content providers.[6] The EC recently sought commitments to provide third-party access to set-top-boxes and cable systems in cases that have come before the Commission. In some cases regulatory interventions may also seek to prevent distributors (i.e., cable and satellite operators) from gaining exclusive access to key content in order to restrict competition in the infrastructure market (and related markets such as voice telephony).

(4) *Convergence is a result of changes in the economies of scope in the joint provision of telecommunications services (such as voice telephony) and broadcasting services. Convergence may place pressure on existing regulatory regimes. Convergence increases the cost of maintaining line-of-business restrictions, where they exist. Where there are no line-of-business restrictions, convergence highlights differences in regulatory requirements between the converging sectors. Convergence may also highlight problems of overlap or gaps in the jurisdiction of separate sectoral regulators. There is a clear trend towards the establishment of cross-sectoral "functional" regulators.*

Although there has always been some overlap in these industries, the telecommunications and broadcasting industries are converging due to changes in the underlying economies of scope. This may place existing regulatory arrangements under strain, especially where particular infrastructures are regulated on the assumption that they will be used to provide particular services. Where there are separate regulatory structures for telecommunications and broadcasting infrastructures, there is the possibility of overlap and conflict between regulatory regimes, and the possibility of incomplete coverage.

Many countries noted that Internet broadcasting was currently unregulated, either because Internet broadcasting was not caught within existing regulatory definitions, or because regulatory agencies have chosen not to attempt to enforce existing rules.[7] As the quality of the Internet increases, video broadcasting on the Internet will increase in variety and popularity, potentially threatening existing regulatory regimes, including rules regarding programming, domestic content quotas and levels of advertising.

Rather than separate "vertical" regulators for telecommunications and broadcasting which license infrastructure, monitor content and enforce competition rules, there is a trend towards allocating these roles to different cross-sectoral institutions on a "horizontal" or "functional" basis.[8] Several countries have adopted combined regulators with responsibilities for both telecommunications and broadcasting.[9] There is also a trend towards an approach to regulation which regulates facilities separately from the services provided over those facilities. In a few countries, spectrum is also licensed in a manner independently from the use to which that spectrum may be put.[10]

(5) *There are many other individual regulatory interventions in broadcasting which often have important effects on competition.*

Several countries noted that certain events were reserved for free-to-air television. Such regulation distorts competition against the development of pay television. Several countries subsidise a (usually state-owned) broadcaster. Where what is being "purchased" with these funds is not clearly contractually specified, such subsidies can distort competition with other private broadcasters and may conflict with applicable rules on state aid.

Several countries noted the existence of controls on the national origin of broadcast works, presumably with the intention of fostering national identity and culture. Controls over inputs (in this case the origin of a work) need not have any effect on the output (in this case the content). In addition, such rules limit the ability of foreign producers to compete for works which promote national identity and culture and therefore hinder international trade. Indeed, the EC notes that these rules are intended as a barrier to trade, to protect the audiovisual sector of the European economy from competition.

Relatively few countries have introduced market mechanisms for the allocation of spectrum. In the absence of market mechanisms for spectrum, new entry can be difficult (as licenses can be difficult to obtain) and existing spectrum can be used inefficiently, limiting the availability of spectrum for new high-value products and services and enhanced competition.

Several, but not all, countries noted that certain events (especially sports events) were prevented from being broadcast exclusively on pay television.[11] The economic basis for such rules is unclear. Such rules appear to distort competition against pay television and may damage the long-term interests of the sports themselves. Concerns over exclusive rights to major sporting events can be addressed through competition law controls.

Virtually all countries have a system for subsidising one or more (usually state-owned) "public service" broadcasters, often funded by a tax on television ownership[12]. In many cases what is being "purchased" with these subsidies is not transparent. The EC notes "the presence of State-funded operators and the strong regulating interventions from the Member States create significant distortions in the allocation of market resources". These subsidies to public broadcasters may distort competition with private broadcasters and may contravene the EC Treaty rules on State Aid. These subsidies can be made more effective and more transparent by introducing a system of contestable funds under which broadcasters compete with each other for the screening of content which meets the "public service" criteria. [13]

Many countries within the EU follow the EC Directive which requires that ("where practicable") at least 50 per cent of the content broadcast (outside certain categories) be of "European works". The intention of this rule is to promote European culture to European citizens. However, control of the *origin* of a programme need not have any effect at all on the *content* of the programme. Moreover, the regulation introduces a distortion in competition between international producers and is a barrier to international trade. If there is a desire to promote European culture it could be achieved more effectively through a contestable fund open to all (European and international) producers who produce works meeting certain cultural criteria. The EC (DGX) notes that the primary purpose of these controls is not to promote European culture but to protect from international competition the EC audiovisual sector.

Relatively few countries noted that spectrum was allocated using market mechanisms and/or that spectrum licenses were fully tradeable.[14] The absence of tradeable spectrum rights can raise barriers to entry, contributes to inefficient use of spectrum and therefore can lead to a reduction

in competition. For example, in some countries the lack of a market value for spectrum has lead to spectrum being used inefficiently (e.g., in extending coverage of terrestrial broadcasters) rather than allowing new entrants into the market. In a few cases spectrum rights have been allocated in a manner which strongly favours state-owned over private broadcasters.[15]

(6) *Many submissions discussed in detail issues surrounding market definition. While acknowledging that broadcasting competes with other forms of media for both viewers and advertisers, most countries noted that they have tended to distinguish broadcasting markets from other media markets. Markets for free-to-air television have also been systematically distinguished from the market for pay television. It remains less clear whether separate markets for cable and satellite services can be distinguished. Within broadcasting, different markets are typically distinguished for different categories of programming.*

Several countries went into some detail explaining market definition principles.[16] Full analysis requires consideration of the potential substitutes and potential for entry at each of the stages of production mentioned above. This is most fully explored in the submission of the EC. Most of the submissions focused on the final demand for broadcasting services, from advertisers and consumers.

In the case of the consumption habits of consumers, although it is acknowledged that broadcasting competes with other forms of media (such as newspapers, cinema, magazines), in no case was it indicated that a market definition was adopted in which broadcasting and other forms of media were held to be sufficiently substitutable as to be in the same market from the perspective of consumers. In general, broadcasting has fewest substitutes (and therefore the greatest potential for market power) in the broadcasting of content for which timeliness is important (such as live sporting events).

Furthermore, although there is clearly some substitution between the various forms of broadcasting, a market for pay television was systematically distinguished from the market for free-to-air television.[17] Although it is clear, that, at one level, free-to-air (which relies on support from advertisers) will never be able to offer identical services to pay television, it appears that the extent of the substitutability between these products may depend upon the extent of regulation of free-to-air television. There is some evidence from Italy, Germany and the US that the growth of pay television is slower (and its market power more limited) in markets which have a large number of free-to-air channels. It is not clear whether or not the various forms of pay television (cable, satellite and microwave) operate in the same market. Mexico notes one case where an incumbent cable operator was held to not have market power as a result of competition from microwave and satellite services. In contrast, in one US case, a market for cable television was distinguished from the market for satellite or microwave television.

Furthermore, the different genre of programmes are likely to be imperfect substitutes. Within sports broadcasting, it is likely that one sport is a relatively weak substitute for another. The overall picture of broadcasting that emerges is of a number of distinct markets for differentiated products.

The situation with regard to the advertising market is similar. Most countries reported finding that different forms of media advertising were relatively weak substitutes (and, in some cases, may in fact be complements).[18] In most cases the geographic scope of the market is national. Even within the EU, which has sought to reduce barriers to trade in television services, markets

remain largely national in scope, probably partly as a result of language and cultural barriers. Only Switzerland, probably because of the special language characteristics of its population noted a significant level of cross-border competition.

(7) *Several countries noted high levels of concentration in particular sectors of the broadcasting industry. Although in general, horizontal mergers and agreements in broadcasting do not raise industry-specific issues, particular concerns were expressed over mergers between telecommunications companies and dominant cable operators (due to the possibilities for restricting the number of likely entrants) and over agreements between competitors for the establishment of standards.*

Several countries noted relatively high degrees of concentration in parts of the broadcasting sector. Examples include Finland (where the national public service broadcaster operates the television distribution networks and leases capacity to its competitors) and Norway (where the incumbent telecommunications company owns most of the terrestrial networks and significant portions of the cable networks). In Mexico and Italy, the two largest free-to-air broadcasters attract 85 per cent and 90 per cent respectively of the total audience.

In general, horizontal agreements and mergers in the broadcasting/multimedia sector raise the same concerns as in other sectors, and similar analysis is applied. Horizontal arrangements have in some cases been approved when the efficiency benefits exceed any competitive harm.[19]

Particular concerns arise in the merger of telecommunications companies and cable television operators. Such cases raise concerns in both the market for pay television (as telecommunications companies are important potential entrants into this market) and in the market for voice telephony (as cable operators are important entrants into that market). Mexico describes one such merger which was called off as a consequence of the conditions imposed by the Mexican competition authority.[20]

Agreements between industry participants for the establishment of standards can be efficiency enhancing as they can avoid costly battles for the establishment of de facto standards and can overcome consumer reluctance to purchase in the face of uncertainty as to which standard will prevail. Such agreements can also raise competition concerns, especially where access to the standard setting process or the standards themselves are denied to new entrants or other market players.

(8) *Some of the most important regulatory and competition issues in broadcasting arise in relation to vertical arrangements and mergers. In certain circumstances a firm with a dominant position at one level in the broadcasting chain of production can use that dominant position to restrict competition either at the same level or in an upstream or downstream market, through exclusive vertical arrangements.*

The difficulty for competition enforcers and policy makers is to distinguish legitimate efficiency enhancing vertical arrangements from those arrangements which are potentially anticompetitive. There are efficiency enhancing reasons why a content provider may only wish to deal with one infrastructure provider in each market. There are also efficiency reasons why an infrastructure provider may wish to only accept one source of content of a given type.

The general rules that emerge are that exclusive contracts should be tolerated provided that their scope and duration is not such as to prevent competing infrastructure providers from having access to key content for an inappropriate period of time, or such as to prevent competing content providers from having access to key infrastructure providers for an inappropriate period of time.

There are four main possibilities, corresponding to the use of a dominant position to restrict competition in a horizontal or vertical market: cases where a dominant content provider refuses to deal[21] with a competing downstream infrastructure provider; or where a dominant content provider insists that a downstream infrastructure provider refuses to deal with a competing content provider; or where a dominant infrastructure provider insists that a content provider refuses to deal with a competing infrastructure provider; or where a dominant infrastructure provider refuses to deal with a competing content provider.

In regard to the first case, a question was raised why content providers would agree to sell to only one infrastructure provider, as content providers should be able to extract the full monopoly rent from their product whether it is sold on an exclusive or on a non-exclusive basis. Furthermore, since the cost of reproducing the content is small, it is argued that content providers should always wish to sell to as wide an audience as possible. However, these arguments are not necessarily correct. Exclusive arrangements may be necessary to obtain certain efficiencies or to exploit the full value of a piece of content. For example, an exclusive territory may be necessary to induce the broadcaster to invest in promoting the content. Alternatively, it may not be possible for the content provider to extract the full value of the content when sold on a non-exclusive basis.

In general, competition concerns are limited when there are adequate substitutes for the exclusive content and/or when the duration of the exclusive rights is no longer than necessary. Similar arguments apply to vertical integration. Vertical integration between a content provider and a distributor will not be a competitive concern when there remain adequate substitutes for the content. In addition, vertical integration can reduce transactions costs arising from, amongst other things, difficulties in specifying in advance the quality of the content.[22]

Several countries reported cases where specific concerns were related to the foreclosure of access to key content. In the UK, the OFT required BSkyB to make all of its channels available to other suppliers of pay TV on the basis of a published rate card.

A dominant content provider may also seek to restrict access to its competitors by requiring that its downstream distributors not also carry competing content (the second case). A possible example of this is the requirement in Formula One broadcasting contracts that the broadcaster not also show other forms of competing motor-vehicle racing.[23] As with all vertical restraints, the costs and benefits of these arrangements need to be weighted carefully. An arrangement of this type could be efficiency enhancing if it prevents free-riding by competing content providers on the promotional efforts of the dominant content provider, but it could also restrict competition.

Parallel competition concerns arise in relation to the denial of access by content providers to broadcasting infrastructures (the third and fourth cases). Although, in general, infrastructure providers have incentives to provide access to a range of content providers, they will, in general, not be willing to provide access to content which competes with content which they provide themselves at equivalent terms and conditions. A distributor that is integrated with a content

provider incurs all of the fixed costs of producing the content. In considering whether to grant access to competing content, it will be willing to pay the competitor no more than the costs it saves by not providing the content itself, which could be very small or zero, unless the rival content completely displaces the incumbent's content.[24] This outcome is efficient as it avoids the duplication of the fixed cost of production, at the cost of raised barriers to entry by independent content producers.

(9) *Several countries reported particular concerns with regard to sports broadcasting.[25] The live broadcasts of certain sporting events have relatively inelastic demand by consumers and are therefore very valuable to broadcasters. The rights to broadcast these events are often exclusive, raising concerns over the competition effects of exclusive vertical arrangements. As the European Commission notes, such exclusivities do not, in themselves, pose competition concerns provided the length and scope of the rights is not incommensurate with any related specific investment on the part of the broadcaster. This exclusivity may for example last several years, where it relates to the development or establishment of a new technology. The sale of the rights collectively, through sports leagues may yield efficiency benefits.*

The question of whether rights to sporting events should be sold individually, by the teams or collectively, by a sports league has not yet been clearly determined. A sports league has an interest in the long-term redistribution of earnings among the league, in order to prevent the emergence of dominant teams and to maintain public interest in the sport. In principle, this can be achieved more easily through collective sale of the broadcasting rights. However, these benefits may not be so large as to outweigh the resulting competition concerns. At least one country (Mexico) noted that broadcasting rights are sold not by the league but by the individual teams.

NOTES

1 France notes: "... in France, where a number of regulations concerning books, the release of first-run films in movie theaters, and local content requirements for television service providers are designed to ensure that French film-makers or authors are not prevented from gaining market access and to ensure pluralism, have restricted competition between service providers". p. 744.

2 For example, the Broadcasting Services Act in Australia limits the total number of free-to-air broadcasters to two public and three private. In the UK, each of the three licensed private broadcasters faces closely defined and specific licence requirements intended to distinguish the private broadcasters from each other and from the main public service broadcaster.

3 Within the EU, advertising is regulated as a result of the Television Without Frontiers Directive. Examples outside the EU include Australia.

4 For example, the Czech Republic, Finland, Sweden.

5 See, for example, Mexico.

6 See for example the submissions of Canada, Finland, Mexico and Australia. In Australia the telecommunications-specific access regime in the Trade Practices Act applies to cable operators. The EC Advanced Television Standards Directive establishes such a regulatory regime for access to "conditional access systems".

7 See for example the submissions of the Czech Republic.

8 For example, in Australia these roles are divided between the Australian Broadcasting Authority, the Australian Communications Authority and the Australian Competition and Consumer Commission.

9 Examples include Italy, Mexico, Switzerland, Canada, the US and Finland.

10 Examples include New Zealand and Australia. Australia notes: "The general trend is away from issuing apparatus licences (with specific uses) and towards granting spectrum licences (with fewer restrictions upon use). This should result in a more diverse array of opportunities for new entrants to offer new types of telecommunications and broadcasting services."

11 This is known as "anti-siphoning" legislation. In the case of the EC countries, this derives from Article 3A of the Television Without Frontiers Directive. New Zealand, Norway and Finland are exceptions.

12 And in some cases, through a tax on private commercial broadcasters (as in Finland).

13 This point is emphasised in the submission from Finland. In Italy, when a part of the public service obligations of the national public service broadcaster (RAI) was tendered out to another broadcaster, the Italian Antitrust Authority argued that the subsidy to RAI should be reduced accordingly. Norway maintains such a fund for subsidising film and broadcast television production. The Slovak Republic also mentions a similar fund.

14 Exceptions include Mexico, Australia and New Zealand.

15 As, for example, in the Slovak Republic.

16 See, for example, Australia, Canada, the European Commission.

17 See, for example, Australia.

18 For example, in Canada, advertising in the (free) community newspapers was considered to be a separate market from advertising in the major daily newspapers.

19 Examples include a case in Canada relating to the joint operation of radio stations (to overcome a regulatory barrier to ownership of more than one station per language per band in a geographic area) and a case in Norway, relating to the cooperation in setting programming schedules in free-to-air television, to provide enhanced diversity.

20 Switzerland also expresses concerns over a holding by the incumbent telecommunications company in the largest cable network.

21 Here and in the remainder of this paragraph, “refuses to deal” should be taken to include the possibility of insisting on discriminatory terms and conditions.

22 This is discussed further in the submission from Australia.

23 Another example arises in Finland where two jointly-dominant networks agreed to refuse to purchase programming from programme providers who were selling to their cable rival, Eurocable. In Sweden, a pay-TV channel was denied access to a cable television network in a case involving possible abuse of a dominant position. No action was taken.

24 This is discussed in the French submission.

25 See for example, the submissions of the EC.

NOTE DE SYNTHÈSE

Par le Secrétariat

Les points suivants émergent des contributions écrites, de la note d'analyse et des débats oraux :

(1) *La radiodiffusion se situe à l'intersection des problèmes de réglementation et de concurrence qu'elle partage avec les médias et les télécommunications. Elle est en concurrence avec d'autres sources de communication à la fois pour répondre aux exigences des consommateurs en matière de contenu en information et pour fournir une audience aux annonceurs publicitaires. La radiodiffusion partage aussi avec d'autres moyens de communication des coûts de production fixes élevés/marginaux faibles et des problèmes de protection de la propriété intellectuelle. Elle se distingue des autres médias principalement par l'actualité du contenu proposé (et le potentiel d'interactivité avec lui). L'actualité est particulièrement importante pour la diffusion des sports et des informations. Les évolutions importantes de la technologie entraînent des changements fondamentaux de la nature du secteur de la radiodiffusion marqués par le passage de la transmission analogique dans un seul sens à une transmission numérique à large bande et interactive.*

Pour les besoins de la table ronde, on a défini la radiodiffusion comme l'activité de production d'un contenu en information (peut-être interactif) et sa diffusion par l'intermédiaire de services de télécommunications. La radiodiffusion fait partie du secteur plus large des médias dont elle est aussi un concurrent. Comme ce secteur, la radiodiffusion connaît des économies d'échelle dans le domaine de la production. Lorsqu'un élément de contenu a été produit, le coût marginal de sa mise à la disposition d'un autre consommateur est souvent voisin de zéro ou égal à zéro. Le contenu en information est protégé par des droits de propriété intellectuelle qui confèrent à son créateur des droits quasi monopolistiques. Comme celle adressée aux autres formes de moyens de communications, la demande de radiodiffusion émane de plusieurs sources, notamment les consommateurs qui souhaitent acquérir un accès à l'information et à des services interactifs (tels que le commerce électronique, la banque à domicile etc.) et les entreprises et les associations qui cherchent à acquérir un accès aux consommateurs afin de transmettre des informations (telles que la publicité).

La diffusion audiovisuelle se distingue des autres médias par le fait qu'elle utilise les services de télécommunications. Ces services de télécommunications peuvent prendre la forme de liaisons hertziennes ou de connexions par câble fixe, ils peuvent être à sens unique ou bidirectionnels, numériques ou analogiques ou à bande de fréquences élevées ou faibles. Traditionnellement, la diffusion audiovisuelle était basée sur la transmission par voie hertzienne, à sens unique et avec une bande de fréquences assez limitée. Il existe actuellement une forte tendance vers les communications numériques, bidirectionnelles et à bande de fréquences large.

(2) *La radiodiffusion traditionnelle faisait le plus souvent appel à la transmission par voie hertzienne et à un financement par la publicité. La théorie économique suggère que si la dimension du spectre disponible est limitée, la concurrence entre opérateurs de radiodiffusion qui font appel uniquement à la publicité ne permettra pas nécessairement d'atteindre les objectifs publics de qualité, de diversité et d'efficience. Ces arguments ont été utilisés pour*

justifier une réglementation assez développée de la diffusion traditionnelle par voie hertzienne comprenant des conditions strictes d'agrément, des règles applicables au contenu des programmes et des subventions aux opérateurs de "service public".

Dans un grand nombre de pays, ces réglementations ont imposé des restrictions explicites ou implicites à l'entrée qui vont au-delà de ce qui est imposé par la capacité du spectre. La concurrence en matière de télévision hertzienne est assez limitée dans beaucoup de pays. D'autres restrictions réglementaires telles que la limitation du volume de la publicité qui peut être diffusée peuvent être considérées comme une réaction à un manque de concurrence effective.

Ces arguments en faveur de la télévision par voie hertzienne ne s'appliquent pas à la télévision payante à canaux multiples. Dès lors que le nombre des "canaux" disponibles est essentiellement illimité, la radiodiffusion ne soulève pas davantage de préoccupations du point de vue de l'action des pouvoirs publics que les autres secteurs des médias. En particulier il n'existe aucune raison économique particulière justifiant une intervention réglementaire visant à assurer la diversité ou à aider la radiotélévision de "service public" pas plus que dans les autres secteurs des médias. En conséquence, un certain nombre de pays ont noté qu'ils ne réglementaient pas l'entrée ou le contenu des programmes des opérateurs de télévision par câble et par satellite.

Les caractéristiques de la diffusion traditionnelle par voie hertzienne, non codée et exploitée à l'intérieur d'un spectre quelque peu limité suscitaient des demandes de réglementation. En raison du coût prohibitif du cryptage/décryptage, il n'était pas possible d'empêcher certains consommateurs de recevoir le signal si bien que cette forme de diffusion devait se financer essentiellement par la publicité. En présence de limites affectant le nombre de canaux disponibles, la concurrence entre les opérateurs hertziens n'aboutit pas nécessairement au bien être total maximum. Ces arguments ont été utilisés pour justifier une réglementation assez développée du secteur de la diffusion traditionnelle comportant des obligations d'agrément, une réglementation du contenu des programmes et des subventions à certains opérateurs.

Cette réglementation a agi explicitement ou implicitement dans le sens d'une restriction de la concurrence dans certains pays[1]. Par exemple, le nombre d'opérateurs par voie hertzienne est soumis dans certains pays à des limitations qui vont au-delà de ce que justifierait la capacité du spectre. Ainsi, certains pays ont noté qu'ils avaient agréé un seul opérateur privé de télévision par voie hertzienne[2].

Les restrictions de la concurrence découlant de la réglementation peuvent avoir un effet direct sur la rentabilité des opérateurs en place et sur la qualité des produits diffusés et peuvent aussi limiter le pluralisme dans le secteur des médias. Les pays qui limitent l'entrée de nouveaux opérateurs réglementent aussi en général le volume et la localisation de la publicité susceptible d'être diffusée[3]. Ceci montre comment une intervention réglementaire (dans ce cas une restriction à l'entrée) peut en nécessiter une autre (dans ce cas une réglementation de la publicité ou des réglementations visant à encourager le pluralisme). L'exigence d'un agrément qui impose des quotas pour certaines catégories de programmes peut fausser la concurrence avec des médias moins réglementés comme la télévision payante et surtout Internet. La CE note :

> "Dans certains pays membres, il est déjà urgent de simplifier les procédures d'agrément. En général, les procédures "traditionnelles" devraient être remplacées par des systèmes plus

simples opérant de manière graduelle en fonction de l'extension de l'influence du diffuseur. Afin de pouvoir évoluer sans une adaptation constante source d'insécurité juridique, le cadre réglementaire devrait se borner autant que possible à définir des principes et comporter des règles moins détaillées".

Les arguments en faveur de la réglementation de la télévision par voie hertzienne ne s'appliquent pas à la télévision payante ou par souscription en particulier lorsque le téléspectateur dispose d'un choix substantiel de sources d'information disponibles. Dans ce cas, les préoccupations que suscitent la radiodiffusion et la télévision chez les pouvoirs publics ne sont pas plus importantes que celles que créent d'autres secteurs des industries de l'information. En particulier, la justification de l'existence d'un "service public" de la radiotélévision s'estompe. En conséquence, plusieurs pays ont noté qu'ils ne réglementaient pas la télévision par câble et satellite[4]. Plusieurs autres pays continuent toutefois à réglementer les services de diffusion par câble et satellite à travers par exemple l'obligation de démontrer une capacité technique et financière et l'imposition d'agréments portant sur le niveau des investissements et le territoire couvert[5]. Le Mexique réglemente aussi les tarifs en fixant des tarifs planchers pour les services tels que la publicité. La DGX de la Commission européenne note qu'elle est d'avis qu'(en partie en raison de la nécessité de protéger l'industrie audiovisuelle européenne contre les importations étrangères) "la réglementation des services qui fournissent le contenu des programmes ne peut pas être traitée en termes purement économiques".

(3) *Comme dans d'autres secteurs, une intervention réglementaire ciblée peut être appropriée pour contrôler l'abus de position dominante. Une position dominante peut en principe exister à n'importe quel stade de la production audiovisuelle. Les préoccupations en matière de concurrence et de réglementation se sont concentrées principalement sur les positions dominantes dans la fourniture de certains programmes (en particulier les évènements sportifs) et dans la diffusion au détail de signaux aux consommateurs.*

Du fait des économies d'échelle et de gamme, relativement rares sont les consommateurs qui ont le choix entre plusieurs liaisons fixes (c'est-à-dire par câble) à un réseau de diffusion. Bien que ces réseaux soient en concurrence avec les services utilisant la transmission par ondes radio (tels que la télévision par satellite) il existe une possibilité réelle de voir un réseau câblé local occuper une position dominante. Les systèmes à décodeurs ("systèmes à accès conditionnel") soulèvent des préoccupations analogues. Une société occupant une position dominante peut être en mesure d'utiliser cette position pour limiter la concurrence sur son propre marché ou sur un autre marché. Certains pays ont pris des mesures réglementaires pour garantir l'accès des fournisseurs de programmes aux câblo-opérateurs dominants et aux chaînes cryptées.

Le secteur de la radio télévision peut être divisé en un certain nombre de "stades de production" distincts depuis la production de programmes, la constitution de bouquets de programmes, la distribution en gros, la distribution au détail et l'équipement du consommateur final en terminaux. Les problèmes de réglementation et de concurrence qui se posent dans la radiodiffusion concernent pour une large part les moyens d'empêcher la création ou l'abus d'une position dominante dans l'un de ces stades de production.

En particulier la diffusion au détail des programmes soulève des préoccupations importantes du point de vue de la concurrence. Il existe relativement peu de solutions de rechange technologiques différentes de la diffusion de signaux de radiotélévision. Les approches disponibles se répartissent en deux catégories : les approches sans fil (à base d'ondes radio)

telles que les émetteurs terrestres ou par satellite et les approches par liaison fixe (câble en cuivre, coaxial ou à fibres optiques). Parmi ces solutions, celles basées sur des liaisons fixes offrent la possibilité importante de communications dans les deux sens. Toutefois, en raison des économies d'échelle et de gamme liées à l'installation d'un réseau câblé ou de fibres optiques il est probable qu'à long terme les ménages qui auront le choix entre plusieurs réseaux câblés seront très peu nombreux. Un câblo-opérateur peut donc être en mesure d'occuper une position de force significative sur le marché de la diffusion de programmes sur bande large à ses propres clients.

De même, il est peu probable que les consommateurs achètent plusieurs "décodeurs" pour le décryptage des signaux numériques et/ou par satellite. Si le fournisseur de ce décodeur est en mesure d'assurer l'incompatibilité avec d'autres systèmes de diffusion, une firme qui acquiert une position dominante dans le secteur des décodeurs peut être en mesure de maintenir cette position en s'assurant que certains programmes essentiels ne sont pas disponibles dans un format compatible avec les autres systèmes de décodeurs. Elle peut arriver à ce résultat par intégration verticale avec le fournisseur du programme ou par des accords d'exclusivité verticaux. La décision prise par une firme de fournir un système incompatible au lieu d'un système basé sur des normes généralement admises dans le secteur est une décision stratégique qui va dépendre de nombreux facteurs y compris la position de l'entreprise sur le marché. Internet est un exemple d'infrastructure pour laquelle il existe une concurrence aux différents stades du fait du recours très large à des normes compatibles ou "ouvertes".

Dans ce contexte, les interventions de la réglementation peuvent viser *(a)* à exiger ou à faciliter l'élaboration de normes (afin que la concurrence puisse se développer aux différents stades tels que la fourniture de décodeurs) et/ou *(b)* à exiger des câblo-opérateurs et des fournisseurs de décodeurs ayant procédé à une intégration verticale qu'ils ouvrent un accès aux fournisseurs de contenu concurrents[6]. La CE a cherché récemment à obtenir des engagements concernant l'accès de tierces parties aux systèmes de décodeurs et de câble dans des affaires dont la Commission a été saisie. Dans certains cas, les interventions réglementaires peuvent aussi chercher à empêcher les distributeurs (c'est-à-dire les opérateurs de câble et de satellite) d'acquérir un accès exclusif à un contenu essentiel afin de limiter la concurrence sur le marché des infrastructures (et les marchés connexes tels que celui de la téléphonie vocale).

(4) *La convergence est le résultat d'évolutions des économies de gamme dans la distribution simultanée de services de télécommunications (tels que la téléphonie) et de services de télévision. Elle peut exercer une pression sur les régimes réglementaires existants en accroissant le coût du maintien de restrictions affectant les lignes d'activités lorsqu'elles existent. Lorsque de telles restrictions n'existent pas, la convergence fait apparaître les différences en matière de réglementation entre les secteurs qui convergent. Elle peut aussi mettre en lumière certains problèmes de recouvrement ou des lacunes dans la compétence des autorités réglementaires sectorielles. Il existe une tendance évidente à l'établissement d'instances de réglementation "fonctionnelles" couvrant plusieurs secteurs.*

Bien qu'il ait toujours existé certains recouvrements entre ces secteurs, la convergence entre les télécommunications et les industries de la radio et télé diffusion résulte des évolutions qui ont affecté les économies de gamme sous-jacentes. Cette évolution peut susciter des tensions au niveau de la réglementation surtout lorsque certaines infrastructures sont réglementées en fonction de l'hypothèse selon laquelle elles seront utilisées pour fournir certains services particuliers. Lorsqu'il existe des structures réglementaires distinctes pour les infrastructures de

télécommunications et de radio télévision, il existe un risque de recouvrement et de conflit entre les réglementations et une possibilité de lacune dans la couverture.

Un grand nombre de pays ont noté que la diffusion via Internet n'était actuellement pas réglementée soit parce qu'elle n'entre pas dans les définitions de la réglementation existante soit parce que les organismes de réglementation ont choisi de ne pas tenter d'appliquer les règles existantes[7]. L'amélioration de la qualité de la diffusion sur Internet va s'accompagner d'un développement de la variété et de la popularité de la diffusion vidéo sur ce média ce qui constituera une menace potentielle pour l'application des réglementations concernant notamment la programmation, les quotas de programmes nationaux et le volume de la publicité.

Les organes de réglementation "verticaux" distincts pour les télécommunications et la diffusion audiovisuelle qui délivrent des licences pour les infrastructures, contrôlent les programmes et appliquent les règles de la concurrence, ont tendance à être remplacés par différentes institutions couvrant plusieurs secteurs sur une base "horizontale" ou "fonctionnelle"[8]. Plusieurs pays ont adopté un dispositif d'organes de réglementation responsables à la fois des télécommunications et de la diffusion audiovisuelle[9]. La tendance est également à adopter une approche de la réglementation qui s'applique séparément aux installations et aux services fournis par ces installations. Dans un petit nombre de pays, les licences concernant le spectre sont délivrées indépendamment de l'utilisation qui peut être faite de ce dernier[10].

(5) *Un grand nombre d'autres interventions réglementaires individuelles dans la radio diffusion ont souvent d'importants effets sur la concurrence. Plusieurs pays ont noté que la diffusion de certains évènements était réservée à la télévision hertzienne. Cette réglementation fausse la concurrence au détriment du développement de la télévision à péage. Plusieurs pays subventionnent un opérateur (généralement public). Lorsque ce que ces aides "achètent" n'est pas clairement précisé par contrat, elles peuvent fausser la concurrence avec d'autres opérateurs privés et être contraires aux règles applicables concernant les aides de l'État.*

Plusieurs pays ont noté l'existence de contrôles de l'origine des œuvres diffusées qui répondent sans doute au souci de favoriser le développement de l'identité et de la culture nationales. Les contrôles sur les composantes (en l'occurrence l'origine des œuvres) n'ont pas nécessairement un effet quelconque sur le produit fini (en l'occurrence le contenu du programme). Par ailleurs, ces règles limitent la capacité des concurrents étrangers à produire des œuvres qui favorisent l'identité et la culture nationales et elles entravent donc les échanges internationaux. En fait la CE note que ces règles constituent des obstacles aux échanges destinés à protéger le secteur audiovisuel de l'économie européenne de la concurrence.

Les pays qui ont adopté des mécanismes de marché pour l'attribution du spectre sont relativement peu nombreux. En l'absence de tels mécanismes, l'entrée sur le marché peut être difficile (ou les licences peuvent être difficiles à obtenir) et le spectre existant peut être utilisé de manière inefficiente ce qui limite son utilisation par de nouveaux produits et services de grande valeur et freine le développement de la concurrence.

Plusieurs pays, mais pas tous, ont noté que certains évènements (en particulier sportifs) ne pouvaient pas être diffusés exclusivement par la télévision payante[11]. Ces règles dont la justification économique est douteuse paraissent fausser la concurrence à l'encontre de la télévision à péage et peuvent être dommageables pour les intérêts à long terme des sports eux-

mêmes. Les problèmes posés par les droits exclusifs de retransmission des grands évènements sportifs peuvent être traités par les contrôles au titre du droit de la concurrence.

La quasi totalité des pays a un système d'aide à un ou plusieurs opérateurs de "service public" (généralement détenus par l'État) qui est souvent financé par une taxe sur les appareils de télévision[12]. Très souvent, ce qui est "acheté" au moyen de ces aides manque de transparence. La CE note que "la présence d'opérateurs financés par l'État et les interventions réglementaires vigoureuses des États membres créent des distorsions significatives dans l'affectation des ressources du marché". Ces subventions accordées aux diffuseurs publics peuvent fausser la concurrence avec les opérateurs privés et être contraires aux règles du Traité de la CE sur l'aide de l'État. L'efficacité et la transparence de ces subventions peuvent être améliorées par l'adoption d'un système d'appel d'offres par lequel les opérateurs se font concurrence pour la diffusion de programmes répondant aux critères du "service public"[13].

Un grand nombre de pays de l'Union Européenne appliquent la Directive européenne qui exige que ("lorsque cela est possible") 50 pour cent des programmes diffusés (en dehors de certaines catégories) soient des "œuvres européennes". Cette règle est destinée à promouvoir la culture européenne auprès des citoyens européens. Le contrôle de l'origine d'un programme peut toutefois être sans aucun effet sur le contenu du programme. Qui plus est, la réglementation fausse la concurrence entre les producteurs internationaux et constitue un obstacle aux échanges internationaux. Si l'on veut promouvoir la culture européenne, un moyen plus efficace consisterait à instituer un système d'appels d'offres ouvert à l'ensemble des producteurs (européens et internationaux) qui produisent des œuvres répondant à certains critères culturels. La CE (DGX) note que le principal objet de ces contrôles n'est pas de promouvoir la culture européenne mais de protéger le secteur audio visuel européen de la concurrence internationale.

Les pays ayant noté que le spectre était attribué en utilisant des mécanismes de marché et/ou que les licences concernant le spectre étaient intégralement négociables sont relativement peu nombreux[14]. L'absence de droits au spectre négociables peut créer des obstacles à l'entrée elle contribue à une utilisation inefficiente du spectre et peut donc conduire à une réduction de la concurrence. Par exemple, dans certains pays, l'absence de valeur de marché du spectre a conduit à une utilisation inefficiente de ce dernier (par exemple par l'extension de la couverture des émetteurs terrestres) par refus d'autoriser de nouveaux entrants sur le marché. Dans un petit nombre de cas, les droits au spectre ont été attribués dans des conditions qui favorisent fortement les opérateurs publics par rapport aux opérateurs privés[15].

(6) *Les problèmes entourant la définition du marché ont été examinés en détail dans un grand nombre de contributions. Tout en reconnaissant que la radio télévision est en concurrence avec d'autres formes de médias pour attirer une audience et de la publicité, la plupart des pays ont noté qu'ils avaient tendu à distinguer les marchés de la radiotélévision des autres marchés des médias. Les marchés de la télévision hertzienne libre d'accès ont été également distingués du marché de la télévision payante. La question de l'existence de marchés séparés pour les services de diffusion par câble et satellite est moins évidente. A l'intérieur du marché de la radio télévision on distingue généralement des marchés différents en fonction du type de programmes qu'ils offrent.*

Plusieurs pays ont fourni des explications assez détaillées sur les principes régissant la définition du marché[16]. Une analyse exhaustive exige la prise en considération des produits de remplacement potentiels et des possibilités d'entrée à chacun des stades de production

mentionnés ci-dessus. L'analyse la plus complète de cette question se trouve dans la contribution de la CE. La plupart des contributions se sont concentrées sur la demande finale de services de radio télévision émanant des annonceurs et des consommateurs.

En ce qui concerne les habitudes de consommation, bien qu'il soit reconnu que la radio télévision est en concurrence avec d'autres formes de médias (journaux, cinéma, magazines) il n'a été indiqué dans aucun cas que l'on ait adopté une définition du marché dans laquelle la radio télévision et les autres formes de médias soient suffisamment substituables pour appartenir au même marché du point de vue des consommateurs. En général la radio télévision est le média qui a le moins de produits de substitution (et qui présente donc le plus fort potentiel de position de force sur le marché) dans la diffusion de programmes pour lesquels l'actualité est importante (tels que les retransmissions en direct d'événements sportifs).

Qui plus est, bien qu'il existe à l'évidence une certaine substitution entre diverses formes de radio télévision, un marché de la télévision payante a été systématiquement distingué du marché de la télévision hertzienne à accès libre[17]. Bien qu'il soit évident que la télévision hertzienne gratuite (qui dépend de la publicité) ne sera jamais capable d'offrir, à un certain niveau, les mêmes services que la télévision payante, il apparaît que le degré de substitualité entre ces produits peut dépendre de l'importance de la réglementation de la télévision hertzienne. L'expérience de l'Italie, de l'Allemagne et des États-Unis montre que la croissance de la télévision à péage est plus lente (et sa position sur le marché moins forte) dans les marchés où existe un grand nombre de chaînes hertziennes gratuites. Il est difficile de déterminer si les diverses formes de télévision payante (câble, satellite, hyperfréquences) opèrent sur le même marché. Le Mexique note un cas dans lequel un câblo-opérateur en place a été considéré comme n'ayant pas une position de force sur le marché du fait de la concurrence de services par satellite et par hyperfréquences. A l'inverse, aux États-Unis, un marché de la télévision par câble a été distingué, dans un cas, du marché de la télévision par satellite ou par hyperfréquences.

Par ailleurs, les différents genres de programmes sont probablement imparfaitement substituables. En ce qui concerne les retransmissions sportives, il est probable qu'un sport n'est qu'un substitut relativement faible d'un autre sport. L'image globale qui ressort est celle d'un certain nombre de marchés concernant des produits différenciés.

La situation est similaire en ce qui concerne le marché de la publicité. La plupart des pays ont indiqué qu'ils avaient observé que différentes formes de publicité sur les médias étaient assez peu substituables (et dans certains cas pouvaient en fait être complémentaires)[18]. Dans la plupart des cas, la dimension géographique du marché est nationale. Même à l'intérieur de l'UE qui a cherché à réduire les obstacles aux échanges de services de télévision, les marchés restent largement de dimension nationale probablement en partie en raison de barrières linguistiques et culturelles. Seule la Suisse, probablement en raison des caractéristiques particulières de sa population en matière linguistique a noté un niveau significatif de concurrence transfrontières.

(7) *Plusieurs pays ont noté l'existence de niveaux de concentration élevés dans certains secteurs de l'audiovisuel. Bien que les fusions et les accords horizontaux ne soulèvent pas de problèmes propres au secteur, des préoccupations particulières ont été exprimées au sujet des fusions entre sociétés de télécommunication et câblo-opérateurs occupant une position dominante (en raison des possibilités de limiter le nombre des entrants probables) et à propos des accords entre concurrents pour l'établissement de normes.*

Plusieurs pays ont noté un niveau élevé de concentration dans certaines parties du secteur audiovisuel. Parmi les exemples figurent la Finlande (où l'opérateur national de service public gère les réseaux de diffusion de la télévision et loue des capacités de diffusion à ses concurrents) et la Norvège (où les sociétés de télécommunications établies possèdent l'essentiel du réseau d'émetteurs terrestres et une partie importante des réseaux câblés). Au Mexique et en Italie, les deux principales chaînes hertziennes gratuites attirent 85 et 90 pour cent respectivement de l'audience totale.

En général, les fusions et accords horizontaux dans le secteur de l'audiovisuel/ multimédia soulèvent les mêmes préoccupations que dans les autres secteurs et font l'objet d'une analyse similaire. Les accords horizontaux ont été approuvés dans certains cas lorsque les avantages en termes d'efficience excèdent les atteintes éventuelles à la concurrence[19].

Les fusions de sociétés de télécommunications et d'opérateurs de télévision par câble suscitent des préoccupations particulières à la fois sur le marché de la télévision payante (dans lequel les sociétés de télécommunications sont des entrants potentiels importants) et sur le marché de la téléphonie vocale (dans lequel les câblo-opérateurs sont des entrants importants). Le Mexique décrit une fusion de ce type qui a été suspendue à la suite des conditions imposées par l'autorité de la concurrence[20].

Les accords entre professionnels pour l'établissement de normes peuvent avoir un effet d'amélioration de l'efficience en évitant les batailles coûteuses pour l'élaboration de normes de fait et en surmontant la réticence des consommateurs face à l'incertitude sur la norme qui prévaudra en définitive. Ces accords peuvent aussi soulever des préoccupations du point de vue de la concurrence, en particulier lorsque l'accès au processus de fixation des normes ou aux normes elles-mêmes est refusé aux nouveaux entrants ou aux autres acteurs du marché.

(8) *Les problèmes de fusions et d'accords verticaux figurent parmi les questions de réglementation et de concurrence les plus importantes qui se posent dans le secteur de l'audiovisuel. Dans certaines circonstances, une entreprise occupant une position dominante à un niveau de la chaîne de production peut utiliser cette position pour limiter la concurrence soit au même niveau soit sur un marché d'aval ou d'amont par des accords verticaux d'exclusivité.*

La difficulté pour les responsables de l'élaboration et de l'application de la politique de la concurrence est de distinguer les accords verticaux légitimes qui ont pour effet d'améliorer l'efficience de ceux qui présentent des risques d'atteinte à la concurrence. Un fournisseur de contenu peut vouloir traiter seulement avec un fournisseur d'infrastructures sur chaque marché pour des raisons d'efficience, de même qu'un fournisseur d'infrastructure peut accepter seulement une source de contenu d'un type donné également pour des raisons d'efficience.

Les règles générales sont que les contrats exclusifs doivent être tolérés à condition qu'ils n'empêchent pas, du fait de leur portée et de leur durée les fournisseurs d'infrastructures d'avoir accès à un contenu essentiel pendant une durée excessive ou les fournisseurs de contenu concurrents d'avoir accès à des fournisseurs d'infrastructures essentiels pendant une durée excessive.

Il existe quatre possibilités principales, correspondant à l'utilisation d'une position dominante, de limiter la concurrence sur un marché horizontal ou vertical : un fournisseur de contenu occupant une position dominante refuse de vendre[21] à un fournisseur d'infrastructures concurrent

en aval ou un fournisseur de contenu dominant insiste pour qu'un fournisseur d'infrastructures d'aval refuse de traiter avec un fournisseur de contenu concurrent ou un fournisseur d'infrastructures dominant insiste pour qu'un fournisseur de programmes refuse de vendre à un fournisseur d'infrastructures concurrent ou un fournisseur d'infrastructures dominant refuse de vendre à un fournisseur de contenu concurrent.

S'agissant du premier cas, on s'est demandé pourquoi des fournisseurs de contenu accepteraient de vendre seulement à un fournisseur d'infrastructures alors qu'ils devraient être en mesure d'obtenir la totalité de la rente de monopole avec leur produit, qu'il soit vendu ou non en exclusivité. Qui plus est, dès lors que le coût de reproduction du contenu est faible, les fournisseurs de programmes devraient toujours être désireux de vendre à une audience aussi large que possible. Toutefois, ces arguments ne sont pas nécessairement corrects. Des accords d'exclusivité peuvent être nécessaires pour obtenir certaines efficiences ou pour exploiter en totalité la valeur d'un élément de programme. Par exemple, l'exclusivité sur un territoire peut être nécessaire pour inciter l'opérateur à investir dans la promotion du contenu des programmes. Par ailleurs le fournisseur de programmes peut ne pas être en mesure d'extraire la valeur intégrale du contenu si ce dernier n'est pas vendu en exclusivité.

En général, les préoccupations en matière de concurrence sont limitées lorsqu'il existe des substituts adéquats du programme en exclusivité et/ou lorsque la durée des droits d'exclusivité n'est pas supérieure à ce qui est nécessaire. Des arguments similaires s'appliquent à l'intégration verticale. L'intégration verticale entre un fournisseur de programmes et un distributeur ne posera pas de problème du point de vue de la concurrence lorsqu'il subsiste des substituts adéquats des programmes. Par ailleurs, l'intégration verticale peut réduire les coûts de transaction découlant, entre autres, de la difficulté de préciser à l'avance la qualité du programme[22].

Plusieurs pays ont fait état de cas dans lesquels la fermeture de l'accès à un contenu essentiel soulevait des préoccupations particulières. Au Royaume-Uni, l'OFT a obligé BSkyB à mettre l'ensemble de ses canaux à la disposition d'autres fournisseurs de TV à péage sur la base d'une carte de tarifs publiée.

Un fournisseur de programmes occupant une position dominante peut aussi chercher à limiter l'accès à ses concurrents en exigeant que ses distributeurs d'aval ne proposent pas de programmes concurrents (2ème cas). Un exemple possible de ce problème est constitué par l'exigence dans les contrats de retransmission de la Formule Un que le diffuseur ne retransmette pas d'autres courses automobiles concurrentes[23]. Comme dans tous les cas de restrictions verticales, il convient de peser avec soin les coûts et les avantages de ces accords. Un accord de ce type pourrait être favorable à l'efficience s'il empêchait les fournisseurs de programmes concurrents de profiter des efforts de promotion du fournisseur de programmes dominant mais il pourrait aussi entraîner une limitation de la concurrence.

Le refus de l'accès des fournisseurs de contenu aux infrastructures de diffusion (troisième et quatrième cas) suscite des préoccupations parallèles au regard de la concurrence. Bien que les fournisseurs d'infrastructures soient en général incités à ouvrir un accès à un ensemble de fournisseurs de programmes, ils ne sont pas généralement disposés à offrir un accès à des programmes concurrents de ceux qu'ils offrent eux-mêmes à des termes et conditions équivalents. Un distributeur intégré à un fournisseur de programmes supporte la totalité des coûts fixes de la production des programmes. S'il devait donner accès aux programmes concurrents, il ne serait pas prêt à payer aux concurrents un prix supérieur aux économies de

coûts qu'il réalise en ne produisant pas les programmes lui-même, économies qui peuvent être faibles ou nulles sauf si le concurrent déplace complètement les programmes du producteur en place[24]. Ce résultat est efficient du fait qu'il évite la duplication des coûts fixes de production au prix d'une augmentation des obstacles à l'entrée des producteurs de contenu indépendants.

(9) *Plusieurs pays ont fait état de préoccupations particulières en ce qui concerne la retransmission des événements sportifs[25]. La retransmission en direct de certains événements sportifs, dont la demande est relativement inélastique, est donc très prisée par les chaînes de télévision. Les droits de retransmettre ces événements sont souvent exclusifs, d'où une inquiétude quant aux effets sur la concurrence des accords verticaux d'exclusivité. Comme le note la Commission européenne, ces exclusivités ne posent pas en elles-mêmes de problèmes du point de vue de la concurrence à condition que la durée et la portée des droits ne soient pas sans rapport avec un investissement spécifique correspondant de l'opérateur. Cette exclusivité peut, par exemple, durer plusieurs années si elle concerne la mise au point ou l'établissement d'une technologie nouvelle. La vente des droits à titre collectif par des fédérations sportives peut comporter des avantages en termes d'efficience.*

La question de savoir si les droits de retransmission des événements sportifs doivent faire l'objet d'une cession individuelle par les équipes ou collective par les fédérations sportives n'est pas encore clairement tranchée. Une fédération a intérêt à une redistribution à long terme des recettes en son sein pour éviter l'apparition d'équipes dominantes et maintenir l'intérêt du public pour le sport. En principe ce résultat peut être atteint plus facilement par la vente collective des droits de diffusion. Toutefois ces avantages ne sont peut être pas suffisants pour éliminer les préoccupations qui en résultent du point de vue de la concurrence. Un pays au moins (le Mexique) a noté que les droits de diffusion sont vendus non pas par la Fédération mais par chaque équipe.

NOTES

1 La France note : "en France où un certain nombre de réglementations concernant les livres, la diffusion de films en exclusivité dans les salles et les exigences en matière de contenu local visant les exploitants de télévision sont destinées à assurer un libre accès au marché aux producteurs de films français et à garantir le pluralisme, ces mesures ont limité la concurrence entre les prestataires de services". p. 744.

2 Par exemple, en Australie, le Broadcasting Services Act limite le nombre total de diffuseurs par voie hertzienne à deux diffuseurs publics et trois privés. Au Royaume-Uni, chacun des trois opérateurs privés agréés sont soumis à des obligations détaillées et spécifiques destinées à distinguer les diffuseurs privés entre eux et du principal opérateur public.

3 A l'intérieur de l'UE, la publicité est réglementée par la Directive sur la télévision sans frontières. Parmi les exemples extérieurs à l'UE figure celui de l'Australie.

4 Par exemple, la Finlande, la République tchèque, la Suède.

5 Voir, par exemple, le Mexique.

6 Voir par exemple les contributions du Canada, de la Finlande, du Mexique et de l'Australie. En Australie, le régime spécifique d'accès aux télécommunications de la loi sur les pratiques commerciales s'applique aux câblo-opérateurs. La Directive de la CE sur les normes de la télévision avancée établit un tel régime pour l'accès aux systèmes à accès conditionnel.

7 Voir par exemple les contributions de la République Tchèque.

8 Par exemple, en Australie, ces rôles sont répartis entre trois organismes: Australian Broadcasting Authority, Australian Communications authority et Australian Competition and Consumer Commission

9 On peut citer les exemples de l'Italie, du Mexique, de la Suisse, du Canada, des États-Unis et de la Finlande.

10 On peut citer entre autres les exemples de la Nouvelle Zélande et de l'Australie. L'Australie note "la tendance générale est à une diminution de la délivrance de licences concernant les matériels (à usage spécifique) au profit des licences concernant le spectre (comportant moins de restrictions d'utilisation). Ceci devrait offrir aux nouveaux entrants un nouvel éventail de possibilités en matière d'offre de nouveaux types de services de télécommunications et de diffusion".

11 Cette législation est connue sous le nom d'"anti-siphonnage". Dans le cas des pays de la CE, elle résulte de l'article 31 de la Directive sur la télévision sans frontières. La Nouvelle Zélande, la Norvège et la Finlande font exception à cette règle.

12 Et dans certains cas par une taxe sur les opérateurs commerciaux privés (comme en Finlande).

13 Ce point est souligné dans la contribution de la Finlande. En Italie, lorsqu'une partie des obligations de service public de l'opérateur national public (la RAI) a fait l'objet d'une

adjudication au profit d'un autre opérateur, l'Autorité antitrust italienne a fait valoir que la subvention accordée à la RAI devait être réduite à due concurrence ; Un fonds destiné à subventionner la production d'œuvres cinématographiques et télévisuelles existe en Norvège. La République tchèque mentionne aussi l'existence d'un fonds similaire.

14 Parmi les exceptions figurent le Mexique, l'Australie et la Nouvelle Zélande.

15 Comme par exemple, en République tchèque.

16 Voir par exemple, l'Australie, le Canada, la Commission européenne.

17 Voir par exemple l'Australie.

18 Par exemple, au Canada la publicité dans les journaux communautaires (gratuits) était considérée comme constituant un marché distinct de la publicité dans les grands journaux quotidiens.

19 Parmi les exemples figure un cas concernant l'exploitation commune de stations de radio au Canada (pour surmonter un obstacle réglementaire interdisant la détention de plus d'une station d'une langue par bande dans une zone géographique donnée) et un cas en Norvège concernant la coopération pour la fixation des programmes de télévision hertzienne afin d'offrir une plus grande diversité.

20 La Suisse s'est également déclarée préoccupée par la participation de la société de télécommunications en place dans le principal réseau câblé.

21 Ici et dans la suite du paragraphe, l'expression "refus de vendre" doit s'entendre comme incluant la possibilité d'exiger des conditions discriminatoires.

22 Cette question est examinée plus en détail dans la contribution de l'Australie.

23 Dans un autre exemple concernant la Finlande, deux réseaux occupant en commun une position dominante se sont mis d'accord pour refuser d'acheter des programmes à des fournisseurs qui vendaient à leur concurrent Eurocable. En Suède, une chaîne de télévision à péage s'est vue refuser l'accès à un réseau câblé de télévision dans un cas impliquant un possible abus de position dominante. Aucune action ne fut entreprise.

24 Cette question est abordée dans la contribution de la France.

25 Voir par exemple les contributions de la CE.

BACKGROUND NOTE

By the Secretariat

Introduction

The broadcasting industry is changing. As the figure below illustrates, changes in technology and consumer demands are changing the broadcast industry from one focused primarily on the *analog*, *one-way* transmission of a *limited* amount of information to a *wide audience* over *radio spectrum* to an industry focused on the *digital*, *interactive* transmission of an essentially *unlimited* quantity of information to a *fragmented* audience over a *wide range of broadband telecommunications paths*.

Figure 1: Broadcasting Industry Developments

Analogue	→	Digital
One-Way	→	Two-Way and interactive
Limited Bandwidth, Limited Choice	→	Unlimited Bandwidth and choice
Primarily Radio Based	→	Variety of broadband access paths (satellite, ADSL, Cable Modem)
Mass Audience	→	Increasingly fragmented audience; very large audiences rare

These changes have important implications for the regulation of broadcasting. The traditional rationales for broadcasting regulation no longer apply in a world of essentially unlimited bandwidth. In addition, new and important competition concerns arise. This paper seeks to explore these regulatory and competition implications of current developments in broadcasting.

Background

Broadcasting

The Definition of Broadcasting

In order to begin, it is necessary to define the notion of "broadcasting". It is no longer possible to provide a single, all-purpose definition of "broadcasting". Although it may have been possible at one time to draw boundaries between the different forms of information dissemination (e.g., on the basis of whether or not radio spectrum was involved, and whether or not the communication was bi-directional), the boundaries of broadcasting have blurred to the extent that it is no longer possible to draw a clear,

consistently meaningful line between what is and what is not broadcasting. The attached box (Box 1) highlights the problems that have arisen in the EC with outdated regulatory definitions of broadcasting.

Box 1: The Changing Definition Of Broadcasting[1]

A key task in adapting the current telecoms regulatory framework to tomorrow's multimedia market will be a ... realignment of the definitional boundaries between the 'telecoms' and 'broadcasting' sectors. The reasons for such a regulatory reappraisal stem largely from the following technological and commercial factors:

- First, individual delivery platforms, once associated with the transmission of a particular type of message or signal, are now capable of carrying all manner of messages. In contrast, however, the licensing framework of the Member States of the EU treat mobile, fixed and broadcasting communications networks separately.

- Second, definitional boundaries based on the distinction between "private" (telecoms) and "public" (broadcasting) messages, can no longer be sustained. The Internet, for example, has blurred the distinction between private and public communications and between "one-to-one" and "one-to-many" communications.

- Third, distinctions based on the "essential character of the messages" transmitted (e.g., 'audio-visual communications' as occurs in France) are also becoming obsolete - in a digital environment, it may be impractical to separate individual streams of data, voice and images and to regulate them differently.

- Fourth, the physical equipment or technology used to record, transmit or receive messages will no longer be relevant in distinguishing telecoms and broadcasting services because terminal equipment will become increasingly multi-purpose.

Both the European Community legal order and the regulatory traditions of the Member States distinguish between broadcasting and telecoms by reference to one or more of the foregoing concepts. These concepts, however, are being rendered largely obsolete by convergence.

For most of the purposes of this paper, it will be adequate to adopt the following definition of broadcasting: broadcasting is the business of producing interactive information content (especially audio and video content) and distributing it via (both one-way and two-way) telecommunications services.

Under this definition, broadcasting is distinguished from (but clearly competes with) the dissemination of information that does not involve telecommunications services such as the publishing of a newspaper. The definition does not attempt to distinguish between broadcasting and the variety of interactive media which make use of telecommunications services (such as the Internet, Minitel and telephone-based information services).

This definition is clearly not entirely satisfactory for all purposes. Under the definition, downloading a CD from a web site constitutes broadcasting, while purchasing the same CD from a record store does not. Reading a newspaper online would constitute broadcasting, while purchasing the same newspaper at a store would not. As these examples illustrate, content that may be distributed via telecommunications services (and thus would fall into the above definition) is often also disseminated by other means. In many contexts it will make more sense to speak of a broader industry which is involved in the production of all forms of audio and video content and its distribution by any feasible means, which we will refer to as the "multimedia/broadcasting industry"[2].

However, as the above definition reflects, information that is disseminated via telecommunications is different in important ways from information disseminated via other means. In particular, information that is disseminated by telecommunications has the overwhelming advantage of *timeliness.* Where the timeliness of the information is important, broadcasting has few, if any, substitutes and broadcasters as a whole may be able to exercise significant market power. The amount that broadcasters are willing to pay for content reflects not only the value that consumer's place on the content, but also the timeliness of the information.

Timeliness is particularly important for the outcomes of sporting events and certain news events. "Sport has a special quality that makes it unlike almost any sort of television programme: immediacy. Miss seeing a particular episode of, say, 'ER' and you can always catch the repeat, and enjoy it just as much. Miss seeing your team beat ... its biggest rival, and the replay will leave you cold. 'A live sporting event loses almost all its value as the final whistle goes'"[3]. As a result there is a profound long-lasting historical link between broadcasting and sports[4].

Timeliness is also important in other applications, especially those applications which require interactivity. Where a consumer does not know exactly what he or she is looking for, and expects to make several requests for information before concluding a search, the timeliness of telecommunications can make a significant difference to the length of the overall process. As a result, broadcasting has a strong comparative advantage in forms of research (such as a search for a particular book or video for which the consumer does not know the title) and in other forms of interaction (for example, for certain applications, the telephone and fax have significant advantages over conventional mail).

Broadcasting Stages of Production

As in other industries, within the multimedia/broadcasting industry we may identify a number of vertically-related "stages of production". At the broadest level, it is common to distinguish between, on the one hand, "content" and, on the other hand, "carriage" or "distribution". Under the earlier definition, the broadcasting industry includes both firms active in content production and firms active in those forms of distribution which involve telecommunications. The earlier CLP report on broadcasting identified 3 broad stages of production: "content production", "content packaging" and "delivery (or distribution)".[5]

For the purposes of this paper, we will identify the following separate stages of production:

Table 1: The Multimedia Value Chain

Stage	Description	Example
Content origination	production of multimedia content for each of the major distribution methods	Hollywood studios; Web publishers; Television studios
Content and service packaging	packaging of content into bundles or brands (often called "channels") to be delivered to consumers	Free-to-air broadcasters; Major cable channels (e.g., CNN, HBO, ESPN, Eurosport); AOL; MSNBC
Service provision	translation of content into a form that can be decoded by terminal equipment, handling interactivity requirements and customer accounting	Internet service providers such as AOL; local cable television providers; satellite television providers
Infrastructure provision	communication to and from service provider, at both wholesale and retail level	PSTN operators; cable television providers; satellite broadcasters; Specialist "backbone" broadcasting carriers such as TDF in France or BCL in NZ
Terminal vending	customer-site equipment translating signals into audio/video signals, controlling access and permitting interactivity	Television, computer and modem manufacturers; Set-top box manufacturers; Satellite receiving equipment providers

Source: OECD, modified from: Analysys (1998), Exhibit C, page 4.

Broadcasting: The Last Ten Miles

Some of the key regulatory and competition issues that arise in broadcasting, arise from the nature of the underlying telecommunications networks. It is useful before we go further, therefore, to explore the economic characteristics of those networks and, in particular, the potential for competition in broadband access paths into consumers' homes.

The technological demands for broadcasting networks are similar to those for other telecommunications networks, with the exception that broadcasting networks typically place greater demands on bandwidth. Virtually all forms of broadcasting make use of broadband "backbone" telecommunications networks to distribute the multimedia signals from central production points to the regional centres from which the signals are distributed to consumers. With certain exceptions, there are relatively few competition concerns over such backbone networks. The barriers to entry for such point-to-point high-bandwidth communications services are low and, at least in those countries which have deregulated telecommunications, there is often adequate competition. Regulatory and competition concerns therefore focus primarily on the *retail* distribution of the broadcasting signals - "the last ten miles" from the backbone network to the customer's house - the broadcasting equivalent of the "local loop" in voice telephony.

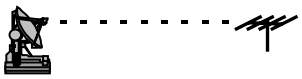
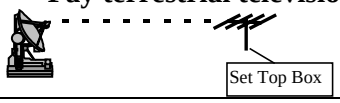
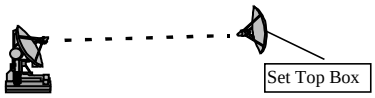
A summary of the different broadcasting paths into the home are set out in table 2. As with other forms of telecommunication, there are two basic means by which the consumer can be connected to the broadband network - via a wireless connection, or via some form of wired connection. The wireless approaches include traditional free-to-air television, pay terrestrial television, pay satellite television, wireless local loop, a dedicated wireless connection and an upgraded high-bandwidth mobile connection. The wired approaches include the traditional copper pair, co-axial cable and fibre-optic cable.

Traditional free-to-air analogue television obviously relies on a wireless connection. The amount of spectrum that ordinary television receivers can tune in is limited, so the total number of channels available is limited, both by the power of the transmission stations and the nature of the geography of the region covered. The current transition to digital compression techniques will enhance the efficiency of spectrum use and therefore the number of different channels available. This form of television is unidirectional. Viewer interactivity is typically limited to choosing the channel to view.[6] It is possible to encrypt the signal before transmission, to prevent unauthorised viewing. In this case, the viewer needs specialised decoding equipment or a specially-equipped receiver.

In principle, the efficiency of spectrum usage could also be enhanced by increasing the number of transmitters (or “base stations”), with a system like that currently used for mobile telephony. It is forecast that the next generation of mobile phones will be capable of the bandwidth necessary for transmission of full video.[7]

It is also possible to increase the number of channels available through the use of alternative (higher frequency) spectrum. This typically requires the use of special antennae (such as a small parabolic dish). As with terrestrial encrypted television, the consumer must also have access to specialised decoding equipment or a specially-equipped receiver.

Table 2: High-Bandwidth Communications Links To The Consumer

	Advantages	**Disadvantages**
Wireless:		
Free-to-air television 	Low set-up cost; large installed base of (analogue) receivers; low cost of (analogue) receivers	Available spectrum limited; Revenue sources limited to advertising. One-way communication only.
Pay terrestrial television 	Relatively low set-up cost.	One-way communication only.
Pay and free satellite television 	Signal available over a large region, including remote areas, from the outset.	One-way communication only. Two-way communication requires another infrastructure
High-bandwidth mobile service	Mobility; two-way communication;	Relatively high set-up cost.
Wireless Local Loop	Low set-up costs; two-way communication;	Limited bandwidth
Dedicated microwave link 	High bandwidths possible; two-way communication;	Relatively high per-subscriber cost.
Wired:		
Copper pair	Very large installed base; two-way communication; is currently used to provide ISDN services;	Bandwidth capabilities limited; initial installation costs can be substantial; Use for a high-bandwidth requires substantial investment in ADSL technology
Co-axial cable	Large installed base in many countries; relatively high bandwidth; two-way communication possible	initial installation costs can be substantial; may require substantial upgrades to existing networks.
Fibre-optic cable	Very high potential bandwidth; two-way communication	initial installation costs can be substantial;

As with free-to-air television, interactivity from such higher-frequency broadcast services is usually limited to choosing the channel to view, however two-way communication is possible using other telecommunications access paths to the home. Many satellite broadcasters, in particular, are investigating arrangements with PSTN[8] operators under which the PSTN could provide the return path. For example, since 1994 DirecPC in the US has been providing relatively high bandwidth data communications services (384 kbit/s downstream with 28.8 kbit/s upstream link via the PSTN and modem) using very small aperture terminal (VSAT) satellite technology. In 1996, its parent company Hughes launched a similar service in Europe in partnership with Olivetti.[9] In addition to the DirecPC-style satellite access services, a number of satellite television broadcasters have announced intentions to provide Internet access at bandwidths of 10 Mbit/s over their existing networks, again using the PSTN as a return channel.

In principle a high-bandwidth bi-directional link could be established with individual consumers. Although this is a feasible alternative for business customers "the high cost of two-way VSAT systems rules them out as a widespread means of access for multimedia services".[10]

Turning now to the wired links into the home, by far the most pervasive is the traditional PSTN, which relies on a "copper pair" wire. In the absence of special action by the PSTN operator, the bandwidth of this link is limited and is inadequate for full multimedia activity. ISDN technology offers a higher bandwidth (basic rate ISDN provides a symmetrical capability of 144 kbit/s) but is still largely insufficient for live video transmission.

ADSL[11] technology offers the greatest promise for the delivery of full multimedia information over the standard copper pair. ADSL offers a bandwidth of around 8 Mbit/s in the downstream direction and around 500 kbit/s upstream on twisted copper pair cables[12]. The widespread roll-out of ADSL technology may be imminent.[13]

In a few OECD countries (such as the US, Netherlands and Belgium) a majority of households are connected to a local broadband network via a co-axial cable. With a coax cable and a cable modem, symmetrical speeds of around 10 Mbit/s can be obtained. Cable modems thus currently offer significant promise as a means for upgrading the existing cable television infrastructure to provide full multimedia broadcasting. However, many countries (especially those with high cable penetration) do not have modern cable networks with a high-bandwidth fibre-optic backbone. These networks will need to be upgraded before they can handle multimedia communications traffic.

In principle, households may also be directly connected to the broadband network by means of fibre-optic cables. In the long-run, this approach offers the greatest bandwidth possibilities. However, the infrastructure investment requirements are substantial and its roll out is likely to be slower than the alternatives.

In general, wireless approaches have the advantage over wired approaches as having significantly lower barriers to entry. Coverage of a large number of homes can be achieved with relatively little or no sunk investment, especially for a simply uni-directional network. The sunk investment required, however, for a network of high-bandwidth cellular base stations or specialised communications satellites, would still be substantial. In addition, there remain potential problems of unreliability due to problems of geography, weather or interference from other radio-magnetic sources. A bi-directional network requires reliance on some other communications infrastructure.

The sunk investment required to establish a new fixed-wire broadband network is substantial and the economies of scale are large. Although demand for high-bandwidth connections to the Internet is

increasing demand for such networks, under forecast demand conditions, few consumers are likely to have a choice of more than 2 fixed operators.[14] Most will have the choice of only one and some (especially those in rural areas) will not have direct access to a fixed-wire broadband network at all. A summary of the costs and access speeds of the predominant alternatives is attached in table 3.[15]

In summary, economies of scale and density are such that the market for broadband distribution of multimedia signals is likely to remain, at best, oligopolistic. Although the number of wired broadband operators is likely to be small in any given region, these face competition from satellite and other wireless operators. However, it is too soon to be completely confident that effective competition will develop. Competition concerns are likely to remain.

Table 3: Current Annualised Unit Costs and Typical Access Speeds for Alternative Technologies

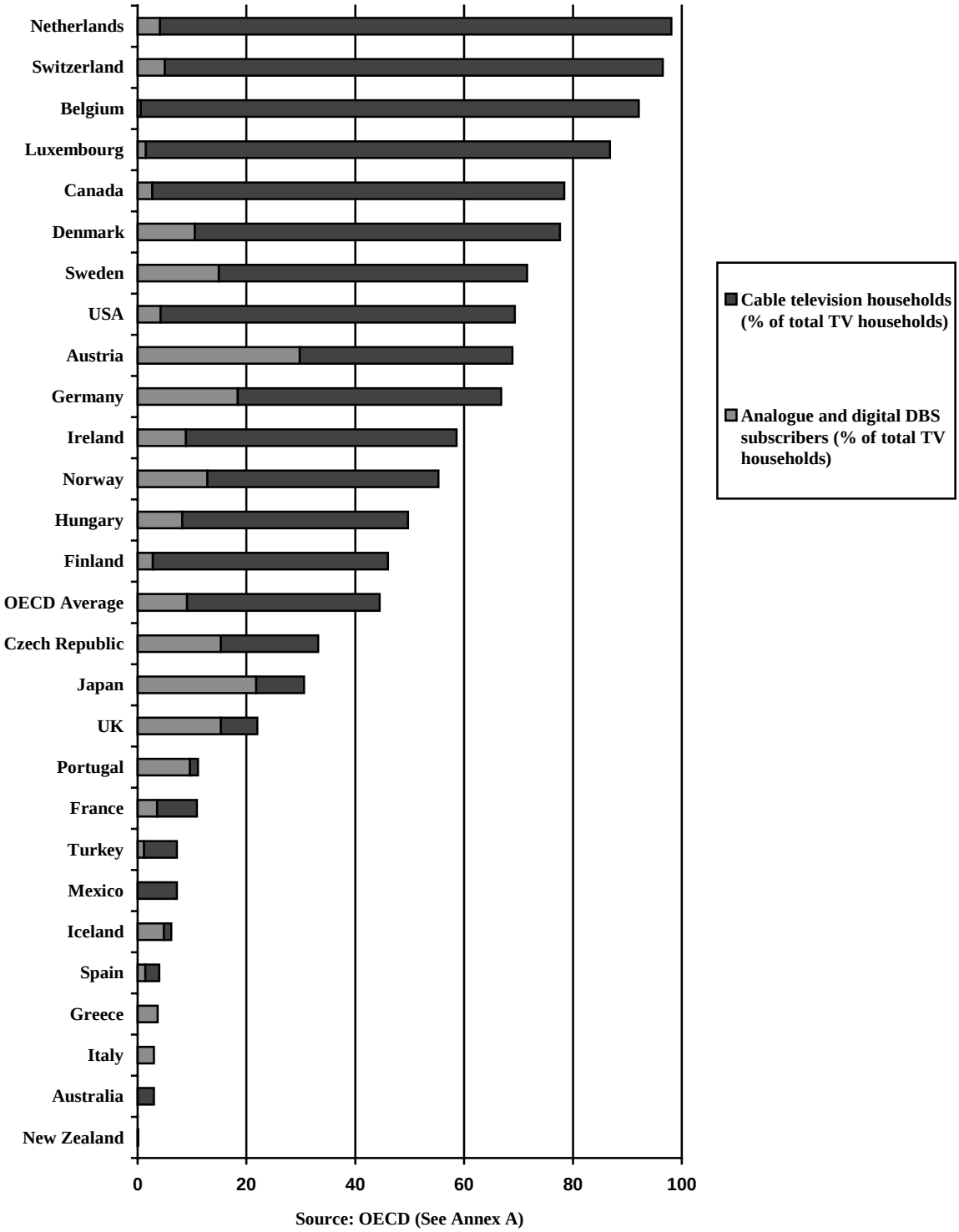
Technology	*Unit Costs (ECU)*	*Typical User*	*Typical Access Speed*
Optical fibre	1000-1500	Business and residential	2 Mbit/s and above
Satellite	1000-1200	Residential, SME	128-384 kbits/s
Cable TV modems	500-700	Residential	2 Mbit/s to 10 Mbit/s (one way)
ADSL	400-600	Business	2 Mbit/s to 6 Mbit/s (one-way)
BR-ISDN	350-450	Business and residential	64 kbit/s to 128 kbit/s
Dial-up PSTN+modem	100-200	Residential	9.6 kbit/s to 56 kbit/s
Wireless Local Loop	400-500	Residential/small business	144 kbit/s
GSM	300-400	Business and residential	9.6 kbit/s

Source: Analysys (1998), page 9

Broadcasting In The OECD

The following figures provide a picture of the high-bandwidth (multichannel) broadcasting industry in OECD countries. On average 93 per cent of OECD households own at least one television set. Only in 3 OECD countries does the penetration of televisions drop below 80 per cent. As figure 2 illustrates, there remains significant variation in the penetration of cable and satellite television amongst OECD countries, but more than half the OECD countries have MVPD[16] penetration rates higher than 50 per cent.

Figure 2: MVPD subscribers percentage of total TV households, 1995

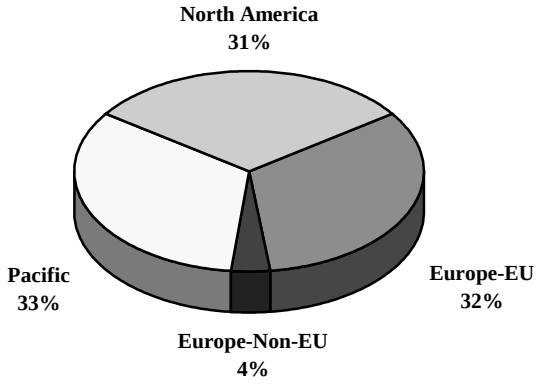


Source: OECD (See Annex A)

This variation in the penetration rates of multi-channel video systems is important. As we will see later, one of the traditional bases for the regulation of broadcasting was that the spectrum required was scarce. These traditional arguments are weaker in those countries in which consumers have access to a very large number of different channels of pay and free content. The arguments may remain strong, however, in those countries such as France and Italy, where the penetration of multi-channel systems is limited.

The total size of the television broadcasting industry of the OECD in 1994 was $US 73 trillion, distributed as shown:

Figure 3: Major Television Broadcasting Expenditures in OECD Regions 1994



Source: OECD, Communications Outlook

The 48 largest multimedia/broadcasting companies in the OECD are listed in table 4:

Table 4: Ranking by Multimedia Turnover in 1995 of the 48 Largest Multimedia Companies in the OECD (billions $US)

Rank	Company	Country	Multimedia Turnover	Rank	Company	Country	Multimedia Turnover
1	Sony	Japan	7.9	25	Fininvest	Italy	2.3
2	Time Warner Entertainment	US	6.3	26	Tokyo Broadcasting System	Japan	2.2
3	Matsushita/MCA	Japan	6.1	27	Carlton	UK	2.1
4	NHK	Japan	5.7	28	Canal Plus	France	6
5	ARD	Germany	5.6	29	Blockbuster	US	6
6	Capital Cities/ABC	US	5.3	30	TCI	US	6
7	Walt Disney	US	4.8	31	Televisa	Mexico	6
8	Polygram	Netherlands	4.7	32	TF1	France	5
9	Fujisankei	Japan	4.7	33	RTL	Germany	4
10	Kirch Gruppe	Germany	4.2	34	PBS	US	4
11	Nintendo	Japan	4.2	35	ZDF	Germany	3
12	Time Warner	US	4.0	36	Toho	Japan	2
13	News Corp	Australia	3.8	37	BSkyB	UK	1
14	CBS	US	3.7	38	Home Shopping Network	US	1
15	Bertelsmann	Germany	3.8	39	Rank	UK	0
16	Viacom	US	3.4	40	CBC-SRC	Canada	0
17	Thorn EMI	UK	3.4	41	SAT1	Germany	0.9
18	General Electric/NBC	US	3.4	42	ORF	Austria	0.9
19	BBC	UK	3.3	43	France 2	France	0.9
20	Turner Broadcasting System	US	2.7	44	France 3	France	0.9
21	RAI	Italy	2.5	45	SSR-SRG	Switzerland	0.8
22	Nippon Television Network	Japan	2.4	46	Asahi Broadcasting	Japan	0.8
23	Sega	Japan	2.4	47	Liberty Media	US	0.8
24	CLT	Luxemburg	2.3	48	Tribune	US	0.7

Source: OECD Communications Outlook, table 5.9. Multimedia companies are defined as companies whose main business is broadcasting, production of audiovisual programs, audiovisual facilities, distribution and the publishing, distribution and marketing of both sound recording and video games.

Convergence

Convergence: The Background

Rather like the concept of "broadcasting", the concept of "convergence" is seldom defined carefully and is used to refer to many different phenomena. For the purposes of this paper we will define convergence as the process under which, due to underlying technological changes, economies of scope increase to the point where two or more products or services which were previously produced by separate firms are produced within the same firm.

In other words, at root convergence is related to the effect of *technological changes* on *economies of scope*. These changes in economies of scope have several implications:

- First, convergence changes *market structures*. Existing firms in one of the converging markets, in order to compete effectively, seek to enter the other markets, through de novo investment or through mergers. One of the effects of convergence is, therefore, significant new investment and/or a significant wave of mergers. New firms entering the industry seek to do so in many or all of the converged markets.

- Second, convergence can lead to changes in the *level of competition* in the converging sectors. When barriers to entry are low, convergence could be expected to enhance the overall level of competition, as firms each of the converging markets are potential entrants into the other markets.

- Third, convergence places pressure on existing *regulatory regimes*. In particular, convergence places pressure on line-of-business restrictions; highlights differences in regulation in the converging sectors; and leads to pressure for changes in the structure of the regulatory institutions that oversee the converging industries.

- Fourth, convergence typically leads to *new products and services*, including products that combine features of existing products of the converging industries and entirely new products.

Putting aside the multimedia/broadcasting industry, which we will deal with shortly, an important example of convergence can be observed in the financial sector. In this sector banks and insurance companies are increasingly competing, using the same underlying technology, in offering a range of products for managing risks of all kinds. Although line-of-business restrictions still prevent banks from directly producing insurance products (and vice versa), there has recently been a very significant trend towards cross-financial sector mergers that seek to exploit the benefits of economies of scope in production and distribution.

The effect of convergence on competition depends upon the relative magnitudes of barriers to entry into each of the converging sectors. When barriers to entry in each of the converging sectors is low, convergence may enhance the overall level of competition, as firms in each of the previously separate sectors are potential entrants into the other sector. Where there are high barriers to entry, and limited competition, in one of the converging sectors, convergence may reduce the overall level of competition in the more-competitive sector. In this case, the effect of convergence is to allow the firms in the sector with high-barriers to entry to enter the more competitive sector, but not the reverse.

For example, suppose that entry into the insurance sector is relatively easy, while (due to, say, regulatory restrictions), new entry into banking is difficult. Suppose, in addition, that the banking sector is highly concentrated. In this context, convergence in the financial services sector would lead to the existing banks merging with some of the insurance companies. By exploiting the resulting economies of scope they may force the departure from the market of the remaining insurance companies. The resulting outcome is not necessarily inefficient - the market power of the banks in the insurance market is bounded by the ability of stand-alone insurers to re-enter the market. However, if there are sunk costs of entry into the insurance market, the incumbent bank-insurance conglomerates may be able to exert a degree of post-merger market power.

As discussed further below, where there are asymmetric barriers to entry of this kind, it is common to find arguments for the imposition of asymmetric line-of-business restrictions in order to enhance the overall level of competition. In particular, it is common to find calls for line of business restrictions which prevent firms in the sector with high barriers to entry from competing in the related, converging markets. Examples of these kind of asymmetric line-of-business restrictions include the (temporary) prohibition on the US RBOCs entering long-distance business (while long-distance operators can enter local) and the restriction (in countries such as the UK[17]) on the incumbent telephone company providing broadcasting services while, simultaneously, cable providers are allowed to provide voice telephony.

As discussed further below, convergence may also lead to pressure for a reassessment of the institutional arrangements for administering regulatory regimes. In some cases, each of the converging sectors has been subject to a separate regulatory regime administered by a distinct regulatory institution. In many cases, these separate regulatory institutions have similar roles and functions. Where, as a result of convergence, firms operate in two or more markets, they may be subject to two or more regulatory institutions. Where the functions of those institutions overlap there is, at a minimum, potential for conflict. New products or services arising from convergence may fall into the gaps between historical regulatory categories. There is a trend towards resolving these issues by allocating the key regulatory functions to institutions with cross-sectoral responsibilities.

Convergence in the Broadcasting Industry

In the broadcasting/multimedia sector, convergence is a result of the following developments:

- digitalisation (which allows all form of information content, including audio and video to be handled over the same networks in the same manner);

- the fall in the price of computing (allowing the development of sophisticated and affordable consumer equipment for encoding/decoding signals and interacting with the multimedia information); and

- reduced costs of bandwidth (and compression technologies which allow existing bandwidth to be used more efficiently);

- telecommunications liberalisation (allowing new firms to enter previously protected markets)

These developments have had important effects on the market for broadcasting. The first, which we might call convergence in market-structure, is the tendency for both broadcasters and telecommunications firms to offer high-bandwidth two-way communication services which simultaneously provides access to a number of different channels of video programming, voice telephony and access to the Internet.[18]

The second, important effect of these developments, relates to what we might call convergence in content. The previously separate markets for content for newspapers, television, film and Internet publishing are overlapping and, to an extent, combining into a single market for interactive content.

These changes will not happen overnight. “The introduction of interactivity to mass-market, universal, broadcast services will not produce an overnight change in market behaviour. This is determined by individual preferences and community attitudes which take time to adapt to new technologies. Over time, there will be a gradual increase in the consumption of customised, interactive services. However, this does not necessarily imply that mass-market, broadcast services for passive reception are destined for extinction. It seems likely that there will continue to be demand for uncustomised multi-channel entertainment for the foreseeable future.”[19]

Finally, convergence in the multimedia/broadcasting industry is not unambiguously expected to increase competition. Strong concerns have been raised that companies will be able to position themselves to exploit new "bottlenecks" as they arise. Herbert Ungerer of the EC's DG IV notes:

> "Convergence is driving infrastructure provision but it is also defining the future bottlenecks. ... Whether the band-width explosion will happen, will entirely depend on the competitive conditions... Convergence can now not mean the creation of new super-monopolies - and this danger is very real. It is the immediate question underlying most current competition cases in the area".[20]

Broadcasting Market Developments

The effects of convergence can be seen in significant market developments in OECD countries over the past few years:

In each of the individual sectors of broadcasting, telecommunications and the Internet, there are clear steps towards the development of a common broadband, interactive communication system:

(a) In the **broadcasting** sector:

- The *number of subscribers to pay television services continues to expand.* OECD data shows that subscribership to pay television services has grown at 10-20 per cent per year between 1990-1995[21]. Total subscribership to MVPD in the OECD was 150 million in 1995 out of a total of 334 million television households[22].

- *Digital satellite and terrestrial television is expanding rapidly*. By mid 1998 almost a dozen OECD countries will be able to receive either digital satellite or digital terrestrial television broadcasts.[23] Following its launch in April 1996, there were more than 200 digital channels in operation in Europe by December 1997 and of the order of one million digital receivers.[24]

- *Cable television providers are upgrading their networks* to be able to offer interactive broadband communications. The examples, from all over the OECD are too numerous to list. A recent step forward was the development of a standard for interoperability of data-over-cable systems on a non-proprietary, multi-vendor basis, known as the Multimedia Cable Network System.[25]

- *Cable television providers are increasingly offering voice telephone and Internet access services*. Among the myriad of examples, we might point to companies such as Residential Communications Network (RCN), which offers a cable TV, voice telephony and Internet service in the Boston area of the US[26], and Cableuropa, a cable operator in Spain, which is rolling-out cable to provide data services, Internet access, voice telephony and cable television, at the same time as launching a 3rd digital satellite platform for Spain.[27]

- *Satellite providers are increasingly offering high-speed Internet access*. For example, DirecTV in the US offers a one-way satellite data communications service which provides 384 kbit/s Internet access.

- *Interactive television is being introduced*. For example, interactive television is being offered in Hong Kong by Hong Kong Interactive Multimedia Services.[28]

(b) In the **Internet** sector:

- *New consumer products are being developed* for interfacing between consumers and the Internet. Examples include the WebTV - Internet-on-your-television product and the Webphone products offered by Alcatel, Nortel and Samsung[29].

- *New multimedia content is being introduced rapidly*. The expansion of multimedia content sites on the Internet is too rapid to catalogue. Recent examples include the announcements in March 1998 by Reuters of a web-based multimedia news service[30] and by NBC of a move into online music marketing[31].

- *Internet service providers are offering voice telephony, webcasting and multimedia conferencing services*. For example, in December 1997, UUNet offers broadcasting capabilities with a service called UUCast.[32] Progressive Networks and MCI premiered their version of an Internet broadcast network in August 1997[33]. Many examples of webcasting are given in an earlier OECD report[34].

(c) In the **telecommunications** sector:

- *Telecommunications companies are upgrading their networks* in order to offer improved data and multimedia services. Examples include Sprint's announcement of the extension of its ATM[35] network to customer sites[36] or the trial by Bell Canada of Nortel's ATM switch in provision of high-speed service to residential customers[37].

- *The use of ADSL and related technologies is expanding rapidly*. TeleDanmark, the incumbent PSTN operator in Denmark, has made a major investment in ADSL technology. In June 1998, Bell Atlantic announced plans to deploy ADSL in 60 central offices and several cities. Swedish PTO Telia has made a commitment to implement ADSL technology throughout its network, enabling it to offer broadband services to all Swedish households by 2004.[38]

- *Development is underway of broadband mobile networks*. For example, since 1989, Ericsson has been dedicated to researching wideband multimedia capabilities, focusing on wideband CDMA. By late 1999, Qualcomm plans to support data rates of about 1 Mbit/s on a normal bandwidth for fixed wireless, campus and mobile applications.[39]

- *There is currently significant growth in "Low-Earth Orbit"(LEO) satellites,* which may, in future, have broadband capabilities. "Networks such as Skybridge, Teledesic and Celestri promise multimedia voice and data communications and even the prospect of an 'Internet-in-the-sky'"[40]. "Spurred by projections that, by 2000, 150 million households using the Internet will demand high-quality text, noise, data and video communications services throughout the world, satellite manufacturers and service providers are investing heavily to capture part of an estimated $40-billion market".[41]

In addition, a very large number of mergers and alliances are being formed, both horizontally (among telecomms, broadcasting and Internet firms) and vertically (between combinations of telecomms, broadcasting and Internet firms and content producers). The EC notes that in 1996 more than 15 per cent of the total value of worldwide mergers and acquisitions ($US 1 trillion) was generated by activity in what can be broadly termed information and communication industries.[42]

(a) In regard to **horizontal** mergers and alliances, mergers and alliances are occurring between:

- *Broadcasting firms and telecommunications firms*. Examples involving satellite broadcasters include the alliance announced in December 1996 between BT and BSkyB, to form a new company British Interactive Broadcasting. Examples involving cable television broadcasters include the purchase by AT&T, the largest US long-distance operator has purchased TCI, one of the larger US cable television companies. Following the implementation of the EC's cable TV directive, 17 Flemish cable TV companies joined together with operator US West to form a new company Telenet Flanders. In June 1996, KPN (the incumbent telco), Nethold (a cable operator) and Phillips formed an alliance in the Netherlands to provide a digital cable service called Nethold Benelux.

- *Broadcasting and Internet firms*. Examples include the purchase by Microsoft of WebTV, a company offering Internet via television receivers and Comcast, a US cable operator.

- *Internet and telecommunications firms*. For example, recently GTE purchased BBN Corp., one of the original architects of the Internet[43]; mobile telephony providers Cellnet and Orange in the UK have moved into other communications services, such as Internet service provision (in conjunction with UUNet); MCI has teamed up with NetSpeak Corp. to provide an Internet telephony service.[44]

- *Within sectors*, for example, agreements on standards such as the agreement announced in October 1997 between Canal Plus, BSkyB and Kirch to develop an open standard for digital multimedia broadcasting.[45]

(b) In regard to **vertical** mergers and alliances between infrastructure providers and content providers, mergers and alliances are occurring between:

- *Content providers and Internet firms*. For example, NBC, the US broadcasting network has taken a stake in the Snap Internet site from C-Net. Disney recently took a 40 per cent stake in Infoseek, the Internet search site.

- *Content providers and broadcasting firms.* Such as the recent attempt by BSkyB to purchase Manchester United, the purchase by Disney of the ABC television network, the purchase by Microsoft of Comcast, a cable television provider, the purchase of Carolco, a studio, by TCI, a cable television provider or the purchase of Turner Broadcasting by Time Warner[46]. Another interesting example is the successful Madison Square Garden cable network in the US.

- *Content providers and telecommunications firms.* For example, In 1994, an alliance was announced between Bell Atlantic, Oracle and a score of other providers, including content providers such as the Washington Post, to provide interactive TV services.

Summary

This section has sought to make the following points:

- For the purposes of this paper, broadcasting is defined as the production and dissemination of multimedia content via telecommunications. The definition thus combines the two sectors of content production and distribution. Broadcasting by this definition competes with, and is part of, a wider market for the dissemination of multimedia content by any means, but broadcasting has a competitive advantage where the timeliness of the content is important. Timeliness is particularly important in the broadcasting of sports, certain news events and in applications where feedback and interactivity is important such as in searching for information and certain games.

- The broadcasting industry includes both content producers and distributors of that content to consumers. As with other telecommunications networks, the greatest competition and regulatory concerns in distribution surround the issue of access to the consumer. There are several wireless and wired alternative broadband access paths to the consumer. Of these, wireless approaches are typically less costly to set-up, but often require some separate telecommunications path to achieve two-way communication. Wired approaches involve larger sunk costs, but offer higher bandwidth and two-way communication. Of the wired approaches, ADSL technology and cable modems currently offer the most promise as means to deliver high-bandwidth services to the household.

- There is, at present, considerably variation amongst OECD countries in the penetration of high-bandwidth access paths to consumers. In those countries where the penetration is low, traditional arguments for the regulation of broadcasting (on the basis of spectrum scarcity) may carry more weight.

- The concept of “convergence” relates to changes in the underlying economies of scope, leading to the joint production of goods and services which were previously produced in separate industries. Convergence leads to significant changes in market structure, particularly through mergers and acquisitions.

- The effect of convergence on competition depends upon the relative barriers to entry in the converging markets. Where there are asymmetric barriers to entry, convergence can reduce competition in the more competitive markets. Convergence also leads to pressure for change in the regulatory institutions governing the converging industries.

- Convergence has had a very significant impact on the broadcasting and telecommunications industries over the past decade, as can be seen in a large number of mergers, acquisitions, alliances, joint ventures, new entry and new investment by incumbent firms.

Competition Analysis

Having set out the technological background, this section seeks to identify specific competition concerns which arise in the multimedia/broadcasting industry, particularly in the light of convergence.

Market Definition Issues

Consider first issues surrounding the definition of the relevant market. A full discussion of market definition would involve consideration of all of the products produced at each of the five stages of production discussed earlier, and would be beyond the scope of this paper. However, we may make the following comments.

The overall demand for broadcasting services comes from the following sources:

(a) Advertisers, who wish to promote a particular product or service;

(b) Companies, groups or individuals, who wish to disseminate certain information;

(c) Companies and consumers, who wish to engage in commercial transactions directly with each other; and

(d) Consumers who wish to purchase entertainment, information or access to electronic commerce or other interactive services.

A full demand-side analysis therefore requires consideration of potential substitutes for all of these groups. It is immediately obvious that there are potential non-broadcasting substitutes for each of these groups. For example, in addition to broadcasting outlets, advertisers may choose from a range of non-broadcasting media outlets, such as magazines, newspapers and billboards. Similarly there are a variety of other non-broadcasting entertainment and information sources for consumers and outlets for groups who wish to disseminate information. From the viewpoint of the consumer the consumption of broadcasting services competes with all other uses of consumer's leisure time.

Broadly speaking, therefore, broadcasting competes for both viewers and advertisers as part of a wider, differentiated, media market.

Within broadcasting, many further sub-markets can be identified. Broadcasting products whose primary aim is to provide entertainment, for example, are unlikely to be good substitutes for broadcasting products whose primary aim is to provide information. Broadcasting targeted at a mature audience is likely to operate in a different market from broadcasting targeted at a youth audience. Furthermore, within the entertainment market, events such as sporting events are unlikely to be good substitutes for, say, feature films. Within sporting events, "different markets are being identified for individual sporting events such as live football and Formula-One racing. By the same token, the market definition for an international football event may differ in scope during the preliminary rounds (which is more likely to be country-specific) as opposed to the finals of such an event. Separate markets are also being identified for live and recorded shows, full coverage and extracts, pay-per-view and pay television".[47]

Markets can also be further subdivided according to the form of the broadcasting itself. Clearly free-to-air broadcast radio is a relatively weak substitute for free-to-air television. Free-to-air television

may, itself, be distinguished from forms of pay television. The market for satellite television may, under some circumstances be differentiated from the market for pay terrestrial television.

There is, however, clearly a degree of competition between these various forms of broadcasting. US audience measurements show that Web users already consumer 59 per cent less television than average viewers. It is estimated that the share of TV sets in screen time will be half that of the PC by 2005. Research into activities displaced by PC use show that watching television loses out rather than reading books and magazines, or playing console video games.[48] This data suggests that television and Internet browsing are clear substitutes.

The overall picture of the broadcasting market that emerges is one of a large number of markets for related, but differentiated, products and services.

A similar picture emerges from the perspective of the advertiser. Advertisers face a wide range of potential forms of advertising. The elasticity of demand for broadcasting advertising will clearly depend on the degree of substitutability between advertising in the various forms of media. However, the nature and purpose of advertising in the different media forms is often quite different. The objective of advertising on mass media, such as television or radio is quite different from that in newspapers or specialist magazines and is different again from advertising on a Web page. For example, it is sometimes alleged that television advertising is good for building a "brand" or an "image", while other forms of advertising (newspapers, magazines) are better for conveying information.

Generally speaking, although the details will differ from country to country, it appears that the different forms of broadcasting represent different markets for advertising outlets. Although a rise in the price of television advertising will cause some advertising to shift to radio, newspapers and billboards, this effect is unlikely to be large enough to act as an effective competitive discipline on television advertising market power.

Potential For Entry

New entry into broadcasting requires obtaining access to both telecommunications services and access to content.

In general, barriers to entry into the market for content production are low. There are a myriad of small and large audio-visual content producers in all OECD countries. However, as mentioned earlier, content is a highly-differentiated product. Certain forms of programming may be able to obtain significant market power within their own niche. In particular, as we have noted earlier, access to content is an important issue in the case of sports and (to a lesser extent) recent feature films:

> "Securing exclusive rights to [popular sporting events and major films] is a critical competitive weapon. ... in the German market, DF1's purchase of many major Hollywood film rights nearly pushed its rival, Bertelsmann, out of the digital satellite television market before it had even taken off".[49]

Barriers to entry to the broadcasting sector may therefore be raised through a system of long-term exclusive contracts for content. The barriers to entry will be higher the longer and the more exclusive these contracts. As discussed below, exclusive rights to content is not in itself, anti-competitive, provided the duration of those rights is not incommensurate with the recovery of any related investments.[50]

In regard to telecommunications services for broadcasting, in general, access to three distinct telecommunications services must be obtained - access to a "wholesale" or "backbone" distribution network; access to a "retail" distribution network; and access to any relevant customer-premises terminal equipment.

In general, as mentioned earlier, in those countries which have deregulated the telecommunications industry, barriers to entry into the wholesale or backbone distribution of broadcasting signals are low. Reaching the consumer, however, involves either establishing one of the broadband access paths discussed earlier, or access to the infrastructure of an existing broadband access path.

Establishing a new wireless access path obviously involves access to spectrum. In those countries which have established effective property rights in spectrum and allow trading, the need for spectrum is not an obstacle to entry. New spectrum can always, in principle, be bid away from existing holders. However, spectrum property rights remain the exception rather than the rule. Obtaining a spectrum licence in some countries is not at all straightforward and involves a non-transparent licensing process. Analysys notes:

> "Spectrum has not been allocated on an efficient basis in the past in the EU. Little attempt has been made to establish how highly alternative users value spectrum and allocate it on that basis. Current allocations of spectrum may constrain the ability of broadcasters and service providers to exploit fully the potential of digital broadcast multimedia delivery platforms. The overall benefit to the economy derived from the use of radio frequency spectrum, may also be constrained".[51]

In addition, as discussed earlier, offering interactive services via a wireless connection typically requires some other form of return communication path, such as via the PSTN. The ability to offer full interactivity will therefore be limited by the necessity to reach agreement with a potentially competing telecommunications service provider.

In the case of satellite broadcasting, entry will require access to satellite capacity. This will depend upon specific factors such as the number of available satellites and the mechanisms for the allocation of capacity. In the case of the UK, the OFT found in its review of BSkyB that UK domestic satellite dishes could only receive signals from the Astra satellite, and that analogue capacity on the Astra system was fully booked. The company owning the Astra satellite did not allow transponders to be reallocated from one country to another. Neither was there an efficient secondary market whereby an incoming broadcaster could purchase capacity from existing lessees. As a result, in that case, the OFT found that new satellite-based entry would be difficult.

In some cases, new wireless entry may be limited by the lack of suitable transmission sites or the lack of access to existing sites, especially for new entry where the number of transmitters is likely to be large (as in a mobile network).

As discussed earlier, new wired entry typically requires a substantial sunk investment. The economies of scope and scale are such that this investment is likely to be undertaken only where take-up rates are forecast to be high. In practice, this limits the number of wired infrastructure providers in a single area to, at most, a handful. Entry will obviously be affected by, say, line-of-business restrictions which prevent entry by certain firms (such as the incumbent PSTN operator) and whether or not consumers have made a sunk investment in an existing system, such as the purchase of a proprietary set-top box. The

competition issues surrounding the set-top box or "conditional access system" are discussed further below.

Broadcasting Industry Structure

The overall barriers to entry into the multimedia/broadcasting industry will depend upon the number of levels at which entry must occur simultaneously. This, together with the opportunities for strategic anti-competitive behaviour, depends upon the multimedia/broadcasting industry structure.

We consider here five different representative industry structures. These are set out in table 7.

(a) The "Fully-Integrated" Structure

Under this structure each broadcaster is a vertically-integrated entity, combining the roles of content provider, infrastructure provider, "packager" and terminal equipment supplier. Furthermore, the different vertically-integrated systems are incompatible. If consumers wish to consume the services of more than one broadcaster they must pay the entire costs (including infrastructure and terminal equipment) of the new system.

This structure reflects current arrangements in some countries in pay (and satellite) television, when those systems use proprietary set-top box standards, such as in the US (see Box 3 below).[52] Another (non-broadcasting) example from the multimedia industry is the Sega and Nintendo video-game platforms, which are not compatible with software from any other sources.

The degree of competition in the market for advertising outlets and in the markets for multimedia entertainment and information depend on the number of such integrated broadcasters. Where the number of such broadcasters in limited they may be able to exert market power with respect to both advertisers and consumers.

Entry must occur at all levels simultaneously. Entry in all segments is limited by the barriers to entry in the segment with the highest barriers to entry. If the retail distribution market cannot support more than two facilities-based competitors, under this market structure there will be no more than two vertically-integrated content providers and packagers.

(b) The "Liberalised Terminal Market" Structure

This structure resembles the fully-integrated structure except the customer's terminal equipment is capable of receiving the signals from a number of different broadcasters. Customers are able to switch broadcasters without needing to pay the terminal equipment costs of the new broadcaster.

This structure represents the current situation in analogue free-to-air television and radio where the same equipment is capable of receiving all analogue TV and radio broadcasts. A number of countries are promoting the adoption of standards for digital television and for set-top boxes, to, in effect, achieve the same situation with digital and pay television.

As described later, where the customer's set-top box is compatible with more than one system, competition is shifted away from the features of each entire system as a whole to more conventional dimensions such as the price and quality of the different, similar, services

offered by the integrated competing broadcasters. Radical innovations (such as the offering of a new improved television standard, such as HDTV[53]) are likely to be restricted.

(c) Partially Disintegrated Structure: I

We may, in turn, consider a structure in which content providers are entirely separate from the infrastructure providers/packagers. Service packagers could simply purchase the content that they wish to offer to consumers.

This structure reflects the position with many cable TV companies which typically purchase a bouquet of channels directly from content providers (or, more typically, content wholesalers) and market these channels to consumers.

The advantage of this approach is that barriers to entry are lowered in the content business (as entry does not need to occur on all levels). Unless explicitly forbidden, vertical exclusive arrangements between content providers and infrastructure providers can amount to a form of vertical integration, returning the structure to an integrated structure like that in (b).[54]

(d) Partially Disintegrated Structure: II

In general, content providers benefit from having access to as wide an audience as possible and infrastructure providers/packagers benefit from as wide a selection of content as possible. Therefore, when no content providers or packagers/infrastructure providers have market power, the benefits of allowing all consumers access to all available content exceeds the benefits of exclusive contractual relationships between content providers and packagers/infrastructure providers.

In this circumstance, a market structure may emerge under which consumers can access all (or virtually all) content through any infrastructure provider/packager. (This structure might, conceivably, also emerge as a result of regulatory controls).

Under these arrangements, content providers would market their content directly to consumers. This represents an intermediate step between the “cable television” approach of the previous structure and the fully disintegrated “Internet” approach of the following structure. Non-broadcasting multimedia examples of this structure include the current structure in the market for CDs, video cassettes, DVDs and so on.

(e) Fully Disintegrated Structure

The final market structure indicates the situation where the consumer can purchase each of the components of the overall broadcasting/multimedia market separately.

This closely reflects the current market structure of the Internet. First, the consumer has the choice of a large range of terminal equipment (computers and modems) which are all capable of communicating with packagers (Internet Service Providers). Second, the consumer is typically able to choose the means by which it accesses the packager. This might be via the PSTN (and the incumbent phone company), or via some any other form of connection which the ISP accepts (such as a direct wireless link). In either case, the customer typically contracts directly with the infrastructure provider for these services. Third, the consumer has

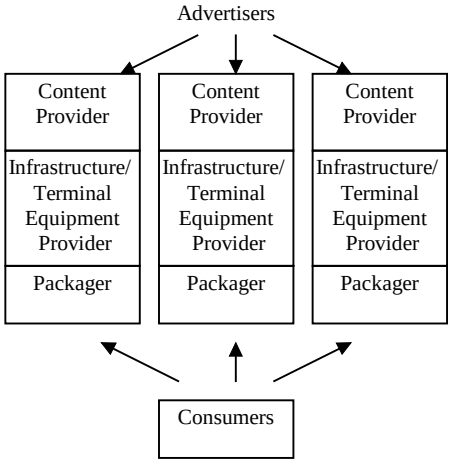
the choice of service packager or ISP. The consumer typically pays the ISP directly for the services it provides. Finally, the consumer has the choice of any content provider (Web page) on the Internet. If the consumer wishes to purchase specific content, he or she contracts directly with that content provider (and not, indirectly, via the packager).

The advantage of this approach is that the different segments of the industry are completely separated. Entry can occur on one level, or on multiple levels, at the decision of the entrant. A bottleneck in say, infrastructure provision, cannot be easily extended to control over content, or vice versa.

Broadly speaking, entirely new innovations are introduced to the market in the form of vertically-integrated structures (as in (a) and (b)).[55] As technologies and standards stabilise and patents expire, more competition is introduced (as in forms (c) and (d)). It is difficult to predict how long this process will take, or whether it will be overtaken by an entirely new innovation. Although the Internet has developed through a process of de facto standardisation, to something like structure (e), it remains possible that sub-networks will re-emerge offering an enhanced range of services, along the lines of (b) or (c). The overall market structure of the multimedia/broadcasting sector has not yet stabilised.

Table 7: Potential Broadcasting Market Structures

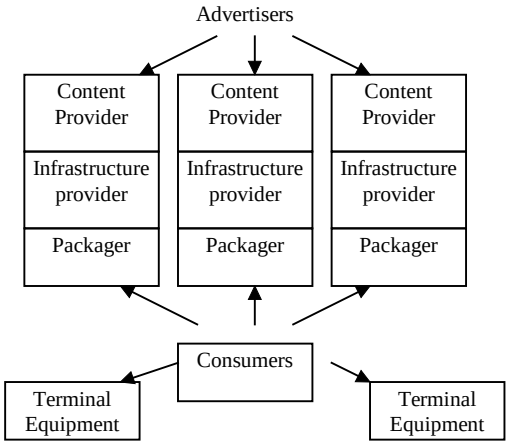
(a) The Fully Integrated Structure:



Features:
Consumers choose between vertically-integrated broadcasting suppliers who provide content, infrastructure and terminal equipment. A customer who wishes to change supplier must choose different terminal equipment, infrastructure and content. This structure is reflective of the current arrangements in pay television.

Comments:
Competition between systems on all dimensions (including innovative services provided) is particularly intense. Competition of this form may exhibit "network effects" discussed below. In equilibrium, it is possible that only a single dominant player will emerge. Entry must occur on all levels simultaneously.

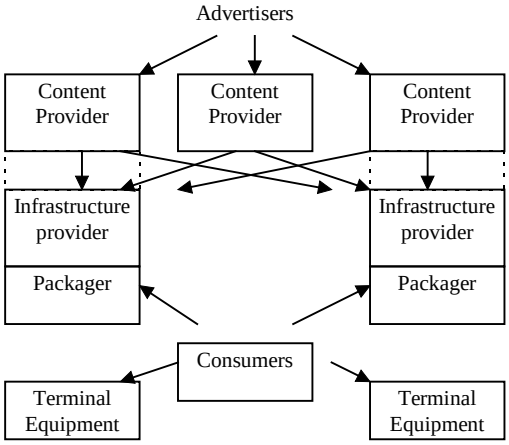
(b) Liberalised Terminal Market Structure



Features:
Standardisation or compatibility requirements ensure that terminal equipment is compatible with all major broadcasters. Consumers choose between vertically-integrated broadcasting suppliers but separately purchase or lease their own terminal equipment. This structure is reflective of the current arrangements in free-to-air television.

Comments:
Competition on certain forms of innovation is limited (as it would not be compatible with all available terminal equipment). However, competition on other dimensions can be enhanced. Entry can occur in the terminal equipment market, separate from the other markets. The ability to use access to terminal equipment to exclude competitors is eliminated.

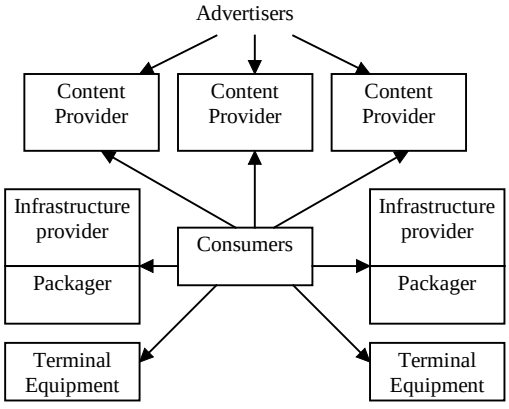
(c) Partially Disintegrated Structure: I



Features:
Compatibility between content providers and infrastructure providers ensures that infrastructure providers can purchase content from a variety of sources. This structure resembles that common in cable television where local cable television companies purchase content from a variety of national and international content suppliers.

Comments:
Entry into the content sector is easier than in the above structures. Vertical arrangements between infrastructure providers and content providers can re-create a structure like that in (b).

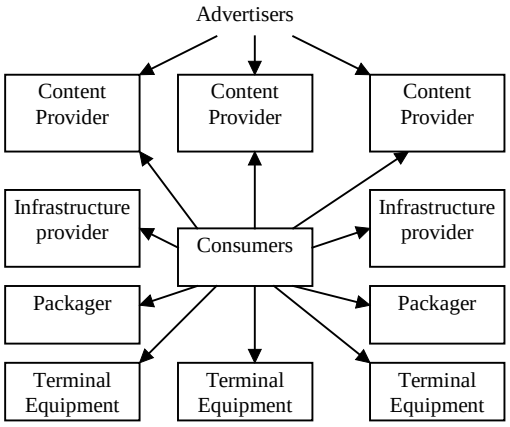
(d) Partially Disintegrated Structure: II



Features:
Compatibility between content providers ensures that consumers can purchase any content through any infrastructure provider. Content providers market their content directly to customers. This structure falls between the cable television model of (c) and the Internet model of (e) and resembles the structure in the market for CDs, DVDs, video cassettes, and so on.

Comments:
Relative to (b), competition is enhanced in content provision. If exclusive vertical agreements are forbidden, the opportunity to use access to content as a strategic weapon to restrict competition in downstream sectors (as discussed below) is eliminated.

(e) Fully Disintegrated Structure



Features:
Compatibility between all of the various components ensures that consumers can purchase each of the components separately. This structure most closely resembles that of the Internet.

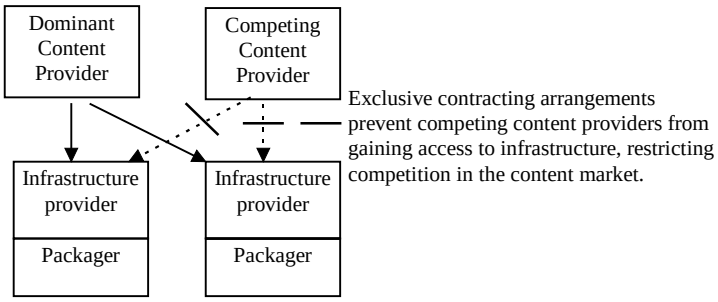
Comments:
The ability of individual dominant firms to use their dominant position to restrict competition in another market is limited. If compatibility at each stage is legally required major technical innovations may be prevented.

Vertical Mergers, Agreements and Abuse of Dominance

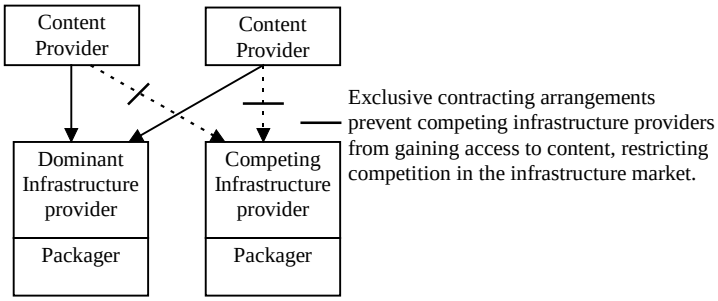
The above discussion suggested that competition concerns were mostly likely to arise at opposite ends of the chain of production - i.e., in access to certain forms of content (such as major sporting events) and in the market for broadband access to consumers. As a result, policy makers and competition enforcement authorities should be most concerned about two categories of horizontal mergers: first, mergers which restrict the number of paths to the consumer (such as a merger between the PSTN and a cable operator, or between a significant satellite operator and a cable operator); second, mergers between two content providers with a strong position in the market for certain categories of content.

Some of the most interesting competition problems in this field arise from vertical relationships. As in other markets, dominant firms may seek to use their dominant position to restrict competition within their own market, or in upstream or downstream markets, using vertical arrangements. Two categories of dominant firms are particularly relevant - firms with a dominant position with respect to access to the consumer and firms in a dominant position with respect to access to particular types of content.

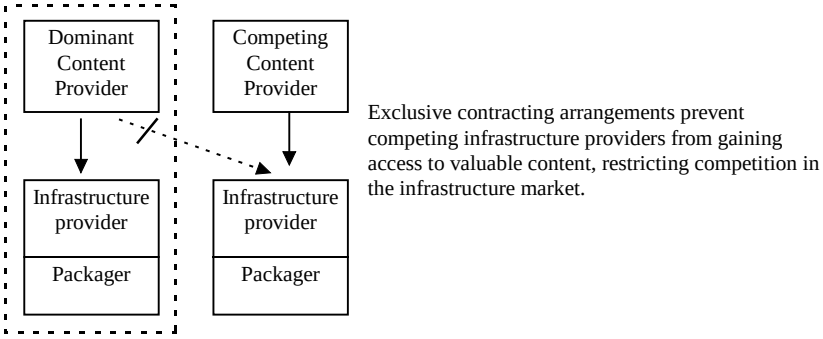
For example, within the context of industry structure (c) above, a firm with a dominant position in the production of a certain category of content might seek to use that dominant position to restrict *horizontal* competition with competing content suppliers through vertical arrangements with packagers that prevent them from also broadcasting a competitor’s content. An example might include a dominant sports channel whose contract with downstream cable TV suppliers prevents the cable TV companies from carrying a competing sports channel. An example of this occurs in motor-racing, where those companies which contract to broadcast Formula 1 motor races are required to not also broadcast other forms of “open top motor racing” (specifically Indycar racing from the USA). This form of arrangement is illustrated in the following diagram:



Alternatively, (also within the context of industry structure (c)), a firm with a dominant position in the provision of infrastructure services to consumers might seek to restrict competition with other infrastructure providers by signing exclusive arrangements with a sufficient number of content suppliers. An example might include a PSTN operator with a start-up broadband ADSL service, who attempts to acquire exclusive rights to all new major feature films.

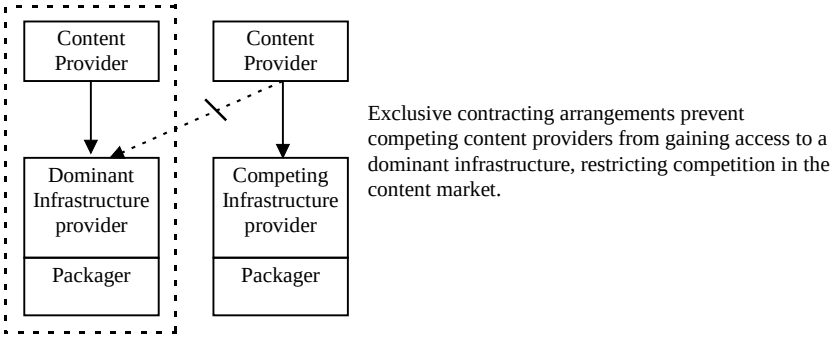


Where firms are partially vertically-integrated, they may seek to use a dominant position in one market to restrict competition in an upstream or downstream market. For example, a firm in a dominant position with respect to content, integrated with an infrastructure provider might seek to deny that content to competing infrastructure providers in order to restrict competition in the infrastructure market (see diagram).



Alternatively, a firm with a dominant position with respect to infrastructure provision to consumers which is also vertically integrated into content provision might deny access to a competing content provider in order to restrict competition in the content market. An important example is the case of a dominant cable television provider which also owns a free-to-air channel. The cable television operator may restrict access to its network to competing free-to-air channels in order to restrict competition in the free-to-air market. This may explain why several OECD countries impose line-of-business restrictions on cable operators, preventing them from owning conventional free-to-air television.

It may also explain why some countries maintain “must carry” rules that require cable providers to carry all conventionally available free-to-air channels.[56]



Note that these exclusive arrangements are only possible within the context of an industry structure illustrated by (c) above. In industry structures (d) and (e), consumers contract directly with content providers and each infrastructure provider is required to provide access to all content providers, making such exclusive arrangements infeasible.

Of course, where individual firms are not dominant, they may nevertheless be able to come to horizontal arrangements to achieve the same restrictions on competition discussed above, that is, to restrict competition in horizontal, upstream or downstream markets. For example, in the US a joint venture of all the major motion picture studios sought to establish a movie channel that would compete with HBO, the leading cable movie channel. Under the proposed arrangement, the joint venture channel would have exclusive rights to the output of the studios for 9 months. This arrangement was found to be in violation of US antitrust law.

In addition, we may note that since mergers are substitutes for contractual arrangements, the same exclusive arrangements discussed above could be achieved through vertical mergers, with the advantage of potentially less threat of antitrust scrutiny.

Are Exclusive Vertical Arrangements Inefficient?

In the above examples, firms sought to enter into exclusive contractual arrangements (or mergers) with upstream or downstream firms. Where competition in the upstream or downstream markets is foreclosed due to the exclusive arrangements, this is known as vertical foreclosure. Is vertical foreclosure inefficient? Should competition law seek to prevent it?

At the outset, we may note that exclusive vertical arrangements are extremely common in the multimedia/broadcasting industry. It is common, for example, for recording artists to sign exclusive contracts with recording studios, for novelists to sign exclusive contracts with publishers and so on.[57] Indeed, it seems that there is something particular about media products which lead to a prevalence of exclusive vertical arrangements.

At first sight, it might appear that exclusive vertical arrangements are simply unnecessary, for the following reason. Consider an upstream firm selling a key input to several downstream firms. The upstream firm could, it is argued earn all the monopoly rents available simply by selling at the monopoly price to all downstream firms. The upstream firm, it is argued, cannot increase its rent by selling to only one downstream firm.

It is widely recognised, however, that this argument is incomplete in several respects. Certain forms of vertical arrangements between firms (including exclusive vertical arrangements) can be efficient in certain contexts. In particular, exclusive vertical arrangements can be efficient when:

(a) There is *imperfect competition downstream*, leading to double marginalisation. Where the downstream firms have some market power, an attempt by the upstream monopolist to sell at a simple linear price will lead to the downstream firms charging an even higher price to final consumers, to the detriment of overall welfare and the upstream firm's profits. In this case, overall welfare and profits can be improved if the upstream firm sells the right to market the product downstream to a single downstream firm (within each downstream market) for a flat fee and subsequently sells the key input to the downstream firm at marginal cost.[58] (An alternative vertical arrangement which does not require exclusivity is a price ceiling - a form of resale-price maintenance - by preventing downstream firms from further marking-up the product the double marginalisation problem can be avoided).

(b) The *downstream firms need to supply inputs* which make the product more attractive to consumers. For example, where the downstream firms must make investments in marketing and promotion, if the upstream firm simply sold to all downstream firms at a simple linear price, some of the downstream firms could "free-ride" on the promotional effort of others. The equilibrium level of promotion would be inefficiently low or zero. Again, the upstream firm can increase overall welfare by selling the right to market the product downstream to a single downstream firm (within each downstream market) using a two-part tariff with both a fixed charge and a charge per unit of the key input equal to its marginal cost.[59]

(c) Efficient rent extraction requires extensive *price discrimination* and the upstream firm is not able to completely control the markets in which the downstream firms operate. In general, charging a simple fixed fee in the downstream market will not maximise the upstream firm's profits. Profits can be increased through the use of price-discrimination - charging a higher price in some sub-markets and a lower price in others. If the upstream firm cannot identify in advance all of the potential sub-markets and carefully restrict each downstream firm to a single market, it may be able to increase its overall rents by selling to the rights to sell in the downstream market to a single downstream firm who then has both the willingness and the ability to fully exploit the different sub-markets.

(d) The downstream firm use inputs in *variable proportions*. In this case, selling the key input at a simple linear monopoly price causes the downstream firms to inefficiently substitute away from the key input. Overall efficiency and upstream profits can be increased, as before, by selling the right to produce the downstream product to a single firm (with the key input sold at marginal cost). An alternative vertical arrangement which can address this inefficiency and which does not require exclusivity is "tying" - requiring the downstream firms to purchase all their inputs (not just the monopoly input) from the upstream firm.[60]

(e) The downstream firms must *incur a sunk cost*, specific to the relationship with the upstream firm, in order to produce the final product, such as an invest in capacity or specific equipment. Selling to more than one downstream firm inefficiently leads to the duplication of this cost.

In each of these cases an exclusive contract is one possible mechanism to achieve the efficient outcome. Furthermore, it is possible to demonstrate that in many circumstances, an exclusive contract is

the *only* mechanism which permits these efficiencies to be attained. If the upstream firm were forced to sell to other firms it is possible to show that profit received by the upstream firm is reduced and, if the downstream market is sufficiently competitive, may be dissipated entirely.[61] Note that in the case of examples (b), (c) and (e) an upstream firm will seek such vertical arrangements whether or not it is in a dominant position. The efficiency-enhancing properties of these vertical arrangements do not depend upon the exercise of market power.

What is the application of these principles to broadcasting and media markets? Consider first the case in which the upstream firm is a content producer, who is seeking to sell the content to a downstream infrastructure provider/packager.

Broadcasting and media markets share with other forms of intellectual property the characteristic that the marginal cost of producing another unit for consumption is very low or zero. Once a film or television programme is produced the cost of adding another person to the audience is very close to zero. Once a novel or a piece of music has been created, the cost of copying it is virtually zero. Because the marginal costs of production are so small, the benefits from careful price discrimination are large. Film distributors, in particular, are well known for maximising the revenue from a particular film through carefully managed distribution that involves several "windows", from screening in cinemas, through pay-per-view, release on video, on pay television, to screening on free-to-air television. Furthermore, it is clear that broadcasters and book and music publishers often invest substantial sums in promoting a piece of content, such as a book, CD or television programme. In addition, a broadcaster may need to upgrade its equipment in order to be able to take advantage of all of the interactive multimedia capabilities of the content.

It is clear, therefore, that content producers (such as novelists, recording artists, or sports leagues) and infrastructure providers/packagers will seek exclusive vertical arrangements in order to encourage price-discrimination and efficient investment in promotional effort. Content producers may also want an exclusive contract where there is a lack of competition in the publishing/broadcasting market. In these cases, one efficient form of vertical contracting is simply to sell exclusive rights to the content to the largest bidder for a flat fee. This allows the content producer to extract all of the available rent and provides an incentive for the downstream broadcaster to efficiently promote the content and to exploit all the available market opportunities (through careful price discrimination). Forcing content producers to sell to all interested broadcasters at the same terms and conditions, essentially forces them to charge a simple linear price per consumer. This limits the incentive for broadcasters to promote the content and prevents all price discrimination.

In other words, at least some forms of exclusive arrangements in the multimedia industry are both efficient and desirable. Note, however, that the fact that a given piece of content is most efficiently sold to a single broadcaster does not imply that all of the content from that content provider need be sold to the same broadcaster. Novelists and recording artists can and do change publishers over time. The right to broadcast key sporting events (such as the US Superbowl) has changed networks over time.

This analysis can provide efficiency reasons why a content provider would seek an exclusive arrangement with a single broadcaster in each market (i.e., exclusive territories). The same analysis can also provide some insights as to why a broadcaster would agree not to carry other, competing content (i.e., exclusive dealing). One possibility is that content providers must also make an investment in promoting the broadcaster. They may be reluctant to do this if, once viewers are attracted to the broadcaster, consumers may instead choose to watch competing content. An example might be a famous video-game which advertises that it is available for playing at home on a particular home video-game platform.

Generally speaking, however, it is rare to observe content providers advocating particular infrastructure providers. Another possibility is that the content provider must make an investment in its content which is specific to the broadcaster (such as adjusting its content to take advantage of all of the interactive multimedia capabilities offered by the broadcaster). In this case the content provider may be reluctant to make the investment without an assurance of a downstream market. The economics of compatibility and standardisation is discussed further in the next section of the paper.

In the above analysis, vertical arrangements are efficiency enhancing and will, therefore, raise overall welfare. Does economic theory also provide a guide as to when exclusive vertical arrangements will reduce welfare? Broadly speaking, economic theory is much less clear on the situations under which vertical arrangements will reduce overall welfare. No single theory has emerged. In most theories the welfare effects of vertical arrangements are positive, neutral or ambiguous.

There is, however, a fairly straightforward argument as to why vertical foreclosure will be inefficient in certain specific cases. In many cases the downstream production technology will be subject to economies of scope. Economic entry into the downstream market in this circumstance requires production of the full range of downstream products. Although restricting access to a key input necessary for the production of just one of the range of products, will not enhance the market power of the integrated firm over the downstream market that requires the essential input, it will enhance the market power of the integrated firm over all of the other products sold using the downstream technology.

The application to the broadcasting industry is straightforward. Suppose that the downstream technology is the broadcasting infrastructure. This can be used for providing a variety of broadcasting services, such as entertainment, sport, films, interactive multimedia and home shopping. If a firm can acquire a dominant position with respect to an input necessary for the provision of one of these services (by, say, acquiring the rights to broadcast major sporting events), the firm may limit the ability of other firms to provide that service and thereby restrict or prevent the entry of competitors in the infrastructure market. Doing so does not increase the value of the sports rights, but does reduce the level of competition (and therefore the monopoly rent) available on all of the other services that can be provided through the broadcasting infrastructure.

The same arguments might also apply in an upstream direction in the chain of production. There are economies of scope in producing some forms of content for, say, both film and television. If an integrated broadcaster with a dominant position in infrastructure were able to deny a competitor access to the television audience, it may thereby be able to restrict competition in the joint market for film and television content and thereby also earn monopoly profits in the market for film content.[62] This effect might explain why dominant national broadcasters have traditionally been highly vertically integrated and why, in most countries, relatively few films are produced without the involvement of a dominant national broadcaster. It might also explain why some countries require dominant national broadcasters to purchase content from independent producers. Such a restriction enhances competition in the market for films by providing access to the television market necessary to fully exploit the benefits of economies of scope.[63]

Vertical foreclosure of the kind illustrated in these examples relies on the assumption that the infrastructure provider/packager can control the access of the consumer to certain forms of content. This has (typically) not been the case to date, for example, in the market for Internet services. Broadly speaking, the market structure of the Internet corresponds to that illustrated in (e) above. Consumers can choose separately their infrastructure/packager (or “ISP”) and any ISP (typically) offers access to all content.

However, this lack of foreclosure attempts in the Internet market may simply reflect a historical anomaly or a transitional state. In the early days of online services, users of services such as Prodigy, AOL or Compuserve could not access content outside the provider's network. Although the growth of outside content has eroded this strategy, it may yet reappear. As the Internet develops, ISPs may seek to obtain exclusive access to valuable content in order to exclude competing ISPs. Alternatively, firms with a dominant position in infrastructure provision (such as incumbent local telephone companies) may seek to exclude competing ISPs by offering them unfavourable terms and conditions for access to the network. Allegations of this type were raised in New Zealand, where the dominant ISP (operated by the dominant incumbent phone company) offered Internet access through an 0800 number at a price that was alleged to be lower than other companies paid for the same 0800 service. The same ISP provides access to a live video feed (and the latest 168 hours of archived video), but only to its own customers, and not to clients of other ISPs. Both actions may, under certain narrow conditions, have the effect of excluding other ISPs from the market.

It is important to mention that there are also other reasons why firms may wish to use exclusive arrangements to deny access to competitors which are more specific to the multimedia/broadcasting context. As we argue below, certain broadcasting markets may exhibit "network effects". In particular, the more consumers there are of a particular broadcasting system, the more content producers may desire to produce content for that system. The more content that is available, the more consumers will wish to purchase the system. In such a context, an early advantage of some kind can be translated into long-term persistent market power. Denying access to specific forms of content may be one strategy for preventing the rise of a competing system. In addition, there may be a form of economies of scale in the broadcasting sector that emerges from the fact that larger audiences tend to be more valuable to advertisers (per head) than smaller audiences[64].

Dominance, Two-way Communication and Network Externalities

Up until now we have considered broadcasting as representing primarily communication between consumers and a specifically identifiable group of "content producers". However, as is well known from the voice telecommunications industry, a specific form of dominance concerns can arise when consumers also desire to communicate with each other (via voice, fax, email or some other future multimedia form of communication). In such markets consumers benefit from being able to communicate with a large number of other consumers. An infrastructure provider/packager who is able to sign up a large number of customers will therefore be in a strong position relative to an infrastructure provider/packager who has only a few customers. The larger network is able to exploit its position by insisting upon terms and conditions for the exchange of communication which are unfavourable for the smaller network.

Application To Competition Enforcement

The preceding sections have identified situations in which exclusive contractual arrangements between content providers and infrastructure providers are efficient and situations in which dominant firms can use their dominant position to restrict competition in horizontal or vertical markets. The question arises whether competition enforcers should seek to prevent this behaviour and, if so, what remedies they should impose.

In general, abuse of dominance issues are some of the most difficult and finely-balanced that competition authorities must address. The above analysis has suggested that anti-competitive behaviour may occur, suggesting that there may be situations in which competition intervention is valuable. However, competition intervention may not always be appropriate, especially when exclusive contractual

arrangements are necessary to enhance overall efficiency or where an effective, enforceable remedy is not available.

We can, however, set out the following principles:

- First, as in all competition analysis, the definition of "dominance" and the definition of the relevant market will be critical.

Exclusive vertical arrangements should not be challenged unless one of the firms to the arrangements can be shown to be in a dominant position with respect to a particular market. The question of market definition is therefore important. The market definition analysis should pay close attention to substitutes (e.g., if enough consumers view the various forms of motor-racing as substitutes, a dominant position in Formula One content may not imply a dominant position in motor-racing content), to geographic scope (consumers may be able to obtain broadcasts from other countries or international broadcasters) and to issues of time (if content contracts are renewed every one-two years, say, a dominant position may be able to be eroded over time).

- Second, the desirability of intervention will depend, in part, on whether there are clear efficiency-enhancing properties of the exclusive arrangement. Exclusive arrangements with efficiency justifications should be tolerated when the period of exclusivity is appropriate in the light of the efficiency justifications.

The analysis above has identified several situations under which exclusive arrangements can enhance efficiency. In particular, an exclusive contract will be efficient when the exclusivity is necessary to protect promotional activity by the infrastructure provider and when price-discrimination will enhance the total overall return. Intervention against such contracts may lower overall welfare. However, the need for exclusivity at any one point in time does not imply that the content provider need sell to the same infrastructure provider over time. Even where exclusive contracts are efficient they need not be longer than is necessary to achieve the desired objectives. The duration of the contract should be no longer than is necessary to achieve the necessary benefits. Furthermore, at the time the contract comes up for renewal all competing providers should have the opportunity to bid on an equal basis.[65]

- Third, mergers, or more extensive vertical arrangements between dominant content providers and infrastructure providers that would prevent other infrastructure providers from having the opportunity to bid for the right to the content in the long term should be subject to careful antitrust scrutiny.

Such arrangements run a strong risk of creating a dominant position in infrastructure provision. Competing infrastructures should periodically have the opportunity to bid for access to key content. Similarly, attempts by infrastructure providers to sign long-term exclusive contracts with a group of content providers who, collectively would have a dominant position, should be closely examined.

- Fourth, in the presence of clear standards for content, mergers, or more extensive vertical arrangements between content providers and dominant infrastructure providers that would prevent competing content from being broadcast by the infrastructure provider in the long term should also be subject to careful antitrust scrutiny.

The analysis above suggested that there may be efficiency arguments why infrastructure providers will seek to deny access to competing content. One argument was that doing so protects any

investment that the content provider makes in tailoring its content for the particular features of the broadcaster's system. The economics of compatibility and standards are discussed further below. Once a content standard has emerged, however, these arguments no longer apply. In the presence of a long-term, stable standard, persistent exclusion of competing content by a dominant infrastructure provider should be subject to close antitrust scrutiny. Similarly, attempts by content providers to sign long-term exclusive contracts with a group of infrastructure providers who, collectively would have a dominant position, should be closely examined.

- Fifth, where there are network externalities due to the need for any-to-any connectivity (as with traditional voice telephony), dominant networks should not be able to deny access to competitors.

These principles are implicit in the summary of Karel Van Miert, EC Competition Commissioner:

> "We will continue to take a close interest in contracts between film studios and sports bodies on the one hand, and pay-television broadcasters on the other. No one operator can be allowed to control the broadcasting of first-release films and sports for an excessive period of time. We will examine the scope and length of exclusivity granted in these contracts. ... As telecoms markets are opened and old and new actors re-position, we will have to be careful that horizontal and vertical alliances do not, again, close the gates which have just been opened. And we have to be wary of companies operating in different parts of the digital world coming together to create bottlenecks. Nor must they extend dominant positions. We assume a positive attitude towards new vertical and horizontal partnerships and ventures, as long as we can be convinced of the real synergies and benefits which should form the underlying logic for these moves. If, on the other hand, it looks more like a defensive strategy to sew up markets and shut out competitors, then the competition rules must be used without hesitation to block the agreement".[66]

Broadcasting Sports Rights and Horizontal Co-operation Between Sports Teams

We may apply these principles to the issue of the broadcasting of sports. In many OECD countries, issues surrounding the broadcasting of sports have given rise to significant competition concerns. Many of these were discussed in an earlier CLP Roundtable[67] on competition issues in sports.

Like many other industries, circumstances arise in the sports industry in which co-operation (rather than competition) between the major firms can enhance overall welfare. In the case of sports, the revenue obtained from broadcasting sports events depends not only on the quality of the teams, but also on the *relative* quality of the teams. It is more exciting to watch a closely fought match than a walk-over. Therefore, a successful team has an incentive to ensure that there are other successful teams around, in order to ensure an adequate supply of worthy opponents.

Worthy opponents can be found in two ways - by looking further afield (perhaps internationally)[68], and/or by fostering rivals. Fostering rivals is best carried out by an independent agency. For the strategy to succeed, consumers must believe the rivals have a chance of winning. If consumers of the sport suspect that rivals are being manufactured only for the purposes of being beaten, they will quickly become bored. Therefore, there is an incentive for even very strong teams to establish an independent body for redistributing their funds to weaker teams, in an objective and non-discriminatory manner.[69] Such co-operation often (but need not) takes place within the framework of a "league" of teams. Through redistribution of earnings, the league can ensure that imbalances in team qualities are offset over time.

Often, as part of its role as a redistributor of earnings, the league will seek to obtain exclusive rights to the broadcasting of league games. These exclusive rights have, on occasion, been challenged by competition agencies.[70] In the absence of control of broadcasting rights, one of the most important sources of revenue for most sports, the ability of the league to redistribute earnings may be weakened. Although vesting exclusive broadcasting rights in the league reduces competition for broadcasting rights between the individual teams of the league, this reduction in competition is offset by the benefits of obtaining a more interesting overall product from the perspective of consumers.

The principles above can be applied in this context. Although exclusive rights are not, in themselves, anti-competitive, they should not last longer than is necessary to achieve the relevant efficiency objectives. For example, they should not last longer than necessary for the recuperation of any promotional investment on the part of the broadcaster. At the time, of re-negotiation, the previous broadcaster should not be placed in a favourable position. For example, in considering a case under which the Danish Football Association, sold all television broadcasting rights exclusively for a period of 8 years, with an option for prolongation, the Danish Competition Council "did not consider [the agreement] - except for the option for prolongation - to entail harmful effects on competition. ... The Council didn't find any fundamental problem with exclusivity per se."[71] Although the Danish Competition Council was probably right to question of the arrangements for the prolongation of the contract, it appears that a contract of 8 years was longer than is necessary to recuperate any investment in promotion on the part of the broadcaster. In another case relating to the arrangements governing re-tendering of a broadcasting contract, the OFT found anti-competitive a clause under which BSkyB and BBC would be allowed to match any competing bid for the screening of Premier League football games in the UK.[72]

Moreover, in order to ensure the possibility of entry of rival leagues, individual teams should not be bound to an existing league for longer than is appropriate. In the Australian Superleague case, the existing league sought to prevent the defection of existing teams to a new league to be called "Superleague", through a system of "Commitment Agreements" and "Loyalty Agreements". These agreements were later struck down as anticompetitive.[73]

Summary

The main points of this section were as follows:

- Demand for broadcasting services comes from a variety of sources, but primarily from advertisers and from consumers who seek information and entertainment. Both of these groups have the alternative of non-broadcasting substitutes. Within the broadcasting market, the various types of content may represent distinct sub-markets. In general, competition in the broadcasting market may be characterised as competition between a large range of highly-differentiated, but related, products.

- Entry into broadcasting markets requires access to content and to a means of distribution. Barriers to entry are likely to be highest in the market for access to certain forms of content (such as major sporting events) and in the markets for broadband access into the home.

- The overall barriers to entry and opportunities for strategic anti-competitive behaviour depend upon the overall industry structure. The future broadcasting industry structure is difficult to forecast, although a range of possibilities is possible.

- Some of the more important competition concerns in the multimedia/broadcasting industry arise from exclusive vertical relationships between firms. The economic theory of vertical foreclosure shows that exclusive vertical relationships can be efficient in many circumstances. In particular, an exclusive arrangement under which a content provider sells to a single downstream broadcaster can be efficient when the broadcaster must make an investment in promoting the content, or when it is efficient to engage in price-discrimination in the final market.

- Vertical foreclosure can also be anti-competitive when the downstream technology exhibits economies of scope and restricting access to a key input can restrict entry in the range of products produced with the downstream technology. Examples in the broadcasting context include attempts to secure exclusive access to key content such as major sporting events, or attempts by content providers to secure exclusive access to broadband distribution channels.

- The competition analysis of particular exclusive arrangements will depend upon the facts of each particular case and, in particular, on the competition implications of particular vertical arrangements, the size and nature of any efficiency benefits and the nature of an available remedy where one exists. Generally speaking, exclusive contractual arrangements should be tolerated where they are no longer than is necessary to achieve any efficiency benefits. However, competing content providers and infrastructure providers should periodically have the ability to bid, on an equal basis, for the exclusive right. Attempts by dominant content providers or infrastructure providers to exclude competing infrastructure providers and content providers (respectively), indefinitely (perhaps through vertical mergers) should be subject to close antitrust scrutiny.

The Regulation of Broadcasting

In many, but not all, OECD countries, broadcasting remains a highly regulated activity. This regulation is, in part, a result of historical technological factors (lack of bandwidth, high cost of encryption/decryption systems) and, in part, a result of government sensitivities towards what was perceived as a powerful medium.

It is clear that this situation is changing. The bandwidth constraints are being eroded. The reduction in costs of computing have made digitalisation (and therefore encryption and decryption) not only feasible, but highly desirable. Broadcasting is becoming more like (and being regulated more like) other media industries such as newspapers and magazines. The focus of regulation is changing from direct control over content and advertising, to concern over competition and the control of market power. This section seeks to highlight some of these important changes in broadcasting regulation.

Regulation of Content and Advertising

Currently, a variety of public policy interventions in OECD countries seek to directly influence what is broadcast, including both the content of the programming and the level of advertising. It is typical, for example, to have rules which seek to promote certain categories of programming (such as drama, current events or programming with a national or regional flavour) or programming which originates from a particular place (particularly domestic programming). It is also common to have rules limiting the quantity of advertising per hour or per day, or the location of that advertising. A few countries also

directly subsidise one or more broadcasters, in order to provide less advertising and/or a different mix of programming. The BBC in the UK is one leading example.

The Foundations of Content Regulation

Is there an economic foundation for these interventions?[74] An important characteristic of media is the strong economies of scale. The cost of producing a piece of content is essentially fixed and independent of the size of the audience. Once it is produced, the marginal cost of consumption by another consumer is relatively small or zero. As a result, there is an inherent tendency for all media to be focused on larger markets. Larger markets are likely to be served with more and better quality products than smaller markets. The market for women's magazines, for example, has more and better quality competitors than the market for magazines for steam train enthusiasts. This phenomenon is common to all media markets. Broadcasting, which has always been more heavily regulated than other media markets, has been regulated for other reasons than simply economies of scale.

The economic foundations of broadcasting regulation stem from the historical combination of spectrum scarcity and the inability to exclude viewers (i.e., the historical inability to make viewers pay for the broadcasting services they received). Economists have pointed out that free-to-air television, particularly when there are spectrum constraints limiting the number of available channels, may suffer from particular inefficiencies. It may fail to deliver certain types of programming that viewers value. Free-to-air television is produced entirely for the benefit of advertisers. Advertisers care primarily about the size of the audience (and, to an extent, about other characteristics of the audience such as age and income). Advertisers do not care at all about how much "value" or "consumers' surplus" viewers receive from a programme. Broadly speaking, given a choice between two programmes, broadcasters will always choose the programme which draws the larger audience, irrespective of how much value or consumers' surplus viewers place on the programme.[75] Advertiser-supported television, therefore, has a bias towards programming that is targeted at mass audiences (even when viewers do not value the programming highly) and away from programming targeted at minority audiences (even when those viewers value the programming highly).

With an increasing number of channels, there is a tendency for minority interests to be better served as each channel seeks increasingly to specialise and target a specific segment of the audience, in much the same way as magazines focus narrowly on specific interests or markets. However, the number of channels required to adequately serve even sizeable minorities can be large, larger than the amount of spectrum available for terrestrial free-to-air television.

Clearly, such concerns become significantly diminished with the development of multi-channel subscription services. With pay television, viewers can communicate their "value" or "consumers' surplus" directly to the broadcaster through the price they are willing to pay. Provided there are sufficient channels available, even very small minorities can be served (if their willingness to consume broadcasting services is large enough).

The tendency towards a proliferation of pay channels (and the potential for an unlimited number of channels in the future) reduces the above concerns related to free-to-air television to the point of insignificance, at least in those countries in which there is a significant penetration of pay television networks. It is increasingly being recognised that the combination of the proliferation of bandwidth and the growth of pay television will virtually eliminate traditional rationales for broadcasting regulation.[76]

> "The regulatory tradition of the broadcasting sector is based on the fact that scarce public resources - frequency spectrum - were being used. That regulatory rationale for broadcasting

> regulation is no longer valid. ... None of [the historical rationales for regulation] conclusively justify the continuance of the onerous regulatory tradition for broadcasting service. The increases in network capacity brought about by digitalisation and the ability to deliver content over a number of delivery platforms means that scarcity is becoming less significant as the basis of regulatory intervention in a multimedia environment. These changes should be reflected in any reassessment of the current telecoms regulatory framework."[77]

The UK Green Paper on Convergence[78] summarises the current state of affairs by noting:

> "The presumption that broadcasting and communications should be regulated should in general be reversed".

Improving Existing Regulation

Even where existing regulations will not be immediately removed, there are often opportunities to enhance their economic efficiency. Possibly as a result over concerns about the content produced by unregulated competition in free-to-air broadcasting, most countries seek to increase the quantity of certain forms of programming, through either direct regulation, or subsidy, or both. The most common form of direct regulation involves requirements to broadcast local, regional or national programming. Subsidies are typically directed at "public service" broadcasters whose mission is to "fill in the gaps" left by advertiser-supported television with programming for minorities or expensive, highly valued programming for majorities.

However, as in other sectors, where the subsidies are directed at a single firm, the government cannot be sure that it is achieving the objective at least cost. In addition, the subsidised firms themselves have little incentive to maintain cost efficiencies. By making the subsidies "contestable" between firms, it is possible to ensure that the public policy objectives of the subsidies are achieved at least cost. Analysys notes that the same principles used to guide the development of universal service requirements in telecommunications apply to such "public service" requirements in broadcasting:

> "[To promote efficiency in public service broadcasting], the model adopted for universal service in the telecoms sector in Germany, Austria and Luxembourg, may be instructive. Under that regulatory model, there exists a general presumption that universal service is being provided. Insofar as market failure suggests that universal service is not being provided, market players may tender to be able to provide such service. In the event that the provision of such service proves to be uneconomic, a mechanism has been established which foresees contributions being made by all relevant market players. ... [T]he use of a tendering process for the provision of 'public goods' or 'public services', may be the system best suited in the medium term to preserving pluralism and cultural diversity in a competitive environment." [79]

In any case, as noted above, the economic basis for content subsidies only applies to free-to-air television in a situation of scarcity of the available spectrum. The proliferation of pay television diminishes these rationales to the point of insignificance, at least in those countries with a high penetration of pay television systems. This raises the question whether public broadcasting will continue to have a role in the broadcasting world of the future. "Perhaps with hindsight public-service broadcasting will seem a freak of technology: for a rare half-century, it was possible for one medium to communicate the same material to most of a country's population."[80]

> "Market and historical developments have led to an environment in which the functions performed by private broadcasters are becoming increasingly indistinguishable from those

performed by public broadcasters. In a multimedia environment with the capacity for multiple sources of content, the usual requirements of diversity, plurality and minority representation may be capable of being satisfied by non-public broadcasting sources. Were this to occur, the privileged position which public broadcasters hold vis-à-vis private broadcasters may need to be re-examined. For example, to the extent that pluralism and other public service goals may be able to be satisfied by the full range of market participants, rather than a single public broadcasting entity, it may be more efficient for the State to sponsor the appropriate public service programming by reference to an open and transparent bidding procedure. This would allow the provision of public services in a form which is not only comparable to the manner in which universal service is provided in a number of Member States, but also compatible with a competitive marketplace."[81]

Controls on Advertising

Some countries also regulate both the levels of advertising and/or the prices of subscription television services. For example, in the EU advertising is to be broadcast in blocks separate from programming and is not to exceed 15 per cent of daily transmission time. Spot advertising is not to exceed 20 per cent of time within any one hour period.[82]

The economic rationale for controls on advertising is unclear. Some economic theory suggests that limited competition amongst channels may lead to a higher level of advertising than would arise under more effective competition. Advertising constraints, therefore, may represent a necessary public policy response to constraints on entry. However, advertising constraints, like price controls in other industries, may also *limit* the number of potential entrants and therefore may restrict competition. In addition, with increasing levels of competition, particularly with low-advertising pay TV channels, this rationale is becoming increasingly weak. Advertising controls may, in fact, be inefficiently distorting competition away from subscription television.

We may also note that it is clear that some form of content controls will be required in the multimedia/broadcasting industry of the future. In particular, controls on the dissemination of information which is harmful in some way. To the extent that broadcasting will increasingly cross national boundaries (as the Internet does today), these controls will require international cooperation. A full discussion of these controls is beyond the scope of this paper. We will merely note that a number of initiatives are currently underway.[83]

Regulation of Entry

Virtually all OECD countries (with the exception of New Zealand), regulate entry into the broadcasting and telecommunications sectors through the use of licences. While licences do not necessarily restrict competition, the cost, delay and conditions necessary to obtain a licence can act as a barrier to entry, especially for entry across several jurisdictions. In the case of the EU, "cable and over-the-air television broadcasting have traditionally been subject to a significantly greater degree of regulation than the publishing sector and other forms of mass media. This regulation includes a very burdensome set of subjective licensing procedures which vary dramatically from Member State to Member State and which confer a great deal of discretion on the regulator. Much of the subjectivity inherent in licensing lies in the fact that issues relating to content are regulated ex ante as part of the market entry process. By way of contrast, the publishing sector operates throughout the European Union on the basis of virtually no ex-ante regulation."[84]

The promotion of competition in the multimedia/broadcasting sector requires that regulatory entry barriers be lowered as far as possible. If we separate the regulation of content from the licensing requirements, "there are no overriding public policy reasons why onerous licensing conditions for the provision of networks and/or services would be necessary in a multimedia environment. Indeed, the underlying policy should be that, to the extent that services in an off-line environment are not subject to regulation (e.g., the sale of books), the delivery of those same services on-line (e.g., the downloading of a book) should be treated no differently from a regulatory perspective."[85]

Regulatory barriers to entry can be lowered through the establishment of clear, transparent and non-discriminatory rules governing market entry. Wherever possible, licensing requirements should be abolished. Mutual recognition of licenses issued in other countries should be adopted. The procedures for granting licences, the criteria used to select prospective licensees and the timeframes within which licences are granted should be simplified, standardised and harmonised across countries. The licensing framework in the telecommunications sector as a result of the Licensing Directive achieves many of these objectives. Unfortunately, "the licensing traditions of the broadcasting sector do not display a comparable degree of transparency and objectivity."[86]

> "Careful consideration should be given to streamlining licensing procedures for broadcasting in order to make them more reflective of an open marketplace characterised by competition, rather than by scarcity. In particular, in the interests of market certainty, licensing procedures and conditions should be made more transparent and less subjective in their application. Perhaps the only way of achieving this goal in the context of multimedia, while at the same time doing justice to all of the public policy goals of broadcasting, is to separate from the licensing process all matters relating to content and other public policy issues. In so doing, the licensing framework for broadcast networks and services could over time be governed by the same regulatory principles which apply to the licensing of other networks and services in the provision of multimedia services. There are already examples of such licensing procedures being effectively deployed in the context of the licensing of satellite broadcast services."[87]

Regulation of Lines-of-business and Ownership

As was discussed earlier, the effect of convergence on the level of competition in the converging markets depends upon the relative barriers to entry into the two markets. Where there are high barriers to entry into one of the two converging markets, convergence may lead to a reduction in the number of competitors in the other market. Where there are sunk costs of entry (so that the market is not perfectly contestable), this reduction in the number of competitors may be associated with a rise in price to consumers.

In the context of multimedia/broadcasting, the largest concerns appear to surround the entry of the dominant telecommunications incumbent into the provision of cable television services. Herbert Ungerer of the EC's DG IV notes:

> "[1995] OECD figures show that PTOs enjoy an increasing share of the cable subscriber market and, thus, the platform for alternative provision of local telecoms access is shrinking. ... In Member States where there are still monopolies in telecoms infrastructure and voice telephony, this increasing cable TV market share of PTOs in the run up to 1998 is worrying. It means that the platform for local loop competition may be shrinking and that incumbent monopolists may well be entrenching bottleneck control of access to customers. ... Many parts of the EU area are already at a tremendous disadvantage compared to, for example, Canada and the US, in terms of the independent infrastructure available for the provision of such competition. ... The application

of EU competition rules generally prevent the extension of a dominant position from one market, for example, telecoms, into another, for example, cable TV. We are therefore keeping a very close watch on moves of incumbent telecom operators".[88]

In the UK, BT is prohibited from delivering cable entertainment services on a national basis to retail customers. This restriction is due to expire in or before 200 Cable operators in the UK have a 4.9 per cent market share in the local voice-telephony market, probably the highest penetration of competition in the local market in the world.

It is clear that a line of business restriction of the kind imposed in the UK should always be temporary, as it is in the UK. A permanent line-of-business restriction raises the cost of telecommunications by limiting the ability of the incumbent to exploit economies of scope and therefore encouraging excess entry. The key question, therefore, is whether a temporary line-of-business restriction has any long-term effect on market structure.

In effect, a line-of-business restriction of the kind imposed in Britain represents a form of temporary protection or subsidy for new entrants, similar to "infant industry" protection sometimes sought in international trade discussions. The arguments against a line-of-business restriction of this kind are similar to the arguments against "infant industry" protection:

(a) First, the infant industry arguments assume that an initial boost to an industry can change the long-run market structure. If it cannot, the initial boost is a pure cost to society, which could have been avoided. The problem is that it is hard to identify the factors that might cause the initial boost to persist. One possible source is an asymmetry in the ease of preventing entry relative to forcing out existing competitors. Where it is harder to force out existing competitors (whose costs are largely sunk), an initial boost in the form of the line-of-business restriction may be sufficient to change the long-run market structure. If it is not, the line-of-business restriction should be avoided.

(b) Second, and relatedly, in practice, infant industry protection tends to be prolonged. The protection builds up a constituency in the form of the protected industry, for a continuation of the protection, especially when the industry itself forecasts that the effects of the initial boost will not last when the protection is removed. If there is any discretion over the lifting of the restriction, the cable television industry in the UK could be expected to argue that the restriction should continue.

In the light of these concerns, such line-of-business restrictions should be significantly limited and subject to a clear and non-discretionary time-limit where they do exist.

Note that such considerations do not suggest that pro-competitive structural measures should not be carefully considered at the time when a new regulatory regime is being constructed. For example, generally speaking dominant incumbent firms providing a range of services should be divested into their separate components when doing so increases the level of potential competition, does not sacrifice economies of scope and when such divestiture cannot be immediately reversed through a merger that would be approved by the competition authority. In particular, as a recent OECD report argues, where these conditions are satisfied, during the transition to competition in incumbent PSTN operators should be required to divest their cable television networks[89].

Ownership Controls and Plurality

Another common form of broadcasting regulation is control on cross-media ownership links (i.e., controls on joint ownership of television and radio, television and newspapers, or television and cable-television[90] in the same geographic region, that go beyond the usual controls inherent in competition law). These restrictions are, in part, due to competition concerns but, more often, are due to a desire to ensure the "plurality" or diversity of views necessary to sustain a democratic society. The concern is that a concentration of media ownership could restrict the access of the public to a desirable diversity of opinion.

It is not clear whether or not competition law provisions alone would sustain the extent of plurality that seems to be desired in some countries. We may note, however, that entry into the business of providing news sources is very easy. There are literally thousands of sources of news, including magazines and Internet sites. Provided these alternative sources are not prevented from reaching their audience, the normal competition law controls on television, radio and newspapers would seem to provide an adequate level of plurality.

Moreover, existing regulations can often be circumvented through various ownership devices. "In Germany, for example, a high degree of media concentration had emerged under the previous ownership rules through complex cross-ownership schemes, with the two giant media conglomerates - the Bertelsmann/CLT group and the Kirsch/Springer group - obtaining dominant positions in the television market. Those cases shows that ownership regulations do not necessarily prove to be a sufficient or effective measure to limit concentration and ensure pluralism".[91]

Lastly, the regulations can become out of date with changing technological developments, especially the growth of pay and cable television. For example, restrictions on free-to-air channels are typically stricter than on cable channels. However, a single pay channel may attract an audience share much larger than that of a free-to-air channel. For these reasons, some countries have adopted an "audience share model", which does not rely on fixed ownership limits on each form of media but on limits on the total share of a single entity of the total media audience calculated according to a specified formula.

The EC has proposed a draft directive suggesting that EU countries regulate media concentration and ensure pluralism on the basis of audience time share instead of ownership restrictions. A problem with such policy approaches is that the underlying problems are not well specified. To what extent is influence or plurality linked to "audience share"? Does a high audience share for a sports program imply more influence than a low audience share for a current affairs documentary? In the absence of further information on the link between policies and objectives, it seems such proposals should be treated carefully.

Regulation of Compatibility

Particular regulatory concern has surrounded "conditional access systems". We may define conditional access systems as the customer-premises equipment which converts the signals that are transmitted across the telecommunications infrastructure into sounds and images that are meaningful to humans. Conditional access systems may also provide other functions, such as ensuring that viewers are only able to watch what they have paid for, or recording viewing habits (for the benefit of broadcasters). Conventionally, a conditional access system takes the form of a "set-top box" which interfaces between the telecommunications infrastructure and the viewer's television set. However, there is little theoretical difference between the set-top box and the other terminal equipment of the consumer (including the television itself which converts video signals into moving images). Although issues surrounding

conditional access systems have historically arisen with regard to satellite broadcasting, the same issues arise in relation to the customer equipment associated with the other broadband access paths into the home.

The essential public policy issue surrounding conditional access systems is whether or not regulators should enforce compatibility at the level of the final broadband link to the consumer, so that the same customer terminal equipment could be used with a variety of multimedia/broadcasting systems (i.e., a move from market structure (a) to (b), above). DTI states the problem as follows: "With relatively expensive consumer equipment containing the means to control access, consumers will not want to purchase more than one. This will tend to mean that whoever is first to the market with their particular access technology will naturally tend to assume the dominant role as a gatekeeper to new services. The issues which arise, then, are how to secure access on fair, reasonable and non-discriminatory terms between all service suppliers and all consumers, and how to achieve interoperability between different technology platforms."[92]

The current situation regarding compatibility of conditional access systems for DBS satellite services is set out in the attached box.

There are two issues to be considered, relating to the effect of such compulsory compatibility on (a) competition between broadband delivery systems in the presence of network effects and (b) on the ability of competing firms to strategically raise switching costs. We will consider each of these in turn.

Box 2: Compatibility Of Conditional Access Systems for Digital DBS services in the OECD area

In the **United States,** digital DBS service providers have different conditional access systems.[93] The companies DirecTV/USSB are an exception. Subscribers use the same receiving equipment for the two services, which provide different programmes. The fact that DirecTV and USSB share an orbital slot increases the incentives for them to adopt a compatible system.

In **Canada**, persons subscribing to existing satellite services will not generally be able to receive digital DBS services, which use a different transmission technology. The existing conditional access system is designed for use within Canada because copyright and regulatory constraints limits the areas in which the service may legally be provided. In the case of ExpressVu, it is clearly stated that set-top boxes and smart cards from EchoStar's network system will not be programmed to receive the Canadian ExpressVu signals, just as ExpressVu set-top boxes will not be programmed to receive the US signals in order to ensure the network services are sold only in their respective countries.[94]

In **France**, there are three large digital DBS service operator groups: CanalSatellite, Télévision par satellite (TPS), and AB Productions. TPS and AB Sat launched their packages in December 1996. AB Sat and CanalSatellite signed a Simulcrypt agreement in April 1997, which allowed CanalSatellite's subscribers to receive AB Sat programmes. Both operators share the same smartcard and AB Sat pays an access fee to CanalSatellite.

In **Germany,** the MMBG (Multimedia Betriebsgesellschaft) consortium, which includes Deutsche Telekom, CLT, Bertelsmann, Canal Plus, RTL, ARD, ZDF and Debis, use the SECA technology for conditional access. They compete against the Kirch Group, which promotes the Irdeto technology based on its d-box decoder. As of February 1997, the Kirch group's DF1 is Germany's main digital DBS services provider. However, when Première, the first pay television channel, owned by Canal Plus, Bertelsmann, and Kirch, launches pilot services using the Mediabox developed by Canal Plus, competition between conditional access systems will accelerate.

Spain has adopted rules to ensure compatibility of conditional access systems so that a single set-top box provides access to all digital DBS services. Technical specifications have not yet been set. CanalSatellite and the DTS consortium, which includes the national telecoms operator Telefonica, the public broadcaster Television Espanola (TVE) and the Mexican TV group Grupo Televisa, will compete in this market.[95] CanalSatellite launched services in January 1997 with a Mediabox decoder.

In **Japan**, after the launch of PerfecTV! in June 1996, the Ministry of Posts and Telecommunications in October 1996 asked existing and expected digital DBS service operators to examine the possibility of implementing a universal integrated receiver and decoder. In the near future, viewers who bought the integrated receiver and decoder for PerfecTV! may be able to receive JskyB. Other digital DBS service operators are expected to make their services as compatible as possible. DirecTV is planning to develop a universal integrated receiver and decoder system that is compatible with PerfecTV! and JSkyB, which have different conditional access systems.[96]

In **Australia**, following a rule change effective 1 July 1997, satellite subscription television broadcasters will be required to ensure that domestic reception equipment and subscriber management systems are accessible by other satellite broadcasters.

Network Effects and Competition Between Incompatible Systems

Consider first the case of no switching costs (perhaps due to an absence of any customer investment in the necessary equipment).

Competition between incompatible multimedia/broadcasting systems may exhibit what are known as network externalities, analogous to the competition that arises between, say, VHS videocassettes and digital video disks, between cassettes and CDs in audio equipment, analog and digital protocols in

cellular telephone systems and so on. These markets share the common characteristic that the demand for a particular system is, in part, related to the number of consumers who are expected to purchase the system. The more viewers adopt a particular conditional access system, the more likely are content producers to supply content compatible with that system. The more content is produced for a system, the more viewers are likely to prefer that system.

"In markets with network effects, there is a natural tendency toward de facto standardisation, which means everyone using the same system. Because of the strong positive-feedback elements, systems markets are especially prone to 'tipping' which is the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge. ... Because a firm with a small, initial advantage in a network market may be able to parlay its advantage into a larger, lasting one, competition in network industries can be especially intense - at least until a clear winner emerges."[97] "If the ultimate outcome is going to be one of tipping to a single system, the firms are effectively bidding for future monopoly profits".

The strategies that may be adopted in order to secure an early advantage are many. For example, competing firms may price below cost as an equilibrium outcome. Other strategies include obtaining exclusive rights to content (in order to deny access to that content to competitors)[98] or promoting consumers' beliefs about a system's popularity. Firms may also be able to raise the credibility about their claim to be the eventual winner of the market competition by raising switching costs (as discussed below).

Note that firms will not always choose to fight in order to establish a de facto standard. In many cases, firms will face a choice between an all-out fight or agreement with competitors over standards. For such firms the choice is between competition to become the standard (competition "for the market") and competition on other conventional grounds (such as price, service and product features - competition "in the market"). Under compatibility "the locus of competition shifts from the overall package to the specific cost and performance characteristics of each component individually. This general principle implies that if one firm has a distinctly superior overall package, including its product offering, its installed base, and its reputation, that firm is likely to prefer incompatibility and may spend resources to block compatibility. However, if each firm has a distinctly superior component, both firms may prefer compatibility and may spend resources to achieve it.[99] ... [Generally speaking] if a firm is confident it will be the winner [in incompatible competition] that firm will tend to oppose compatibility."[100]

As an example, the competitors of Microsoft frequently and vehemently denounce Microsoft for attempting to introduce minor incompatibilities in its in-house implementation of Java. By introducing incompatibilities in its version of Java, Microsoft can distinguish its implementation of Java from others. Microsoft's position in the PC market mean that it's attempts to establish a new standard are likely to be credible and succeed. Other software developers will quickly switch to producing software that runs on the Microsoft standard. In this way, Microsoft may be able to gain a dominant position in the market for Java software and products.

Is competition between firms to achieve a de facto standard inefficient? In general, this question is difficult to answer. There are both benefits and costs. The potential monopoly rents is a significant spur to R&D investment, but the cost of the resulting innovations may be higher than is necessary (due to "rushing" of the research programme). The potential monopoly rents also intensifies the competition between firms, stimulating the spread of a new technology and enhancing the size of the market. However, the firms may expend resources to achieve those monopoly rents which are socially wasteful. Consumers may delay purchases of the product until a clear winner has emerged.[101] Once the monopoly position is attained, the incumbent firm may have strong incentives to prevent the rise of new, rival technologies.

Furthermore, some have argued that network markets exhibit "excess inertia" - once a standard has been reached, it may be difficult for a new technology to establish the critical mass necessary to replace the existing standard.[102] "In a dynamic environment, such as the converging communications industries, there is a great risk of premature standardisation".[103]

On the other hand, there are clearly also costs of enforced standardisation. There is a very real danger of standardisation on a protocol which becomes obsolete over time. Some argue, for example, that the US NTSC standard for colour television was out of date shortly after it was adopted. As mentioned earlier, enforced standardisation may dampen incentives for substantial new product innovation. In addition, enforced standardisation may limit the opportunity for firms to produce differentiated products serving different market segments.

In addition, it is worth noting that should a dominant standard emerge, this standard is, of course, vulnerable to the emergence of completely new standards offering clearly superior services. The history of the PC industry provides an important illustration of what can happen in a world without government-mandated standards. In that industry standards are transitional. Standards may develop, and be very strong and powerful for a time, but then evaporate when something new comes along.[104]

On balance, in a context of rapid technological change, it appears inappropriate to introduce heavy handed control over standards. A recent OECD paper notes:

> "Favouring market forces seems especially important in the turbulent uncertain markets that will be the characteristic of convergence. In such markets it is difficult to predict which infrastructure platform is best for which service, which application will grow the quickest, or which terminal is best suited for access to different services. There must be experimentation by companies, and there will be failures. For these reasons it is crucial that resource allocation decisions are demand-led, driven by the market. So much so that the question whether regulation - which can frequently conflict with such market forces - is really necessary needs to be at the forefront of the policy debate. The question of whether, in fact, developments within a rapidly converging environment are too complex and dynamic to proactively construct effective regulation also needs serious consideration."[105]

Raising Switching Costs

Although it is uncommon for firms to require customers to purchase facilities which are not located on the customer's premises (even facilities which are dedicated to serving that customer, such as the local loop in telecommunications[106]), a requirement by a firm to "purchase" some of the customer-premises equipment may have the effect of raising the customers' investment in an on-going relationship with a particular company, in the same way as other fixed costs of commencing service, such as a "sign-up fee" or an "installation fee". The decision to sell (rather than lease) some of the customer-premises equipment to the customer can have the effect of raising customers' switching costs.

Raising switching costs can have the effect of restricting new entry. Where switching costs are substantial, new entrants will be restricted to only serving new customers. Where the incumbent is sufficiently dominant there may be too few new customers to allow a new entrant to achieve necessary economies of scale.

Mandating compatibility in this context prevents an incumbent from using the sale of customer equipment as a strategic device to raise switching costs (although it does not prevent the incumbent from using other strategies such as "sign up fees" or "installation fees").[107]

Conclusion: Should We Seek To Regulate Compatibility?

Overall, the arguments related to network effects and switching costs do not provide a clear basis for mandating compatibility for conditional access systems. In the multimedia/broadcasting industry a clear technological standard has yet to emerge. Different means of communication (broadcast television, satellite television, Internet) currently have their own standards. The imposition of compatibility at this stage risks limiting growth of systems which offer radically new services. Although there is a danger that a single dominant system will emerge, as long as technological developments continue, this system will be vulnerable to competition from competitors offering a significantly improved bundle of services.

In any case, regulatory intervention to address switching costs is unlikely to be effective. Mandating compatibility (or other strategies which seek to minimise the customer investment, such as a requirement that consumers only "lease" the set-top box), can be eroded through other forms of customer investment, such as "sign-up fees" or "installation fees".

If, at some point, technological change slows and a single dominant firm emerges, consideration could be given to imposing certain requirements related to the nature of conditional access system as a "bottleneck" or "essential facility". Until such time, mandated compatibility is likely to be, on balance, unnecessary. As the EC concludes: "As a general rule, issues of access to networks or to content, are a matter for commercial agreement, subject to the application of competition rules".[108]

Industry Compatibility Agreements

Industry agreements on standards can have important benefits. For example they might enhance efficiency (through avoiding costly standardisation battles) and may overcome consumer inertia due to uncertainty as to what standard will succeed.[109]

However, industry agreements on standards may also raise serious competition concerns. An agreement on standards may, at one extreme, be little more than an agreement not to compete on R&D. More importantly, an agreement of standards between particular firms in the industry may represent an attempt to exclude other firms, in order to obtain a dominant position. In July 1995 the European Commission refused the NSD (Nordic Satellite Distribution) plan because it could lead to dominance in the Scandinavian multi-channel video programming distributors market. It pointed out that NSD would exercise unacceptable gateway powers in the relevant markets and restrict potential market entry.

In general it will be important to ensure that:

(a) access to both the standardisation process and the standards themselves are not denied arbitrarily, disproportionately or unfairly to certain market players;

(b) standardisation does not unnecessarily reduce product differentiation and competition in product design, research and development;

(c) widespread access to proprietary standards does not act as a disincentive to innovation, while at the same time preventing the entrenchment of a dominant market position based on proprietary standards developed in the early stages of multimedia; and

(d) the standardisation process does not extend the habit of co-operation among competitors to other aspects of their commercial behaviour.[110]

Digital broadcast standards pioneered by the so-called Digital Video Broadcasting Consortium, which resulted in a September 1997 agreement to support open standards for set-top boxes throughout Europe, is the most recent example of the attempted development of open standards at the Community level.[111]

Regulators may also seek to enforce compatibility at other stages of the chain of production. In particular, regulators may seek to ensure that all infrastructure providers/packagers carry the content of all content providers that offer their content (i.e., a move from industry structure (b) to (c), above). As discussed earlier, this has the advantage of eliminating the ability of the infrastructure provider/packager to restrict competition through exclusive access to content. Some countries maintain "must carry" rules that require cable providers to carry all conventionally available free-to-air channels. In the US, cable operators which choose to carry the signals of all-comers face a lower level of regulation than do traditional cable companies. The 1995 EC Advanced Television Services Directive required that member states ensure third-party access to conditional access technologies be granted on "fair, reasonable and non-discriminatory terms".

Where packagers are required to provide content which they would not otherwise wish to carry, they may seek other ways to discriminate. For example, there has been a concern that providers of "Electronic Programme Guides" and other mechanisms for assisting consumers to find the information they are looking for (equivalent to the "search engines" of the Internet) could provide unfavorable access to certain categories of content.

"Siphoning" Legislation

Some countries have sought to ensure that certain events (particularly sports events) be broadcast on free-to-air, rather than pay television. An example is the English law which prevents subscription television channels from tying up exclusive rights to broadcast big events, such as the Wimbledon tennis championship. Are there economic foundations for such "siphoning" legislation?

Changing content from free-to-air to pay television essentially converts a "public good" (such as a public park) into a "private good" (such as a private garden) for which users must pay. Whenever a public good is converted into a private good there will be winners and losers. In particular, those who made the most use of the public good will stand to lose. Yet, there are sound economic reasons for privatising commodities. In particular, market forces act to ensure that private goods are supplied in the quantities and qualities that consumers demand. The link between advertising revenue and viewer value on free-to-air television is, at best, weak. By broadcasting these events on pay television, the events will typically receive more money, more events are likely to be able to be shown and there will be a better match between the events that are shown and viewer preferences.

However, the possibility was raised earlier that, by obtaining access to key content, a firm could acquire a dominant position in the market for certain forms of content and would be both able and willing to use that dominant position to restrict competition in the downstream infrastructure. In this circumstance, one remedy might be requiring that the key content be made available through other infrastructures, such as free-to-air television. In other words, although this is seldom given as the rationale, siphoning legislation may be interpreted as an attempt to control the acquisition of market power.

However, these arguments do not support siphoning legislation as it commonly exists. To begin with, the assessment whether or not access to certain content will lead to the strengthening or acquisition of a dominant position involves competition analysis which needs to be made on a case-by-case basis, in the light of a careful definition of the market and the other content held by the acquirer. This assessment is best carried out by the competition authority. In addition, as discussed above, the acquirer must refuse to make the content available to competing infrastructure operators for a significant period of time. Finally, the remedy may not involve forced licensing to free-to-air television, but simply shortening the period of exclusivity of the contract.

These are matters which can be adequately addressed through careful application of competition law by the competition authority. Such siphoning legislation therefore appears unnecessary.

Regulatory Institutions

As mentioned earlier, the changes in economies of scope that give rise to convergence also call into question the structure of the regulatory institutions governing the broadcasting sector.

In many countries the broadcasting and telecommunications sectors have been subject to separate regulatory regimes with distinct rules administered by separate regulators. We might label this a "vertical" structure of regulation, to contrast it with an alternative "functional" or "horizontal" structure of regulation under which one or more regulators have responsibility for specific functions across the communications sector.

Table 8: Alternative Regulatory Structures

"Vertical" Approach To Regulation

Broadcasting Regulator	**Telecomms Regulator**
Broadcasting Licensing	Telecomms Licensing
Control of prices; lines of business; regulation of access	Control of prices; lines of business; regulation of access
Allocation of spectrum	Allocation of spectrum
Control of anti-competitive behaviour	Control of anti-competitive behaviour
Control of content; public service requirements	Control of content; public service requirements

"Horizontal" Approach to Regulation

	Broadcasting Licensing	Telecomms Licensing
Economic Regulator	Control of prices; lines of business; regulation of access	Control of prices; lines of business; regulation of access
Spectrum Manager	Allocation of spectrum	Allocation of spectrum
Competition Regulator	Control of anti-competitive behaviour	Control of anti-competitive behaviour
Content Regulator	Control of content; public service requirements	Control of content; public service requirements

Aspects of the "vertical" approach to regulatory institutions can be found in the UK, as illustrated in the following table. The primary disadvantages of such an approach are that, as convergence progresses, increasingly the same companies fall under the jurisdiction of each regulator. This raises the

risk of conflicting or inconsistent regulatory demands. Furthermore, new firms may emerge which fall outside the scope of each regulator's responsibilities. In brief, the vertical approach to regulation gives rise to the risk of both overlaps and gaps in the regulatory responsibility for the converging sector.

Table 9: The Current Structure of Regulatory Institutions In The UK

	Telecommunications Industry	Broadcasting Industry
Economic Regulation:	Dept. of Trade and Industry ("DTI"), Oftel	DTI , OFTEL, Radiocommunications Agency ("RA"), Dept. of Culture, Media and Sport ("DCMS"), Independent Television Commission ("ITC")
Content Regulation:	DTI , Home Office ("HO") (obscenity), ICSTIS (self-regulation of premium-rate services)	DCMS, ITC, HO (obscenity), BBC, S4C, Broadcasting Standards Commission, British Board of Film Classification, Radio Authority, BBC
Competition Regulation:	DTI, Oftel, OFT, MMC	DTI, Oftel, OFT, MMC, ITC and Radio Authority (provision of licensed and connected services, cross-media ownership), Oftel and ITC (shared jurisdiction on EPGs)
Spectrum Regulation:	RA	RA, ITC

Source: Based on DTI (1998), page 20

The UK notes: "The erosion of distinctions between delivery platforms means that differences in regulatory approaches on different media are highlighted. ... Increasing interaction between regulators can cause conflict, confusion or inconsistency if the statutory duties of each are not clearly defined and rationally distributed. The duties of existing sectoral regulators were drawn up for a range of service definitions. This risks, over time, failing to match the nature or range of services which are available, and assumes a conjunction of particular services with specific platforms which may not apply in the future. ... A firm operating in the converged sectors potentially faces scrutiny by several different regulators, operating under specific regulatory functions. While this is not always reasonable, when coupled with an overlap of responsibilities, firms face regulatory double jeopardy, with the possibility of different decisions from different regulators and the threat of regulatory forum shopping by competitors seeking the 'right' regulatory decision. ... the specific statutory duties of each regulator tend to focus their attention of different subsets of the range of economic activities involved. As a result, it is possible that, with the emergence of new services, there could be a hiatus between the regulators so that gaps in regulatory coverage emerge as well as overlaps."[112]

"The onset of technological convergence has meant that regulatory policy can no longer be realistically confined to narrow vertical sectors. Policies such as conditional access, for example, should not be restricted solely to 'television broadcasting' (as occurs currently under the Television Standards Directive), but should be developed consistently across the full range of multimedia services. A recent example of such forward-looking 'horizontal' legislation can be found in the Proposed Conditional Access Directive, which, unlike the Television Standards Directive, addresses certain aspects of conditional access systems across the full range of multimedia services."[113] "The existing static model of 'vertical' regulation for the respective telecommunications, broadcasting and publishing sectors requires radical re-evaluation. A forward-looking approach to regulation would be more horizontal in nature and would seek to regulate key common issues which cut across traditional vertical lines of sectoral regulation."[114]

Examples of this kind of cross-sectoral "horizontal" approach to regulation can be seen clearly in the financial sector. In Australia, following the Wallis Inquiry, it has been decided to overhaul the institutions with responsibility for the financial sector through the establish of a number of cross-financial sectoral regulators. In Norway and the UK, a single financial regulator has been formed with responsibilities across the financial sector.

There is also a tendency towards "horizontal" regulation of this kind in the broadcasting sector, especially for certain functions. For example, the allocation of spectrum is the responsibility of the same regulatory body for both the telecomms and broadcasting sectors in 10 EU Member States. Italy has concentrated all regulatory responsibilities for both the telecommunications and broadcasting sector in a single body, known as the Communications Authority. "Official announcements in the United Kingdom suggest that such convergence is being considered as a likely policy option by 1999 for a range of 'economic' regulatory functions, including licensing and resource management (with the future establishment of OfCom)".[115]

The Future Direction Of Regulation

The introduction to this section noted that the focus of regulation is changing, from a concern over controls on content and advertising to a concern over competition and the control of market power. If we put aside controls on undesirable content and the regulation necessary to define and enforce property rights in spectrum, both of which are likely to continue to be necessary in the future, what other regulatory controls are necessary?

At least a few commentators have argued that future broadcasting regulation should rely primarily on competition law with other, prescriptive, rules necessary only in the transition. For example, Oftel argue that in the fully developed competitive broadcasting regime of the future "most of the detailed prescriptive rules currently applied in both telecommunications and broadcasting can, and should, fall away. They are not necessary in a well functioning market subject to general competition law. Only a small subset of the rules presently applied to the broadcasting and telephony markets are required ... In the short term, during the transitional period, some further detailed rules are necessary. But even during the transition, many of the existing prescriptive rules can be discarded".[116]

This point is echoed in a recent OECD paper on convergence:

> "The case for regulation to gravitate quickly to a general competition law basis has been strengthened by the recognition that the complexity, dynamics and unpredictability of convergence makes proactive regulatory rules extremely difficult to determine. However, there may be sound arguments in favour of regulatory measures in limited areas, and for a limited time, to achieve specific public interest objectives".[117]

In any case, even if no action is taken, the development of the Internet may increasingly displace traditional forms of broadcasting. Provided the problems of access to key content and access to high bandwidth links to the consumer can be overcome, the Internet may become the broadcasting medium of the future. Regulation on conventional broadcasters may remain, but it would be increasingly irrelevant.

Summary

The main points developed in this section are as follows:

- Broadcasting remains, in most OECD countries, a heavily regulated activity. Traditional economic rationales for broadcasting regulation are becoming obsolete in many OECD countries due to the proliferation of available bandwidth and the spread of pay television.

- Where state intervention in content of broadcasting will persist, it can be more efficiently provided through a system of contestable subsidies.

- Some OECD countries also regulate the quantity and location of advertising. The economic foundations for this regulation are weak. The regulation may be a response to constraints on entry. As entry restraints are lifted and competition, especially from pay television, increases, the rationales for these restrictions will disappear.

- Broadcasting licensing requirements in OECD countries can be burdensome and onerous. Barriers to entry can be lowered through the elimination of licensing requirements or replacing them with simple notification or class licensing procedures. Mutual recognition and harmonisation of licensing requirements further lowers barriers to cross-border entry.

- At least one OECD country imposes asymmetric line-of-business restrictions that restrict the ability of the incumbent PSTN to provide cable television services, but not the reverse. The arguments for such line-of-business restrictions are finely balanced. Where they are imposed they should be subject to a clear and non-discretionary time-limit.

- Substantial public policy concern surrounds issues of standardisation and compatibility. In particular, questions have been raised whether the customer terminal equipment ("conditional access systems") should be required to be compatible with signals from alternative infrastructure providers. Such requirements change the nature of competition. Although they may reduce competition for the overall package of services (including any revolutionary new services) they may enhance competition in the individual components of the services. On balance, given the rapid technological change in the industry, it would be inappropriate to mandate compatibility requirements at this stage.

- In many cases industry players themselves will choose to adopt standards rather than compete to establish a de facto standard. Such agreements can be efficiency enhancing but should be subject to close antitrust scrutiny.

- In some countries broadcasting and telecommunications regulatory institutions are separate and have comparable "vertical" roles and functions. Convergence of these two industries places such structures under pressure. Conflicting demands and conflict between institutions can be reduced through an institutional regulatory structure which allocates separate regulatory functions (such as spectrum management or competition enforcement) to cross-sectoral regulators.

- Some commentators argue that, aside from continued regulation of undesirable content and the definition and enforcement of property rights in spectrum, the future regulatory regime

for broadcasting and telecommunications will rely primarily on competition law, with other, more prescriptive laws required only in the transition.

Conclusion

The multimedia/broadcasting industry is undergoing fundamental change. The resulting market opportunities are substantial and may rival even the opportunities associated with the development of the personal computer itself. These developments and the resulting changes of market structure are placing existing regulatory regimes under strain and are raising new and important competition questions. This paper has sought to highlight and clarify some of these key regulatory and competition issues that can be expected to arise in the transition to the multimedia/broadcasting industry of the future.

In regard to competition issues, an underlying theme of this paper is that the transition to full multimedia/broadcasting competition will require balanced competition judgments. On the one hand, careful effective competition enforcement will be necessary to prevent firms from acquiring through mergers or agreements exclusive rights to key content or a dominant position in the market for broadband access to consumers. On the other hand, in most markets it appears inappropriate to go further to mandate across-the-board access to set-top boxes or to impose line-of-business restrictions on dominant incumbents.

In regard to regulation issues, a theme to emerge from the paper is that broadcasting regulatory structures developed for former technology is inappropriate in a world of broadband interactive multimedia broadcasting. Licensing requirements, controls on content, controls on advertising and subsidies to public broadcasters appear increasingly unjustifiable in the broadcasting world of the future. Regulatory institutions developed for a time before convergence, when broadcasting and telecommunications were separate industries are becoming increasingly out-of-date and may hinder moves towards convergence. The regulatory frameworks institutions erected for a former technology will need to be carefully dismantled. Given the technological changes that underlie convergence, the broadcasting regulatory regime of the future will be considerably lighter than in the past. In most countries, a simple light-handed regulatory framework based upon careful enforcement of the competition law, enforced by the competition authority, will suffice.

Annex A: TV households, MVPD subscribers, cable, analogue and digital DBS services penetration

	Television households[1]		MVPD subscribers[3]		Cable television subscribers[4]			Analogue and digital DBS subscribers[5]		
	1995 Total (000s)	% of total households[2]	1995 MVPD Total (000s)	% of total TV households	1995 Total (000s)	% of total TV households	% of total MVPD	1995 Total (000s)	% of total TV households	% of total MVPD
Australia	6000	93.8	180	3.0	180	3.0	100.0	0	0.0	0.0
Austria	2648	85.4	1825	68.9	1035	39.1	56.7	790	29.8	43.3
Belgium	3968	99.0	3654	92.1	3629	95	99.3	25	0.6	0.7
Canada	10286	98.0	8066	78.4	7791	75.7	96.6	275	2.7	3.4
Czech Republic	3585	90.3	1190	33.2	640	17.9	53.8	550	15.3	46.2
Denmark	2061	86.8	1600	77.6	1383	67.1	86.4	217	10.5	13.6
Finland	1915	89.1	881	46.0	827	43.2	93.9	54	2.8	6.1
France	20500	90.9	2224	10.9	1496	7.3	67.3	728	3.6	32.7
Germany	32634	88.3	21807	66.8	15808	48.4	72.5	5999	18.4	27.5
Greece	3517	93.0	130	3.7	0	0.0	0.0	130	3.7	100.0
Hungary	3687	96.9	1832	49.7	1530	45	83.5	302	8.2	16.5
Iceland	84	88.6	5	6.2	1	4	23.1	4	4.8	76.9
Ireland	958	90.1	561	58.6	476	49.7	84.8	85	8.9	15.2
Italy	15864	75.3	480	3.0	0	0.0	0.0	480	3.0	100.0
Japan	34374	79.1	10490	30.5	3009	8.8	28.7	7481	28	73
Korea	12000	92.3	3073	25.6	2573	24	83.7	500	4.2	16.3
Luxembourg	136	99.0	118	86.8	116	85.3	98.3	2	5	7
Mexico	16000	77.7	1144	7.2	1144	7.2	100.0	0	0.0	0.0
Netherlands	6067	98.0	5950	98.1	5700	94.0	95.8	250	4.1	4.2
New Zealand	1009	80.7	1	0.1	1	0.1	100.0	0	0.0	0.0
Norway	1575	99.0	872	55.4	670	42.5	76.8	202	12.8	23.2
Poland	10200	. .	3018	29.6	1380	13.5	45.7	1638	16.1	54.3
Portugal	4004	96.4	445	11	59	5	13.2	386	9.6	86.8
Spain	11700	96.0	466	4.0	300	2.6	64.4	166	4	35.6
Sweden	3352	88.2	2398	75	1900	56.7	79.2	498	14.9	20.8
Switzerland	2623	75.1	2532	96.5	2400	95	94.8	132	5.0	5.2
Turkey	6760	50.7	482	7.1	404	6.0	83.8	78	2	16.2
United Kingdom	21176	92.1	4660	22.0	1420	6.7	30.5	3240	15.3	69.5
United States[6]	95900	99.4	67275	70.2	62450	65.1	92.8	4016	4.2	6.0
All OECD	334583	97.8	149415	44.7	118323	35.4	79.2	30283	9.1	20.3

1994 data for Canada, France, Hungary, Ireland, Italy, Korea, New Zealand, Poland, Sweden and United Kingdom. 1993 data for total number of households.

2. Data for Belgium, France, Greece, Luxembourg, Netherlands, Norway and the United States are from OECD, *Communications Outlook 1997*. Other data are mainly from the International Telecommunications Union (ITU).

3. MVPD subscribers are the sum of cable television subscribers and analogue and digital DBS subscribers. Because of data availability, data for MMDS (multi-channel multipoint distribution service) and SMATV (satellite master antenna television) are not included in MVPD data, although these media are important MVPD services in some countries. See the exception in note 5.

4. 1994 data for Korea and Poland.

5. Data are not available for Australia, Mexico and New Zealand. Data for Canada and Korea is ITU data in 1993, which includes both DTH and SMATV.

6. The US data correspond to those in Table 3 (September 1995), and analogue and digital DBS subscribers are the sum of (7) DBS subscribers and (6) HSD (home satellite dishes: C-band) subscribers in Table 3.

Source: OECD, ITU, European Audiovisual Observatory, Eutelsat, MPT Japan, Institutodas Comunicações de Portugal, Ministerio de Fomento, Spain, FCC.

Annex B: Digital television broadcasting initiatives

Country		1994	1995	1996	1997	1998	1999	2000 ---
Australia	Satellite		◆ January					
Belgium	Satellite			◆ May				
Canada	Satellite		----- Licensed -----			----- Implementation: to be decided-----		
	Terrestrial			Δ September				○ 1999-2000
Denmark	Satellite			◆ June				
	Terrestrial		----- Licensed -----			----- Implementation: to be decided -----		
Finland	Satellite			◆				
	Terrestrial					○		
France	Satellite			◆ April: CanalSatellite December: TPS, AB Sat				
Germany	Satellite			Δ July: DF1	□ Autumn: Start standard setting			
Hungary	Terrestrial							○ 2005
Japan	Satellite			◆ June: PerfecTV!				
	Terrestrial							○ Before 2000
Korea	Satellite			◆ KBS				○ 2001
Norway	Satellite				○ Telenor			
Sweden	Terrestrial				----- Launch in 1997 -----			
United Kingdom	Satellite					○ BSkyB		
	Terrestrial					◆ Summer: British Digital Broadcasting and existing UK public broadcasters		
United States	Satellite	◆ June: DirecTV/ USSB		◆ March: EchoStar		----- 4 additional entities to be granted -----		
	Terrestrial			□ Unified specification for terrestrial DTV		Application for DTV licenses		○ Simulcast: see note 2006: full conversion to DTV

Symbols: ◆ Service commencement. Δ Licenses granted. ○ Planned start of implementation. □ Standards setting.

Note: In the US, digital television (DTV) licensees must simulcast 50 per cent of their analogue channel video programming by April 2003, 75 per cent by April 2004, and 100 per cent by April 2005. Full conversion to DTV and recovery of the analogue spectrum is set for 2006, but the FCC will review DTV progress every two years and may adjust the recovery date based on its findings.

Source: "GII-GIS (Global Information Infrastructure - Global Information Society): Policy Requirements", OECD, 1997; Fifth Report and Order in MM Docket No. 87-268, United States, April 1997.

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NOTES

1 The information in this box is based on Analysys (1998), p. 18. Analysys is a telecommunications and broadcasting consultancy which was sponsored (together with Squire, Sanders and Dempsey) to produce a study to examine the impact of convergence on the audiovisual, IT and telecoms sectors, timed to coincide with the release of the Commission's convergence Green Paper, EC (1997). The study focuses on the changes that need to be made in the medium term to the telecoms regulatory framework in Europe to accommodate convergence and the development of the multimedia sector.

2 More generally, since, once digitalised, audio and video is indistinguishable from other data communications, we may speak of a broader "information industry" which involves the production and distribution of software of all kinds.

3 "Swifter, higher, stronger, dearer. Sport and Television", Economist, 20 July 1996.

4 Broadcasts of baseball were used to promote the growth of radio. Live broadcasts of boxing, were linked with the early growth of television. Today sport is being used to drive the growth of pay television. Rupert Murdoch, at the time of his attempted takeover of Manchester United is quoted as saying "We intend to use sport as a battering-ram in all our pay-television operations", Economist, 12 September 1998, p. 18. An Economist article of 20 July 1996 notes that some insiders comment that five billion pounds of BSkyB's 8 billion pounds value can be attributed to the profitability of its soccer rights (BSkyB has exclusive rights to broadcast the English Premier League). "In America, the rights to the National Football League helped establish Fox as the fourth national network. In Britain, the rights to Premier League football turned BSkyB from a deadweight that nearly sank the Murdoch empire into the world's most profitable satellite-television operator, and the dominant power in the pay-television business in Britain". Economist, 12 September 1998, p. 18.

5 OECD (1993), p. 67.

6 A limited form of interactivity is available by means of utilisation of other telecommunications paths, such as the PSTN.

7 "Over the next four years, cellular data speeds will increase rapidly. An ISDN-like capability will be available in 1999, and when third-generation mobile services based on UMTS technology are launched in 2002, wireless will be capable of transmission rates 40 times greater than today's fastest fixed-line dial-up modems". Economist, "Mobile Telecoms: Unwired", 12 September 1998, p. 76.

8 "Public Switched Telephone Network"

9 Analysys (1998), p. 55.

10 Analysys (1998), p. 50.

11 "Asymmetric Digital Subscriber Line"

12 To an extent, transmission distance and maximum bit rate can be traded:

Line Length (feet)	18,000	16,000	12,000	9,000	4,500	3,000	1,000
Access Speed (Mbit/s)	544	2.048	6.312	8.448	12.960	25.920	5840

13 "A majority of the countries in the EU have trialled ADSL, but none have announced public deployment... A number of US and European telecoms operators have commissioned orders for ADSL modems - customer and exchange end - during the previous year". Analysys (1998), p. 51-52.

14 See Hogendorn (1998).

15 See also Pupillo and Conte, (1998), "The Economics of Local Loop Architecture for Multimedia Services", Information Economics and Policy, March 1998, pp. 107-126.

16 "Multi-channel video programming distributors". The number of MVPD subscribers is the sum of cable television subscribers and analogue and digital DBS subscribers.

17 In the UK, BT is prohibited from providing "entertainment services" over its telecoms network until the year 200

18 "Convergence might be regarded as complete when all networks are able to carry all content". DTI (1998), p. 27.

19 DTI (1998), p. 47.

20 Ungerer (1996).

21 Communications Outlook, Tables 5.20 and 5.23.

22 See Annex A.

23 See Annex B. Digital satellite services are offered by (amongst others) Primestar and Echostar in the US, CanalSatellite in France, Viacom and BSkyB in the UK, Telepiù in Italy, Sogecable and ViaDigital in Spain, ExpressVu in Canada and Sky Television in New Zealand. Digital terrestrial services are offered by Telenor in Norway and BBC in the UK

24 EC (1997), p. 4.

25 See "Cable Modems: coming to an outlet near you", Telecommunications, March 1998, pp. 36-37.

26 See "Face Value: Stand and Deliver", Economist, 18 April 1998, p. 65.

27 "Cableuropa plans a third digital platform for Spain", New Media Markets, 11 December 1997.

28 "Pioneer's Progress", Far Eastern Economic Review, 2 October 1997, pp. 77-78.

29 "Vendors air combination Web browser and phone", Network World, 1 September 1997, p. 10.

30 "Reuters, Fantastic to develop multimedia news", Broadcasting and Cable, 13 April 1998, p. 47.

31 "NBC Launches into music", Broadcasting and Cable, 6 April 1998, p. 156.

32 "ISPs focus on Web hosting services", Network World, 15 December 1997, p. 10. See also "ISPs to offer multimedia conferences", InformationWeek, 27 October 1997, p. 8.

33 "Progressive Networks, MCI create online network", Broadcasting and Cable, 11 August 1997, p. 50.

34 OECD, (1997b), *Webcasting and Convergence: Policy Implications*

35 "Asynchronous Transfer Mode". ATM is an international standard for very high-speed data services.

36 "Sprint pitches all-in-one network", Computerworld, 8 June 1998, p. 10.

37 "Bell Canada trials provide high bandwidth for interactive multimedia and Internet services", Telesis, December 1996, pp. 41-42.

38 "Reality Bites", Communications International, January 1998, pp. 45-48.

39 "Hype or hope?", Wireless Review, 15 February 1998, pp. 64-78.

40 "Satellite revolution on the way", African Business, June 1998, p. 35.

41 "Multimedia Satcom competition intensifies", Aviation Week and Space Technology, 13 April 1998, p. 72.

42 EC (1997), p. 6. See also Noam (1998).

43 "A Wider net", Mediaweek, 12 May 1997, pp. 50-52.

44 "Sounding the IP bells", Telephony, 9 February 1998, p. 53.

45 "Deal on open standards has a long way to go", New Media Markets, 1 October 1997, pp. 3-5.

46 This last merger was challenged by the FTC. See DAFFE/CLP(98)9, p. 12.

47 Analysys (1998), p. 157

48 EC (1997), p. 13.

49 Analysys (1988), p. 26.

50 In the recent OFT review of BSkyB's position in the wholesale pay TV market, it was noted that BSkyB had long-term contracts with the major Hollywood studios and with the larger independents which gave BSkyB pay TV rights to over 90 per cent of first run major films. Although this content, competed with other (non-broadcasting forms) of distribution, including cinemas and videotape, there were not considered an adequate constraint on BSkyB. Further

action was not taken, however, because BSkyB made these films available to its retail competitors. OFT (1996).

51 Analysys (1998), p. 99.

52 However, these broadcasters also compete with free-to-air broadcasts (which are better represented by structure (b)).

53 "High Definition Television".

54 Note that the advertising can be inserted into the content either by the packagers or by the content producers themselves..

55 For example, in the early days of colour television, NBC was vertically integrated with RCA, a colour television manufacturer. In the early days of the Internet, providers such as AOL and Compuserve offered both content and infrastructure/access services.

56 For example, the UK regulator Oftel requires that all set-top boxes receive unscrambled free-to-air digital signals.

57 It is true of course that these contracts do not always involve a simple sale of all the rights at a fixed fee. For example, novelists may be rewarded with a commission per book sold. This can be seen as a form of risk-sharing between the content producer and the publisher. When the contract is signed before the content is produced, it may also be a form of incentive contracting.

58 See Tirole (1988), p. 176. See also the OECD CLP publication on vertical restraints: OECD (1994).

59 Tirole (1988), p. 177.

60 Tirole (1988), p. 179.

61 See Rey and Tirole (1995). It might be thought, at first, that the upstream firm could simply offer a contract under which the key input is sold at marginal cost and upstream firm obtains all of the downstream profits. However, in the absence of an exclusive contract, the upstream firm may not be able to commit to this strategy. The first firm to accept the offer will fear that the upstream firm will subsequently offer the key input at a lower price to a second or third downstream firm, eroding the first firm's profits. As a result, the upstream firm will not be able to extract all of the monopoly rent. If there is enough downstream competition, the monopoly profits are eroded entirely.

62 However, infrastructure providers are unlikely to be larger than country boundaries, whereas some content producers are fully international. Therefore this effect is likely to be limited to that content which has a specifically national appeal.

63 For example, in the UK "terrestrial television broadcasters are required to ensure that at least 25 per cent of their qualifying output is of productions of independent origin, while other broadcasters are subject to 10 per cent quota under the EU Television Without Frontiers directive, which also requires that 50 per cent of the output of all broadcasters, over time and

where practicable, should be of European origin". DTI (1998), p. 63. Aside from the arguments above, such rules are puzzling. The content of a production is virtually (if not entirely) independent of the ownership of the production company. Such controls therefore have virtually no effect on what appears on UK television screens.

64 Amongst other things, advertisers value the "reach" of the advertising - the number of people that hear the message. One message that is broadcast to 10 million people will typically have more reach than a message broadcast ten times to one million, because it is difficult to guarantee that the audience consists of a different set of individuals each time. As a result, advertisers are typically willing to pay larger amounts (per head) the larger the target audience that can be attracted at one time. Even in the case where the content is screening on several channels simultaneously, although in principle the advertisers could purchase exactly the same time slot on all channels, slight differences in the timing of advertising and the enhanced transactions costs make this strategy less valuable than if all the audience were concentrated on a single channel.

65 The OECD report on vertical restraints notes: "Where franchise agreements potentially raise anticompetitive problems, the duration of franchise contracts is an important factor. Long-term contracts can help protect the returns from sunk-cost investments by placing some limits on a wide-variety of opportunistic behaviour, but they may also have important anti-competitive effects if they raise barriers to entry. Competition policy should be cautious about long-term contracts where market conditions indicate there is a specific risk that entry barriers could be increased. It would then be important to ask if the contract terms can be justified, for instance, by the seen to protect important relationship-specific initial investments that cannot be protected in any other way". OECD (1994), p. 62.

66 Van Miert (1997).

67 OECD (1997)

68 An example is the attempt to create a European "Superleague" for football.

69 The US courts have recognised that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of co-operation for economic survival". *Brown v. Pro Football Inc.*, 116 S. Ct. 2116, 2126 (1996).

70 For example, the OFT challenged certain agreements in the Football Association Premier League Ltd rulebook which prevented the individual teams from selling their television rights, except through the Premier League. The hearing for this case is expected to occur in January 1999. See DAFFE/CLP(98)10/17, p. 7.

71 OECD (1997), p. 26. In a similar case, the Spanish competitor authority finds that a five-year period of exclusivity is too long.

72 OECD (1997), p. 77.

73 See Australia's submission in OECD (1997).

74 Many commentators point wider public policy arguments for broadcasting regulation, such as a desire to promote a particular language or a desire to promote a sense of national identity. These rationales, while valid, will not be specifically addressed.

75 In addition, given a choice between two programmes which have the same audience, broadcasters will tend to choose the least expensive programme, even if the value to the viewers of the more expensive programme, more-than-exceeds the additional cost.

76 The recent OECD paper argues this point in the context of Webcasting: "Governments in many OECD countries have funded public broadcasting based on the rationale that a purely commercial service, in an environment of limited available licences, would not provide enough programme diversity to cater for all sectors of the community. ... [these policy approaches are] clearly not very relevant to webcasting. One of the main advantages of the Internet is its ability to link communities of interest, however, small, in a way traditional broadcasting could never be expected to achieve. In respect to content the Internet is more akin to publishing, where governments do not intervene in the market, than broadcasting. Accordingly, there would seem to be little justification for regulating webcasting based on concerns with content quality and diversity". OECD (1997b), p. 42.

77 Analysys (1998), p. 6

78 DTI (1998)

79 Analysys (1998), p. 215.

80 "Time to adjust your set", Economist, 23 December 1995.

81 Analysys (1998), p. 185.

82 Directive 89/552/EEC, OJL 298/23, 17 October 1989.

83 Such as the following EC initiatives: The Green Paper on the Protection of Minors and Human Dignity in New Audiovisual and Information Services (16 October 1996), Communication on Illegal and Harmful Content on the Internet (16 October 1996), Resolution of the European Parliament on the Commission Communication on Illegal and Harmful Content on the Internet (24 April 1997) and the Draft Council Recommendation on the Protection of Minors (November 1997).

84 Analysys (1998), 182-83.

85 Analysys (1998).

86 Analysys (1998), p.172.

87 Analysys (1998), p.187.

88 Ungerer (1996)

89 See OECD (1996). An example of such divestiture can be found in the Netherlands.

90 See OECD (1998), table 6.

91 See OECD (1998) pp. 24-25.

92 DTI (1998), p. 5

93 The FCC annual report on assessment of the status of competition in the market for the delivery of video programming, 2 January 1997 (hereafter, FCC 1997) (http://www.fcc.gov/Bureaus/Cable/Reports/fcc96496.txt).

94 ExpressVu homepage (http://www.expressvu.com/story.html).

95 *Information Society Trends*, No. 64 (28.97-12.97) (http://www.ispo.cec.be/ispo/press.html).

96 Nikkei Newspaper, 22 September 1997, Asahi Newspaper 30 September 1997

97 Katz and Shapiro (1994), p. 106.

98 For example, in the market for video game systems, Nintendo signed exclusive contracts for games developed by third parties, making those games unavailable to Nintendo's rivals, Atari and Sega. Katz and Shapiro (1994), p. 107.

99 Recently a group of firms involved with HDTV agreed to merge their technologies and split their licensing fees.

100 Katz and Shapiro (1994), p. 11

101 Thus, to an extent, these markets exhibit a "last-mover advantage".

102 The failure of the market for Digital Audio Tape is an illustration of this.

103 Cowie and Marsden (1998), p.16.

104 Examples include 8" and 51/4" floppy disks, FORTRAN and COBOL programming languages, Novell local area networks.

105 OECD (1998b), p. 6. Overd and Bishop comment: "The overzealous application of the essential facilities doctrine has the potential seriously to undermine the incentive for firms to innovate". Overd and Bishop (1998), p. 183. They go on to criticise the regulation of digital pay-TV conditional access systems by the European Union Directive as an example of essential facilities regulation which has a 'chilling effect' on innovation by first movers.

106 In some countries new subscribers pay a fee which is related to the "purchase" of the local loop.

107 It may be possible to prevent consumers from incurring these sunk costs by requiring new firms to lease, rather than sell, customer premises equipment.

108 EC (1997), p. 23.

109 For example, in the case of CDs, an industry standard was established by a consortium of major players, lead by Phillips. The DVD standard is being lead by a consortium including Phillips, Sony, Matsushita, Toshiba, Time Warner, Pioneer, Hitachi, JVC, Mitsubishi, Thompson, RCA and GE! See FCC, (1996), *Economic Considerations For Alternative Digital Television Standards*.

110 Analysys (1998), p. 266.

111 Analysys (1998), p. 266.

112 DTI (1998), pp. 21-22. "One recent example where there is clear industry confusion as to whom is actually responsible for imposing regulation is that of IRD ["set-top box"] interoperability, where the satellite service provider BSkyB has complained vociferously that the ITC has no powers to mandate minimum technical standards for the IRD. BSkyB argues that those powers lie with Oftel. This confusion arises from the initial failure ... to explicitly allocate jurisdictional responsibilities to regulators", Cowie and Marsden (1998), p. 14.

113 Analysys (1998), pp. 159-160.

114 Analysys (1998), p. 159.

115 Analysys (1998), p. 27

116 Oftel (1998), paragraph 4.20.

117 OECD (1998b), p. 7.

NOTE DE RÉFÉRENCE

Par le Secrétariat

Introduction

Le secteur de la diffusion audiovisuelle est en cours de transformation. Comme l'illustre la figure ci-dessous, l'évolution de la technologie et de la demande des consommateurs transforme ce secteur : la diffusion audiovisuelle, jusqu'alors consistant essentiellement en la transmission *analogique et unidirectionnelle* d'une quantité *limitée* d'information vers *un large auditoire* sur le *spectre radio*, devient un secteur axé sur la transmission *numérique et interactive* d'une quantité essentiellement *illimitée* d'information vers un auditoire *fragmenté* sur des *voies de télécommunications large bande variées*.

Figure 1 : Evolution du secteur de la diffusion audiovisuelle

Analogique	→	Numérique
Unidirectionnel	→	Bidirectionnel et interactif
Largeur de bande limitéee, Choix limitéee	→	Largeur de bande et choix illimités
Essentiellement à base radio	→	Voies d'accès large bande variées (satellite, ADSL, modem-câble)
Auditoire de masse	→	Auditoire de plus en plus fragmenté ; rareté des très grands auditoires

Ces changements ont d'importantes implications pour la réglementation de la diffusion audiovisuelle. Les justifications traditionnelles de la réglementation de la diffusion audiovisuelle ne s'appliquent plus dans un monde où la bande passante est pratiquement illimitée. En outre, des préoccupations nouvelles et importantes apparaissent concernant la concurrence. Dans le présent document, on essaie d'explorer ces implications en matière de réglementation et de concurrence dues à l'évolution actuelle de la diffusion audiovisuelle.

Contexte

La diffusion

Définition de la diffusion audiovisuelle / multimédia

Pour commencer, il est nécessaire de définir la notion de "diffusion". Il n'est plus possible de donner une définition générale unique. Naguère, on pouvait peut-être distinguer précisément les différentes formes de dissémination de l'information (par exemple, suivant que l'on utilisait ou non le

spectre radio ou que la communication était ou non bidirectionnelle), mais les frontières de la diffusion audiovisuelle se sont brouillées à tel point qu'il n'est plus possible de tracer clairement une délimitation cohérente entre ce qui est ou n'est pas de la diffusion audiovisuelle. L'encadré ci-dessous (Encadré 1) expose les problèmes que posent pour la Communauté européenne les définitions réglementaires périmées de la diffusion audiovisuelle.

Encadré 1 : Evolution de la définition de la diffusion audiovisuelle[1]

Une tâche essentielle pour adapter le cadre réglementaire actuel des télécommunications au marché multimédia de demain consistera ... à réaligner les frontières des définitions entre les secteurs des "télécommunications" et de la "diffusion audiovisuelle". Les raisons de ce réexamen réglementaire reposent pour une large part sur les facteurs technologiques et commerciaux suivants :

- Premièrement, les différentes plates-formes de livraison naguère associées à la transmission d'un type particulier de message ou de signal sont maintenant capables de transporter toutes sortes de messages. Au contraire, le régime de délivrance des licences des Etats membres de l'Union européenne traite de manière séparée les réseaux de communications mobiles, fixes ou de diffusion audiovisuelle.

- Deuxièmement, il n'est plus possible de maintenir les frontières définitionnelles basées sur la distinction entre les messages "privés" (télécommunications) et "publics" (diffusion audiovisuelle). L'Internet, par exemple, a brouillé la distinction entre les communications privées et publiques et entre les communications "biunivoques" et "multivoques".

- Troisièmement, les distinctions basées sur la "nature essentielle des messages" transmis (comme dans le terme français de "communications audiovisuelles") sont aussi sur le point de devenir obsolètes : dans un environnement numérique, il peut être pratiquement impossible de séparer des flux de données, de conversation vocale et d'images et de les réglementer différemment.

- Quatrièmement, les équipements matériels ou la technologie utilisés pour enregistrer, transmettre ou recevoir les messages ne permettront plus de distinguer les services de télécommunications et les services de diffusion audiovisuelle parce que les équipements terminaux seront de plus en plus polyvalents.

Aussi bien le cadre juridique de la Communauté européenne que les traditions réglementaires des Etats membres font la distinction entre la diffusion audiovisuelle et les télécommunications en se référant à un ou plusieurs des concepts précédents. Cependant, la convergence rend pour une large part ces concepts obsolètes.

Pour la plupart des besoins du présent document, il sera commode d'adopter la définition suivante de la diffusion : activité consistant à produire un contenu d'information interactif (notamment audiovisuel) et à le distribuer par le biais de services de télécommunications (unidirectionnels ou bidirectionnels).

Selon cette définition, la diffusion (audiovisuelle/multimédia) se distingue (mais est évidemment concurrente) de la dissémination d'information qui ne fait pas intervenir de services de télécommunications, comme la publication d'un journal. Cette définition ne tente pas de faire une distinction entre la diffusion audiovisuelle au sens strict et les divers médias interactifs qui utilisent des services de télécommunications (comme l'Internet, le Minitel ou les services d'information à base téléphonique).

Il est clair que cette définition ne convient pas entièrement à tous les besoins. Selon cette définition, télécharger un disque compact à partir d'un site Web constitue de la "diffusion" alors

qu'acheter le même disque compact dans un magasin n'en est pas. Lire un journal en ligne constituerait de la diffusion, alors que l'achat du même journal à un kiosque n'en serait pas. Comme le montrent ces exemples, le contenu que l'on peut distribuer par le biais des services de télécommunications (et qui ainsi entre dans le cadre de la définition précédente) est souvent distribué aussi par d'autres moyens. Dans de nombreux contextes, il sera plus judicieux de parler d'une industrie plus large engagée dans la production de toutes les formes de contenu audio ou vidéo et dans sa distribution par tous les moyens possibles, que nous appellerons "l'industrie du multimédia et de la diffusion audiovisuelle".[2]

Cependant, comme l'indique la définition ci-dessus, l'information qui est disséminée par le biais des télécommunications diffère à d'importants égards de l'information disséminée par d'autres moyens. En particulier, l'information qui est disséminée par les télécommunications a l'énorme avantage de la *promptitude.* Quand la promptitude de l'information est un élément important, cette diffusion (audiovisuelle/multimédia) est irremplaçable, ou tout au moins a peu de concurrents, et les diffuseurs considérés dans leur ensemble sont sans doute en mesure d'exercer une forte domination sur le marché. Le montant que les diffuseurs sont disposés à payer pour le contenu reflète non seulement la valeur que le consommateur attribue au contenu, mais aussi la promptitude de cette information.

La promptitude est particulièrement importante dans le domaine du sport ou pour certains événements d'actualité. "Le sport a un caractère spécial qui le distingue de presque toutes les autres sortes de programmes de télévision : l'immédiateté. Si vous manquez un épisode particulier d'"Urgences", par exemple, vous pouvez toujours regarder la rediffusion et l'apprécier tout autant. Si vous manquez, au contraire, la victoire de votre équipe favorite ... sur sa principale rivale, la rediffusion vous laissera indifférent. Un événement sportif en direct perd presque toute sa valeur dès le coup de sifflet final"[3]. C'est pourquoi il existe un lien historique profond entre la diffusion audiovisuelle et le sport[4].

La promptitude est aussi importante dans d'autres applications, notamment celles qui nécessitent l'interactivité. Quand un consommateur ne sait pas exactement ce qu'il veut, et qu'il s'attend à faire plusieurs demandes d'information avant de conclure une recherche, la promptitude des télécommunications est un facteur important pour la longueur du processus total. En conséquence la diffusion audiovisuelle/multimédia a un fort avantage comparatif pour certaines formes de recherches (comme la recherche d'un livre ou d'une vidéo dont le consommateur ne connaît pas le titre) et dans d'autres formes d'interaction (par exemple, pour certaines applications, le téléphone et la télécopie présentent d'importants avantages par rapport au courrier classique).

Stades de production de la diffusion (audiovisuelle/multimédia)

Comme dans d'autres industries, à l'intérieur du secteur multimédia/ diffusion audiovisuelle, on peut distinguer un certain nombre de "stades de production" en relation verticale. Au niveau le plus général, on distingue couramment, d'un côté, le "contenu" et, de l'autre, le "transport" ou la "distribution". Avec la définition précédente, l'industrie de la diffusion contient des entreprises opérant dans la production de contenu et des entreprises opérant dans des formes de distribution qui font intervenir les télécommunications. Le rapport précédent du Comité du droit et de la politique de la concurrence sur la diffusion audiovisuelle distinguait trois stades généraux de la production : la production de contenu, l'assemblage de contenu et la livraison (ou distribution).[5]

Aux fins du présent document, nous distinguerons les stades de production suivants :

Tableau 1 : La chaîne de la valeur du multimédia

Stade	Description	Exemple
Fabrication de contenu	production de contenu multimédia pour chacune des grandes méthodes de distribution	Studios d'Hollywood; éditeurs sur le Web ; studios de télévision
Assemblage de contenu et de services	assemblage de contenu en produits composés ou en marques (souvent appelées "chaînes") à livrer aux consommateurs	Diffuseurs hertziens en clair ; grandes chaînes du câble (par exemple, CNN, HBO, ESPN, Eurosport) ; AOL ; MSNBC
Fourniture de service	traduction du contenu en une forme qui peut être décodée par un terminal qui assure les besoins d'interactivité et la comptabilité client	Fournisseurs de service Internet comme AOL ; fournisseurs de télévision par câble locaux ; fournisseurs de télévision par satellite
Fourniture d'infrastructure	communication provenant et à destination du fournisseur de service, au niveau des activités de gros et de détail	Exploitants du RTPC ; fournisseurs de télévision par câble ; diffuseurs par satellite ; transporteurs spécialisés de diffusion audiovisuelle sur des réseaux "dorsaux", comme TDF en France ou BCL en Nouvelle-Zélande
Vente de terminaux	équipements de client qui convertissent les signaux en signaux audio/vidéo, assurent le contrôle d'accès et permettent l'interactivité	Fabricants de téléviseurs, d'ordinateurs et de modems ; fabricants de décodeurs ; fournisseurs d'équipement de réception de communications par satellite

Source : OCDE, d'après Analysys (1998), présentation C, page 4.

Diffusion : les dix derniers kilomètres

Certaines des questions essentielles que pose la diffusion (audiovisuelle/ multimédia) en matière de réglementation et de concurrence découlent de la nature des réseaux de télécommunications sous-jacents. Il convient donc, avant d'aller plus loin, d'examiner les caractéristiques économiques de ces réseaux et en particulier le potentiel de concurrence dans les voies d'accès large bande aboutissant au domicile du consommateur.

Les exigences technologiques des réseaux de diffusion sont similaires à celles des autres réseaux de télécommunications, en dehors du fait que les réseaux de diffusion sont généralement plus exigeants en ce qui concerne la largeur de bande. Pratiquement toutes les formes de diffusion utilisent des réseaux de télécommunications "dorsaux" large bande pour distribuer les signaux multimédias à partir de points de production centraux vers des centres régionaux d'où les signaux sont distribués vers les consommateurs. A certaines exceptions près, la concurrence n'est guère une source de préoccupations concernant ces réseaux dorsaux. Les obstacles à l'entrée pour ces services de communications point à point à haute largeur de bande sont faibles et, au moins dans les pays qui ont déréglementé les télécommunications, il existe souvent une concurrence adéquate. Les préoccupations en matière de réglementation et de concurrence

portent donc essentiellement sur la distribution *au détail* des signaux de diffusion (“les dix derniers kilomètres” conduisant du réseau dorsal au domicile du consommateur), c’est-à-dire l’équivalent, pour la diffusion audiovisuelle/ multimédia, de la “boucle locale” de la téléphonie vocale.

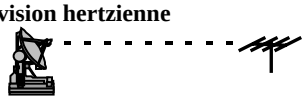
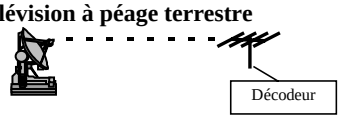
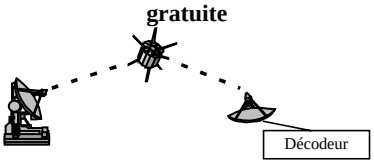
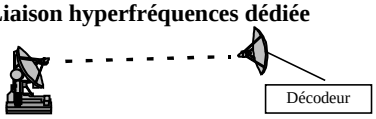
Le Tableau 2 donne un aperçu des différentes voies de diffusion aboutissant au domicile du consommateur. Comme pour d’autres formes de télécommunications, il y a deux moyens fondamentaux de raccorder le consommateur au réseau large bande : la connexion sans fil ou une forme ou une autre de connexion filaire. Les méthodes sans fil comprennent la télévision hertzienne classique, la télévision à péage terrestre, la télévision à péage par satellite, la boucle locale sans fil, une connexion sans fil dédiée ou une connexion mobile améliorée à haute largeur de bande. Les méthodes filaires comprennent la paire de cuivre classique, le câble coaxial et le câble à fibre optique.

La télévision analogique hertzienne classique repose évidemment sur une connexion sans fil. La quantité de spectre sur laquelle les récepteurs de télévision ordinaires peuvent se mettre à l’écoute est limitée (de telle sorte que le nombre total de canaux disponibles est limité) par la puissance des stations émettrices et par la géographie de la région couverte. Le passage aux techniques de compression numérique, qui a lieu actuellement, accroîtra l’efficience d’utilisation du spectre et donc le nombre de canaux disponibles. Cette forme de télévision est unidirectionnelle. L’interactivité du spectateur se limite généralement au choix de la chaîne à regarder.[6] Il est possible de chiffrer le signal avant son émission, afin d’empêcher une visualisation non autorisée. Dans ce cas, le spectateur a besoin d’un équipement de décodage spécialisé ou d’un récepteur spécialement équipé.

En principe, on pourrait aussi améliorer l’efficience d’utilisation du spectre en augmentant le nombre d’émetteurs (ou “stations de base”), avec un système similaire à celui qui est actuellement utilisé pour la téléphonie mobile. On prévoit que la prochaine génération de téléphones mobiles offrira une largeur de bande permettant la transmission de vidéo normale.[7]

Il est aussi possible d’accroître le nombre de canaux disponibles en utilisant d’autres bandes du spectre (à plus hautes fréquences). Cela nécessite généralement l’utilisation d’antennes spéciales (telles que les petites antennes paraboliques). Comme pour la télévision terrestre cryptée, le consommateur doit aussi avoir un équipement de décodage spécialisé ou un récepteur spécialement équipé.

Tableau 2 : Liaisons de communications à haute largeur de bande aboutissant au consommateur

	Avantages	**Inconvénients**
Sans fil :		
Télévision hertzienne 	Faible coût d'installation ; grande base existante de récepteurs (analogiques) ; faible coût des récepteurs (analogiques)	Spectre disponible limité ; sources de recettes limitées à la publicité. Communication unidirectionnelle seulement.
Télévision à péage terrestre 	Coût d'installation relativement faible.	Communication unidirectionnelle seulement.
Télévision par satellite à péage ou gratuite 	Signal disponible sur une large région, y compris des zones reculées, dès le début.	Communication unidirectionnelle seulement. La communication bidirectionnelle nécessite une autre infrastructure
Service mobile à haute largeur de bande	Mobilité ; communication bidirectionnelle	Coût d'installation relativement élevé.
Boucle locale sans fil	Faible coût d'installation ; communication bidirectionnelle	Largeur de bande limitée
Liaison hyperfréquences dédiée 	Hautes largeurs de bande possibles ; communication bidirectionnelle	Coût par abonné relativement élevé.
Filaire :		
Paire de cuivre	Très grande base existante ; communication bidirectionnelle ; actuellement utilisée pour fournir des services RNIS	Capacités de largeur de bande limitées ; les coûts de mise en place initiale peuvent être importants ; l'utilisation pour une haute largeur de bande nécessite un investissement important dans la technologie ADSL (ligne d'abonné numérique asymétrique)
Câble coaxial	Grande base existante dans de nombreux pays ; largeur de bande relativement élevée ; communication bidirectionnelle possible	Les coûts de mise en place initiale peuvent être importants ; peut nécessiter des mises à niveau importantes dans les réseaux existants.
Câble à fibre optique	Très haute largeur de bande potentielle ; communication bidirectionnelle	Les coûts de mise en place initiale peuvent être importants

Comme pour la télévision hertzienne classique, l'interactivité de ces services de diffusion à plus hautes fréquences se limite habituellement au choix de la chaîne à regarder, mais une communication bidirectionnelle est possible au moyen d'autres voies de télécommunications accédant au domicile du consommateur. Beaucoup de diffuseurs par satellite, en particulier, étudient des arrangements avec les exploitants du RTPC[8], dans lesquels le RTPC pourrait fournir la voie de retour. Par exemple, depuis 1994, DirecPC fournit aux Etats-Unis des services de communications de données à largeur de bande relativement élevée (384 kbit/s vers l'aval avec une liaison à 28,8 kbit/s vers l'amont par le RTPC avec un modem) au moyen de la technologie des microstations de communications par satellite (VSAT). En 1996, sa société-mère Hughes a lancé un service similaire en Europe en association avec Olivetti.[9] Outre les services d'accès par satellite du type DirecPC, un certain nombre de diffuseurs de télévision par satellite ont annoncé leur intention de fournir l'accès à l'Internet avec des largeurs de bande de 10 Mbit/s sur leurs réseaux existants, là encore en utilisant le RTPC comme voie de retour.

En principe, il est possible d'établir avec un consommateur donné une liaison bidirectionnelle à haute largeur de bande. C'est une solution réalisable pour les clients professionnels, mais "le coût élevé des systèmes VSAT bidirectionnels en exclut l'utilisation comme moyen généralisé d'accès aux services multimédias".[10]

Si l'on considère maintenant les liaisons filaires aboutissant au domicile du consommateur, le type le plus répandu est le RTPC classique, qui repose sur une "paire de fils de cuivre". En l'absence de mesures particulières de l'exploitant du RTPC, la largeur de bande de cette liaison est limitée et insuffisante pour une pleine activité multimédia. La technologie du RNIS offre une plus grande largeur de bande (le RNIS au débit de base offre une capacité symétrique de 144 kbit/s) mais encore notablement insuffisante pour une transmission vidéo en direct.

La technologie ADSL[11] offre les meilleures perspectives pour la livraison d'informations pleinement multimédias sur la paire de cuivre ordinaire. L'ADSL offre une largeur de bande d'environ 8 Mbit/s vers l'aval et d'environ 500 kbit/s vers l'amont sur les câbles à paires de cuivre torsadées[12]. Le déploiement à grande échelle de la technologie ADSL est peut-être imminent.[13]

Dans quelques pays de l'OCDE (comme les Etats-Unis, les Pays-Bas ou la Belgique), la majorité des ménages sont connectés à un réseau large bande local au moyen d'un câble coaxial. Avec un câble coaxial et un modem-câble, on peut obtenir des vitesses symétriques d'environ 10 Mbit/s. Les modems-câble offrent ainsi à l'heure actuelle des perspectives prometteuses pour une mise à niveau de l'infrastructure de télévision par câble existante permettant d'assurer une diffusion pleinement multimédia. Cependant, beaucoup de pays (notamment ceux qui ont un fort taux de pénétration du câble) n'ont pas de réseaux de câble modernes avec une dorsale de fibre optique à haute largeur de bande. Il faudra mettre à niveau ces réseaux avant qu'ils puissent assurer un trafic de communications multimédias.

En principe, les ménages peuvent aussi être directement connectés au réseau large bande au moyen de câbles à fibre optique. A long terme, cette méthode offre les plus grandes possibilités en ce qui concerne la largeur de bande mais les investissements d'infrastructure nécessaires sont importants et son déploiement sera probablement plus lent que pour les autres technologies.

En général, les méthodes sans fil ont sur les méthodes filaires l'avantage de présenter de plus faibles barrières à l'entrée. On peut couvrir un grand nombre de foyers avec relativement peu d'investissement irrécupérable, voire aucun, en particulier pour un réseau simplement unidirectionnel. Toutefois, les investissements irrécupérables nécessaires pour un réseau de stations de base cellulaires à haute largeur de bande ou de satellites de communications spécialisés restent élevés. En outre, le manque

de fiabilité pour des raisons de géographie, de météorologie ou d'interférence avec d'autres sources électromagnétiques demeure un problème potentiel. Pour un réseau bidirectionnel, on a aussi besoin d'une autre infrastructure de communications.

L'investissement irrécupérable nécessaire pour établir un nouveau réseau filaire fixe large bande est élevé et les économies d'échelle sont importantes. Bien que la demande de connexions à haute largeur de bande à l'Internet accroisse la demande à l'égard de ce genre de réseaux, les prévisions indiquent que peu de consommateurs sont susceptibles d'avoir le choix de plus de 2 exploitants de réseau fixe.[14] La plupart n'auront le choix que d'un seul exploitant et certains (notamment dans les zones rurales) n'auront pas du tout d'accès direct à un réseau filaire large bande fixe. Le Tableau 3 donne un aperçu des coûts et des vitesses d'accès des principales solutions possibles.[15]

En résumé, pour des raisons d'économies d'échelle et de densité, le marché de la distribution large bande de signaux multimédias restera probablement, au mieux, oligopolistique. Le nombre d'exploitants filaires large bande sera probablement faible dans une région donnée, mais ils devront faire face à la concurrence des exploitants de communications par satellite ou autres technologies sans fil. Toutefois, il est trop tôt pour être sûr qu'une concurrence effective s'établira. Les préoccupations relatives à la concurrence subsisteront probablement.

Tableau 3 : Coûts unitaires annualisés actuels et vitesses d'accès typiques pour différentes technologies

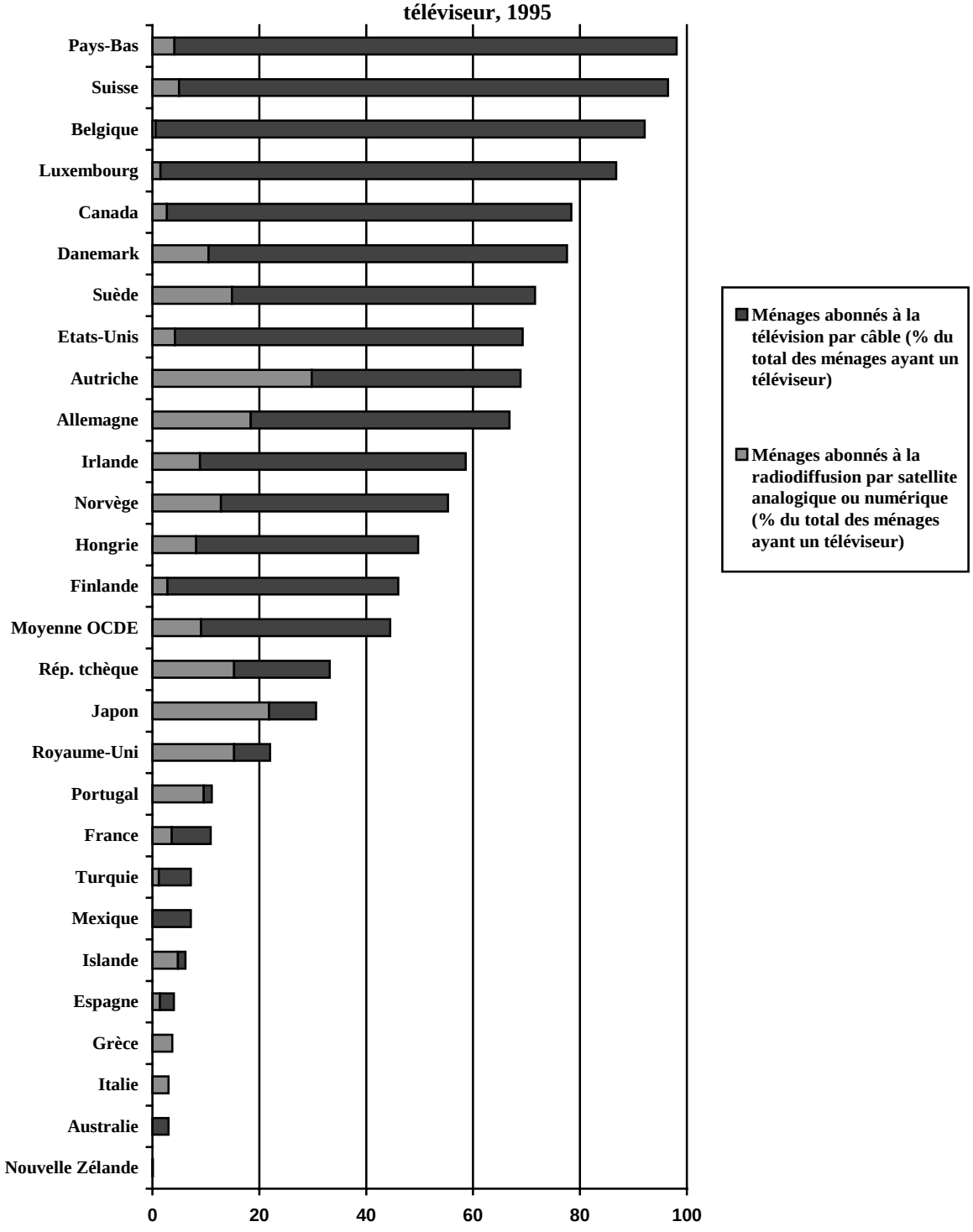
Technologie	*Coûts unitaires (Euros)*	*Utilisateur typique*	*Vitesse d'accès typique*
Fibre optique	1000-1500	Professionnel et résidentiel	2 Mbit/s et plus
Satellite	1000-1200	Résidentiel, PME	128-384 kbit/s
Modems-câble	500-700	Résidentiel	2 Mbit/s à 10 Mbit/s (dans seulement une direction)
ADSL	400-600	Professionnel	2 Mbit/s à 6 Mbit/s (dans seulement une direction)
RNIS débit de base	350-450	Professionnel et résidentiel	64 kbit/s à 128 kbit/s
Accès commuté RTPC +modem	100-200	Résidentiel	9.6 kbit/s à 56 kbit/s
Boucle locale sans fil	400-500	Résidentiel /petite entreprise	144 kbit/s
GSM	300-400	Professionnel et résidentiel	9.6 kbit/s

Source : Analysys (1998), p. 9

La diffusion audiovisuelle dans l'OCDE

Les chiffres qui suivent donnent une image de l'industrie de la diffusion audiovisuelle (multicanal) à haute largeur de bande dans les pays de l'OCDE. En moyenne 93 pour cent des ménages de l'OCDE possèdent au moins un téléviseur. Le taux de pénétration des téléviseurs ne tombe au-dessous de 80 pour cent que dans 3 pays de l'OCDE. Comme le montre la Figure 2, la pénétration de la télévision par câble ou par satellite continue de varier notablement d'un pays de l'OCDE à l'autre, mais plus de la moitié des pays de l'OCDE ont, pour les services des DPVM[16], un taux de pénétration supérieur à 50 pour cent.

Figure 2 : Abonnés des DPVM en pourcentage du nombre total des ménages ayant un téléviseur, 1995

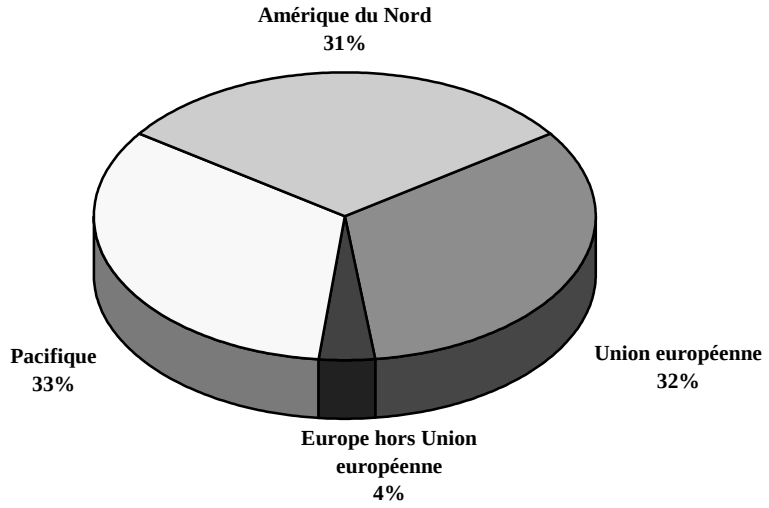


Source: OCDE (voir Annexe A)

On observe donc une forte disparité du taux de pénétration des systèmes vidéo multicanaux. Comme nous le verrons plus loin, une des bases traditionnelles de la réglementation de la diffusion audiovisuelle tenait dans le fait que le spectre nécessaire était une ressource rare. Ces arguments traditionnels ont moins de force dans les pays où les consommateurs ont accès à un très grand nombre de canaux différents offrant un contenu payant ou gratuit. Ces arguments peuvent garder leur force, au contraire, dans des pays comme la France ou l'Italie où la pénétration des systèmes multicanaux est limitée.

La taille totale de l'industrie de la diffusion télévisuelle dans la zone de l'OCDE s'élevait en 1994 à 73 000 milliards de dollars, répartis comme suit :

Figure 3: Principales dépenses de diffusion télévisuelle dans les régions de l'OCDE, 1994



Source: OCDE, Perspectices des communications

Le Tableau 4 énumère les 48 plus grandes compagnies du secteur multimédia/diffusion audiovisuelle dans la zone de l'OCDE :

Table 4 : Les 48 plus grandes compagnies du secteur multimédia dans la zone de l'OCDE : classement par le chiffre d'affaires multimédia en 1995 (milliards de dollars)

Rang	Compagnie	Pays	Chiffre d'affaires multimédia	Rang	Compagnie	Pays	Chiffre d'affaires multimédia
1	Sony	Japon	7.9	25	Fininvest	Italie	2.3
2	Time Warner Entertainment	Etats-Unis	6.3	26	Tokyo Broadcasting System	Japon	2.2
3	Matsushita/MCA	Japon	6.1	27	Carlton	Royaume-Uni	2.1
4	NHK	Japon	5.7	28	Canal Plus	France	1.6
5	ARD	Allemagne	5.6	29	Blockbuster	Etats-Unis	1.6
6	Capital Cities/ABC	Etats-Unis	5.3	30	TCI	Etats-Unis	1.6
7	Walt Disney	Etats-Unis	4.8	31	Televisa	Mexique	1.6
8	Polygram	Pays-Bas	4.7	32	TF1	France	1.5
9	Fujisankei	Japon	4.7	33	RTL	Allemagne	1.4
10	Kirch Gruppe	Allemagne	4.2	34	PBS	Etats-Unis	1.4
11	Nintendo	Japon	4.2	35	ZDF	Allemagne	1.3
12	Time Warner	Etats-Unis	4.0	36	Toho	Japon	1.2
13	News Corp	Australie	3.8	37	BSkyB	Royaume-Uni	1.1
14	CBS	Etats-Unis	3.7	38	Home Shopping Network	Etats-Unis	1.1
15	Bertelsmann	Allemagne	3.8	39	Rank	Royaume-Uni	1.0
16	Viacom	Etats-Unis	3.4	40	CBC-SRC	Canada	1.0
17	Thorn EMI	Royaume-Uni	3.4	41	SAT1	Allemagne	0.9
18	General Electric/NBC	Etats-Unis	3.4	42	ORF	Autriche	0.9
19	BBC	Royaume-Uni	3.3	43	France 2	France	0.9
20	Turner Broadcasting System	Etats-Unis	2.7	44	France 3	France	0.9
21	RAI	Italie	2.5	45	SSR-SRG	Suisse	0.8
22	Nippon Television Network	Japon	2.4	46	Asahi Broadcasting	Japon	0.8
23	Sega	Japon	2.4	47	Liberty Media	Etats-Unis	0.8
24	CLT	Luxembourg	2.3	48	Tribune	Etats-Unis	0.7

Source : OCDE, Perspectives de communications, Tableau 5.9. Les compagnies du secteur multimédia sont définies comme étant celles qui ont pour activité principale la diffusion audiovisuelle, la production de programmes audiovisuels, les moyens audiovisuels, la distribution ainsi que l'édition, la distribution et la commercialisation d'enregistrements phonographiques et de jeux vidéo.

La convergence

Convergence : le contexte

Un peu comme la "diffusion", le concept de la "convergence" est rarement défini de façon précise et sert à désigner un grand nombre de phénomènes différents. Pour les besoins du présent document, nous définirons la convergence comme étant le processus par lequel, en raison des changements technologiques sous-jacents, les économies de gamme augmentent au point que deux ou plusieurs produits ou services qui étaient auparavant produits par des entreprises distinctes sont désormais produits à l'intérieur d'une même entreprise.

Autrement dit, la convergence est essentiellement liée à l'effet des *changements technologiques* sur les *économies de gamme*. Ces changements touchant les économies de gamme ont un certain nombre d'implications :

- Premièrement, la convergence change les *structures de marché*. Les entreprises existantes sur un des marchés en convergence, afin de soutenir efficacement la concurrence, essaient d'entrer sur les autres marchés au moyen d'investissements nouveaux ou par des fusions. Un des effets de la convergence est donc la réalisation d'importants investissements nouveaux et/ou une vague de fusions importante. Les nouvelles entreprises entrant dans cette industrie essaient de le faire sur un grand nombre ou sur la totalité des marchés convergents.

- Deuxièmement, la convergence peut entraîner des changements dans le *degré de concurrence* des secteurs convergents. Quand les barrières à l'entrée sont faibles, on peut s'attendre à ce que la convergence augmente le degré global de concurrence, du fait que les entreprises de chaque marché convergent sont des entrants potentiels sur les autres marchés.

- Troisièmement, la convergence remet en question les *régimes réglementaires* existants. En particulier, la convergence remet en question les restrictions limitant le type d'activité ; elle attire l'attention sur les différences de réglementation entre les secteurs convergents et elle engendre des pressions en faveur de changements dans la structure des institutions réglementaires qui surveillent les branches convergentes.

- Quatrièmement, la convergence conduit généralement à de *nouveaux produits et services*, notamment à des produits qui réunissent les caractéristiques des produits existant dans les branches convergentes ainsi qu'à des produits entièrement nouveaux.

En dehors de l'industrie multimédia/diffusion audiovisuelle que nous allons examiner, on observe un exemple important de convergence dans le secteur financier. Dans ce secteur, les banques et les compagnies d'assurances sont de plus en plus concurrentes, au moyen de la même technologie sous-jacente, dans l'offre d'une gamme de produits permettant de gérer les risques de toute sorte. Bien que certaines restrictions par le type d'activité empêchent encore les banques de produire directement des produits d'assurances (et vice versa), on a observé récemment une très forte tendance à des fusions traversant le secteur financier qui visent à exploiter des économies de gamme dans la production et la distribution.

L'effet de la convergence sur la concurrence dépend de l'ampleur relative des barrières à l'entrée sur chacun des secteurs convergents. Quand les barrières à l'entrée sur chacun des secteurs convergents sont faibles, la convergence peut accroître le degré global de concurrence, du fait que les entreprises présentes dans chacun des secteurs auparavant séparés sont des entrants potentiels dans l'autre secteur. Quand il existe de fortes barrières à l'entrée et une concurrence limitée dans un des secteurs convergents, la convergence peut réduire le degré général de concurrence dans le secteur le plus concurrentiel. Dans ce cas, la convergence a pour effet de permettre aux entreprises du secteur à fortes barrières à l'entrée d'entrer sur le secteur le plus concurrentiel mais non l'inverse.

Par exemple, supposons que l'entrée dans le secteur des assurances soit relativement facile, alors que (par exemple, en raison de restrictions réglementaires), l'entrée dans la banque soit difficile. Supposons, en outre, que le secteur bancaire soit très concentré. Dans ce contexte, la convergence dans le secteur des services financiers conduirait les banques existantes à opérer des fusions avec certaines compagnies d'assurances. En exploitant les économies de gamme qui en résultent, elles peuvent alors

évincer du marché les compagnies d'assurances restantes. Le résultat final n'est pas nécessairement non efficient : la puissance de marché des banques sur le marché des assurances est limitée par la possibilité, pour les assureurs indépendants, de rentrer sur le marché. Toutefois, s'il existe des coûts d'entrée irrécupérables sur le marché des assurances, le conglomérat banque-assurances en place peut être en mesure d'exercer une certaine puissance de marché après la fusion.

Comme on le verra plus loin, quand il existe des barrières à l'entrée asymétriques de ce genre, on rencontre fréquemment des arguments tendant à imposer des restrictions par le type d'activité asymétriques afin d'accroître le degré global de concurrence. En particulier, on préconise souvent des restrictions par le type d'activité qui empêchent les entreprises présentes dans le secteur qui a de fortes barrières à l'entrée de participer à la concurrence sur les marchés connexes convergents. Comme exemples de ce genre de restrictions par le type d'activité asymétriques, on peut mentionner l'interdiction (provisoire) faite aux RBOC (Sociétés régionales Bell, aux Etats-Unis) d'entrer sur le marché grande distance (alors que les exploitants grande distance peuvent entrer sur le marché des télécommunications locales) ou la restriction (dans des pays comme le Royaume-Uni[17]) interdisant à la compagnie de téléphone en place de fournir des services de diffusion audiovisuelle alors que, dans le même temps, les câblo-opérateurs sont autorisés à offrir la téléphonie vocale.

Comme on le verra plus loin, la convergence peut aussi engendrer des pressions en faveur d'un réexamen des arrangements institutionnels pour l'administration des régimes réglementaires. Dans certains cas, chacun des secteurs convergents est soumis à un régime réglementaire séparé administré par une institution réglementaire distincte. Souvent, ces institutions réglementaires distinctes ont des missions et fonctions similaires. Quand, en conséquence de la convergence, des entreprises opèrent sur deux ou plusieurs marchés, elles peuvent être soumises à l'autorité de plusieurs institutions réglementaires. Quand les fonctions de ces institutions se chevauchent, il y a, au minimum, une possibilité de conflit. Les nouveaux produits ou services découlant de la convergence peuvent se situer dans des lacunes échappant à toutes les catégories réglementaires héritées du passé. Il existe une tendance à résoudre ces problèmes en attribuant les fonctions réglementaires clés à des institutions investies de responsabilités transsectorielles.

Convergence dans l'industrie de la diffusion audiovisuelle

Dans le secteur diffusion audiovisuelle/ multimédia, la convergence est le résultat des événements suivants :

- la numérisation (qui permet de manier toute forme de contenu informationnel, y compris audio et vidéo, de la même manière sur les mêmes réseaux) ;

- la baisse des prix de l'informatique (qui permet la création d'équipements de consommateur perfectionnés et relativement peu coûteux pour coder et décoder les signaux et interagir avec l'information multimédia) ;

- la réduction des coûts de la bande passante (et des technologies de compression qui permettent d'utiliser plus efficacement la bande passante existante) ; et

- la libéralisation des télécommunications (qui permet à de nouvelles entreprises d'entrer sur des marchés auparavant protégés).

Ces événements ont eu d'importants effets sur le marché de la diffusion audiovisuelle. Le premier, que l'on pourrait appeler la convergence dans la structure du marché, est la tendance aussi bien

pour les diffuseurs que pour les entreprises de télécommunications à offrir des services de communications bidirectionnelles à haute largeur de bande qui donnent à la fois accès à différents canaux de programmes vidéo, à la téléphonie vocale et à l'Internet.[18]

Le deuxième effet important de ces événements concerne ce que l'on pourrait appeler la convergence du contenu. Les marchés, auparavant séparés, du contenu des journaux, de la télévision, du cinéma et de l'édition Internet commencent à se chevaucher et, dans une certaine mesure, se combinent en un marché unique du contenu interactif.

Ces changements ne se réaliseront pas du jour au lendemain. "L'introduction de l'interactivité dans les services de diffusion universels du marché de masse ne produira pas un changement instantané dans le comportement du marché. Celui-ci est déterminé par des préférences individuelles et des attitudes collectives qui prennent du temps à s'adapter aux nouvelles technologies. Avec le temps, la consommation de services interactifs personnalisés augmentera graduellement. Cependant, cela n'implique pas nécessairement que les services de diffusion du marché de masse destinés à une réception passive soient voués à l'extinction. Il semble probable, pour l'avenir prévisible, qu'il subsistera une demande de divertissement multicanal non personnalisé."[19]

Enfin, on ne s'attend pas à ce que la convergence dans l'industrie multimédia/ diffusion audiovisuelle augmente automatiquement la concurrence. On a exprimé de fortes craintes que les compagnies parviennent à se positionner de manière à exploiter les nouveaux "goulots" qui apparaîtront. Herbert Ungerer, de la DG IV de la Commission européenne, note que :

> "La convergence oriente la fourniture de l'infrastructure mais elle est aussi en train de définir les goulots futurs ... L'avènement de l'explosion de la largeur de bande dépendra entièrement de la situation de la concurrence ... La convergence ne doit pas maintenant impliquer la création de nouveaux super-monopoles, et ce danger est très réel. C'est la question immédiate sous-jacente à la plupart des cas qui se posent en matière de concurrence dans ce domaine".[20]

Evolution du marché de la diffusion audiovisuelle

Les effets de la convergence se sont manifestés ces dernières années par des évolutions notables des marchés dans les pays de l'OCDE :

Dans chacun des secteurs de la diffusion audiovisuelle, des télécommunications et de l'Internet, on constate clairement des avancées vers la création d'un système commun de communications interactives large bande :

(a) Dans le secteur de la **diffusion audiovisuelle** :

- *Le nombre d'abonnés des services de télévision à péage continue d'augmenter*. Les données de l'OCDE montrent que la clientèle d'abonnés aux services de télévision à péage a augmenté au rythme de 10 à 20 pour cent par an entre 1990 et 1995[21]. Le nombre total d'abonnés des DPVM dans la zone de l'OCDE était de 150 millions en 1995 sur un total de 334 millions de ménages possédant un téléviseur[22].

- *La télévision numérique par satellite ou terrestre est en croissance rapide*. Dès le milieu de l'année 1998, près d'une douzaine de pays de l'OCDE seront en mesure de recevoir des émissions de télévision numérique, par satellite ou terrestre.[23] Depuis ses débuts en avril 1996, le nombre de canaux numériques en fonctionnement en Europe a augmenté pour atteindre plus de 200 en décembre 1997 avec environ un million de récepteurs numériques.[24]

- *Les fournisseurs de télévision par câble mettent à niveau leurs réseaux* pour pouvoir offrir des communications large bande interactives. Les exemples, de pays de toute la zone de l'OCDE, seraient trop nombreux à énumérer. Une des avancées récentes est la mise au point d'une norme d'interfonctionnement des systèmes pour données sur le câble, sur une base multi-constructeurs non exclusive, appelée Multimedia Cable Network System.[25]

- *Les fournisseurs de télévision par câble offrent, de plus en plus, des services de téléphonie vocale et d'accès à l'Internet*. Parmi une multitude d'exemples, on peut mentionner des compagnies comme Residential Communications Network (RCN), qui offre un service de télévision par câble, de téléphonie vocale et Internet dans la zone de Boston aux Etats-Unis[26], et Cableuropa, câblo-opérateur espagnol, qui installe le câble pour fournir des services pour données, l'accès à l'Internet, la téléphonie vocale et la télévision par câble, tout en lançant une troisième plate-forme numérique par satellite pour l'Espagne.[27]

- *Les fournisseurs de télévision par satellite offrent de plus en plus un accès à haute vitesse à l'Internet*. Par exemple, DirecTV aux Etats-Unis offre un service de communications pour données unidirectionnel par satellite qui donne accès à l'Internet à 384 kbit/s.

- *On introduit actuellement la télévision interactive.* Par exemple, à Hong Kong, la société Hong Kong Interactive Multimedia Services offre la télévision interactive.[28]

(b) Dans le secteur de l'**Internet** :

- *De nouveaux produits grand public sont en cours de mise au point* pour servir d'interface entre les consommateurs et l'Internet. On peut donner comme exemple le produit WebTV ("l'Internet sur votre télévision") et les produits Webphone offerts par Alcatel, Nortel et Samsung[29].

- *De nouveaux contenus multimédias apparaissent à un rythme rapide.* L'expansion des sites de contenu multimédia sur l'Internet est trop rapide pour qu'on en fasse le catalogue. Parmi les exemples récents figurent l'annonce par Reuters, en mars 1998, d'un service d'actualités multimédias basé sur le Web[30] et l'annonce par NBC de son entrée dans des activités de commercialisation d'enregistrements musicaux en ligne[31].

- *Les fournisseurs de service Internet offrent des services de téléphonie vocale, de diffusion sur le Web et de conférence multimédia*. Par exemple, en décembre 1997, UUNet a commencé à offrir des capacités de diffusion avec un service appelé UUCast.[32] Progressive Networks et MCI ont inauguré leur version d'un réseau de diffusion sur

l'Internet en août 1997[33]. Un précédent rapport de l'OCDE donne de nombreux exemples de diffusion sur le Web ("webcasting")[34].

(c) Dans le secteur des **télécommunications** :

- *Les compagnies de télécommunications mettent à niveau leurs réseaux* pour offrir des services pour données et multimédias améliorés. On peut en donner comme exemples l'annonce par Sprint de l'extension de son réseau ATM[35] aux sites des clients[36] ou l'essai par Bell Canada d'un commutateur ATM de Nortel pour la fourniture d'un service à haute vitesse à des clients résidentiels[37].

- *L'utilisation de l'ADSL et des technologies connexes augmente rapidement.* TeleDanmark, l'exploitant du RTPC en place au Danemark, a effectué un investissement majeur dans la technologie ADSL. En juin 1998, Bell Atlantic a annoncé des plans de déploiement de l'ADSL dans 60 centraux et plusieurs grandes villes. L'ETP suédois Telia s'est engagé à mettre en œuvre la technologie ADSL dans tout son réseau, ce qui lui permettra d'offrir des services large bande à tous les ménages suédois d'ici 2004.[38]

- *Des réseaux mobiles large bande sont en cours de mise au point*. Par exemple, depuis 1989, Ericsson conduit des recherches sur les possibilités multimédias en largeur de bande moyenne, en particulier avec le CDMA (accès multiple par différence de code) à largeur de bande moyenne. D'ici la fin de 1999, Qualcomm prévoit d'assurer des débits de données d'environ 1 Mbit/s sur une largeur de bande normale pour les applications fixes sans fil, de campus et mobiles.[39]

- *On observe actuellement un développement important des satellites à orbite basse (Low-Earth Orbit ou LEO)* qui pourront, dans l'avenir, avoir des capacités large bande. "Des réseaux comme Skybridge, Teledesic et Celestri promettent des communications voix et données multimédias et offrent même la perspective d'un 'Internet dans le ciel'"[40]. "Stimulés par les projections suivant lesquelles, d'ici l'an 2000, 150 millions de ménages utilisant l'Internet dans le monde entier demanderont des services de communications de texte, voix, données et vidéo de haute qualité, les fabricants et fournisseurs de services dans le domaine des communications par satellite investissent fortement pour saisir une part d'un marché estimé à 40 milliards de dollars".[41]

En outre, un très grand nombre de fusions et d'alliances sont en cours de formation, aussi bien horizontalement (entre entreprises de télécommunications, de diffusion audiovisuelle et de service Internet) que verticalement (entre des combinaisons d'entreprises de télécommunications, de diffusion audiovisuelle et de service Internet et des producteurs de contenu). La Commission européenne note qu'en 1996 plus de 15 pour cent de la valeur totale des fusions et acquisitions dans le monde (1000 milliards de dollars) ont été générés par l'activité dans ce que l'on peut globalement appeler les industries de l'information et des communications.[42]

(a) Concernant les fusions et alliances **horizontales**, elles ont lieu entre :

- *Entreprises de diffusion audiovisuelle et entreprises de télécommunications*. Parmi les exemples où interviennent des diffuseurs par satellite, on peut mentionner l'alliance annoncée en décembre 1996 entre BT et BSkyB visant à former une nouvelle compagnie appelée British Interactive Broadcasting. Parmi les exemples où interviennent des

diffuseurs de télévision par câble figure l'achat de TCI, une des plus grandes compagnies de télévision par câble américaines, par AT&T, plus grand exploitant de télécommunications grande distance aux Etats-Unis. A la suite de la mise en œuvre de la directive de la Commission européenne sur la télévision par câble, 17 compagnies de télévision par câble flamandes se sont associées à l'exploitant US West pour former une nouvelle compagnie appelée Telenet Flanders. Aux Pays-Bas, en juin 1996, KPN (la compagnie de télécommunications en place), Nethold (câblo-opérateur) et Phillips ont formé une alliance pour offrir un service numérique par câble appelé Nethold Benelux.

- *Entreprises de diffusion audiovisuelle et entreprises Internet*. On peut donner comme exemple l'achat par Microsoft de WebTV, compagnie offrant l'Internet par le biais des récepteurs de télévision, et de Comcast, câblo-opérateur américain.

- *Entreprises Internet et entreprises de télécommunications*. Par exemple, GTE a récemment acheté BBN Corp., un des architectes initiaux de l'Internet[43]; les fournisseurs de téléphonie mobile Cellnet et Orange au Royaume-Uni sont entrés dans d'autres services de communications, comme la fourniture de service Internet (conjointement avec UUNet) ; MCI s'est associé avec NetSpeak Corp. pour fournir un service de téléphonie Internet.[44]

- *A l'intérieur des secteurs*, des accords sur les normes comme celui annoncé en octobre 1997 entre Canal Plus, BSkyB et Kirch en vue d'élaborer une norme ouverte pour la diffusion multimédia numérique.[45]

(b) Concernant les fusions et alliances **verticales** entre des fournisseurs d'infrastructure et des fournisseurs de contenu, elles ont lieu entre :

- *Fournisseurs de contenu et entreprises Internet*. Par exemple, la chaîne de télévision américaine NBC a pris une participation dans le site Internet Snap de C-Net. Récemment, Disney a pris une participation de 40 pour cent dans Infoseek, site de recherche dans l'Internet.

- *Fournisseurs de contenu et entreprises de diffusion audiovisuelle.* Par exemple, la tentative récente de BSkyB d'acheter Manchester United, l'achat de la chaîne de télévision ABC par Disney, l'achat du câblo-opérateur Comcast par Microsoft, l'achat du studio Carolco par le câblo-opérateur TCI, ou l'achat de Turner Broadcasting par Time Warner[46]. Un autre exemple intéressant est le succès du réseau câblé du Madison Square Garden aux Etats-Unis.

- *Fournisseurs de contenu et entreprises de télécommunications.* Par exemple, en 1994, une alliance a été annoncée entre Bell Atlantic, Oracle et une vingtaine d'autres entreprises, parmi lesquelles des fournisseurs de contenu comme le Washington Post, en vue d'offrir des services de télévision interactive.

Résumé

La présente section peut se résumer par les points suivants :

- Aux fins du présent document, on définit la diffusion (audiovisuelle/multimédia) comme la production et la dissémination de contenu multimédia par le biais de télécommunications. Ainsi, cette définition associe les deux secteurs de la production et de la distribution de contenus. La diffusion selon cette définition est en concurrence avec le marché plus large de la dissémination de contenu multimédia par un moyen quelconque et en constitue une partie, mais la diffusion (audiovisuelle/multimédia) possède un avantage compétitif quand l'actualité du contenu est un élément important. La promptitude de la diffusion est un aspect particulièrement important pour le sport, pour certains événements d'actualité et dans les applications où la rétroaction et l'interactivité interviennent comme dans la recherche d'information et dans certains jeux.

- L'industrie de la diffusion (audiovisuelle/ multimédia) contient les producteurs de contenu et les distributeurs de ce contenu aux consommateurs. Comme pour les autres réseaux de télécommunications, les principales préoccupations en matière de concurrence et de réglementation dans la distribution tournent autour de la question de l'accès au consommateur. Il existe différentes voies d'accès large bande au consommateur possibles, sans fil ou filaires. Parmi elles, les solutions sans fil sont généralement moins coûteuses à installer, mais elles nécessitent souvent une autre voie de télécommunications distincte afin de réaliser une communication bidirectionnelle. Les solutions filaires comportent des coûts irrécupérables plus importants, mais elles offrent une plus grande largeur de bande et une communication bidirectionnelle. Parmi les solutions filaires, la technologie ADSL et les modems-câble sont actuellement les plus prometteurs pour livrer des services à haute largeur de bande dans les foyers.

- Actuellement, le taux de pénétration des voies d'accès au consommateur à haute largeur de bande varie considérablement entre les pays de l'OCDE. Dans les pays où le taux de pénétration est faible, les arguments traditionnels pour la réglementation de la diffusion audiovisuelle (reposant sur la rareté du spectre) peuvent avoir plus de poids.

- Le concept de "convergence" est lié aux changements des économies de gamme sous-jacentes, avec la production conjointe de biens et services auparavant produits dans des industries distinctes. La convergence conduit à d'importants changements dans la structure des marchés, notamment par les fusions et acquisitions.

- L'effet de la convergence sur la concurrence dépend des barrières à l'entrée relatives sur les marchés convergents. Quand il existe des barrières à l'entrée asymétriques, la convergence peut réduire la concurrence sur les marchés les plus concurrentiels. La convergence engendre aussi des pressions en faveur de changements dans les institutions réglementaires qui gouvernent les industries convergentes.

- La convergence a eu un impact très important sur les industries de la diffusion audiovisuelle et des télécommunications au cours de la dernière décennie, comme le montrent un grand nombre de fusions, acquisitions, alliances, coentreprises, entrées nouvelles et investissements nouveaux par les entreprises en place.

Analyse de la concurrence

Après avoir présenté le contexte technologique, on s'attache dans la présente section à identifier les préoccupations spécifiques en matière de concurrence qui se manifestent dans l'industrie multimédia/ diffusion audiovisuelle, notamment eu égard à la convergence.

Questions touchant à la définition du marché

Considérons d'abord les questions touchant à la définition du marché pertinent. Une discussion complète de la définition du marché nécessiterait d'examiner tous les produits créés à chacun des 5 stades de production considérés ci-dessus et dépasserait le cadre du présent document. Toutefois, on peut faire les commentaires suivants.

La demande globale de services de diffusion audiovisuelle provient des sources suivantes :

(a) Annonceurs qui veulent promouvoir un produit ou service particulier ;

(b) Compagnies, groupes ou individus qui souhaitent disséminer certaines informations ;

(c) Compagnies et consommateurs qui souhaitent effectuer des transactions commerciales directement les uns avec les autres ; et

(d) Consommateurs qui souhaitent acheter des services de divertissement, d'information, d'accès au commerce électronique ou autres services interactifs.

Une analyse complète de la demande nécessite donc de considérer les substituts potentiels pour tous ces groupes. Il est immédiatement évident qu'il existe des substituts potentiels en dehors de la diffusion audiovisuelle pour chacun de ces groupes. Par exemple, en dehors de la diffusion audiovisuelle, les annonceurs ont le choix d'autres médias comme les magazines, les journaux ou les panneaux d'affichage. De même, il existe pour les consommateurs des sources variées de divertissement et d'information en dehors de la diffusion audiovisuelle et d'autres supports pour les groupes qui souhaitent disséminer des informations. Du point de vue du consommateur, la consommation de services de diffusion audiovisuelle est en concurrence avec toutes les autres loisirs.

Grosso modo, la diffusion audiovisuelle dispute la clientèle des spectateurs et des annonceurs à l'intérieur d'un marché des médias différencié plus large.

A l'intérieur de la diffusion audiovisuelle, on peut distinguer beaucoup de sous-marchés. Les produits de la diffusion audiovisuelle visant essentiellement le divertissement, par exemple, ne seront guère de bons substituts pour les produits de cette industrie visant essentiellement à fournir des informations. La diffusion audiovisuelle destinée à un auditoire d'âge mûr opère sans doute sur un marché différent de celui destiné aux jeunes. En outre, à l'intérieur du marché du divertissement, des événements comme les rencontres sportives ne sont probablement pas de bons substituts des films de cinémas, par exemple. A l'intérieur des événements sportifs, "on distingue différents marchés pour des événements sportifs particuliers comme le football en direct ou les courses de Formule 1. De même, la définition du marché pour un match de football international peut varier par son étendue selon qu'il s'agit de phases préliminaires (plus susceptibles d'intéresser des pays particuliers) par opposition à la finale. On distingue

aussi des marchés différents pour les spectacles en direct ou enregistrés, in extenso ou en extraits, en télévision à la carte ou à péage".[47]

On peut aussi subdiviser les marchés suivant la forme de la diffusion elle-même. De toute évidence, la radio hertzienne classique est un substitut relativement faible de la télévision hertzienne en clair. La télévision hertzienne en clair se distingue elle-même des différentes formes de télévision à péage. Le marché de la télévision par satellite peut, dans certains cas, se différencier du marché de la télévision terrestre à péage.

Toutefois, il est clair qu'il existe un certain degré de concurrence entre ces diverses formes de diffusion audiovisuelle/ multimédia. Les mesures d'audience aux Etats-Unis montrent que les utilisateurs du Web ont une consommation de télévision inférieure de 59 pour cent à celle des téléspectateurs moyens. On estime qu'en 2005 le temps relatif passé devant un écran de téléviseur ne représentera plus que la moitié du temps passé devant un écran d'ordinateur personnel. Des recherches sur les activités supplantées par l'utilisation de l'ordinateur personnel montrent que la télévision perd plus de terrain que la lecture de livres ou de magazines ou que les jeux sur console vidéo.[48] Ces données indiquent que la télévision et la navigation sur l'Internet sont clairement des substituts l'une de l'autre.

L'image globale du marché de la diffusion audiovisuelle/ multimédia qui se dégage montre un grand nombre de marchés de produits et services connexes mais différenciés.

Une image similaire se dégage du point de vue de l'annonceur. L'élasticité de la demande de publicité dans la diffusion audiovisuelle dépendra évidemment du degré de substituabilité entre la publicité dans les diverses formes de médias. Cependant, la nature et le but de la publicité dans les différentes formes de médias sont souvent très différents. L'objectif de la publicité dans les médias de masse comme la télévision ou la radio est différent de celui de la publicité dans les journaux ou dans des magazines spécialisés et encore différent de la publicité sur une page Web. Par exemple, on avance quelquefois que la publicité à la télévision convient bien pour forger une "marque" ou une "image", alors que d'autres formes de publicité (journaux, magazines) sont plus appropriées à la communication d'informations.

De manière générale (les détails pouvant varier d'un pays à l'autre), il apparaît que les différentes formes de diffusion représentent des marchés de supports de publicité différents. Une hausse du prix de la publicité à la télévision entraînera un certain transfert de la publicité vers la radio, les journaux ou l'affichage, mais cet effet est probablement insuffisant pour imposer une discipline concurrentielle efficace contre une puissance de marché dans la publicité télévisée.

Potentiel d'entrée

L'entrée dans la diffusion audiovisuelle/ multimédia nécessite d'obtenir l'accès aux services de télécommunications et l'accès au contenu.

En général, les barrières à l'entrée sur le marché de la production de contenu sont faibles. Il existe une multitude de petits ou grands producteurs de contenu audiovisuel dans tous les pays de l'OCDE. Toutefois, comme on l'a remarqué précédemment, le contenu est un produit très différencié. Certaines formes de programmation peuvent être en mesure d'acquérir une puissance de marché importante à l'intérieur de leur créneau. En particulier, comme on l'a vu ci-dessus, l'accès au contenu est une question importante dans le cas du sport et (dans une moindre mesure) des films de cinéma récents :

> "S'assurer des droits exclusifs [pour les événements sportifs à succès et les grands films] est une arme concurrentielle critique. ... sur le marché allemand, en achetant les droits sur de nombreux grands films d'Hollywood, DF1 a failli évincer son rival Bertelsmann du marché de la télévision numérique par satellite avant même que celui-ci n'ait pris son essor".[49]

Des barrières à l'entrée dans le secteur de la diffusion audiovisuelle peuvent donc se constituer par un système de contrats exclusifs de longue durée sur le contenu. Ces barrières à l'entrée seront d'autant plus hautes que ces contrats seront plus longs et plus exclusifs. Comme on le verra plus loin, les droits exclusifs sur le contenu ne sont pas en eux-mêmes anticoncurrentiels à condition que la durée de ces droits ne soit pas disproportionnée en regard du recouvrement des investissements correspondants.[50]

Concernant les services de télécommunications pour la diffusion audiovisuelle, il faut en général obtenir l'accès à trois services de télécommunications distincts : l'accès à un réseau de distribution "de gros" ou "dorsale" ; l'accès à un réseau de distribution "de détail" ; et l'accès aux équipements terminaux d'abonné éventuellement nécessaires.

En général, comme on l'a vu plus haut, dans les pays qui ont déréglementé l'industrie des télécommunications, il y a de faibles barrières à l'entrée dans la distribution de gros, ou de dorsale, des signaux de diffusion audiovisuelle. Pour atteindre le consommateur, au contraire, il faut soit établir une des voies d'accès large bande mentionnées précédemment, soit avoir accès à l'infrastructure d'une voie d'accès large bande existante.

Pour établir une nouvelle voie d'accès sans fil, il faut évidemment avoir accès au spectre. Dans les pays qui ont établi de fait des droits de propriété sur le spectre et qui autorisent les transactions sur ces droits, la nécessité d'obtenir des fréquences n'est pas un obstacle à l'entrée. On peut toujours, en principe, obtenir des fréquences des détenteurs existants en faisant une offre suffisante. Cependant, les droits de propriété sur le spectre restent l'exception et non la règle. Dans certains pays, il n'est pas du tout facile d'obtenir une licence d'utilisation du spectre et le processus d'octroi des licences n'est pas transparent. D'après Analysys :

> "Dans le passé le spectre n'a pas été alloué de manière efficiente dans l'Union européenne. On n'a guère essayé de déterminer quelle valeur lui attribuent des utilisateurs différents en concurrence pour son obtention et de l'allouer sur cette base. Les allocations actuelles du spectre peuvent restreindre la capacité qu'ont les diffuseurs et les fournisseurs de services d'exploiter pleinement le potentiel des plates-formes de livraison multimédia numériques. Cela peut aussi restreindre l'effet bénéfique global que l'économie tire de l'utilisation du spectre des fréquences radio".[51]

En outre, comme on l'a vu précédemment, l'offre de services interactifs par le biais d'une connexion sans fil nécessite généralement une autre forme de voie de communication pour le retour, par exemple le RTPC. La capacité d'offrir une pleine interactivité se heurte donc à la nécessité de conclure un accord avec un fournisseur de services de télécommunications potentiellement concurrent.

Dans le cas de la diffusion par satellite, l'entrée nécessite l'accès à des capacités de satellite. Cela dépend de facteurs spécifiques comme le nombre de satellites disponibles et les mécanismes d'attribution des capacités. Dans le cas du Royaume-Uni, l'OFT a conclu dans son examen de BSkyB que les antennes de réception de satellite domestiques au Royaume-Uni ne peuvent recevoir que des signaux du satellite Astra, et que la capacité analogique sur le système Astra était entièrement réservée. La compagnie propriétaire du satellite Astra ne permet pas la réattribution de répéteurs d'un pays à un autre.

Il n'existe pas non plus de marché secondaire efficient où un diffuseur entrant puisse acheter des capacités auprès de locataires existants. En conséquence, dans ce cas, l'OFT pense qu'il est difficile d'effectuer de nouvelles entrées reposant sur l'utilisation de satellites.

Dans certains cas, les entrées nouvelles avec des moyens sans fil peuvent se heurter au manque de sites d'émission appropriés ou au manque d'accès aux sites existants, notamment pour les entrées nouvelles nécessitant un grand nombre d'émetteurs (comme dans un réseau mobile).

Comme on l'a vu précédemment, les entrées nouvelles par des moyens filaires nécessitent généralement un important investissement irrécupérable. Eu égard aux économies de gamme et d'échelle, on n'effectuera sans doute cet investissement que si l'on prévoit des taux d'adoption élevés. Dans la pratique, cela limite fortement le nombre de fournisseurs d'infrastructure filaire dans une zone donnée. L'entrée dépendra évidemment de facteurs comme l'existence de restrictions du type d'activité empêchant l'entrée de certaines entreprises (par exemple, l'exploitant du RTPC en place) ou le fait que les consommateurs aient ou non fait un investissement irrécupérable dans un système existant tel que l'achat d'un décodeur exclusif. On examine plus loin les questions que le décodeur ou le "système d'accès conditionnel" posent en matière de concurrence.

Structure de l'industrie de la diffusion audiovisuelle

Les barrières générales à l'entrée dans l'industrie multimédia/ diffusion audiovisuelle dépendront du nombre des niveaux auxquels on doit entrer simultanément. Cela dépend, conjointement avec les possibilités de comportement stratégique anticoncurrentiel, de la structure de l'industrie multimédia/ diffusion audiovisuelle.

Nous considérons ici cinq structures-types différentes pour l'industrie, présentées dans le Tableau 7.

(a) La structure "totalement intégrée"

Dans cette structure, chaque diffuseur est une entité verticalement intégrée, qui cumule les rôles de fournisseur de contenu, de fournisseur d'infrastructure, d'"assembleur" et de fournisseur d'équipements terminaux. En outre, les différents systèmes verticalement intégrés sont incompatibles. Si un consommateur veut recevoir les services d'un autre diffuseur, il doit payer tout le coût (infrastructure et équipement terminal) du nouveau système.

Cette structure correspond à la situation actuelle dans certains pays pour la télévision à péage (et par satellite) quand ces systèmes utilisent des décodeurs exclusifs, comme aux Etats-Unis (voir Encadré 3 ci-dessous).[52] On peut donner un autre exemple (en dehors de la diffusion audiovisuelle) dans l'industrie du multimédia, avec les plates-formes de jeux vidéo de Sega et Nintendo, qui ne sont compatibles avec les logiciels d'aucune autre source.

Le degré de concurrence sur le marché des supports de publicité et sur les marchés du divertissement multimédia et de l'information dépend du nombre de ces diffuseurs intégrés. Quand le nombre de ces diffuseurs est limité, ils peuvent être en mesure d'exercer une puissance de marché à l'égard des annonceurs et des consommateurs.

L'entrée doit se faire à tous les niveaux simultanément. Cette entrée dans tous les segments est limitée par les barrières à l'entrée dans le segment où ces barrières sont les plus fortes. Si le marché de la distribution de détail ne peut supporter plus de deux concurrents possédant

leur infrastructure, avec cette structure de marché il n'y aura pas plus de deux fournisseurs de contenu et assembleurs verticalement intégrés.

(b) La structure du "marché des terminaux libéralisé"

Cette structure ressemble à la structure totalement intégrée, à l'exception du fait que l'équipement terminal du client est capable de recevoir les signaux d'un certain nombre de diffuseurs différents. Les clients peuvent changer de diffuseur sans avoir à payer le coût de l'équipement terminal du nouveau diffuseur.

Cette structure correspond à la situation actuelle dans la radio et la télévision hertziennes en clair analogique où un même équipement est capable de recevoir toutes les émissions de télévision ou de radio analogiques. Un certain nombre de pays encouragent l'adoption de normes pour la télévision numérique et pour les décodeurs afin de parvenir de fait à la même situation pour la télévision numérique et à péage.

Comme on le verra plus loin, quand le décodeur du client est compatible avec plusieurs systèmes, la concurrence ne porte plus sur les caractéristiques de chaque système considéré dans sa globalité mais sur des aspects plus classiques comme le prix et la qualité de différents services similaires offerts par les diffuseurs intégrés concurrents. Cela tend à restreindre les innovations radicales (comme l'offre d'une nouvelle norme de télévision supérieure, comme la TVHD[53]).

(c) Structure partiellement dissociée : I

Nous pouvons aussi considérer une structure où les fournisseurs de contenu sont entièrement séparés des fournisseurs d'infrastructure/ assembleurs. Les assembleurs de services peuvent simplement acheter le contenu qu'ils souhaitent offrir aux consommateurs.

Cette structure correspond à la situation de nombreuses compagnies de télévision par câble qui, généralement, achètent leur bouquet de chaînes directement à des fournisseurs de contenu (ou, plus typiquement, à des grossistes en contenu) et commercialisent ces chaînes auprès des consommateurs.

Ce système a pour avantage de réduire les barrières à l'entrée dans les activités de contenu (étant donné qu'il n'est plus nécessaire d'entrer à tous les niveaux). Si on ne les interdit pas explicitement, les arrangements exclusifs verticaux entre les fournisseurs de contenu et les fournisseurs d'infrastructure peuvent équivaloir à une intégration verticale, ce qui fait revenir la structure à la forme intégrée telle que celle de (b).[54]

(d) Structure partiellement dissociée : II

En général, il est bénéfique pour les fournisseurs de contenu d'avoir accès à un auditoire aussi large que possible et il est bénéfique pour les fournisseurs d'infrastructure/ assembleurs d'avoir un choix de contenu aussi large que possible. En conséquence, quand aucun fournisseur de contenu ou assembleur/ fournisseur d'infrastructure ne détient une puissance de marché, les avantages qu'il y a à permettre à tous les consommateurs d'accéder à tout le contenu disponible l'emportent sur les avantages de relations contractuelles exclusives entre fournisseurs de contenu et assembleurs/ fournisseurs d'infrastructure.

Dans ce cas, il peut apparaître une structure de marché où les consommateurs peuvent accéder à (presque) tout le contenu en passant par un fournisseur d'infrastructure/ assembleur quelconque. (On peut aussi concevoir que cette structure résulte de mesures réglementaires).

Dans ce type de système, les fournisseurs de contenu commercialisent leur contenu directement auprès des consommateurs. Cela constitue un moyen terme entre la structure précédente de type "télévision par câble" et la structure suivante totalement dissociée de type "Internet". Dans le multimédia hors diffusion audiovisuelle, le marché des disques compacts, cassettes vidéo, DVD (vidéodisques numériques), etc., offre un exemple de cette structure.

(e) Structure totalement dissociée

La structure finale du marché correspond à la situation où le consommateur peut acheter séparément chacune des composantes du marché global de la diffusion audiovisuelle/ multimédia.

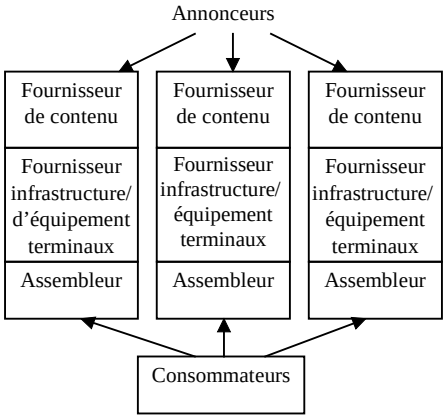
Cela correspond étroitement à la structure de marché actuelle de l'Internet. Premièrement, le consommateur a le choix d'une large gamme d'équipements terminaux (ordinateurs et modems) qui sont tous capables de communiquer avec les assembleurs (fournisseurs de service Internet). Deuxièmement, le consommateur est généralement en mesure de choisir les moyens par lesquels il accède à l'assembleur. Cela peut être par le RTPC (et la compagnie de téléphone en place) ou par une autre forme de connexion acceptée par le fournisseur de service Internet (par exemple, une liaison sans fil directe). Dans l'un ou l'autre cas, en général, le client contracte directement avec le fournisseur d'infrastructure pour l'obtention de ces services. Troisièmement, le consommateur a le choix de l'assembleur de services ou fournisseur de service Internet. Généralement, le consommateur paie directement le fournisseur de service Internet pour les services qu'il fournit. Enfin, le consommateur a le choix parmi tous les fournisseurs de contenu (pages Web) sur l'Internet. Si le consommateur souhaite acheter un contenu donné, il contracte directement avec ce fournisseur de contenu (et non indirectement par le biais de l'assembleur).

Ce système a l'avantage que les différents segments de l'industrie sont complètement séparés. L'entrée peut se faire à un seul niveau ou à plusieurs niveaux, au choix de l'entrant. Un goulot dans, par exemple, la fourniture d'infrastructure ne peut s'étendre facilement à une domination du contenu, ou vice versa.

Généralement parlant, les innovations entièrement nouvelles s'introduisent sur le marché sous la forme de structures verticalement intégrées (comme dans (a) et (b)).[55] Avec la stabilisation des technologies et des normes et l'expiration des brevets, une plus grande concurrence s'introduit (comme dans les formes (c) et (d)). Il est difficile de prédire quelle peut être la durée de ce processus, ou si une innovation entièrement nouvelle l'emportera. Bien que l'Internet ait atteint, par un processus de normalisation de fait, une structure ressemblant à (e), il reste possible que des sous-réseaux offrant une gamme améliorée de service réapparaissent, suivant les structures (b) ou (c). La structure de marché globale du secteur multimédia/ diffusion audiovisuelle ne s'est pas encore stabilisée.

Tableau 7 : Structures potentielles du marché de la diffusion audiovisuelle

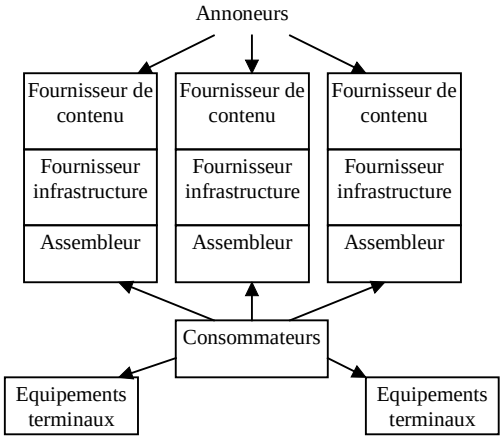
(a) La structure totalement intégrée :



Caractéristiques:
Les consommateurs ont le choix entre des offreurs de diffusion audiovisuelle verticalement intégrés qui fournissent le contenu, l'infrastructure et l'équipement terminal. Le client qui souhaite changer de fournisseur doit choisir un équipement terminal, une infrastructure et un contenu différent. Cette structure correspond à la situation actuelle dans la télévision à péage.

Commentaires:
La concurrence entre les systèmes sous tous les aspects (y compris les services innovateurs fournis) est particulièrement intense. La concurrence sous cette forme peut présenter les "effets de réseau" considérés ci-dessous. A l'équilibre, il est possible qu'émerge un seul acteur dominant. L'entrée doit se faire à tous les niveaux simultanément.

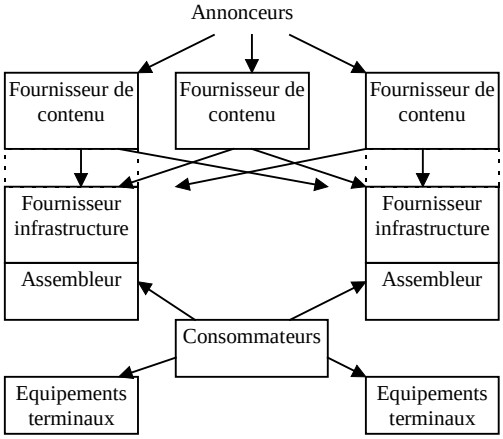
(b) La structure du marché des terminaux libéralisé



Caractéristiques:
La normalisation ou les obligations de compatibilité assurent la compatibilité de l'équipement terminal avec tous les grands diffuseurs. Les consommateurs ont le choix entre des offreurs de diffusion audiovisuelle verticalement intégrés mais ils achètent ou louent séparément leur propre équipement terminal. Cette structure correspond à la situation actuelle dans la télévision hertzienne en clair.

Commentaires:
La concurrence par certaines formes d'innovation est limitée (car ce ne serait pas compatible avec tous les équipements terminaux existants). Cependant, cela peut renforcer la concurrence sur d'autres aspects. L'entrée peut se faire sur le marché des équipements terminaux, séparément des autres marchés. Cela élimine la possibilité d'utiliser l'accès aux équipements terminaux pour exclure les concurrents.

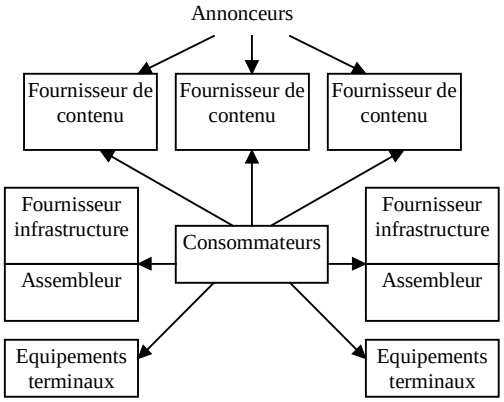
(c) Structure partiellement dissociée : I



Caractéristiques:
Du fait de la compatibilité entre les fournisseurs de contenu et les fournisseurs d'infrastructure, les fournisseurs d'infrastructure peuvent acheter le contenu à des sources variées. Cette structure est semblable à la situation courante dans la télévision par câble où les compagnies de télévision par câble locales achètent le contenu à divers fournisseurs de contenu nationaux et internationaux.

Commentaires:
L'entrée dans le secteur du contenu est plus facile que dans les structures précédentes. Des arrangements verticaux entre les fournisseurs d'infrastructure et les fournisseurs de contenu peuvent recréer une structure similaire à (b).

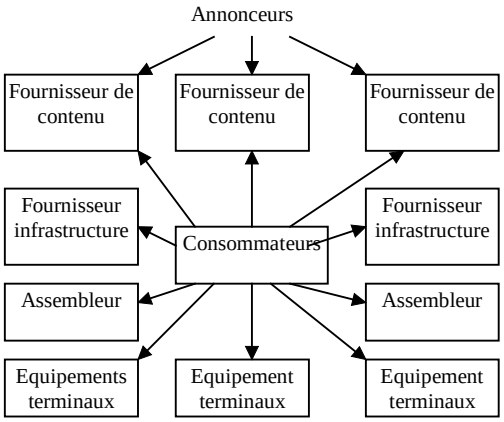
(d) Structure partiellement dissociée : II



Caractéristiques:
Du fait de la compatibilité entre les fournisseurs de contenu, les consommateurs peuvent acheter n'importe quel contenu en passant par n'importe quel fournisseur d'infrastructure. Les fournisseurs de contenu commercialisent leur contenu directement aux clients. Cette structure se situe entre le modèle de la télévision par câble de (c) et le modèle de l'Internet de (e) et est similaire à celle du marché des disques compacts, cassettes vidéo, DVD, etc.

Commentaires:
Par comparaison avec (b), la concurrence est renforcée dans la fourniture de contenu. Si on interdit les arrangements exclusifs verticaux, on élimine la possibilité d'utiliser l'accès au contenu comme une arme stratégique pour restreindre la concurrence dans les secteurs en aval (comme on le verra plus loin).

(e) Structure totalement dissociée



Caractéristiques:
Du fait de la compatibilité entre toutes les différentes composantes, les consommateurs peuvent acheter séparément chacune de ces composantes. Cette structure est très semblable à celle de l'Internet.

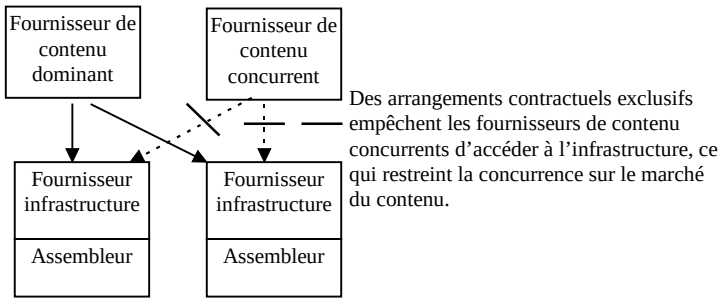
Commentaires:
Pour une entreprise dominante, la possibilité d'utiliser sa position pour restreindre la concurrence sur un autre marché est limitée. Si la législation impose la compatibilité à chaque stade, cela peut empêcher les grandes innovations techniques.

Fusions verticales, accords et abus de position dominante

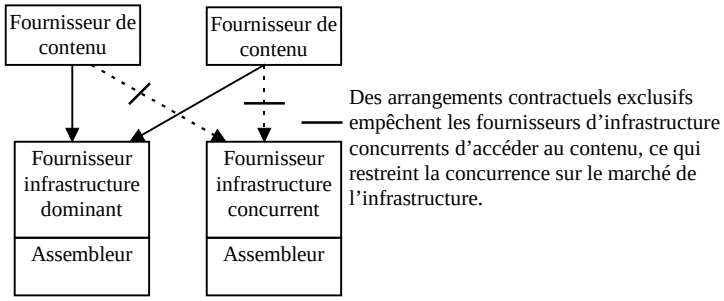
L'exposé ci-dessus indique que les préoccupations en matière de concurrence sont principalement susceptibles de concerner les deux extrémités de la chaîne de production, à savoir l'accès à certaines formes de contenu (comme les grands événements sportifs) et le marché de l'accès large bande aux consommateurs. En conséquence, les responsables publics et les autorités chargées de faire respecter la législation de la concurrence devraient montrer la plus grande vigilance à l'égard de deux catégories de fusions horizontales : premièrement, les fusions qui limitent le nombre de voies aboutissant au consommateur (par exemple, une fusion entre l'exploitant du RTPC et un câblo-opérateur, ou entre un important exploitant de services de satellite et un câblo-opérateur) ; deuxièmement, les fusions entre deux fournisseurs de contenu détenant une forte position sur le marché de certaines catégories de contenu.

Certains des problèmes les plus intéressants en matière de concurrence dans ce domaine découlent des relations verticales. Comme sur d'autres marchés, les entreprises dominantes peuvent tenter d'exploiter leur position pour restreindre la concurrence à l'intérieur de leur propre marché, ou sur des marchés en amont ou en aval, au moyen d'arrangements verticaux. Cela concerne particulièrement deux catégories d'entreprises dominantes : les entreprises détenant une position dominante pour l'accès au consommateur et les entreprises détenant une position dominante pour l'accès à des types particulier de contenu.

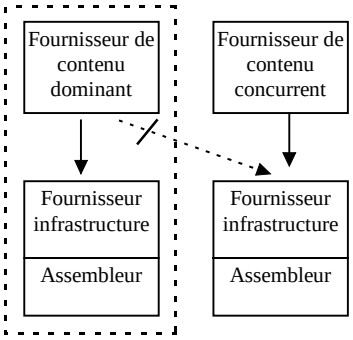
Par exemple, dans le contexte de la structure d'industrie du type (c) ci-dessus, une entreprise en position dominante dans la production d'une certaine catégorie de contenu peut essayer d'exploiter cette situation pour restreindre la concurrence *horizontale* avec les fournisseurs de contenu concurrents au moyen d'arrangements verticaux avec les assembleurs qui empêchent ces derniers de diffuser aussi le contenu d'un concurrent. C'est, par exemple, la situation d'une chaîne de sport dominante dont le contrat avec les distributeurs de télévision par câble en aval empêche ces dernières d'offrir une chaîne de sport concurrente. On observe ce genre de situation dans les courses automobiles, où les compagnies qui passent contrat pour diffuser des courses de Formule 1 doivent s'abstenir de diffuser également d'autres formes de courses de voitures "sans toit" (notamment les courses Indycar des Etats-Unis). Le diagramme suivant illustre cette forme d'arrangements :



Une autre éventualité (aussi dans le contexte de la structure d'industrie (c)) est qu'une entreprise en position dominante dans la fourniture de services d'infrastructure aux consommateurs essaie de restreindre la concurrence avec les autres fournisseurs d'infrastructure en signant des arrangements exclusifs avec un nombre suffisant de fournisseurs de contenu : par exemple, un exploitant du RTPC qui lance un service ADSL large bande et qui essaie d'acquérir des droits exclusifs sur tous les nouveaux grands films de cinéma.

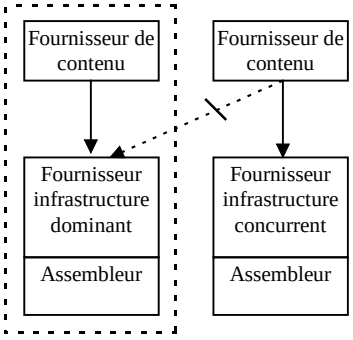


Quand les entreprises sont en partie verticalement intégrées, elles peuvent essayer d'exploiter leur position dominante sur un marché pour restreindre la concurrence sur un marché en amont ou en aval. Par exemple, une entreprise en position dominante en ce qui concerne le contenu, intégrée avec un fournisseur d'infrastructure, peut tenter de refuser ce contenu aux fournisseurs d'infrastructure concurrents afin de restreindre la concurrence sur le marché de l'infrastructure (voir le diagramme).



Des arrangements contractuels exclusifs empêchent les fournisseurs d'infrastructure concurrents d'accéder à un contenu de grande valeur, ce qui restreint la concurrence sur le marché de l'infrastructure.

Une autre éventualité est qu'une entreprise en position dominante pour la fourniture d'infrastructure aux consommateurs, qui est aussi verticalement intégrée dans la fourniture de contenu, refuse à un fournisseur de contenu concurrent l'accès à son infrastructure afin de restreindre la concurrence sur le marché du contenu. Le cas d'un câblo-opérateur dominant qui possède aussi une chaîne hertzienne en est un exemple notable. Le câblo-opérateur peut empêcher les chaînes hertziennes concurrente d'accéder à son réseau afin de restreindre la concurrence sur le marché hertzien. Cela peut expliquer pourquoi un certain nombre de pays de l'OCDE imposent des restrictions du type d'activité aux câblo-opérateurs, qui interdisent à ces derniers d'être propriétaires de chaînes de télévision hertziennes classiques. Cela peut aussi expliquer pourquoi certains pays maintiennent des règles de diffusion obligatoire ("must carry") qui obligent les câblo-opérateurs à offrir toutes les chaînes hertziennes reçues en clair de manière classique.[56]



Des arrangements contractuels exclusifs empêchent les fournisseurs de contenu concurrents d'accéder à une infrastructure dominante, ce qui restreint la concurrence sur le marché du contenu.

On notera que ces arrangements exclusifs ne sont possibles que dans le contexte d'une structure d'industrie du type (c) ci-dessus. Dans les structures d'industrie (d) et (e), les consommateurs contractent directement avec les fournisseurs de contenu et chaque fournisseur d'infrastructure est tenu d'offrir l'accès à tous les fournisseurs de contenu, ce qui rend ces arrangements exclusifs irréalisables.

Evidemment, si les entreprises ne sont pas individuellement dominantes, elles peuvent néanmoins être en mesure de conclure des arrangements horizontaux pour établir le même genre de restrictions de la concurrence que ci-dessus, c'est-à-dire pour restreindre la concurrence sur des marchés horizontaux, d'amont ou d'aval. Par exemple, aux Etats-Unis, une coentreprise réunissant tous les grands studios de cinéma a tenté de créer une chaîne de cinéma qui aurait rivalisé avec HBO, principale chaîne de cinéma sur le câble. Dans ce projet d'arrangement, la chaîne de cette coentreprise aurait eu des droits exclusifs sur la production des studios pendant neuf mois. Les autorités ont déclaré cet arrangement contraire à la législation antitrust américaine.

En outre, étant donné que les fusions peuvent jouer le même rôle que les arrangements contractuels, les arrangements exclusifs examinés ci-dessus peuvent se réaliser par des fusions verticales, avec l'avantage que cela peut peut-être moins attirer l'attention des autorités antitrust.

Les arrangements verticaux exclusifs sont-ils contraires à l'efficience ?

Dans les exemples ci-dessus, les entreprises cherchent à conclure des arrangements contractuels exclusifs (ou des fusions) avec des entreprises en amont ou en aval. La situation dans laquelle des arrangements exclusifs bloquent la concurrence sur les marchés en amont ou en aval s'appelle la "forclusion verticale". La forclusion verticale est-elle contraire à l'efficience ? La législation de la concurrence doit-elle viser à l'éviter ?

Tout d'abord, on peut remarquer que les arrangements verticaux exclusifs sont extrêmement courants dans l'industrie multimédia/ diffusion audiovisuelle. Il est courant, par exemple, que les chanteurs signent des contrats exclusifs avec les maisons de disques, que les romanciers signent des contrats exclusifs avec les éditeurs, etc.[57] En fait, il semble que les produits des médias aient un caractère particulier conduisant à une prédominance des arrangements verticaux exclusifs.

A première vue, il pourrait sembler que les arrangements verticaux exclusifs sont tout simplement inutiles, pour la raison suivante. Considérons une entreprise en amont qui vend un intrant essentiel à plusieurs entreprises en aval. On pourrait avancer que l'entreprise en amont peut recueillir toute la rente de monopole disponible en vendant simplement au prix de monopole à toutes les entreprises en aval. Toujours selon cet argument, l'entreprise en amont ne peut pas accroître sa rente en ne vendant qu'à une seule entreprise en aval.

Cependant, on reconnaît généralement que cet argument est incomplet à plusieurs égards. Certaines formes d'arrangements verticaux entre entreprises (y compris les arrangements verticaux exclusifs) peuvent être efficients dans certains contextes. En particulier, les arrangements verticaux exclusifs peuvent être efficients quand :

(a) Il existe *une concurrence imparfaite en aval*, conduisant à une double marginalisation. Quand les entreprises en aval possèdent une certaine puissance de marché, une tentative par le monopoliste en amont de vendre à un prix linéaire simple conduira les entreprises en aval à appliquer aux consommateurs finals un prix encore plus élevé, au détriment du bien-être global et des profits de l'entreprise en amont. Dans ce cas, le bien-être global et ces profits sont supérieurs si l'entreprise en amont vend le droit de commercialiser le produit en aval à une unique entreprise en aval (à l'intérieur de chaque marché en aval) à un prix forfaitaire et vend ensuite l'intrant essentiel à l'entreprise en aval au coût marginal.[58] (Un autre arrangement vertical qui ne nécessite pas l'exclusivité est le prix-plafond, forme de prix imposé ; en empêchant les entreprises en aval de majorer le prix du produit, on évite le problème de la double marginalisation).

(b) Les *entreprises en aval doivent apporter des intrants* qui rendent le produit plus attrayant pour les consommateurs. Par exemple, quand les entreprises en aval doivent faire des investissements dans le marketing et la promotion, si l'entreprise en amont se contentait de vendre à toutes les entreprises en aval à un prix linéaire simple, certaines des entreprises en aval pourraient "profiter gratuitement" de l'effort promotionnel des autres. Le niveau d'équilibre de la promotion serait bas ou nul, de manière contraire à l'efficience. Là encore, l'entreprise en amont peut augmenter le bien-être global en vendant le droit de

commercialiser le produit en aval à une unique entreprise en aval (à l'intérieur de chaque marché en aval) avec un tarif à deux parties comprenant une rémunération fixe et une rémunération par unité de l'intrant essentiel égale à son coût marginal.[59]

(c) L'extraction de rente efficiente nécessite une importante *discrimination par les prix* et l'entreprise en amont n'est pas capable de contrôler complètement les marchés sur lesquels opèrent les entreprises en aval. En général, l'application d'un prix fixe simple sur le marché en aval ne maximisera pas les profits de l'entreprise en amont. Elle peut augmenter ses profits au moyen de la discrimination par les prix : appliquer un prix plus élevé sur certains sous-marchés et plus bas sur d'autres. Si l'entreprise en amont ne peut identifier à l'avance tous les sous-marchés potentiels et confiner soigneusement chaque entreprise en aval dans un marché unique, elle peut arriver à accroître sa rente globale en vendant les droits de vente sur le marché en aval à une unique entreprise en aval qui a alors la volonté et la capacité d'exploiter pleinement les différents sous-marchés.

(d) L'entreprise en aval utilise les intrants en *proportions variables*. Dans ce cas, la vente de l'intrant essentiel à un prix de monopole linéaire simple conduit les entreprises en aval à effectuer une substitution au détriment de l'intrant essentiel, de manière contraire à l'efficience. On peut augmenter l'efficience globale et les profits en amont, comme précédemment, en vendant à une unique entreprise le droit de produire le produit de l'aval (en vendant l'intrant essentiel au coût marginal). Un autre arrangement vertical qui peut résoudre ce défaut d'efficience et qui ne nécessite pas l'exclusivité est la "vente liée", qui oblige les entreprises en aval à acheter tous leurs intrants (et non l'intrant monopolistique seulement) à l'entreprise en amont.[60]

(e) Les entreprises en aval doivent supporter un *coût irrécupérable*, propre à la relation avec l'entreprise en amont, pour produire le produit final, par exemple investir dans une capacité ou dans un équipement spécifique. La vente à plusieurs entreprises en aval entraîne une multiplication de ce coût, contraire à l'efficience.

Dans chacun de ces cas, un contrat exclusif est un des mécanismes possibles pour atteindre le résultat efficient. En outre, on peut démontrer que, dans de nombreuses circonstances, un contrat exclusif est *le seul* mécanisme qui permet d'atteindre l'efficience. Si l'entreprise en amont était obligée de vendre aux autres entreprises, on peut montrer que cela réduirait les profits de l'entreprise en amont, et cela peut les annuler complètement si le marché en aval est suffisamment concurrentiel.[61] On notera que dans le cas des exemples (b), (c) et (e), une entreprise en amont recherchera ces arrangements verticaux qu'elle soit ou non en position dominante. Les propriétés d'accroissement de l'efficience que possèdent ces arrangements verticaux ne dépendent pas de l'exercice d'une puissance de marché.

Comment ces principes s'appliquent-ils aux marchés de la diffusion audiovisuelle et des médias ? Considérons tout d'abord le cas où l'entreprise en amont est un producteur de contenu, qui veut vendre ce contenu à un fournisseur d'infrastructure/ assembleur en aval.

Les marchés de la diffusion audiovisuelle et des médias ont en commun avec d'autre formes de propriété intellectuelle la caractéristique que le coût marginal de production d'une unité supplémentaire pour la consommation est très faible ou même nul. Une fois qu'un film ou une émission de télévision a été réalisé, le coût d'adjonction d'une personne supplémentaire à l'auditoire est très proche de zéro. Quand un roman a été écrit ou une chanson a été créée, la coût de la reproduction est pratiquement nul. Du fait que les coûts marginaux de production sont si faibles, on peut tirer de grands profits d'une discrimination des

prix judicieuse. Les distributeurs de films, en particulier, sont bien connus pour maximiser les recettes d'un film en gérant soigneusement sa distribution, avec plusieurs "fenêtres" : exploitation dans les cinémas, télévision à la carte, cassettes vidéo, télévision à péage, télévision hertzienne en clair. En outre, il est clair que les diffuseurs et les éditeurs ou les maisons de disques investissent souvent des sommes importantes dans la promotion d'un contenu tel qu'un livre, un disque compact ou une émission de télévision. De plus, un diffuseur peut avoir besoin de mettre à niveau ses équipements pour tirer parti de toutes les possibilités multimédias interactives du contenu.

Il est donc clair que les producteurs de contenu (comme les romanciers, les chanteurs ou les fédérations sportives) et les fournisseurs d'infrastructure/ assembleurs chercheront à établir des arrangements verticaux exclusifs pour favoriser la discrimination des prix et un investissement efficient dans les efforts de promotion. Les producteurs de contenu peuvent aussi vouloir un contrat exclusif quand il y a un manque de concurrence sur le marché de l'édition ou de la diffusion audiovisuelle. Dans ce cas, une forme efficiente d'accord contractuel vertical consiste simplement à vendre des droits exclusifs sur le contenu au plus offrant contre une rémunération forfaitaire. Cela permet au producteur de contenu d'extraire toute la rente disponible et cela crée une incitation poussant le diffuseur en aval à promouvoir le contenu de manière efficiente et à exploiter toutes les possibilités qu'offre le marché (par une discrimination des prix judicieuse). Si l'on oblige les producteurs de contenu à vendre à tous les diffuseurs intéressés selon les mêmes conditions, cela les oblige essentiellement à appliquer un prix linéaire simple par consommateur. Cela limite l'incitation des diffuseurs à promouvoir le contenu et empêche toute discrimination des prix.

Autrement dit, au moins certaines formes d'arrangements exclusifs dans l'industrie multimédia sont à la fois efficientes et souhaitables. On notera toutefois que le fait qu'il soit plus efficient de vendre un contenu particulier à un unique diffuseur n'implique pas que tous les contenus de ce fournisseur de contenu doivent être vendus au même diffuseur. Les romanciers et les chanteurs peuvent changer d'éditeur ou de maison de disques au cours du temps et ils ne s'en privent pas. Le droit de diffuser des grands événements sportifs (comme le Superbowl aux Etats-Unis) est passé d'une chaîne de télévision à l'autre au cours du temps.

Cette analyse peut expliquer par l'efficience pourquoi un fournisseur de contenu peut vouloir un arrangement exclusif avec un unique diffuseur sur chaque marché (c'est-à-dire, des territoires exclusifs). La même analyse peut aussi donner quelques raisons pour lesquelles un diffuseur convient de ne pas diffuser d'autres contenus concurrents (c'est-à-dire, distribution exclusive). Un cas possible est que les fournisseurs de contenu doivent aussi effectuer un investissement pour promouvoir le diffuseur. Ils peuvent hésiter à le faire si, une fois que les consommateurs ont été attirés vers ce diffuseur, ils peuvent alors choisir de regarder un contenu concurrent. On peut illustrer cette situation, par exemple, par le cas d'un éditeur de jeux vidéo qui annonce qu'un jeu bien connu est disponible sur une console de jeu particulière. Cependant, de manière générale, il est rare de voir des fournisseurs de contenu recommander des fournisseurs d'infrastructure particuliers. Une autre cas possible est que le fournisseur de contenu doive effectuer dans son contenu un investissement spécifique propre au diffuseur (comme d'adapter son contenu pour tirer parti de toutes les capacités multimédias interactives qu'offre le diffuseur). Dans ce cas, le fournisseur de contenu peut hésiter à effectuer cet investissement sans avoir l'assurance d'un marché en aval. On approfondit l'économie de la compatibilité et de la normalisation dans la section suivante du document.

Dans l'analyse qui précède, les arrangements verticaux augmentent l'efficience et, en conséquence, accroissent le bien-être global. La théorie économique peut-elle aussi nous dire dans quels cas les arrangements verticaux exclusifs réduiront le bien-être ? De manière générale, la théorie

économique est beaucoup moins claire sur les situations où les arrangements verticaux réduisent le bien-être global. Aucune théorie ne s'est imposée. Dans la plupart des théories les effets des arrangements verticaux sur le bien-être sont positifs, neutres ou ambigus.

Il existe toutefois un argument assez immédiat quant à la raison pour laquelle la forclusion verticale sera contraire à l'efficience dans certains cas particuliers. Souvent, la technologie de production en aval présente des économies de gamme. Une entrée économique sur le marché en aval dans ces circonstances exige la production de toute la gamme des produits de l'aval. La restriction de l'accès à un intrant essentiel nécessaire à la production d'un seul des produits de la gamme n'accroît pas la puissance de marché que détient l'entreprise intégrée sur le marché en aval qui a besoin de cet intrant essentiel, mais elle accroît pas la puissance de marché de l'entreprise intégrée sur tous les autres produits vendus au moyen de la technologie de l'aval.

L'application à l'industrie de la diffusion audiovisuelle est immédiate. Supposons que la technologie en aval soit l'infrastructure de diffusion audiovisuelle. Elle peut servir à fournir des services de diffusion audiovisuelle variés (divertissement, sport, films, multimédia interactif ou télé-achat). Si une entreprise peut s'assurer une position dominante pour un intrant nécessaire à la fourniture d'un de ces services (par exemple, en acquérant les droits de diffusion des grands événements sportifs), cette entreprise peut limiter la capacité qu'ont les autres entreprises de fournir ce service et ainsi restreindre ou empêcher l'entrée de concurrents sur le marché de l'infrastructure. Cela n'augmente pas la valeur des droits sur les événement sportifs mais cela réduit le degré de concurrence (et donc accroît la rente de monopole) sur tous les autres services qui peuvent être fournis par l'infrastructure de diffusion audiovisuelle.

Les mêmes arguments pourraient aussi s'appliquer en direction de l'amont dans la chaîne de production. Il existe des économies de gamme dans la production de certaines formes de contenu, par exemple destiné à la fois au cinéma et à la télévision. Si un diffuseur intégré ayant une position dominante dans l'infrastructure était en mesure de refuser à un concurrent l'accès à l'auditoire de la télévision, il pourrait ainsi restreindre la concurrence sur le marché conjoint du contenu du cinéma et de la télévision et s'assurerait aussi des profits monopolistiques sur le marché du contenu du cinéma.[62] Cet effet pourrait expliquer pourquoi les diffuseurs nationaux dominants ont traditionnellement une forte intégration verticale et pourquoi, dans la plupart des pays, relativement peu de films sont produits sans la participation d'un diffuseur national dominant. Cela pourrait aussi expliquer pourquoi certains pays obligent les diffuseurs nationaux dominants à acheter le contenu de producteurs indépendants. Cette restriction accroît la concurrence sur le marché du cinéma en donnant accès au marché de la télévision, nécessaire pour bénéficier pleinement des économies de gamme.[63]

La forclusion verticale, telle qu'illustrée par ces exemples, repose sur l'hypothèse que le fournisseur d'infrastructure/ assembleur maîtrise l'accès du consommateur à certaines formes de contenu. Ce n'est (généralement) pas le cas jusqu'à présent, par exemple, sur le marché des services Internet. Grosso modo, la structure de marché de l'Internet correspond à celle illustrée dans (e) ci-dessus. Les consommateurs peuvent choisir séparément leur fournisseur d'infrastructure/ assembleur ("fournisseur de service Internet") et chaque fournisseur de service Internet offre (généralement) l'accès à tous les contenus.

Cependant, il se pourrait que cette absence de tentatives de forclusion sur le marché de l'Internet soit une anomalie historique ou un état transitoire. Dans les débuts des services en ligne, les utilisateurs de services comme Prodigy, AOL ou Compuserve ne pouvaient accéder à un contenu en dehors du réseau du fournisseur. La croissance du contenu extérieur a fait échouer cette stratégie, mais elle pourrait bien

réapparaître. Avec le développement de l'Internet, les fournisseurs de service Internet pourraient essayer d'obtenir un accès exclusif à des contenus de valeur afin d'évincer les fournisseurs de service Internet concurrents. Une autre éventualité est que les entreprises en position dominante dans la fourniture d'infrastructure (comme les compagnies de téléphone locales en place) essaient d'évincer les fournisseurs de service Internet concurrents en leur offrant des conditions d'accès au réseau défavorables. Des allégations de ce genre ont été émises en Nouvelle-Zélande où le fournisseur de service Internet dominant (exploité par la compagnie de téléphone en place dominante) offrait l'accès à l'Internet par un numéro libre-appel à un prix qui, d'après ces critiques, était inférieur au prix payé par les autres compagnies pour le même service libre-appel. Le même fournisseur de service Internet donne accès à une transmission vidéo en direct (et aux dernières 168 heures de vidéo archivées), mais seulement à ses propres clients et non à ceux des autres fournisseurs de service Internet. Ces deux actions peuvent, dans certaines conditions précises, avoir l'effet d'évincer les autres fournisseurs de service du marché.

Il importe d'indiquer qu'il existe aussi d'autres raisons pour lesquelles des entreprises peuvent souhaiter utiliser des arrangements exclusifs pour empêcher l'accès de concurrents, qui sont plus particuliers au contexte du secteur multimédia/ diffusion audiovisuelle. Comme on le verra plus loin, certains marchés de diffusion audiovisuelle peuvent présenter des "effets de réseau". En particulier, plus les consommateurs d'un système de diffusion particulier sont nombreux, plus les producteurs de contenu seront enclins à produire des contenus pour ce système. Plus il y a de contenu offert, plus les clients du système seront nombreux. Dans ce genre de contexte, un avantage précoce d'une forme ou d'une autre peut se traduire par une puissance de marché persistante. Refuser l'accès à des formes particulières de contenu peut être une stratégie pour empêcher l'essor d'un système concurrent. En outre, il peut exister une certaine forme d'économies d'échelle dans le secteur de la diffusion audiovisuelle qui découle du fait que les grands auditoires ont généralement plus de valeur (par spectateur) pour les annonceurs que les petits auditoires.[64]

Domination, communication bidirectionnelle et externalités de réseau

Jusqu'à présent, nous avons considéré la diffusion audiovisuelle essentiellement comme une communication entre les consommateurs et un groupe de "producteurs de contenu" précisément identifiable. Cependant, comme l'industrie des télécommunications vocales le montre bien, une forme particulière de préoccupations en matière de domination peut se manifester quand les consommateurs veulent aussi communiquer les uns avec les autres (par téléphone, télécopie, courrier électronique ou quelque autre forme future de communication multimédia). Sur ces marchés, les consommateurs tirent bénéfice de pouvoir communiquer avec un grand nombre d'autres consommateurs. Un fournisseur d'infrastructure/ assembleur qui réussit à obtenir la clientèle d'un grand nombre de consommateurs se trouvera donc en position de force par rapport à un fournisseur d'infrastructure/ assembleur qui n'a que quelques clients. Le grand réseau est en mesure d'exploiter sa position en imposant, pour l'échange de communications, des conditions qui sont défavorables pour le petit réseau.

Application à l'exécution de la législation de la concurrence

On a exposé dans les sections précédentes des situations où les arrangements contractuels exclusifs entre fournisseurs de contenu et fournisseurs d'infrastructure sont efficients et des situations où les entreprises dominantes peuvent exploiter leur position dominante pour restreindre la concurrence sur les marchés horizontaux ou verticaux. La question se pose de savoir si les autorités chargées de faire respecter la législation de la concurrence doivent chercher à empêcher ce comportement et, dans l'affirmative, quelles mesures elles doivent prendre.

En général, les questions d'abus de position dominante sont, pour ces autorités, parmi les plus difficiles et d'équilibre le plus délicat. L'analyse qui précède indique qu'il peut exister des comportements anticoncurrentiels et donc des situations où l'intervention en matière de concurrence se justifie. Cependant, cette intervention n'est peut-être pas toujours souhaitable, notamment quand des arrangements contractuels exclusifs sont nécessaires pour augmenter l'efficience globale ou quand il n'existe pas de remède efficacement applicable.

Nous pouvons toutefois énoncer les principes suivants :

- Premièrement, comme dans toute analyse de la concurrence, la définition de la "domination" et la définition du marché pertinent seront essentielles.

On ne devrait pas objecter aux arrangements verticaux exclusifs à moins que l'on puisse montrer qu'une des entreprises participant à l'arrangement est en position dominante à l'égard d'un marché particulier. La question de la définition du marché est donc importante. Dans l'analyse de définition du marché, il faut porter une grande attention aux substituts (par exemple, si un nombre suffisant de consommateurs considèrent les diverses formes de courses automobiles comme substituables, une position dominante dans le contenu de Formule 1 n'implique pas nécessairement une position dominante dans le contenu des courses automobiles), à l'étendue géographique (des consommateurs peuvent être en mesure de recevoir des émissions d'autres pays ou de diffuseurs internationaux) et aux aspects temporels (si les contrats sur le contenu sont renouvelés tous les un ou deux ans, par exemple, une position dominante peut s'affaiblir au cours du temps).

- Deuxièmement, l'opportunité de l'intervention dépendra, pour une part, du fait que l'arrangement exclusif possède ou non des propriétés manifestement favorables à l'efficience. On devrait tolérer les arrangements exclusifs qui se justifient par l'efficience quand la période d'exclusivité est appropriée au regard de ces arguments d'efficience.

L'analyse ci-dessus a mis en évidence plusieurs situations dans lesquelles des arrangements exclusifs peuvent accroître l'efficience. En particulier, un contrat exclusif sera efficient quand l'exclusivité est nécessaire pour protéger l'activité promotionnelle du fournisseur d'infrastructure et quand une discrimination des prix augmentera le rendement d'ensemble total. Une intervention contre ces contrats peut diminuer le bien-être global. Cependant, la nécessité de l'exclusivité à un moment donné n'implique pas que le fournisseur de contenu doive vendre au même fournisseur d'infrastructure au cours du temps. Même quand les contrats exclusifs sont efficients, il n'est pas nécessaire qu'ils durent plus longtemps que ce qu'il faut pour réaliser les objectifs visés. La durée du contrat ne devrait pas dépasser ce qui est nécessaire pour obtenir les effets bénéfiques requis. En outre, au moment où le contrat arrive à renouvellement, tous les fournisseurs concurrents devraient avoir la possibilité de faire une offre sur un pied d'égalité.[65]

- Troisièmement, les fusions ou les arrangements verticaux de grande ampleur entre des fournisseurs de contenu dominants et des fournisseurs d'infrastructure qui empêcheraient sur une longue période les autres fournisseurs d'infrastructure de faire une offre pour obtenir le droit au contenu devraient faire l'objet d'une grande vigilance de la part des autorités antitrust.

Les arrangements de ce genre risquent fortement de conduire à la création d'une position dominante dans la fourniture d'infrastructure. Les infrastructures concurrentes devraient avoir périodiquement la possibilité de faire une offre pour pouvoir accéder aux contenus clés. De même, la vigilance doit s'exercer sur les tentatives des fournisseurs d'infrastructure de signer des contrats exclusifs

de longue durée avec un groupe de fournisseurs de contenu qui, collectivement, seraient en position dominante.

- Quatrièmement, s'il existe des normes bien déterminées pour le contenu, les fusions ou les arrangements verticaux de grande ampleur entre des fournisseurs d'infrastructure dominants et des fournisseurs de contenu qui empêcheraient sur une longue période la diffusion de contenus concurrents par le fournisseur d'infrastructure devraient aussi faire l'objet d'une grande vigilance des autorités antitrust.

L'analyse ci-dessus a indiqué qu'il peut y avoir des arguments d'efficience justifiant que de fournisseurs d'infrastructure veuillent refuser l'accès à des contenus concurrents. Un de ces arguments est que cela protège les investissements que peut effectuer le fournisseur de contenu pour adapter son contenu aux caractéristiques particulières du système du diffuseur. On approfondit ci-dessous l'économie de la compatibilité et des normes. Toutefois, lorsqu'une norme pour le contenu s'est établie, ces arguments ne s'appliquent plus. En présence d'une norme stable et durable, l'exclusion persistante d'un contenu concurrent par un fournisseur d'infrastructure dominant devrait être examinée de près par les autorités antitrust. De même, cette vigilance devrait s'exercer sur les tentatives des fournisseurs de contenu de signer des contrats exclusifs de longue durée avec un groupe de fournisseurs d'infrastructure qui, collectivement, seraient en position dominante.

- Cinquièmement, quand il existe des externalités de réseau résultant de la nécessité d'une connectivité entre deux points quelconques (comme pour la téléphonie vocale classique), il ne devrait pas être permis aux réseaux dominants de refuser l'accès à leurs concurrents.

Ces principes sont implicites dans le résumé de Karel Van Miert, Commissaire à la concurrence de la Commission européenne :

> "Nous continuerons à nous intéresser de près aux contrats entre les studios de cinéma et les organismes sportifs, d'un côté, et les diffuseurs de télévision à péage, de l'autre. On ne peut permettre à aucun opérateur de contrôler la diffusion des films en première sortie ou des sports pendant une période de durée excessive. Nous examinerons l'étendue et la durée de l'exclusivité accordée dans ces contrats. ... Avec l'ouverture des marchés de télécommunications et le repositionnement des anciens et des nouveaux acteurs, nous devrons veiller à ce que des alliances horizontales ou verticales ne referment pas les portes que l'on vient juste d'ouvrir. Nous devons prendre garde que des compagnies opérant dans différentes parties du monde numérique ne s'unissent pour créer des goulots. Elles ne doivent pas non plus élargir des positions dominantes. Nous adoptons une attitude positive à l'égard des nouvelles associations et coentreprises verticales et horizontales, si l'on peut nous convaincre des réels avantages et synergies qui devraient constituer la logique à la base de ces initiatives. Si, au contraire, cela ressemble plutôt à une stratégie défensive pour accaparer les marchés et tenir à l'écart les concurrents, il faut alors appliquer sans hésitation la réglementation de la concurrence pour interdire cet accord".[66]

Droits de diffusion du sport et coopération entre les équipes sportives

Nous pouvons appliquer ces principes à la question de la diffusion du sport. Dans beaucoup de pays de l'OCDE, les questions entourant la diffusion du sport soulèvent des préoccupations importantes en matière de concurrence. Un grand nombre d'entre elles ont été examinées dans une Table ronde[67]

précédente du Comité du droit et de la politique de la concurrence sur les questions touchant à la concurrence dans le sport.

Comme dans beaucoup d'autres industries, il existe des circonstances dans l'industrie du sport où la coopération (et non la concurrence) entre les principales entreprises peut augmenter le bien-être global. Dans le cas du sport, les recettes tirées de la diffusion des événements sportifs dépendent non seulement de la qualité des équipes, mais aussi de la qualité *relative* de ces équipes. On se passionne plus pour un match très disputé. En conséquence, une équipe de tête a intérêt à faire en sorte qu'il y ait d'autres équipes qui connaissent le succès, afin qu'il existe un approvisionnement suffisant en adversaires de valeur.

On peut trouver des adversaires de valeur de deux manières : en les cherchant à plus grande distance (éventuellement au niveau international)[68] et/ou en favorisant le développement de rivaux. Un organisme indépendant est le mieux à même de favoriser le développement de rivaux. Pour que cette stratégie réussisse, il faut que les consommateurs pensent que les rivaux ont une chance de gagner. Si les consommateurs du sport considéré soupçonnent que les rivaux ne sont fabriqués que pour être battus, ils s'ennuieront rapidement. En conséquence, il existe une incitation même pour les équipes les plus solides à établir un organisme indépendant pour redistribuer leurs fonds aux équipes plus faibles, de manière objective et non discriminatoire.[69] Cette coopération a lieu souvent (mais pas nécessairement) dans le cadre d'une "ligue" (fédération) d'équipes. Par la redistribution des revenus, la ligue peut atténuer au cours du temps la disparité de qualité des équipes.

Souvent, dans son rôle de redistributeur des revenus, la ligue essaiera d'obtenir les droits exclusifs de diffusion des matchs. Quelquefois, les autorités de la concurrence ont fait objection à ces droits exclusifs.[70] Si la ligue n'a pas la maîtrise des droits de diffusion, qui sont une des sources de revenus les plus importantes pour la plupart des sports, cela peut réduire sa capacité de redistribution des fonds. Le fait de confier les droits de diffusion exclusifs à la ligue réduit la concurrence à l'égard de ces droits entre les différentes équipes de la ligue, mais cette réduction de la concurrence est compensée par l'avantage d'obtenir un produit global plus intéressant du point de vue des consommateurs.

On peut appliquer dans ce contexte les principes mentionnés ci-dessus. Bien que les droits exclusifs ne soient pas en eux-mêmes anticoncurrentiels, ils ne devraient pas durer plus que ce qui est nécessaire pour réaliser les objectifs d'efficience qui s'y attachent. Par exemple, ils ne devraient pas durer plus longtemps que ce qui est nécessaire pour le recouvrement des investissements promotionnels éventuels du diffuseur. Au moment de la renégociation, le diffuseur précédent ne devrait pas être placé dans une situation favorable. Par exemple, dans l'examen d'un cas où l'Association de football danoise a vendu tous les droits de diffusion télévisuelle en exclusivité pour une durée de 8 ans, avec une option de prolongation, le Conseil de la concurrence danois "n'a pas considéré que l'accord ait des effets dommageables sur la concurrence, à l'exception de l'option de prolongation. ... Le Conseil ne pense pas que l'exclusivité en elle-même pose un problème fondamental".[71] Le Conseil de la concurrence danois a eu sans doute raison d'objecter à la clause de prolongation du contrat, mais il semble qu'un contrat de 8 ans était déjà plus long qu'il n'est nécessaire pour recouvrer un investissement du diffuseur dans la promotion. Dans une autre affaire concernant les clauses régissant l'appel d'offres pour le renouvellement d'un contrat de diffusion, l'OFT a jugé anticoncurrentielle une clause autorisant BSkyB et la BBC à s'aligner sur toute offre concurrente pour la diffusion des matchs de football de la Premier League au Royaume-Uni.[72]

En outre, afin de garantir la possibilité de l'entrée de ligues rivales, chaque équipe ne devrait pas être liée à une ligue existante plus longtemps qu'il n'est nécessaire. Dans le cas de la Superleague

australienne, la ligue existante a essayé d'empêcher la défection de ses équipes au profit d'une nouvelle ligue appelée "Superleague", au moyen d'un système d'"accords d'engagement" et d'"accords de fidélité". Ces accords ont été par la suite annulés comme étant anticoncurrentiels.[73]

Résumé

La présente section peut se résumer par les points suivants :

- La demande de services de diffusion audiovisuelle vient de diverses sources, mais essentiellement des annonceurs et des consommateurs d'information et de divertissement. Ces deux groupes ont la possibilité de recourir à des substituts en dehors de la diffusion audiovisuelle. A l'intérieur du marché de la diffusion audiovisuelle, les divers types de contenu peuvent constituer des sous-marchés distincts. En général, la concurrence sur le marché de la diffusion audiovisuelle peut se caractériser comme une concurrence entre une large gamme de produits très différenciés mais connexes.

- L'entrée sur les marchés de la diffusion audiovisuelle nécessite l'accès au contenu et à un moyen de distribution. Les plus hautes barrières à l'entrée se situeront probablement sur le marché de l'accès à certaines formes de contenu (comme les grands événements sportifs) et sur les marchés de l'accès large bande au domicile du consommateur.

- Les barrières à l'entrée globales et les possibilités de comportement stratégique anticoncurrentiel dépendent de la structure globale de l'industrie. Il est difficile de prédire la structure future de l'industrie de la diffusion audiovisuelle, bien qu'on puisse avancer un ensemble de possibilités.

- Certaines des préoccupations les plus importantes en matière de concurrence dans l'industrie multimédia/ diffusion audiovisuelle concernent les relations verticales exclusives entre les entreprises. La théorie économique de la forclusion verticale montre que les relations verticales exclusives peuvent être efficientes dans de nombreuses circonstances. En particulier, un arrangement exclusif dans lequel un fournisseur de contenu vend à un unique diffuseur en aval peut être efficient quand le diffuseur doit investir dans la promotion du contenu, ou quand il est efficient de pratiquer une discrimination des prix sur le marché final.

- La forclusion verticale peut être anticoncurrentielle quand la technologie en aval présente des économies de gamme et que la restriction de l'accès à un intrant essentiel peut faire obstacle à l'entrée dans la gamme des produits de cette technologie en aval. Dans le contexte de la diffusion audiovisuelle, on peut en donner comme exemples les tentatives de s'assurer un accès exclusif à un contenu clé comme les grands événements sportifs ou les tentatives des fournisseurs de contenu de s'assurer un accès exclusif aux canaux de distribution large bande.

- L'analyse de la concurrence concernant des arrangements exclusifs particuliers dépendra des faits afférents à chaque cas et, en particulier, des implications qu'ont pour la concurrence les arrangements verticaux considérés, de l'ampleur et de la nature des éventuels effets d'efficience bénéfiques et de la nature du remède s'il en existe un. En général, on devrait tolérer les arrangements contractuels exclusifs quand leur durée ne dépasse pas ce qui est nécessaire pour réaliser les effets d'efficience éventuels. Toutefois, les fournisseurs de contenu et fournisseurs d'infrastructure concurrents devraient périodiquement avoir la

possibilité de faire une offre, sur un pied d'égalité, pour l'obtention du droit exclusif. Les tentatives de fournisseurs de contenu ou fournisseurs d'infrastructure dominants d'exclure indéfiniment (respectivement) des fournisseurs d'infrastructure ou fournisseurs de contenu concurrents (éventuellement au moyen de fusions verticales) devraient faire l'objet d'une grande vigilance des autorités antitrust.

La réglementation de la diffusion audiovisuelle

Dans beaucoup de pays de l'OCDE, mais non dans tous, la diffusion audiovisuelle reste une activité très réglementée. Cette réglementation résulte, pour une part, de facteurs technologiques historiques (manque de bande passante, coût élevé des systèmes de chiffrement-déchiffrement) et, pour une autre part, de la sensibilité des gouvernements à l'égard de ce qui était perçu comme un média puissant.

Il est clair que cette situation est en train de changer. Les contraintes de la bande passante s'amenuisent. La baisse des coûts de l'informatique a rendu la numérisation (et donc le chiffrement et le déchiffrement) non seulement réalisable mais très souhaitable. La diffusion audiovisuelle devient plus semblable aux autres industries des médias comme les journaux et les magazines (et sa réglementation évolue aussi dans ce sens). La réglementation, consistant jusqu'alors à contrôler directement le contenu et la publicité, évolue vers les préoccupations relatives à la concurrence et le contrôle de la puissance de marché. La présente section vise à mettre en évidence quelques-uns de ces changements importants dans la réglementation de la diffusion audiovisuelle.

Réglementation du contenu et de la publicité

Actuellement, dans les pays de l'OCDE, des interventions variées des pouvoirs publics visent à influer directement sur ce qui est diffusé, notamment le contenu de la programmation et le degré de publicité. Par exemple, il existe couramment des règles qui visent à promouvoir certaines catégories de programmes (comme les dramatiques, l'actualité ou les programmes à caractère national ou régional) ou les programmes ayant une certaine origine géographique (particulièrement d'origine nationale). Il existe aussi couramment des règles limitant la quantité de publicité par heure ou par jour ou l'emplacement de cette publicité. Quelques pays subventionnent aussi directement un ou plusieurs diffuseurs afin de réduire la publicité et/ou assurer une programmation de composition différente. La BBC au Royaume-Uni en offre un exemple notable.

Les fondements de la réglementation du contenu

Existe-t-il un fondement économique à ces interventions ?[74] Une des caractéristiques importantes des médias est leurs fortes économies d'échelle. Le coût de production d'un contenu donné est essentiellement fixe et indépendant de la taille de l'auditoire. Une fois que le contenu a été réalisé, le coût marginal de la consommation par un consommateur supplémentaire est faible ou même nul. En conséquence, il existe une tendance inhérente à tous les médias à viser les grands marchés. Les grands marchés sont généralement servis par des produits plus nombreux et de meilleure qualité que les petits marchés. Le marché des magazines féminins, par exemple, comprend plus de concurrents et de meilleure qualité que le marché des magazines destinés aux passionnés de trains à vapeur. Ce phénomène est commun à tous les marchés des médias. La diffusion audiovisuelle, qui a toujours été plus lourdement réglementée que les autres marchés des médias, a été réglementée pour d'autres raisons que les seules économies d'échelle.

Les fondements économiques de la réglementation de la diffusion audiovisuelle résultent de la conjonction historique de la rareté du spectre et de l'impossibilité d'exclure des spectateurs (c'est-à-dire, dans le passé, l'impossibilité de faire payer les spectateurs pour les services de diffusion audiovisuelle qu'ils recevaient). Les économistes ont remarqué que la télévision hertzienne en clair, notamment quand il existe des limitations du spectre restreignant le nombre de canaux disponibles, peut présenter des défauts d'efficience particuliers. Quelquefois, elle ne réussit pas à fournir certains types de programmes auxquels les spectateurs attachent une valeur. La télévision hertzienne en clair est produite entièrement au bénéfice des annonceurs. Les annonceurs se soucient en premier lieu de la taille de l'auditoire (et, dans une certaine mesure, d'autres caractéristiques de l'auditoire comme l'âge ou le revenu). Les annonceurs ne se soucient pas du tout de la quantité de "valeur" ou de "rente du consommateur" que les spectateurs reçoivent d'un programme. De manière générale, s'ils ont le choix entre deux programmes, les diffuseurs choisiront toujours celui qui attire le plus grand auditoire, quelle que soit la valeur ou la rente du consommateur que les spectateurs attachent au programme.[75] La télévision financée par les annonceurs a donc tendance à choisir une programmation visant les auditoires de masse (même quand les spectateurs n'attachent pas une grande valeur à cette programmation) au détriment d'une programmation visant des auditoires minoritaires (même quand ceux-ci lui attachent une forte valeur).

Avec l'augmentation du nombre des canaux, les intérêts minoritaires sont généralement mieux servis, du fait que chaque chaîne cherche de plus en plus à se spécialiser et à viser un segment spécifique de l'auditoire, d'une manière très semblable aux magazines qui ciblent des intérêts ou des marchés bien particuliers. Toutefois, le nombre de canaux nécessaires pour servir des minorités, même de taille de non négligeable, de manière adéquate peut être élevé et dépasser la quantité de spectre disponible pour la télévision hertzienne terrestre.

Il est clair que ces problèmes s'atténuent beaucoup avec le développement des services à abonnement multicanaux. Avec la télévision à péage, les spectateurs peuvent communiquer directement au diffuseur leur "valeur" ou leur "rente du consommateur" par le prix qu'ils sont disposés à payer. Si le nombre de canaux est suffisant, même les très petites minorités peuvent être servies (si leur désir de consommer les services de diffusion est suffisant).

La tendance à la prolifération des chaînes à péage (et la perspective future d'un nombre illimité de canaux) réduit à presque rien les préoccupations mentionnées ci-dessus au sujet de la télévision hertzienne en clair, au moins dans les pays où les réseaux de télévision à péage ont un taux de pénétration appréciable. De plus en plus, on admet que la prolifération de la bande passante conjuguée avec la croissance de la télévision à péage va pratiquement annihiler les justifications traditionnelles de la réglementation de la diffusion audiovisuelle.[76]

> "La tradition réglementaire du secteur de la diffusion audiovisuelle repose sur le fait que l'on utilisait des ressources publiques rares, le spectre de fréquences. Cette raison d'être de la réglementation de la diffusion audiovisuelle n'est plus valable.... Aucune des [raisons historiques de la réglementation] ne justifie de manière convaincante le maintien du lourd héritage réglementaire du service de diffusion audiovisuelle. L'augmentation de la capacité des réseaux résultant de la numérisation et la possibilité de livrer le contenu sur différentes plates-formes font que la rareté est un fondement moins important de l'intervention réglementaire dans l'environnement multimédia. Ces changements devraient être pris en compte dans tout réexamen du cadre réglementaire actuel des télécommunications."[77]

Le Livre vert britannique sur la convergence[78] résume l'état présent en ces termes :

> "Il faudrait en général inverser le présupposé suivant lequel la diffusion audiovisuelle et les communications doivent être réglementées".

Améliorer la réglementation existante

Même dans le cas où l'on ne supprimera pas immédiatement les réglementations existantes, on a souvent la possibilité d'accroître leur efficience économique. Peut-être à cause des préoccupations concernant le contenu qu'une concurrence non réglementée peut produire dans la diffusion hertzienne en clair, la plupart des pays essaient d'accroître la quantité de certaines formes de programmation, par une réglementation directe ou par des subventions ou les deux. La forme la plus courante de réglementation directe consiste en l'obligation de diffuser des programmes locaux, régionaux ou nationaux. Les subventions vont généralement aux diffuseurs du "service public" qui ont pour mission de "combler les lacunes" laissées par la télévision à financement publicitaire, avec des programmes destinés à des minorités ou des programmes coûteux de grande valeur aux yeux d'auditoires majoritaires.

Cependant, comme dans d'autres secteurs, quand les subventions vont à une unique entreprise, le gouvernement ne peut être sûr d'atteindre au moindre coût l'objectif souhaité. En outre, les entreprises subventionnées ont elles-mêmes peu d'incitations à la maîtrise des coûts. En rendant les subventions "disputables" entre les entreprises, il est possible de faire réaliser les objectifs publics à moindre coût. Analysys note que les mêmes principes qui guident la formulation des exigences du service universel dans les télécommunications s'appliquent à ces exigences de "service public" dans la diffusion audiovisuelle :

> "[Pour promouvoir l'efficience dans le service public de diffusion audiovisuelle], le modèle adopté pour le service universel dans le secteur des télécommunications en Allemagne, en Autriche et au Luxembourg peut être instructif. Dans ce modèle de réglementation, on suppose de manière générale que le service universel est assuré. Si, du fait d'une défaillance du marché, on pense que le service universel n'est pas assuré, les participants au marché peuvent soumettre une offre pour fournir ce service. Si la fourniture de ce service s'avère non rentable, on a établi un mécanisme qui prévoit les contributions que doivent apporter tous les participants au marché concernés. ... l'utilisation d'un processus d'appel d'offres pour la fourniture de "biens publics" ou de "services publics" est peut-être le système qui convient le mieux à moyen terme pour préserver le pluralisme et la diversité culturelle dans un environnement concurrentiel."[79]

En tout cas, comme on l'a remarqué ci-dessus, le fondement économique des subventions au contenu ne s'applique qu'à la télévision hertzienne en clair dans une situation de rareté des fréquences disponibles. La prolifération de la télévision à péage réduit à presque rien ces justifications, au moins dans les pays où les systèmes de télévision à péage ont un fort taux de pénétration. Cela pose la question de savoir si la radiodiffusion publique continuera de jouer un rôle dans le monde de la diffusion audiovisuelle futur. "Le service public de radiodiffusion paraîtra peut-être rétrospectivement une technologie monstrueuse : pendant un singulier demi-siècle, il a été possible à un média de communiquer le même contenu à la plus grande partie de la population d'un pays."[80]

> "L'évolution du marché et l'évolution historique ont conduit à un environnement où les fonctions exercées par les diffuseurs privés sont de plus en plus difficiles à distinguer de celles qu'assument les diffuseurs publics. Dans un environnement multimédia offrant la possibilité de multiples sources de contenu, les obligations habituelles de diversité, de pluralité et de représentation des minorités peuvent être satisfaites par des sources de diffusion audiovisuelle non publiques. Si cela a lieu, il conviendrait peut-être de réexaminer la position privilégiée que

détiennent les diffuseurs publics vis-à-vis des diffuseurs privés. Par exemple, si le pluralisme et autres objectifs du service public peuvent être assurés par tout l'éventail des participants au marché, au lieu d'une seule entité de diffusion publique, il peut être plus efficient pour l'Etat de parrainer une programmation de service public appropriée en recourant à un système d'appel d'offres ouvert et transparent. Cela permettrait la fourniture de services publics sous une forme non seulement comparable à la façon dont le service universel est assuré dans un certain nombre d'Etats membres, mais aussi compatible avec un marché concurrentiel."[81]

Mesures gouvernant la publicité

Certains pays réglementent aussi le degré de publicité et/ou les prix des services de télévision par abonnement. Par exemple, dans l'Union européenne, la publicité doit être diffusée par blocs séparés de la programmation et elle ne doit pas dépasser 15 pour cent du temps de diffusion quotidien. Le temps de diffusion consacré aux spots publicitaires dans toute période d'une heure ne doit pas dépasser 20 pour cent.[82]

La raison d'être économique de ces mesures gouvernant la publicité n'est pas claire. D'après certains arguments de théorie économique, une concurrence entre les chaînes limitée peut conduire à un degré de publicité plus élevé que ce ne serait le cas avec une concurrence plus effective. Les contraintes sur la publicité peuvent donc représenter pour les pouvoirs publics une conséquence nécessaire des contraintes imposées à l'entrée. Cependant, les contraintes sur la publicité, comme la réglementation des prix dans d'autres industries, peuvent aussi *limiter* le nombre d'entrants potentiels et ainsi restreindre la concurrence. En outre, avec l'intensification de la concurrence, notamment avec les chaînes de télévision à péage comportant peu de publicité, cet argument est de moins en moins valable. Il se pourrait, en fait, que ces mesures gouvernant la publicité faussent, d'une manière contraire à l'efficience, la concurrence au détriment de la télévision par abonnement.

On peut aussi noter qu'une forme ou une autre de mesures gouvernant le contenu sera certainement nécessaire dans l'industrie multimédia/ diffusion audiovisuelle du futur. En particulier, des dispositions gouvernant la dissémination d'informations qui peuvent être, d'une certaine manière, nocives. Dans la mesure où la diffusion audiovisuelle franchira de plus en plus les frontières nationales (comme le fait l'Internet aujourd'hui), ces dispositions nécessiteront une coopération internationale. Un examen complet de ces mesures dépasserait le cadre du présent document. On notera simplement qu'un certain nombre d'initiatives sont en cours.[83]

Réglementation de l'entrée

Pratiquement tous les pays de l'OCDE (à l'exception de la Nouvelle-Zélande) réglementent l'entrée dans les secteurs de la diffusion audiovisuelle et des télécommunications au moyen de licences. Si les licences ne restreignent pas nécessairement la concurrence, le coût, le délai et les conditions d'obtention d'une licence peuvent être une barrière à l'entrée, en particulier quand l'entrée a lieu sur plusieurs juridictions. Dans le cas de l'Union européenne, "la télévision par câble et la télévision hertzienne sont traditionnellement soumises à un degré de réglementation nettement plus élevé que le secteur de l'édition ou d'autres formes de masse-médias. Cette réglementation comprend un ensemble très lourd de procédures d'octroi de licences à caractère subjectif avec de très grandes différences d'un Etat membre à l'autre et qui confèrent aux autorités réglementaires un pouvoir très discrétionnaire. La subjectivité inhérente à l'octroi des licences tient en grande partie au fait que les questions relatives au contenu sont réglementées a priori dans le cadre du processus d'entrée sur le marché. En comparaison, le secteur de l'édition fonctionne dans toute l'Union européenne pratiquement sans réglementation a priori."[84]

Pour promouvoir la concurrence dans le secteur multimédia/diffusion audiovisuelle, il faut réduire autant que possible les barrières à l'entrée dues à la réglementation. Si l'on place la réglementation du contenu en dehors des exigences imposées pour l'obtention des licences, "il n'y a pas de raisons primordiales pour les pouvoirs publics d'imposer de lourdes conditions d'obtention des licences pour la fourniture des réseaux et/ou services dans un environnement multimédia. En fait, la politique de base devrait être que, si des services dans l'environnement hors ligne ne sont pas soumis à une réglementation (par exemple, la vente de livres), la livraison de ces mêmes services en ligne (par exemple, le téléchargement d'un livre) ne devrait pas être traitée de manière différente du point de vue réglementaire."[85]

On peut réduire les barrières à l'entrée dues à la réglementation en établissant des règles claires, transparentes et non discriminatoires gouvernant l'entrée sur le marché. Dans tous les cas possibles, on devrait abolir les exigences imposées pour l'obtention des licences. Il faudrait instaurer une reconnaissance mutuelle des licences délivrées dans les autres pays. Il faudrait simplifier, normaliser et harmoniser entre les pays les procédures d'octroi des licences, les critères de sélection des futurs titulaires de licence éventuels et les délais de délivrance des licences. Le cadre régissant la délivrance des licences dans le secteur des télécommunications formulé par la Directive sur les licences réalise un grand nombre de ces objectifs. Malheureusement, "les habitudes en matière de délivrance des licences dans le secteur de la diffusion audiovisuelle ne présentent pas un degré comparable de transparence et d'objectivité."[86]

> "Il conviendrait de porter une grande attention à la rationalisation des procédures d'octroi de licences dans la diffusion audiovisuelle afin de les mettre en plus grande concordance avec un marché ouvert qui se caractérise par la concurrence plutôt que par la rareté. En particulier, pour lever les incertitudes sur le marché, il faudrait rendre les procédures et conditions d'octroi des licences plus transparentes et moins subjectives dans leur application. Peut-être la seule façon de réaliser cet objectif dans le contexte du multimédia, tout en préservant la totalité des objectifs des pouvoirs publics en matière de diffusion audiovisuelle, consiste à séparer du processus de délivrance des licences toutes les questions relatives au contenu et aux autres aspects de la politique gouvernementale. De cette manière, le cadre régissant la délivrance des licences pour les réseaux et services de diffusion audiovisuelle pourrait suivre les mêmes principes réglementaires que ceux qui s'appliquent à la délivrance des licences pour les autres réseaux et services dans le domaine du multimédia. Il existe déjà des exemples d'une mise en œuvre effective de ce genre de procédures de délivrance des licences dans le contexte de l'autorisation des services de radiodiffusion par satellite."[87]

Réglementation du type d'activité et de la propriété des entreprises

Comme on l'a vu plus haut, l'effet de la convergence sur le degré de concurrence dans les marchés convergents dépend des barrières à l'entrée relatives sur les deux marchés. Quand il existe de fortes barrières à l'entrée sur un des deux marchés convergents, la convergence peut entraîner une réduction du nombre des concurrents sur l'autre marché. Quand il existe des coûts d'entrée irrécupérables (de telle sorte que le marché n'est pas parfaitement "contestable"), cette réduction du nombre des concurrents peut s'accompagner d'une hausse des prix pour les consommateurs.

Dans le contexte du multimédia/ diffusion audiovisuelle, il semble que les préoccupations les plus grandes sont celles qui entourent l'entrée dans les services de télévision par câble par l'exploitant de télécommunications en place dominant. Herbert Ungerer, de la DG IV de la Commission européenne, note que :

> "Les chiffres de l'OCDE [de 1995] montrent que les exploitants de télécommunications publiques [ETP] détiennent une part croissante du marché des abonnés au câble et, ainsi, la base qui permettrait la fourniture de l'accès aux télécommunications locales par des concurrents se rétrécit. ... Dans les Etats membres où il subsiste des monopoles dans l'infrastructure de télécommunications et la téléphonie vocale, cette part de marché croissante des ETP dans la télévision par câble est préoccupante dans la perspective de 1998. Cela signifie que la base de la concurrence dans la boucle locale est peut-être en train de rétrécir et que les monopolistes en place pourraient bien être en train de renforcer leur maîtrise d'un goulot d'accès aux consommateurs. ... De nombreuses parties de la zone de l'Union européenne sont déjà très désavantagées en comparaison, par exemple, du Canada et des Etats-Unis en ce qui concerne l'infrastructure indépendante disponible pour assurer cette concurrence. ... L'application des règles de la concurrence de l'Union européenne permet généralement d'empêcher l'extension d'une position dominante sur un marché, par exemple les télécommunications, à un autre marché, par exemple la télévision par câble. Nous surveillons donc de très près les initiatives des exploitants de télécommunications en place".[88]

Au Royaume-Uni, il est interdit à BT de fournir au public des services de divertissement par le câble à l'échelle nationale. Cette restriction doit expirer au plus tard en 2001. Les câblo-opérateurs au Royaume-Uni ont une part de marché de 4,9 pour cent dans la téléphonie vocale locale, ce qui est probablement le plus fort taux de pénétration de la concurrence sur le marché local dans le monde.

Il est clair qu'une restriction par le type d'activité, du genre de celle imposée au Royaume-Uni, devrait toujours être temporaire, comme c'est le cas dans ce pays. Une restriction du type d'activité permanente élève le coût des télécommunications en limitant la capacité qu'a l'exploitant en place de tirer parti des économies de gamme et, en conséquence, cela encourage des entrées excessives. La question clé est donc de savoir si une restriction temporaire du type d'activité a un effet persistant sur la structure du marché.

De fait, une restriction par le type d'activité du genre de celle imposée au Royaume-Uni représente une forme de subvention ou de protection temporaire pour les nouveaux entrants, similaire à la protection des "industries naissantes" quelquefois demandée dans les discussions sur le commerce international. Les arguments contre une restriction par le type d'activité de ce genre sont semblables aux arguments contre la protection des "industries naissantes" :

(a) Premièrement, les arguments de "l'industrie naissante" supposent qu'une impulsion initiale apportée à une industrie peut changer durablement la structure du marché. Si ce n'est pas le cas, cette impulsion initiale représente uniquement un coût pour la société, que l'on aurait pu éviter. Le problème est qu'il est difficile d'identifier les facteurs qui peuvent causer la persistance de l'impulsion initiale. Une source possible réside dans une asymétrie entre la facilité d'empêcher l'entrée par rapport à celle de forcer les concurrents existants à sortir. Quand il est plus difficile d'évincer les concurrents existants (dont les coûts sont pour une large part irrécupérables), une impulsion initiale sous la forme d'une restriction du type d'activité peut être suffisante pour changer durablement la structure du marché. Sinon, on devrait éviter les restrictions du type d'activité.

(b) Deuxièmement, et de manière connexe, la protection de "l'industrie naissante" tend à se prolonger dans la pratique. La protection crée une communauté d'intérêts, à savoir l'industrie protégée, en faveur de la continuation de la protection, notamment quand l'industrie elle-même prévoit que les effets de l'impulsion initiale ne dureront pas quand la

protection aura été retirée. Si la levée de la restriction est laissée peu ou prou à la discrétion des pouvoirs publics, on peut s'attendre à ce que l'industrie de la télévision par câble au Royaume-Uni milite pour son maintien.

Eu égard à ces préoccupations, il conviendrait de limiter fortement ces restrictions du type d'activité et de leur assigner une date d'extinction claire et non discrétionnaire quand elles existent.

On notera que ces considérations n'impliquent pas qu'on doive s'abstenir d'examiner soigneusement l'éventualité de mesures structurelles favorables à la concurrence au moment de la construction d'un nouveau régime réglementaire. Par exemple, en général, les entreprises en place dominantes qui fournissent un éventail de services devraient être décomposées en leurs différentes composantes quand cela accroît le degré de concurrence potentiel, que cela ne sacrifie pas des économies de gamme et que ce démantèlement ne peut pas être immédiatement inversé par une fusion que les autorités de la concurrence approuveraient. En particulier, comme le préconise un récent rapport de l'OCDE, quand ces conditions sont remplies, les exploitants du RTPC en place devraient être obligés de se séparer de leurs réseaux de télévision par câble au cours de la période de transition vers la concurrence[89].

Mesures régissant la propriété des entreprises et la pluralité

Une autre forme courante de réglementation de la diffusion audiovisuelle comprend les mesures régissant les liens de participation au capital des entreprises entre différents médias (c'est-à-dire, les mesures restreignant la possession de participations en même temps dans la télévision et dans la radio, ou dans la télévision et dans la presse, ou encore dans la télévision hertzienne et dans la télévision par câble[90] dans une même zone géographique, qui vont au-delà des mesures habituelles inhérentes à la législation de la concurrence). Ces restrictions sont dues, en partie, à des préoccupations concernant la concurrence mais, plus souvent, elles résultent du désir d'assurer la "pluralité" ou diversité d'opinions nécessaire à une société démocratique. Dans ce cas, on craint qu'une concentration de la propriété des médias prive le public de la diversité d'opinions souhaitable.

On ne sait pas très bien si les seules dispositions de la législation de la concurrence peuvent assurer le degré de pluralité qu'on semble désirer dans certains pays. On peut toutefois noter qu'il est très facile d'entrer dans les activités consistant à fournir des informations d'actualité. Il y a littéralement des milliers de sources d'informations d'actualité, comme les magazines ou les sites Internet. Dès lors que ces diverses sources ont la possibilité d'atteindre leur auditoire, il semble que les dispositions normales du droit de la concurrence appliquées à la télévision, à la radio et à la presse assurent un degré de pluralité adéquat.

En outre, divers arrangements en matière de propriété des entreprises permettent souvent de contourner les réglementations existantes. "En Allemagne, par exemple, les précédentes règles de la participation n'avaient pas empêché une forte concentration des médias d'apparaître par le biais de programmes complexes de participation croisée entre les deux conglomérats géants des médias, le groupe Bertelsmann/CLT et le groupe Kirsch/Springer, lesquels ont ainsi obtenu des positions dominantes sur le marché de la télévision. Ce cas montre que les réglementations de la participation ne sont pas forcément des mesures suffisantes ou efficaces pour limiter la concentration et garantir le pluralisme".[91]

Enfin, les réglementations peuvent devenir obsolètes du fait des changements technologiques, par exemple en raison de la croissance de la télévision à péage et de la télévision par câble. Par exemple, les restrictions qui s'appliquent aux chaînes hertziennes en clair sont généralement plus strictes que pour

les chaînes du câble. Pourtant, une seule chaîne à péage peut détenir une part d'audience beaucoup plus grande qu'une chaîne hertzienne en clair. Pour ces raisons, certains pays ont adopté un "modèle des parts d'audience", qui ne repose pas sur des limitations fixes des participations dans chaque forme de médias mais sur des limitations de la part totale que détient l'entité considérée dans l'audience totale des médias, calculée suivant une formule spécifiée.

La Commission européenne a formulé une proposition de directive suggérant que les pays de l'Union européenne réglementent la concentration des médias et assurent le pluralisme sur la base de la part de temps d'audience et non par des restrictions portant sur la propriété des entreprises. La difficulté de ces approches est que les problèmes sous-jacents ne sont pas bien spécifiés. Dans quelle mesure l'influence ou la pluralité sont-elles liées à la "part d'audience" ? Une forte part d'audience pour un programme sportif implique-t-elle une plus grande influence qu'une faible part d'audience pour un documentaire d'actualité ? En l'absence de plus ample information sur le lien entre les dispositions et les objectifs, il semble qu'il faille considérer ces propositions avec prudence.

Réglementation de la compatibilité

Les "systèmes d'accès conditionnel" sont une source particulière de préoccupations pour la réglementation. On peut définir les systèmes d'accès conditionnel comme étant les équipements de consommateur qui convertissent les signaux transmis sur l'infrastructure de télécommunications en sons et en images intelligibles pour les êtres humains. Les systèmes d'accès conditionnel peuvent aussi remplir d'autres fonctions, comme faire en sorte que les spectateurs ne puissent regarder que ce qu'ils ont payé, ou enregistrer les habitudes du spectateur (pour les besoins du diffuseur). Classiquement, un système d'accès conditionnel revêt la forme d'un boîtier-décodeur qui assure l'interface entre l'infrastructure de télécommunications et le poste de télévision du spectateur. Cependant, il y a peu de différence théorique entre ce décodeur et les autres équipements terminaux du consommateur (y compris le téléviseur lui-même qui convertit les signaux vidéo en images animées). Historiquement, les questions entourant les systèmes d'accès conditionnel ont pour origine la radiodiffusion par satellite, mais les mêmes questions se posent en ce qui concerne les équipements du consommateur associés aux autres voies d'accès large bande aboutissant à son domicile.

La question essentielle pour les pouvoirs publics concernant les systèmes d'accès conditionnel est de savoir si les autorités réglementaires devraient ou non imposer la compatibilité au niveau de la liaison large bande finale aboutissant au consommateur, de telle sorte que le même équipement terminal de ce consommateur puisse être utilisé avec des systèmes de diffusion audiovisuelle/ multimédia variés (c'est-à-dire, le passage de la structure de marché (a) ci-dessus à (b)). Le DTI expose le problème en ces termes : "Avec les équipements de consommateur relativement coûteux qui contiennent les moyens de contrôler l'accès, les consommateurs ne voudront pas en acheter plusieurs. Cela impliquera généralement que le premier présent sur le marché avec sa technologie d'accès particulière tendra à acquérir naturellement le rôle dominant de portier des nouveaux services. Les questions qui se posent alors sont les suivantes : comment assurer l'accès selon des conditions équitables, raisonnables et non discriminatoires entre tous les fournisseurs de services et tous les consommateurs, et comment réaliser l'interopérabilité entre des plates-formes technologiques différentes."[92]

L'Encadré 2 expose la situation présente concernant la compatibilité des systèmes d'accès conditionnel pour les services de radiodiffusion par satellite (RDS).

Deux questions sont à considérer, concernant l'effet d'une telle compatibilité obligatoire sur (a) la concurrence entre les systèmes de livraison large bande en présence d'effets de réseau et (b) sur la

capacité qu'ont les entreprises concurrentes d'élever stratégiquement les coûts de changement de fournisseur. Nous les considérons l'une après l'autre.

Encadré 2: Compatibilité des systèmes d'accès conditionnel pour les services de radiodiffusion par satellite (RDS) numérique dans la zone de l'OCDE

Aux **Etats-Unis,** les fournisseurs de services de RDS numérique ont des systèmes d'accès conditionnel différents.[93] Les compagnies DirecTV/USSB sont une exception. Les abonnés utilisent le même équipement de réception pour ces deux services, qui proposent des programmes différents. Le fait que DirecTV et USSB se partagent une position orbitale accroît leur incitation à adopter un système compatible.

Au **Canada**, les abonnés aux services par satellite existants ne seront généralement pas en mesure de recevoir les services de RDS numérique, qui utilisent une technologie de transmission différente. Le système d'accès conditionnel existant est conçu pour l'utilisation à l'intérieur du Canada parce que les contraintes du droit d'auteur et de la réglementation limitent les zones dans lesquelles le service peut être légalement fourni. Dans le cas d'ExpressVu, il est clairement déclaré que les décodeurs et les cartes à puce du système du réseau EchoStar ne seront pas programmés pour recevoir les signaux canadiens d'ExpressVu, de même que les décodeurs d'ExpressVu ne seront pas programmés pour recevoir les signaux américains, de telle sorte que ces services de réseau ne soient vendus que dans leurs pays respectifs.[94]

En **France**, il existe trois grands groupes d'opérateurs de services de RDS numérique : CanalSatellite, Télévision par satellite (TPS) et AB Productions. TPS et AB Sat ont lancé leurs produits en décembre 1996. AB Sat et CanalSatellite ont signé un accord Simulcrypt en avril 1997, qui permet aux abonnés de CanalSatellite de recevoir les programmes d'AB Sat. Ces deux opérateurs ont la même carte à puce et AB Sat paie un droit d'accès à CanalSatellite.

En **Allemagne,** le consortium MMBG (Multimedia Betriebsgesellschaft), qui réunit Deutsche Telekom, CLT, Bertelsmann, Canal Plus, RTL, ARD, ZDF et Debis, utilise la technologie SECA pour l'accès conditionnel. Ils sont en concurrence avec le groupe Kirch, qui soutient la technologie Irdeto avec son décodeur "d-box". En février 1997, DF1, qui appartient au groupe Kirch, était le principal fournisseur de services de RDS numérique en Allemagne.

Toutefois, quand Première, première chaîne de télévision à péage, qui appartient à Canal Plus, Bertelsmann et Kirch, lancera ses services pilotes avec la Mediabox mise au point par Canal Plus, la concurrence entre les systèmes d'accès conditionnel s'intensifiera.

L'**Espagne** a adopté des règles destinées à assurer la compatibilité des systèmes d'accès conditionnel de telle sorte qu'un unique décodeur donne accès à tous les services de RDS numérique. Les spécifications techniques ne sont pas encore fixées. CanalSatellite et le consortium DTS, qui réunit l'exploitant de télécommunications national Telefonica, le radiodiffuseur public Television Espanola (TVE) et le groupe de télévision mexicain Grupo Televisa seront en concurrence sur ce marché.[95] CanalSatellite a lancé ses services en janvier 1997 avec le décodeur Mediabox.

Au **Japon**, après le lancement de PerfecTV! en juin 1996, le ministère des Postes et Télécommunications a demandé en octobre 1996 aux opérateurs de services de RDS numérique existants ou attendus d'examiner la possibilité d'un récepteur-décodeur intégré universel. Dans un avenir proche, les spectateurs qui ont acheté le récepteur-décodeur intégré de PerfecTV! pourront recevoir JSkyB. On s'attend à ce que d'autres opérateurs de services de RDS numérique rendent leurs services aussi compatibles que possible. DirecTV projette de créer un système de récepteur-décodeur intégré universel compatible avec PerfecTV! et JSkyB, qui ont des systèmes d'accès conditionnel différents.[96]

En **Australie**, à la suite d'un changement de la réglementation entré en vigueur le 1er juillet 1997, les diffuseurs de télévision par satellite sur abonnement seront tenus de faire en sorte que leurs équipements de réception domestiques et leurs systèmes de gestion des abonnements soient accessibles par les autres diffuseurs par satellite.

Effets de réseau et concurrence entre systèmes incompatibles

Considérons d'abord le cas où le changement de fournisseur est de coût nul (par exemple, en l'absence d'investissement du consommateur dans les équipements nécessaires).

La concurrence entre des systèmes de diffusion audiovisuelle/ multimédia incompatibles peut présenter ce que l'on appelle des externalités de réseau, de manière analogue à la concurrence entre, par exemple, les vidéocassettes VHS et les vidéodisques numériques, entre les cassettes et les disques compacts dans les équipements audio, entre les protocoles analogiques et numériques dans les systèmes de téléphone cellulaire, etc. Ces marchés ont la caractéristique commune que la demande d'un système particulier est, pour une part, fonction du nombre des consommateurs que l'on s'attend à voir acheter le système. Plus les spectateurs sont nombreux à adopter un système d'accès conditionnel particulier, plus les producteurs de contenu seront enclins à fournir des contenus compatibles avec ce système. Plus on produit de contenu pour un système, plus les spectateurs seront nombreux à préférer ce système.

"Sur les marchés à effets de réseau, il existe une tendance naturelle à la normalisation de fait, ce qui signifie que tout le monde utilise le même système. En raison des forts éléments de rétroaction positive, les marchés de systèmes ont une tendance particulière au "basculement", c'est-à-dire le fait qu'un système a tendance à distancer ses rivaux dès lors qu'il a acquis un avantage initial. ... Parce qu'une entreprise possédant un petit avantage initial sur un marché de réseaux peut être en mesure de transformer cet avantage en une victoire plus grande et durable, la concurrence dans les industries de réseau peut être particulièrement intense, du moins jusqu'à ce qu'un vainqueur se dégage clairement."[97] "Si le résultat final va être le basculement à un système unique, les entreprises rivalisent en fait pour de futurs profits de monopole".

Il existe de nombreuses stratégies pour s'assurer un avantage initial. Par exemple, les entreprises concurrentes peuvent appliquer un prix inférieur au coût comme résultat d'équilibre. D'autres stratégies consistent à obtenir des droits exclusifs sur le contenu (afin d'empêcher l'accès des concurrents à ce contenu)[98] ou à influencer les convictions des consommateurs concernant le succès du système. Les entreprises peuvent aussi être en mesure d'accroître la crédibilité de leur prétention à la victoire finale dans cette concurrence en élevant les coûts de changement de fournisseur (comme on le verra plus loin).

On notera que les entreprises ne décideront pas toujours de se combattre afin d'établir une norme de fait. Souvent, les entreprises auront le choix entre une lutte totale et un accord sur les normes avec les concurrents. Pour ces entreprises, le choix est entre la concurrence en vue de devenir la norme (concurrence "pour le marché") et la concurrence sur des terrains classiques (comme le prix, le service ou les caractéristiques des produits : concurrence "sur le marché"). Dans une situation de compatibilité, "le champ de la concurrence n'est plus l'offre de l'entreprise dans sa globalité mais les caractéristiques de coût et de performances spécifiques de chaque composante. Ce principe général implique que si une entreprise a une offre globale nettement supérieure, comprenant son offre de produits, le parc existant et sa réputation, cette entreprise aura tendance à préférer l'incompatibilité et consacrera peut-être des ressources à empêcher la compatibilité. Au contraire, si chaque entreprise a une composante nettement supérieure, les deux entreprises peuvent préférer la compatibilité et consacrer des ressources à la réaliser.[99] ... [De manière générale] si une entreprise est sûre d'être le vainqueur [dans une concurrence avec incompatibilité], cette entreprise aura tendance à s'opposer à la compatibilité."[100]

Par exemple, les concurrents de Microsoft accusent souvent avec véhémence cette entreprise d'essayer d'introduire de petites incompatibilités dans sa propre mise en œuvre de Java. En introduisant

des incompatibilités dans sa version de Java, Microsoft peut la différencier des autres mises en œuvre de Java. En raison de la position de Microsoft sur le marché des ordinateurs personnels, ses tentatives d'établir une nouvelle norme ont des chances d'être crédibles et de réussir. Les autres créateurs de logiciels se mettront rapidement à produire des logiciels fonctionnant selon la norme de Microsoft. De cette manière, Microsoft peut arriver à acquérir une position dominante sur le marché des logiciels et produits Java.

La concurrence entre les entreprises visant à établir une norme de fait est-elle contraire à l'efficience ? En général, il est difficile de répondre à cette question. Il y a à la fois des coûts et des avantages. Les rentes de monopole potentielles sont un stimulant notable pour l'investissement dans la R-D, mais le coût des innovations qui en résultent peut être plus élevé qu'il n'était nécessaire (en raison de la "précipitation" du programme de recherche). Les rentes de monopole potentielles intensifient aussi la concurrence entre les entreprises, stimulant la diffusion d'une nouvelle technologie et accroissant la taille du marché. Cependant, les entreprises peuvent employer des ressources à obtenir ces rentes de monopole, d'où un gaspillage social. Les consommateurs peuvent retarder leur achat du produit en attendant qu'un vainqueur se dégage clairement.[101] Une fois atteint la position de monopole, l'entreprise en place peut avoir de fortes incitations à empêcher l'essor de nouvelles technologies rivales.

En outre, certains avancent que les marchés de réseaux présentent un "excès d'inertie" : une fois qu'une norme s'est établie, il peut être difficile pour une nouvelle technologie d'atteindre la masse critique nécessaire pour remplacer la norme existante.[102] "Dans un environnement évolutif, comme les industries des communications en convergence, la normalisation prématurée est un grand danger".[103]

D'un autre côté, la normalisation imposée comporte aussi clairement des coûts. Il existe un danger très réel que l'on normalise un protocole qui devienne ensuite obsolète. Certains pensent, par exemple, que la norme américaine NTSC de télévision en couleur est devenue périmée peu après son adoption. Comme on l'a vu plus haut, une normalisation imposée peut réduire les incitations à de nouvelles innovations de produit substantielles. En outre, la normalisation imposée peut limiter, pour les entreprises, leur possibilité de produire des produits différenciés servant des segments de marché différents.

En outre, on notera que, dans l'hypothèse où une norme dominante se dégage, cette norme peut, bien sûr, être remise en cause par l'émergence d'une norme complètement nouvelle offrant des services clairement supérieurs. L'histoire de l'industrie des ordinateurs personnels fournit une illustration importante de ce qui peut arriver dans un monde sans normes imposées par les gouvernements. Dans cette industrie, les normes sont transitoires. Des normes peuvent se développer, être très solides et puissantes pendant un temps, et ensuite disparaître quand arrive une nouveauté.[104]

Dans un contexte de changement technologique rapide, une intervention lourde sur les normes semble en fin de compte peu souhaitable. D'après un document récent de l'OCDE :

> "Il semble important de favoriser le libre jeu de la concurrence tout particulièrement dans les marchés changeants et incertains qui seront typiques de la convergence. Dans ces marchés, il est difficile de prévoir quelle plate-forme d'infrastructure sera la plus appropriée pour quel type de service, quelle application progressera le plus rapidement ou quel terminal sera le mieux adapté pour l'accès à différents services. Les entreprises devront procéder par tâtonnements. C'est pourquoi, il est primordial que les décisions concernant l'allocation des ressources soient fondées sur la demande et déterminées par le marché. Ceci est tellement vrai que la question de savoir si la réglementation – qui peut fréquemment entrer en conflit avec ces mécanismes du

marché – est réellement nécessaire doit être au premier plan du débat politique. La question de savoir si les développements au sein d'un environnement rapidement convergent sont trop complexes et trop changeants pour qu'il soit en fait possible d'établir proactivement une réglementation efficace doit également être examinée avec attention."[105]

L'élévation des coûts de changement de fournisseur

Il n'est pas courant qu'une entreprise oblige ses clients à acheter des installations qui ne sont pas situées dans leurs locaux (même des installations qui sont consacrées au service du client considéré, comme la ligne d'abonné dans les télécommunications[106]), mais si une entreprise exige que le client "achète" certains équipements situés chez ce dernier, cela peut avoir l'effet d'augmenter l'investissement du client dans la relation qu'il entretient avec cette compagnie, de la même manière que d'autres coûts fixes de commencement du service comme les "frais d'inscription" ou "frais d'installation". La décision de vendre (plutôt que de louer) au client certains de ses équipements peut avoir l'effet d'augmenter ses coûts de changement de fournisseur.

L'élévation des coûts de changement de fournisseur peut avoir pour effet de faire obstacle aux entrées nouvelles. Quand les coûts de changement de fournisseur sont importants, les nouveaux entrants ne pourront servir que de nouveaux clients. Quand l'entreprise en place est suffisamment dominante, le nombre de nouveaux clients peut être trop faible pour permettre à un nouvel entrant de réaliser les économies d'échelle nécessaires.

Si l'on impose la compatibilité dans ce contexte, cela empêche l'entreprise en place d'utiliser la vente d'équipements de client comme un moyen stratégique d'élever les coûts de changement de fournisseur (mais cela n'empêche pas cette entreprise de recourir à d'autres stratégies comme les "frais d'inscription" ou "frais d'installation").[107]

Conclusion : Doit-on chercher à réglementer la compatibilité ?

Globalement, les arguments relatifs aux effets de réseau et aux coûts de changement de fournisseur ne convainquent pas clairement qu'il faille rendre la compatibilité obligatoire pour les systèmes d'accès conditionnel. Dans l'industrie multimédia/ diffusion audiovisuelle, une norme technologique claire ne s'est pas encore dégagée. Différents moyens de communications (télévision hertzienne, télévision par satellite, Internet) ont actuellement leurs normes particulières. Imposer la compatibilité à ce stade risque de limiter la croissance de systèmes qui offrent des services radicalement nouveaux. Même s'il existe un risque qu'un unique système dominant s'établisse, dès lors que l'évolution technologique continuera, ce système sera vulnérable aux attaques de concurrents offrant un ensemble de services nettement meilleur.

En tous les cas, l'intervention d'autorités réglementaires pour remédier aux coûts de changement de fournisseur n'a guère de chance d'être efficace. La compatibilité obligatoire (ou d'autre stratégies visant à réduire l'investissement du client, comme l'obligation de "louer" le décodeur aux consommateurs) est une mesure qui peut être contournée par d'autres formes d'investissement du client, comme les "frais d'inscription" ou "frais d'installation".

Si, à un certain moment, le changement technologique ralentit et qu'une entreprise dominante se dégage, on peut envisager d'imposer certaines obligations liées au caractère de "goulot" ou d'"installation essentielle" du système d'accès conditionnel. Avant ce stade, une compatibilité obligatoire serait sans doute, tout bien considéré, inutile. Comme l'affirme la Commission européenne : "…en règle générale, les

questions d'accès aux réseaux et/ou au contenu, relèvent d'accords commerciaux soumis à l'application des règles de concurrence".[108]

Accords de compatibilité à l'initiative de l'industrie

Les accords sur des normes à l'initiative de l'industrie peuvent avoir d'importants effets bénéfiques. Par exemple, ils peuvent favoriser l'efficience (en évitant les coûteuses batailles de normalisation) et ils peuvent vaincre l'inertie des consommateurs due à l'incertitude quant à la norme qui l'emportera.[109]

Cependant, les accords de l'industrie sur les normes peuvent aussi soulever de sérieuses préoccupations en matière de concurrence. Un accord sur des normes, à la limite, peut n'être guère plus qu'un accord pour ne pas se faire concurrence par la R-D. De manière plus importante, un accord sur des normes entre certaines entreprises à l'intérieur de l'industrie peut être une tentative d'évincer d'autres entreprises afin d'acquérir une position dominante. En juillet 1995, la Commission européenne a rejeté le projet de NSD (Nordic Satellite Distribution) parce qu'il pouvait conduire à une domination du marché scandinave des distributeurs de programmes vidéo multicanaux. La Commission a souligné que NSD aurait détenu une position de gardien inacceptable sur les marchés considérés et aurait restreint le potentiel d'entrée sur les marchés.

En général, il importera de veiller à ce que :

(a) l'accès au processus de normalisation et aux normes elles-mêmes ne soit pas refusé de manière arbitraire, abusive ou déloyale à certains participants au marché ;

(b) la normalisation ne réduise pas inutilement la différenciation des produits et la concurrence dans la recherche et le développement et la conception des produits ;

(c) un large accès à des normes exclusives ne soit pas dissuasif pour l'innovation, en empêchant toutefois que des normes exclusives établies dans les débuts du multimédia ne permettent l'enracinement d'une position dominante ; et

(d) le processus de normalisation n'étende pas l'habitude de la coopération entre concurrents à d'autres aspects de leur comportement commercial.[110]

Les normes de diffusion numérique établies à l'initiative du "Digital Video Broadcasting Consortium", qui ont conduit en septembre 1997 à un accord en faveur de normes ouvertes pour les décodeurs dans toute l'Europe, constituent l'exemple le plus récent d'un effort visant à établir des normes ouvertes au niveau de la Communauté.[111]

Les autorités réglementaires peuvent aussi essayer d'imposer la compatibilité à d'autres stades de la chaîne de production. En particulier, ces autorités peuvent vouloir faire en sorte que tous les fournisseurs d'infrastructure/ assembleurs diffusent le contenu de tous les fournisseurs de contenu qui offrent leur contenu (c'est-à-dire, passer de la structure d'industrie (b) à (c), ci-dessus). Comme on l'a vu précédemment, cela a l'avantage d'éliminer la possibilité, pour le fournisseur d'infrastructure/ assembleur, de restreindre la concurrence par un accès exclusif au contenu. Certains pays maintiennent des règles de diffusion obligatoire qui obligent les câblo-opérateurs à offrir toutes les chaînes hertziennes reçues en clair de manière classique. Aux Etats-Unis, les câblo-opérateurs qui choisissent de diffuser les signaux de tout venant sont soumis à une moindre réglementation que les compagnies de câblodistribution classiques. La Directive de 1995 de la Commission européenne sur les services avancés de télévision demande aux Etats

membres de veiller à ce que les tiers puissent accéder aux technologies d'accès conditionnel "à des conditions équitables, raisonnables et non discriminatoires".

Quand les assembleurs sont obligés de fournir des contenus qu'ils n'auraient pas souhaité distribuer, ils peuvent rechercher d'autres moyens de discrimination. Par exemple, on s'est inquiété de la possibilité que les fournisseurs de "guides électroniques des programmes" et autres mécanismes destinés à aider les consommateurs à trouver les informations dont ils ont besoin (l'équivalent des "moteurs de recherche" de l'Internet) défavorisent l'accès à certaines catégories de contenu.

Législation anti-accaparement

Quelques pays ont essayé de faire en sorte que certains événements (notamment sportifs) soient diffusés sur la télévision hertzienne en clair, par opposition à la télévision à péage. Par exemple, la loi britannique empêche les chaînes de télévision par abonnement d'accaparer des droits exclusifs sur la diffusion de grands événements comme le tournoi de tennis de Wimbledon. Existe-t-il des fondements économiques à cette législation anti-accaparement ?

Transférer un contenu de la télévision hertzienne en clair à la télévision à péage revient essentiellement à convertir un "bien public" (tel qu'un parc public) en un "bien privé" (tel qu'un jardin privé) dont l'utilisation est payante. Chaque fois qu'un bien public est converti en un bien privé, il y a des gagnants et des perdants. En particulier, ceux qui utilisaient le plus le bien public vont perdre à ce changement. Cependant, il y a de bonnes raisons économiques à privatiser des biens. En particulier, les mécanismes du marché permettent de faire en sorte que les biens privés soient fournis dans les quantités et les qualités que demandent les consommateurs. Dans la télévision hertzienne en clair, le lien entre les recettes de la publicité et la valeur que les téléspectateurs attachent à ce qu'ils reçoivent est, dans le meilleur des cas, lâche. En diffusant ces événements sur la télévision à péage, ils attireront généralement plus d'argent, on pourra probablement diffuser un plus grand nombre d'événements et il y aura une meilleure adéquation entre les événements diffusés et les préférences des téléspectateurs.

Cependant, on a évoqué précédemment la possibilité que, en s'assurant l'accès à un contenu clé, une entreprise acquière une position dominante sur le marché de certaines formes de contenu et qu'elle puisse et souhaite utiliser cette position dominante pour restreindre la concurrence dans l'infrastructure en aval. Dans ces circonstances, un remède pourrait consister à exiger que le contenu clé soit mis à disposition par le biais d'autres infrastructures, comme la télévision hertzienne en clair. Autrement dit, bien que l'on présente rarement cela comme raison d'être, on peut interpréter cette législation anti-accaparement comme un moyen de limiter la puissance de marché que les entreprises sont susceptibles d'acquérir.

Cependant, ces arguments ne justifient pas la législation anti-accaparement telle qu'elle se présente couramment. Tout d'abord, pour apprécier si l'accès à un certain contenu conduira ou non au renforcement ou à l'acquisition d'une position dominante, il faut réaliser pour chaque cas une analyse de la concurrence spécifique en définissant soigneusement le marché et en tenant compte des autres contenus que détient l'acquéreur. Les autorités de la concurrence sont les mieux placées pour effectuer cette appréciation. En outre, comme on l'a vu ci-dessus, l'acquéreur doit refuser de mettre le contenu à la disposition d'exploitants d'infrastructure concurrents pendant une période relativement longue. Enfin, le remède peut consister simplement à raccourcir la période d'exclusivité du contrat, sans aller jusqu'à la cession obligatoire de droits de diffusion à la télévision hertzienne en clair.

Ce sont des questions qu'une application soigneuse de la législation de la concurrence par les autorités de la concurrence permet de traiter de manière adéquate. En conséquence, la législation anti-accaparement paraît inutile.

Institutions réglementaires

Comme on l'a indiqué précédemment, les changements touchant les économies de gamme qui donnent lieu à la convergence remettent aussi en question la structure des institutions réglementaires gouvernant le secteur de la diffusion audiovisuelle.

Dans de nombreux pays, les secteurs de la diffusion audiovisuelle et des télécommunications ont été jusqu'à présent soumis à des régimes réglementaires aux règles distinctes, administrés par des autorités différentes. On peut qualifier de "verticale" cette structure de réglementation, par opposition à une structure de réglementation "fonctionnelle" ou "horizontale" dans laquelle une ou plusieurs entités réglementaires sont chargées de fonctions spécifiques pour tout le secteur des communications.

Tableau 8 : Différentes structures de réglementation

Approche "verticale" de la réglementation			**Approche " horizontale " de la réglementation**	
Autorité de la diffusion audiovisuelle	**Autorité des télécommunications**		Délivrance de licences de diffusion audiovisuelle	Délivrance de licences de télécommunications
Délivrance de licences de diffusion audiovisuelle	Délivrance de licences de télécommunications	**Autorité économique____**	Réglementation des prix ; types d'activité ; réglementation de l'accès	Réglementation des prix ; types d'activité ; réglementation de l'accès
Réglementation des prix ; types d'activité ; réglementation de l'accès	Réglementation des prix ; types d'activité ; réglementation de l'accès	**Gestionnaire du spectre_____**	Attribution du spectre	Attribution du spectre
Attribution du spectre	Attribution du spectre	**Autorité de la concurrence____**	Répression des comportements anticoncurrentiels	Répression des comportements anticoncurrentiels
Répression des comportements anticoncurrentiels	Répression des comportements anticoncurrentiels	**Autorité du contenu_____**	Contrôle du contenu ; exigences de service public	Contrôle du contenu ; exigences de service public
Contrôle du contenu ; exigences de service public	Contrôle du contenu ; exigences de service public			

On observe au Royaume-Uni certaines caractéristiques de l'approche "verticale", comme le montre le tableau suivant. Les principaux inconvénients de cette approche tiennent dans le fait que, à mesure que la convergence progresse, les mêmes compagnies se trouvent de plus en plus soumises à la juridiction des autorités réglementaires des deux industries. Ces compagnies risquent ainsi d'être soumises à des exigences réglementaires contradictoires ou incohérentes. En outre, il peut apparaître de nouvelles entreprises qui échappent à la compétence des deux autorités réglementaires. En bref, l'approche verticale de la réglementation crée le risque à la fois de chevauchements et de lacunes dans les responsabilités réglementaires à l'égard du secteur en convergence.

Tableau 9 : Structure actuelle des institutions réglementaires au Royaume-Uni

	Industrie des télécommunications	Industrie de la diffusion audiovisuelle
Réglementation économique :	Department of Trade and Industry (DTI, ministère du Commerce et de l'Industrie), Oftel	DTI , OFTEL, Radiocommunications Agency ("RA"), Department of Culture, Media and Sport (DCMS, ministère de la Culture, des Médias et des Sports), Independent Television Commission (ITC, Commission de la télévision indépendante)
Réglementation du contenu :	DTI , Home Office (HO, ministère de l'Intérieur) (obscénité), ICSTIS (autodiscipline des services d'audiotex)	DCMS, ITC, HO (obscénité), BBC, S4C, Broadcasting Standards Commission (normes de radiodiffusion), British Board of Film Classification (classification des films), Radio Authority, BBC
Réglementation de la concurrence :	DTI, Oftel, OFT, MMC	DTI, Oftel, OFT, MMC, ITC et Radio Authority (fourniture de services soumis à licence et services connexes, possession transsectorielle de médias), Oftel et ITC (juridiction partagée sur les guides électroniques des programmes)
Réglementation du spectre :	RA	RA, ITC

Source : d'après DTI (1998), page 20

Le Royaume-Uni note que : "L'affaiblissement des distinctions entre les plates-formes de livraison attire l'attention sur les différences des approches réglementaires à l'égard des différents médias. ... L'interaction croissante entre les autorités réglementaires peut être une source de conflit, de trouble ou d'incohérence si les missions légales de chacune ne sont pas clairement définies et rationnellement réparties. Les responsabilités des autorités sectorielles existantes ont été formulées en fonction d'un ensemble de définitions des services. Avec le temps, cela risque de ne plus correspondre à la nature ou à l'éventail des services offerts, et cela suppose que des services particuliers sont associés à des plates-formes spécifiques, ce qui peut ne pas être le cas dans l'avenir. ... Une entreprise opérant dans les secteurs issus de la convergence est potentiellement assujettie à la surveillance de plusieurs autorités différentes, investies de fonctions réglementaires spécifiques. Bien que ce ne soit pas toujours déraisonnable, quand il s'y ajoute un chevauchement des responsabilités les entreprises risquent d'être jugées deux fois par ces autorités, avec la possibilité de décisions différentes rendues par des autorités différentes et le risque que des concurrents souhaitant une "bonne" décision réglementaire choisissent en conséquence l'autorité qui la réglementera. ... les missions légales spécifiques de chaque autorité réglementaire tendent à focaliser leur attention sur différents sous-ensembles de l'éventail des activités économiques en présence. En conséquence, il est possible qu'avec l'émergence de nouveaux services il y ait un hiatus entre des autorités réglementaires de telle sorte qu'il apparaisse des lacunes dans le champ couvert par la réglementation aussi bien que des chevauchements."[112]

"Avec la convergence technologique, il n'est plus possible de confiner de manière réaliste la politique réglementaire à l'intérieur d'étroits secteurs verticaux. Des politiques comme celle de l'accès conditionnel, par exemple, ne devraient pas se limiter à la "diffusion de télévision" (comme c'est le cas actuellement avec la Directive sur les normes de télévision), mais devraient être formulées de manière

cohérente pour tout l'éventail des services multimédias. On peut trouver un exemple récent de ce genre de législation orientée vers l'avenir avec la proposition de Directive sur l'accès conditionnel qui, à la différence de la Directive sur les normes de télévision, aborde certains aspects des systèmes d'accès conditionnel pour tout l'éventail des services multimédias"[113] "Le modèle statique existant de réglementation verticale pour les secteurs respectifs des télécommunications, de la diffusion audiovisuelle et de l'édition nécessite un réexamen radical. Une approche orientée vers l'avenir à l'égard de la réglementation serait de nature plus horizontale et chercherait à régir les questions communes essentielles transversales aux lignes verticales traditionnelles de la réglementation sectorielle."[114]

On trouve des exemples évidents de ce type d'approche "horizontale" transsectorielle à l'égard de la réglementation dans le secteur financier. En Australie, à la suite de l'enquête Wallis, une réforme des institutions ayant compétence dans le secteur financier a été décidée en vue d'établir un certain nombre d'autorités agissant sur l'ensemble de ce secteur. En Norvège et au Royaume-Uni, une unique autorité financière ayant compétence sur tout ce secteur a été créée.

Il existe aussi une tendance vers une réglementation "horizontale" de ce genre dans le secteur de la diffusion audiovisuelle, en particulier pour certaines fonctions. Par exemple, dans 10 Etats membres de l'Union européenne, un même organisme réglementaire pour les secteurs des télécommunications et de la diffusion audiovisuelle est chargé d'allouer le spectre. L'Italie a concentré toutes les responsabilités de réglementation pour les télécommunications et la diffusion audiovisuelle dans un unique organisme, l'Autorité des communications. "Les déclarations officielles au Royaume-Uni laissent penser que cette convergence est envisagée comme une option probable d'ici 1999 pour un ensemble de fonctions réglementaires "économiques", comprenant la délivrance des licences et la gestion des ressources (avec l'établissement futur de l'OfCom)".[115]

L'orientation future de la réglementation

En introduction à la présente section, on a noté que l'orientation de la réglementation est en train de changer : les préoccupations relatives au contrôle du contenu et de la publicité cèdent la place à celles qui concernent la concurrence et le contrôle de la puissance de marché. Si l'on excepte le contrôle des contenus indésirables et la réglementation nécessaire pour définir et faire respecter les droits de propriété afférents au spectre, deux aspects qui resteront vraisemblablement nécessaires à l'avenir, quelles autres mesures réglementaires sont-elles requises ?

Parmi les commentateurs, au moins quelques-uns affirment que la réglementation future de la diffusion audiovisuelle devrait reposer essentiellement sur la législation de la concurrence, avec d'autres règles prescriptives seulement nécessaires pour la période de transition. Par exemple, l'Oftel est d'avis que, quand le futur régime concurrentiel de la diffusion audiovisuelle se sera pleinement établi, "la plupart des règles prescriptives détaillées qui s'appliquent actuellement dans les télécommunications et dans la diffusion audiovisuelle pourront et devront disparaître. Elles ne sont pas nécessaires sur un marché qui fonctionne bien, dans le cadre de la législation générale de la concurrence. Seul un petit sous-ensemble des règles actuellement appliquées aux marchés de la diffusion audiovisuelle et de la téléphonie sera nécessaire... A court terme, pendant la période de transition, quelques autres règles détaillées sont requises, mais même durant cette transition on peut abandonner une grande partie des règles prescriptives existantes".[116]

Ce point trouve un écho dans un document récent de l'OCDE sur la convergence :

> "La thèse suivant laquelle la réglementation s'orienterait rapidement vers une forme de loi concurrentielle générale s'est vue renforcée par la constatation qu'il est, compte tenu de la

complexité, de la dynamique et de l'imprévisibilité de la convergence, extrêmement difficile de déterminer proactivement des principes réglementaires. Des dispositions réglementaires peuvent toutefois se justifier dans des domaines circonscrits et pour une durée limitée, et ce dans le but de réaliser des objectifs spécifiques allant dans l'intérêt public".[117]

En tout cas, même si aucune mesure n'est prise, le développement de l'Internet pourrait de plus en plus supplanter les formes classiques de diffusion audiovisuelle. Si l'on réussit à résoudre les problèmes de l'accès aux contenus clés et de l'accès aux liaisons à haute largeur de bande aboutissant au consommateur, l'Internet peut devenir le média de diffusion audiovisuelle de l'avenir. La réglementation des diffuseurs de type classique pourrait subsister mais elle serait de plus en plus hors de propos.

Résumé

La présente section peut se résumer par les points suivants :

- La diffusion audiovisuelle reste, dans la plupart des pays de l'OCDE, une activité très réglementée. Les justifications économiques traditionnelles de la réglementation de la diffusion audiovisuelle deviennent obsolètes dans beaucoup de pays de l'OCDE en raison de la prolifération de la bande passante disponible et du développement de la télévision à péage.

- Dans les cas où il subsistera une intervention de l'Etat dans le contenu de la diffusion audiovisuelle, le moyen le plus efficient sera un système de subventions disputables.

- Certains pays de l'OCDE réglementent aussi la quantité et l'emplacement de la publicité. Il n'y a guère de fondements économiques à cette réglementation. Cette réglementation peut être une conséquence des contraintes imposées à l'entrée. Avec la levée des restrictions pesant sur l'entrée et avec l'accroissement de la concurrence, notamment de la télévision à péage, la raison d'être cette réglementation disparaîtra.

- Les exigences imposées pour l'obtention des licences de diffusion audiovisuelle dans les pays de l'OCDE peuvent être excessivement pesantes. On peut réduire les barrières à l'entrée en supprimant ces exigences ou en les remplaçant par une simple notification ou des licences délivrées par catégorie. La reconnaissance mutuelle et l'harmonisation des exigences pour l'obtention des licences réduisent encore les barrières à l'entrée transfrontières.

- Au moins un pays de l'OCDE impose des restrictions du type d'activité asymétriques qui limitent la possibilité, pour l'exploitant du RTPC en place, de fournir des services de télévision par câble, mais non l'inverse. Les arguments en faveur de ces restrictions du type d'activité reposent sur équilibre délicat. Dans le cas où on les impose, il conviendrait de leur fixer une date d'extinction claire et non discrétionnaire.

- Les questions de normalisation et de compatibilité sont un sujet de préoccupation important pour les pouvoirs publics. En particulier, on a soulevé le point de savoir s'il fallait exiger que les équipements terminaux de client ("systèmes d'accès conditionnel") soient compatibles avec les signaux des fournisseurs d'infrastructure concurrents. Les exigences de ce genre changent la nature de la concurrence. Elles peuvent réduire la concurrence sur le plan de la configuration globale des services (et s'opposer à d'éventuels nouveaux services révolutionnaires) mais elles peuvent accroître la concurrence dans les différentes

composantes des services. Tout bien pesé, étant donné le changement technologique rapide dans cette industrie, il serait inapproprié d'imposer des obligations de compatibilité au stade actuel.

- Dans de nombreux cas, les acteurs de l'industrie eux-mêmes décideront d'adopter des normes plutôt que de lutter pour établir une norme de fait. Ces accords peuvent favoriser l'efficience mais ils doivent faire l'objet d'une grande vigilance de la part des autorités antitrust.

- Dans certains pays, les institutions réglementaires gouvernant la diffusion audiovisuelle et les télécommunications sont séparées et ont des missions et fonctions "verticales" comparables. La convergence de ces deux industries remet en question ces structures. On peut remédier aux exigences contradictoires et au conflit entre ces institutions au moyen d'une structure institutionnelle qui attribue des fonctions réglementaires séparées (comme la gestion du spectre ou l'application de la législation de la concurrence) à des autorités à juridiction transsectorielle.

- Certains commentateurs pensent qu'en dehors du maintien de la réglementation réprimant les contenus indésirables et de la réglementation nécessaire pour définir et faire respecter les droits de propriété afférents au spectre, le futur régime réglementaire de la diffusion audiovisuelle et des télécommunications reposera essentiellement sur la législation de la concurrence, les autres règles plus prescriptives n'étant requises que pour la période de transition.

Conclusion

L'industrie multimédia/ diffusion audiovisuelle connaît un changement fondamental. Les perspectives qui s'ouvrent en conséquence sur le marché sont importantes et pourraient même se comparer à celles qui ont accompagné le développement de l'ordinateur personnel lui-même. Cette évolution et les changements de la structure du marché qui en résultent remettent en cause les régimes réglementaires existants et soulèvent des questions nouvelles et importantes en matière de concurrence. Dans le présent document, on a essayé de discerner et de clarifier quelques-unes de ces questions clés concernant la réglementation et la concurrence, que l'on peut s'attendre à voir se poser au cours de la transition vers l'industrie multimédia/ diffusion audiovisuelle de l'avenir.

Concernant la concurrence, un des thèmes sous-jacents du présent document est que le passage à une pleine concurrence dans le secteur multimédia/ diffusion audiovisuelle nécessitera sur ce plan des jugements équilibrés. D'un côté, il sera nécessaire de faire respecter soigneusement une concurrence effective pour empêcher les entreprises d'acquérir, au moyen de fusions ou d'accords, des droits exclusifs sur les contenus clés ou une position dominante sur le marché de l'accès large bande au consommateur. D'un autre côté, sur la plupart des marchés, il paraît inapproprié d'aller plus loin en imposant un accès généralisé aux décodeurs ou en soumettant les exploitants en place dominants à des restrictions du type d'activité.

Concernant la réglementation, un des thèmes qui se dégagent de ce document est que les structures réglementaires de la diffusion audiovisuelle établies pour les anciennes technologies sont inappropriées dans le monde de la diffusion multimédia interactive large bande. Les exigences pour l'obtention des licences, les mesures de contrôle du contenu, les mesures de contrôle de la publicité et les subventions aux diffuseurs publics apparaissent de plus en plus injustifiables pour le monde futur de la diffusion audiovisuelle. Les institutions réglementaires établies pour une époque antérieure à la convergence, où la diffusion audiovisuelle et les télécommunications étaient des industries séparées, sont de plus en plus obsolètes et peuvent entraver la progression vers la convergence. Il faudra s'attacher à démanteler les cadres institutionnels réglementaires érigés pour les anciennes technologies. Etant donné les changements technologiques à la base de la convergence, le futur régime réglementaire de la diffusion audiovisuelle sera beaucoup plus léger que dans le passé. Dans la plupart des pays, un cadre réglementaire simple et léger reposant sur une application attentive de la législation de la concurrence par l'autorité compétente en matière de concurrence sera suffisant.

Annexe A : Ménages ayant un téléviseur, abonnés des DPVM, pénétration des services de télévision par câble et des services de radiodiffusion par satellite analogique ou numérique, 1995

	Ménages ayant un téléviseur[1]		Abonnés des DPVM[3]		Abonnés de la télévision par câble[4]			Abonnés RDS analogique ou numérique[5]		
	Total 1995 (milliers)	% du total des ménages[2]	Total 1995 DPVM (milliers)	% du total des ménages ayant un téléviseur	Total 1995 (milliers)	% du total des ménages ayant un téléviseur	% du total DPVM	Total 1995 (milliers)	% du total des ménages ayant un téléviseur	% du total DPVM
Australie	6000	93.8	180	3.0	180	3.0	100.0	0	0.0	0.0
Autriche	2648	85.4	1825	68.9	1035	39.1	56.7	790	29.8	43.3
Belgique	3968	99.0	3654	92.1	3629	91.5	99.3	25	0.6	0.7
Canada	10286	98.0	8066	78.4	7791	75.7	96.6	275	2.7	3.4
République tchèque	3585	90.3	1190	33.2	640	17.9	53.8	550	15.3	46.2
Danemark	2061	86.8	1600	77.6	1383	67.1	86.4	217	10.5	13.6
Finlande	1915	89.1	881	46.0	827	43.2	93.9	54	2.8	6.1
France	20500	90.9	2224	10.9	1496	7.3	67.3	728	3.6	32.7
Allemagne	32634	88.3	21807	66.8	15808	48.4	72.5	5999	18.4	27.5
Grèce	3517	93.0	130	3.7	0	0.0	0.0	130	3.7	100.0
Hongrie	3687	96.9	1832	49.7	1530	41.5	83.5	302	8.2	16.5
Islande	84	88.6	5	6.2	1	1.4	23.1	4	4.8	76.9
Irlande	958	90.1	561	58.6	476	49.7	84.8	85	8.9	15.2
Italie	15864	75.3	480	3.0	0	0.0	0.0	480	3.0	100.0
Japon	34374	79.1	10490	30.5	3009	8.8	28.7	7481	21.8	71.3
Corée	12000	92.3	3073	25.6	2573	21.4	83.7	500	4.2	16.3
Luxembourg	136	99.0	118	86.8	116	85.3	98.3	2	1.5	1.7
Mexique	16000	77.7	1144	7.2	1144	7.2	100.0	0	0.0	0.0
Pays-Bas	6067	98.0	5950	98.1	5700	94.0	95.8	250	4.1	4.2
Nouvelle-Zélande	1009	80.7	1	0.1	1	0.1	100.0	0	0.0	0.0
Norvège	1575	99.0	872	55.4	670	42.5	76.8	202	12.8	23.2
Pologne	10200	. .	3018	29.6	1380	13.5	45.7	1638	16.1	54.3
Portugal	4004	96.4	445	11.1	59	1.5	13.2	386	9.6	86.8
Espagne	11700	96.0	466	4.0	300	2.6	64.4	166	1.4	35.6
Suède	3352	88.2	2398	71.5	1900	56.7	79.2	498	14.9	20.8
Suisse	2623	75.1	2532	96.5	2400	91.5	94.8	132	5.0	5.2
Turquie	6760	50.7	482	7.1	404	6.0	83.8	78	1.2	16.2
Royaume-Uni	21176	92.1	4660	22.0	1420	6.7	30.5	3240	15.3	69.5
Etats-Unis[6]	95900	99.4	67275	70.2	62450	65.1	92.8	4016	4.2	6.0
Total OCDE	334583	97.8	149415	44.7	118323	35.4	79.2	30283	9.1	20.3

1. Données de 1994 pour le Canada, la France, la Hongrie, l'Irlande, l'Italie, la Corée, la Nouvelle-Zélande, la Pologne, la Suède et le Royaume-Uni. Données de 1993 pour le nombre total de ménages.

2. Les données pour la Belgique, la France, la Grèce, le Luxembourg, les Pays-Bas, la Norvège et les Etats-Unis sont tirées de OCDE, *Perspectives des communications 1997*. Les autres données ont principalement pour source l'Union internationale des télécommunications (UIT).

3. Le nombre d'abonnés des DPVM est la somme des abonnés à la télévision par câble et des abonnés à la radiodiffusion par satellite analogique et numérique. Par manque de données, les services de distribution multipoint multicanal et la télévision par satellite avec antenne collective ne sont pas inclus dans les données des DPVM, bien que ces médias soient d'importants services de DPVM dans certains pays. Voir les exceptions dans la note 5.

4. Données de 1994 pour la Corée et la Pologne.

5. Données non disponibles pour l'Australie, le Mexique et la Nouvelle-Zélande. Pour le Canada et la Corée, données de l'UIT de 1993 qui couvrent à la fois la réception directe à domicile et la réception par antenne collective.

6. Les données des Etats-Unis correspondent à celles du Tableau 3 (septembre 1995) et les abonnés de la RDS analogique ou numérique sont la somme de (7) abonnés RDS et (6) abonnés HSD ("paraboles domestiques" en bande C) du Tableau 3.

Source : OCDE, UIT, Observatoire européen de l'audiovisuel, Eutelsat, MPT du Japon, Institutodas Comunicações de Portugal, Ministerio de Fomento (Espagne), FCC.

Annexe B : Initiatives en matière de diffusion télévisuelle numérique

Pays		1994	1995	1996	1997	1998	1999	2000 ---
Australie	Satellite		◆ janvier					
Belgique	Satellite			◆ mai				
Canada	Satellite		----- Autorisée -----			----- Mise en œuvre : à décider -----		
	Terrestre			Δ septembre				○ 1999-2000
Danemark	Satellite			◆ juin				
	Terrestre		----- Autorisée -----			----- Mise en œuvre : à décider -----		
Finlande	Satellite			◆				
	Terrestre					○		
France	Satellite			◆ avril : CanalSatellite décembre : TPS, AB Sat				
Allemagne	Satellite			Δ juillet : DF1	□ automne : début de l'établissement des normes			
Hongrie	Terrestre							○ 2005
Japon	Satellite			◆ juin : PerfecTV!				
	Terrestre							○ avant 2000
Corée	Satellite			◆ KBS				○ 2001
Norvège	Satellite				○ Telenor			
Suède	Terrestre				---- Lancement en 1997 ----			
Royaume-Uni	Satellite					○ BSkyB		
	Terrestre					◆ été : British Digital Broadcasting et radiodiffuseurs publics britanniques existants		
Etats-Unis	Satellite	◆ juin : DirecTV/ USSB		◆ mars : EchoStar	-- 4 licences supplémentaires doivent être accordées --			
	Terrestre			□ Spécification unifiée pour la DTV terrestre		Demandes de licence de DTV		○ Simulcast: voir note 2006 : conversion complète à la DTV

Légende : ◆ Mise en service. Δ Délivrance de licences. ○ Démarrage prévu du projet. □ Définition de normes.

Note : Aux Etats-Unis, les titulaires de licence de DTV (télévision numérique) doivent diffuser parallèlement (simulcast) en numérique 50 pour cent de leur programmation des canaux analogiques d'ici avril 2003, 75 pour cent d'ici avril 2004 et 100 pour cent d'ici avril 2005. La conversion complète à la télévision numérique et la récupération du spectre analogique sont fixées à 2006, mais la FCC révisera l'état d'avancement de la DTV tous les deux ans et pourrait modifier en conséquence la date de récupération.

Source : "Infrastructure-Société mondiale de l'information (GII-GIS) : les politiques requises", OCDE, 1997 ; Fifth Report and Order in MM Docket No. 87-268, Etats-Unis, avril 1997.

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NOTES

1 Les informations de cet Encadré reposent sur Analysys (1998), p.18. Analysys est une société de conseil en télécommunications et audiovisuel qui a été subventionnée (avec Squire, Sanders and Dempsey) pour produire une étude visant à examiner l'impact de la convergence sur les secteurs de l'audiovisuel, des technologies de l'information et des télécommunications, avec une publication qui coïncide avec celle du Livre vert sur la convergence, de la Commission européenne (1997). Cette étude considère les changements qu'il faut apporter, à moyen terme, au cadre réglementaire des télécommunications en Europe de manière à prendre en compte la convergence et le développement du secteur multimédia.

2 Plus généralement, étant donné que, une fois numérisé, l'audiovisuel est impossible à distinguer des autres communications de données, on peut parler d'une "industrie de l'information" plus large, consistant en la production et la distribution de contenus informationnels de toute sorte.

3 "Swifter, higher, stronger, dearer. Sport and Television", Economist, 20 juillet 1996.

4 Dans le passé, les diffusions de base-ball ont permis de stimuler la croissance de la radio aux Etats-Unis. Les diffusions de matchs de boxe en direct ont été associées aux débuts de la croissance de la télévision. Aujourd'hui, le sport sert de moteur à la croissance de la télévision à péage. On rapporte que Rupert Murdoch, à l'époque de sa tentative d'achat de Manchester United, a déclaré : "Nous avons l'intention d'utiliser le sport comme bélier dans toutes nos activités de télévision à péage", Economist, 12 septembre 1998, p. 18. Un article de l'Economist du 20 juillet 1996 note que, d'après les commentaires de personnes bien informées, cinq des huit milliards de livres sterling de la valeur de BSkyB sont attribuables à la rentabilité de ses droits dans le football (BSkyB détient les droits exclusifs de la première division anglaise). "Aux Etats-Unis, les droits de la division nationale de football américain ont contribué à faire de Fox le quatrième réseau de télévision national. Au Royaume-Uni, les droits de la première division de football ont transformé BSkyB, d'un poids mort qui a failli faire sombrer l'empire Murdoch, en la compagnie de télévision par satellite la plus rentable du monde et la puissance dominante dans la télévision à péage dans ce pays". Economist, 12 septembre 1998, p. 18.

5 OCDE (1993), p. 77.

6 Une forme limitée d'interactivité est possible au moyen de voies de télécommunications supplémentaires comme le RTPC.

7 "Dans les quatre ans à venir, les vitesses de la transmission de données cellulaire augmenteront rapidement. On disposera en 1999 d'une capacité similaire au RNIS et quand les services mobiles de troisième génération basés sur la technologie UMTS (système de télécommunications mobiles universelles) seront lancés en 2002, les moyens sans fil permettront des débits de transmission 40 fois supérieurs à ceux des modems actuels les plus rapides sur les lignes fixes du réseau commuté". Economist, "Mobile Telecoms: Unwired", 12 septembre 1998, p. 76.

8 Réseau téléphonique public commuté.

9 Analysys (1998), p. 55.

10 Analysys (1998), p. 50.

11 “Asymmetric Digital Subscriber Line”: ligne d’abonné numérique asymétrique.

12 Dans une certaine mesure, il existe une relation inverse entre la distance de transmission et le débit maximum :

Longueur de la ligne (mètres)	5 500	4 900	3 700	2 700	1 400	900	300
Vitesse d’accès (Mbit/s)	1,544	2,048	6,312	8,448	12,960	25,920	51,840

13 “La majorité des pays de l’Union européenne ont fait des essais d’ADSL, mais aucun n’a annoncé un déploiement public ... L’année dernière, un certain nombre d’exploitants de télécommunications des Etats-Unis et d’Europe ont passé commande de modems ADSL (pour les extrémités client et central)”. Analysys (1998), pp. 51 - 52.

14 Voir Hogendorn (1998).

15 Voir aussi Pupillo et Conte, (1998), “The Economics of Local Loop Architecture for Multimedia Services”, Information Economics and Policy, mars 1998, pp. 107-126.

16 “Distributeurs de programmes vidéo multicanaux”. Le nombre d’abonnés des DPVM est la somme des abonnés à la télévision par câble et des abonnés à la radiodiffusion par satellite analogique et numérique.

17 Au Royaume-Uni, il est interdit à BT de fournir des “services de divertissement” sur son réseau de télécommunications jusqu’en 2001.

18 “On peut considérer que la convergence sera achevée quand tous les réseaux pourront transporter tous les contenus”. DTI (1998), p. 27.

19 DTI (1998), p. 47.

20 Ungerer (1996).

21 Perspectives des communications, Tableaux 5.20 et 5.23.

22 Voir Annexe A.

23 Voir Annexe B. Les compagnies suivantes (entre autres) offrent des services par satellite numériques : Primestar et Echostar aux Etats-Unis, CanalSatellite en France, Viacom et BSkyB au Royaume-Uni, Telepiù en Italie, Sogecable et ViaDigital en Espagne, ExpressVu au Canada et Sky Television en Nouvelle-Zélande. Telenor en Norvège et la BBC au Royaume-Uni offrent des services terrestres numériques.

24 Commission européenne (1997), p. 4.

25 Voir : “Cable Modems: coming to an outlet near you”, Telecommunications, mars 1998, pp. 36-37.

26 Voir : “Face Value: Stand and Deliver”, Economist, 18 avril 1998, p. 65.

27 “Cableuropa plans a third digital platform for Spain”, New Media Markets, 11 décembre 1997.

28 “Pioneer’s Progress”, Far Eastern Economic Review, 2 octobre 1997, pp. 77-78.

29 “Vendors air combination Web browser and phone”, Network World, 1 septembre 1997, p. 10.

30 “Reuters, Fantastic to develop multimedia news”, Broadcasting and Cable, 13 avril 1998, p. 47.

31 “NBC Launches into music”, Broadcasting and Cable, 6 avril 1998, p. 156.

32 “ISPs focus on Web hosting services”, Network World, 15 décembre 1997, p.10. Voir aussi : “ISPs to offer multimedia conferences”, InformationWeek, 27 octobre 1997, p. 81.

33 “Progressive Networks, MCI create online network”, Broadcasting and Cable, 11 août 1997, p. 50.

34 OCDE, (1997b), *Diffusion sur le Web et convergence : implications pour l’action des pouvoirs publics*

35 Asynchronous Transfer Mode (“mode de transfert asynchrone”). L’ATM est une norme internationale pour les services pour données à très haute vitesse.

36 “Sprint pitches all-in-one network”, Computerworld, 8 juin 1998, p. 10.

37 “Bell Canada trials provide high bandwidth for interactive multimedia and Internet services”, Telesis, décembre 1996, pp. 41-42.

38 “Reality Bites”, Communications International, janvier 1998, pp. 45-48.

39 “Hype or hope?”, Wireless Review, 15 février 1998, pp. 64-78.

40 “Satellite revolution on the way”, African Business, juin 1998, p. 35.

41 “Multimedia Satcom competition intensifies”, Aviation Week and Space Technology, 13 avril 1998, p. 72.

42 Commission européenne (1997), p.6. Voir aussi Noam (1998).

43 “A Wider net”, Mediaweek, 12 mai 1997, pp. 50-52.

44 “Sounding the IP bells”, Telephony, 9 février 1998, p. 53.

45 “Deal on open standards has a long way to go”, New Media Markets, 1er octobre 1997, pp. 3-5.

46 La FTC a fait objection à cette fusion. Voir DAFFE/CLP(98)9, p. 12.

47 Analysys (1998), p. 157

48 Commission européenne (1997), p. 13.

49 Analysys (1988), p. 26.

50 Dans son examen récent de la situation de BSkyB sur le marché de gros de la télévision à péage, l'OFT note que BSkyB a des contrats de longue durée avec les grands studios d'Hollywood et avec les grands indépendants, ce qui lui donne des droits pour la télévision à péage sur plus de 90 pour cent des grands films en première sortie. Bien que ce contenu soit en concurrence avec d'autres formes de distribution extérieures à la diffusion audiovisuelle, comme les cinémas et les cassettes vidéo, on ne considère pas que ce soit une contrainte suffisante sur BSkyB. Cependant, cela n'a pas donné lieu à une action ultérieure parce que BSkyB a mis ces films à la disposition de ses concurrents au niveau de la distribution de détail. OFT (1996).

51 Analysys (1998), p. 99.

52 Cependant, ces diffuseurs sont aussi en concurrence avec les diffuseurs hertziens en clair (qui sont mieux représentés par la structure (b)).

53 Télévision à haute définition.

54 On notera que la publicité peut être insérée dans le contenu par les assembleurs ou par les producteurs de contenu eux-mêmes.

55 Par exemple, dans les débuts de la télévision en couleur, NBC était verticalement intégré avec RCA, fabricant de téléviseurs couleur. Dans les débuts de l'Internet, des fournisseurs comme AOL ou Compuserve offraient à la fois des services de contenu et des services d'infrastructure/ accès.

56 Par exemple, au Royaume-Uni, l'autorité réglementaire Oftel exige que tous les décodeurs reçoivent les signaux numériques hertziens émis en clair.

57 Il est vrai que ces contrats ne consistent pas toujours en une simple vente de tous les droits à un prix fixé. Par exemple, les romanciers peuvent être rémunérés au prorata des ventes. On peut le considérer comme une forme de partage des risques entre le producteur de contenu et l'éditeur. Quand le contrat est signé avant la production du contenu, ce peut être aussi une forme de contrat incitatif.

58 Voir Tirole (1988), p.176. Voir aussi la publication de l'OCDE (Comité du droit et de la politique de la concurrence) sur les restrictions verticales : OCDE (1994).

59 Tirole (1988), p. 177.

60 Tirole (1988), p. 179.

61 Voir Rey et Tirole (1995). On pourrait penser, à première vue, que l'entreprise en amont peut simplement offrir un contrat aux termes duquel l'intrant essentiel est vendu au coût marginal et où l'entreprise en amont obtient la totalité des profits de l'aval. Cependant, en l'absence d'un contrat exclusif, il se peut que l'entreprise en amont ne soit pas en mesure de maintenir cette stratégie. La première entreprise à accepter l'offre craindra que l'entreprise en amont n'offre

ensuite l'intrant essentiel à un prix plus bas à une deuxième ou à une troisième entreprise en aval, réduisant les profits de cette première entreprise. En conséquence, l'entreprise en amont ne pourra pas extraire la totalité de la rente de monopole. S'il existe une concurrence suffisante en aval, les profits monopolistiques disparaissent complètement.

62 Toutefois, les fournisseurs d'infrastructure dépassent rarement les frontières d'un pays, alors que certains producteurs de contenu sont totalement internationaux. En conséquence, cet effet se limite probablement au contenu dont l'attrait est spécifiquement national.

63 Par exemple, au Royaume-Uni, "les diffuseurs de télévision terrestre sont tenus de faire en sorte qu'au moins 25 pour cent de leur diffusion répondant à certaines caractéristiques se compose de productions d'origine indépendante, alors que les autres diffuseurs sont soumis à un quota de 10 pour cent en vertu de la directive de l'Union européenne Télévision sans frontières, qui requiert aussi que 50 pour cent de la diffusion de tous les diffuseurs, progressivement et quand cela est réalisable, soit d'origine européenne". DTI (1998), p. 63. Mis à part les arguments mentionnés précédemment, ces règles laissent perplexe. Le contenu d'une production est à peu près (sinon totalement) indépendant des propriétaires de la compagnie de production. Ces mesures n'ont donc pratiquement aucun effet sur ce que l'on voit sur les écrans de télévision britanniques.

64 Entre autres choses, les annonceurs attachent une valeur à la "couverture" de la publicité, c'est-à-dire le nombre de personnes qui entendent le message. Un message qui est diffusé vers 10 millions de personnes aura généralement une plus grande couverture qu'un message diffusé dix fois vers 1 million de personnes, parce qu'on peut difficilement garantir que l'auditoire est constitué à chaque fois de personnes différentes. En conséquence, les annonceurs acceptent généralement de payer d'autant plus cher (par personne) que l'auditoire cible attiré à un moment donné est plus grand. Même dans le cas où le contenu passe à l'écran sur plusieurs chaînes simultanément, alors qu'en principe les annonceurs pourraient acheter exactement le même créneau temporel sur toutes les chaînes, de légères différences dans l'horaire de la publicité et les coûts de transaction plus élevés rendent cette stratégie moins intéressante que si tout l'auditoire est concentré sur une seule chaîne.

65 Dans le rapport de l'OCDE sur les restrictions verticales, on note que : "Dans les cas où les accords de franchise risquent de susciter des problèmes anticoncurrentiels, la durée de ces contrats est un facteur important. Les contrats de longue durée permettent de garantir le rendement des investissements amortis en évitant dans une certaine mesure tout un ensemble de comportements opportunistes, mais ils peuvent aussi avoir d'importants effets contraires à la concurrence s'ils contribuent à élever des barrières à l'entrée. La politique de la concurrence devrait être prudente à l'égard des contrats de longue durée lorsqu'existe ce risque spécifique. Il serait alors important de se demander si les clauses contractuelles peuvent être justifiées par exemple par la nécessité de protéger d'importants investissements initiaux basés sur une relation de franchise et qui ne pourraient être protégés autrement". OCDE (1994), p. 62.

66 Van Miert (1997).

67 OCDE (1997)

68 On peut en donner comme exemple la tentative de créer une "superdivision" de football européenne.

69 Les tribunaux des Etats-Unis ont reconnu que “les clubs qui composent une ligue (fédération) de sport professionnel ne sont pas des concurrents économiques complètement indépendants, du fait que leur survie économique dépend d’un certain degré de coopération”. *Brown v. Pro Football Inc.*, 116 S. Ct. 2116, 2126 (1996).

70 Par exemple, l’OFT a contesté certains accords stipulés dans le règlement de la Football Association Premier League qui empêchaient les équipes de vendre leurs droits de télévision autrement qu’en passant par la Premier League. Cette affaire devrait passer en audience en janvier 1999. Voir DAFFE/CLP(98)10/17, p. 7.

71 OCDE (1997), p. 26. Dans un cas similaire, les autorités de la concurrence espagnoles ont jugé qu’une durée d’exclusivité de cinq ans était trop longue.

72 OCDE (1997), p. 77.

73 Voir la contribution de l’Australie dans OCDE (1997).

74 Beaucoup de commentateurs mentionnent des arguments relevant d’aspects plus larges de l’action des pouvoirs publics, comme la volonté de promouvoir une langue particulière ou le sens de l’identité nationale. Ces raisons, bien que valables, ne seront pas traitées ici.

75 En outre, s’ils ont le choix entre deux programmes qui ont la même audience, les diffuseurs choisiront généralement le moins coûteux, même si la valeur que le programme le plus coûteux revêt pour les spectateurs dépasse le supplément de coût.

76 Un document récent de l’OCDE expose ce point dans le contexte de la diffusion sur le Web : “Dans beaucoup de pays de l’OCDE, le gouvernement finance la radiodiffusion publique sur le principe qu’un service purement commercial, dans un environnement où le nombre de licences est limité, n’assurerait pas une diversité suffisante des programmes pour répondre aux besoins de tous les secteurs de la collectivité. ... [ces politiques] ne concernent guère le Webcasting. Un des principaux avantages de l’Internet est son aptitude à maintenir les liens de groupes partageant un intérêt commun, si petits soient-ils, d’une manière que l’on n’aurait jamais pu attendre de la radiodiffusion traditionnelle. En ce qui concerne la qualité du contenu, l’Internet ressemble plus au secteur de l’édition, où les gouvernements n’interviennent pas sur le marché, qu’à celui de la radiodiffusion. En conséquence, il semblerait peu justifié de réglementer le Webcasting sur la base des préoccupations concernant la qualité et la diversité du contenu…”. OCDE (1997b), p. 45.

77 Analysys (1998), p. 61.

78 DTI (1998)

79 Analysys (1998), p. 215.

80 “Time to adjust your set”, Economist, 23 décembre 1995.

81 Analysys (1998), p. 185.

82 Directive 89/552/CEE, JOCE L 298/23, 17 octobre 1989.

83 Comme les initiatives suivantes de la Commission européenne : Livre vert sur la protection des mineurs et de la dignité humaine dans les services audiovisuels et d'information (16 octobre 1996), Communication "contenu illégal et préjudiciable sur Internet" (16 octobre 1996), Résolution du Parlement européen sur la communication de la Commission relative au contenu illégal et préjudiciable sur Internet (24 avril 1997) et la proposition de Recommandation sur la protection des mineurs (novembre 1997).

84 Analysys (1998), pp. 182-183.

85 Analysys (1998).

86 Analysys (1998), p. 172.

87 Analysys (1998), p. 187.

88 Ungerer (1996)

89 Voir OCDE (1996). Les Pays-Bas offrent un exemple de ce genre de cession.

90 Voir OCDE (1998), tableau 6.

91 Voir OCDE (1998), p. 25.

92 DTI (1998), p. 51.

93 Rapport annuel de la FCC sur l'appréciation de l'état de la concurrence sur le marché de la livraison de programmes vidéo, 2 janvier 1997 (ci-après désigné par : FCC 1997) (http://www.fcc.gov/Bureaus/Cable/Reports/fcc96496.txt).

94 Page d'accueil d'ExpressVu (http://www.expressvu.com/story.html).

95 *Information Society Trends*, n° 64 (28.1.97-11.2.97) (http://www.ispo.cec.be/ispo/press.html).

96 Nikkei Newspaper, 22 septembre 1997, Asahi Newspaper 30 septembre 1997

97 Katz et Shapiro (1994), p. 106.

98 Par exemple, sur le marché des systèmes de jeux vidéo, Nintendo a signé des contrats exclusifs pour des jeux créés par des tiers, empêchant Atari et Sega, les concurrents de Nintendo, de les obtenir. Katz et Shapiro (1994), p. 107.

99 Récemment, un ensemble d'entreprises opérant dans la TVHD ont convenu de fusionner leurs technologies et de partager leurs redevances de licences.

100 Katz et Shapiro (1994), p. 111.

101 Ainsi, dans une certaine mesure, ces marchés présentent un "avantage au dernier qui agit".

102 L'échec du marché du Digital Audio Tape (système audionumérique à cassette) en est une illustration.

103 Cowie et Marsden (1998), p. 16.

104 On peut en donner comme exemples les disquettes de 8 pouces et 5 pouces et quart, les langages de programmation FORTRAN et COBOL, ou les réseaux locaux Novell.

105 OCDE (1998b), p. 7. Selon Overd et Bishop : “L’application trop zélée de la doctrine des installations essentielles risque d’amoindrir gravement l’incitation des entreprises à innover”. Overd et Bishop (1998), p. 183. Ils poursuivent en critiquant la réglementation des systèmes d’accès conditionnel de la télévision à péage numérique par la Directive de l’Union européenne, la considérant comme un exemple de réglementation des installations essentielles qui a un “effet glaçant” sur l’innovation par des pionniers.

106 Dans certains pays, les nouveaux abonnés paient des frais afférents à “l’achat” de la ligne d’abonné.

107 Il est sans doute possible d’éviter aux consommateurs ces coûts irrécupérables en imposant aux nouvelles entreprises de louer, plutôt que de vendre, les équipements de client.

108 Commission européenne (1997), p. 26.

109 Par exemple, dans le cas des disques compacts, un consortium de grands participants mené par Phillips a établi une norme pour l’industrie. La norme DVD est soutenue par un consortium réunissant Phillips, Sony, Matsushita, Toshiba, Time Warner, Pioneer, Hitachi, JVC, Mitsubishi, Thompson, RCA et GE ! Voir FCC, (1996), *Economic Considerations For Alternative Digital Television Standards*.

110 Analysys (1998), p. 266.

111 Analysys (1998), p. 266.

112 DTI (1998), pp. 21-22. “Un exemple récent où l’incertitude règne dans l’industrie sur le point de savoir qui est réellement l’autorité compétente est celui de l’interoperabilité des décodeurs, où le fournisseur de services par satellite BSkyB s’est plaint à grand bruit en arguant que l’ITC n’était pas investie du pouvoir d’imposer des normes techniques minimums pour le décodeur. BSkyB affirme que ce pouvoir appartient à l’Oftel. Ce trouble résulte du fait qu’au départ on n’a pas réparti explicitement les responsabilités juridictionnelles entre les autorités réglementaires”, Cowie et Marsden (1998), p. 14.

113 Analysys (1998), pp. 159-160.

114 Analysys (1998), pp. 159.

115 Analysys (1998), pp. 271.

116 Oftel (1998), paragraphe 4.20.

117 OCDE (1998b), p. 7.

AUSTRALIA

Australian media industries, like those in most countries, are subject to significant government regulation. Foreign investment restrictions, limitations on cross media ownership, and local content regulation are features of the Australian regulatory structure.

Regulatory Institutions

The Australian Broadcasting Authority (ABA) exercises principal regulatory control over the electronic media. Its key functions relate to licensing of broadcasting services and administration of the broadcasting specific regulatory regime under the *Broadcasting Services Act 1992* (BSA) which covers commercial free to air, subscription broadcasting and narrowcasting services, and community broadcasting services. Broadcasting services are regulated in accordance with their ability to influence the public. Commercial free to air television and radio, community and subscription television broadcasting services are individually licensed. Other services are subject to a class licensing regime with the intention of promoting the development of new and innovative services.

The Australian Communications Authority (ACA) has responsibility for licensing telecommunications carriers under the *Telecommunications Act 1997* and managing the radiofrequency spectrum in accordance with the *Radiocommunications Act 1992*. It therefore has a number of telecommunications functions which mirror the ABA's broadcasting role (e.g. conducting price based allocations of spectrum and apparatus licences), as well as technical regulation in the telecommunications industry. The ACA also issues transmitter licences for broadcasting services.

The Australian Competition and Consumer Commission (ACCC) has primary responsibility for the enforcement of competition policy in Australia and has devoted considerable attention to competition issues in the broadcasting industry. Issues of market definition, content monopolisation, vertical integration and anticompetitive market foreclosure have been considered by the ACCC in the past few years. It is also responsible for enforcing industry specific competition policy that applies to telecommunications, including an access regime.

This paper seeks to reflect Australia's experience with competition law enforcement issues in broadcasting. It primarily deals with the Australian experience with competition law enforcement issues in the pay TV market and their implications for competition in related telecommunications markets. However, it first provides a brief background on competition and regulation issues facing the converging broadcasting and telecommunications markets in Australia.

Broadcasting regulation

The 1992 broadcasting legislation was designed to remedy shortcomings in the previous 1942 legislation – in particular concerns about its ability to deal with emerging technology and services. The 1992 Act contains a statement of regulatory policy, establishing that the Parliament intends that broadcasting services be regulated in a way which encourages the development of broadcasting technologies and which readily accommodates technological change.

Recent amendments to the BSA are directed at ensuring that the regulatory framework is sufficiently adapted to accommodate such changes. In particular, during the period before the commencement of digital terrestrial broadcasting on 1 January 2001, there will be a series of regulatory reviews that will address broadcasting regulation in a digital environment, including a review of broader communications policy issues such as convergence. This forum will explore whether any legislative amendments should be made to deal with the convergence between broadcasting and other services.

The BSA determines the free to air broadcast market structure with the number of broadcasters limited to three commercial broadcasters and two public broadcasters. There is no regulatory limit to the number of telecommunications carriers that may offer cable or satellite pay TV services. The number of microwave pay TV broadcasters is limited by the availability of suitable radiofrequency spectrum (currently all operational licences are held by one provider).

Interaction between broadcasting and telecommunications regulation

It is worth noting the industry specific competition policy which applies to the telecommunications industry in Australia given its part in the convergence phenomenon.

Australia has recently opened its telecommunications market to full and open competition. From 1 July 1997 there is no limit on the number of carrier licences that may be issued. A person communicating by means of a fixed line link (including by radiocommunications) requires a telecommunications carrier licence and is potentially subject to the telecommunications competition policy regime. Service providers (non-facilities based entrants) are subject to a class licensing regime.

Free-to-air broadcasting service providers are effectively exempt from the telecommunications regime until such time that they primarily supply telecommunications services with their signal. Owners of other broadcasting delivery platforms are required to be licensed as telecommunications carriers. Cable pay TV service providers require a telecommunications carrier licence (if using their own cable) and must comply with the conditions of the appropriate subscription broadcasting or narrowcasting licence. Satellite and microwave pay TV service providers require a licence for radiofrequency spectrum, may require a telecommunications carrier licence and must comply with the conditions of the appropriate subscription broadcasting or narrowcasting licence.

The telecommunications competition policy regulatory regime basically consists of two elements: enhanced powers to deal with anti-competitive conduct by persons with a substantial degree of market power in telecommunications markets; and a telecommunications access regime. The telecommunications access regime reflects the policy interests of promoting any-to-any connectivity; promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services such as physical interconnection, billing information and access to conditional access customer equipment.

In order to facilitate the introduction of open competition, the ACA has also embarked on a substantial program of market based allocation of radiofrequency spectrum. The general trend is away from issuing apparatus licences (with specific uses) and towards granting spectrum licences (with fewer restrictions upon use). This should result in a more diverse array of opportunities for new entrants to offer new types of telecommunications and broadcasting services.

Broadcast market definition

The ACCC has undertaken extensive analysis of broadcast markets. A proposed merger between two of Australia's pay TV companies in 1995 was the catalyst for much of the ACCC's work on broadcast market definition. The definition of the market is critical in merger analysis. A range of market definitions is possible. At the broadest level, it may be possible to argue that there is a market for entertainment. A more limited definition might be to define the market as one for broadcast services. At a narrower level again it might be possible to argue that there is a distinct market for pay TV services. It might even be possible to delineate markets based on delivery mechanisms such as cable versus satellite delivery. The ACCC has taken an approach to market definition that puts free to air TV and pay TV in separate markets.

Cinema

A wide market definition would likely include cinema, video, free to air television and pay TV. At issue is whether competition from a related media product would be sufficient to constrain the pricing behaviour of a firm with market power in a particular media sector. The issue for the ACCC was whether competition from cinema, video and free to air TV would constrain the exercise of market power by a pay TV operator. If a pay TV operator increased its prices would consumers switch to other entertainment services?

The ACCC approach took account of the product characteristics. With regard to cinema, it argued that the unique 'out of home' experience and the first run movie product were characteristics of cinema, unmatched by video or television. The rapid expansion of cinema in Australia in recent years has been unaffected by the entry of pay TV services and there is no evidence to indicate that cinema is a substitute for home entertainment services. Cinema pricing may be constrained by home entertainment to some degree, but the reverse is probably not true.

Video

It may be that there is a degree of substitutability between video and pay TV. One of the major subscription drivers of pay TV has been premium movie channels. However, there are significant differences in the services provided by pay TV and video cassette recorders (VCRs). The primary attribute of VCRs is that they allow consumers to 'time shift' broadcast programs and view pre-recorded tapes at a time which suits the consumer. Pay TV does not provide this option (although pay per view and near video on demand may prove to be a more effective video substitute). Movies are available on video before their pay TV release, so direct competition between the two distribution mechanisms is blunted. Further, video does not compete with most pay TV programming such as news, sport, music and other special interest channels.

The pricing structure of pay TV also limits the ability of video rental to be an effective substitute. Pay TV movie channels are not sold separately in Australia, but are bundled in with numerous other special interest channels so that the ability of video rental to act as any competitive restraint on pay TV pricing is extremely limited.

Free to air TV

The most important issue for broadcast market definition is whether free to air television is a substitute for pay TV to an extent sufficient to constrain the exercise of market power by pay TV companies. While free to air is currently the more substantial broadcasting market, pay TV services could

be expected to become more strategically significant in a converging market for on-line services (e.g. through the introduction of video on demand and other broadband services).

At first sight it would seem that pay TV and free to air offer similar services. The ease with which consumers are able to switch between pay TV and free to air would indicate a high degree of substitutability. However, such superficial comparisons are misleading. The critical issue for competition analysis is whether free to air television would provide sufficient competition to prevent a dominant pay TV provider 'charging more and giving less'.

The fact that pay TV uses the same programming inputs as free to air television does not necessarily mean that their outputs are in close competition. Pay TV offers a range of narrow programming choices with each channel targeting a particular niche market. Pay TV is subscription driven, while commercial free to air is advertiser driven. Consequently commercial free to air stations generally attempt to maximise their audience share to maximise advertising revenues. Pay TV offers a diverse package of special interest programming appealing to minority interests and bundles such a package to maximise subscription revenues. As pay TV develops more channels devoted to specialised programming interests, the substitutability with free to air will diminish even further.

There is limited evidence that many households see pay TV as a complement to free to air TV rather than as a substitute. In Australia, households most likely to subscribe to pay TV watch more free to air TV and rent more videos than average. Under such conditions, a dominant pay TV provider may have considerable market power despite the existence of free to air broadcasting.

An analysis of how firms assess their competition would also indicate that free to air broadcasters do not see themselves in the same market as pay TV providers. Australian commercial free to air broadcasters accept advertising from pay TV firms. Advertising rates of commercial free to air broadcasters continue to rise despite the substantial increase in the number of potential advertising channels available via pay TV. Free to air stations in Australia appear to have made no adjustments to their programming in response to the entry of the pay TV providers. Of course it may be that there is some degree of asymmetry in that while free to air broadcasters do not see pay TV as a competitive threat, pay TV sees free to air as a close substitute. While this may be the case, for the purposes of competition analysis, the issue is whether free to air is a sufficiently close competitor to pay TV to act as a constraint on any anticompetitive behaviour.

In Australia, almost all households have access to five free to air networks (i.e. three commercial networks and two government owned networks). The existence of five free to air broadcast networks is likely to provide some restraint on pay TV pricing only at the margin.

Australian pay TV companies have engaged in loss leading behaviour by subsidising the cost of new connections. Such behaviour is not necessarily evidence that free to air is providing intense competition. In the pay TV market, first mover advantages are likely to be substantial. It may be in the interests of a pay TV supplier to subsidise installation and recoup these costs via higher subscription fees if such an approach gives the firm significant market share growth. There are significant scale economies in program acquisition (discussed later) such that subsidising installation to maximise growth rates and subscriber numbers may be an important element in achieving market dominance.

Australian broadcasting market structure

In Australia there are three major broadcast markets, radio, free to air TV and pay TV. Within the radio and free to air markets there are national, publicly funded and owned broadcasters as well as private commercial operators. The pay TV market contains only privately owned broadcasters.

Cross media ownership regulations effectively prevent ownership links between commercial radio and free to air TV broadcasters in any geographic broadcast market. There are no such restrictions placed on links between radio and pay TV ownership or free to air and pay TV ownership. Broadcasting regulation limits horizontal concentration such that no operator may control more than one free to air TV licence or two commercial radio licences in the one geographic broadcast market. In addition, operators are prohibited from controlling commercial television licences that cover more than 75 per cent of the population.

Pay TV in Australia has developed a market structure with significant competition concerns. In many countries pay TV delivery via cable has developed through numerous regional monopolies. General competition policy and merger law application in most countries is designed to prevent the establishment of horizontal dominance by a single cable company. In Australia, the Foxtel partnership (between Telstra, the dominant telecommunications provider, and News Ltd) and Optus (the more recent entrant into the telecommunications market controlled by the UK's Cable and Wireless), have rapidly laid competing cables past around one third of Australian households. Both cable systems are concentrated in the major cities and there is considerable overbuild. Most of the remainder of the country, around four million homes, have no cable.

Austar is the third player in the market. It provides satellite, microwave and limited cable pay TV services to around one third of the market. It predominantly offers Foxtel's programming. While its satellite footprint would enable it to supply satellite delivered pay TV in the major cities in competition with the cable companies, it has chosen to concentrate on regional and rural areas.

Competition in pay TV

There is the potential for anticompetitive conduct to deprive consumers of the benefits of competition in a number of markets. Such conduct is most likely to occur if there is monopolisation at some level of the supply chain. In the broadcast market, such monopolisation may be possible at various stages of the supply process.

The broadcasting industry has a number of separate stages between content production and delivery to the household. Monopolisation at any stage may have considerable anticompetitive impact not only in broadcasting but also in telecommunications and electronic data delivery. Vertical integration between various levels of the production and delivery processes may also generate anticompetitive effects.

Content control

At the first stage there is the creation of content (programming) and the packaging of that content into channels. In certain cases, sporting associations and movie studios may exhibit a degree of monopoly power and vertical expansion, evidenced by their equity participation in downstream markets. In the Australian pay TV market, the two principal cable companies, Foxtel and Optus, have developed their own exclusive content channels, sometimes in conjunction with the owners of particular programming assets.

The two major subscription drivers appear to be first run movies and sports. In the case of movies, a few US studios dominate the production and distribution of programming with the greatest appeal to Australian audiences. These studios have formed two principal joint ventures in Australia and have taken equity in movie channels supplied exclusively to one of the two major pay TV operators.

Twentieth Century Fox, Paramount, Universal and Sony (Columbia/TriStar) have established a joint venture to supply exclusively two premium movie channels to Foxtel. They have equity in these channels with their cable distribution partner, Foxtel. Warner Bros, Disney and MGM/UA have formed a similar joint venture and supply exclusively to Optus and also have equity in their channels along with Optus, the cable distributor of the channels.

The effect is that the movie programming is split into two vertically integrated streams and then packaged with a number of other channels. There are no opportunities for 'a la carte' channel selection. Consumers would need to acquire packages from both suppliers to be able to view all of the recent US movies. As both packages also include some non exclusive channels such as CNN and TNT, consumers who wish to purchase all the movie channels currently available are required to pay substantial monthly subscription fees for both services.

Sports rights have also been acquired on an exclusive basis. 'Anti-siphoning' rules require that free to air broadcasters have the first opportunity to acquire broadcasting rights to a prescribed list of sporting events. Both pay TV companies have acquired sports events which are not on the prescribed list and each has also acquired exclusive pay TV rights to events which have been taken off the prescribed list. There is no requirement that the free to air TV operators actually show the content so acquired. News Ltd, one of the two Foxtel partners, has ownership of a number of sports channels which are then supplied to Foxtel and Austar (which service geographically separate areas). Optus attempted to develop similar, vertically integrated sports channels, but subsequently abandoned the arrangement. Certain sport content providers have created channels and plan to distribute these non exclusively.

The exclusivity of programming combined with the vertical ownership between content supply and channel ownership may provide an effective barrier to the entry of new delivery systems. In many other countries, legislation has been enacted to ensure non discriminatory access to programming distributed by vertically integrated suppliers.

The economies of scale in the creation of media products such as television programs, movies, magazines and newspapers might suggest that it would be in the interests of the producer of such material to distribute it as widely as possible. Such products have very high 'first copy' costs. However, once the product has been created, the costs of supplying additional customers is typically very low. A non integrated supplier of programming channels to a pay TV distributor would generally prefer distribution over as large a number of delivery systems as possible. The cost of exclusivity would be substantial and therefore the content supplier would require much higher prices to compensate for the lower distribution. Current program supply arrangements incorporate minimum subscriber levels which effectively place a floor on the cost of acquiring programming.

Vertically integrated companies creating their own content channels and distributing them through their own distribution mechanisms would have conflicting objectives. The costs associated with 'first copy' would create an incentive to distribute to independent delivery systems. However, the benefits to the delivery partner of exclusivity may be sufficient to prevent widespread distribution via independent delivery systems if the integrated firm has a substantial share of the market for pay TV delivery. An integrated company may be able to make more profit from its operations by preventing the entry of competing delivery systems, even given the economies of scale in wide distribution. Further, if such

action leads to market dominance then the integrated supplier will ultimately get the widespread distribution and gain the scale economies also.

Vertical integration and efficiency

One of the difficulties for competition policy in this area is that vertical integration may have a legitimate commercial purpose and improve efficiency. One of the major reasons for vertical integration in broadcast markets is to improve efficiency in contracting between buyer and seller. In the case of pay TV, transactions costs may be considerable in the absence of vertical integration. Agreements between content (channel) providers and pay TV delivery companies would need to include terms relating to price, content, quality and promotional activities which are often difficult to specify via contract. Further, even if such contractual arrangements are completed, there may be incentives for either party to engage in behaviour which increases its own profits even if such behaviour reduces the joint profits of the two parties. For example the channel owner may cut back on expenditure and reduce quality while the pay TV delivery company may not promote the channel in the way or to the extent that the channel owner expected. Vertical integration eliminates such transactions problems.

Vertical integration may also allow the integrated firm to avoid the double marginalisation issue in bilateral monopoly. If the upstream channel provider charges a price above its marginal cost, that price then becomes the input cost to the pay TV distributor, which then sets its price based on its own marginal cost. This so-called double marginalisation then leads to a higher price and lower output than might otherwise be the case. Vertical integration between the content provider and the distributor of pay TV services would lead to programming supplied to the downstream partner at marginal cost, lowering its input cost and leading to lower prices and increased output, benefiting the suppliers and the consumers.

Greater diversity in programming and a greater range of channels is another possible outcome from vertical integration. The establishment of new content channels may be made easier when it is known from the start that such channels would receive widespread distribution on the delivery systems of their related company. This reduced risk of non carriage may enable a more diverse range of programming than would be case if channel ownership was unrelated to carriage. A non integrated channel provider may need to provide more mass appeal programming to ensure distribution thus leading to a duplication of general entertainment channels rather than genre specific channels targeting small, narrow interests.

Vertical integration and anticompetitive behaviour

There are two major anticompetitive concerns with regard to vertical integration in pay TV. The first is that the vertically integrated supplier of content and carriage will use its delivery mechanisms in an anticompetitive manner by foreclosing new content suppliers from access to the subscribers it controls. The second is the possibility that the vertically integrated firm will use its control of programming to create barriers to the entry of competing delivery systems by denying the potential entrant access to the programming it controls.

In the case of the Australian pay TV market, the first issue then is whether a non integrated program supplier would be able to find sufficient carriage of its programming that rejection by the vertically integrated Foxtel, Optus and Austar would not prevent entry. Given that these three companies are the only significant pay TV suppliers in Australia, rejection by all three would block any new entry.

An independent supplier of programming has recently approached all three integrated suppliers and competition issues may become relevant if all refuse to carry the content.

The second issue is whether vertical integration could lead to the foreclosure of competitors to the existing delivery mechanisms. It is probable that the effect will depend on the extent of market power at any of the horizontal levels. This may be particularly important in the Australian case. Only around one third of Australian households have been cabled. If control of content allows the vertically integrated companies to prevent entry not just in those areas where they are currently operating, but also in those areas where they do not currently operate, but may plan to do so in the future, they can progress with cable rollout at their own pace. There is no risk that any tardiness in expanding their cable will lead to a new competitor entering that market before them. Consequently, new entrants may be blocked from providing pay TV services and may therefore be unable to take advantage of any economies of scope available from the provision of other cable delivered services such as internet, telephony and a range of interactive services. A possible outcome then, is that the vertically integrated companies are able to extend their dominance in the pay TV market into any new market for cable delivered services. If dominant telephony companies are part of the vertically integrated pay TV group, there is considerable risk to competition in the emerging markets for on line services as the telephony partner attempts to lever its market power in one sector into the emerging markets.

Vertical integration, exclusivity and competition policy

Vertical integration can generate efficiencies as well as facilitating anticompetitive behaviour. The effects of the vertically integrated structure of Australian broadcast markets and the exclusivity of content on competition in both broadcasting and emerging markets for data delivery and interactive services is not yet clear. Australian competition law allows exclusive dealing arrangements even when the effect is to substantially lessen competition if it can be shown that there are public benefits from such arrangements.

There is no competition legislation in Australia which requires that the vertically integrated companies in pay TV supply programming to other companies. Should the ACCC consider that the exclusive dealing arrangements and the vertical integration are having the effect of substantially lessening competition, the ACCC could take legal action against the parties concerned. Any firm which has a substantial degree of market power and uses that power to substantially damage competition by for example, preventing entry or preventing others from engaging in competition, may be in breach of Australian trade practices legislation.

The major companies in the Australian broadcasting market are still in the process of forming arrangements which will determine the longer term structure of broadcasting in the country. Australia's leading free to air commercial television network has the option to become a partner in Foxtel; the three leading pay TV companies are investigating options to share a satellite delivery platform; and the shareholders in Optus are about to publicly float the company. The arrangements and alliances formed as a consequence of these proposals may have a major impact on the extent of the various vertical arrangements and exclusive dealings over the next few years.

Bundling and tiering

The bundling of channels may have anticompetitive effects. A dominant supplier of a package of channels may be able to prevent new independent channels from being successful. Each time that a potential rival content provider develops a new channel, the incumbent may develop a similar channel and bundle it with its existing package at marginal or less than marginal cost, thereby diminishing the

attractiveness to the consumer of any new stand alone programming entrant. Alternatively, the dominant delivery system may agree to take a new channel from a content provider only on condition that the delivery firm gets an equity position in the new channel.

Australian Pay TV companies require subscribers to purchase programming in bundles of channels. It is not possible to buy premium movie and sport channels separately nor without purchasing a bundle of other channels which are probably of substantially lesser interest. Bundling may have the effect of decreasing consumer choice and slowing the penetration rate of pay TV.

Delivery systems

Control of content delivery hardware may be another source of market power. In Australia there are three methods of delivery: cable, satellite and microwave. At present around one third of Australian households have access to at least one cable delivery system while the remaining two thirds have no cable delivery. Given low population densities in much of the country, satellite will likely be the dominant delivery mechanism outside the major cities. At present all satellite delivery of pay TV services is via a satellite owned by Optus. However, Optus does not deliver its own pay TV via satellite (although it is currently trailing such a service) and rents transponders to those who request delivery. Later in 1998, additional alternative satellite delivery mechanisms are likely to be available via PanAmSat. Consequently, control of satellite facilities does not appear to be a competition issue. Of course it may be that scale economies in satellite distribution are such that in a small market such as the non cabled parts of Australia, more than one satellite service would not be viable.

Operational microwave delivery licences are in the hands of one market participant (Austar) but have not been seen as a significant means of pay TV delivery in most of Australia and control of microwave would not appear to be a significant competition issue.

Australian trade practices legislation[1] has established a telecommunications access regime. Cable broadcasting services were deemed to be ‘declared services’. Complementary provisions contained in telecommunications legislation ensure that the necessary ancillary services and supplementary facilities are also covered. Other forms of broadcasting are specifically exempted from the application of the telecommunications regulatory regime. As a consequence, cable pay TV access providers are subject to access obligations such that they must provide access to their ‘service’ to service providers if requested. However, there is some doubt as to the effective application of the access regime with regard to the Telstra cable. Telstra and Foxtel have claimed that existing spare capacity on the cable may be subject to contractual arrangements pre-dating the access regime.

Opportunities for the exercise of market power could occur through control of household reception equipment. Broadcasters who earn the bulk of their revenue from consumer subscriptions will encrypt their signal such that it cannot be received by a household unless that household pays for the service. The mechanism to convert the encrypted signal into a viewable signal is via the conditional access system, the set top box and associated software.

In Australia the household reception equipment is generally owned by the pay TV company which provides the service to that household. Proprietary technology is embedded in the various conditional access and encryption systems such that any new entrant may need access to technology controlled by a competitor for entry to be effective.

The scope of the telecommunications access regime would appear sufficiently broad to cover such circumstances in respect of declared services (i.e. cable delivery systems); however its coverage of other delivery platforms and associated ancillary facilities is less certain.

Australian pay TV mergers

The ACCC was required to define broadcast markets when it examined the competitive impact of a proposed merger between two of Australia's pay TV companies.

Pay TV was introduced into Australia in early 1995, later than in most developed countries. Australia's first pay TV operator, Australis Media, established satellite and microwave delivery of pay TV. It was quickly followed into the market by two competing companies which delivered pay TV via cable in Australia's major cities. Both of these companies had telephony businesses. OptusVision, a joint venture involving Optus Communications, Australia's second largest telephony company, established a cable delivered pay TV operation. It was followed a short time later by Foxtel, a joint venture between the Government controlled Telstra, Australia's dominant telephony provider, and News Ltd, Australia's major newspaper group and a world-wide media company.

Australis Media did not become the major pay TV company as might have been expected. It was Australia's first pay TV company and had a statutory monopoly on satellite distribution of pay TV until July 1997. It acquired valuable US movie programming and onsold these rights to Foxtel for cable delivery at a substantial margin. Nevertheless, Australis Media's competitive advantage was quickly dissipated when Telstra (via Foxtel) and Optus (via OptusVision) decided to enter the pay TV market using cable delivery. Optus saw its cable roll out as an opportunity to also provide local telephony services in the shorter term, and both companies saw the possibility of offering broadband services in the longer term.

The two telephony companies undertook extensive cable roll out schemes with substantial overbuild in the major capital cities, providing strong and unexpected competition for Australis Media. The cable companies were able to supply a more comprehensive channel package at a cheaper price than Australis Media and the latter's competitive position deteriorated rapidly. Between 1995 and 1997 Australis Media and Foxtel explored several merger proposals.

The ACCC decided to oppose these mergers on the grounds that it would lead to a substantial lessening of competition in two markets: pay TV and local telephony. The major element of the ACCC's case was that the merged entity would be in a position to quickly marginalise the pay TV services of the other cable company, Optus. Should Optus not achieve acceptable pay TV penetration, its entry into the local telephony market, monopolised by Telstra, would be unlikely to occur. Should Optus fail to be an effective competitor, Australia would have had a monopoly pay TV supplier controlled by the Telstra and News, and Telstra's monopoly on fixed wire local loop telephony would have remained unchallenged.

Exclusive content

The merger of Foxtel and Australis Media would have given the merged group, and its associated franchisees, more than 70 per cent of the Australian pay TV market. This dominant market share would have enabled the merged group to have greater access to programming, both existing and new. The merged group would have been able to spread program acquisition costs over a much larger number of subscribers than OptusVision, giving it substantially lower costs per subscriber.

Australian pay TV companies have been aggressive in purchasing exclusive content from US studios and local sporting organisations. This exclusivity has typically come at a high price such that the prices Australian pay TV companies have paid for US product are high compared to the prices paid by pay TV operators in most markets around the world. As a consequence of this exclusivity, a small player in the market would be unable to afford the high price of exclusivity and would quickly be at a major competitive disadvantage. The ACCC was concerned that should the merger go ahead, Optus with only one-quarter of the market and less than 200,000 subscribers, would lose its own exclusive content and would quickly lose its market share to a rival who had a far greater range of programming, much of it exclusive.

The merger would have likely led to a 'downward spiral' where the considerably larger Foxtel offered programming on an exclusive basis, spreading the high acquisition costs over its large subscriber base while OptusVision rapidly lost subscribers and lost the ability to finance exclusivity and thereby compete.

In the Australian market, Foxtel has a market share considerably greater than its rivals. The current market share is Foxtel 45.4 per cent, Austar 30.7 per cent and Optus Vision 23.9 per cent[2]. In an effective duopoly pay TV market with exclusivity of programming, should one firm become significantly larger than its rival, the smaller firm is likely to have considerable difficulty in providing effective competition in the longer term. The larger player will have greater subscriber revenue which can be used to acquire still more exclusive programming, while spreading such acquisition costs over a larger subscriber base. This may have the effect that the smaller player rapidly loses market share, its revenue shrinks or remains static and its ability to acquire further competitive programming is eroded and it rapidly becomes marginalised.

Pay TV and local telephony

Optus argued that the ability to offer pay TV was fundamental to its establishment of a viable local telephony business. Without access to the revenue streams provided by pay TV as well as local telephony, the company claimed that it would not have an income stream sufficient to justify cable investment. Optus also argued that there are synergies between pay TV and telephony in that the bundling of service combinations substantially reduces the consumer disconnection rate.

The entry of Optus into the pay TV market and the competitive response from the incumbent telephony operator Telstra, indicates that there may be substantial economies of scope in the provision of pay TV and telephony. Revenues from cable delivered interactive services will likely provide a third significant revenue stream in the not too distant future.

Consequently, competition in the Australian pay TV market is closely linked to competition in telephony (and possibly other telecommunications markets). Revenues from a number of sources may be necessary to earn sufficient return to justify new cable investment. Should competition in the cable delivery of pay TV be eliminated, there may be little opportunity for competition in fixed wire, local loop telephony markets nor emerging markets for interactive services.

Future competition issues

The ACCC's rejection of the merger between Australis Media, which delivered pay TV via satellite and microwave, and Foxtel, which delivered pay TV via cable, has not led to competition between delivery mechanisms in Australia. Australis Media ultimately went into liquidation. Foxtel has plans to

establish its own satellite delivery platform. Major competition issues in broadcasting and telecommunications are yet to be resolved.

One of the most important issues for competition in Australian broadcast markets in the future is whether new entry into the pay TV and local telecommunications markets is blocked by the exclusive programming arrangements of Foxtel and Optus. Given that two thirds of the country have not been cabled, opportunities exist for new firms to lay cable or develop other transmission platforms to service new markets. A key issue is the roles that exclusivity in content and vertical integration play in supporting the transmission services industry as opposed to potentially foreclosing new entry (to a converging market).

It is clear that any new Pay TV entrant will require content to develop a customer base. Given the exclusive content arrangements established by the two major cable companies, any entrant will need to acquire movie and sports programming (the key subscriber drivers) from either or both Foxtel and Optus.

Optus has scaled back its cable roll out and consequently the competitive pressure on Telstra has been reduced. New competition will be possible at a local level by local utility companies, new cable companies, seeking access to services provided by existing infrastructure and potentially through alternative wireless delivery means. If such potential entrants are blocked by having no pay TV programming, Telstra may have less incentive to upgrade its network and many Australian consumers will not receive the benefits of competition in pay TV or other telecommunications services.

Another issue which might generate concern in the future would be joint purchasing schemes. It has been suggested by at least one of the incumbent pay TV operators that competition between them for exclusivity in content has pushed up prices for some content to unsustainable levels. It has also split important subscription drivers such as sport and movies into two streams, weakening the quality of each, and according to the suppliers, slowing the penetration of pay TV in Australia. While sport and movie product may be split between competing channels in other countries, the split in Australia is between competing delivery companies such that the outcome is that consumers would be required to purchase two sets of programming and two sets of reception hardware to access all major movies and sports events.

A proposal which has been tentatively raised is the establishment of a single content company which would purchase programming on behalf of all pay TV companies. This monopsonist would use its market power as the sole buyer of programming for Australian pay TV to force price reductions from suppliers. The lower costs of programming would then be passed on through to the pay TV operators distributing the product to households, and to consumers.

There may be some pro-competitive element to such a proposal if sellers of programming have some monopoly power. For example, if buyers faced a dominant sports or movie programming supplier, the establishment of a single buying group may provide some degree of countervailing power. However, many content providers do not have substantial market power. Local drama suppliers and suppliers of individual sports rights may be disadvantaged by dealing with a single content buyer. Payments to small content providers might be significantly reduced, at substantial cost to the content industry.

Further, there is no certainty that the monopsonist would pass on the cost savings. If it is controlled as a joint venture by the existing three pay TV providers in Australia, then it may pass on the cost savings to its shareholders but they may not pass on the savings to consumers. The joint venture in purchasing may be a convenient way to co-ordinate downstream prices to the detriment of competition.

It is also possible that a joint venture controlling all product and made up only of the existing suppliers, may block any new entry into pay TV by refusing to supply. In those instances where it chose to supply, it may supply at discriminatory prices to deter new entry. Even if it practised non discriminatory pricing, it may charge all downstream firms a monopoly price. The integrated shareholders in the monopoly content company would earn profits from the content company but the non integrated supplier of pay TV to households might find entry unprofitable under such pricing arrangements.

A further set of issues, relating to vertical arrangements in the industry, also appears to be emerging. For instance, the emergence of global alliances is potentially of concern to regulators of broadcasting and telecommunications industries. One key issue which this raises is the need for international cooperation and dialogue on dealing with vertical integration in a converging industry. Within Australia there also appears to be a growth in alliances between the free to air and subscription sectors for the purposes of acquiring content.

The market structure of the Australian communications industry is expected to be rather fluid in the face of the convergence phenomenon. It will be necessary to identify and act upon the emerging competition policy concerns while ensuring that the industry is not hindered by regulatory impediments to its development. Given the global nature of the communications revolution, international cooperation in developing such policy will undoubtedly be crucial to its success.

NOTES

1 *Trade Practices Act* 1974 (Cth).

2 Source: Australian Pay TV News.

CANADA

Key Regulations

Application of competition law (does the competition law apply in full to this sector? Are there exemptions to competition law, related for example, to the broadcasting of sports?)

In Canada, the *Competition Act* is of general application; there are no specific provisions in the *Act* for specific industries. The *Competition Act* includes among its provisions criminal sanctions against conspiracies to prevent or lessen competition unduly as well as civil remedies in respect to mergers or abuse of dominant market positions where their effect is to prevent or lessen competition substantially.

Inquiries under the *Competition Act* are carried out on a case-by-case basis having regard to a number of factors including the definition of relevant geographic and product markets. In its analysis, the Competition Bureau would consider such factors as barriers to entry, including regulatory barriers to entry, and the extent of remaining competition in the market. The *Competition Act* provides an exception for mergers resulting in efficiency gains which offset or outweigh a lessening or prevention of competition resulting from a merger.

The Canadian Radio - television and Telecommunications Commission (CRTC) regulates and supervises all aspects of the Canadian broadcasting system under the *Broadcasting Act*, including Canadian programming services and Canadian broadcasting distribution undertakings, cable television systems, wireless systems and Direct - to - Home satellite services.

In broadcasting the CRTC has broad regulatory powers. It has, amongst other things, the authority to make regulations, issue, amend and renew broadcasting licences; approve transfers of ownership and control; exempt classes of undertakings from licensing; and issue mandatory orders to enforce compliance.

The Competition Bureau's examination of broadcasting mergers or other competition issues relates exclusively to competitive effects. The Bureau's concern in radio and television broadcast markets relates primarily to the impact on local advertising markets and with respect to broadcast distribution undertakings, to the choices and prices available to consumers. The CRTC's consideration involves a broader set of objectives under the *Broadcasting Act*, principally ensuring diversity of views and prominent Canadian content. In awarding new licences or reviewing changes in control or ownership, the CRTC takes account of competition issues as they relate to the ability of licensed undertakings in the affected market to fulfil their obligations under the *Act*, regulations or conditions of license.

Regulated Conduct Defence

Jurisprudence, developed primarily under the criminal provisions of the *Competition Act*, has held that, in certain circumstances, parties who have breached the *Competition Act* may have a defence if those activities are specifically authorized pursuant to valid regulatory legislation. This 'regulated conduct defence' is not a defence for all types of behaviour in a regulated industry. The rationale for the defence is

that valid regulation properly applied is deemed to be in the public interest and firms cannot be found culpable under the *Competition Act* for activities specifically authorized by the regulator.

The mere fact that government regulation exists in a given sector does not in itself preclude the application of the *Competition Act*. Furthermore, whether or not such a defence may be applicable depends upon a careful examination of the nature of regulation and the facts of the particular case under review. The Director of Investigation and Research has identified four elements necessary for the defence to be considered: the relevant provincial board or federal legislation must be validly enacted; the activities must not only fall within the scope of the relevant legislation, but also be specifically authorized; the authority of the regulatory body must have been exercised; and finally, the activity or conduct in question cannot have frustrated the exercise of authority by the regulatory body.

To date, no jurisprudence has been developed under the *Competition Act* as to the potential application of the regulated conduct defence to the broadcasting industry. The Competition Bureau is of the view, at least insofar as mergers are concerned, that the Bureau and the CRTC have parallel jurisdiction and any transaction must comply with the legislation administered by both organizations.

Enforcement of Competition Law

Market Definition

How have markets been defined in the past? Are different forms of media advertising considered to be in the same market? Have different forms of programming such as sports or drama programming been considered to be in the same market?

The Canadian experience and related jurisprudence in defining relevant media markets, while extensive, has almost exclusively been confined to print media. Over the years, the Bureau has investigated and litigated a number of major newspaper cases, as well as a major case involving the Yellow Pages Industry. [1]

Two recent cases, *Southam* and *Yellow Pages*, are instructive in considering the question of product market for advertising. The *Southam* case involved the issue of the definition of the relevant product market. Southam was the owner of the two Vancouver-area daily newspapers, *The Vancouver Sun* and *The Province,* when during the 1989-1990 it acquired a direct or indirect controlling interest in thirteen community newspapers in the Vancouver area. In addition, Southam acquired three distribution businesses, two printing businesses and a real estate advertising publication, which prior to the acquisition competed with the *Homes* supplement to the *North Shore News* and the North Shore edition of the *Real Estate Weekly*.

The Director contended that the joint control of these publications and the two Vancouver dailies by Southam prevented or lessened or would likely prevent or lessen competition substantially in the supply of newspaper advertising services, including real estate advertising, in various markets in the Vancouver area. The Director requested that the Competition Tribunal order Southam to dispose of its interests in *The Vancouver Courier* and the *North Shore News*, and the *Real Estate Weekly*.

The Director took the position that the product market consisted of newspaper retail advertising services provide by the two Pacific Press dailies and two of the community newspapers in the Lower Mainland. The respondents argued, first, that dailies and community newspapers are not close substitutes and, second, that if the product market is enlarged to include both dailies and community newspapers,

then all advertising channels (television, radio, free-standing flyers, billboards, yellow pages, etc.) should also be included because they too are substitutes for advertisers in the dailies and community papers.

The Competition Tribunal recognized that it would be virtually impossible to obtain a direct measure of the cross elasticity of demand between community and daily newspapers. The Tribunal proposed to use five secondary sources to determine the issue of substitutability; physical characteristics of the products, the uses to which the products are put, behaviour of buyers, views of industry participants, and the views of experts. Although this decision was appealed all the way to the Supreme Court, both parties agreed that the Tribunal had articulated the proper test for substitutability.

In its decision the Competition Tribunal stated:

> There are few obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them. In light of the differences, it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles. Evidence showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite. *There is in fact no evidence before the tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers. (emphasis added)*[2]

The Tribunal also observed that:

> The evidence is that the ability to obtain very high household penetration in the areas from which they draw customers is a major advantage that advertisers find in the community newspapers ... (and) ... with their present product configurations *the dailies and community newspapers are at best weak substitutes for some advertisers. (emphasis added)*[3]

The Tribunal states that the evidence regarding the demand for newspaper advertising

> ... leads (it) to conclude that the community newspapers and the dailies are very weak substitutes: small changes in relative prices are not likely to induce a significant shift by advertisers from one type of newspaper to the other.[4]

Significantly, the Competition Tribunal also concluded that:

> The evidence with respect to the electronic media is that they are too weak substitutes to be considered part of the same retail advertising market as newspapers.[5]

The Yellow Pages case involved aspects of Yellow Pages advertising. The first aspect concerned the provision of advertising space in a published directory or the publishing business. This involved activities such as the compilation, printing and distribution of the directory. A second aspect was the provision of the advertising services required to create a finished advertisement for publication in a directory. This included elements such as locating customers, content, creation and placement of directory advertising.

The Director brought an application against two Yellow Pages Publishers -- Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. -- under sections 77 and 79 of the Competition Act, the provisions dealing with tied selling and abuse of dominant position. The relevant products in the application were telephone directory advertising space and telephone directory advertising services. The

Director alleged that in relation to section 77, the respondents engaged in a practice whereby as a condition of supplying advertising space in telephone directories, they required or induced customers seeking advertising space in telephone directories to acquire another product from them, namely telephone directory advertising services.

With respect to the allegation of abuse of dominant position, the Director alleged that the respondents substantially or completely controlled the classes or species of business they engage in, namely the provision of advertising space and the provision of advertising services.

The definition of the product market focused on whether there were close substitutes for telephone directory advertising. The key issue for the Tribunal was whether all local media are close substitutes, providing sufficient competitive discipline among themselves that they should be considered to part of the same product market. Because of the statistical difficulties in measuring the demand cross-elasticity, the Competition Tribunal assessed indirect evidence of substitutability. Specifically, the Tribunal employed an indicia of functional interchangeability and inter-industry competition as provided in the decision of the Court of Appeal in *Southam*.

The Court of Appeal found that in respect to functional interchangeability, it was "not simply one of many criteria to be considered but a critical part of the framework." It also confirmed that functional interchangeability will generally be regarded as a "necessary but not sufficient condition to be met before products will be placed in the same market." The Director argued that the two headings from the *Merger Enforcement Guidelines*, "end use" and "physical and technical characteristics" were both related to the question of functional interchangeability. The Director held that certain characteristics of directories were key factors which dictate the end use[6] of a directory as a directional reference tool and which thus limit the "functional interchangeability" of directory advertising with directional advertising in other media. The respondents argued that all local advertising has the same end use: to increase business at a particular location, and that therefore the characteristics of the various media should not be considered as part of the determination of functional interchangeability.

The Tribunal agreed with the Director's position that the distinction between creative and directional media is valid for determining the end use of Yellow Pages and other local media. The Tribunal stated that:

> A fair consideration of the evidence ... supports the position that creative advertising creates awareness of and demand for goods and services at the beginning of the buying cycle and that directional advertising refers to advertising to consumers who are at the end of the buying cycle which "directs" them where to buy a product or service. This effectively limits the number of media that can be considered to be directional.[7]

The Tribunal concluded that "the respondents' position that local advertising in *all* media qualifies as directional is not tenable." In particular, the Tribunal found that television radio and outdoor media were clearly not treated as directional in tele-Direct's own materials. Television is seen as having little relevance to the latter stages in the buying cycle; it is strong in creating awareness and interest at the beginning of the cycle only. While radio and outdoor media have a role at the later stages, that role was not to present a directive message but rather to create urgency or serve as a reminder of other advertising. The Tribunal stated that "... both the electronic and outdoor media can be excluded ... as they are not directional media and thus do not have the same end use as Yellow Pages advertising."

The Tribunal then turned to an examination of practical indicia to "decide if (local advertising) are close substitutes and belong to the same product market as telephone advertising." The Tribunal

looked at physical characteristics: time sensitivity/permanence, comprehensiveness and other restrictions on price advertising that Yellow Pages employs to regulate comparative advertising, as well as the use of coupons and the use of superlatives.

Upon reviewing the evidence, the Tribunal found that:

> There is little evidence supporting the respondents' position that all media are substitutes for local advertisers. Specifically, the evidence of switching behaviour between Yellow Pages and other media is extremely weak. There is almost no evidence that advertisers regard Yellow Pages as serving the same purpose as other media nor that they regard its purpose in the broad manner put forward by the respondents. While there is evidence of changes in advertising expenditures, they are associated with changes in economic conditions or advertising strategy rather than switching between media in response to competitive moves by the media.[8]

In summary, it is reasonable to conclude from the decisions reviewed above, that the approach to defining relevant advertising markets adopted by Competition Tribunal favours narrower as opposed to broad market definitions**.**

Horizontal Agreements and Mergers

How have mergers between competing firms at the same stage in the value chain been assessed? Have cross-media ownership concerns arisen? Have mergers threatened to lead to concentration in the market for media advertising in general? Which forms of cooperation between firms in the value chain have been held to be illegal? For which forms of cooperation have exemptions been granted?

In which markets has dominance or market power been a concern? Has such market power been used to reduce competition upstream or downstream? E.g., have broadcasters with exclusive rights to certain forms of programming sought to exclude competing broadcasters? Have firms with a dominant position in the market for access to consumers used that dominant position to restrict competition in the market for content? Has competition law been used to enforce access to certain facilities or to certain forms of programming? Have there been any cases or allegations of predatory pricing or other forms of entry-deterring behaviour?

The experience of the Competition Bureau in assessing the impact of horizontal mergers in the broadcasting sector is very limited. In large part, this is due to stringent ownership restrictions imposed by the industry regulator. The Canadian Radio-television and Telecommunications Commission (CRTC) has enunciated a policy that a broadcaster should only have one over-the-air television station in one language in a regional market. The impact to date of the CRTC's ownership television rules has, from a practical standpoint, tended to negate the need for merger review under the *Competition Act*. For example, in a 1989 transaction involving MacLean Hunter and Selkirk Communications, the CRTC rules required overlapping television stations in local markets to be divested.[9] It should be noted, however, that these ownership restrictions are currently being reconsidered by the CRTC as part of a larger review of Canadian television policy.

Until April, 1998 radio broadcasters were restricted to ownership of a maximum of one AM and one FM undertaking operating in the same language in the same market. The CRTC liberalized its ownership rules to provide that in markets with less than eight commercial stations operating in a given language, a single entity may own or control up to three stations in the same language, with a maximum of two in any one frequency band. In markets with eight commercial stations or more, a single entity may

own or control as many as two AM and two FM stations in the same language. Ownership changes continue to require approval of the industry regulator under the Broadcasting Act and will also be subject to review under the *Competition Act*. While the Bureau anticipates that these new ownership rules will result in moves to consolidate the Canadian radio industry, there is insufficient experience to date to judge to what extent this will occur or the results of merger reviews under the *Competition Act*.

In the current Shaw/WIC/CanWest proposed transaction, which involves overlapping television stations in several markets, the CRTC may order divestiture. If divestiture does not satisfactorily address the concerns the Bureau may have, then it will need to examine the impact of this transaction on the advertising sector.

With respect to horizontal agreements, in a number of Canadian cities radio stations have entered into what are known as "local station management agreements". Under these agreements, stations combine management and overhead functions and jointly sell advertising. The Bureau has examined certain of these agreements, but to date has not identified any markets in which their impact on competition warrants an application to the Competition Tribunal or other enforcement action under the *Competition Act*. The CRTC has generally concluded that these management agreements do not contravene its ownership restrictions or the conditions of licence of the parties. However, the Commission is reconsidering its approach to local station management agreements in light of its recently relaxed ownership rules.

Regarding exclusive rights and access, in December, 1997 the CRTC introduced detailed Broadcasting Distribution Regulations.[10] With respect to competition, these rules in large part are intended to address issues of dominance on the part of incumbent cable companies during the transition to more competitive broadcast distribution markets. Among other things, these rules address concerns over distributors engaging in anti-competitive behaviour with respect to carriage and access by non-affiliated programmers. The rules also provide for transfer of inside wiring from cable companies to customers in order to facilitate competitive entry. They also provide that new entrants will not be rate regulated and establish criteria under which incumbents rates are to be deregulated. Under this regulatory regime, it is anticipated that at least for the immediate future, competition concerns in this sector are most likely to be dealt with by the CRTC.

NOTES

1 *Director of Investigation and Research v. Southam Inc. et al* (8 March 1993) Order Regarding Divestiture CT-90/1(Comp. Trib.); Director of Investigation and Research v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (February 26, 1997) CT-94/3 (Comp. Trib.); *R.* v. *K.C. Irving Ltd.*, [1978] 1 S.C.R. 408, 1 B.L.R. 10, 29 C.P.R. (2d) 83, 32 C.C.C. (2d) 1, 72 D.L.R. (3d) 82, 12 N.R. 458; *R.* v. *Thomson Newspapers Ltd.* (9 December 1983), (Ont. H.C.J.) [unreported].

2 Southam, *supra*, Note 1, p. 276.

3 Ibid, p. 277.

4 Ibid, p. 278.

5 Ibid, p. 214.

6 The Director defined the relevant end use of telephone directory advertising to be use as a "directional" medium. Directional advertising is characterized by two elements: (1) consumers consult the medium when they are at a point in the buying cycle when they are ready to buy; and (2) the medium is used as a reference tool. The respondents argued that all local advertising has the same end use, to attract customers to a particular establishment, and therefore advertising in the Yellow Pages and advertising in other local media are functionally interchangeable. p. 46.

7 Yellow Pages, *supra*, note 1, p. 49.

8 Yellow Pages, *supra*, note 1, P. 83

9 Broadcasting Decision CRTC 89-766.

10 Public Notice CRTC 1997-150

Annex:
Overview of the Canadian Broadcasting System

The framework for the Canadian broadcasting system is largely set out in Canada's Broadcasting Act. The Broadcasting Act defines broadcasting as: "Any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place". "Program means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text".

The Broadcasting Act sets out: the broad objectives - mainly cultural and social - for the broadcasting system, the mandate of the Canadian Radio-Television and Telecommunications Commission (CRTC) which is Canada's broadcasting regulator and the mandate of the Canadian Broadcasting Corporation (CBC) - which is Canada's national public broadcaster. The Act also gives the Government of Canada a power of policy direction over the CRTC and provides for appeals to Government regarding CRTC decisions. Spectrum management, a mainly technical function, is handled by the Department of Industry Canada. The Department of Canadian Heritage is responsible for setting out the broad policy framework for broadcasting. The Competition Bureau may upon receiving complaints, use its regulatory oversight within the context of its own mandate. The Competition Bureau also often intervenes during the context of CRTC proceedings.

Programming

Canada's broadcasting system provides Canadians with a broad diversity of programming choices that include English and French-language programming, private, public, community and provincially-owned educational broadcasters; programming choices also extend to native, ethnic, European and American broadcasting.

Distribution

Programming is distributed by a variety of means: over-the-air, terrestrial cable, multi-point multi-channel distribution system (MMDS) and direct-to-home satellite broadcasting. For each of these means, competition exists between distribution undertakings. The Canadian government used its power of policy direction to set out a framework for competition between cable distribution undertakings and telephone companies as well as between direct-to-home satellite broadcasters. In the past, any monopoly situation was the result of limitations imposed by technological or market size constraints.

Structure of the Canadian broadcasting system (figures are from 1996)

Television

There are 91 private television stations in Canada and 31 CBC TV stations, 2 English- language national networks (CBC, CTV) and one French-language national network. Canada has over 40 speciality services (cable services as they are known in the U.S.), 6 pay-per-view services and 3 pay-per-view services. There are 3 English-language and two French-language provincial educational TV broadcasters.

Cable

There are 1, 990 cable systems operating in Canada with 355 ownership groups. There are 7.87 million cabled households (69 per cent of all households).

Wireless and satellite

There are two Direct-to-Home satellite services and, as of 1998, there are two MMDS systems in operation.

CZECH REPUBLIC

Regulatory Institutions

At the moment there are two regulatory institutions in radio and television broadcasting. Firstly the protection of economic competition is regulated by the Office for Economic Competition (hereinafter referred to as the "Office"). Its powers and jurisdiction are laid down in the Act on the Protection of Economic Competition No. 63/1991 Coll. and the Act on the Jurisdiction of the Office for Economic Competition No. 273/1995 Coll. Secondly, adherence to legal regulations for radio and television broadcasting, its development of plurality and its independence is guaranteed by the Council For Radio and Television Broadcasting (hereinafter referred to as the "Council"), following Act No. 103/1992 Coll. on the Council of the Czech Republic For Radio and Television Broadcasting (hereinafter referred to as the "Act on the Council"). The powers of the Council are laid down by Act No. 468/1991 Coll. on the operation of radio and television broadcasting in its current wording (hereinafter referred to as the "Act on Broadcasting").

The Council has 13 members, headed by a chair. The Office of the Council of the Czech Republic for radio and television broadcasting (hereinafter referred to as the "Office of the Council") is the executive body of the Council. It has specialised, organisational and technical roles. The Office of the Council consists of the licensing section, the programming section, the technical section, the legal section and the economic section. The Council's annual report is submitted to the Parliament of the Czech Republic while the Office submits its annual report to the government of the Czech Republic.

The Czech Telecommunications Office is part of the Ministry of Transport and Telecommunications and is responsible for telecommunications, in accordance with the current wording of act No 110/1964 Coll. (hereinafter referred to as the "Act on Telecommunications"). A broadcaster is allocated a broadcasting frequency by the Czech Telecommunications Office, based on the decision of the Council for granting licences to particular broadcasters. The Czech Telecommunications Office operates in close co-operation with the technical section of the Office of the Council. The Office of the Council is responsible for planning the frequencies, for suggested new frequencies and changes in the use of the frequency spectrum, as well as for random checks of adherence to technical specifications in broadcasting.

The Relationship between Regulation and Competition Authorities

The Office is responsible for competition enforcement. It is necessary to state that there is no conflict of powers between the Office and the Council. Both authorities work together and consult on important issues relating to their jurisdiction. Maintaining pluralism in broadcasting is supervised by the Council. This is an obligation derived from the Act on the Council. There is no potential conflict between pluralism and competition at the moment. Nevertheless, it is necessary to state that the number of broadcasting circuits in terrestrial radio and television broadcasting is to be considered as a form of "national treasure" that cannot be expanded by technological means without losing the quality of the signal. Technical use of the present system and the choice of its operators is decided by the Council.

When considering an application for granting a licence for radio or television broadcasting, the Council will, according to the Act on Broadcasting, take into account the fact that the applicant should not

attain a dominant position in the field of media. The same act obliges the radio or television broadcaster to inform the Council of having been granted the license to publish periodicals or of having merged with an enterprise of another entity, which publishes periodicals. A television broadcasting operator has an obligation to inform the Council about any merger of his business with any other broadcaster and the same holds vice versa. Assessing competitive behaviour of entities undertaking in the media falls within the jurisdiction of the Office. It is fully covered by the Act on the Protection of Economic Competition, even if the parties concerned are not businessmen, as long as they take part in economic competition.

The short development in the field of regulation has been made possible through some liberalisation of the Council's powers. A new amendment to the Act on Broadcasting (1995) states that the authorisation to broadcasting via satellite, cable or via satellite and cable networks comes into being upon registration. Up to the time of the new amendment such authorisation used to be subject to a license granted by the Council, as it was and still is in the case of authorisation of radio and television broadcasting. Another significant change brought about by the amendment is the fact that the Council no longer has the power to set certain conditions for the licensee to fulfil. The Council can set the conditions anyway, but it has to take into account the information about programming stated by the applicant in the application for the license. As a result of this liberalisation the number of operators through cable networks has increased dramatically.

Broadcasting regulations

General restrictions

The definition of broadcasting is included in Article 2 of the Act on Broadcasting. Radio and television broadcasting means transmitting programmes or visual and audio information via transmitters, cable networks, satellites and other means, aimed at public reception. The Council's interpretation of this law does not include the Internet. The Council has pointed out areas of issues that should be taken into consideration when preparing the legislature in this field, since providing services via Internet has not been addressed from the legal point of view.

Based on the Act on Broadcasting, there are three categories of broadcasters. These are broadcasters by law (public service radio and television), licensed broadcasters (private radio and television) and registered broadcasters (broadcasting through satellite and cable networks). Only a person with a permanent residence in the Czech Republic can become a broadcaster. If such persons are granted a license or receive a registration certificate, they are obliged to incorporate into the commercial register (if they have not been yet).

When granting the license, the Council reflects conditions for programming plurality and balance, equal access to cultural values, information and opinions, as well as the development of culture. A broadcaster by law must not be a partner of a company applying for license or of a licensee. If the application is submitted by an entity with foreign participation, the Council, when granting the licence, also has to take into account the applicant's contribution to the development of original local culture. The license cannot be transferred and legally claimed.

Registration is carried out by the Council. If conditions set by the Act on Broadcasting for submission of applications for registration are fulfilled, registration can be legally claimed by the applicant. Registration cannot be transferred. The Act sets no limitations as to the number of registrations for a particular region.

There is no monopoly in program distribution, there is no obligation to grant better conditions for "public service" broadcasters or to favour them in the broadcasting spectrum. There is no regulation of ownership relations, nor any law that restricts acquiring shares by one owner in different categories of the media concurrently.

Programming restrictions

Public service radio and television broadcasters are required by law to observe certain rules concerning programming for certain areas, content promotion, programming fostering national identity etc. Adherence to these rules is checked by the Council. There are no such rules for licensed or registered broadcasters and there is no way of imposing them.

All broadcasters, however, are subject to regulations set by the Act on Broadcasting, concerning advertising and programming restrictions. Promoting war is prohibited. Between 6 a.m. and 10 p.m. broadcasts threatening children's psychological or moral development are prohibited. Broadcasts must not include subliminal information. Further restrictions for broadcasters can be found in Act No. 40/1995 on advertising regulations (tobacco, spirits, medicine, etc. advertising). Fulfilment of these regulations is checked not only by the Council, but also by other bodies, e.g. The Council for Advertising. Rules for advertising broadcasts are structured differently for public service broadcasters and for licensed and registered broadcasters.

Market Structure

Television Broadcasting

Terrestrial television

The only statutory television broadcaster – Èeská televize – has two comprehensive broadcasting circuits at its disposal. Èeská televize ratings are 35 percent. The main source of income are licence fees, revenues from advertising are 23 percent.

Local terrestrial broadcasting in the Czech Republic evolves in two ways. It is local (community) broadcasting and real regional broadcasting, covering an area of several districts. Broadcasters can broadcast on the basis of a granted licence. At present there are 12 regional and 48 local licenses.

Licensed Broadcasting

- CET 21, Ltd. (NOVA channel) – market share according to ratings is 52 percent. Revenue share 76 percent.
- FTV Premiéra, Ltd. – market share according to ratings is 9 percent.
- Broadcasting in MMDS (multi-channel microwave multi-functional system) – enabling wireless transmission of several TV channels to the users. Substitutes cable networks. 11 licenses for this system have been granted.

Registered Broadcasting

- television broadcasting in cable networks – 72 entities have been registered
- television satellite broadcasting – 8 registered entities, 5 of which are actually broadcasting

Radio Broadcasting

Public service radio

The statutory broadcaster is Èeský rozhlas, with 3 whole-area stations and 8 regional circuits. Its market share according ratings is 33 percent. The main source of income are licence fees.

Licensed broadcasting

- Frekvence 1 Radio and Alfa Radio – market share 10 percent.
- Regional and Local Radio Stations – 77 entities altogether, each of them in an area specified in the license.

Enforcement of Competition Law

In the field of radio and television broadcasting, within its jurisdiction, the Office has been dealing with mergers in cable networks (US West / KABEL Plus), with abuse of dominant position by cable television in relation to television cable network users and with the assessment of agreements on granting exclusive rights for the provision of sports broadcasts for TV broadcasters.

FINLAND

Regulatory Institutions

In Finland, the Ministry of Transport and Communications is responsible for the regulation and general development of public service broadcasting operations. The operation licences are granted by the State Council on the proposal of the Ministry of Transport and Communications. The task of the Telecommunications Administration Centre is to control the enforcement of the Acts and operation licences. The Telecommunications Administration Centre is also responsible for the frequency administration.

The Ministry of Transport and Communications is responsible for the regulation and general development of telecommunications operations. Our public service broadcaster the Finnish Broadcasting Company (YLE) is, however, directly subject to the Parliament.

Competition law enforcement falls within the domain of the Finnish Competition Authority. The Act on Television and Radio Broadcasting and the Act on Yleisradio Oy aim to guarantee pluralism while they, in a certain respect, limit the application of competitive considerations in the broadcasting operations.

Key Regulations

On 22 September 1998, the Parliament passed a new Act on Television and Radio Broadcasting. This Act will enter into force on 1 January 1999. The new Act is the first that covers the whole broadcasting sector. As the Act was passed, old special statutes concerning cable and satellite broadcasting and terrestrial radio broadcasting as well as the provisions based on them were repealed.

Definition of broadcasting: the definition in the new Act on Television and Radio Broadcasting is based on the definition of television broadcasting in the EU television directive. The definition also covers the Internet but so far, the operations on the Internet remain outside the enforcement of the Act on Television and Radio Broadcasting .

Only the broadcasting in the terrestrial radio networks is subject to licence. Broadcasting operations via cables and satellites only require a registration.

According to the new Act, the licence may be granted only to a solid applicant who evidently has the capability to maintain regular operations in accordance with the licence. The grantor of the licence, which according to law is the State Council, shall, in declaring licences open for application and in granting licences, taking into account the supply of television and radio services as a whole in the area in question, aim to promote the freedom of speech and to increase the diversity of programmes and the special needs of the public.

In the EU television directive, there is a certain quota for the European and the independent producers' programmes. These obligations, naturally, also apply to Finnish television broadcasters. Otherwise, in Finland, attempts have been made to avoid very strict limitations to programming. The

licences include some general terms, for example, the promotion of local discussion and culture, but the decision on details has been left to the responsibility of the operators. According to the new Act, special conditions may be attached to licences, if the diversity of communications and minorities' needs cannot be otherwise guaranteed.

In Finland, operating licences are free of charge and cannot be sold forward. This has been considered necessary in order to ensure the diversity of communications.

According to the new Act, the licence procedure is based on the frequency plan accepted by the State Council. This plan defines the number of national, regional and local frequencies and, hence, also the number of the licences in question.

The new Act does not directly set limits to the number of frequencies/licences a television or a radio broadcaster may be granted. The Constitutional Committee of the Parliament has, in its statement on the new Act, defined that the aim of the licence policy is to grant licences to several independent applicants.

The operations of the public service broadcasting company, YLE, are regulated by a special Act. The extension of the operations of the company is decided by a parliamentary committee. In principle, the company is entitled to have those channels that it needs to perform the public service tasks. Since YLE was the first to begin operations, it has naturally a very strong hold on frequencies. This position has been strengthened by YLE's ownership of the national television and radio programme networks.

In Finland, commercial licences have been granted by the channels. The frequency authorities grant frequencies according to this. The frequencies are not auctioned in Finland. No licence is needed to broadcast programmes on the Internet.

In Finland, there are no restrictions concerning the centralisation of communication or the ownership or providing services in other networks. The only regulation of this type is the quota of the independent productions of the EU television directive.

According to the new Act on Television and Radio Broadcasting, "the licensing authority shall have the right to issue regulations relating to the programme service which are necessary to safeguard the diversity of the programmes and to meet the needs of special groups." At the moment, we are not able to state specifically what this will mean in practice.

Certain public service tasks are defined for the company in the special act concerning YLE.

According to the new Act, no detailed conditions for the programme operations can be set for cable and satellite broadcasting.

For the present, the commercial television and radio operators have not been granted subsidies for the programme operations. YLE's operations are financed by licence fees and the so-called public service fees obtained from commercial television operators.

The owner of the cable television network has to retransmit all the services of YLE and the national commercial television and radio operators.

In Finland, there are no specific Acts or other regulations concerning the pricing of advertising and television services.

The competition law applies in full to this sector and there are no exemptions eg. concerning the broadcasting of sports.

Key Developments

In Finland, the telecommunications legislation was liberalised at a very early stage, which is considered to be one reason for Finland being one of the most developed countries in the world in this sector. In the new television and radio broadcasting legislation, we have liberalised the cable and satellite television operations as far as possible.

Market Structure

YLE (TV1 and TV2)

(a) The transmissions cover the whole country.

Two national television channels and four national radio channels and 18 regional radio channels. Produces most of its programmes itself and also carries out their terrestrial distribution.

(b) state-owned company.

(c) licence fees and public service fees.

MTV Oy (MTV 3)

(a) The transmissions cover the whole country.

One national television channel. Produces most of its programmes itself, but uses many independent producers, too. The programmes are distributed in the YLE network.

(b) Part of the Alma Media corporation. Alma Media is a listed company whose biggest single owner is the Swedish Marienberg corporation.

(c) advertising

(d) Alma Media is the second biggest newspaper publisher in Finland. The corporation owns a large number of the shares of the national commercial radio.

Ruutunelonen Oy (Nelonen)

(a) The transmissions cover 70 per cent of the population.

Orders programmes mainly from independent producers. The programmes are distributed in the YLE network.

(b) Part of the Helsinki Media Company Oy corporation and is thus connected to the biggest media corporation in Finland, Sanoma Oy. The ownership is changing since Sanoma Oy and Helsinki Media Oy will be merged with the biggest Finnish publishing-house, WSOY.

(c) advertising

(d) Helsinki Media is a significant magazine publisher. Sanoma Oy is the biggest newspaper publisher in Finland. A subsidiary of Helsinki Media Oy, HTV, is the most significant cable television operator in the Helsinki area.

Specific Issues

Digital television. In 1996, the Council of State made a resolution on the digitalisation of the terrestrial television and radio networks. A working group of the Ministry of Transport and Communications published its report in May 1998. The implementation of digital television is the responsibility of YLE and commercial television companies. The State will not take part in the funding. The role of the State will, in the future, be limited to the role of regulator.

"Siphoning". The new Act gives the State Council a right to define events which have to be broadcast via free television. At this moment, Finland has no plans on the matter.

Access. There are no provisions concerning the matter in the television and radio operations legislation. The matter is of significance mainly in cable television operations, to which the orders of telecommunications market legislation can be applied.

Local production industry. The new legislation does not offer a direct possibility to favour local production. However, conditions may be attached to licences according to which local matters have to be included in the programmes.

Universal service. As to the contents of programmes, only YLE has a binding public service obligation. An obligation to distribute programmes throughout the whole country has been set on MTV Oy.

Internet. In Finland there is no specific legislation concerning the Internet and, for the present, it has not been considered necessary.

Enforcement of Competition Law

Market Definition: Review of Markets by Function

The electronic mass communications market may be divided into submarkets by function. Based on the logic and value chain of operations, such submarkets may contain production, programming and distribution. Traditionally, the field has been strictly vertically integrated.

The Finnish cinema and TV production is centralised. The national TV companies YLE (Finnish Broadcasting Company) and MTV3 (main commercial broadcaster) formerly produced closer to 80 per cent of the entire value of production. Recently, the number of independent producers has increased with MTV3 and Ruutunelonen (the latest commercial entrant) buying a considerable part of their programmes from them.

Programming refers to the compiling of programme blocks eg. those of the television channels from single programmes. YLE, MTV3 and Ruutunelonen are the biggest programmers. In the compiling of YLE's programmes, the public service obligation has to be taken into account. According to the Act on Television and Radio Operations, a broadcaster has to reserve the main amount of air-time to European programmes. In addition, 10 per cent of the air-time or programme budget has to be reserved to the programmes of indepedent producers. The EU Council Directive 89/552/EEC and its amendments is followed with respect to the broadcasting of television programmes, which have been obtained by exclusive rights, on other than free TV channels. In the programmes of cable-television networks, there has been little domestic production. The operations have primarily been composed of the distribution of satellite programmes and programming has thus been handled by outside companies.

Anyone wishing to conduct television or radio operations via free radio waves has to seek a licence from the State Council. Other television and radio operations are not subject to licence but a notification has to be made of it to the Telecommunications Administration Centre (Finnish Telehallintokeskus). The holder of the licence is obliged, under the law, to pay a licence fee to the government television and radio fund, the size of which is determined by the annual turnover of the company. The fee may be a maximum of 25 per cent. The licence fee for radio operations is smaller.

Distribution includes programme transmission and broadcasting through the distribution network. In Finland, YLE owns the national television and radio network, where from it has rented channel rights to MTV3 and Ruutunelonen. The cable television network attracts cirka 800 000, ie. 40 per cent, of households and, at the present time, it would not be profitable to build a new network to the sparsely populated regions. Satellite programmes may be followed by cirka 202 300 households via common antennae, and in single-family homes, cirka 59 000 households via direct reception.

Advertising Market

The media compete with each other for readers, viewers and listeners with news and edited material. At the same time, competition is being waged for advertisers and sponsors. In its case-law, the Finnish Competition Authority has found (cf. eg. the proposal to ban the abuse of dominant position by a leading provincial newspaper Lapin Kansa) that advertising in the various mass communication media does not form a uniform product market. Newspapers and electric media differ from each other in many ways from the point of view of both advertisers and those using the media.

The production technique of advertisements varies considerably in the different mass media, resulting in differing production costs. The different communications media require different advertising material from advertisers, too, so the design, purchase and manufacture of material differ according to advertising media. In television and radio commercials, the message cannot contain as much information as a newspaper advertisement. In television, picture and movement usually hold a central position, and in radio advertising, music is often used to create atmosphere. Television is more often used in brand advertising when the intention is to communicate something about the environment in which the product is used, or about the users or other images related to the use of the product. On the other hand, specialist magazines are better at reaching a specific target group than are the electronic media where the advertisement is only displayed for a few seconds. Hence the need for several re-runs, in order to secure maximum coverage. The following of the electronic media often consists of background listening and channel surfing during commercial breaks is possible. The spotting and reading of a newspaper advertisement, for its part, is not tied to a certain air-time.

In the cases examined by the Finnish Competition Authority, it has been estimated that electronic communications may best replace the press in national brand advertising. In brand advertising

aimed at specific target groups, magazines, too, rival newspapers. Whereas the advertising of the retail trade and service sector is, unlike brand advertising, mainly regional and local, and hence, usually carried out in newspapers containing news of their circulation area. The local advertising areas of MTV3 are so large in Finland that TV advertising is not, as a rule, a substitute for newspaper advertising. Direct advertising, however, plays a major role in regional advertising.

Market definition based on programme content

The Finnish Competition Authority is currently investigating a case where the Finnish Satellite Television Federation has found Music Television to hold a dominant position in the music programme market and the company to abuse that position. Music Television distributes programme rights directly to the Finnish cable television networks whereas the satellite television customers are forced to buy the viewing rights from MTV Europe's sole seller Canal Digital (for digital broadcasts) or from TV 1000 Finland part of the Modern Times Group (for the analogical technique). The price difference between the various distribution channels is considerable and, according to the appealant, unfoundedly in favour of the cable television networks. The Finnish Competition Authority holds that the relevant market comprises the distribution of the broadcast rights of the programme channels and that their division into sub-markets based on the content of programming is not justified.

Market definition and convergence

Convergence refers to the blurring of the line between telecommunications (target communications) and mass communications, and complicates the definition of the markets within mass communications. Electronic and graphic communications are nearing each other. Newspapers can be read through the Internet and digital versions can be made of books. With the coming of digitalisation and the interactive media, content production, communications infrastructure and information fields of the media are drawing closer to each other.

Horizontal Agreements and Mergers

There are three major operators in the Finnish communications field: the state-owned **Finnish Broadcasting Company** (YLE), **Alma Media** which came into being in the merger between the newspaper group Aamulehtiyhtymä and the commercial broadcasting company MTV3 and which is also involved in the operations of Finland's only commercially funded radio station Radio Nova; and the **Sanoma group**. The Sanoma group publishes Helsingin Sanomat, the biggest Finnish newspaper, and owns Ruutunelonen Oy, to whom an operating licence for national television broadcasts was granted two years ago. A major Finnish publishing-house WSOY is also just about to merge into the Sanoma group.

On 1 October 1998, an amendment of the Finnish Act on Competition Restrictions became effective, which empowers the Finnish Competition Authority to intervene with concentrations where the combined turnover of the parties to the concentration exceeds FIM 2 milliard and where the turnover of a minimum of two parties exceeds FIM 150 million. A concentration may be banned or conditions may be attached to its implementation, if, as a result of it, a dominant position will arise which significantly impedes competition in the Finnish markets. Because the arrangements described above occurred before these provisions became effective, the Finnish Competition Authority has not been able to intervene with the rise of the concentrations or attach conditions to them.

The birth and expansion of the Sanoma and Alma Media groups to new fields have been justified by an increase of effectiveness in the operations of the companies. The business branches of the groups include newspaper, magazine and book publishing, television and radio operations and the graphic

industry. Additionally, the groups operate in the field of the so-called new media. The centralisation of the media market and the expansion of firm size are often seem as imperative because, with scarce recourses, the necessary investments required by the new media and technical development cannot be realised. But the common acquisition of information and production of material to the different media increases efficiency and frees resources to quality development. In addition, the position of YLE has become so firm by the support of the state that additional resources from graphic communications have been said to be needed for competing television and radio operations. Major Nordic company arrangements are also to be expected.

However, the centralisation of the media market also decreases viewer, listener and reader options as well as those of the advertisers. With the increased market power of companies, customers can be tied in an exclusionary manner, or unreasonable or unfair trading terms be applied to them. Cross-subsidisation arrangements are also possible.

Vertical Arrangements and Mergers

YLE owns the television and radio broadcast networks. Other market operators have to pay network rent to YLE for the use of the existing infrastructure. A decision has been made in Finland that terrestrial digital television broadcasts will begin at the beginning of year 2000. The Ministry of Transport and Communications is currently preparing decisions on the rights of use of the new digital frequencies and the multiplex management. The Finnish Competition Authority has demanded that YLE differentiate its distribution network either into its own company or at least into a separate profit unit to ensure the indiscriminatory terms for the use of the network and to enable the monitoring of potential cross-subsidisation. Recently, YLE has made a decision that a new subsidiary will start operating next year. At the beginning, the only shareholder of the network company is YLE but later the minority of the shares can be sold out.

Television companies compete with each other for the purchase of foreign films and television programmes, in particular. In 1993, the Finnish cable television company Eurocable lodged a complaint with the Finnish Competition Authority according to which MTV and YLE had refused business relations with the programme sellers who were selling their programmes to Eurocable. Eurocable maintained that YLE and MTV hold a cirka 65 per cent share of the turnover of the film and television business in Finland, which gives them the possibility to pressure programme sellers not to sell to Eurocable. In its decision, the Finnish Competition Authority found that no evidence of actual coercision could be found. The companies had also displayed valid business grounds for not buying so-called free-tv rights to programmes that had already been sold via Eurocable to the PTV channel: a free cable channel for whose reception the cable television networks do not collect a fee from households that have been joined in the cable television network.

Competition Problems Caused by Public Regulation

The national broadcasting company receives its funding from the television fees collected from viewers for the use of television and from the operating fees collected from television and radio broadcast operators who have the right to broadcast advertisements. Additionally, YLE has a special licence for commercial breaks during certain sports events.

The Finnish Competition Authority finds the operating fees collected from YLE's competitors, in particular, problematic in view of effective competition. The obligation to support YLE's operations set on the other companies distorts the competitive situation. YLE has appealed to its public service obligation obliging it to broadcast news, current affairs and cultural programmes and to look after the needs of

language minorities. The Finnish Competition Authority holds that other companies send similar programmes, too, and if the programmes included in the public service obligation were tendered, all producers and television companies could compete for their production. Neither have any efficiency demands been set on YLE while the fees have been set; the starting point is that the current expenses are met in full.

In the future, the licence fees collected from viewers will also prove problematic as it is to be expected that viewers who merely follow commercially sponsored television channels or programmes broadcast by foreign companies via satellite will be unwilling to participate in the funding of YLE's operations. At present, a fee has to be paid for the use of television under the law.

ITALY

Introduction

Starting in 1974, a number of decisions taken by the Constitutional Court opened up the Italian broadcasting sector to competition. While several private broadcasters entered into the market, only RTI S.p.A. and to a lesser extent Cecchi Gori Communications S.p.A. were able to become effective competitors to RAI S.p.A., the Italian national public television company, in the provision of free-television services. Moreover, since 1993 the first pay-television broadcaster, TelePiù S.p.A., started operating.

Currently, the television broadcasting sector is regulated by law no. 223/90, subsequently integrated by law no. 422/93, and by a recent statute enacted in 1997 (law no. 249/97) concerning the whole communications industry.

The Regulatory Framework

The Constitutional Court Case Law and the Subsequent Legislative Evolution

After Second World War, radio and television national broadcasting activities (comprehensive of cable and terrestrial television) were reserved to the State, which since then has been operating through a wholly State owned corporation, RAI S.p.A.

The Constitutional Court, while reaffirming, the Constitutional legitimacy of the existing State monopoly on the broadcasting activity on a national scale, moved the first steps towards liberalisation, by establishing the principles which would have been the basis of the later legislative developments in the sector. First of all, the Court liberalised the setting up and operation of installations for broadcasting television signals coming from abroad (dec. no. 225/1974) and the setting up and operation of cable television networks (dec. no. 226/1974). Secondly, the Court recognised that the justification of public monopoly represented by the physical scarcity of channels did not apply to local broadcasting and, hence, the carrying out of the related activity had to be opened up to private operators (dec. no. 202/1976). Moreover, in 1981 the Court (dec. no. 148) outlined the possibility for private broadcasters to operate television networks also on a national scale, conditional on the adoption of an exhaustive regulation of the entire sector.

In 1985, the Italian Parliament passed a statute (law no. 10), limited in scope, aiming at authorizing the then common practice, developed by the local private broadcasters, of using functional interconnection[1] - as opposed to structural interconnection[2] - for transmitting television programs on areas as wide as the national territory. The above statute, expressly recognising this practice as legitimate, permitted the consolidation of a private broadcaster, RTI S.p.A. which, controlling three television networks (Canale 5, Italia 1 and Rete 4) operating on a national scale, became the main competitor of RAI S.p.A.

Eventually, in 1990, an overall regulation of the television sector was introduced by law no 223, which expressly permitted private operators to set up and operate television networks on a national scale, thus definitely eliminating public monopoly in broadcasting. Law no. 223 introduced for the first time in the broadcasting sector some limits on the number of available channels which may be controlled by an individual operator[3], as well as other limits concerning the cumulative ownership of television networks and newspapers. However, these limits actually reflected the *de facto* situation, letting RTI S.p.A. to maintain its three national channels and confirming the existing oligopolistic structure of the television sector.

Moreover, the aforementioned limits were fundamentally aimed at protecting the pluralism of information rather than at pursuing the allocative efficiency resulting from competition. In this respect, it is significant that the thresholds were not defined in terms of antitrust relevant markets but were based on the overall dimension of the television sector and of the whole communication industry, including the press.

Law n. 223 also set limits on television advertising, differentiating them in relation to the public or private nature of the national broadcasters. In detail, RAI S.p.A. was permitted to transmit commercials for a time not exceeding 4 per cent of the weekly programming and 12 per cent of the hourly programming. Any other private national broadcaster, since not receiving public contributions, enjoyed a less strict limit represented by 15 per cent of the daily programming and 18 per cent of the hourly programming.

In 1994 the Constitutional Court intervened once again and, on the basis of the principles affirmed in its previous decision no. 826/1988[4], it stated that in order to guarantee the pluralism of information it was necessary to modify law no. 223, further limiting the number of channels which may be controlled by an individual undertaking.

Accordingly, law no. 249/97, *inter alia*, decreased the percentage of channels that a private operator in terrestrial free-television could control, reducing it from 25 per cent to 20 per cent without predetermining the total number of national channels available.

More specifically, the thresholds provided by law no. 249 may be summarised as follow:

(a) each individual broadcaster may not be assigned more than 20 per cent of the channels available, as determined on the basis of a national plan of frequencies prepared by the Ministry of Communication;

(b) each individual broadcaster may not collect more than 30 per cent of the overall resources of its branch of activity. This thresholds is calculated with reference, respectively, to terrestrial television broadcasting, to radio broadcasting and to cable and satellite television broadcasting;

(c) if a broadcaster has even minority shareholdings in undertakings operating in the press sector, such broadcaster may not collect more than 20 per cent of the overall cumulated resources of the press and television sectors.

Law no. 249 contains some provisions aiming at fostering technological development in the sector, including in particular, the establishment of a digital platform for promoting the development of pay-tv services, the use of cables and, foremost, of satellite transmissions also by free-television networks.

Market Structure

Free-Television and Pay-Television Markets

With regard to broadcasting on a national scale, pay and free television's markets are characterised by very different market structures. Basically, this is due to the relatively recent development of pay-television and to the continuing technological innovation affecting the range of possibilities offered by digital broadcasting.

As briefly outlined above, the free-television market for national broadcasting passed with some difficulty from a public monopoly situation to a quasi-duopoly situation, where the two main competitors, RAI S.p.A. (holding three national channels, RAI 1, RAI 2 and RAI 3) and RTI S.p.A. (also holding three national channels, Canale 5, Italia 1 and Rete 4) represent around 90 per cent of the market in terms of audience and around 96 per cent in terms of the advertising revenues coming from terrestrial free-television. The third undertaking operating on the market, Cecchi Gori Communications S.p.A. (with two national channels, TMC and TMC 2), holds a market share of less then 3 per cent in terms of audience and around 2 per cent in terms of advertising revenues. Another four operators (running one channel each) are currently active in national broadcasting; however, due to their marginal position, they do not represent an actual competitive threat for the main operators.

Figure 1 - Shares of audience
(%)

	1994	**1995**	**1996**	**1997**	**1998**
RAI	46,4	47,9	47,9	48,1	47,2
RTI	43,7	42,8	42,4	41,7	42,5
CGC	-	-	-	2,4	2,4
Others	9,9	9,3	9,7	7,8	7,8
Total	100	100	100	100	100

Source: Auditel

Figure 2 - Advertising revenues
(billion Lire and % shares)

	1994		**1995**		**1996**		**1997**	
RTI	2.946	63,7%	3.137	64,0%	3.325	63,3%	3.605	62,6%
RAI	1.562	33,8%	1.646	33,7%	1.811	34,5%	2.017	35,0%
CGC	0.112	2,4%	0.114	2,3%	0.120	2,3%	0.131	2,3%
Total	4.620	100%	4.897	100%	5.256	100%	5.753	100%

Source: broadcasters data

The pay-television market was effectively set up only in 1993, when the first broadcaster in encoded form - TelePiù S.p.A., then belonging to the same corporate group as RTI S.p.A. and subsequently acquired by the French broadcaster Canal Plus - began to operate through analogue terrestrial transmission. Currently, TelePiù S.p.A., which broadcasts its programs also through digital technology by means of satellite transmissions, holds a quasi-monopoly position in pay-television

broadcasting. Since its control has been acquired by the French pay-tv broadcaster CanalPlus, TelePiù has strengthened its position on the market through the acquisition of important broadcasting rights (sport events and premium films), which has permitted a relevant increase in the number of its subscribers in the last two years. A marginal position is held by Stream S.p.A., a cable pay-tv operator, wholly owned by the main Italian telecommunication operator, Telecom Italia S.p.A. It is likely that Stream S.p.A. will develop the second Italian digital platform, other than the one promoted by TelePiù S.p.A.

Figure 3 - Pay-television
(number of subscribers - 1998)

	terrestrial	**satellite**	**cable**
TelePiù S.p.A.	900.000	400.000	
Stream S.p.A.			30.000/40.000 (potential subscribers 700.000)

Source: estimates

A further feature of both free-television and pay-television markets is represented by the presence of administrative barriers to entry, namely by the need to obtain a franchise released by the Ministry of Communication for setting up a television network on the basis of a national plan of frequencies prepared by the same Ministry. The duration of the franchise is six years, with the possibility of renewal. The limited number of frequencies and channels available on the *spectrum* in relation to analogue broadcasting represents a further barrier, although the foreseeable development of digital technology transmissions will overcome such physical scarcity. For cable or satellite transmission, however, a simple license is needed to broadcast television signals.

At present, cable and satellite transmissions are not significantly developed in Italy. Cable television development, in particular, was hampered by the availability of a wide range of free-channels with good technological quality standards through terrestrial television.

Advertising and revenues are the main source of financing for both private and public operators. The public broadcaster also receives a further contribution from the Government (representing around 50 per cent of its annual turnover), which for this purpose levies a “tax” on television sets owners. With regard to pay-television, revenues derive to a great extent from customers’ subscription fees and only marginally from advertising.

Broadcasting and the Italian Antitrust Authority

The Relations between the Sectorial Regulatory Authority and the Antitrust Authority in the Light of the Legislative Evolution

In general, with regard to both broadcasting and publishing sectors, law no. 249/97 has modified the institutional structure, granting to the Antitrust Authority the power, previously assigned to the former Publishing and Broadcasting Authority established by law no 223/1990, to enforce competition law in these sectors.

In the previous institutional setting, section 20, paragraph 1, of the Antitrust Act no 287/90 assigned to the Publishing and Broadcasting Authority the responsibility for enforcing competition rules with respect to agreements, abuses of dominant position and mergers which involved broadcasting and

publishing industries. Such provision, in addition to section 20, paragraph 2, of the Antitrust Act that empowered the Bank of Italy to enforce competition rules in the banking sector, constituted the only exception to the general power vested in the Antitrust Authority to apply the competition rules to all economic sectors.

In order to ensure a strict co-operation between Antitrust Authority and the Publishing and Broadcasting Authority, the Competition Act provided for a system of prior not binding opinions. More specifically, section 20, paragraph 3, required the Publishing and Broadcasting Authority to ask a prior not binding advice to the Antitrust Authority on such decisions. If the advice was not delivered within 30 days, the Publishing and Broadcasting Authority was entitled to proceed. The undertakings falling within the competences of the Publishing and Broadcasting Authority have been identified as those registered in the Press National Register (section 11, of law no. 416/81) and in the Media National Register (section 12, of law no. 223/90).

In any case, section 20, paragraph 1, of the Antitrust Act no 287/90, as well as the Publishing and Broadcasting Authority, have been abrogated by law no. 249/97.

Law no. 249/97 has substituted the former Publishing and Broadcasting Authority with the Communications Authority ("Autorità per le garanzie nelle comunicazioni"). The law has confirmed the general trend towards a separation of tasks between competition and regulatory authorities based on functional criteria rather than on a specific sectorial expertise, by assigning to the Antitrust Authority the full enforcement of competition rules while entrusting the regulatory agency with specific sectorial regulatory functions.

The Communications Regulatory Authority is however required to contribute to the decision making process of the Antitrust Authority through a prior not binding opinion on decisions concerning agreements, abuses of dominant position or mergers involving undertakings operating in the communication industry.

The co-operation between the two institutions is further reinforced by section 2, paragraph 33, of law no. 481/95 that requires the Communications Regulatory Authority to notify the Antitrust Authority of any alleged violation of competition rules they may come to know.

Since the institutional setting has just been modified and the Communications Regulatory Authority only recently established, it is quite early to draw any conclusion on the effectiveness and efficiency of the new system. In general, the choice of assigning regulatory tasks to the Regulatory Communications Authority and the duty to enforce competition rules to the Antitrust Authority involves several advantages.

First of all, also due to the removal of some regulatory line of business restrictions, it is becoming increasingly difficult to design an effective and stable system in which a subset of markets or undertakings is not under the jurisdiction of the economy-wide competition authority, but of a sector-specific competition law enforcer. In particular, the boundaries of relevant product markets are not stable over time, but change as a result of changes in technologies and in demand.

However the most important advantage of the general approach of assigning regulatory tasks to sectoral regulatory agencies and tasks of competition law enforcement to the Antitrust Authority is that it guarantees a consistent interpretation and enforcement of antitrust rules. In fact in the enforcement of general competition rules in different sectors, competition authorities apply similar principles, while the specific economic characteristics of each market may be taken into account; on the other hand regulatory

authorities, when they are assigned also the task to apply the competition law in their sector, are not able to build up enough experience, leading to possible contradictions in the interpretation of the antitrust law.

As for regulatory institutional design, the solution opted for in Italy to assign to a single regulatory authority a broad sectoral mandate (telecommunications, broadcasting and publishing) seems appropriate in a context of rapid technological changes and of increasing overlaps between telecommunications and broadcasting, also taking the convergence of these industries into account. Although the rules governing each sector are still different, the existence of a common regulatory authority responsible for their enforcement may in perspective also foster a substantive convergence in the relevant regulations.

The Activity of the Antitrust Authority in the Broadcasting Sector

As briefly described above, the Italian Antitrust Authority was given full competence to enforce the Antitrust Act in the broadcasting sector only in July 1997 (law no 249), while before its role was limited in the releasing of a compulsory (but non binding) opinion to the competent authority. Since then, the main interventions on the part of the Italian Antitrust Authority with regard to broadcasting have regarded the setting up of a common digital platform for pay-tv, the regulation of broadcasting of parliamentary discussions and two proceedings - currently in progress - involving an alleged agreement concerning the distribution of sport broadcasting rights among RAI S.p.A., RTI S.p.A. and Cecchi Gori Communications S.p.A..

(i) Report on the Digital Platform

In July 1997, the Italian Antitrust Authority expressed its opinion on a provision contained in a draft version of law no. 249/97 providing for the creation of a common digital platform by way of the setting up of a joint-venture involving the three main undertaking operating in free television (RAI S.p.A., RTI S.p.A. and CGC S.p.A.), TelePiù S.p.A. and Telecom S.p.A. The Antitrust Authority, while recognising the importance of common technological standards for infrastructure, in order to permit the rapid development of a new product, clearly highlighted the risks of a restriction of competition resulting from the joint participation to the same corporation of the main operators in broadcasting and telecommunications.

In particular, the Authority underlined the risk of horizontal co-ordination among the free-tv broadcasters deriving by such corporate structure with regard to their commercial activity in the supply of pay television. Such commercial co-operation could have led to significant distortion of competition. The creation of the common digital platform would have also determined the raising of further barriers to entry in the market and would have impeded the development of an effective competition for pay-tv.

When the law no. 249/97 was enacted, the provision relating to the creation of a common digital platform was maintained. The law requires, however, that open access to the platform should be granted on a transparent, competitive and non discriminatory basis. The regulatory Authority was assigned the task of monitoring that the conducts of the participants are consistent with these principles.

(ii) Report on the Broadcasting of Parliamentary Proceedings

In March 1998 the Authority expressed an opinion on a bill changing the regulations governing the broadcasting of parliamentary proceedings to ensure that the licence for the service is awarded by competitive tender between the nation-wide broadcasting companies. The Authority expressed its doubts on a provision which incorporated firms' size, in addition to the ability to cover most of the national

territory and technical capability, as a criterion for assessing the suitability of competing tendering companies. This criterion was likely to give an unjustified competitive advantage to the largest broadcasting companies. Lastly, the Authority expressed the hope that even for the current year, the share of the RAI licence fee to finance the parliamentary network would be cancelled, because under the new statutory system there was no longer any justification for it.

(iii) Broadcasting Rights to Sports Events

The Italian Antitrust Authority has opened up two formal proceedings for the evaluation of two alleged agreements between the main broadcasters operating on the free-television market, concerning the allocation of television rights to sport events.

NOTES

1 "Functional interconnection" refers to the practice of simultaneous or quasi-simultaneous broadcasting of the same television programs by syndicated local operators, thus reproducing the effect of a national television network.

2 "Structural interconnection" is the electronic connection of different installations belonging to the same operator on a national scale

3 Art. 15, of law no 223/1990, expressly prohibited any broadcaster from controlling more than 25 per cent of the channels declared available by the Government and, in any case, from controlling more than 3 channels.

4 With its decision no 826/1988 the Court affirmed that the principle of pluralism which has to guide the legislator in regulating the television broadcasting sector would not be fulfilled by permitting the creation of a sole private operator as opposed to RAI S.p.A.

JAPAN

An overview of the Television Broadcasting Industry in Japan

Television Broadcasters

In Japan, television broadcasters via ground waves (VHF or UHF) consist of the Japan Broadcasting Corporation (NHK), which is broadcast to the public nationwide and depends on reception fee revenue, and 126 private broadcasting companies which broadcast commercial and regional program and depend on advertising and other sources of revenue. Since private broadcasters are in principle restricted to broadcasting in regional areas and there is a limit to the distance reached by radio waves, nationwide broadcasting is carried over a network transmitting programs to affiliated regional stations from a central station employing relay broadcasting, etc.

Furthermore, satellite television broadcast started broadcasting satellites (BS broadcasting) in 1989, and communications satellites (CS broadcasting) in 1992. Since September 30, 1998, satellite television broadcasting has been relying on broadcasting satellites (two companies conducting BS broadcasting) and communications satellites (279 programs and 120 companies conducting CS broadcasting). As of March 31, 1998, there are also 720 cable television companies.

Television program producers

The production of television programs is carried out by the television stations themselves, or consigned to television program producers. In the past, each central station produced television programs, but now the majority of programs are consigned to television producers and produced by them. Consigned production is carried out for the purpose of diversifying program contents and reducing costs, undergoing a rapid increase in the 1970s when many television station producers, etc., left the television stations and began producing programs on their own. It is said that there are currently between 1,000 and 3,000 television program producers.

Regulation in the Television Broadcasting Sector

Broadcasting differs from other media such as publishing and printed press in that: (i) it exclusively utilizes the limited range available within a given area without interference due to the physical characteristics of radio waves (i.e. their fixed limit and scarcity); and (ii) it has a large impact on society by providing many receivers with instant access to a large volume of information on a wide scale and transmitting this information in forms which have strong appeal, such as moving images and audio. Moreover, broadcasting media contributes to social, economic, and cultural progress and to the sound development of democracy through its ability to transmit information effectively to its audience. As such, various regulations are implemented for granting a broadcasting station license, the broadcasting entities, program contents, etc., from the viewpoint of ensuring freedom of expression and enabling receivers to have equal access to multiple and diverse information, etc. Regulation of the broadcasting business is carried out according to the Radio Law, the Broadcast Law, and the Cable Television Broadcast Law and these laws come under the jurisdiction of the Ministry of Posts and Telecommunications (hereafter “MPT”).

Regulation regarding Entry

It is necessary to have a broadcasting station license in order to enter the broadcasting business, and licenses for broadcasting stations are granted in line with the "Basic Broadcasting Plan" and "The Plan for the Available Frequencies Allocated for Broadcasting" (Radio Law, Article 4) from the viewpoint of ensuring that limited and scarce radio waves are made available to as many people as possible, and that freedom of expression through broadcasting be enjoyed by as many people as possible. In accordance with the Radio Law, etc., the licensing procedures consist of a review of the license application, a preliminary license, an inspection on completion of construction, and licensing. For the preliminary licensing of broadcasting stations, the MPT, in principle, consults with the Radio Regulatory Council and complies with its decision. In the application review, a preliminary license will be granted provided that the station in question meet the following four criteria: (i) it conforms with the technical standards laid down in the Radio Law, (ii) frequency allocation is possible, (iii) it has sufficient financial means to support the work involved in the application; (iv) it conforms to the basic criteria for the establishment of a radio wave office laid down in the ordinances of the MPT (the principle of eliminating mass media concentration, etc.).

Non-Japanese broadcasting stations are excluded in that licenses are not granted to "a person who does not have Japanese nationality," "a foreign government or its representative," "a foreign corporation or organization," or "a domestic corporation whose foreign shareholders account for 20 per cent or more of its shareholders."

The following principles are adopted in order to systematically ensure that radio waves, as limited and scarce resources, are made available to as many people as possible and that freedom of expression through broadcasting is enjoyed by as many people as possible:

(i) In principle, one entity must not own or control two or more broadcasting stations (excluding relay stations): that is, the investment ratio of a broadcasting company to another is limited to 1/10 or less of the voting rights (1/5 or less in the case of different broadcasting business areas), and only 1/5 or fewer of the interlocking directorates are allowed. (excluding multiplex broadcasting, consigned domestic broadcasting and some other cases)

(ii) In principle, one entity must not manage or control radio, television and newspaper simultaneously in each area of broadcasting,

(iii) The major investors, directors, etc., of the broadcasting station must, to the fullest extent possible, have a business address in the broadcasting area.

Furthermore, in the case of consigning broadcasting business, there is a restriction on transmission capacity.

For satellite television broadcasting, consigning satellite broadcast is permitted, providing the consigned broadcaster has authorization from the MPT (requirements are set forth regarding financial basis, investors, etc.).

Approval System regarding Cable Television

A person wishing to establish cable television broadcasting facilities and conduct cable TV broadcasting must have permission from the MPT (the Cable Television Broadcast Law, Section 3). Those who meet the following four criteria are granted approval: (i) rationality of the facility plan and certainty

of its implementation; (ii) conformity with the technical standards laid out in the ordinances of the MPT; (iii) possession of sufficient financial means and technical capability; and (iv) whether CATV is necessary and appropriate in view of regional circumstances. Furthermore, with regard to (iv), the MPT requires exclusion of the existing broadcasters from the management, etc., upon approval. In addition, upon approval, procedures are followed for gathering the views of the local governments concerned and consulting with the Telecommunications Council.

Regarding foreign capital regulation of CATV broadcasters, foreign capital regulations were abolished in February 1998 for CATV broadcasters which also conduct Type 1 telecommunications business (i.e. business using telecommunications circuit facilities). Regarding deregulation of other foreign capital regulations, a conclusion will be reached with a view to abolishing them by the end of 1998 in the new three-year Deregulation Action Plan (March 1998).

Regulation regarding Program Editing

Regarding the editing of broadcast programs, the government sets forth the rules to be observed by broadcasters in accordance with the Broadcast Law draws up programs standards for broadcasters, decides the establishment of program monitoring organizations, ensures the autonomy of the broadcasters and encourages their activities to be fair and reasonable.

Regulations regarding Fees and Business Agreements

General broadcasters broadcasting on a fee basis must set forth contractual agreements regarding fees for their broadcasting services and other conditions of these services, and receive authorization from the MPT. However, it suffices to send notification of these contractual agreements (including fees for the services and conditions of provision) on multiplex broadcasting and fees for satellite broadcasting. Furthermore, regarding the conditions of provision, it is not necessary to receive authorization when notification is sent to the MPT that the contractual agreements are identical to the standard contractual agreements set forth by the MPT. In addition, the MPT must be notified of the conditions under which services are provided by consignee broadcasters to consignor broadcasters. If a cable television broadcaster is to charge fees to receivers for their cable television broadcast service, it must set forth advance contractual agreements regarding these fees and notify the MPT accordingly.

Recent Deregulation in the Broadcasting Sector

The MPT has taken the following measures regarding deregulation in the broadcasting sector.

(1) Deregulation of foreign capital regulation in the CATV business and simplification of authorization, application and notification procedures (1997-1998)

(2) Deregulation of the principle of eliminating mass media concentration in CS digital broadcasting (1996-1998)

(3) In light of the increase in new entrants and other changes in the CS digital broadcasting business, introduction of a standard contractual agreement system and a system for advance notification of broadcast fees (1997)

(4) Publication of a manual for entering the ground broadcasting sector from the viewpoint of ensuring the autonomy of applicants and transparency of procedures when multiple licensing applications are submitted in the same district (1997)

Role of Competition Authorities

The above rules and regulations on broadcasting come under the jurisdiction of the MPT. However, the enforcement of competition laws in the broadcasting business (e.g. elimination of acts in violation of the Antimonopoly Act (hereafter "AMA"), corporate combination regulations) comes under the jurisdiction of the Japan Fair Trade Commission (hereafter "JFTC").

So far, violations of the AMA have not been found in the broadcasting business and legal measures have not been taken. Nevertheless, the provisions of the AMA (prohibition of cartels, prohibition of private monopolization, prohibition of unfair trade practices, corporate combination regulations, etc.) apply in their entirety without exemption.

In view of the establishment of new markets, the increase in the number of firms, and expansion of market scale, etc., the scope for competition in the broadcasting business has expanded, and it has therefore become important to promote it. Furthermore, bearing in mind future developments in CS broadcasting, the provision of telecommunications services through CATV, the implementation of broad-ranging digital telecommunications networks and convergence of Broadcasting and Telecommunications, further review of the present system is necessary. The JFTC has studied issues concerning the broadcasting sector from the perspective of competition policy, and should any anticompetitive conducts be found, the JFTC will take strict measures against these violations in accordance with the AMA.

Advocacy of deregulation

In view of the increasingly significant role of competition policy in promoting fair and free competition in the broadcasting sector, the JFTC held a study group on competition policy in the information and telecommunications sector and examined problems concerning competition policy in the broadcasting business, published its findings (August 1992). The report highlighted the following points:

(i) Regarding the licensing system, it is imperative to ensure fair competition in the application stage and to review the system with a view to enhancing transparency of the decision-making process.

(ii) The principle of eliminating mass media concentration should be reviewed with regard to the broadcast service contents of the broadcasting station, the scope of the service area, and the range of options for viewers.

The MPT also has actively set about regulatory reform in the broadcasting sector. Specific contents are mentioned in U"(4) of this paper.

Prevention of Acts Restricting Competition

As stated above developments such as the establishment of new markets, an increase in the number of firms, the growth in market size, etc., are evident in the broadcasting business. Among broadcasting firms, there has also been a move to diversify business including expanding into other broadcasting media. For this reason, it is important for the JFTC to understand the firms' activities, circumstances of competition, etc., and to attempt to prevent acts which impede new entry, collusive acts between entrepreneurs, acts that are an abuse of a dominant bargaining position and other acts which violate the AMA. On implementing these measures, the following issues should not be neglected.

Broadcasting services for viewers

Broadcasting services have now come to be offered to viewers (consumers) on a fee-paying basis, but it is vital to be vigilant to prevent collusive acts regarding fees, etc., among broadcasters.

Broadcast advertising

Broadcast advertising is characterized by: (i) in general, advertising agencies exist as intermediaries between broadcasters and advertisers, and the market of advertising agencies (television advertising) is oligopolistic; (ii) the earning capacity of broadcasters for whom advertising revenue accounts for approximately 70 per cent of revenue is high compared to other industries. For these reasons, it is important to understand the actual circumstances of the broadcast advertising business from the perspective of competition policy and ensure that no anti-competitive acts are carried out.

Broadcasting software business

The JFTC conducted a fact-finding survey of business consigned between broadcasting firms and program producers, and published its findings in September 1991. According to this survey, there were cases such as: (i) even when program contents were changed or production halted as a result of circumstances involving the broadcasting firms, no payment or other compensation was given for expenses incurred in making the change, and (ii) the person ordering the program requested the purchase of commodities to the program procedures etc., and other such acts that in certain cases were problematic in terms of the AMA (abuse of dominant bargaining position) In the light of these findings, the JFTC requested that the business of the organizations concerned be rectified accordingly.

Furthermore, in a fact-finding survey of business consigned in services which was published in June 1997, the JFTC selected television program production as one industry to be surveyed and it conducted interviews. According to the findings of the survey, there has been a general improvement of business practices in the television program production industry in relation to the findings of the 1991 survey. Compared with the past, there are fewer problematic cases in the business conducted between TV stations and TV program producers.

There are agreements between broadcasting firms and program production firms regarding the ownership of copyright, the exercise of rights, etc., of the programs produced. According to the findings of the 1997 survey, there appears to be a difference of opinion between the two parties regarding the ownership of program copyrights, including those for programs jointly produced by a television station and television program producer. Television program producers were dissatisfied mainly with the following: (i) even when the copyright belongs to the producer, only the television station is considered to be the copyright owner and the producer is not able to benefit from the proceeds of its secondary usage; (ii) even when it is considered that the producer’s copyright has been transferred to the television company, the price placed on the copyright is too low. On the other hand, the main opinions of TV stations were the following: (i) most of the jointly produced programs are jointly copy righted works, whose copyright belongs to the TV stations for the purpose of smooth secondary usage, as stipulated in the contract; (ii) the TV stations consider that, in the case of secondary usage, the proceedings are allocated amongst all the parties involved.

Furthermore, due to the diversification of broadcasting media such as the development of satellite broadcasting and cable television and an increase in the number of broadcasting firms, it has become important for broadcasting firms to obtain programs to broadcast. In tandem with this development, the JFTC recognizes the diversification of distribution routes such as one broadcasting firm

selling programs for broadcasting to another firm and market growth. It is thus important to establish rules regarding the issuing of rights in the area of provision and sales of programs for broadcasting, in order to promote fair and free competition and to prevent acts which unjustly exclude the purchase of competitors' programs, etc., or otherwise unjustly impede access, etc., of broadcasting firms to programs which are to be broadcasted.

In March 1998, the JFTC published "Guidelines on the Abuse of Dominant Bargaining Position in Commissioning of Services from the Perspective of the Antimonopoly Act"; it will also keep a close watch to ensure that problems do not arise in the area of consigned business including the broadcasting software business sector.

KOREA

Definition of Broadcasting

Broadcasting: This means that a broadcasting company plans, produces and edits programs and transmits them to the public (viewers and listeners) through electronic facilities.

Terrestrial free-to-air broadcasting: This means the most common service (free of charge) using an on-the-ground broadcasting station for playing and transmitting.

Pay or subscriber terrestrial broadcasting: Unlike terrestrial free-to-air broadcasting, this is a terrestrial broadcast for subscribers only. This form of broadcasting does not exist in the Republic of Korea.

Pay or subscriber satellite broadcasting: This is broadcasting using a wireless relaying mechanism on board a satellite. Most of this form of broadcasting is for paying subscribers. Broadcasting via satellite is not included in the nation's current law on broadcasting. However, it is expected to be included in new legislation being pursued.

Pay or subscriber cable television: Unlike terrestrial broadcasting, this is broadcasting using wire or wireless (LMDS, MMDS) facilities. It broadcasts programs only to paid subscribers. In the Republic of Korea, cable television broadcasting consists of program providers, system operators, and network operators. *Program providers* (PP) plan, produce and edit programs and supply them to the cable television stations. *System operators* (SO) obtain a franchise for a certain area for broadcasting programs provided by PP to subscribers. *Network operators* (NO) set up and operate cable television networks to relay programs from the broadcasting station to subscribers.

Internet broadcast services: The nation's current law on broadcasting does not include any clause that regulates Internet broadcasting.

Regulatory Institutions

The formation and implementation of overall policy for the software side of broadcasting is handled by the Ministry of Culture and Tourism (the Broadcasting and Advertisement Policy Division of the Culture Industry Bureau). The Ministry of Information and Communication (the Broadcasting Division of the Radio and Broadcasting Bureau) handles the hardware side of broadcasting - planning for broadcast transmission, including the management of spectrum, the setting up of broadcasting stations and facilities, and setting broadcasting technical standards. Private regulatory organizations, the Korean Broadcasting Commission (KBC) and the Korean Cable Communications Commission (KCCC), deliberate on and regulate the contents of programs. The KBC handles terrestrial broadcasting programs while the KCCC is in charge of cable TV programs. Thus, the broadcast business in Korea is divided up into three areas and placed under two different ministries and private regulatory commissions. There are close consultations and exchanges of ideas between these agencies. Should there be disputes and conflicts

among them, they are settled in cabinet meetings or the Office of Administrative Coordination in the Prime Minister's Office.

Basically, since the broadcasting area cannot be an exception to the competition law, the regulatory agency is not responsible for the implementation of competition law in the broadcasting field. Therefore, the competition agency implements the law but in some cases, it consults with the regulatory agency before enforcing the law.

Key Regulations

The definition of broadcasting is the planning, production and editing of programs and the transmission of them to listeners and viewers using electronic communication means. It is subject to the law on broadcasting. The law sets out different definitions for terrestrial broadcasting, cable TV broadcasting and satellite broadcasting. We do not separate radio and television. As for Internet broadcasting, it is not included in the definition of broadcasting.

Entry or Licensing Regulations

According to the present law on broadcasting, in order to launch a broadcasting business such as a cable television station, one has to have a license. However, under the new proposed legislation, program providers would be required, after a certain grace period, only to register with the Government.

A set of conditions is attached, including faithful fulfillment by the licensee of requirements such as the promotion of public interests and service to the public.

Generally speaking, the Government issues licences after taking into consideration overall conditions in the broadcasting market. However, in special cases (i.e., specialized broadcasting), it is the applicants who must present to the Government justifiable reasons for taking out a license.

Prior permission from the Minister in charge is required when a station wants to lengthen broadcasting time. For three years from the date issuance of the license, a broadcasting station is required to obtain prior approval for a change in shareholders.

Although the law does not prohibit license trading, in the case of cable television system operators, prior approval is necessary for a change in the largest shareholder.

In the case of terrestrial broadcasting, due to the scarcity of available frequencies, there is a limit on the number of licenses. In the case of cable television, the number of licenses is limited because system operators have the franchise right. Under the current comprehensive cable broadcasting law, system operators are prohibited from owning more than one station, we plan to ease the restriction under new legislation in the works.

Sales of programs by producers to broadcasting companies are done on their own; as long as copy rights are honored, we do not regard the dealings as monopolistic.

Because of the nature of their service, public service broadcasters are given priority over others as a general practice.

It is possible for a licensee to use more than one channel, but it has to obtain permission for each channel.

The Government assesses all available spectrum that can be used and takes into consideration the broadcasting environment and market, before deciding on approval plans. It then selects broadcasters based on the result of its study of applications submitted by prospective broadcasters.

At present, there is no ground for legally regulating Internet services. However, if the Government judges that low-quality programs distributed by Internet services are causing adverse effects on society, we plan to introduce a system requiring broadcasters to either register with or report to the Government.

Ownership and Line-of-Business Regulations

Under the current law, a broadcaster is prohibited from engaging in both terrestrial and cable television broadcasting businesses. As for satellite broadcasting, there is no regulation under the current law. But under a new law, which is being legislated, the Government plans to prohibit a broadcaster from engaging in more than one area.

There is no regulation that restricts a broadcaster from going into telecommunications services.

A terrestrial or cable television broadcaster cannot be a publisher of a daily newspaper under the law concerning the registrations of periodicals, but there is no restrictive clause for publishing magazines.

A terrestrial broadcaster cannot own a cable system operator. But there is no clause that restricts the ownership of cable television program provider by a terrestrial broadcaster.

No one is allowed to own more than a 30 percent interest in terrestrial broadcasting or news cable television. There are no restrictions on cable television system operators and program providers (except news program providers).

The current law prohibits foreign ownership of shares in terrestrial broadcasting and news cable television. With the exception of news program providers for cable television broadcasters, the law allows foreigners to own 15 percent of shares in a cable television broadcaster. Under a proposed new law the percentage is expected to go up to 33 percent.

In the case of terrestrial broadcasting, there is no clause that says content producers can't be distributors. In cable television broadcasting, system operators, program providers and network operators cannot do business in other's field. However, under a new law, which is currently under deliberation, we plan to allow them to do so.

At present, there are no policy measures for the promotion of public service programming. However, we plan to formulate such promotional measures and actively implement them in the future. As for the promotion of certain types of programming reflecting cultural and educational purposes, there is no clause that legally allows the involvement of the Government. Each broadcaster makes a judgment on its own and produces and broadcasts its own programs on national events or any special social issues.

In case of terrestrial broadcasters who broadcast diverse types of programs--political, economic, social and cultural--they are required to have a balanced schedule of programs in all these areas. Reporting

on public affairs has to be more than 10 percent of the total, educational programs, more than 40 percent and entertainment, 20 percent. In the case of specialized terrestrial broadcasting, they have to broadcast sufficient programs on subjects in their given specialized field, for which their licenses were issued. In the cable television broadcasting, the broadcasters air adequate number of programs in their specialized area, for which their licenses were issued. Under the current law, there is no clause that regulates satellite broadcasting, a new law, which is being deliberated, will impose similar requirements as those on cable television broadcasters. The costs that these rules impose on the broadcasters are transparent as they are specified in the law or are publicly announced by the Minister of Culture and Tourism.

There are no subsidies contestable in the sense that they are available to all licensees.

Under the current law, cable television broadcasting has to set aside at least one channel that could be used by the Government for public service. It also has to operate a regional channel and has to broadcast certain terrestrial programs designated by the law.

Advertising time is limited to 10 minutes per 100 minutes of programming. The number of spot segments that are aired between programming is limited to less than two per hour. The length of each segment is 90 seconds, and each one may comprise four or fewer spots. Subtitle ads can be done in both words and pictures before and during the program, but the content is limited to station identification or display of broadcasting schedules. The size of the subtitles cannot exceed one quarter of the screen. Subtitle ads are allowed up to six times an hour. Each of such ads cannot exceed 10 seconds. To protect children and youths and not offend the public, the Korean Broadcasting Commission deliberates on the content of programs in advance. Advertising of thirteen products and services, including tobacco, gambling and weapons, is prohibited. Price discrimination between customers is not allowed. The pricing of advertising is not regulated.

The competition law is applied in full to this sector. However, exemptions are allowed when there is an exclusive contract between broadcasters and PP.

Key Developments

There have been several key developments in recent years. Cable TV was introduced in March 1995 and accordingly necessary programming production and distribution infrastructures were established. As for free-to-air, SBS, a major private broadcasting system was introduced in 1990. It set up four regional stations in 1994, and four more in 1996. With the introduction of the private broadcasting system, the traditional monopoly by state-owned broadcasting stations ended, opening the way for balanced development between the private and public sector. Development of the broadcasting and video industry was given national priority. In an effort to encourage private production of programming, the broadcasters were required to contract out at least 10 percent of their programming beginning in 1993. The required percentage has increased to 20 percent since 1997. Also export of programming and training of broadcasting professionals is actively encouraged. There will be several important developments in the next few years. The Government is in the process of enacting a comprehensive broadcasting law with a view to modernizing broadcasting in the country.

When the satellite system is introduced in full according to the new law, the state-of-the-art technology and facilities will help modernize the broadcasting system drastically Traditionally, the Government’s broadcasting policies were largely concerned with the public nature of broadcasting. However, the environment of broadcasting has changed dramatically in recent years because of the appearance of multi-media, multi-channels and propagation of broadcast waves to other countries

transcending national borders. In the future, the economic nature of broadcasting will also be emphasized along with its public service nature. Balanced development among various media and international competitiveness of programming will be pursued.

Market Structure

In regards to free-to-air, broadcasters may produce and organize programming by themselves or use programming from independent producers or importers of foreign productions. In the case of cable TV, the PPs plan, produce and organize programming for different channels and supply them to SOs who package them and serve the subscribers. Like free-to-air, cable PPs produce programming on their own, buy from contractors, or import from foreign countries. The satellite PPs, just like cable providers, supply programming to satellite broadcasters who, then, package them and offer the service to the subscribers.

KBS and other public TV stations broadcast throughout Korea. The privately-owned stations have a limited regional reach, so they formed a network with SBS as the key station. Eighty percent of SBS programming is aired nationally. Local SBS affiliates air 20 percent local programming produced by themselves. The cable SOs air regionally and are licensed across the country. SOs have the right to program different channels. Accordingly, all PP-provided programming may not be aired uniformly through all SOs. However, most SOs air all PP-provided programming at present. Programming on satellite stations can reach neighboring countries. Organization of channels and programming will depend on the preference of subscribers.

Information on free-to-air is not available. Satellite broadcasting is not yet in place. See the attachment for the number of cable TV subscriber households.

Please refer to the attachment for information on free-to-air and cable TVs. (Satellite system is not yet in service) Refer to the attachment on revenues, etc.

Both the free-to-air and cable TV are believed to be engaged in arranging contracts vertically and horizontally. Detailed information is not available, however.

Transferring to digital television will take more than changing television sets. As it will bring about huge changes in industry as a whole, including broadcasting stations, home-appliance manufacturers and program providers, Government intervention would seem inevitable in view of the need for national industrial restructuring. Considering the social and cultural effects digital television will have and the need to revise industrial policies and decide the time and method of introducing digital television, the Government will have to come up with suggestions for objectives and directions in a way that will protect the profits of related companies while keeping unnecessary budget waste and trials and errors to the minimum.

There is no regulation regarding siphoning which gives monopoly rights for airing certain programs only on designated free-to-air stations. Exclusive broadcasting rights are given to a particular station when they have an agreement with producers for exclusive rights. But if certain programs that all people are eager to see were made available only for pay-TV viewers, it would be a violation of the right to know. The Government will play a role of intermediary to ask for cooperation from broadcasting stations concerned so that all the people will have access to all programs.

Broadcasting Laws and Regulations have no specific articles regarding essential facilities. No policies impose any restrictions nor guarantee access to essential facilities.

Free-to-air stations can air imported programs according to specified percentages respective of the fields set by the Minister of Culture and Tourism, all within the limit of 20 percent of total airing time per week. News, current events, cultural and educational programs, documentaries and sports events are not subjected to the 20 percent limit. In case of Cable TV, imported programs will not exceed 30 percent of the total airing time a week (science and technology; cultural and educational programs; and sports events will be allowed up to 50 percent).

Programming is within broadcasting stations' competence, and basically the Government has no authority to force or to recommend them to air unprofitable programs.

But as broadcasting is so powerful a means of forming democratic public opinion, of promoting national culture, and of contributing to the public well being, the Government cannot afford to ignore unprofitable areas. In particular, as public broadcasting, funded by television subscription fees, is heavily influenced, both directly and indirectly, by public opinion and civic organizations, their programming places much emphasis on programs that will have a positive influence regardless of profitability.

The present broadcasting regulations have no specific articles regulating broadcasting via the Internet but if such broadcasting brings social evils such as the circulation of low grade programs, it would make it necessary to promulgate laws concerning broadcasting via the Internet. As of now, there are no specific discussions on regulating Internet broadcasting.

Enforcement of Competition Law

In the past, the definition of broadcasting was mainly based on free-to-air broadcasting, and the market was limited mostly to media advertising. But with the appearance of new media such as Cable TV geared to pay subscribers, the definition of the media market has become diversified. As different forms of media have different definitions of the market, each media has a market of its own. For example, free-to-air broadcasting considers all television viewers as its market, while pay subscribers constitutes the market of new media, including cable TV.

In case of free-to-air and cable TV, mergers have been prohibited by law. But when a new broadcasting law is enacted, partial mergers among media other than free-to-air broadcasters will be allowed.

Present laws ban cross-media ownership. But when a new law is enacted, restrictions on cross-media ownership except for the free-to-air broadcasting will be lifted.

No mergers threatened to lead to concentration in the market for media advertising. And exchanging programs is not considered illegal.

Examples of exerting market power to reduce competition are as follows: In case of outside productions, free-to-air broadcasting companies paid independent producers with promissory notes or assigned work at unreasonably low prices. A broadcasting company forced an independent producer to enter a joint venture to manufacture a program submitted by the independent producer or to make partial production with a company designated by it. Payment of unrealistically low production costs or forcing an independent producer to guarantee a certain amount of advertisement as a condition for work.

There has been no case concerning exercise of powers from dominant positions. However, efforts to regulate unfair trade practices between broadcasters and independent productions should be reinforced. It is strongly believed that the issues regarding access to essential facilities should be thoroughly examined in competition policy perspectives.

ATTACHMENT

Terrestrial Broadcasting

	Broadcaster	Ownership	97 Revenue (million $°	Source of revenue
Public-owned	KBS	State 100%	799	Subscription fee 3% advertising 58% Miscellany 5%
	MBC	Fund for promoting broadcasting culture 70%	659	Advertising
Privately-owned	SBS	Tae-yong 30%	293	“
	PBS	Han-chang 30%	27	“
	TBS	Chong-gu 30%	23	“
	KBC	Song-Chon 30%	16	“
	IJB	Woo-sung 30%	14	“
	ITV	Dong-yang 30%	7	“
	UBC	Juriwon 30%	4	“
	JTV	Se-poong 30%	3	“
	CJB	Too-Jin 30%	3	“
	Kyunggi FM	Chun-ji 30%	3	“
Specialised broadcasting	EBS (education)	state owned	60	subsidies 38% advertising, etc. 62%
	CBS (religion)	christian foundation	32	
	BBS (religion)	Buddhist foundation	8	(avg.)
	PBC (religion)	catholic foundation	13	donation 26% advertising 56%
	FEBC (religion)	FEBC (US)	4	miscellany 18%
	Asia Broadcasting (religion)	“	2	
	TBS, TBN (traffic)	state owned	160	subsidies 31% advertising 69%

Cable TV			
	Broadcaster	**97 revenue (million $)**	**Source of revenue**
PP	29 PP	285 (sumi)	advertising 29%
	YTN	18	program fee 10%
	MBN	11	miscellany 61%
	IIBS	10	
	Drama net	6	
	Peace	2	
	Buddhist	3	
	Christian TV	3	
	Catch One	8	
	DCN	11	
	39 Shopping	69	
	LG shopping	57	
	Q channel	4	
	Century TV	3	
	JN	6	
	My TV	2	
	Dasom	2	
	KMTV	10	
	M-net	6	
	Dong-aTV	14	
	GTV	9	
	Daegyo	9	
	Baduk TV	4	
	Tooniverse	8	
	KSTV	6	
	A&C Kolon	5	
	L-TV	2	
	K-TV	-	
	OUN	-	
	Arirann	-	
SO	77 Sos (53 Sos launched ‘95) (24 Sos licensed ‘97)	126 (53 SO) (avg. 2)	subscription fee 71% advertizing 4% miscellany 25% * subscribers 830.00
NO	KEPICO	20	
	KT	6	

MEXICO

The Regulatory Framework For Broadcasting

The broadcast industry, as well as the telecommunications sector as a whole, has traditionally been regulated by the Ministry of Communications and Transport. In 1996, the major part of the ministry's tasks and authorities were transferred to the newly established Federal Telecommunications Commission. This Commission is a so-called deconcentrated agency of the Ministry of Communications and Transport, with technical and operational autonomy. The Interior Ministry has certain authority with respect to content regulation.

The current legislation for the sector includes the Federal Law for Radio and Television (enacted in 1960, revised most recently in 1982), the Regulations for Cable Television Services (1979, revised most recently in 1993) and the Federal Telecommunications Law (1995). The Law for Radio and Television is still most important for public (as opposed to subscriber) radio and TV services. The Telecommunications Law fully applies to pay-TV and pay-radio services. At present the Telecommunications Commission is drafting new Regulations for Restricted Television and Audio Services (i.e., services limited to subscribers), based on the Telecommunications Law. These Regulations would replace the 1979 Regulations for Cable Television Services. They are also meant to eliminate the asymmetric regulation which exists nowadays between cable TV, on one hand, and pay-TV services using microwave and satellite technology, on the other.[1]

Due to this change in regulation, it would be of little use to enter into the details of the older laws and regulations. The main emphasis in the following is therefore on the 1995 Telecommunications Law. The objectives of the law are: (i) to promote the efficient development of telecommunications; (ii) to exercise state control over the sector in order to guarantee national sovereignty; (iii) to promote healthy competition so that services be provided at better prices, diversity and quality, to the benefit of consumers; and (iv) to promote social coverage.

In the light of convergence, it is interesting to note that the Telecommunications Law adopts certain principles which apply in the same way to broadcasting and to other telecommunications services. The most important principles refer to entry and licensing, to the interconnection of networks, and to tariffs.

Entry and licensing regulation

The Telecommunications Law defines as "public telecommunications networks" all systems that use the radio spectrum, satellite connections, wires, electric transmission networks, or any other means of transmission, and through which telecommunications services are commercially exploited.[2] Public telecommunications networks are thus meant to include all broadcast networks as well, whether they use airwaves, cable or satellite technology.

Under the Telecommunications Law, the installation or operation of a public telecommunications network requires a concession given by the Telecommunications Commission. Foreign ownership of concession holders is limited to 49 percent.[3] With respect to convergence it is

important to notice that a concession for a public network may in principle be used for several different telecommunications services. For example, a number of cable operators now have been given a concession for a public network which they may use to provide telephone and other services as well as cable TV.

Concessions for the use of the radio spectrum and for exploiting satellite communications are allocated by means of public auctions. In fact, the Telecommunications Commission initiated a large scale public auction for the use of the radio spectrum for restricted radio and TV services in September 1998. These concessions are complementary to the concessions for public networks.

Concessions for public telecommunications networks, including those for broadcasting, may be applied for at the Telecommunications Commission. Applications must include, among other things, proof of financial and technical capacity, a business plan, and programs and obligations with respect to investments, coverage and service quality. Concessions for radio and TV broadcasting usually refer to specific geographic areas.

Under the Law of Radio and Television, only commercial public radio and TV stations need a concession. Official, cultural and educational stations only require a permit. As to pay-TV services, the forthcoming Regulations for Restricted Television and Audio Services will probably establish that the Telecommunications Commission only gives a concession for providing two or more different pay-TV services in the same area to one person, if that person obtains a favourable opinion from the Federal Competition Commission. All concession holders have certain obligations with respect to consumer protection, service quality, non-discriminatory service provision, etc. Most of these obligations are established generally in the regulations, but the individual concessions may include additional ones.

Besides concessions, the Telecommunications Law refers to permits, which are required for certain telecommunications services provided by firms that do not have their own public network, as well as for the construction and operation of transmission stations on the ground. So-called value added services do not need a permit but must be registered at the Telecommunications Commission.

Interconnection regulation

At present, in Mexico interconnection between public telecommunications networks is not so much of an issue for broadcasting as it is, for example, for long distance and wireless telephony. However, technological developments may increase the importance of interconnection for broadcasting in the near future.

The Telecommunications Law regulates interconnection in a procompetitive way. Holders of concessions for public telecommunications networks must adopt open network designs that allow for the interconnection and interoperability with other public networks, and are obliged to interconnect. In principle the concession holders themselves must negotiate the terms of interconnection between their networks, but if no agreement is reached within 60 days the Telecommunications Commission may impose those terms. Each concession holder must also allow other concession and permit holders to provide their services through its network on non-discriminatory terms.

Tariff regulation

Under the Law for Radio and Television and the Regulations for Cable Television Services, the Ministry of Communications and Transport imposes minimum tariffs for radio and TV services, including advertising.

Under the Telecommunications Law, all other concession and permit holders are free to set tariffs for telecommunications services. Tariffs must only be registered at the Telecommunications Commission. This liberalization of tariffs represents one of the most important recent changes in the regulatory framework for telecommunications in general and broadcasting in particular.

However, the law includes a possibility for tariff regulation if competitive conditions are absent. The Telecommunications Commission may impose special regulations regarding tariffs, service quality and information, upon a concession holder who has substantial market power in some relevant market, according to the standards established in the Federal Law of Economic Competition. The Federal Competition Commission is the agency in charge of determining whether a concession holder has substantial market power.[4]

Content regulation

Content regulation for broadcasting is included in the respective law and regulations. For example, under the Law for Radio and Television, each radio and TV channel must transmit certain educational, cultural or social programs free of charge and up to 30 minutes a day. There are also restrictions with respect to the advertising of alcoholic drinks and lotteries, and to false advertising.

The Regulations for Cable Television Services copy the content regulations of the Law for Radio and Television. However, the forthcoming Regulations for Restricted Television and Audio Services, which will replace the former, are likely to be more specific. For example, in the most recent draft version, at least 60 percent of all programming must be in Spanish (either spoken or subtitled). Cable and microwave pay-TV services must reserve at least two hours a day for local programming and 15 percent of all transmissions for national programs. Pay-TV services using satellites (i.e., direct-to-home or DTH services) must reserve 17 percent of all programs for national productions. The regulations furthermore provide for the classification of programs according to rules set out by the Interior Ministry. They also establish maximum advertising times.

Industry Structure And Market Developments

There are slightly more than 700 public (as opposed to subscriber) TV stations in Mexico with two dominant broadcasters owning more than 85 per cent of them.[5] Televisa owns 46.3 per cent of all stations and TV Azteca 35.7 per cent. Both are nation-wide, advertising-funded, commercial broadcasters. The remaining TV stations are owned by smaller, both publicly and privately owned broadcasters. Televisa was founded in 1973 (when all the commercial TV channels that had been in the air since the early 1950s united into one broadcaster). TV Azteca was formed only in 1993 following the privatization of a large communications package.

Both TV Azteca and Televisa are vertically integrated, engaging in program production, packaging and delivery. Televisa and TV Azteca both use analogue satellite technology for their national channels. For regional broadcasting they may also use microwave technology. Televisa's most important channel (Canal 2) reaches almost 18 million homes with TV out of a total of more than 19 million homes in Mexico. Its other three important channels reach 17, 14 and 5 million homes, respectively. According to data of market analyst IBOPE, TV Azteca's two national channels reach 15.5 and 15 million homes, respectively.[6] Additionally, it is worth noting that Televisa has an important presence as a broadcaster and program maker throughout Latin America and Spanish speaking parts of the United States.

Pay-TV services are still relatively unimportant, but are expected to increase as the government grants more concessions and bids off parts of the radio spectrum for these services, and as DTH television via satellite develops further. Until recently, pay-TV was confined to larger cities, but DTH has made it possible to provide the service throughout the country. According to data of market analyst Nielsen, total advertising expenditure on public broadcasting was 40 times that on pay-TV in 1995. This is of course not an accurate measure, since pay-TV operators do not rely as much on advertising as public broadcasters do. The number of pay-TV subscribers, including all different technologies and regions, is estimated at around 2 million, out of a total number of TV homes of more than 19 million.

Pay-TV services took off in 1969 when Televisa founded cable TV company Cablevisión in the Mexico City area. Only at the end of the 1980s did competitor Multivisión enter, using the so-called Microwave Multichannel Distribution System (MMDS). By 1995, Multivisión had a market share in the Mexico City area of 64 percent and Cablevisión of 36 percent. In other cities, pay-TV services are provided by different firms, some of them under monopoly conditions.

Two companies started to offer DTH services in the mid-1990s. One of them, Sky TV, is a joint-venture between Televisa, Organizacoes Globo from Brazil, and News Corporation and Telecommunications Inc. from the U.S. The other, Direct TV, is formed by Multivisión, Direct TV International and Galaxy Latin America (a subsidiary of Hughes Electronics from the U.S.). The Ministry of Communications and Transport had given a third concession for DTH to Grupo Medcom, but this company decided to join forces with Sky TV. By the end of 1997, Sky TV already had 142,000 subscribers (compared to, for example, 227,000 subscribers of Televisa's cable subsidiary Cablevisión). DTH operators offer a package of around 160 channels, compared to approximately 30 channels for other pay-TV operators. Prices for DTH are still substantially higher than for the other types of pay-TV services.

Competition Law Enforcement In Broadcasting

In Mexico there is a general mandate driven division of labour, whereby competition law is exclusively applied by the Federal Competition Commission and regulation exclusively by technical and economic regulators.[7] The 1993 Federal Law of Economic Competition (the Competition Law) fully applies to regulated sectors, including broadcasting. The only exceptions are certain areas defined as "strategic" under the Constitution, including, among others, crude petroleum, postal services and electricity.

As a result, the Competition Commission has full authority to act against monopolistic practices and mergers in the broadcasting sector. It also plays an important competition advocacy role in the regulatory reforms of the telecommunications industry in general and broadcasting in particular.

The Competition Commission's main activities related to broadcasting so far have been the following:

- An advocacy role in the regulatory reform of telecommunications infrastructure for broadcasting, for example, in the privatization of the satellite system.
- An advocacy role in the design of the rules for the privatization of satellites and for various airwave auctions.
- An advocacy role in the design of the forthcoming Regulations for Restricted Television and Audio Services.

- Reviews of participants in the privatization of satellites and in the auctions of airwaves for MMDS broadcasting.
- Reviews of a large number of (mainly horizontal) mergers between broadcasters, radio stations and pay-TV operators.
- Assessment of alleged monopolistic practices with respect to broadcasting rights for certain sports events.

Below we describe the enforcement of the Competition Law in the broadcasting sector in the light of a number of illustrative cases, with special emphasis on matters such as relevant market definition and market power determination.

Competition advocacy: privatization of satellites

The satellite system is of special importance to the broadcasting industry. Broadcast services absorb 37 percent of Mexico's satellite capacity. In February 1995, the Congress approved the removal of satellite services from the Constitutional list of "strategic areas" restricted to the state, thus opening the way for privatization (which was realized at the end of 1996).

Several alternative privatization schemes were considered. One was selling each of the three geostationary satellites separately. Under this scheme the control centres on the ground would be sold to an independent firm servicing the different operators on non-discriminatory terms. In the end it was decided to sell the whole package, including satellites and control centres, to a single firm.

The Competition Commission agreed with this scheme because it considered that the eventual winning bidder would still face sufficient competition from three other sources. First, satellite services in Mexico can now also be provided by foreign satellite systems, due to a reciprocal agreement between Mexico and the U.S. signed in April 1996, and to the recent WTO agreements. Thus, the national satellite system will no longer have a monopoly in the domestic market. Second, optic fibre and microwave technologies are an important (though not perfect) substitute for satellites for the transmission of voice, data and images. Third, it is expected that low-orbit satellite services take off in the near future.

Next, the Competition Commission reviewed the potential bidders in the privatization process, under its mandate established in the 1995 Federal Telecommunications Law. Two interested parties were related to important U.S. satellite systems (Loral and Hughes/PanAmSat). The Competition Commission did not object their participation, for it considered that the winning bidder would still face important competition from the other international satellite systems. Some of the potential bidders were providing other telecommunication services, including DTH broadcasting. The commission recognized the benefits of vertical integration that would result if any of these firms would win, and saw no danger of the national satellite system becoming an essential facility for telecommunications services, for the reasons mentioned above.

Horizontal mergers: Radio Centro and Radiodifusión Red

This merger between two radio stations illustrates how the Competition Commission defines relevant markets in broadcasting. At the end of 1994, Grupo Radio Centro notified its plans to acquire Radiodifusión Red. Both firms had their main radio stations in the Mexico City area. The Competition Commission's analysis focused on the advertising market. It found that advertisers usually consider several media outlets in deciding how to spend their advertising budget, including radio stations, TV stations and newspapers. However, the services of TV stations with national coverage is of less interest to advertisers whose business is limited to Mexico City. Likewise, newspapers were considered to compete

only partially with the services that radio provides, due to their more limited coverage. Thus, the relevant market was defined as radio broadcast advertising services in the Mexico City area.

The acquisition would increase the number of radio stations controlled by Grupo Radio Centro from 10 to 13, a 24 percent share of all stations in Mexico City. It would also concentrate 39.2 percent of all advertising sales and 45.6 percent of radio audience. The main reason for the difference between the share in the number of stations and the share in audience is that the acquisition included the highly popular Monitor news station. New entry into the market is limited due to saturation of the frequency bands available for radio broadcasting.

The Competition Commission imposed a number of conditions on the acquisition. For example, Grupo Radio Centro had to eliminate the exclusivity restrictions on news services, informational programming and special events included in the contractual relationships with Infored, a firm that had formerly provided these services exclusively to the Monitor news station. Grupo Radio Centro was also required to refrain from tying the purchase of advertising time from the stations it acquired to the purchase of advertising time from the stations it already owned.

Diversifying mergers: Telmex and Cablevisión

Early 1995, the Competition Commission was notified of incumbent telephone company Telmex's intent to purchase 49 percent of the stock of Cablevisión, a Mexico City cable TV operator owned by broadcaster Televisa. The purchase also required, and received, the express consent of the Ministry of Communications and Transport, which was empowered to apply the Cable Television Service Regulations and to rule on the compliance of the conditions contained in the interested parties' respective concessions.[8]

The Competition Commission authorized the merger (on certain conditions).[9] It considered possible anticompetitive effects in two activities: broadcasting and telephony. As to broadcasting, the commission limited the relevant market to pay-TV services in the Mexico City area. Pay-TV services in principle compete with public broadcasting for advertisers. However, pay-TV services are provided exclusively to subscribers and depend more on subscriber fees than on advertising for their revenues. The fact that subscribers are willing to pay (often high) fees in order to receive more and better channels demonstrates that they do not regard public broadcasting as a close substitute for pay-TV.

The commission determined that Cablevisión did not have market power, in spite of still being the only cable TV operator in the Mexico City area. Rival Multivisión, which uses microwave technology, had a share of 64 percent in the whole pay-TV market in the area. Besides, the commission expected the increase of competing DTH pay-TV services. At any rate, Telmex did not participate in the pay-TV market before the acquisition so that market structure would not be altered by the merger.

Greater concerns for competition arose in the local telephony market, where Telmex still has a monopoly. Mobile local telephony was not considered a substitute (basically because of important price and quality differences) and local telephone networks using other types of wireless technologies are just beginning to develop.

The commission analyzed whether the acquisition was a defensive move by Telmex to prevent Cablevisión's cable network from providing local telephone services (as happened in other countries). However, it was found that upgrading Cablevisión's network would take major investments, since basically all cables would have to be changed from copper to optic fibre.

It should be noted that in August 1996 Telmex notified its intention to acquire the full 100 percent of Cablevisión. During the subsequent investigation and consultations, the Competition Commission made it clear that this time more conditions might be imposed, whereupon the parties decided to refrain from the merger.

Vertical agreements: exclusive broadcasting rights for football matches

During 1996 the Competition Commission performed an informal inquiry into the exclusive contracting of broadcasting rights for national league football (soccer) matches.[10] Considering the audience ratings published by market research firms, the commission concluded that the broadcasting of first division football matches cannot be replaced by other types of programs, and thus constituted a relevant market.

No harm to competition was found since each of the 18 first division clubs negotiates the rights to its home matches individually with one of the two public broadcasters (Televisa and TV Azteca). The exclusive contracts usually last only for one or two seasons. Teams are almost equally divided between the broadcasters, and several clubs have switched broadcasters in recent years depending on the highest bid.

Recently the Competition Commission has opened a formal investigation into a number of exclusive contracts for broadcasting rights to matches of the national football team and to international events such as the World Cup. This investigation is still under way and nothing can be said yet on the possible outcomes.

Final Remarks

Convergence is not yet as important in Mexico's broadcasting industry as it is in other countries. Non-basic telecommunications services in general, and pay-TV in particular, have only relatively recently begun to spread on a wide scale throughout the country.

Nonetheless, the new regulatory framework, centred around the 1995 Telecommunications Law, adequately anticipates developments and problems related to convergence that may show up in the near future. Most importantly, the law treats all types of telecommunications networks uniformly as public networks. Thus, cable, microwave and satellite networks, or combinations of them, are subject to the same regulations, no matter whether they are used to provide telephone, broadcasting or other telecommunications services. Likewise, the Telecommunications Law gives concession holders ample possibilities to use their networks to provide different types of services. This way, any future developments in the field of convergence are not likely to be hindered by the regulatory framework.

NOTES

1 The Regulations for Cable Television Services only apply to cable operators. The new regulations will cover all pay TV services, independently of the technology used.

2 Private telecommunications networks are those that are not used by their owners to offer commercial telecommunications services to others.

3 The only exception are wireless telephony networks, for which 100 percent foreign ownership is allowed.

4 In 1997, the Competition Commission declared incumbent telephone company Telmex as an agent with substantial power in several relevant markets. The Telecommunications Commission is still considering which special regulations to impose.

5 Data available at Televisa's Internet homepage *www.televisa.com.mx.*

6 IBOPE regularly publishes certain data on TV audiences and ratings in Mexico and four other Latin American Countries at the Internet page *www.zonalatina.com/zlibope.htm.*

7 See also the Mexican contribution to the recent mini-roundtable on relationships between regulators and competition authorities, DAFFE/CLP/WD(98)20.

8 These powers are now transferred to a large extent to the Telecommunications Commission.

9 The commission's decision was based on the Competition Law's standards, as discussed below. But it was a sensitive case because the public in general conceived it as a joining of forces between two traditionally powerful and influential companies, Telmex and Televisa.

10 For a full description we refer to our contribution to the October 1996 roundtable on competition issues related to sports, OCDE/GD(97)128.

NORWAY

Regulatory Institutions

Agencies responsible for broadcast regulation and policy

The Royal Ministry of Cultural Affairs is responsible for developing policy and drawing up new legislation, implementing regulation etc. in the media field. The Ministry is also responsible for issuing licenses for private commercial broadcasters transmitting nation-wide by terrestrial networks, and to supervise the license conditions related to these broadcasters.

In Norway only two companies are granted licenses for private, nation-wide radio and television, respectively. Licence holder for television is TV2 Ltd. The licence holder for radio is Radio P4 Hele Norge Ltd. An obligation to provide a certain amount of public-service programme services is presupposed in the licenses held by these companies. The Ministry of Cultural Affairs is responsible for conducting supervision of the general rulings concerning public service content in domestic and nation-wide terrestrial broadcasts, assisted by an advisory council appointed to evaluate the public service content of these broadcasts.

The non-commercial national public service broadcasting corporation (NRK) is owned by the Norwegian State and is part of the administrative field of the Ministry of Cultural Affairs. NRK provides both radio and television public service broadcast services.

The Mass Media Authority (MMA) is a governmental body placed directly under the Ministry, issuing licenses for local and satellite broadcasters. The tasks of the MMA include supervision of license-conditions concerning local and satellite broadcast and general regulations on sponsorship and advertising in all Norwegian broadcasts. The MMA also has some responsibilities related to the provisions of cable network distribution services, hereunder implying ruling on common subscribers choice of content, and a «must carry» obligation imposed on network operators by regulation.

The Royal Norwegian Ministry of Communications is responsible for the telecommunication policy. The Norwegian Post and Telecommunications Authority (PT) is an administrative body directly subordinated to The Ministry of Communications, and is responsible for infrastructure and spectrum concerning broadcast, allocating terrestrial network frequencies, authorising suppliers, drawing up new legislation, controlling the market, etc.

Some procedures for co-operation between the MMA and PT have been established. These relate to licensing of broadcasting services and network operation, and issues of defining and establishing geographical areas for local broadcast and frequency allocation. In this particular context, PT is a consultative agency for the MMA, which also issues licenses for operation of terrestrial networks for broadcast transmission and retransmission purposes. A range of related issues concerning integration and development in the field of broadcast transmission in general are also subject to mutual consultations between the MMA and PT, as it is between the respective ministries.

The Norwegian Competition Authority (NCA) is responsible for the competition law enforcement in the broadcasting sector according to the Competition Act. The NCA is a body directly

subordinated to The Ministry of Labour and Government Administration. The objective of the Competition Act is to achieve efficient utilization of society's resources by providing the necessary conditions for effective competition.

In addition to the Competition Act, the Norwegian Parliament in June 1997 adopted the Media Ownership Act relating to supervision of the acquisition of newspaper and broadcasting enterprises. The purpose of the Act is to promote freedom of expression, genuine opportunities to express one's opinions and a comprehensive range of media. The Media Ownership Authority (MOA) which is established under the Media Ownership Act will be responsible for supervision pursuant to the Act, including supervision of market conditions and ownership in the newspaper and broadcasting sector. The MOA will have the possibility to intervene and lay down conditions for or prohibit acquisitions in the press or broadcasting sector.

The Media Ownership Act shall enter into force 1 of January 1999 and therefore neither the NCA nor the MOA have any experience of the effects the Media Ownership Act will have in the media markets.

In addition to the Competition Act and the Media Ownership Act there are also some limitations on ownership resulting from the Broadcasting Act and the broadcaster's license conditions. Further information concerning these limitations are given below.

Key regulations

Definition of broadcasting

According to the Norwegian Broadcasting Act «broadcasts» or «broadcasting» shall mean the transmission of speech, music, images and the like by radio waves or cable, intended to be received directly by the general public.

Some Internet-services may fall under the definition of "broadcasting" in the Broadcasting Act, depending on the technical characteristics of the services as mentioned above. For instance, the two broadcasting companies that have been granted licences for nation-wide terrestrial broadcasting have also introduced Internet-services that probably fall under the definition of "broadcasting". Further, the plenary sessions in the Norwegian parliament are transmitted over the Internet. So far, however, the provisions of the Broadcasting Act have not been enforced with respect to any Internet-services and no specific Internet-licences have been issued.

Entry or licensing conditions

A licence is required to provide broadcasting services in Norway, except for mere distribution services via cable networks.

The Broadcasting Act requires that certain sets of conditions be met to obtain a license for local broadcast. These relate mainly to restrictions on ownership and cross ownership between newspaper and broadcasting companies, intending to secure ownership diversity and to counteract the development of media monopolies in local license areas. The size of local broadcast areas may vary from one to some ten municipalities, though not exceeding half a county by size.

In a recent proposal The Norwegian Government has prepared to abolish the detailed ruling on media ownership, leaving questions of ownership concentration and integration to be dealt with by the MOA.

Applications for radio licenses have to be justified in local areas with a multitude of concurrent applicants for broadcast license. When issuing licenses, the MMA takes into consideration established local broadcaster services existing in the actual area, as well as the availability of terrestrial transmission network frequency resources.

The MMA shall take into consideration the applicant's economic and professional basis and his general programming plans or outlines, aiming to secure a certain amount of public service programme content when presupposed (in terrestrial nation-wide commercial radio and television and terrestrial local television). As for local radio license applications, the MMA is to take into consideration the general implications for programming diversity, regarding the overall composition of programme services provided by local broadcast in the respective area.

According to regulation, introduction of new licenses for terrestrial local radio broadcasting during a license period is restricted to certain occasions, for instance when the disappearance of a radio station in a local area results in scarce or no local radio programme services in that area.

Licenses are not to be traded, but ownership changes within a licence-holding company during the period of license may be accepted. Changes are to be considered and confirmed by the MMA before put through by the licensee.

Establishment of terrestrial nation-wide radio and television licenses is restricted by policy measures. As for terrestrial local television, also having a certain public service programming obligation, the limitation is one licence per defined local area. For other kinds of local radio and television broadcasters, there is no presupposed or fixed amount of licenses.

As mentioned above, the mere distribution of television broadcast programmes by cable network does not require a license as far as regulation on broadcast is concerned.

No person or company may hold more than one license for local radio and local television services, respectively, in one and the same license area. There is, however, no limitation as to how many licenses for local broadcasting services a licensee may hold across different regions (i.e. across local license areas), provided the licensee does not hold licences representing more than one third of the national market for local television, respectively local radio services. This provision is presently subject to revision.

There is no monopoly in the wholesale or retail distribution of programming.

The national public service broadcasting corporation, NRK, provides two separate television programme service channels. A system of frequencies is allocated to obtain the broadcasting company's obligation to provide nation-wide public reception of its services. PT licenses the spectrum according to the plan of broadcast frequency allocation in Norway. The same goes for the two existing nation-wide commercial televisions and radio companies, as well as for the local television companies having some obligation concerning public service programmes according to license. Frequency spectrums for local radio purposes are also allocated according to the framework of frequency planning. In many local areas, topographical characteristics may require a multitude of frequencies to establish a terrestrial network ensuring sufficient public reception possibilities.

According to the regulation of cable networks, NRK television as well as TV2 shall also be distributed through cable network channels reserved for this requirement. This obligation to carry also includes terrestrial broadcasts from local commercial public service television, when receivable by network head-end.

As for NRK, license is granted for a specific range of frequencies to secure general public reception. The nation-wide commercial public service television is, by license, granted access to a multi-frequency terrestrial network.

It should be noticed that a company other than the one holding the broadcasting license might hold a network license.

Use of spectrum is not auctioned. The methods for allocation of frequencies are, however, presently subject to evaluation by The Ministry of Communications.

There is no specific domestic regulation, apart from the provisions of the "Television without frontiers Directive", concerning transmission by satellite broadcast frequencies in Norway.

Ownership and line-of-business regulations

As mentioned above, no person or company can control more than one third of the total national broadcasting market for local radio and local television respectively. There are no further regulations restricting a broadcaster's engagement in other - national or local - broadcasting services, regardless of whether the engagement concerns radio or television broadcast, and also regardless of broadcast transmission technology involved.

As for license conditions, no person or company may own more than one third of a company holding licence for nation-wide commercial public service broadcast. As mentioned above, the Government has proposed to abolish the detailed regulation on ownership.

There is no specific ownership regulation related to satellite broadcast licensing.

Regulation of broadcasting includes no restrictions on a broadcaster's opportunity to provide cable television services. For broadcasting services in cable network - as opposed to mere signal distribution or retransmission services - licence for local broadcasting is required. According to regulations under the Broadcasting Act cable companies can not possess more than 49 per cent of the shares in a local broadcasting company.

There are no restrictions as to whether a broadcaster may provide other media services like newspapers and magazines. However, there are certain limitations according to provisions on ownership in broadcasting regulations: In broadcast license areas which have only one transmission network available, a newspaper holding a de facto local monopoly in that area may only in special cases be allocated its own license to operate local broadcast services. Such a newspaper's shares of possession in a broadcast license company may not exceed 49 per cent.

There are no specific limitations on foreign ownership imposed by broadcast regulations.

Within the frame of broadcasting regulations, vertical integration is prevented solely by a provision on cable companies' access to license for local broadcast: Cable companies may not hold a

license to operate local broadcasting services, or possess more than 49 per cent of the shares in a local broadcasting company.

A content producer (broadcaster) may, subsequently, own distribution networks, regardless of distribution technology.

Content promotion

NRK, the national non-commercial public service broadcaster, shall meet certain programming requirements imposed by policy measures. Programming shall reflect cultural and educational, as well as ethnic, linguistic and religious purposes. NRK broadcasts nation-wide as well as on a regional level and content must reflect the general programming requirements at all levels. The main financial basis for NRK is a licence fee imposed on television owners.

The two broadcasters holding license for nation-wide private commercial public service radio and television, are - as mentioned above – subject to certain public service programming requirements imposed through license conditions.

As for local broadcasting, regulations contain general rules for local programming. In local radio broadcasts, at least 75 per cent of the licensee's daily transmission time shall consist of programmes produced by the licensee or by others connected with the license area. In local television locally produced programmes containing local material shall be broadcast on weekdays. The objective is for these broadcasts to contain such programmes every day.

For satellite broadcasters there are no corresponding measures or regulations concerning program contents.

Television companies shall ensure that at least 50 percent of the television transmission time that does not consist of news, sport and entertainment programmes and advertising shall be set aside for broadcasts of European works. Furthermore 10 per cent of the same type of programmes shall be set aside for broadcasts for European works by producers who are independent of television companies.

Except for measures and regulations mentioned above, there are no specific regulations on quantities regarding types of programmes.

Subsidies are available through a Fund for Audio-visual Productions, established and financed mainly by the Norwegian state. The objective of the fund is to stimulate and enrich film and broadcast programme production for television and radio. The fund board on the basis of project applications issues subsidies to private broadcasters.

There are no requirements to be met by satellite or cable broadcasters concerning carriage of certain programme channels. As mentioned above, only cable networks, as distributors of broadcast services, must secure distribution («must carry» obligation) of certain broadcast transmissions such as NRK television, the private nation-wide commercial public service television (TV 2) and private commercial local public service television (all terrestrial).

Pricing and advertising regulations

The regulations related to broadcasting do not apply to advertisement pricing.

Regulation of advertising contains ruling on duration, language, days on which advertising is permitted, content and placement of advertising. For Norwegian broadcasting companies the advertising time is limited to 20 percent per hour and 15 percent of the total broadcasting time every 24 hours. In addition the advertisement must be broadcast between two independent programs. An advertisement cannot be placed in the middle of a programme. For television companies that broadcast to Norway from abroad, these regulations are not valid.

NRK does not have access to advertising as part of its broadcasting services. However, a small part of the total income of NRK may come from sponsorship, restricted to one per cent of total revenues. The Ministry of Cultural Affairs has undertaken a revision of the provisions on advertising and sponsorship in broadcasts.

Any broadcasting company in Norway is responsible to broadcast regulation on advertising and sponsorship, supervised by The Mass Media Authority. Supervision is undertaken mainly by controlling records of transmission and incoming cases of complaint.

Application of competition law

The Norwegian Competition Act applies fully in the broadcasting sector. As mentioned above the MOA supervises acquisitions of ownership in newspaper and broadcasting enterprises, but there are no regulations in the Media Ownership Act that affect the enforcement of the Competition Act.

The NCA has granted one exemption from the Competition Act in the broadcasting sector. This exemption gives TV2 the possibility to determine the program schedule in another Norwegian broadcasting company, TVNorge. TV2 owns 49 percent of TVNorge. The main reason for the exemption is the assumption that the agreement will increase the total TV-advertising market because the channels can diversify. The exemption expires in 2001 and is subject to certain conditions. The most important conditions are that both TV2 and TVN must report to the NCA every quarter of a year how the prices of advertising time and the number of viewers are developing. They also have to report how many hours of broadcasting that have been transmitted.

Market structure

Range of services

Terrestrial television

	Percentage of total viewers (average 1997)	Turnover mill. NOK
National		
NRK1	41	2.630 (NRK total, radio incl.)
NRK2	2	
TV2	31	1.035
Satellite television		
TVNorge	8	243
TV3	6	
Others (incl. local television)	12	150 (local television)

Source: MMI/Statens Medieforvaltning

Cable television

Cable television network services mainly consist of distribution retransmission of terrestrial or satellite broadcasting services originated outside the network. According to a change in the regulation on telecommunication, cable networks also may provide certain telecommunication services.

Distribution

Telenor (the incumbent state owned telecommunications operator) is the major operator in the field of broadcast distribution services in Norway, concerning terrestrial-, cable- and satellite broadcast. The company owns and operates most of the terrestrial networks as well as a significant portion of cable networks in Norway. The company also provides satellite transmission services, being a satellite owner, operator of transponder capacity and part owner in DTH-distribution.

All terrestrial television companies provide own programme production.

NRK: A major portion (51 per cent) of programme content is produced by NRK itself.

TV2: The share of own programme production is relatively moderate, mainly consisting of news, documentaries, debates and current affair programmes. In addition, TV2 has a certain amount of its additional programme content produced by agreement with independent production companies.

Terrestrial local-television: Approximately 138.000 hours of broadcasting were transmitted in 1997. The portion of own programme production constitutes 7.300 hours or 5 per cent of annual broadcasting. Own programme production mainly consists of news, local current affairs, local sport events, documentaries, debate programmes and entertainment.

TVNorge: TVNorge has no programme production of its own. However, TVNorge co-operates with independent programme production companies producing programme content for the broadcaster by commission.

Ownership

NRK: Owned by the Norwegian State.
TV2 : Egmont Holding Ltd: 33%, Schibsted Ltd: 33 %, A-pressen Ltd: 33 %.
TVNorge: TV2: 49 %, Scandinavian Broadcasting System (SBS): 51 %

Terrestrial local television: By large owned by different private investors, among others Schibsted and A-pressen.

Both Schibsted and Egmont are engaged in broadcasting programme production through their own production companies.

Telenor - the provider of distribution services - is owned by the Norwegian State.

Revenue

NRK:	Obligatory license fee imposed on TV sets and sponsorship
TV2:	Revenue from advertising and sponsorship
TVNorge:	Revenue from advertising and sponsorship

Local terrestrial television: Revenue from advertising and sponsorship, in addition to income from retransmission of broadcast through their own terrestrial network.

Vertical or horizontal arrangements

There is a rather strong tendency towards horizontal concentration within the private television sector. Actors involved are TV2, TVNorge, local television licensees and some of the larger content production companies.

As for distribution services, there is a significant horizontal tendency of integration, involving a spectrum of distribution technologies (like terrestrial as well as cable networks and satellite or telecommunication networks) through Telenor. There is also an ongoing vertical tendency of integration as a result of Telenor's engagement in a diversity of companies focused on various aspects of programming, distribution, transmission and communication operations and development in the overall field of media.

So far the tendency towards vertical integration in other parts of the broadcasting sector has been weak, due to the rather restrictive national policy on this issue.

Specific Issues

Digital television

The Norwegian State, due to its role as owner of NRK and Telenor, is expected to be involved in the transition to digital television.

«Siphoning»

There are at presents no regulation requiring free-to-air broadcasting of major sports events. The Ministry has, however, issued a proposal on regulatory adjustment in accordance with the EU-Directive concerning major events.

«Access issues»

As mentioned above, a «must carry» obligation is imposed by regulations of cable networks as providers of distribution of broadcast services. The obligatory carriage of certain broadcasting services is specified in provision and relates to NRK television and TV2. It also includes terrestrial local television broadcasts within the area where the actual cable network is situated, and on the condition that transmission signals can be received in the network head-end. The "must-carry" obligation is not valid for the DTH-subscribers.

Local production industry

There are no direct regulations. Production is stimulated through public funds, mainly the Fund for Audiovisual Productions (radio, television and film).

Universal service

There are policy measures and ruling requiring near-to nation-wide distribution of the public service broadcasts (NRK and TV2).

Broadcasting via the Internet

This is not regulated through specific rulings, neither is there any motion put forward on this issue at the present.

Enforcement of Competition Law

Market definition

The total market for advertising consists of several different media or advertising channels like television, radio, newspapers, boards, Internet etc. Based on an analysis of the quality of distribution and the presentation of the advertising, the NCA has concluded that television advertising is one relevant market.

The NCA has also analysed advertising on boards, and concluded that this can not be defined as one relevant advertising market.

The NCA has not yet considered the markets of programmes e.g. whether sport drama and other programs are competitors or are in different relevant markets.

Horizontal Agreements and Mergers

In 1997 TV2 acquired 49 percent of the shares of TVNorge from two of TV2's owners, Schibsted and A-pressen and took possession of TVNorge's programming through a co-operation agreement. After the acquisition TV2 and TVNorge's common market share in the television advertising market was 85 percent. The NCA analysed the acquisition and concluded that it would lead to concentration in the market for television advertising. The NCA also found that the barriers to entry to the Norwegian broadcasting market were high mainly because of the license requirement.

The NCA did, however, accept the acquisition because the NCA could not prove that it would lead to a less efficient utilization of resources in the television advertising market in Norway. The reason for this is that TV2 did not gain control over TVNorge and that the companies would maintain their sales organisations of television advertising. In addition the NCA concluded that the co-operation agreement probably would lead to a higher number of viewers which could have a positive influence on the supply of television advertising. As mentioned above the NCA granted an exemption which gives TV2 the possibility to determine the programmes of TVNorge.

Vertical Agreements and Mergers

In 1997 the NCA analysed Telenor's acquisition in Canal Digital which is a company with activities within distribution of television programmes in the DTH-market. The NCA concluded that the acquisition did not create a significant restriction of competition and thus accepted it.

SUISSE

Concurrence et réglementation en matière de radiodiffusion

Structure du marché suisse de la radiodiffusion

Ce marché est caractérisé par le statut particulier accordé à la Société suisse de radiodiffusion (SSR). Ce diffuseur, qui est juridiquement constitué sous forme d'une association ouverte au public, a reçu du législateur un mandat de service public. La SSR exploite dans chacune des trois régions linguistiques 2 programmes de télévision et 3-4 programmes de radio, dont un à caractère culturel. La SSR offre en outre un programme de radio en romanche (langue parlée dans le canton des Grisons) et des émissions en cette langue dans ses programmes de télévision. La SSR produit la plupart des émissions originales qu'elle diffuse ; les fictions sont par contre en grande partie achetées.

A l'origine, la SSR avait une position de diffuseur unique. Depuis une vingtaine d'années, elle a progressivement perdu cette position avec la création de radios locales (aujourd'hui 46 ayant une diffusion régulière) et de télévisions locales (86, y compris les journaux sur écran). Trois demandes de concessions ont été déposées pour des programmes partiels de télévision couvrant l'ensemble de la Suisse alémanique (Tele24, Prime TV et TV3 du groupe Tages-Anzeiger). En outre, des diffuseurs étrangers ont mis en place des fenêtres publicitaires et programmatiques (SAT1 a obtenu une concession suisse en été 1998, tandis qu'une demande de RTL/Pro7 est pendante) à l'intention du public suisse.

La SSR est financée en grande partie par une taxe de concession perçue auprès des auditeurs et des téléspectateurs (820 millions de francs, soit environ 540 US $). Un financement complémentaire par la publicité n'intervient que pour la télévision (265 millions de francs, soit environ 175 US $). Le budget de la SSR est réparti équitablement entre les régions linguistiques (objectif d'ordre politique).

La SSR dispose de filiales qui s'occupent de la gestion des spots publicitaires, de la détermination des taux d'écoute et de l'exploitation du Télétexte (journal sur écran). Il n'existe pas de liens directs entre la SSR et la presse, à l'exception d'une fenêtre programmatique de 4-5 heures hebdomadaire exploitée de manière autonome par un groupe d'éditeurs de journaux (PresseTV), cela à l'intérieur des programmes SSR.

La télévision par abonnement est encore peu répandue. On peut supposer que l'offre étendue des téléréseaux et le bas prix des vidéos jouent un rôle de frein.

La réglementation

La Loi sur la radio et la télévision (LRTV) règle l'activité de la radiodiffusion en Suisse. Un Office fédéral de la communication (OFCOM) a été créé en 1991 en vue de l'application de cette législation, ainsi que de celle sur les télécommunications. L'obtention d'une concession aux échelons régional linguistique, ainsi que national et international, relève du gouvernement fédéral. La concession à l'échelon local relève du ministère concerné.

La situation de concurrence

Au plan interne, la SSR a été soumise au cours des dernières années à une concurrence toujours plus forte.

En radio, la concurrence des stations locales est parfois très vive ; certaines atteignent un taux d'écoute qui dépasse celui du programme principal de la SSR. Dans les régions frontalières les radios suisses sont confrontées à la pression de stations commerciales étrangères qui bénéficient d'avantages en matière de puissance d'émission et de publicité.

En télévision, une situation de réelle concurrence est apparue avec la mise en place de relais pour la diffusion dans toute la Suisse de programmes étrangers. Cette concurrence s'est notablement renforcée avec la diffusion de programmes sur satellites. La construction de téléréseaux, à la même époque, a permis la diffusion de nombreux programmes avec une grande qualité d'image.

Lorsqu'on examine la situation de concurrence sur le marché suisse de la radiodiffusion, il faut tenir compte de l'influence de la concurrence étrangère. Celle-ci est très importante du fait que chaque région linguistique dispose d'une offre importante dans sa propre langue (par exemple 8 programmes en français en plus des 2 de la SSR). Cette offre de programmes étendue oblige la SSR à adapter sa stratégie de programme en vue de fidéliser son public. Vu que ses unités d'entreprise ne disposent pas de budgets aussi élevées que ceux de grands diffuseurs étrangers (relation pouvant atteindre de 1 à 10), elle doit se concentrer sur les éléments de programme qui intéressent tout particulièrement le public suisse. En raison de l'explosion des droits de retransmission de certaines manifestations sportives, elle pourrait être amenée à faire des choix.

Malgré cette concurrence souvent très vive, la SSR conserve la première place sur son marché avec un taux d'écoute avoisinant 40 pour cent dans chacune des régions linguistiques (en prime-time pour la télévision).

Dans plusieurs villes, des éditeurs sont engagés dans la télévision locale. Les autorités suisses s'efforcent, dans la mesure du possible, d'éviter les concentrations multimédiales dans les régions où un éditeur de journaux dispose déjà d'une position dominante, voire d'un monopole de fait pour l'information régionale.

Il n'existe que très peu de liens entre des médias suisses et les grands groupes étrangers de la branche.

Des accords de collaboration ont été passés entre la SSR et des diffuseurs étrangers. Il s'agit notamment de sa participation aux programmes communs 3Sat, TV5, Euronews et Arte, ainsi que de coproductions de films ou de séries, d'émissions communes et de l'achat d'émissions.

La notion de service public

La Suisse accorde une grande importance à cette notion pour deux raisons d'ordre politique. Tout d'abord, il s'agit de contribuer à la formation de l'opinion publique de manière aussi complète que possible. Cet objectif revêt une grande importance dans une démocratie directe. Il ne peut être atteint que si le diffuseur conserve un fort taux d'écoute. Il s'agit ensuite de couvrir les besoins des nombreuses minorités qui sont à la base du fédéralisme suisse. Si la radiodiffusion était laissée entièrement à la libre entreprise, il est à craindre que ces besoins ne soient plus couverts.

La législation suisse sur la radio et la télévision fixe les grands principes du service public confié à la SSR. Parmi ceux-ci, on trouve un rôle d'intégration des différentes communautés qui forment la Suisse, ainsi que l'épanouissement culturel du public. En matière d'information du public, la SSR doit refléter objectivement et fidèlement les événements suisses ; en cas d'infraction, une "Autorité indépendante d'examen des plaintes" peut être saisie.

Portée de la concurrence

La concurrence exerce un effet bénéfique sur les diffuseurs en obligeant leurs réalisateurs à s'intéresser aux besoins réels du public. Quant à savoir si ces besoins correspondent à l'intérêt général, comme la survie d'une nation ou d'une civilisation, c'est une autre question qui peut être laissée ouverte en l'état (référence aux éléments pornographiques contenus dans certains programmes). L'expérience montre que la multiplication des chaînes n'a pas entraîné une augmentation correspondante de la variété de l'offre ; les chaînes ont en effet tendance à présenter des programmes semblables aux mêmes heures. On note cependant l'apparition de chaînes thématiques qui enrichissent l'offre ; mais faute de moyens, elles se limitent à la rediffusion d'émissions produites par d'autres producteurs, parfois il y a plusieurs années (cas de Canal Planète pour les documentaires et de TNT pour les films).

Concurrence et réglementation dans le domaine particulier des téléréseaux

Présentation des câblodistributeurs suisses

Structure des réseaux

Il existe en Suisse environ 597 réseaux qui sont de dimensions très variables. Beaucoup ont été créés par des communes (en général par leurs services industriels) ; d'autres sont dus à l'initiative de commerçants en appareils de radios et de télévision. Le but était d'offrir un plus grand choix de programmes avec une plus grande qualité d'image. Il faut rappeler ici que le caractère montagneux de la Suisse limite la diffusion des ondes OUC et de télévision. Les réseaux se sont développés rapidement. Ils couvrent aujourd'hui plus du 86 pour cent des ménages.

Une concentration des forces est intervenue dans ce secteur ; la tendance aux fusions se poursuit. Plusieurs grands câblodistributeurs ont fusionné pour former la société Cablecom. Celle-ci détient actuellement la moitié du marché suisse (notamment les réseaux de Zurich, Berne et Lucerne). Swisscom, qui est le moment le principal opérateur de télécommunications de Suisse (encore en mains étatiques), détient une participation minoritaire dans Cablecom.

Les réseaux suisses sont groupés au sein de l'association Swisscable ; celle-ci est chargée de défendre des intérêts communs.

Les services offerts

Les réseaux offrent entre 20 et 50 programmes, dont une grande partie captés à partir de satellites. Les câblodistributeurs négocient avec les diffuseurs étrangers les droits pour leur réseau (souvent 10 centimes par abonné et par mois) et ils assurent le décodage des signaux. Vu que l'offre de programmes accessibles dépasse souvent la capacité technique du réseau, les câblodistributeurs sont amenés à faire des choix ; ils se fondent en général sur les désirs du public et sur l'audience prévisible, ce qui ne correspond pas toujours à l'intérêt général. Ils sont toutefois tenus de retransmettre les programmes

de la SSR, ainsi que d'autres programmes qui peuvent être captés par une antenne individuelle dans la zone desservie (must-carry-rule).

Jusqu'ici, les dispositions légales en vigueur empêchaient l'utilisation de la voie de retour, par exemple pour des services d'alarme.

Base légale

Le câblodistributeur qui installe un réseau doit demander plusieurs concessions. La commune concernée doit donner son accord à l'utilisation du domaine public. Elle demande souvent un droit de regard sur le choix des programmes et sur les prix d'abonnement (bien que la politique des médias soit de la compétence juridique de l'Etat fédéral); elle fixe aussi l'étendue du réseau (obligation de desservir aussi les zones de faible densité d'habitations).

L'utilisation des réseaux pour l'accès à Internet est une question qui se pose. Les sites d'accès, dans la mesure où ils sont mis à disposition par des fournisseurs de services de télécommunication, doivent être enregistrés auprès de l'OFCOM.

Problèmes de concurrence

Conséquences de la situation de monopole de fait des téléréseaux

Pour des raisons économiques, il n'est pas possible d'envisager la construction de réseaux parallèles. Par ailleurs, de nombreuses communes interdisent les antennes extérieures pour des raisons esthétiques. En conséquence, l'usager qui ne veut pas s'abonner ne dispose que d'un choix très restreint de programmes qu'il ne reçoit pas toujours dans de bonnes conditions d'image. Les réseaux disposent donc d'un monopole de fait. Un abus de puissance monopolistique de leur part peut se manifester de trois manières :

-- Par un choix arbitraire des programmes diffusés,
-- Par un prix d'abonnement trop élevé par rapport aux coûts réels,
-- Par le financement d'émissions locales avec une partie de l'argent des abonnements (calculation mixte).

Influences externes exercées sur des câblodistributeurs

En Suisse, de telles influences ont été jusqu'ici relativement peu nombreuses. On citera tout particulièrement une prise de participation minoritaire de Swisscom dans Cablecom, le principal câblodistributeur de Suisse. La Commission de la concurrence avait recommandé au gouvernement que Swisscom se sépare de cette participation par crainte que cette société protège ses propres prestations de manière excessive. Le gouvernement n'a pas donné suite à cette recommandation, préférant protéger ses intérêts de propriétaire par rapport à celui de la concurrence. Pour le surplus, on notera que Cablecom offre aujourd'hui un accès direct à Internet.

Les relations entre des Pay-TV étrangères et des câblodistributeurs suisses ont été parfois difficiles à établir. La Commission de la concurrence n'a cependant pas été appelée à intervenir en cette matière.

SWEDEN

Regulatory Institutions

Implementing regulations in the broadcasting sector

The responsibility for implementing regulations in the context of the broadcasting sector rests with the following three independent authorities. It should be noted that in Sweden independent administrative authorities possess competence limited to specific administrative duties mainly guided by means of general norms - laws and decrees. As a rule the implementation of the norms by the authorities can only be subject to scrutiny afterwards by means of appeals against their decisions presented to an administrative court.

The Radio and TV Authority is an independent State Authority, which supervises compliance with broadcasting legislation other than the rules which relate to broadcasting content. The Authority grants licences for commercial local radio and community radio and appoints non-commercial local cable TV stations. The Authority is also responsible for proposing to the Government which companies should be granted licences for digital broadcasting. In addition, the Authority is responsible for the registration of the names and addresses, as well as the registration of persons who are legally responsible for the content of programming services. Finally, the Authority handles fees for commercial local radio and commercial television.

The Broadcasting Commission is a State Authority that reviews and monitors radio and television programmes in Sweden. It is composed of a Chairman and six other members. The Chairman and Vice-chairman are senior judges. The other members are appointed by the Government and represent various sectors of society (e.g. politicians and representatives of the media and cultural groups). The Broadcasting Commission supervises the compliance of programme content with the provisions of the laws, which regulate broadcasting services, and the licences granted by the Government. However, the supervision of compliance with programme content rules is effected strictly on an ex post facto basis. The Broadcasting Commission also monitors compliance with the rules pertaining to commercial advertising and sponsoring. The Commission acts primarily as a complaints board before which anyone can raise its concerns that a programme has exceeded ethical standards which constitute the definition of public service in broadcasting (including standards of objectivity, impartiality and so forth). In such cases, the Commission restricts its intervention to the issuance of public statements. The Commission may however also impose a fine on broadcasters that violate the rules relating to advertising and sponsoring. In cases of repeated violation of the content rules, other than advertising and sponsorship, the Commission may issue an injunction. An injunction may be appealed to the Administrative Court of Appeal. In addition, repeated violations of the content rules may lead to a decision to revoke the licences of the companies held to be in violation.

The National Post and Telecom Agency (PTS) is the regulatory authority for implementing and supervising telecommunications legislation. PTS grants licences to telecom operators. The Agency also allocates radio frequencies and grants licences for the possession and use of radiotransmitters in accordance with the Radio Communications Act. Radio frequencies are used for many purposes, e.g. mobile telephony, sound broadcasting and television. Certain radio services require licensing in

accordance with laws other than the Radio Communications Act. Sound broadcasting, must for instance be licensed by the Government or the Radio and Television Authority before PTS is able to grant a license.

In order to ensure effective supervision of the telecommunications market PTS shall, according to the Telecom Act, be active as a sector authority. Therefore PTS has been given a co-ordinating and unifying function in relation to the Consumer Protection Agency and the Competition Authority. PTS shall take the initiative for regular liaison meetings between the authorities and also resume responsibility for gathering information and accumulating knowledge concerning developments in the telecommunications sector based on the experiences of all relevant government authorities.

Competition law enforcement

The Competition Authority is the central government agency for application of the Competition Law. The Authority is the competent national authority with regard to the co-operation with the European Commission in competition matters.

The objective of the Competition Authority is to promote effective competition in the private and the public sector to the benefit of the consumers. An important task is surveillance and enforcement of competition legislation. This includes the handling of applications for negative clearance and notifications for exemption, as well as control of notified mergers. The Authority shall also take action against infringements of the prohibitions in the Act. The Competition Act is based mainly on the same principles as those applied in the EC. It is important to emphasise that the Competition Act is applicable within all sectors of the economy, including the broadcasting sector. Recently the limit for the application of the Competition Act, as concerns the provisions in the Fundamental Law on Freedom of Expression has been subject to discussion.

Convergence, implications for regulation

The Swedish Government has appointed a special investigator to study implications deriving from the convergence between the telecommunications, media and Information Technology (IT) sectors. This inquiry is prompted by technical developments that are making the boundaries between IT, telecommunications and media increasingly fluid, whereas the existing legislation essentially presumes that those boundaries can be maintained. The study comprises the following tasks:

(i) investigating the necessity, feasibility and consequences of a co-ordination of the law relating to sound broadcasting, television, other radio communications and telecommunications;

(ii) assessing the need for further legislation in order to safeguard freedom of expression, availability and pluralism in the field of electronic information services and in order to counteract harmful restrictions on competition, and also

(iii) suggesting ways in which work relating to these questions should be continued.

A report is to be submitted not later than February 28, 1999.

Key Regulations

Sweden, being a member of the EU, is subject to EU legislation and obliged to implement the different directives of the EU.

Definition of broadcasting

For the purpose of broadcasting regulations the relevant definitions are as follows.

In the 1996 Radio and Television Act, "Broadcasting" is defined as transmissions of radio and television programmes which are directed to the general public, and which are intended to be received by technical appliances. A broadcast is directed to the general public if it may be received by its viewers at the same time, and is available for each and every one without any particular request[1].

"Real-time" (live) broadcasting over the Internet would probably be defined and treated as cable broadcasting. Presenting audio or video files for downloading on websites would, on the other hand, most likely not be considered as broadcasting under the Radio and Television Act.

Entry or licensing regulations

Certain conditions have to be fulfilled before a broadcasting licence is granted. For the different activities the following licence conditions are primarily imposed.

Terrestrial broadcasting (analogue with national coverage) is subject to a public service franchise that is awarded by the Government. There are no clear provisions or regulations for the licensing of private commercial broadcasters. Up to now, only one private commercial licence has been awarded, which means that no clear procedure has been developed.

Licences to transmit terrestrial television programme (analogue) and licences to transmit sound radio programmes throughout Sweden or abroad are granted by the Government. Broadcasting companies, which currently hold such licences are the public service broadcasters Swedish Television (SVT), Swedish Radio (SR), Swedish Educational Broadcasting (UR) and the commercial TV channel TV4.

The Radio and TV Authority grants the licences to transmit community and local radio programmes. In addition, it may grant licences to transmit television programmes or radio programmes, which is not community radio or local radio for a limited period of at most two weeks.

The Radio and Television Act requires a licence for the transmission of sound radio or television programmes by means of radio waves at a frequency below 3 GHz. Anyone who conducts a transmission operation for which a licence is not required must register with the Radio and TV Authority.

Cable Television is regulated primarily by the Radio and Television Act. There is no licence required to provide Cable Television. An owner or operator of a Cable TV-network that reaches more than 100 households is however, in each municipality where there is such a network, obliged to make available one channel for programmes originating from one or more local operators and as well carry all terrestrial channels – at present two by SVT and TV4. The Radio and Television Act is also applicable for satellite broadcasting if it involves the transmission of television programmes via satellite and if it can be received in Sweden or if the transmission (uplink) is made in Sweden[2]. There is no licence required to provide Satellite Broadcasting.

The Broadcasting Commission supervises that the programme content complies with the laws regulating broadcasting services. No restrictions exist that prevent the use of say, the public switched telephony network, to distribute video signals in an area where a cable operator is established. Further, a broadcasting company in one category has no legal restrictions that prevent it to engage in another type of broadcasting activity.

Ownership and line-of-business regulations

As concerns ownership there are no legal restrictions. However, under the present broadcasting regulation, the general aim is to achieve plurality. The ownership in and control over TV4 as an example, may not change in a way, that will increase concentration of ownership in the media industry. As no licenses are required for cable and satellite broadcasting there are no ownership restrictions. An investigation on questions concerning concentration in the media sector is however at present conducted by a Parliamentary Committee expected to present its proposals for legislation in early 1999.

Content Promotion

Public policy measures designed to promote certain types of programming are accounted for in the Radio and Television Act where the limitations on content, including public service requirements, the conditions for a terrestrial broadcasting licence are set out. The rules on content are based on general principles such as impartiality, objectivity, and respect for the democracy along with freedom of speech and information. These rules are further extended and specified in the individual licences and include requests for transmitting a varied programme output, programmes in Swedish and with Swedish artists and works by Swedish authors, regionally produced and transmitted.

Satellite and Cable TV (CATV) broadcasters are subject to the requirements in the Act that half of the transmission time must consist of programmes of European origin[3]. Further on at least ten per cent of the annual transmission time or at least ten per cent of the programming budget shall relate to programs of European origin, which have been produced by independent producers. The CATV operators are as mentioned above required to provide capacity for the two public service channels SVT1 and SVT2 and the commercial national TV-channel TV4 and also for two of the digital terrestrial channels. In addition a cable operator has to provide capacity for one local broadcaster appointed by the Radio-and TV Authority. According to the Radio and TV Act every broadcaster is under the obligation to render account of the above mentioned program content.

Pricing And Advertising Regulations

The price of the service to subscribers is not regulated. An owner of a TV-set is however charged a licence fee for the public service channels decided upon by the Parliament.

The Radio- and TV Act sets out a detailed regulation on the level of advertising transmitted from Sweden. The level of advertising for the broadcasters own services is however not regulated. The pricing of advertising is not regulated. There is no prohibition per se against price-discrimination between different types of customers.

Application of competition law

As mentioned above, it is important to emphasise that the Competition Act – which is based mainly on the same principles as those applied in the EC - is applicable within all sectors of the economy, including the broadcasting sector. The Competition Act applies to all undertakings. The term "undertaking" applies to every form of activity of an economic or commercial nature, irrespective of whether its purpose is to make profit or not.

Key Developments

The Swedish Parliament has decided that digital terrestrial television shall be introduced in Sweden. Viewers will also soon be offered additional services such as an electronic programme guide. To receive digital transmissions a digital receiver is required. This means that during a transition period it will be necessary to buy a set-top box, which is connected to the existing television set. However, digital and analogue transmissions will continue side by side in the foreseeable future. The Government has decided partly that digital terrestrial television shall begin in five areas, partly to grant broadcasting licences for digital terrestrial television in Sweden to 11 companies. Transmissions are expected to start in January 1999.

Market Structure

Terrestrial TV

The largest broadcasting operator is Teracom AB. Teracom transmits information and entertainment for TV and radio. Customers include both large and small programme companies. Teracom transmits programmes to the public service program companies Sveriges Television (SVT), Sveriges Radio (SR) and Swedish Educational Broadcasting (UR), to e.g. the privately owned channel TV4 and most of the local and neighbourhood stations in Sweden.

Teracom's operations are based on a nation-wide terrestrial network, which incorporates about 700 radio- and TV-masts scattered evenly throughout the country and on the Sirius Satellite System. Teracom is fully state-owned.

Digital radio transmission started in 1995. To date, all TV transmission via the terrestrial network has been analogue, but Teracom started to prepare for conversion from analogue to digital technology early. Digitalisation of the TV transmission network is also ongoing, and in the near future half of the Swedish population will be able to receive digital transmission.

Cable TV and Satellite

Quite a large part of the households in Sweden are able to receive TV-signals and watch TV through Cable TV or Satellite Master Antenna Television (SMATV). It can be estimated that approx. 2.4 million households in Sweden or 65 per cent are connected via Cable TV or SMATV.

Most of today's cable TV-networks were built during the years from 1986 to 1990. In Sweden there are about 70 cable TV-networks which vary significantly in size and coverage. Four cable TV-operators together control approx. 90 per cent of the Cable TV-market. Market shares for the major players are shown below.

Market shares for the major cable TV-networks 1997[4]

Telia kabel-TV	53 %
Kabelvision	19 %
Stjärn-TV	9 %
Sweden On Line	7 %
Others	12 %

The biggest cable TV-operator, Telia Kabel-TV, is a subsidiary of the dominant incumbent telecom operator as well as telecom network owner Telia with a market share of fully 50 per cent. Most of the cables TV-operators are engaged in digitising their networks. At present only Telia Kabel-TV offers digital TV-channels in its network. Kabelvision is a company in the Kinnevik Group, which is also active on other segments of the media market and on the telecommunications market.

The networks owned by companies active in the market for cable TV could provide a competitive distribution alternative to e.g. Telia's fixed access network. At present, however, the cable TV-networks are not used for telephony services.

Programme companies and viewing time

Almost 100 per cent of the Swedish population have access to the channels provided by the public service broadcasting company SVT (SVT1 and SVT2) and the privately owned channel TV4.

For the time being, households are able to watch commercially financed TV-channels, except for TV4, only through cable or by satellite.

Since commercial TV was introduced in the 1980s, the Kinnevik Group has dominated this sector. This Group controls TV3, TV6 and ZTV, the pay TV-channels TV 1000 and TV 1000 Cinema and is also an important shareholder in TV4, the major privately owned TV-channel in the Nordic countries. The Kinnevik Group is also engaged in general production and distribution of TV programmes.

Other privately owned TV-channels in Sweden outside the Kinnevik Group are e.g. Kanal 5 and TV8. TV8 is using digital technology and transmits its programmes via satellite.

The public service channels, SVT1 and SVT2, share of total viewing time was in 1996 approx. 50 per cent while the biggest commercial channels had 28 and 9 per cent market shares respectively. This is shown below.

Share of total viewing time (population between 3-99 years) 1996 distributed among TV-channels[5]

SVT1	24 %
SVT2	25 %
TV3	9 %
TV4	28 %
Kanal 5	6 %
Others	9 %

Specific Issues

Digital Television

As mentioned above, the Swedish Parliament has decided that digital terrestrial television shall be introduced in Sweden. The Government has also recently decided to grant licences for digital terrestrial television in Sweden to 11 companies. Two of these are public service channels (SVT and UR) and the other nine are private. Transmission is expected to start in January 1999 in five regions to cover almost half of the Swedish population. Another two licences are likely to be decided on in the near future.

"Siphoning"

Certain forms of content, such as major sports events, are only allowed to be broadcasted on free-to-air television.

Broadcasting rights to most of the sporting events that could appear on a Swedish "list" have already been granted for several years to come, and to broadcasters that can transmit to a large proportion of the Swedish population. The Government is therefore of the opinion that there is no need at present to compile a Swedish list of sporting events that should be accessible to the general public via free television. The Government has however proposed a legislation that makes it possible for such a list to be drawn up if it becomes necessary.

Access issues

According to Article 19 in the Competition Act, abuse by one or more undertakings of a dominant position on the market shall be prohibited. Such abuse may, e.g., consist in directly or indirectly imposing unfair selling prices, limiting markets to the prejudice of consumers or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

The Swedish Competition Act has proven to be a powerful instrument for dealing with competition problems such as excessive pricing for access to a dominant actor's network or discriminatory pricing in the telecommunications sector. However, so far the Competition Authority has taken no decisions regarding e.g. the financial conditions for access to "essential facilities" in the broadcasting sector.

In addition, it is important to bear in mind that the Television Standards Directive[6] provides a regulatory framework for conditional access to digital television services, based on a requirement for those operating such systems to offer broadcasters technical services on a fair, reasonable and non-discriminatory basis. This EU directive has been implemented in Sweden. Responsibility for certain regulations concerning these matters rest with the Radio- and TV Authority.

Enforcement of Competition Law

The Competition Authority has treated a limited number of cases concerning broadcasting out of which some will be accounted for below, along with some conclusions from neighbouring sectors.

Market definition

The Competition Authority found in a case, decided upon in 1994, concerning co-operation between two commercial TV-channels that TV advertising constituted a relevant product market. In a merger case concerning evening-newspapers, decided upon in 1997, the Authority was of the opinion that the advertising market for evening newspapers met competition, potential and real, from morning newspapers and also other kinds of media depending on the kind of advertising. In a case concerning co-operation between evening newspapers the Authority found that these papers offering brand advertising on a national level met competition from other media i.e. TV, magazines, direct mail and local daily newspapers. In these last two cases the relevant product market was not finally defined.

Horizontal Agreements and Mergers

Mergers are examined in accordance with the merger regulations in the Swedish Competition Act. The Authority has examined one merger concerning cable TV. No reasons were found to intervene in that case. In another merger concerning daily newspapers a dominant position on the market for advertising in evening newspapers could be created. However, it was concluded that it did not significantly impede the existence or development of effective competition on the market.

A co-operation agreement between the two biggest commercial TV-channels in Sweden TV3 and TV4 regarding selling of advertising time through a joint controlled company has been found incompatible with the Competition Act. The application for individual exemption was rejected.

A pay-TV channel filed a complaint that a decision from a cable-TV operator, not to have their channel included in the basic package of free TV-channels, constituted an abuse of a dominant position. The cable-TV operator was partly owned by a broadcasting company operating TV-channels competing with the complainant. The preliminary assessment by the Authority was that the behaviour constituted an abuse incompatible with the Swedish Competition Act. The case was revoked since the parties came to an agreement.

Vertical Agreements and Mergers

Regarding vertical agreements, the Nordic Satellite Distribution Agreement Decision[7] by the European Commission had implications for the Kinnevik Group, active on the Swedish media- and telecommunications markets. In its decision, the Commission identified three separate product markets, namely the provision of satellite TV transponder capacity, the distribution of Pay-TV and other encrypted TV channels and operation of cable TV networks. The Commission decided against the joint venture set up by Norsk Telekom, Tele Danmark and the Kinnevik Group, since it allowed the reinforcement of the respective dominant positions in individual geographic and product markets. In short, the Commission found that NSD would acquire a dominant position in the market for transponders suitable for Nordic viewers and strengthen Tele Danmark's dominant position on the cable TV market. Viasat (a subsidiary of the Kinnevik Group) would obtain a dominant position as a distributor of Pay TV and the vertically integrated nature of the venture would deter potential competitors from broadcasting from other transponders to the Nordic area.

NOTES

1 Section 1 of the 1996 Radio and Television Act.

2 Based on the EC “Television without frontiers” Directive 89/552/EC

3 Ibid.

4 Source: “The Swedish Telecommunications market 1997”, AB Stelacon.

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UNITED KINGDOM

UK Regulatory Institutions

Development of policy on the broadcasting and telecommunications sectors; agencies responsible for policy and implementation of regulations

Two ministerial departments are concerned with broadcasting and telecommunications, the Department for Culture, Media and Sport (DCMS) and the Department of Trade and Industry (DTI). It is noteworthy that the recent UK Green paper on convergence[1] was jointly produced by both ministries. In broad terms, DCMS is responsible for broadcasting policy and legislation, while DTI deals with information technology, telecommunications, the radio spectrum and policy on competition legislation.

The DTI and the DCMS have delegated practical day-to-day decisions to particular bodies, summarised as follows:

- The Independent Television Commission (ITC), established under the Broadcasting Act 1990, is a statutory body whose Members are appointed by the Secretary of State for Culture, Media and Sport (SoS, CMS). The ITC is responsible for the award and subsequent regulation of licences granted to commercial television broadcasters, both advertising-funded and subscription-financed, as well as home shopping channels and certain data services. It has a duty to ensure that a wide range of services, including some of high quality, are available throughout the UK and to ensure fair and effective competition in the provision of such services and services connected with them. The ITC's responsibilities encompass the regulation of television advertising and technical standards. The ITC has powers to impose fines or even to revoke licences.

- The Office of Telecommunications (OFTEL) is the National Regulatory Authority (NRA) for telecommunications. The Director General of OFTEL (DGT) is responsible for advising the DTI on the issue of telecommunications licences to operators. He may agree a licence modification with a licence holder[2]. OFTEL also has certain responsibilities relating to broadcast transmission. It sets the price controls for the transmission service for analogue broadcasts for the BBC and the ITV companies provided by two recently privatised organisations, NTL and CTI. It also has a particular role in the oversight of conditional access systems for digital television.

- The Radio Authority (RA) is a statutory body whose Members are appointed by the SoS, CMS and is responsible for the licencing of local and national commercial radio, including the introduction of digital radio in the near future.

- The Radiocommunications Agency (RCA) is a DTI agency responsible for allocation and management of the radio spectrum. It is funded by fees paid by commercial licensees.

- The British Broadcasting Corporation (BBC) is a public corporation. The BBC Governors, appointed by the Queen on the advice of Ministers, are responsible for regulating the BBC's

output and activities, whether television, radio or the Internet, in accordance with the BBC's Royal Charter which defines the BBC's objectives, power and obligations, its constitution and the sources and use of its revenue. The Charter is reviewed by the DCMS every few years. The BBC is funded through a licence fee which is payable by every UK household which receives television broadcasts[3].

Competition law enforcement

General competition law applies to this sector and has been applied in the past to investigate both the state-owned BBC[4] and the commercial channels (ITV and pay-TV). Competition law enforcement is carried out by the following:

- The Director General of Fair Trading (DGFT) is empowered to apply UK competition legislation by keeping under review monopolies, mergers and restrictive agreements and investigating anti-competitive practices. He advises the Secretary of State for Trade and Industry (SoS, DTI) and seeks undertakings from firms when necessary. These powers are described briefly in 2(h) below. The Monopolies and Mergers Commission (MMC) investigate and report on matters referred to them by the SoS, DTI and the DGFT. The SoS, DTI has overall responsibility for competition policy and takes the final decisions to stop or change anti-competitive behaviour, although the DGFT has certain discretion to settle many cases.

- The DGT (heading OFTEL) has concurrent powers with the DGFT to apply UK general competition legislation to the telecommunications sector.

- The Office of Fair Trading (OFT) is the UK competent authority and principal contact point for the European Commission's's Competition Directorate (DGIV) on all competition cases under Articles 85 and 86 of the Treaty of Rome and the EC Merger Regulation. (The OFT has no role in State Aid issues dealt with under Article 92 of the Treaty.) DTI has also been designated a national competition authority and takes the lead on policy matters.

Co-operation between these bodies

New services may fall within the remit of more than one regulator. A group, comprising the OFT, ITC and OFTEL, has been formed which meets regularly to work together closely on matters affecting the converging sectors, to seek to identify at an early stage the regulatory issues which arise from new ventures, to ensure that regulatory responsibilities are clear and are handled in a coherent way[5]. Government bodies, and other stakeholders including industry and the public are regularly given the opportunity to comment on emerging issues which may be of interest to them. Regulators, Government Departments and the competition authorities (apart from those involved in radio) participate in a regular forum to discuss competition issues in convergence.

The UK government is currently consulting on the regulatory approach needed to address the issues which arise from convergence. The Government will monitor the effectiveness of regulation on new services. Changes will be introduced if the current system is found to be no longer appropriate for the purposes of ensuring competition, promoting the interests of consumers or for addressing cultural or content issues. Although new services are evolving and the distinction between new methods of delivery systems for broadcasting is becoming more blurred, it may be some time yet before UK consumers take up and use new services to the extent that they consider televisions, radios and computers as interchangeable for the services.

Key Regulations

Definition of Broadcasting

Broadcasting is defined in slightly different terms depending on whether it is delivered in wireless telegraphy, cable or satellite transmissions. In general, a broadcasting service is defined as a service consisting of (television or radio) programmes for general reception in, or in an area in, the United Kingdom. The definitions are framed in such a way that they cover the content of Internet broadcasts.

The Broadcasting Act

The Broadcasting Act 1996 established the regulatory framework for the development of digital terrestrial broadcasting, including the award of multiplex (ie packages of digital terrestrial television channels) licences, and liberalised media ownership regulations to allow greater consolidation and cross-ownership. The Act also empowered the ITC to licence and regulate the commercial television services of the BBC and S4C, which provides a language service in Wales.

Entry or Licensing Regulations

With the exception of the BBC which is authorised under a Royal Charter subject to detailed scrutiny by Government, and S4C, it is contrary to UK law for television broadcasting to be undertaken without an ITC licence unless the government obtains a specific exemption order for the service concerned from Parliament. The ITC licences terrestrial television services, both analogue and digital, as well as services distributed by means of cable and satellite. The law in the UK defines types of licences for the different types of services.

For analogue terrestrial services, the ITC is required to conduct a competition by a process and according to criteria set out in statute. Licences for Channels 3 and 5 are awarded by competitive tender. Applicants have to pass a quality threshold and the licence is normally awarded to the highest bidder. Channel 4 is provided by the Channel 4 Corporation under a licence granted by the ITC. Restricted Service licences are awarded by competition for the broadcast of specific events or for particular locations.

Programme service licences are generally for 10 years' duration, although they may be renewed. Among its sanction for the non-performance of licence obligations and failure to observe statutory requirements, the ITC may shorten the term of a licence or revoke it.

For Local Delivery Service (cable), the ITC issues an invitation to apply, indicating the area for which the service is to be provided. The ITC judges whether the applicant's technical and business plans are acceptable and then the licence is normally awarded to the highest bidder. If the cable operator also provides programme content, a Programme Service licence is required.

The ITC also licences multiplex operators. For digital terrestrial (DTT), satellite and cable-delivered services, licensing is effectively "on demand", subject to ownership requirements being met.

The licences define the obligations of the broadcaster, including, in the case of analogue terrestrial services, the specific commitments into which the licensee enters. The process in both cases is a competitive one, according to criteria and by a process set out in legislation. The licences contain specific commitments. Licences in these cases are for 15 and 12 years respectively.

Ownership and line-of-business regulations

Under successive broadcasting Acts, there is a restriction on BT and other public telephone operators from offering broadcast entertainment over their national networks (this restriction will be lifted in time when the market has become sufficiently competitive). Telecommunications operators having a turnover exceeding a certain amount per annum are prevented from holding or controlling licences to operate national and regional commercial television services, domestic satellite services, national radio services and cable services (and holders of such services may not control a telecommunications operator with a turnover exceeding £2 billion per annum).

The BBC is disqualified by law from holding an ITC licence for any purpose, although television companies in which it is a shareholder for the purposes of offering commercially-funded services must be licensed by the ITC. The ITC is required to apply the statutory rules on ownership, although it is the responsibility of the licensee to maintain compliance with the rules.

In the case of analogue television (terrestrial, cable & satellite) no one person or corporate body may hold or control licences for more than 15 per cent of the total television audience. Public service broadcasters are excluded from this restriction, but their audiences are included in the total for the purposes of calculating the audience shares of other broadcasters.

For digital television, a points scheme is used. Depending on the total number of points allocated, the maximum permitted number of points that any one person or corporate body may hold varies between 20 per cent and 25 per cent of total digital programme services. In addition, the holding of multiplex licences is restricted. No more than 3 may be held by any one person or corporate body (there are a total of 6 licences at present).

No newspaper group having more than 20 per cent of total national circulation may hold a national or regional commercial television licence, or have a holding of more than 20 per cent in a company which holds such a licence. Applications by other newspaper groups to acquire commercial television licences (or vice versa) are subject to a public interest test.

There are no restrictions on cross-ownership between newspapers and the holders of licences to provide digital multiplex services. Cross-holding of newspaper and digital programme service interests may also under certain circumstances be subject to a public interest test.

Only UK nationals and nationals of European Economic Area Member States, or corporate bodies registered in such States, may hold licences to provide national and regional analogue television services. There are no nationality restrictions on the holder of licences to provide cable, satellite or digital terrestrial services.

Content promotion (public service obligations)

Terrestrial television

Channel 3 regional licensees are required to ensure that 65 per cent of the hours of programming transmitted in each calendar year are originally produced or commissioned by any or all the Channel 3 licensees. Equivalent requirements exist for original productions/commissions, but different figures apply to Channels 4 and 5. At least 80 per cent of hours of regional programming on Channel 3 must be made in the regions. Under the EC Broadcasting Directive, the majority of transmission time of Channels 3, 4 and

5 must be devoted to programming of European origin. Under the Broadcasting Act 1990, 25 per cent of programming for Channels 3, 4 and 5 in specified categories must be independent productions.

BBC1 also provides a range of regional programming.

Cable television

Those cable operators who hold cable diffusion licences issued before the Broadcasting Act 1990 came into force "must carry" the BBC, ITV and Channel 4. The cable licences issued since 1/1/91 when the Act came into force, now known as "local delivery licences", do not have this requirement. Under the Broadcasting Act 1996, digital cable operators, whether operating under diffusion or local delivery licences, will be required to carry the BBC, ITV, Channels 3, 4 and where technically practical, Channel 5. The Government introduced in 1996 digital "must carry" requirements on digital cable operators to ensure that, in a multiplicity of transmission services, viewers have access to public service broadcasting. Under the EC Broadcasting Directive, 10 per cent of programming in specified categories are to be independent productions.

Satellite television

The majority of transmission time (excluding certain categories, for example, sport and news) must be devoted to programming of European origin. 10 per cent of programmes in specified categories must independent productions. There are no "must carry" requirements.

Public service obligations

These are enshrined in legislation (The Broadcasting Act 1990) and the BBC Royal Charter and Agreement. Obligations vary for different broadcasters.

There are a number of positive programming requirements placed on specific broadcasters to further the Government's aims of stimulating quality of output and diversity of product. Channel 3 and 5 broadcasters must meet the following requirements of s16 and 29 of the 1990 Act:

that a sufficient amount of time is given in the programmes in the service to:

- news and current affairs programmes of high quality which deal with both national and international matters, and that such news programmes are broadcast at intervals throughout the period for which the service is provided and in particular at peak viewing time;

- high quality programmes other than news and current affairs programmes;

- (for regional Channel 3 licensees only) a suitable range of regional programmes which are of interest to persons in the particular region (including programmes in Gaelic for Scottish licensees) or, if the ITC determine, within different areas in the region for which the service is to be provided and that any news programmes included should be of high quality;

- religious programmes and programmes intended for children;

that a suitable proportion of the regional programmes are made within the region (Regional Channel 3 licensees only)

that taken as a whole, programmes are calculated to appeal to a wide variety of tastes and interests

that a proper proportion of the matter in the programmes is of European origin (the EC Broadcasting Directive requires that a majority of transmission time - excluding certain categories, eg news and sport - be of European origin); and

that in each year not less than 25 per cent of the total amount of time allocated to the broadcasting of qualifying programmes is allocated to a range and diversity of independent productions is of European origin. (EC Directive requires where practicable that 10 per cent of transmission time - excluding certain categories eg news and sport - be independent productions of European origin).

Channel 4's remit is also enshrined in the Broadcasting Act 1990 (s25). The Act states that Channel 4 programmes "should contain a suitable proportion of matter calculated to appeal to tastes and interests not generally catered for by ITV". The Act also stipulates that Channel 4 should have a "distinctive character" and that innovation in the form and content of its programmes should be encouraged.

Pricing of subscription TV and regulation of advertising

No price regulation as such exists. Where pricing is thought to indicate anti-competitive behaviour, the OFT may intervene under competition legislation, or the ITC under its duty to uphold fair and effective competition.

Pluralism and competition

UK legislation places certain limits on media ownership and cross-media ownership. These fall to the DCMS via the ITC (television) or the RA (radio). Ownership limits have been set at levels which are unlikely to deter competition.

Application of competition law

The DGFT and DGT have concurrent powers to consider, make or vary a monopoly reference under the Fair Trading Act 1973, following an investigation of allegations of anti-competitive behaviour involving an undertaking, or a group of undertakings, which possess a share in excess of 25 per cent of the relevant market, and have concurrent responsibility in respect of action taken in consequence of an MMC monopoly report. They also have concurrent powers to investigate anti-competitive practices under the Competition Act 1980. Before either the DGFT or DGT exercise their concurrent functions, they have a statutory duty to consult each other before these are used.

Under the existing competition regime, the DGT has no powers in relation to agreements which are treated under the Restrictive Trade Practices Act 1976. In respect of mergers, the provisions of the Fair Trading Act 1973 involve only the DGFT; however, there is an informal arrangement whereby the views and advice of OFTEL (or other relevant industry regulators) are sought by the DGFT in mergers which cut across their respective boundaries[6].

The ITC does not have concurrent powers but does have a duty to ensure fair and effective competition in the services which it licences (s 2(2)(a) of the Broadcasting Act 1990). In 1997, the ITC undertook investigations into channel bundling in the pay-TV market and into the promotion of BSkyB's pay-per-view services.

All three organisations regularly discuss competition cases as noted above.

Key developments in regulation

The 1996 Broadcasting Act

To enable UK industry to exploit the commercial opportunities of digital technology, the Government introduced legislation, the Broadcasting Act 1996, to enable the development of digital terrestrial broadcasting. In recognition of the important role which the existing terrestrial broadcasters will play in the development of digital terrestrial television, the Government offered the BBC its own multiplex; and offered guaranteed places on multiplexes to Channel 3, 4, 5 and S4C. Four multiplexes, including one carrying Channel 5/S4C, were made available to new broadcasters and the Act empowered the ITC to award licences to provide the new services. New legislation was not required for digital cable and digital satellite services as the existing framework - the 1990 Act - allowed for these services to be delivered either by analogue or digital means.

The new Competition Act

The Competition Bill, at present before the UK parliament, would introduce a new prohibition-based approach to competition law, based on Articles 85 and 86 of the Treaty of Rome. It is envisaged that the prohibitions will be enforced by the DGFT. He will have strengthened powers of investigation, be able to take interim measures, and to impose financial penalties. The DGT (and other sectoral regulators) will have concurrent jurisdiction over cases affecting regulated industries. Decisions made by the DGFT or regulators will be subject to appeal to a specially created body, the Competition Commission, which will assume the subsisting functions of the MMC[7].

Changes in cable licensing

The ITC has embarked on a new delivery policy of issuing non-exclusive licences for new local cable services applications in unfranchised areas. Existing licence holders in franchised areas may also apply for a non-exclusive licence on a fast-track renewal basis.

Market structure (with emphasis on companies having market power)

Free-to-air television

The BBC operates two analogue television channels funded by a licence fee. Digital television viewers will receive not only BBC1 and BBC2 digitally, but also two new digital channels : BBC Choice and BBC News 24. From April 1999, BBC Learning will be transmitted. Commercial advertising is not permitted on the channels themselves.

The ITV channels consists of 14 regional franchises (with London split by parts of the week) and a national breakfast time licence.

Channel 4 and Channel 5, funded by commercial advertising. In Wales, the fifth channel (S4C) promotes the Welsh language and while taking commercial advertising, is principally funded by annual government grant (£75.5 million in 1998). For advertisers, the BBC is not a substitute for ITV channels. The UK has placed a restriction on the share of advertising revenue sold by ITV groups such that no single company accounts for more than 25 per cent of the advertising revenue from this dominant station.

Audience shares for terrestrial broadcasters	viewing share %	Advertising revenue £m (for year ended December (at 20/9/98) 1997)
BBC 1	20.8	nil
BBC 2	7.7	nil
ITV	24.4	1,682
C4/SC4	7.2	519
C5	4.1	not available
pay-TV	35.8	not available

Pay television

Retail distribution (ie by cable or via satellite) is treated as a separate issue to programme supply (for example, Sky Sports 1, Eurosport). Approximately 25 per cent of UK homes subscribe to pay television. The market presently consists of two delivery platforms: BSkyB's DTH satellite (60 per cent) and cable (40 per cent). The ITC currently licences 180 satellite services service licensees and 90 non-satellite - generally cable-only - service licensees, although not all of these will be providing pay services.

The most popular premium content channels (movies and sports) are owned by BSkyB and made available to all operators. Cable and BSkyB also offer competing pay- per-view movie channels. BSkyB also owns a number of basic channels, where its largest UK competitor is a joint venture between the BBC and Flextech, which offers several channels and makes use of the BBC archives. Until very recently broadcasting in the UK has used the analogue spectrum. However a digital satellite platform was launched by BSkyB in October 1998, and Ondigital, a joint venture between two ITV companies, Carlton and Granada, plans to launch a DTT platform in November. Digital cable platforms will follow[8]. The huge increase in capacity available from digital will greatly increase the number of channels and the scope for pay-per-view. The consequences of these important developments for the dynamic of the Pay TV market in the UK remain to be seen.

The introduction of digital television, easing existing capacity constraints, and delivered via satellite, digital terrestrial service or via cable, is expected to have an impact on market structure. Consumer take-up of each system and the longer term implications, cannot be predicted at this early stage.

Specific issues

Digital television

For satellite and cable delivery, the transition to digital television in the UK is beginning without direct Government involvement. The licensing system set up by the 1990 Broadcasting Act is technologically neutral and allows services to be delivered either by analogue or digital means.

However, for DTT, there needed to be new legislation to determine the conditions on which licences to provide such services would be granted. The 1996 Broadcasting Act did this, and the ITC has now granted licences to three separate commercial organisations for the provision of five multiplex services. The BBC will provide services funded by the licence fee on a sixth multiplex.

The legislative and licensing arrangement for digital terrestrial television gives rise to certain special requirements, for example :

- multiplex operators must promote the take-up of digital terrestrial television receivers capable of receiving all the different services on offer;
- certain levels of coverage must be achieved;
- a diverse range of programmes must be included;
- over time, certain proportions of programmes must carry subtitling for the deaf, an audio - description commentary for the visually impaired or deaf signing; and
- the analogue terrestrial channels (BBC1 and 2, Channels 3, 4 and 5, and SC4, and Teletext) must be "simulcast" in digital form.

The Government has just received responses to a consultation on whether there are any steps it might take to bring forward the time when analogue terrestrial services can be switched off. No decisions on this have been taken.

Siphoning

The UK Government has reserved certain listed sporting events for broadcast on public service channels and for the purpose of allowing *both* free-to-air and pay-TV broadcasters the opportunity to purchase these rights. The UK list divides broadcasters into two categories. Category A broadcasters are generally-available-free-to-air channels. Category B includes all others. The rights to coverage of listed events must be made available on fair and reasonable terms to both Categories of broadcaster. Live coverage of Group A listed events, and secondary coverage of Group B listed events, is protected. The ITC is responsible for implementing this legislation. The list was revised in June 1998 and has been notified to the European Commission. The UK Government believes that the revised list is fully in accordance with the principles of Article 3A of the "Television Without Frontiers" Directive.

Access and essential facilities

The ITC, under its duty to ensure fair and effective competition in the broadcasting sector, has a general role in monitoring issues arising in "gateways" in broadcasting (such as the inter-operability of digital televisions, electronic programme guides, and viewer access to pay-TV from channel bundling for example).

The Advanced Television Services Regulations 1996 implement Directive 95/47/EC of the European Parliament and of the Council on the use of standards for the transmission of television signals. The regulations are implemented by OFTEL. The Directive requires that technical conditional access services - the means to control access to broadcast (digital) services - are provided on fair, reasonable and non-discriminatory terms. The provisions of the directive apply only to "television services". In the UK, a number of operators have announced plans to provide interactive services via the set-top box. This may

also involve a gatekeeper function that is essentially the same as conditional access. For this reason, the UK took the view that there should be a comprehensive regulatory framework : it has therefore put in place provisions for regulating "access control" for interactive services which parallel the requirements on conditional access for digital television services.

A number of telecoms operators offer special prices to schools and colleges for Internet access. OFTEL's emphasis has been to put in place arrangements in which all operators can participate, not just the dominant operator.

Local/national production rules

The UK Government's aim is to encourage the development and expansion of the independent production industry as part of the wider aim of promoting competition throughout the broadcasting industry. The Broadcasting Act 1990 therefore placed a statutory requirement on the BBC, Channels 3, 4 and 5 to obtain at least 25 per cent of qualifying programmes from independent producers. Independent productions refers to a range of such productions in terms of costs of acquisition as well as in terms of the types of programmes involved.

The OFT has certain duties under the Broadcasting Acts of 1990 and 1996, including to provide the SoS,CMS with annual reports on the performance of the requirement that at least 25 per cent of the total programmes broadcast on BBC1 and BBC2 must be made by independent production companies. Responsibility for publishing reports on a similar quota for the BBC's free-to-air digital broadcasts will also rest with the OFT as such broadcasts begin. The OFT also has a specific duty to keep under review the ITV Networking arrangements. The ITC also has a similar duty with respect to monitoring ITV networking and independent production quotas on commercial television.

Universal service obligations

In telecoms, there are no arrangements in the UK for funding universal service obligations for domestic consumers - OFTEL has taken the view that a universal service funding mechanism is not justified at this stage as the case is not proven that BT faces an undue burden as a result of its universal service obligations.

Currently, 99.4 per cent of the UK population have access to analogue television. The UK Government will wish to secure access to similar digital broadcasts before analogue digital switch-off.

Internet regulation

The 1990 Broadcasting Act provides for the ITC to licence and regulate television services carried for public viewing over telecommunications networks, including "video-on-demand" services. This can be taken to encompass television services originated in the UK and delivered over the Internet. In practice, the ITC has not yet licensed any such services.

Theoretically, both the ITC and the Radio Authority have jurisdiction over any services which would be characterised as "broadcast services" originating in the UK. It has not up to now been found necessary to intervene in "broadcast services" on the Internet and Internet "broadcasting" is not currently regulated. The UK Government has encouraged the development of self-regulation of content through the Internet Watch Foundation and notes the growth in use of affordable site-blocking software. The Government is however monitoring developments closely and is prepared to consider further regulation should the need arise.

Legislation concerning economic activity generally applies to on-line as it does to off-line. However, in some areas such as the use of cryptography and the recognition of digital signatures, legislation is being extended in order to provide a firm network for electronic commerce.

Enforcement of UK competition law

Market definitions

It is not possible to give a general statement about market definitions without reference to a specific competition complaint or agreement, in which an assessment has been carried out of the degree of substitutability between different media. Depending upon the context, it can be justifiable to look at a company's activities under more than one market definition. The UK's approach to defining markets in the media sector is the same as for any market - we look at both demand- and supply-side substitution. In preparation for the introduction of the new Competition Act, the UK is preparing a number of guidelines for industry on the new legislation, including one on market definition, dealing with methodology and the importance of market definition for the purposes of interpreting the new legislation. This makes reference to both the European Commission's Notice on Market Definition[9], and the OFT's 1992 Office Research Paper No. 1[10] on market definition.

Convergence as a result of technological change could bring about changes to market definition as demand-side substitutes for delivery of services may develop. Although providers of services may regard digital technology and the means of delivery as potentially routes for reaching the same market(s), the fact that technologies are converging does not mean that the markets which use them become indistinguishable. Mass markets for digital services are yet to be established. The speed and outcome of such developments are unpredictable. It may be some time before most households have digital television offering interactive services, or computers capable of receiving good quality audiovisual material via the Internet. Consumers may not regard televisions and computers as interchangeable for all purposes. The UK will re-examine market definitions in the light of the development of technological changes and their general take up.

In broadcasting, the OFT has considered cases in which premium sports channels have been regarded as a separate market as well as some in which the market has been all pay television, or even all UK television. The UK has also considered cases, often involving a regional market, in which television advertising may be a substitute for radio and outdoor media, and other cases where radio and television advertising have been found to be constituting distinct product markets[11].

Horizontal agreements and mergers

The OFT has considered a number of mergers between ITV companies. The affected markets have been regarded as the production and supply of programmes to the ITV and Channel 4 networks and the supply of television airtime to advertisers. Following the consideration of three mergers between major Channel 3 licence holders in 1994, undertakings in lieu of a reference to the MMC were negotiated by the OFT. These had the effect of limiting the major ITV companies to a share of all television advertising of 25 per cent and the undertakings currently remain in place.

The UK has recently seen a number of mergers among cable television companies, who also supply telephony to their customers. There are now three main cable companies, each with exclusive geographical franchises - Telewest accounting for 14.3 per cent of multi-channel homes in the UK; C&WC - 11.9 per cent; and NTL 10.5 per cent[12]. Approval of recent mergers and takeovers has taken

account of various factors, including strong competition in telecommunications from several companies, including the privatised company which used to be the PTO. Cable companies also face strong competition in the pay television market from a powerful satellite broadcaster and, from later in 1998, will also compete against a new digital terrestrial television broadcaster.

Vertical agreements and mergers

The OFT has required the vertically integrated satellite broadcaster BSkyB to make all of its channels available to other suppliers of pay television on the basis of a published rate card. This requirement has recently been eased to permit individual negotiation on four basic channels which are considered to have no significant market power[13]. The OFT requires the satellite broadcaster to submit separated accounts for its broadcast and satellite distribution businesses to check that there is no cross-subsidy which could disadvantage their competitors.

The OFT has asked the Restrictive Practices Court to rule on a case in which television broadcasting rights for Football Association Premier League (PL) matches have been sold collectively and exclusively by the PL to the BBC for highlights and BSkyB for live matches. The PL negotiated on behalf of the clubs and signed long term agreements (the first was for five seasons starting in 1992 and the second for four seasons due to end in 2001) for exclusive access to the rights. Neither broadcaster will show all the matches - BSkyB will show only 60 out of 380 - but the rights to the matches not shown are not available to any other broadcaster. This is generally known as ‘broad exclusivity’ or ‘buy-to-block’.

The OFT contends that these agreements have distorted competition and are against the public interest. Key sports, and particularly PL, rights are considered to be a driver of pay television, and the limited availability to broadcasters is likely to be an important influence on the development of competition in the broadcasting industry, especially in view of the incipient digital TV revolution. In effect, therefore, the PL is acting as a cartel and restricting the output of valuable rights by collectively selling to one broadcaster for live rights and one broadcaster for highlights. Such restrictions on selling, the OFT argues, allow the price of the rights to be maintained above that which would be sustainable in the event of more open competition**.** The case is due to commence on 11 January 1999 and is currently scheduled to take about 11 weeks.

The OFT is presently considering the proposed acquisition by BSkyB of Manchester United football club[14]. In due course, the Director General of Fair Trading will advise the SoS, T&I whether it should be referred to the MMC for further investigation.

REFERENCES

1 "Regulating Communications: approaching convergence in the Information Age", Command Paper No. 4022, HMSO, July 1998, ISBN 010-140222-8.

2 An appeal to a licence modification may be made to the MMC

3 The BBC also carries out commercial activities separate to its public service provision, which are not funded by the licence fee but by commercial revenue, such as advertising and subscription revenue.

4 Following an OFT referral, the MMC reported in 1992 about the on-air promotion of BBC magazines and required certain changes in practice. The OFT has also negotiated with the BBC to remedy certain other perceived problems.

5 A press release was issued by all three bodies on 21 May 1998.

6 The DGFT may make a monopoly reference to the MMC). It is only the Secretary of State for Trade and Industry who can refer mergers to the MMC, following consideration of the advice of the DGFT

7 The mergers regime will remain substantially unchanged. The Competition Commission will take over the MMC's responsibilities in respect of mergers.

8 BSkyB's satellite digital service was launched on 1 October 1998; digital terrestrial will be launched on 15 November 1998 and digital cable is expected to be launched during 1999.

9 European Commission, *Commission Notice on the definition of the relevant market for the purposes of Community competition law, 1997*

10 National Economic Research Associates, *Market Definition in UK Competition Policy*, OFT Research Paper 1, 1992

11 Most recently, upheld by the MMC in the case of Capital Radio plc/Virgin Holdings Ltd, January 1998

12 Figures for 1 April 1998 (ITC data)

13 OFT press release 36a/98, issued on 11 August 1998.

14 OFT press release 39/98, issued on 14 September 1998.

UNITED STATES

Agencies Responsible for Regulation of Broadcasting

The Federal Communications Commission (“FCC”) is an independent United States government agency, directly responsible to Congress. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 U.S. states, the District of Columbia, and U.S. possessions. The mission of this independent government agency is to encourage competition in all communications markets and to protect the public interest. In response to direction from the Congress, the FCC develops and implements policy concerning interstate and international communications by radio, television, wire, satellite, and cable.

The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. The President designates one of the Commissioners to serve as Chairperson. Only three Commissioners may be members of the same political party. The Commission staff is organized by function. There are six operating Bureaus. The Bureaus are: Mass Media, Cable Services, Common Carrier, Compliance and Information, Wireless Telecommunications, and International. These Bureaus are responsible for developing and implementing regulatory programs, processing applications for licenses or other filings, analyzing complaints, conducting investigations, and taking part in FCC hearings.

The Cable Services Bureau was established in 1993 to administer the "Cable Television Consumer Protection and Competition Act of 1992." The Bureau enforces regulations designed to ensure that cable rates are reasonable under the law. It is also responsible for regulations concerning "must carry," retransmission consent, customer services, technical standards, home wiring, consumer electronics, equipment compatibility, indecency, leased access and program access provisions. The Bureau also analyzes trends and developments in the industry to assess the effectiveness of the cable regulations.

The Mass Media Bureau regulates AM, FM, television broadcast stations, wireless cable and related facilities. It assigns frequencies and call letters to stations, and designates operating power and sign-on and sign-off times. It also assigns stations in each service within the allocated frequency bands, with specific locations, frequencies, and powers. It regulates existing stations, inspecting to see that stations are operating in accordance with rules and technical provisions of their authorizations. At renewal time, the station's records are reviewed.

Broadcast stations are licensed for eight years. Licensees are obligated to comply with statutes, rules and policies relating to program content such as identifying sponsors and broadcasting information only on state-operated lotteries in their own or adjacent states. The Bureau assures that licensees make available equal opportunities for use of broadcast facilities by political candidates or opposing political candidates, station identification, and identification of recorded programs or program segments. Licensees who have violated FCC statutes, rules or policies are subject to sanctions, including loss of license and fines.

The National Telecommunications and Information Administration (“NTIA”) is an executive branch agency within the Department of Commerce. NTIA and the FCC together determine what parts of

the electromagnetic spectrum should be reserved to the federal government, and NTIA manages the spectrum assigned to the government. NTIA also has principal responsibility for determining administration policy on telecommunications issues, and regularly submits comments on FCC rule-making proceedings.

Enforcement of Competition Rules

The telecommunications industry affords a good example of how U.S. government agencies can minimize the potential conflicts inherent in overlapping enforcement jurisdiction over competition matters. The FCC has concurrent authority with DOJ to enforce Section 7 of the Clayton Act with respect to telecommunications carriers that it regulates. As a practical matter, the FCC and the antitrust agencies are usually able to avoid inconsistent decisions on telecommunications mergers because the agencies informally share views in advance of a decision by either (though the antitrust agencies are limited in their ability to share confidential information they receive in an investigation). These discussions have been facilitated by special exemptions from FCC rules requiring public disclosure of *ex parte* communications, thus permitting discussions between the FCC and the antitrust agencies on mergers being reviewed by both. The agencies have had such discussions more commonly in recent years, in response to some past instances of inconsistent competition analyses. In addition, the FCC does not need to rely on its concurrent Clayton Act Section 7 jurisdiction to review mergers, but can also rely on its more general "public interest" authority to review transfers of licenses.

Cable Television

The FCC and local authorities[1] regulate the cable television industry pursuant to the Cable Communications Act of 1984 ("1984 Act"), the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), as amended and supplemented by provisions of the Telecommunications Act of 1996 ("1996 Act"). The 1984 Act was enacted to establish a national policy concerning cable communications, in lieu of *ad hoc* regulations that inhibited the growth and development of cable, and to promote competition, minimize unnecessary regulation, and allocate regulatory responsibility among federal and local authorities.

Finding that the 1984 Act allowed cable operators to increase cable rates substantially, Congress enacted the 1992 Act to curb the market power of cable operators, to protect the economic viability of broadcast television threatened by the growth of cable, and to promote competition to cable television by new technologies for the distribution of video programming. A key element of the 1992 Act was to entitle multichannel video programming distributors to obtain access at reasonable, non-discriminatory rates to programming owned by vertically integrated cable operators. The 1992 Act also prohibited price discrimination in the subscriber rates charged by the many cable operators not subject to "effective competition" in their franchise areas. The relevant federal antitrust law, the Robinson-Patman Act, was determined not to apply to this situation because it applies only to price discrimination in the sale of goods, whereas the delivery of cable programming is a service.

The 1996 Act effected a number of changes to the regulatory scheme by eliminating or reducing ownership restrictions and regulations, among other things. These changes were aimed at opening up the opportunity for new programmers and new distributors to get into the business of producing cable television programming and delivering it to consumers. The Act's most important change was to permit telephone companies to provide services similar to those provided by cable operators, subject to FCC approval. In addition, the Act eliminates as of 1999 rate regulation of programming carried by cable with

the exception of broadcast TV programming. Further, the 1996 Act limited the price discrimination provision of the 1992 Act by expanding the parameters of "effective competition" noted above in the 1992 Act.

Besides its responsibilities under the three aforementioned statutes, the FCC also has authority to approve or deny transfers of cable television relay service licenses, and thus has indirect power over mergers and acquisitions. Its decision on a proposed transfer is based on a determination of whether it will serve the public interest, convenience and necessity. In making this determination, the FCC must make findings related to the pertinent antitrust policies and weigh them along with other important public interest considerations.[2] An aspect of the interface between the FCC and federal antitrust authorities is illustrated by its decision in *Telecommunications, Inc. & Liberty Media Corp.*[3] There the applicants argued to the FCC that the license transfers should be approved since the DOJ had reviewed the acquisition and approved it subject to certain conditions of a negotiated consent decree. But the FCC decided not to abbreviate its review in deference to the DOJ review on the ground that the FCC must make an independent review that requires consideration of factors other than antitrust in its public interest analysis. To facilitate its review, the FCC subsequently amended its regulations to allow for consultations with FTC and DOJ staff on antitrust policies.

The FCC's regulation of the cable industry does not provide immunity from antitrust scrutiny.[4] Participants in the cable industry remain subject generally to federal antitrust laws. The 1992 Cable Act specifically provides that nothing in the statute shall be construed to alter in any manner the applicability of federal or state antitrust laws. (The 1996 Act has a similar provision.) Both the DOJ and the FTC have successfully challenged proposed acquisitions that raised antitrust concerns of increased horizontal concentration or vertical foreclosure. The FTC also entered into consent agreements with cable TV companies settling charges of illegal agreements not to compete and to allocate markets.

Antitrust Agencies and the FCC Generally

While the U.S. antitrust agencies generally prefer structural to behavioral remedies in resolving horizontal competitive overlaps, both antitrust agencies and regulators have made use of behavioral restrictions as well, particularly in dealing with competitive problems arising from vertical relationships. Both the DOJ and the FCC largely employed "behavioral" conditions in dealing with joint ventures between foreign dominant telecommunications carriers and U.S. carriers, but based their conditions for approval in some cases on the basis of market-opening reforms ordered by European antitrust and telecommunications authorities. It is not possible to generalize about the breadth of market definitions used by antitrust agencies and regulators, as those decisions are case specific, but in many instances regulatory agencies have tended to adopt market definitions that differ from what a purely antitrust perspective would dictate, but afford greater regulatory convenience for purposes of broad rulemaking. However, the FCC's market definitions are increasingly reflecting application of antitrust concepts, as in its local competition safeguards decisions.

The relationship between the FCC and the antitrust agencies has operated without any formal designation of "lead" agencies or development of common guidelines on competition issues, although the FCC in its decisions often refers to the merger guidelines jointly developed by the DOJ and the FTC for accepted principles on such issues as market definition and measurement of concentration. In addition, an FCC decision on a merger is appealable to the federal courts, and enforcement actions by the antitrust agencies likewise are reviewable by the federal courts of appeal and ultimately the U.S. Supreme Court, providing a safeguard against development of inconsistent antitrust precedent.

In various FCC rulemaking proceedings, DOJ and FTC staff have filed comments advising the agency to adopt antitrust analysis or to rely on antitrust enforcement against monopolization rather than continuing bans or limitations on acquisitions or multiple ownership, particularly in broadcasting. For example, the FTC staff urged case by case analysis of acquisitions of radio stations using antitrust principles rather than a blanket ban of multiple ownership. Both agencies also recommended use of the 1992 merger guidelines principles to FCC decisions on TV station ownership. Yet another example is the FCC's former Financial Interest and Syndication ("Fin-Syn") Rule. FTC staff argued that instances of alleged monopolization could be addressed through conventional application of the antitrust laws rather than the rule's existing prohibitions or limitations on network ownership of syndication rights.

Licensing Issues in Television Broadcasting

The "statutory scheme of all broadcast regulation follows the public trustee concept, by which broadcast station owners, as trustees of the public interest, receive limited term licenses in exchange for a promise to serve that interest."[5] Although entertainment programming is generally left to the market, content is important for licensing issues related to non-entertainment programming. An advisory committee established in March 1997 by the White House is expected to issue a report in the near future recommending whether current public interest requirements should be expanded (possibilities would include free air time for political candidates or more public service announcements) in exchange for free spectrum allocated for digital TV.

All TV broadcasters must have an FCC license, which specifies the frequency, transmitter location, signal strength, technical standards, and types of service covered. Spectrum allocation is handled by the FCC and NTIA. An April 1997 FCC order temporarily gives existing broadcasters an additional channel for digital TV at no cost, with a requirement to be on the air by a certain date in the larger markets and rules for the eventual return of analog channel licenses to the FCC.

Qualification provisions for a broadcast license include rules relating to citizenship and alien ownership, character, financial condition, mutuality of ownership and management, and technical issues (to avoid interference and to maximize operating efficiency). Equal employment opportunity issues are also relevant, and applicants who have previously had a license revoked because of an antitrust violation are ineligible. The standard for granting a license is the public interest. Licenses are for an eight year term, and under the 1996 Act, there is a high level of renewal expectancy. In addition to competition issues, the public interest licensing review considers diversification, including minority ownership, concerns.

The 1996 Act altered the broadcast ownership rules, introducing limits based on an aggregated national audience calculation -- a single entity may not hold interests in television stations reaching more than 35 percent of the national audience, although this figure may be exceeded if minorities or small businesses control the additional stations. The 1996 Act also relaxed limits on local ownership of radio stations and repealed all national radio ownership limits. The 1996 Act directs the FCC to re-examine the duopoly rules, which generally prohibit ownership of more than one station in the same market. The 1996 Act also provides for a waiver of the rule against radio-TV combinations in the top fifty markets; the FCC has long favored such waivers where "failed" TV stations have not broadcast for over four months or are bankrupt.

The 1996 Act eliminated the statutory prohibition of TV-cable cross-ownership, leaving this area to the FCC's discretion. The Act instructs the FCC to review cross-ownership biannually and eliminate rules which are no longer in the public interest.

The FCC regulates broadcasting content in accordance with the Fairness Doctrine, the Personal Attack rule, and political broadcasting rules (equal opportunity for political candidates). The FCC may also impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting, consistent with First Amendment protections for free speech. The 1996 Act mandates that future TV sets have the ability to block certain programs, and authorizes the FCC to establish a rating system if the industry fails to develop one on its own (in March 1998 the FCC announced that it found the industry's video programming rating system acceptable and adopted technical requirements to enable blocking of video programming with the "V-Chip"). Provisions in the 1996 Act relating to indecent and obscene material have been the subject of litigation, and the Supreme Court struck down parts of these provisions on free speech grounds in a decision covering Internet communications. The FCC also enforces the Children's Television Act of 1990, which sets limits on advertizing aimed at children and requires the FCC to consider in licensing decisions whether a broadcaster has served children's educational and informational needs. The FCC has promulgated a number of regulations designed to implement this Act.

In the past, the FCC enforced a number of regulations related to the TV networks, mandating access for non-network programming during prime time (Prime Time Access Rule) and limiting domestic syndication of programs or network financial interests in programs not solely produced by the network ("Fin-Syn" rule). These rules were intended to curb network power over independent programmers, but were repealed in the last few years because they unnecessarily limited broadcaster and consumer choices.

The 1996 Act, in sec. 335, requires the FCC to promulgate regulations on various service obligations placed on direct broadcast satellite licensees, covering political broadcast rules and educational and informational carriage obligations, at reasonable terms, prices, and conditions.

Enforcement of Competition Law

Federal Trade Commission cases in the cable television sector

The Federal Trade Commission has successfully challenged cable television mergers based on concerns of increased horizontal concentration or vertical foreclosure. The agency also has entered into consent agreements with cable television companies settling charges of illegal horizontal agreements not to compete and to allocate markets. The following summarizes a few illustrative cases.

Cablevision Systems Corp, Docket No. C-3804 (1998)

Cablevision System Corporation's 1998 acquisition of certain cable operations of Tele-Communications, Inc. ("TCI") raised concerns of substantially reducing competition in two highly-concentrated local markets in New Jersey in which these companies were the only providers of cable television services. The relevant product market in which the Commission analyzed the effects of the acquisition is the distribution of multi-channel video programming by cable television. The Commission so defined the product market after determining that multi-channel video programming by technologies other than cable television (e.g., direct broadcast satellite or multichannel multipoint distribution systems) should not be included. The investigation found that those technologies did not have a significant price-constraining effect on prices charged by cable operators to subscribers. Most cable television subscribers are not likely to switch to another technology in response to a small price increase by cable television providers. In addition, cable television operator do not typically change their prices in response to prices charged by other providers of multi-channel programming. Based on its analysis of competitive effects, the Commission alleged that the acquisition would substantially reduce competition in two local markets which are highly concentrated and in which only Cablevision and TCI provide cable television services.

The complaint alleged that if the acquisition proceeded as proposed, Cablevision would be the sole provider in these markets, thereby significantly increasing the likelihood that the price of cable television services would rise, and/or the quality of service would decline. Entry into the distribution of multi-channel video programming allegedly was unlikely to be timely or effective to prevent anticompetitive effects in the relevant geographic markets.

The Commission's concerns were resolved by a consent order by which the parties agreed to divest certain cable operations in the two localities. To ensure that the buyer of TCI's systems in the two localities is able to purchase programming, the order required Cablevision to waive all existing exclusive rights, other than one local all-news network, and not to obtain any new exclusive rights to distribute programming in the two local markets.

Time Warner Inc., Docket No. C-3709 (1997)

The acquisition of Turner Broadcasting Systems ("Turner") by Time Warner raised, among other issues, the issue of vertical foreclosure in the relevant markets of cable television programming and cable television distribution.[6] The case involved three media giants: Time Warner, Turner, and Tele-Communications, Inc. (TCI.) Time Warner indirectly owns HBO and Cinemax, two cable networks devoted to premium movies, and also is the second largest cable television distributor in the U.S. Turner is a leading cable programmer and owned several "marquee" cable networks [7]: Cable News Network (CNN), Turner Network Television, and TBS SuperStation. TCI is the nation's largest cable distributor and a leading provider of cable programming.

In September 1995, Time Warner and Turner entered into an agreement for Time Warner to acquire the approximately 80 per cent of the outstanding shares in Turner that it did not already own. TCI and its affiliates had an approximately 24 per cent existing interest in Turner. By trading their interest in Turner for an interest in Time Warner, TCI would acquire approximately a 7.5 per cent interest Time Warner, with the potential, under the terms of the agreement, to increase that interest to more than 17 per cent. Also Time Warner entered into two-long term mandatory carriage agreements referred to as programming service agreements (PSAs) that would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85 per cent of the industry average price or the lowest price given to any other program distributor.

One of the most important aspects of the transaction was the degree to which it increased vertical integration in the cable television market. Prior to the acquisition, Time Warner and TCI, the two largest cable systems in the U.S., had some relatively significant cable programming holdings mentioned above. But this acquisition dramatically increased those holdings, by putting several significant cable networks under Time Warner's control. Thus, the complaint alleged that post-acquisition, Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing cable distribution systems, by denying programming, or providing programming only at discriminatory (i.e., disadvantageous) prices. For example, post-merger Time Warner would have had the incentive and ability to foreclose alternative cable networks from its distribution systems in order to give its own programming a competitive advantage.

First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone would control more than 40 per cent of the programming assets. Time Warner and TCI, the nation's two largest cable systems, would control access to about 44 per cent of all cable subscribers. Under U.S. case law, these levels of concentration can be problematic. Second, there was reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be much more difficult

without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on cable systems that cover 40-60 per cent of subscribers. Thus, the Commission recognized that one effect of the merger might be to heighten the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrants of sufficient distribution outlets to achieve the necessary economies of scale.

The order imposed three provisions to address the impact of the acquisition on entry barriers. First, the order prohibits Time Warner from bundling the most desirable "marquee" channels with less desirable programming to compel local cable systems to accept unwanted channels and further limit available channel capacity to non-Time Warner programmers. Second, the order contains conduct and reporting requirements to provide a mechanism for the Commission to learn of situations where Time Warner might discriminate in handling carriage requests from programming rivals. Finally, the order eliminates the PSAs which would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner restored TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

Summit Communications Group, Inc., Docket No. C-3630 (1995)

In 1995, the Commission settled charges that Summit Communications Group, Inc. and seven Wometco Cable TV companies illegally agreed to allocate between themselves the customers that they would serve in a county in Georgia where their local cable systems overlap. According to the FTC complaint the illegal market allocation began in March 1990 when Summit and Wometco reached an understanding concerning which of the two companies would serve apartment complexes and/or housing complexes in one county in Georgia, where both companies had franchise authority to provide cable television services. The initial agreement was that Wometco would do so and Summit would assign Wometco the contract rights it had with the apartment complex to provide the service. The companies later reached additional agreements on how they would handle future situations where both companies were attempting to serve the same apartment complexes or housing subdivisions.

The FTC charged that the agreements between Summit and Wometco not to compete restrained competition for cable television services in the dual franchise area and deprived cable television subscribers there of access to competitively determined prices and quality of cable television services. The consent order prohibits Summit and Wometco from in any way agreeing or attempting to agree to allocate or divide markets, customers, contracts or territories in any of the 14 counties in Georgia where they offer cable service. It also prohibits such agreements to refrain from overbuilding any portion of any cable television system in these counties. The settlement also contains various reporting requirements that would assist the FTC in monitoring compliance with the consent order.

Department of Justice Cases

The Department of Justice and the FTC have both been active in competition enforcement in the broadcast media area, though the two agencies have focused on somewhat different categories of cases. For the Department of Justice, two of the most important categories of enforcement related to broadcasting have been review of mergers of radio stations in the wake of the 1996 Telecommunications Act, and prevention of arrangements that could limit the development of competition between landline cable television systems and alternative delivery systems, particularly Direct Broadcast Satellite.

Radio Mergers

In the 1996 Telecommunications Act, Congress required that the Federal Communications Commission's rules be changed to raise significantly the limits on how many radio stations a party could own, operate or control in a market to between 5-8 stations, depending on the number of other stations in the market. These new caps potentially allow one party to control between 20-50 per cent of the stations in a market. However, Congress did not alter the applicability of the antitrust laws to radio station combinations. In practice, this has led to a vast expansion in radio station mergers and also considerable expansion of antitrust enforcement in the area of radio broadcasting, since a number of the mergers that have occurred do not violate the caps but nonetheless pose antitrust concerns. Before the Telecommunications Act was passed, the FCC's stricter regulatory cap of no more than 3-4 stations per market ensured as a practical matter that hardly any radio merger could occur that could give rise to antitrust concerns without also falling afoul of the regulatory prohibition.

Congress did not change in the Telecommunications Act the FCC's parallel rule limiting a party to owning, operating or controlling no more than one television station in a single market, although it did allow one party to have any number of TV stations nation-wide, up to 35 per cent of audience reach and directed the FCC to review the need for the one-to-a-market rule. Therefore, there has not been an expansion of antitrust enforcement in mergers in TV broadcasting paralleling that with radio stations.

Since 1996, there have been over a thousand radio station mergers, of which by early 1997 140 had been large enough to trigger the prefiling requirements of the Hart-Scott-Rodino Act, and 50 were actually investigated. To date, the Antitrust Division of the Justice Department has challenged eight of these radio mergers and obtained agreements from the parties to divest radio stations to prevent unacceptable risks of lessening of competition, while seven other mergers were abandoned when faced with investigation, and four others were voluntarily modified by the parties to fix competitive problems.

In these cases the Department of Justice has adopted the same market analysis. The Department of Justice has focused on advertising as the relevant product for radio broadcasting, since listeners receive the service for free although their preferences are naturally important to which stations advertisers choose to use. The Department of Justice regards radio advertising as a distinct market for which other forms of advertising are not sufficient substitutes for identifiable groups of customers. Although some advertisers may have other choices, radio stations individually negotiate prices and can price discriminate against those advertisers who do not have other adequate substitutes. The conclusion that radio advertising is a distinct market, though disputed by some, is based on extensive empirical evidence, including documents of radio station owners themselves. Definition of geographic markets is based on metropolitan areas and has been less controversial; local advertisers typically do not want to incur the expense of advertising on a station with broader regional coverage and do not regard such stations as substitutes. In the radio cases, entry issues have not been a problem, since the number of competitors is inherently constrained by the amount of spectrum allocated by the FCC for radio licenses in any given market.

Based on the experience with radio mergers reviewed to date, the Department of Justice has most commonly challenged transactions that would lead to a party controlling more than 35-40 per cent of advertising revenues in a particular market, though it has not adopted a single market share number as a hard-and-fast rule for antitrust enforcement. Combined market shares in the eight mergers challenged include: *American Radio Systems Corp.* (Rochester, N.Y. over 60 per cent; *Jacor Communications Inc.* (Cincinnati, Ohio, over 50 per cent); *Westinghouse/Infinity* (Philadelphia and Boston, over 50 per cent); *American Radio Systems Corp.* (Sacramento, California 36 per cent, and Charlotte, North Carolina, 55 per cent); *Gulfstar* (north-west Arkansas, 62 per cent); *Chancellor Media* (Long Island, N.Y., over 65 per cent); *Capstar* (various locations in South Carolina, Texas, Pennsylvania, Mississippi and New York

ranging from 43 per cent to 74 per cent); and *CBS/American Radio Systems* (Boston, St. Louis and Baltimore, ranging from 46 per cent to 59 per cent). These cases have been based on a unilateral effects analysis, and 35 per cent market share, significantly, has been identified in past Department of Justice policy statements as a threshold at which unilateral effects could occur.

The Department of Justice's enforcement actions have not been limited to challenging mergers, but also have dealt in some cases with conduct short of mergers that led to unacceptable restraints on competition between radio stations. Indeed, such restraints were apparently being used by radio station owners in some instances to evade the limitations on mergers. For example, in the *American Radio Systems Corp.* Rochester case, the Department of Justice required that the parties terminate a joint sales agreement, under which one party gave the other control over its advertising sales. This joint sales agreement was considered to be a restraint on trade violating Section 1 of the Sherman Act, limiting price competition without any procompetitive efficiencies. The Department of Justice has also required the termination of local marketing agreements by which one party effectively takes control over another station, even while a proposed merger between the stations is under review, as in *Chancellor Media,* and has blocked radio station swaps in the same market that would have eliminated competition between stations with the same format, in the *American Radio Systems Corp.* Sacramento/Charlotte case. This indicates that not only is radio station advertising a distinct market, but that in some cases these markets can be segmented by listener format differences that give rise to distinct categories of demand on the part of advertisers.

To date, competition enforcement in the United States involving radio mergers has not been affected by convergence concerns. To the contrary, the empirical analysis of the Department of Justice has tended to establish the distinctness of local radio advertising markets from other types of advertising for important categories of customers. While programming has not been analyzed as a relevant market in radio station mergers, it is implicit in the conclusion that radio advertising is a distinct market that radio programming enables advertisers to reach distinct listener groups in a more targeted way or less expensively than other media.

Direct Broadcast Satellite - Cable Television Competition

Cable television networks ordinarily face no competition in their franchised areas from other landline networks in the United States, as instances of direct overbuilds are still relatively uncommon. The 1996 Telecommunications Act, recognizing the possibility of convergence between landline networks, precludes certain forms of combinations that could eliminate potential competition between them. In particular, it forbids acquisitions of interests of more than 10 per cent in each other by cable television providers and local telephone companies operating in the same area (47 U.S.C. § 572), which could eliminate the potential for the two most ubiquitous networks in a geographic area to be used to serve each other's customers. It also prohibits joint ventures between cable television providers and local telephone companies to provide video programming or telecommunications service in the same geographic market. There are exceptions for small or rural cable systems, and competitive overbuild systems. However, the Act leaves most competitive issues involving cable television and its relationship with potential competitors to general antitrust enforcement.

The Department of Justice has regarded multichannel subscription television service as a distinct market for which over-the-air broadcasting is not a fully effective substitute. Cable television is the predominant form of multichannel subscription television service in the United States, passing over 90 per cent of homes and penetrating two-thirds of homes. Of the various potential multichannel competitors for cable television networks that have been emerging, the most significant has been Direct Broadcast Satellite (DBS). Though DBS still faces some important limitations as a competitor, such as the inability

to provide local broadcast channels, and the FTC has concluded that it does not yet have a significant price-constraining effect on cable television, nonetheless cable companies have been concerned about the developing competitive potential of DBS. Some of the Department of Justice's most important enforcement actions in broadcasting have arisen from the efforts of an alliance of cable television networks to control some of the limited number of DBS satellite slots, which would restrict the availability of this scarce resource to competitors.

On May 12, 1998, the Department of Justice filed a civil antitrust suit to block Primestar, Inc. -- which is owned by five of the largest cable companies -- from acquiring the DBS assets of The News Corporation Limited and MCI. Primestar, Inc., is the successor to Primestar Partners, L.P., a joint venture formed in 1990 by five of the six largest cable system operators in the nation, Time Warner, Inc., Tele-Communications, Inc., Comcast Corporation, Cox Enterprises, Inc., and US West/MediaOne, and Primestar's satellite provider, GE American Communications, Inc. Primestar's cable owners serve 60 per cent of the nation's cable households. Since 1990, Primestar has offered a medium-power DBS service nation-wide, having acquired control over another orbital slot for its K-1 satellite, and the original Primestar agreement contained various provisions restricting access of competitors to the partners' cable programming and facilitating co-ordinated retaliation against any cable programmer that provided programming to a DBS competitor. The Department of Justice brought suit against Primestar and its owners in 1993, after it was first formed, and secured a consent decree, which protected access to programming controlled by the cable system operators for other potential multichannel television service competitors of the cable systems and precluded the use of Primestar as a retaliatory device against potential competitors to cable television.

The Department's second suit against Primestar contended that it would be anticompetitive for Primestar to acquire the MCI/News Corp. DBS assets, which included one of only three orbital slots which can be used for nation-wide distribution of video programming in competition with the cable services offered by Primestar's owners. The transaction involved the transfer to Primestar of News Corp./MCI's authorization to operate 28 satellite transponders at the 110 West Longitude orbital slot, along with two high-power DBS satellites currently under construction. MCI acquired the 110 license by bidding $682.5 million in a FCC auction in January 1996. In April 1996, MCI announced the formation of a joint venture with News Corp. (which operates DBS businesses in Europe and Asia) to use the 110 slot to provide DBS service throughout the United States beginning in late 1997. In February 1997, News Corp. announced plans to combine its ASkyB satellite assets and business with Echostar Communication Corporation's existing DBS operations to offer an expanded service to compete aggressively against cable companies. That spring, however, News Corp. and Primestar began discussions which led to the announcement on June 11, 1997, of Primestar's agreement to acquire the DBS assets.

The Department contended in the most recent case against Primestar that high-power DBS is the best hope for consumers who seek alternatives to their local cable company and, in the majority of local markets, it is the only significant competition for the cable incumbent. In only five years, high-power DBS firms have garnered 7 million subscriber households nation-wide, attracting many of cable's most profitable customers with expanded digital program offerings. High-power DBS competition is constrained, however, by international treaties that limit the number of orbital satellite positions capable of serving the entire continental United States to three locations or "slots." The 110 slot, which has never been used and which Primestar sought to acquire to launch a high-power service, is the last position available for new entry or for expansion by existing, independent DBS firms. The Department alleged that Primestar, Inc. would not use the valuable 110 capacity to compete aggressively against cable companies, because to do so would "cannibalize" its owners' existing cable subscribers. Rather, acquisition of these assets by Primestar's cable owners forecloses an independent firm from using them to compete directly and vigorously with their cable systems. Thus, the acquisition protects and expands the market power

which Primestar's cable owners already enjoy in many local markets. In addition, the complaint asserted that the transaction eliminates the cable companies' most significant potential competitor yet, News Corp.'s ASkyB satellite venture. ASkyB was poised to enter the U.S. DBS business in 1997 and possessed numerous unique advantages, including the authority to program the 110 slot, DBS experience abroad, access to valuable programming, and financial resources which made it a particularly significant potential competitor to cable.

Faced with this suit, on October 14, 1998, the parties agreed to terminate the proposed acquisition. This leaves News Corp. and MCI free to make use of these scarce DBS assets in a fully competitive manner, either by initiating their own service or selling the assets to a purchaser not affiliated with the cable companies.

The Department's enforcement actions with respect to Primestar, in 1993 and 1998, clearly reflect an assessment of the potential for convergence between cable television systems and DBS as competitive alternatives, and also recognize the potential for dominant cable television operators to exercise market power to exclude competition, either through combined control over programming needed by competitors or pre-emptive acquisition of scarce resources needed for competitive DBS entry.

NOTES

1 There also is a limited number of express private rights of action to enforce certain provisions of the 1984 and 1992 Acts.

2 47 U.S.C. §§ 308, 310(d) (1994). The FCC also publishes an annual report on the state of competition in the cable industry.

3 9 F.C.C.R. 4783 (1994).

4 Cableamerica v. FTC, 795 F. Supp. 1082 (N.D. Ala. 1992); U.S. v. RCA, 358 U.S. 334, 336 (1959).

5 Communications Law and Practice, 3.01[2]

6 The Commission included direct broadcast satellite in the market but concluded that this emerging technology was not yet likely to prevent competitive harm by putting competitive pressure on both cable distributors and programmers to offer quality programming at reasonable prices.

7 A "marquee" network offers a type of programming that cable companies find essential or nearly essential to convince households to initiate cable service.

COMMISSION EUROPÉENNE

Le secteur audiovisuel a connu ces dix dernières années de profondes mutations et des changements à la fois rapides et profonds. Les innovations commerciales et technologiques se sont multipliées et il apparaît que le mouvement est loin d'être achevé comme le montrent les défis de l'entrée dans l'ère numérique. Compte tenu de l'importance des investissements à réaliser et des risques financiers encourus, la nécessité de nouer des alliances stratégiques est apparue comme une réponse appropriée.

Une telle situation ne pouvait manquer de soulever des questions du point de vue du droit et de la politique de la concurrence. La commission a par conséquent été amenée à développer une politique active dans ce secteur, tant par l'examen des fusions et acquisitions entrant dans le champ d'application du règlement communautaire sur le contrôle des concentrations, que par l'instruction des plaintes et notifications qui lui ont été adressées. Elle a été aussi conduite à mener des actions ex-officio pour porter remède à des dysfonctionnements importants.

L'application des règles de concurrence à un secteur développant de nouvelles technologies pose nécessairement des questions de fond en ce qui concerne, par exemple, la définition du marché pertinent ou les barrières à l'entrée sur le marché. Plus globalement, le débat a été soulevé sur la nécessité de prévoir des règles spécifiques à ce secteur plutôt que d'appliquer les règles générales de concurrence.

Le présent document présente les principaux axes de l'action de la Commission vis à vis du secteur de la télévision. Il s'intéressera en particulier aux déterminants de cette politique, à la question de la définition du marché pertinent, au traitement des fusions et alliances dans le secteur, et enfin à l'acquisition des droits de retransmission.

Les déterminants de la politique de la concurrence dans le secteur audiovisuel

L'objectif central de la politique de la Commission dans ce secteur a une double nature ; il s'agit, d'une part, de maintenir des structures de marché ouvertes et, d'autre part, d'éviter l'apparition de barrière à l'entrée qui interdirait à de nouveaux opérateurs d'y accéder.

Quatre raisons principales justifient ces deux axes :

- L'intérêt des consommateurs : l'accroissement du degré de satisfaction du consommateur doit être au centre au centre des préoccupations des responsables politiques parce que c'est ce qui justifie et légitime leurs interventions

  Le consommateur bénéficie d'un fonctionnement concurrentiel de ce marché à deux points de vue au moins : d'abord, la concurrence entre les opérateurs a pour effet de faire baisser les prix et, ensuite, d'accroître la qualité et la diversité des services offerts.

  Dans le domaine de la télévision numérique payante, des baisses importantes des tarifs d'abonnement ont été constatées en France lors de l'apparition du second bouquet numérique diffusé par satellite, TPS.

Le même phénomène est intervenu au Royaume-Uni ; lorsqu'en raison de l'apparition prochaine d'une concurrence par l'opérateur de télévision numérique terrestre, Ondigital, BSkyB a été amenée à baisser ses prix et à étendre la gamme des services offerts.

En Belgique, la perspective de la concurrence du satellite a amené les câblo-opérateurs à développer des services nouveaux, à proposer des chaînes nouvelles en option, à améliorer le service de relations avec la clientèle, qui était jusque-là fort critiqué.

- La réalisation du marché unique de l'audiovisuel : l'accès aux marchés de l'audiovisuel, qui restent encore largement nationaux et au mieux étendus à une même zone linguistique, est la condition indispensable à la création du marché unique dans ce secteur.

  L'apparition de positions dominantes nationales, compromettrait le développement d'une industrie audiovisuelle de dimension européenne. Les efforts pour éliminer les réglementations nationales qui cloisonnaient les marchés, auront été inutiles si le comportement des opérateurs nationaux interdit l'accès au marché en recréant des barrières techniques ou financières.

- Le pluralisme : l'application des règles de concurrence garantit le maintien de la pluralité des médias. Cette dimension est essentielle ; elle fait partie des objectifs prioritaires dans ce domaine de tous les gouvernements des pays membres de l'Union Européenne. Les débats en France qui ont eu lieu autour des projets de textes réformant la loi sur l'audiovisuel attestent l'importance de cette question.

- La convergence technologique : il existe un consensus pour considérer que la convergence entre la télévision, les télécommunications et des technologies de l'information est la voie prometteuse de l'avenir et que les plates-formes de télévision numérique sont un vecteur essentiel à sa réalisation.

  L'existence d'un environnement concurrentiel est essentielle pour stimuler le progrès technique et accélérer sa mise en place ; le projet d'entreprise commune BiB au Royaume-Uni entre BSkyB, la Midlands Bank, Matsushita et British Telecom l'illustre parfaitement. Ce projet permettra d'offrir au consommateur un accès à une palette de services (e-mail, accès à Internet, banque à domicile, télé-achat…) via les plates-formes de télévision numérique.

  Dans les commentaires au livre vert de la Commission sur la convergence adopté en décembre 1997, les industriels ont largement appuyé l'analyse de la Commission sur la nécessité de préserver un environnement ouvert et concurrentiel et que l'application stricte des règles de concurrence est le meilleur moyen d'y parvenir.

Le marché pertinent

La définition du marché pertinent est un outil essentiel pour mesurer le degré réel de concurrence existant dans un secteur d'activité ainsi que les effets prévisibles que peuvent avoir des accords conclus entre opérateurs.

Les règles qu'applique la Commission pour l'analyse et la définition du marché pertinent en matière audiovisuelle sont identiques à celles appliquées dans les autres secteurs. En effet, définir un marché pertinent, c'est utiliser une méthodologie qui est d'application transversale. Cette méthodologie fait l'objet d'une communication de la Commission très détaillée du 9 décembre 1997.

Plusieurs cas de figures doivent être analysés pour prendre en compte la globalité de l'activité du secteur audiovisuel. Il faut donc identifier plusieurs marchés ; un marché de détail (offre et demande de chaînes diffusant des programmes), un marché de gros (offre et demande de droits de diffusion), un marché de prestations de service pour la télévision payante (offre et demande de services administratifs, techniques et de gestion d'abonnés).

- **Le marché de détail :** la vision du marché pertinent pour la télévision numérique est aujourd'hui peu contestable en ce qui concerne sa dimension géographique. Plusieurs exemples montrent le bien-fondé de l'approche.

Pour des considérations linguistiques et culturelles, les marchés restent nationaux ; les taux d'audience des chaînes diffusées en langues étrangères dépassent rarement 1 à 2 pour cent.

De même, en ce qui concerne le contenu des programmes, une chaîne cryptée comme Canal+ a des programmes spécifiques pour chaque filiale : la programmation reste sur une base nationale, même lorsque la langue est la même, à cet égard, l'exemple de Canal+ en France et dans la partie Francophone de la Belgique le montre particulièrement bien.

Pour l'achat de programmes (films, droits sportifs) la négociation est menée de façon autonome au niveau de chaque filiale et pas de manière centralisée, comme le montre l'examen des notifications faites par Canal+.

La consultation sur le livre vert sur la convergence a également confirmé cette analyse ; les industriels ont souligné que, de leur point de vue, les marchés resteraient encore durablement nationaux.

La segmentation du marché de l'audiovisuel en termes d'activité a été sujette à davantage de discussions ; la question est ici de savoir si, la télévision généraliste et la télévision à péage sont sur un même marché. La Commission a abouti à la conclusion que ces marchés étaient distincts pour les raisons suivantes :

- Sur le marché en termes de produits, il ne correspond pas à la réalité de mettre sur un même pied télévision payante et télévision généraliste. Les produits ne sont pas les mêmes, les attentes du consommateur non plus, le contenu des programmes diffère.

- Vis-à-vis des fournisseurs, on ne peut pas non plus considérer que ces deux types d'opérateurs sont en concurrence. L'exemple de l'acquisition de droits de retransmission de films à la télévision est significatif : on constate que les sociétés de production de films font une exploitation séquentielle des droits ; d'abord, le Pay-per-view, puis la télévision cryptée, puis la télévision en clair. Bien sûr dans chaque cas le prix est différent. Il n'y a pas à une échéance prévisible une évolution de cette politique commerciale.

Il n'y a donc qu'une concurrence très indirecte entre ces deux segments, en tous les cas trop indirecte pour que l'on puisse considérer qu'ils appartiennent à un même marché. Enfin, dans le contexte de la convergence, si ces frontières devaient évoluer, et c'est très possible dans le futur, il faudrait que ce

soit à un horizon suffisamment prévisible pour pouvoir l'intégrer dans le raisonnement concurrentiel. Or, les professionnels eux-mêmes ne voient pas, à une échéance prévisible, une modification de ces frontières.

Il faut examiner également si le secteur de la télévision payante ne doit pas être subdivisé lui-même, compte tenu des spécificités de certains nouveaux services comme le Pay-per-view ou les services de télévision interactive. On peut estimer que cela est sans doute le cas pour les chaînes sportives de pay-per-view, et que, de même, les services pour lesquels le spectacle n'est pas le motif central, comme la banque à domicile, ne sont pas substituables avec des chaînes de divertissement.

- **Le marché de gros** : deux questions différentes seront ici abordées, l'acquisition de programmes et la question des modes de diffusion.

L'acquisition de programmes : en ce qui concerne les films, les licences de droit de diffusion sont attribuées par les sociétés de production de films sur une base nationale et selon une exploitation séquentielle. Il y a des fenêtres différentes d'exploitation commençant par le pay-per-view, puis la télévision payante, puis les chaînes généralistes. Il a été considéré que l'acquisition de droits par les chaînes de télévision payantes constituait un marché séparé parce que les autres formes de programmes n'exerçaient aucune influence sur la formation des prix d'acquisition des droits. Le marché géographique est déterminé par le territoire couvert par la licence.

En ce qui concerne les droits de retransmission des épreuves sportives, il a été estimé que celui-ci constituait un marché séparé. Le plus souvent, et en particulier pour les sports les plus populaires comme le football, chaque sport constitue un marché distinct parce que la demande est inélastique (un téléspectateur qui veut voir un match de football ne se contentera pas d'une épreuve de tennis ou de rugby en lieu et place).

La transmission de programmes : il existe actuellement trois moyens de transmission pour la télévision, hertzien, par câble ou par satellite.

Comme les capacités de transmission en mode hertzien sont rares, les opérateurs de télévision payante n'auront généralement le choix qu'entre le câble ou le satellite. Les coûts de location de capacités entre ces deux modes varient très fortement. Il semble que dans les zones où la réception par le câble est la norme, le mode de diffusion par satellite est peu à même d'exercer une pression concurrentielle sur les prix. Il semble donc que, dans la majorité des cas, il faut considérer que ces trois modes de diffusion constituent chacun un marché séparé.

- **Les prestations de services pour la télévision payante** : tout opérateur de télévision payante doit disposer d'une infrastructure technique ; ces services techniques comportent un décodeur, un système d'accès conditionnel et les cartes à puce y afférent, un système de gestion des abonnés. Il a été considéré que ces services formaient un marché distinct en termes de produits.

Le marché géographique sera le même que celui de la télévision payante qui utilise ses services.

Traitement des fusions et alliances dans les médias

Le développement de la télévision par satellite, puis l'apparition de la technologie numérique et demain l'émergence du multimédia nécessitent la maîtrise de nombreux facteurs techniques et des investissements considérables. Dans un tel contexte, il était logique que des alliances industrielles et financières se nouent pour mener à bien ces projets avec le maximum de chances de succès.

De telles alliances, qu'elles soient horizontales ou verticales, qu'il s'agisse de concentrations ou de coopérations, ne pouvaient manquer d'être examinées au titre du contrôle des concentrations ou du droit des ententes, compte tenu du poids économique et financier des protagonistes.

Sur la dizaine d'opérations qui ont fait l'objet d'une décision d'interdiction, au titre du règlement sur le contrôle des fusions, cinq concernaient des fusions dans le secteur de l'audiovisuel. Dans le même temps, plus d'une vingtaine d'autres opérations concernant l'audiovisuel ont fait l'objet de décisions favorables.

L'examen des cinq cas d'interdiction montre qu'ils touchaient tous les domaines d'activité dans l'audiovisuel :

- Les services techniques, commerciaux et administratifs pour la gestion de chaînes de télévision payantes ; la décision du 9 novembre 1994 MSG Média Service et la décision Deutsche Telekom/Betaresearch du 27 mai 1998.

- Les capacités de diffusion par satellite ; la décision 19 juillet 1995 Nordic Satellite Distribution.

- Le marché de la publicité et de la production de programmes ; la décision du 20 septembre 1995, RTL/Véronica/Endemol.

- La fusion horizontale de deux chaînes concurrentes de télévision payante ; la décision du 27 mai 1998, Kirch/Bertelsmann.

Qu'il s'agisse de décisions prises au titre des concentrations ou du droit des ententes, l'approche de la Commission repose sur un même raisonnement. D'abord, une vision positive des fusions ou accords qui permettent le développement de nouveaux produits ou de nouveaux services et qui favorisent l'émergence de la société de l'information. De telles opérations sont en réalité procompétitives.

Il faut également s'assurer que les marchés liés aux médias pour de nouveaux opérateurs. Ceci est particulièrement vrai pour la télévision numérique. Il faut examiner si des situations de monopole ou de position dominante ne sont pas créées. Il faut aussi veiller à ce que des barrières à l'entrée sur le marché n'interdisent l'accès des concurrents. Ce dernier point concerne tout particulièrement les infrastructures, c'est-à-dire l'accès au câble, à des capacités de diffusion par satellite ou encore l'accès au système de décodage. Elle concerne aussi l'accès aux programmes.

Quatre affaires particulièrement significatives illustrent l'approche de la Commission : la fusion UFA/CLT, l'accord British Digital Broadcasting (BDB), les décisions d'interdiction Kirch/Bertelsmann et Telekom/Betaresearch.

- **la Fusion CLT/UFA(7 octobre 1996)** : cette fusion concernait deux parmi les plus importants opérateurs de télévision analogique en Europe. La Commission a d'abord constaté que les deux opérateurs n'étaient pas présents sur les mêmes marchés en Europe, à l'exception de l'Allemagne. En examinant la situation de la concurrence sur ce dernier marché, la Commission a noté que les deux groupes devaient faire face à la forte concurrence du groupe Kirch.

Il apparaissait donc que l'opération ne pouvait conduire à créer une position dominante en Allemagne et qu'au contraire elle renforcerait la capacité concurrentielle de la nouvelle entité face au groupe Kirch.

De telles alliances proconcurrentielles ne posent pas de difficulté même si les partenaires sont des entreprises très puissantes. Dans le même sens, d'autres alliances feront l'objet de décisions positives dans les semaines à venir, par exemple le cas TPS.

A la lumière de la situation concurrentielle sur le marché français, il est constaté que dès l'entrée d'un second opérateur, la présence de deux plates-formes est une meilleure situation pour l'intérêt du consommateur qu'une configuration de marché où il n'y a qu'une seule plate-forme.

- BDB (dénommée maintenant On-digital) : cette affaire concernait la notification d'une entreprise commune créée au Royaume-Uni entre les groupes Granada et Carlton, deux sociétés de radiodiffusion, afin de créer une plate-forme numérique de télévision hertzienne. Les parties avaient, aussi, conclu un accord avec BSkyB pour une durée de sept ans, afin d'assurer la fourniture de programmes de 3 chaînes «premium» (c'est-à-dire des films en première exclusivité et des événements sportifs).

Un autre aspect particulièrement positif de ces accords : l'obligation de subventionner un décodeur qui soit non seulement nécessaire pour accéder aux programmes diffusés par BDB, mais qui puisse également décrypter les programmes des autres chaînes hertziennes, y compris la BBC.

Cette opération avait toutes les caractéristiques propres à stimuler la concurrence sur le marché de la télévision payante. Elle venait mettre fin à la situation très dominante détenue par BSkyB sur ce marché.

La Commission, dans son examen du dossier, a constaté l'existence de liens entre BDB et BSkyB de nature à susciter une coopération, plus qu'une réelle concurrence entre les deux groupes. Il s'agissait, en particulier, de l'approvisionnement en programmes du nouveau groupe par BSkyB qui couvrait une durée excessive et qui a donc été ramenée à 5 ans.

Il y avait également le conflit d'intérêt potentiel de Granada, qui est actionnaire des deux groupes. Il a donc été nécessaire de s'assurer que Granada ne pourra exercer une influence sur l'entreprise commune, de nature à le dissuader de faire concurrence à BSkyB dans le domaine de l'acquisition de programmes ou sur le marché de la télévision payante, en limitant, par exemple, son agressivité commerciale en matière de tarifs.

Cette affaire est particulièrement exemplaire. A l'origine, BSkyB envisageait de faire partie de l'actionnariat de BDB. Dans ce cas, cette société aurait été en mesure de contrôler les décisions commerciales de son concurrent. L'action, tant des autorités nationales de concurrence que communautaires, a amené BSkyB à renoncer à sa première intention.

Cette décision illustre tout particulièrement la recherche d'un point d'équilibre qui concilie le réalisme économique, le libre choix des entreprises, et l'intérêt du consommateur.

- Bertelsmann/Kirch et Telekom/Beta research du 27 mai 1998 : ces deux récentes décisions d'interdiction ont relancé le débat entre politique industrielle et politique de la concurrence.

Ces deux opérations étaient étroitement liées. L'objectif de la première fusion était de favoriser le développement de la chaîne payante de Bertelsmann, Premiere, en y incluant les activités numériques du groupe Kirch et en utilisant la technologie du décodeur de Kirch.

L'objectif de la seconde opération était de donner à Deutsche Telekom l'accès à la technologie de décodeur de Kirch pour alimenter ses réseaux câblés.

Ces deux opérations auraient complètement bouleversé la configuration du marché de la télévision payante numérique en Allemagne. Seule chaîne à péage jusqu'en 1996, avant le lancement par Kirch d'une chaîne concurrente, Premiere aurait retrouvé sa position de monopole tant en ce qui concerne l'offre de programmes que les services techniques et commerciaux.

Une seule technologie, celle du groupe Kirch, aurait été disponible pour le satellite et pour le câble, via Deutsche Telekom. Cette dernière société étant dominante sur le câble, elle aurait été en mesure de bloquer l'apparition de tout concurrent sur le câble au bouquet numérique diffusé par satellite par Premiere.

Ces opérations, si elles avaient été autorisées, auraient créé une situation de monopole en Allemagne dans le domaine de la télévision payante. Elles auraient également instauré de très fortes barrières à l'entrée pour tout nouvel entrant potentiel à trois niveaux : les programmes, le décodeur et le câble.

Les propositions des parties, à l'occasion des négociations avec la Commission, ont porté sur les deux derniers sujets. Ils proposaient d'y laisser accéder les entreprises tierces. Par contre, en ce qui concerne les programmes, la demande d'inclure les chaînes «premium» de Première dans les bouquets de programmes des entreprises concurrentes n'a pas été acceptée par Bertelsmann

Il n'était pas possible dans ces conditions d'accepter ces deux opérations.

Les demandes de la Commission dans ces affaires ne présentaient aucun caractère inhabituel ; dans un système d'encryptage analogique Videocrypt, au Royaume-Uni, l'Office of Fair Trading et la Commission avaient demandé à BSkyB des garanties similaires pour l'accès des tiers à des conditions non discriminatoires. Cette société ayant accepté ces demandes, l'opération avait été considérée comme ne portant pas atteinte à la concurrence.

De même, dans le cas de la notification de BiB, qui vise à développer des services numériques de télévision interactive, les parties ont accepté les aménagements nécessaires pour éviter toute application discriminatoire vis-à-vis des tiers.

L'accès aux programmes : la question des droits de retransmission des compétitions sportives

La révolution numérique a entraîné un besoin de plus en plus important en programmes afin d'alimenter un nombre de chaînes, notamment thématiques, toujours plus important. Ceci est vrai en ce qui concerne le cinéma, mais l'est, sans doute encore davantage, en ce qui concerne la diffusion d'épreuves sportives.

Certains sports très populaires, comme les rencontres de football et les épreuves de formule 1, sont particulièrement recherchés. Ils font l'objet d'une forte concurrence entre les chaînes qui se traduit par l'explosion des prix dont profitent les fédérations et les clubs sportifs.

Le sport à la télévision présente certaines caractéristiques propres qui en font un produit très spécifique :

- C’est, en premier lieu, un produit ayant une durée de vie très éphémère. Il n’a souvent d’intérêt que si l’événement sportif est diffusé en direct.

- Ensuite, la demande est inélastique. Le téléspectateur qui veut voir une rencontre donnée ne se satisfera pas de la retransmission d’une autre épreuve sportive.

- Enfin, la forte concentration des droits entre les mains de certaines fédérations raréfie le nombre de droits disponibles, et ce, d’autant plus, que les contrats sont conclus sur une base exclusive pour une très longue période ou pour un grand nombre d’événements.

On trouve ici toutes les caractéristiques propres à générer des effets anticoncurrentiels. Il faut d’ailleurs souligner que l’enjeu est important pour les chaînes, car ce type de programme est attractif et draine un nombre très important de téléspectateurs. Les recettes publicitaires s’en trouvent accrues. Pour les chaînes payantes, c’est également un moyen d’attirer de nouveaux abonnés.

La Commission a aujourd’hui une trentaine de cas ouverts concernant le domaine des droits de retransmission des événements sportifs couvrant ces questions. Parmi ceux-ci beaucoup sont relatifs à des plaintes. Ceci montre l’existence de réels problèmes de concurrence dans ce secteur auxquels les autorités de la concurrence ne sauraient rester indifférentes

Dans un souci de transparence, la direction générale de la concurrence a publié en juin dans «la lettre de la politique de la concurrence», un document de référence sur la mise en œuvre du droit de la concurrence dans ce domaine.

Ce document a été conçu pour recenser les différents aspects qui intéressent le droit de la concurrence. Il procède également à une séparation des champs de compétence respectifs du niveau national et communautaire. Il montre enfin que les remèdes nécessaires doivent s’apprécier au cas par cas ; il n’y a donc pas de solution générale, automatique et systématique.

Plusieurs points peuvent être soulignés.

- **Les accords d’exclusivité** : La Commission a déjà eu l’occasion de dire que des contrats d’exclusivité portant sur une saison sportive ne posaient pas, en principe, de problème de concurrence. L’interrogation commence lorsque cette exclusivité porte sur une période longue et pour une gamme étendue de droits de retransmission, en raison de l’effet de fermeture de l’accès des concurrents à ces droits.

Une durée longue peut pourtant s’avérer pleinement justifiée. Tel est, en particulier le cas, lorsqu’il s’agit, pour un nouvel opérateur, de s’assurer les moyens nécessaires pour réussir son entrée sur le marché. C’est également le cas, lorsqu’un opérateur souhaite développer une nouvelle technologie, nécessitant de lourds investissements ; il doit alors sécuriser ses investissements.

Lorsqu’une exclusivité est susceptible de créer des phénomènes de fermeture de l’accès au marché, des remèdes peuvent être envisagés. Il s’agit dans ce cas de limiter les effets négatifs pour l’accès des tiers.

A cet égard, la solution ne passe pas toujours par l’application du droit de la concurrence. L’intervention du législateur Communautaire ou national s’exerce au nom de l’intérêt général et du droit du plus grand nombre à avoir accès à l’information.

Tel a été le cas, lorsque le parlement Européen, dans une directive modifiant la directive «télévision sans frontières», a introduit l'article 3A. Par cet article, il est fait obligation aux Etats membres de veiller à ce que des opérateurs, par le jeu de leurs droits exclusifs de retransmission, ne privent pas une grande partie de la population de l'accès à des événements majeurs qui font partie de son droit à l'information. Chaque Etat membre devra fixer la liste des événements qui devront nécessairement être diffusés en clair.

La directive vise des événements de nature transnationale comme les Jeux Olympiques, la coupe du monde de football, ou le championnat d'Europe de football.

Dans d'autres cas, le droit de la concurrence peut requérir certains aménagements qui limitent les effets négatifs de l'exclusivité. En ce domaine, le régime des sous-licences est le principal outil.

En lui-même, le fait d'imposer un régime de sous-licence ne constitue pas nécessairement le remède approprié. Il faut être conscient que ce qui importe, ce sont les termes et conditions auxquelles elles sont consenties. La Commission a ainsi demandé à l'UER (l'Union Européenne de Radiodiffusion), dans la décision d'exemption de 1993, de modifier son système de sous-licence afin d'améliorer les conditions d'accès des concurrents à ces droits de retransmission.

- **Les champs respectifs de compétence entre les autorités communautaires et les autorités nationales** : deux questions peuvent ici être abordées, le régime des droits de propriété et la question de la commercialisation des droits des ligues nationales.

En ce qui concerne le régime de propriété des droits, plus la valorisation des droits de retransmission devient forte, plus les litiges surgissent pour revendiquer la propriété de ces droits.

La question de savoir si ceux-ci appartiennent aux clubs ou aux fédérations sportives n'est pas une question à laquelle le droit de la concurrence peut répondre. Cette question relève typiquement du régime de propriété que prévoit chaque législation nationale. Il n'appartient pas à l'ordre communautaire d'intervenir en la matière.

En ce qui concerne la commercialisation des droits par les ligues nationales pour les championnats nationaux. La Commission a considéré que cette question devait le plus souvent être laissée aux autorités nationales. L'absence d'effets sur le commerce intra-communautaire justifie pleinement ce choix. Bien entendu, lorsque de tels effets sont susceptibles de se produire, par exemple par le jeu de sous-licences ou des diffusions hors du territoire national, la compétence communautaire se trouve réaffirmée.

- **Achat et vente collective des droits de retransmission** : En ce qui concerne la vente certaines autorités nationales ont été amenées à se prononcer sur cette question. C'est le cas en Allemagne, aux Pays-Bas et au Royaume-Uni. Les ventes collectives de droits affectent nécessairement le fonctionnement du marché. Elles ne permettent, en effet, que des transactions espacées dans le temps. Elles globalisent le nombre de manifestations, objets de la transaction. Elles peuvent également favoriser le développement d'autres pratiques restrictives à l'égard des chaînes de télévision ou des autres clubs sportifs.

Si les accords de vente collective de droits sont susceptibles de tomber sous le coup de l'interdiction de l'article 85-1, il convient de s'interroger sur le point de savoir si les conditions de l'article 85-3 se trouvent remplies. De ce point de vue, La Commission ne limite pas l'analyse à de simples considérations économiques. Il faut également, prendre en compte toutes les caractéristiques propres à

l'organisation sportive ; à cet égard, il faut rappeler que certaines réglementations reconnaissent que les fédérations remplissent une mission de service public.

Il faut également tenir compte de la nécessité d'aider les petits clubs à financer leurs activités, voire leur existence. Cette solidarité entre clubs fait partie de cette mission de service public. Il y a, enfin, la nécessité d'assurer la formation des jeunes joueurs qui assureront la relève demain.

Toutes ces considérations sont estimables et doivent être prises en considération dans l'évaluation au titre de l'article 85-3, mais elles ne sauraient en aucun cas servir de prétexte ou de justification à une quelconque inapplicabilité a-priori des règles de concurrence de la part des autorités communautaires. Ici encore, quel que soit le bien fondé de leur action globale, il convient de vérifier le principe de proportionnalité et le caractère indispensable des restrictions.

De ce point de vue, la procédure engagée dans l'affaire de la commercialisation des droits de retransmission des épreuves de Formule 1, et celle concernant l'UEFA seront l'occasion de mieux préciser la jurisprudence en la matière et les limites au-delà desquelles les comportements ne sont plus susceptibles d'être acceptés.

En ce qui concerne l'achat en commun de droits de retransmission, il convient, là aussi, d'examiner les circonstances de chaque espèce. En tout premier lieu, le caractère restrictif ou non d'un tel achat dépendra de la position occupée sur le marché par les parties à l'accord. Plus elles occuperont des positions fortes, plus la possibilité d'un effet anticoncurrentiel sera importante. Il faut ensuite examiner la durée de l'accord d'exclusivité et l'étendue des droits acquis.

Dans tout un ensemble de cas, de tels accords ne devraient pas poser de problème de concurrence. Ainsi, le regroupement d'opérateurs qui, individuellement n'auraient pas les moyens financiers nécessaires pour acquérir les droits peut s'avérer en réalité, tout à fait proconcurrentiel.

La réalité économique impose également de constater que face au caractère très généralisé de la vente en commun, l'achat en commun constitue une réponse souvent nécessaire, voire indispensable économiquement.

Dans ce domaine également, une plus grande transparence quant aux règles à suivre devrait intervenir lors de la décision de la Commission sur les Statuts de l'Union Européenne de Radiodiffusion.

Conclusion

Ces dernières années ont été riches en décisions dans le secteur de l'audiovisuel. De cette approche au cas par cas, s'est dégagée une pratique décisionnelle de la Commission ayant valeur de précédent et qui permet de lever beaucoup d'incertitudes juridiques pour les opérateurs économiques.

Cette application des règles générales de concurrence n'a pas constitué un frein au développement de ces nouvelles technologies, comme l'atteste le foisonnement de nouvelles initiatives des opérateurs industriels.

Le droit de la concurrence a démontré sa parfaite souplesse d'adaptation aux réalités économiques d'un secteur à forte innovation technologique et sa capacité concomitante à servir et défendre les intérêts du consommateur. Cette approche équilibrée a permis de trouver les solutions adaptées qui permet une évolution dynamique des marchés vers la société de l'information.

EUROPEAN COMMISSION
(DG IV - Competition)

State Aid in the Audiovisual Sector

The Commission tried to establish a coherent policy concerning State aid in the audio-visual sector for the first time in 1995; the draft then presented was strongly rejected by some Member States and therefore the issue was no longer addressed.

Rapid technological developments - digitalisation, multimedia convergence, etc. – and economic changes – globalisation, customer behaviour, etc. - are transforming the very nature of broadcasting and having a dramatic impact on the development of trade between Member States in the sector.

The increased competition in the sector has also led to a growing number of complaints submitted to the Commission by private broadcasters in different Member States, concerning possible infringements of Article 92 of the EC Treaty. Most of them are related to the State financing schemes established in favour of public broadcasters in some of the largest Member States (Italy, France, Spain and, to a lesser extent, Germany). In two cases, the Commission has been brought to Court under Art. 175 procedure. For one case, the Commission has recently been condemned for failure to take a position within a reasonable time.

From a State aid point of view, the presence of State-funded operators and the strong regulating interventions from the Member States create significant distortions in the allocation of market resources:

- while most operators can collect revenues either on the market or from the State, some public operators can collect revenues from both;
- the public operators obtain funds from the State as a flat licence fee and not as a reimbursement for specific costs related with the Public Service Obligations (PSOs);
- the public operators can obtain additional revenues by selling on the market programs developed in-house with the financial support of the State.

The first distortion is by far the largest in terms of resources involved and is the matter of most of the complaints lodged by private broadcasters against public operators (e.g. Mediaset/RAI, TF1/FR2, Telecinco/RTVE, etc.).

Member States (with few exceptions, such as Austria where there is still a quasi-monopoly of the public broadcaster) started liberalising the television market during the late 70s-early 80s, allowing several private operators to enter. Technological developments – that have increased the frequencies available for transmission – favoured the opening up of the market. The strongest competition occurs in the advertising market which represents by far the largest portion of commercial revenues in the sector: in this market, public broadcasters have brought a significant increase in the available advertising space, thus reducing the price of the space.

Since the advertising market is liberalised, television operators have to compete to sell advertising space; competition is based on price (price per ad) and audience (price per contact), in the

sense that an operator can sell its advertising time at a higher price the higher the audience of its programs is. However, public broadcasters may, in principle, offer "dumping" prices for their advertising space, thanks to the public financing received.

Public broadcasters, although entitled to compete on this market (with some exceptions), receive from the State additional resources (e.g. licence fees, grants, etc.), which are refused to private operators. Public broadcasters do not need to compete to obtain these additional resources which provide them a safe cash flow that may be used to compete unfairly on the market.

From the State aid point of view, the easiest solution would be to ban advertising from public broadcasters. Although it would not eliminate *all* State aid problems (e.g. the sale of programs), this solution would probably cut the legal grounds for most of the related complaints. However, such solution may also have some drawbacks:

- it may damage seriously public broadcasters, as public resources available are lower than market ones (budget restrictions, difficulties to increase licence fees, etc.);
- it may reduce the appeal of their programs, as they would not need to gain audience.

Moreover, it would be politically difficult, for obvious reasons, to sell this solution to those Member States where public broadcasters have traditionally enjoyed dual funding.

Also, the State may choose its public service broadcaster by calling public tenders open to all potential operators, as implemented in other sectors[1]. Each Member State defines a set of public service obligations and calls for a public tender, open to all operators, in order to select the undertaking which will be in charge of the obligations. The best offer would be selected and the State would then reimburse the extra costs according to the service contract.

Alternatively, the costs of public service obligations may be reimbursed (totally or partially) by establishing an independent fund financed by all authorised companies in the market[2]. However, this would also pose practical problems as, in most cases, the advertising revenues represent a significant part of the turnover of public broadcasters: asking private operators to provide such financing may cause serious damage to their companies[3].

In addition, a rather more complex option would imply a dual funding scheme (market revenues *and* State reimbursement of the "net costs" of accountable public service obligations)[4]. In this case, public service broadcasters would be entitled to compete for market revenues and, at the same time, would be reimbursed, on the basis of analytical accounting, for the costs incurred to fulfil their public service mission, net of any *related* advertising revenue.

In the debate on broadcasting, two different schools of thought may be identified:

- those who consider broadcasting a normal business and that therefore believe that the same rules of other sectors should be applied;
- those who consider broadcasting as a "non-commercial" sector and that therefore would allow any type of State measure, as not falling under competition rules.

According to the first, public service broadcasting may be provided to citizens by means of public tenders: any operator is able to ensure that objectives such as the democratic, social and cultural needs of citizens and pluralism in the media are fulfilled at an efficient cost. Private broadcasters may provide such objectives at lower costs than public ones.

According to the second, broadcasting is a sort of “non-commercial” activity, given the social, democratic and political issues related to it. They believe that broadcasting should possibly be excluded from the competition rules of the Treaty.

However, as underlined by the Protocol of Amsterdam, none of them is right. First of all, broadcasting is a special sector as it fulfils needs of the EU citizens additional to the pure economic ones. On the other hand, it is not excluded from the provisions of the Treaty: such rules should be applied as long as they do not obstruct the fulfilment of the needs of the EU citizens.

NOTES

1 Regulation 2408/92, publ. OJ L 240 of 24.08.92.

2 As, for example, in the Telecommunications sector or, as recently proposed by the Commission, in the postal service; a similar system exists in Finland and Denmark.

3 The elimination of advertising from public broadcasters would not re-direct all the related advertising revenues to private operators (as audience share may remain with public broadcasters). As a result, the total revenues of the market will be reduced; thus, private operators would not be able to finance a fund of the same size as the previous advertising revenues of the public broadcaster.

4 As in the case of the Portuguese public broadcaster (RTP) - Case NN 141/95. “Net costs” refer to the costs incurred to fulfil the public service tasks, as imposed by the State to the broadcaster, net of possible revenues obtained from that particular task; therefore, net costs would consist, in principle, of the full costs of the programs included in the public service remit, deducted of the commercial revenues (such as advertising revenues or income from the sale of programs), if any, directly attributable to these programs.

EUROPEAN COMMISSION

(DG X – Information, Communication, Culture and Audiovisual Media)

Introduction

All Member States have in place "media", and generally more specific "broadcasting" legislation, some of which is quite detailed. This legislation generally covers both public and private broadcasting i.e. it creates the legal framework for broadcasting as an activity. Moreover, in order to monitor the implementation of this legislation, most European countries have long recognised the need for independent regulatory bodies.

One of the prime tasks of these bodies today is to issue broadcasting licenses. Licences are issued with regard to two basic goals:

- to ensure pluralism in broadcasting
- and to ensure compliance with rules on content, which include measures to attain public policy objectives, such as cultural diversity, and measures to preserve the general public interest (such as protection of minors, consumer protection, etc.)

Although it does not detract from such public interest objectives, digitalisation raises the question of the extent to which "traditional" licensing procedures need to be maintained or adapted. The ever-increasing number of services available will require adaptations and improvements in such procedures. In some Member States there is already an urgent need to simplify licensing procedures. In general, "traditional" procedures should be replaced by lighter, simpler systems operating in a graduated way as a function of the pervasiveness of the medium (e.g. pay-per-view and near video-on-demand services should only be subject to minimal requirements, whereas terrestrial free-to-air television will continue to need a higher level of regulation in the general public interest). Notwithstanding, it is clear that competition rules are not sufficient, in themselves, to achieve all legitimate public interest objectives in this sector (for example, competition rules are not designed, nor are they able, to ensure that the content of broadcasts are not harmful to minors, do not incite to racial hatred, preserve cultural and linguistic diversity, etc.)

It will be necessary, moreover, to consider whether any licensing procedures are needed for on-line services. It may not be necessary to subject certain services to a licensing requirement at all. For example, it would seem unnecessary to require an information service on the Web to have a licence. But if this same service were to be included in a digital terrestrial broadcast package the problem of scarcity would arise again, and with it a selection procedure.

The Internet in particular poses daunting challenges for the regulatory framework. However, for regulatory purposes, there is a fundamental difference between the Internet and broadcasting. In the latter case, it is clearly the broadcaster (who is easily identifiable) that is legally liable for the content of his broadcasts and, in both international and community legislation, it is the country of origin principle that applies. The Internet environment, however, functions in a different way, involving infrastructure suppliers, service providers, access providers and content providers (which may be located in different

countries for the same service). The question of liability is therefore far more complex. Neither it, nor the matter of which State has jurisdiction has yet been resolved.

The regulatory framework, in order to evolve without the need for constant adaptation and the consequent lack of legal security, should be more based on principles and consist of less detailed rules. Such principles, however, should include pluralism, the need to provide for quality content, respect for linguistic and cultural diversity and the protection of minors. In addition, clear rules and safeguards are needed to ensure open, non-discriminatory and equal access both for competing providers and for users to digital networks and services. The framework should also be conducive to fostering European, national and local audiovisual production.

On a global level, it is essential that the specificity of content and legitimacy of public policy objectives based on cultural diversity and pluralism of expression be recognised in international trade negotiations.

Key Community Legislation

The Television Without Frontiers Directive (89/552/EEC as modified by 97/36/EC)

The main objective of this Directive is to create the conditions necessary for the free movement of television broadcasts within the Community. It achieves this essentially through coordinating national rules on certain public interest objectives (where such objectives are legitimate and where disparities between national rules were of a nature to obstruct the free circulation of services). The coordinated fields cover such matters as advertising, European works and works by independent producers, the protection of minors and public order and the right of reply. As the Directive is based on the principle of achieving the minimum level of coordination necessary to ensure free circulation, each Member State retains the right to impose stricter measures on broadcasters under its jurisdiction.

Directive 97/36/EC amended the original Directive to take account of changes in the market, particularly those arising from technological developments and the need to refine the jurisdictional criteria. The scope of the Directive was not modified, as it was considered that it was already sufficiently broad to cover immediate needs at Community level (the scope includes all forms of transmission to the public of television programmes, except communication services providing items of information or other messages on demand).

Member States must bring the provisions of the Directive into force not later than 30 December 1998. The description which follows is of the amended Directive.

Definitions

Television broadcasting is defined as “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public”. It does not include “communication services providing items of information or other messages on individual demand”. The key phrase is “television programmes intended for reception by the public”. DG X agrees with the definition of broadcasting put forward in the OECD questions for delegates and considers that Internet Broadcast Services, even though the log-on procedure has replaced the on/off button, should, in a converged environment, be defined as broadcasting since they are intended for reception by the public.

Jurisdiction

The Directive contains a "cascade" of criteria for deciding where a broadcaster is established (where the head office is based, where editorial decisions are taken and where a significant part of the workforce is based) for the purpose of determining which Member State has jurisdiction over any given broadcaster. Further technical criteria (frequencies, satellite capacity, location of up-link) can bring broadcasters under the jurisdiction of a Member State when they are not actually established in another Member State.

Freedom of reception and retransmission

This is the fundamental principle of the Directive. Member States are obliged to ensure freedom of reception and must not restrict retransmission on their territory of broadcasts emanating from another Member State. The only exception to this is if such a broadcast is held to infringe Article 22 (which states that broadcasts must not seriously impair the physical, mental or moral development of minors, nor contain incitement to hatred on grounds of race, sex, religion or nationality). The Commission is required to verify whether any such restriction of retransmission is compatible with Community law.

Events of major importance to society

The Member States may each draw up a list of events which must be broadcast in such a way that a substantial proportion of the public in that Member State is not deprived of the possibility of following such events on free television. On the basis of the principle of mutual recognition, they must ensure that broadcasters under their jurisdiction respect each of these lists. The events concerned may be national or other, such as the Olympic Games, the World Cup or the European Football championship. These provisions apply to contracts concluded after the publication of the Directive and relate to events taking place after its entry into force.

Promotion of distribution and production of television programmes

Broadcasters are required to reserve a majority of their broadcasting time – excluding news, sports events, games, advertising and teleshopping - for European works. The words "where practicable" in this clause and the definition of a "European" work allow a certain flexibility. Broadcasters are similarly required to reserve 10 percent of their broadcast time (or 10 per cent of their programming budget) for works by independent European producers.

Television advertising, sponsorship and teleshopping

Television advertising must be readily recognisable as such and surreptitious advertising is not allowed. At least 20 minutes must elapse between advertising spots and certain other conditions on advertising breaks and teleshopping apply according to the kind of broadcast (feature film, religious service, news and current affairs programmes).

Advertising and teleshopping for tobacco products is prohibited as it is for certain categories of medicinal products and treatment. There are also conditions applying to advertising and teleshopping for alcohol. Further rules are designed to protect children. Sponsorship of programmes is subject to rules mainly designed to maintain the editorial independence of the broadcaster.

Finally, advertising and teleshopping are limited to certain quantitative thresholds (e.g. the time allotted to spots must not exceed 20 per cent of daily transmission time).

Protection of minors and public order

Programmes which might seriously impair the development of minors are prohibited. Those which might simply be harmful to minors must, where they are not encrypted, be broadcast at a time of the day when minors will not normally see them and be preceded by an acoustic warning or made clearly identifiable throughout their duration by means of a visual symbol. Broadcasts must not contain any incitement to hatred on grounds of race, sex, religion or nationality.

Right of Reply

The Directive requires that any party whose legitimate interests have been damaged by assertion of incorrect facts in a television programme shall have right of reply or equivalent remedies.

Contact Committee

The revisions to the Directive included the establishment of a Contact Committee, composed of representatives of the Member States, charged with overseeing the implementation of the Directive and the consideration of any relevant matters.

Transposition

According to the information the Commission has, Member States will generally be able to comply with the deadline for transposing the new Directive into national legislation i.e. 30 December 1998.

Relationship with the Council of Europe

The amended Convention on "Transfrontier Television" contains provisions that are substantially similar or identical to those of the Directive. It was opened for acceptation on 1/10/1998.

Recommendation on the Protection of minors

The Recommendation on the development of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity was adopted by the Council on May 28th, 1998. It is the first legal instrument which covers the content of on-line audiovisual and information services. It seeks to encourage the take-up of new audiovisual services by contributing to a climate of consumer confidence.

The Recommendation provides guidelines for national legislation. It covers all electronic media and contains the following main recommendations :

- Member States should promote voluntary national frameworks as a supplement to regulation, including a national framework for self-regulation by operators of on-line services (guidelines on this are given in an Annex);

- broadcasters are encouraged to try out new methods of protecting minors and informing parents (such as personal codes, filtering software or control chips);

- transnational cooperation between complaint-handling structures should be encouraged;

- industry is encouraged to participate, to set up structures at national level, and to draw up codes of conduct for on-line services;

- the Commission is invited to facilitate the networking of the bodies responsible, to encourage cooperation and the sharing of good practice, to promote international cooperation, to develop a methodology for evaluating the measures taken in pursuance of the Recommendation and to report back to the Council of Ministers and the European Parliament in two years.

Key Regulatory Developments

The Commission's Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors

The Green Paper on Convergence was published in December of last year and the consultation procedure ended on 3 May 1998. The Green Paper attracted much interest and some 270 written responses were received by the Commission. In addition, the Commission held several public hearings.

The Green Paper did not take a position with regard to new regulatory structures. It analysed the convergence phenomenon, identified certain issues relating to regulation and posed 9 general questions in relation to these. For the purposes of discussion, it put forward three options for future regulatory development :

- Build on current structures (an example is the U.K. 1996 Broadcasting Act):

- Develop a regulatory model for new activities to co-exist in telecoms and broadcasting regulation (an example is the German Multimedia Law of 1997):

- Introduce a new regulatory model to cover the whole range of existing and new services (an example is the U.S. Federal Communications Act, or Italian Law No. 249 of 1997)

Results of Consultation

The Commission produced a Working Document summarising the results of the consultation on 29 July 1998.[1] These results can be summarised as follows:

1 SEC (1998) 1284 final

- Agreement on the reality of technological convergence, but different views as to the speed and scope of its impact on markets and services.

- Most commentators preferred an evolutionary rather than revolutionary approach – expressing a preference for Option 1 in the Green Paper (building on existing structures). Those supporting an Option 3 approach generally viewed this as a gradual process of change rather than an urgent rewriting of the rules in question.

- There is general recognition of the continuing role of sector specific rules to assist in securing certain general interest objectives, in particular within the audiovisual sector.

- A number of potential barriers and key regulatory issues were highlighted, e.g. access to set top boxes, Electronic Programme Guides (EPGs) and Application Programming Interfaces (APIs).

- The question of the right approach to spectrum issues (in particular allocation and fees) attracted much attention – but no clear consensus on this.

- Support for a more horizontal approach to regulation (i.e. same rules for networks / access issues, but with a vertical or sector specific approach for regulating aspects of the provision of services such as, for example, the content of audiovisual programming).

In addition, individual sector interests were evident from many of the comments. For example:

- There are strong calls within the telecommunications and IT sectors for less burdensome sector-specific regulation.

- Consumer organisations claimed that the approach taken in the Green Paper was unduly biased towards technology and the supply side, with insufficient emphasis on evaluating the potential demand for convergent services and addressing the needs of consumers.

- There is an active discussion within the audiovisual sector about whether there should be national or EU timetables for the switch-off of analogue broadcasting, and of the relationship between regulation and content-support initiatives.

- There was agreement that demand for high quality content, particularly in the audiovisual sector, would increase, and that measures to foster European production should therefore be considered.

The Working Document also contains three further questions intended to deepen the convergence debate on three key issues, namely :

- Access to networks and digital gateways in a converging environment;

- Creating the framework for investment, innovation, and encouraging European content production, distribution and availability, and ;

- Ensuring a balanced approach to regulation.

The EP will adopt its opinion during its session on October 19-23.

Following the consultation on the Green Paper, the Commission will issue a Communication towards the end of this year containing further analysis and any policy proposals considered necessary.

Future Developments

At this stage, while the Commission is still analysing and reflecting on the feedback to the Green Paper, it cannot take a firm position with regard to the future regulatory framework affecting the electronic media.. Nevertheless, from the point of view of audiovisual policy, certain important indicators are already available. The most important of these are the outcome of the *European Audiovisual Conference* held in Birmingham on 6-8 April, entitled "Challenges and Opportunities of the Digital Age" and the *Report of the High Level Group on Audiovisual Policy* set up by Commissioner Oreja last year. This Report, entitled "The Digital Age", is being made public on 26 October 1998 at a Press Conference in Brussels.

The European Audiovisual Conference

One of the four Working Groups set up by the conference was charged with considering " The Right Regulatory Framework for a Creative Media Economy in a Democratic Society. Its recommendations are considered by the Commission as a significant contribution to the debate on convergence. The Audiovisual and Cultural Council on 28 May unanimously welcomed the ideas put forward by the Working Groups in Birmingham and urged the Commission to take them forward. The Recommendations are summarised below :

- For the foreseeable future, the Regulatory approach should combine Option 1 of the Green Paper on Convergence (building on the existing framework), with Option 2 (the creation of new regulatory categories). Sector specific regulation should be retained and expanded and the regulatory focus should distinguish between infrastructure and content.

- The recycling of revenue into the creation and production of content must be a priority policy objective. Fair and reasonable regulatory obligations for investment in EU content are one way of achieving this. Appropriate measures should also be taken to facilitate the availability of rights.

- All Member States should define their public service broadcasting mission and should provide for financial transparency as regards commercial services provided by public service broadcasters

- Where self-regulation or technology does not provide for openness and transparency of gateways, in particular conditional access systems, navigator systems and APIs (Application Programme Interfaces), regulatory intervention should be considered.

- With regard to on-line services, self-regulation is probably the best approach, though this should be underpinned by regulatory measures to ensure it is effective. Self-protection by users should also be encouraged and could involve labelling of content and the use of filtering devices.

- The European Commission should encourage Member States to adopt a calendar for analogue switch-off as soon as possible and should promote co-ordination at the EU level

with regard to frequency selling. Member States should ensure that existing analogue services are able to migrate to the new digital frequencies.

- Regulators in the EU should build on existing structures for co-operation, with a view to promoting the exchange of information, the elaboration of "best practice" rules and achieving consistency between Member States.

The High Level Group on Audiovisual Policy

Similarly, the Group devoted a considerable amount of time to this issue and one section of the Report deals specifically with the question of the Legal Framework and Regulatory Bodies in the Digital age. The Group is composed of a broad cross-section of representatives of the audiovisual industry including commercial and public service broadcasters, regulatory authorities, the cinema sector and the creative community from a number of different countries. The Group is expected to adopt recommendations on the future regulatory framework along the following lines:

- there will continue to be a need for specific regulation for audiovisual content, based on the fundamental distinction between public and private communication i.e. a service which provides information for the public (or a section of the public) or content which has copyright attached to it, is communication to the public and the same public interest principles apply as those that underpin traditional broadcast regulation, whereas a service which provides the facilities for private correspondence between users does not raise the issue of content regulation or of copyright (except, possibly, breach of copyright) and the issue here is that of protecting the confidentiality of private correspondence;

- regulation should encourage innovation and competitiveness;

- licensing procedures need to be simplified and the level of regulation adapted to the nature of the service;

- the regulatory framework must be clear and consistent to avoid subjecting the same service to two sets of regulatory requirements with different objectives;

- the regulatory framework should abide by certain principles and in particular it should encourage competition, pluralism and open, non-discriminatory access;

- the regulatory framework may take account of other, more specific, public policy goals, primarily set at national level;

- the regulatory framework should encourage the development of digital services and a smooth transition to an all-digital environment;

- whether there is one regulator for technological aspects and another for content aspects, or a unified regulator administering both sets of rules, is for national governments to decide;

- where there is more than one regulator, they will increasingly need to co-operate between themselves and with the competition authorities;

- European-level co-operation between national regulators should be encouraged to ensure mutual understanding and a degree of consistency;

- at a global level, it is essential that the specificity of the sector continues to be recognised and that the principle of the "cultural exception" be applied in international trade negotiations.

In conclusion, there is a clear case to be made that the regulation of services providing content cannot be dealt with in purely economic terms. The key element is rather the nature of the service and the question should therefore be analysed in the following way :

- a service which provides information for the public (or a section of the public) or content which copyright attached to it, is communication to the public and the same public interest principles apply as those that underpin traditional broadcast regulation;

- a service which provides the facilities for private correspondence between users does not raise the issue of content regulation or of copyright (except, possibly, breach of copyright). The issue here is that of protecting the confidentiality of private correspondence.

Digitalisation will not alter these different forms of communication, which correspond to some extent to the differences between the audiovisual media and telecommunications, as we know them today.

Digitalisation of the electronic media will bring immense benefit to consumers and companies; its advent will be greatly facilitated by a climate of confidence that a clear, predictable and strictly proportionate legal framework can help to provide.

SLOVAK REPUBLIC

Regulatory Institutions

In the Slovak Republic the telecommunications and broadcasting sectors are regulated separately.

Telecommunications

The key legislation in the telecommunications sector is the Act on Telecommunications of 1964, as amended. The Act on Telecommunications does no define either broadcasting or the term transmission. Rather, it defines "telecommunications services" which are the provision of information via telecommunications devices. Telecommunications devices are defined as devices for transmission, relay and receipt of any information by means of radio, optical or other means employing electromagnetic waves.

The technical infrastructure for telecommunication services including conveying of radio and television programmes traditionally falls under the authority of the state. The state administrative body is the Ministry of Transport, Post and Telecommunications.

Currently many new services (such as GSM mobile phone networks, access to the Internet, premium-audiotex telephone services, etc.) are provided by natural and legal persons acting under permission granted by the Ministry of Telecommunications.

The public switched telephone network (PSTN) is primarily managed by Slovak Telecom.

There are no rules prohibiting operating cable networks and the PSTN simultaneously.

Radio and Television Broadcasting

The state monopoly in radio and television broadcasting was broken in 1991 when by special Acts, state radio and state television were transformed into public service institutions. The Act on radio and television broadcasting of 1991 enabled the establishment of private commercial radio and televisions.

Private broadcasters operate under a licence granted by the Council of Slovak Republic for Radio and Television Broadcasting. Regulation of radio and television broadcasting is carried out by this body (hereafter "Council"). The Council was enacted by a special law of 1992, followed by a new law in 1997. The Council is an body independent on the government and its nine members are appointed and dismissed by the National Council of Slovak republic (Parliament). The Council is a state administrative body and is tasked with two functions: licensing and regulating.

The Council has the power to grant and withdraw licences. Three types of licences are granted:

- for radio programming;

- for television programming (free to air, cable and satellite);
- licences for operating cable networks (retransmission of unchanged programmes).

The regulatory functions of the Council are:

(a) to determine licence terms and conditions;

(b) to determine the terms for improvements when legal provisions in broadcasting licence terms and conditions are violated;

(c) to impose sanctions for violation of rules on:

- Private broadcasters and cable operators and
- Broadcasters enacted under the law - public service
- Slovak Radio and Slovak Television and
- On those legal or natural persons who are pursuing the
- Transmission without the permission.

The Council also:

- Allocates the usage of frequency spectrum for public service and licensed broadcasters;
- Elaborates the plans and conceptions for the use of frequency spectrum in co-operation with the Telecom Office;
- Finally the Council takes part in legislative rulemaking and in other general rules governing the area of broadcasting and dealing with programmes, advertising, sponsorship, protection of children and youth, and right of reply. The Council has no legislative initiative, but the Council is entitled to co-operate in creating of new legal standards relating to broadcasting.

Economic competition

The Act on broadcasting supports competition indirectly by stressing plurality of information sources as the basic principle. Moreover the Act on Broadcasting calls for attention when considering a possible dominant position in media ownership. Transparency of media ownership is as a result a basic entry condition.

The key agency overseeing compliance with the Act on the Protection of Economic Competition is the Antimonopoly Office of Slovak republic. The body is a part of central state administrative. The Act on the Protection of Competition was adopted in 1994.

There is no concurrent jurisdiction between the Council and the Antimonopoly Office. There is the same philosophy of the relevant law: to protect consumers against the monopoly whatever range, to support and to protect economic competition.

Key Regulations

Definitions of Broadcasting

In the Slovak Republic there are two definitions of radio and television broadcasting:

First, the Act on pursuing of radio and television broadcasting No. 468/91 of Coll., as amended (Art. 2.1 (a)) contains the definition:

> Radio and television broadcasting (hereafter "broadcasting") is the transmission of programme or visual and audio information via transmitters, cable or, satellite and destined for public reception.

Second, the European Convention on Transfrontier Television (No.168/1998 of Coll.) to which is the Slovak Republic the Contracting Party since May 1997 defines in Article 2 (“Terms employed”) as follows:

> “Transmission means the initial emission by terrestrial transmitter, by cable or by satellite of whatever nature in encoded or free form of television programme services for reception by the general public. It doesn’t include communication services on individual demand”.

These definitions of radio and television broadcasting both stress the aim of broadcasting as intended for public rather than individual demand. Moreover the different means enabling the conveyance and technical infrastructure of programme transmitting are not taken into account. That’s why there are no special definitions related to cable television, satellite television and terrestrial television. These definitions don’t cover so-called ”broadcasting” (webcasting) over the Internet.

Regulation of Entry

Entry conditions of the application for the licence are set out in the Act in Broadcasting, section three – Art.10. Two terms can be mentioned: (a) The extent of the applicant’s current business in the sphere of the mass media. When assessing an application, the Council ensures that no applicant acquires a dominant position in the mass media. (b) On assessing an application made by companies with foreign property participation, the Council takes into account for contribution an applicant for the development of the original home production as well as the property participation of Slovak persons and their representation in that company bodies.

Article 11 “The Application for a Licence” sets the conditions for application, which has to contain the following data:

(a) The name, registered office and legal form of the legal person and name of the person authorised to act on his behalf or the name and permanent residence of a natural person who intends to broadcast;

(b) The documents about the level of basic capital (shares) and deposits of the individual participants, bank information, similar data and information if the applicant is a natural person;

(c) The time and territorial scope of broadcasting and its technical and organisational method;

(d) The name of the station

(e) Programme composition for broadcasting with a proposal for a broadcasting plan;

(f) A part of the costs which the applicant will use annually for the production of programmes;

(g) The share of broadcasting time devoted to home produced programmes;

(h) The period for which a licence is being requested.

If the applicant is an operator or owner of another means of mass media in the Slovak Republic or abroad or a participant in a company operating another form of mass media in the Slovak Republic or abroad it will inform the Council of the same data listed in the paragraph above about this form of mass media. If the applicant is a natural person he must enclose with the application, a document or proof of a clean record and permanent residence on the territory of the Slovak Republic

§ 12 of the Act on Broadcasting states:

"The decision for granting the licence is issued in agreement with the Telecom Office about providing frequency and further technical broadcasting terms which must comply with the plan for the use of frequencies for radio and television broadcasting."

In the area of terrestrial transmission, the frequency usage plan was prepared in 1993 on the base of international treaties (the Geneva and Stockholm Conventions).

A licence is bound with a concrete channel or frequency. A list of free frequencies is publicly announced and legal and natural persons can apply for the licence or for the change of the existing licence.

In the area of cable television the applicant has to have confirmation of cable network operator or a contract between an owner and supplier of programming must be available. Technical standards of cable networks are set out in the relevant documents of Telecom Office. In the Slovak republic cable television channels with few exceptions are of local importance provided local information flow and local events coverage. Such cable televisions – or info channels are very near to the notion of community media.

Regarding transmission via satellite an applicant has to have a contract with the owner or operator of a satellite transmitter. When the up-link device is situated on the Slovak territory, the provider of this telecommunication service has to have a permission of Telecom Office.

Neither the Council nor the legislation set limits on the number of licences available in one region. The number of licences is primarily influenced by available frequencies and by technical possibilities in the region.

The Frequency Spectrum Plan and the Act of 1993 divided frequencies between public service broadcasters and private ones. Public service broadcasting is favoured compared to the private sector, which in fact has no national frequencies or channel.

In terrestrial television broadcasting there are three channels in Slovakia. Two channels with national coverage are allocated to the public service Slovak Television. A private broadcaster uses the

third one, but this channel covers only 65 percent of the territory. The Council has also granted one licence for satellite television. This programming is available to about 50 percent of TV households.

The situation in radio broadcasting is the same. Slovak radio (the public service broadcaster) operates on two FM frequency networks and no frequency of national coverage is available to private broadcasters. Some of local radio broadcasters are forming small networks, establishing so-called regional or multi-regional coverage. The biggest private radio broadcaster covers about 50 percent of the settled territory of Slovakia.

This means that allocation of more frequencies for one licence holder in one region is possible and it is decided by the change of the licence. Allocation of other frequency in another region for the same broadcasters is possible as well.

The use of the spectrum is not auctioned. Free frequencies are publicly announced and legal and natural persons can apply the Council to grant the licence. When awarded by the licence, licence holders are obliged to pay a licence fee in an amount which is set by the Act on administrative fees. The fee for granting the licence is paid just once.

There is no monopoly in the wholesale distribution of programming, or in retail distribution of programming in the private sector.

Media concentration

In general the broadcaster of one category can be engaged in another type of broadcasting even in the same region, or in another region, can own newspapers or magazines and can provide telecommunication services, to an extent limited by the Act on the Protection of the Competition of 1994.

When the Council considers the background of a new applicant for the licence he is interested in shares of domestic and foreign capital, but in fact there is no rule in the Act to limit foreign ownership.

Content promotion

Local and regional broadcasting corresponds to technical infrastructure, which provides the access of locally or regionally restricted amount of consumers/audience to programming. The intent of a potential broadcaster is to provide this audience by information and media coverage of events of local interest mainly.

Public service radio and television with national coverage are obliged to broadcast programmes reflecting, amongst other things, cultural and educational purposes. As the Act on Slovak Radio and Act on Slovak Television states: “Slovak Radio and Slovak Television is a national, independent information, cultural and educational public service institution ”. According the Act on Broadcasting the public service broadcasters are obliged to produce or have produced a significant part of their programme to preserve and develop the cultural identity of the nation, nationalities and ethnic groups of the Slovak republic and to support the development of home and European audio-visual production.

Public service broadcasters are financed from three sources: (a) television and radio licence fees; (b) ad revenues; and (c) special subsidies from state budget or finances from specifically established fund to support Slovak culture “PRO SLOVAKIA”. Type of programming has to be culturally or educationally purposed.

Must carry channels

Cable operators are obliged according to the Act on Broadcasting to include Slovak Television and Slovak Radio in the basic package of channels which they offer. An operator is obliged to provide one - free of charge - channel for local information distribution.

Pricing and advertising regulation

There is no regulation on pricing of advertisement. It is under the powers of broadcaster to determinate the price of advertising time when selling the time to advertiser.

Restrictions on level, timing, form or content of advertisement are set out in the Act on Broadcasting of 1991 as amended and in the Act on Advertisement (General Advertising Requirements, Protection of personality and Ownership Rights, Protection of Persons under 18 Years of Age and Banned Advertising of certain products. The ban applies to Tobacco products and alcoholic beverages, except beer in television and radio broadcasting, addictive substance and types of medicines containing psychotropic and those drugs available on medical prescription only.)

Regarding competition the Act on advertisement states in Art. 3 that:

"Advertising may be disseminated only by the legal or natural person authorised to do this business in accordance with the general regulations of business making or particular regulations and advertising must be in compliance with the rules of economic competition."

Key Developments

The key steps in the development of radio and television broadcasting have been these acts:

1991- The Act on Pursuing of Radio and Television Broadcasting

1991- The Act on Slovak Radio and Slovak Television

1992- The Act on the Council (replaced in 1997)

1993- The Act on some policies in radio and television broadcasting

1996- The Act on Audiovisuals

1996- The Act on Advertisement

1997- The Act on the Council

1997- Slovak republic became a Contracting Party to European Convention on Transfrontier Television since May 1997

Developments in the near future:

- Adopting the new Act on Broadcasting - the first draft is scheduled to be submitted in 1999, fully compatible with European Directive on Television without Frontiers and European Convention on Transfrontier television as amended.

- Adopting the New Act on Telecommunications – the necessity of liberalisation has been already reflected in the draft of the new law. The Ministry of Telecommunication has prepared the draft.

Market Structure

Basic Data

(source: Statistical Office of Slovak Republic 1997, Council of Slovak republic for Radio and television broadcasting 1998)

Total population:	5,374 (thousands)
Number of households:	1,871
Number of TV households:	1,802
at least one TV set:	1,802
colour TV set :	90%
at least one VCR:	29%
At least one TV set with 16/9 screen:	N/A.
at least one TV set with tele-text:	29 %
TV HH passed by a cable system :	30 % (over 550, 000 TV HH are passed by cable)

Systems of licensed cable operators:

Private dish:	estimated 17%-20% of TV HH
SMATV + private dish:	estimated totally 33%
Multi-channel access:	over 60 % of TV HH
Number of cable operators:	104 licensed cable operators by the end of September 1998
Amount of channels carried by cable systems:	8 - 40
At least one PC:	estimated 10%-14%

Market Share

Public service broadcaster Slovak Television operates two analogue television channels STV 1 and STV 2. Commercial advertising (including tele-shopping) can be aired in amount of 10 per cent of daily programming.

Average market share in 1997 : STV 1 20% and 2-3% STV 2

Commercial broadcaster Markíza Television transmits its programme terrestrially (in analogue) and covers approximately 65 per cent of the Slovak territory.

Average market share in 1997 : 55%

Commercial broadcaster VTV Cable broadcasts via satellite, programme is encoded and available for nearly 50 percent of all TV households.

Average market share in 1997 : 3 %

Time allotted for commercials must not exceed 10 per cent of daily broadcasting time of the programme; this can be increased up to 20 percent when tele-shopping is broadcast.

Market power of main players on June 1998 (source: Visio – research agency)

TV Channels	Viewing share in June 1998 in %	Market Share In %	Ad revenues In Mio SK
STV 1	40	16,7	39
STV 2	23	16,2	18
Markíza	65	44,2	290
VTV Cable TV	3	9,2	22
Others Foreign Channels	N/A	16,2	N/A

Specific Issues

Some issues relating to digital television in the Slovak Republic are being discussed. It was noted earlier that the possibilities of terrestrial broadcasting in analogue are exhausted. A research Institute of Telecommunications has been tasked by the Slovak Ministry of Telecommunication to carry out a study on the development of digital terrestrial broadcasting. The final report is expected by the end of November 1998.

Regulation of the Internet

The provision of access to the Internet is considered as a telecommunication service. The provider has to have an authorisation granted by the Ministry of Telecommunication. The transmission of information over Internet – webcasting - is not considered to be broadcasting. Internet communication is meant as the service point-to-point and on individual demand. A licensed broadcaster doesn’t need any special permission for re-broadcasting its own programmes over the Internet.

Other regulation of the content of information is derived from the provision of Penal Code, which prohibits distributing of child pornography and some other forms of pornography and racial hatred contents.

The Act on Advertisement bans any form of advertising distributed by telephone lines, telex and over computer networks.

AIDE MEMOIRE OF THE DISCUSSION

Part I: Regulatory Issues

Survey of Regulatory Regimes

The first session of the discussion sought to highlight important similarities and differences across a range of regulatory regimes. The discussion was initiated by the European Commission, whose directives in this sector have had an important influence in the legislation of many of the OECD countries present. The **Chairman** asked the EC to address why subsidies for public broadcasters are necessary, what services are being "purchased" with these subsidies and what are the implications of these subsidies for competition and for the Treaty's rules on State Aid.

The representative from the **EC** emphasised that the state aid rules of the Treaty apply in this sector and apply, in particular, to the subsidies that are provided to public broadcasters. The Commission has received a number of complaints about such subsidies from private broadcasters alleging that the subsidies unfairly distort competition. Public broadcasting has received special attention in the Amsterdam Protocol. The Protocol allows member states to provide funds to support the public service mission of a broadcaster (the precise nature of the "public service mission" is left up to the individual states to define), but, in dispensing these funds, the member state must ensure that there is no resulting distortion to competition. At this stage it is too early to tell what will be the Commission's decisions on these matters. There are important legal and policy questions which remain to be answered, including questions relating to the definition of the public service mission itself, potential methods for financing and the proportionality between the mission and the funds allocated.

The **EC** went on to describe the key piece of community legislation in this field: the Television Without Frontiers Directive. The objective of the Directive is to ensure the free movement of television broadcasts within the community. It achieves this through coordinating national rules on certain public interest objectives, notably matters such as controls on advertising, content quotas relating to "European works" and "works by independent producers" (the Directive requires that broadcasters allocate 10 per cent of their broadcasting time to independent producers, and 50 per cent of their content to European works), the protection of minors and public order, and the right of reply.

With regard to the key regulatory developments at the European level, the delegate pointed to the Green Paper on Convergence, which was published at the end of 1997. The Commission has since issued a working document summarizing the results of the consultation. The most salient point to mention is the clear preference for an "evolutionary" rather than a "revolutionary" approach to regulatory change. The consultation process on the Green Paper is not yet finished. The Commission has in a recent working document set out three further questions on particular issues where it wished to deepen the debate and to gather more detailed information. The further questions were on particular access issues, on the right framework for investment in the future, and on finding a balanced approach to regulation.

It is too early, in the view of DGX, to say what the future direction of community policy in this area will be, but there are certain important signposts to the future. According to the EC delegate, there is

a consensus in the EU that the regulation of services providing content cannot be dealt with in purely economic terms.

The **Chairman** introduced the next set of interventions noting some similarities and contrasts which emerged in the submissions. First, not every country has a licensing system for every market - there may be licensing of free-to-air television but not licensing of satellite, cable or the other mechanisms by which broadcasting is provided to the public. Second, there is the problem of spectrum allocation and how the spectrum allocation is related to the licensing regime. Third, there are rules affecting convergence - rules preventing telecom operators from providing cable television services or vice versa. To highlight these contrasts, the Chairman called on Switzerland, Japan, Sweden, Korea and the Slovak Republic.

The delegate agreed that the broadcasting system in **Switzerland** is rather rigid, with a very strong public service element and noted the following points: First, Switzerland is a multilingual country with strong competition from foreign broadcasters. Even though the public broadcaster SSR (Société Suisse de Radiodiffusion) is virtually the only domestic broadcaster, its market share does not exceed 25-35 per cent of the audience and on some days the market share of foreign broadcasters exceed those of SSR. Second, SSR is not a government body, but a democratic association open to the public. SSR does not receive subsidies directly from the government but indirectly from a tax on broadcasting viewers and listeners. This tax is collected by a private body. Third, to produce general-interest programming costs around $US 100 million per year. You cannot produce quality television with less. Switzerland is a small country and there is no room for two competing channels, each with a budget of more than $100 million. Furthermore, you would need a separate channel in each linguistic region (i.e., three different channels to cover the country). Fourth, a partial liberalisation is underway. A request for a new television concession to allow broadcasting several hours per day is being considered. Fifth, liberalisation has already been carried out in regard to local radio broadcasting. Sixth, Swisscom, the Swiss telecomms operator, is a minority shareholder in the largest cable network. This presents a danger that it may be able to prevent the use of this network for two-way telecommunications. It is possible that Swisscom will withdraw from this interest. Seventh, in considering the effects of concentration on television markets, it's necessary to take into account the growth of the Internet. It appears that this growth is occurring to the detriment of television rather than the press.

In response to a question from the Chair, the delegate noted that SSR has no connection at all with the cable networks. It is completely independent. The majority of the capital of Swisscom is held by the Swiss confederation. A minority is traded on the stock exchange as of October 1998. Cablecom is a company which combines a number of cable networks covering about 50 per cent of the Swiss cable customers, notably the larger Swiss cities of Zurich and Bern.

The delegate from **Japan** explained that like most of the other OECD countries, it is necessary to have a broadcasting license to enter the broadcasting business in Japan. In the case of terrestrial and satellite broadcasting, the Ministry of Post and Telecommunications checks whether an applicant meets the following 4 criteria: (1) whether the applicant can perform according to the technical standards laid down in the law; (2) whether a frequency allocation is available; (3) whether the applicant has sufficient financial means to carry out the undertakings stipulated in the application; (4) whether the applicant conforms with the basic criteria for the establishment of a broadcast station laid down in the ordinances of the MPT (including the rules on regulation regarding cross media ownership links and the controls of ownership of more than one broadcasting station). In the case of cable TV, the permission of the MPT is necessary to establish cable television broadcasting facilities and to conduct cable television broadcasting. There is also regulation of foreign investment in broadcasting, although this is under review by the MPT, with a view to abolishing it.

The delegate also mentioned the activity of the JFTC in promoting competition in this industry. In 1992, the JFTC published a report by its study group on the broadcasting industry, pointing out the following two points: (1) regarding the licensing system, it is imperative to ensure fair competition in the application stage and to review the system with a view to enhancing the transparency of the decision-making process; (2) the restrictions on ownership of more than one broadcasting station should be reviewed so that range of options for viewers is also taken into consideration in the regulatory scheme.

The delegate from **Sweden** noted that the broadcasting industry in Sweden is subject to three regulators in addition to the competition authority: the Radio and Television Authority, the Broadcasting Commission, and the Post and Telecommunications Agency. A group is at present investigating the implications of convergence and assessing the need for new legislation. A parliamentary committee is also conducting an investigation into media concentration in order to determine whether the merger provisions of the competition law are sufficient to guarantee plurality.

In regard to the regulatory regime, Sweden is subject to the EU Regulations and Directives. Licenses for terrestrial broadcasting are awarded by the government. At present there are two public service television channels in analogue, financed by: (a) license fees, (b) sponsoring of sports programs, and (c) income from the sale of products. There is one commercial terrestrial channel in analogue. Recently, 11 channels have requested licenses for terrestrial digital broadcasting. There is at present a debate on the cost of the set-top boxes and the implications for the consumers regarding the possibility to obtain access to an increased number of channels. There are no license requirements for cable operators other than "must carry" rules and the provisions of the Television Without Frontiers directive. There is no license required to provide satellite broadcasting. There are no restrictions preventing the public switched network from distributing video signals. In fact, the incumbent telecommunications operator and the second biggest telecommunications operator are both important operators of cable television networks. The second biggest telecoms operator is a subsidiary of the Kinnevik group - an important player in the different sectors of the broadcasting market. There is rather high concentration in Sweden with respect to both telecommunications and broadcasting.

Korea has a unique regulatory system in that there is a distinction between Program Providers, System Operators and Network Operators. This was done for two reasons: First, it was thought this would maintain a balance between industries. The System Operators sector is only open to entry by small and medium enterprises. Large conglomerates cannot enter this sector. Because it was believed it would take a lot of money to enter the Network Operators sector, entry into this sector is permitted only by large corporations, such as Korea Telecom or the Korea Electricity Power Corporation. This was thought to lead to a balance between these industries. The second reason for the unique system is that it was thought it would improve the market structure in the future.

Korea has found that this regulation is inefficient. It is thought to be a major cause for the failure of the development of cable television in Korea. Among the many problems that have arisen, for instance, the stoppage of network operators' installation work has had important spillover effects over the whole cable television industry. More over, such policies ignore the effects of economies of scale. The new broadcasting law that is being prepared attempts to eliminate this three-sector system.

In the **Slovak Republic** the state monopoly in radio in television broadcasting was broken in 1991 when by a special Act, state radio and television were transformed into public service institutions, and private radio and television broadcasting was permitted. Private broadcasters operate under a license granted by the Council of the Slovak Republic for Radio and Television Broadcasting. This is an independent body, with nine members, appointed and dismissed by the National Council for the Slovak Republic.

The conditions for obtaining a broadcasting license are set out in the Broadcasting Act. The first condition is that no applicant should acquire a dominant position in the mass media. The second condition is that, when assessing an application made by companies with foreign shareholding, the council takes into account the contribution of the applicant to development of original domestic production as well as that the participation of Slovak nationals in the company. The council does not set a limit on the number of licenses available in any one region. The number of licenses available is limited by the availability of spectrum and local geographic conditions. The national frequency spectrum plan is biased in favour of public broadcasting. There are no national channels assigned to private broadcasters. In terrestrial television broadcasting there are three channels allocated, two channels with national coverage reserved for public broadcasting and the third channel reserved for private broadcasters. This channel covers only 65 per cent of the territory of the Slovak Republic. The Council has granted one license for satellite broadcasting.

The **Chairman** then opened the floor to discussion on the issues that have been raised. The delegate from the **US** noted that the European Union regulations require that at least 50 per cent of the programming of European broadcasting be of European origin and asked whether this could operate in a potentially anticompetitive manner - it could have both exclusionary and discriminatory effects vis-à-vis programming from outside the EU.

The representative from the **EC** admitted that the Television without Frontiers directive requires that 50 per cent of the broadcasting time of European broadcasters be reserved for European works. More specifically, the rule refers to 50 per cent of the total broadcasting time excluding news, advertising, sports, talk shows and so on.

The purpose of these content requirements is well known: it is to protect the European audiovisual industry against certain structural disadvantages from which it suffers. 80 per cent of the Community's audiovisual material is imported. The purpose of the content requirements is to address what is seen as a structural imbalance between community audiovisual producers and audiovisual producers elsewhere. From the consultation on the Green Paper (and also from the High-Level Group on Audiovisual Policy), there was a clear response that regulatory measures would be required for the foreseeable future to guarantee the existence of the European audiovisual industry.

The particular form of the requirements may change. Content requirements based simply on broadcasting time are a crude and blunt instrument. With the proliferation of television channels that is already happening (there are already several hundred television channels available within the Community), certain of these channels are, of course, speciality channels, such as sports channels or Western movie channels. It makes no sense whatsoever to apply a broadcasting time requirement for European works to channels like these.

In response to a question from the Chairman as to what constitutes a "European work", the **EC** responded that the definition is set out in Article 6 of the Television Without Frontiers directive. This is a long and complicated definition. It basically refers to audiovisual producers who are established in a Community state but also takes into account European works that have been produced under a co-production agreement with a non-Community country. There is a cascade of definitions, starting from where the producer is established, who controls the company, the nationality of the staff and so on.

The delegate from the **UK** went on to underline that the directive requires that the 50 per cent target be achieved "where practicable" and "over time". This introduces a significant amount of flexibility. The 50 per cent target is not possible for a "Great Western Movies of the Past" channel, nor is it possible for a Japanese channel broadcasting in Japanese to Japanese residents of Europe. Other means

of regulating content are being explored. Whether a blunt instrument like a quota is appropriate or not is a question for us all to answer. The UK is also concerned about how co-production agreements are defined for the purposes of the quota. For example, the funding (four million pounds) for "Four Weddings And A Funeral" was found within the United Kingdom alone. But when 50 million pounds was required to produce "The English Patient", even though this involved an English director, an English cast, and was a very "English" movie, this was classified as an American movie for the purposes of the quota because the underlying funds came from America.

Switzerland noted that competition between private free-to-air operators may in certain circumstances lead to broadcasters screening similar programs at the same time. It may also lead to a focus on certain sports - football, auto racing, formula one, tennis, skiing (in certain alpine countries), boxing, etc. - to the exclusion of other sports. Show-jumping, for example, may not be covered because the interested public is too small. In addition, there are some supra-economic factors of media that it is necessary to take into account in particular its effect on the formation of public opinion.

Part II: Competition Issues

Market Definition

The **European Commission** noted that the definition of the relevant market in broadcasting is a question on which the Commission is beginning to accumulate specific decisions and precedents as a result of around 20 cases which have been decided. Over time, certain concepts have been clarified. In regard to the relevant geographic market, in general the relevant market remains largely national, or, at best, extends to a common language zone.

In regard to the product market, a certain number of distinctions have been made. First, a distinction has been made between pay television and free-to-air television. In addition to the mode of financing, the relationship with consumers in each case is different as, in one case, the consumers are subscribers and, in the other case, the consumers are advertisers who purchase broadcasting as a means to show advertising. These two types of television are not in sufficiently direct competition to consider them in the same market. The fact that these are not in the same market can be seen in the decisions of movie distributors to allocate broadcast rights clearly and distinctly in certain "windows". Free-to-air television is typically the last to receive these broadcast rights, after the rights to broadcast on pay television (and video release, etc.) have been exploited.

The second distinction that might be made is between analogue and digital television. The position of the Commission in this regard is that it is not necessary to distinguish between the two. The two technologies compete in the same market.

A third distinction might be made between the different broadcasting modes, i.e., cable, satellite, etc. There have been several cases dealing with this question, the most recent of which is the decision in the BIB case concerning the British market. In that decision, the three transmission modes were considered as belonging to the same market. In this case (and this result is, of course, specific to the British market), it was observed that in cabled regions, consumers often take up satellite and other sources in place of cable. In addition, there are, at present, no effects by which a consumer becomes locked into one source as the cable companies have a commercial policy of buying back the customer equipment from the customer. Finally, when one looks at the rental or subscription fee, you find that the price levels are comparable across the different modes. In a related case in France, involving TPS, the same market

definition was made - that cable, satellite and so on, are in the same market. There also, this was the result of an examination of the subscription policies of the different modes.

As a final point, the delegate noted that full consideration has not yet been given to whether or not one should distinguish separate pay television markets. Is traditional subscription-based pay television in a different market from pay-per-view or near-video-on-demand? In the Bertelsmann-Kirch case it was considered that these three were in the same market. The possibility remains open, however, that a more fine market distinction might be made in the future.

Australia noted that it would agree with virtually all of these conclusions of the EC, on the nature of the geographic market, on distinguishing pay television from free-to-air television, that analogue and digital are probably the same market and that the mode of broadcasting is irrelevant to market definition. Australia has also not considered pay TV vs. pay-per-view.

Market definition will depend a great deal upon the existing institutional arrangements. For example, in Australia, there are 5 free-to-air channels, three commercial and 2 government-owned. The regulatory regime prevents further new channels from entering. This structure has a profound effect on market definition issues. If there were 20 free-to-air channels, pay television might be seen as being in the same market as free-to-air.

Is there a market for entertainment? Are cinema and video in the same market at television? Cinema offers a different and unique "out-of-home" experience and, in addition, cinema offers first-run movies unavailable on video or television. The rapid expansion of cinema in Australia has been unaffected by pay TV. There is no evidence that cinema is a substitute for home entertainment at this time. Regarding video, there is clearly some substitutability between video and pay TV since pay TV offers premium movies which are available on video. But video does not compete with most pay television programming such as news, sport, music and other special-interest channels. In addition, most pay TV movie channels are not sold separately in Australia - they are bundled with these other special-interest programs. The ability of video rentals to be a competitive restraint on pay TV pricing is therefore limited.

At the moment the ACCC does not consider that free-to-air television is a big constraint on the market power exercised by pay television, but with convergence this might change. Superficially, pay television and free-to-air appear to offer similar services. Consumers can easily switch between pay television and free-to-air television. This would, on the surface, suggest a high degree of substitutability, but this is a superficial comparison. The fact that you are viewing a television set and can easily switch from one channel to another does not mean that the products offered are substitutes. Free-to-air television uses the same inputs as pay television but, again, this does not imply that the outputs are in close competition. Pay television offers a range of narrow programming choices with each channel targeted at a particular market. It is also subscription-driven, as has been mentioned, whereas free-to-air television is advertiser-driven. Commercial free-to-air channels try to maximize audience shares in order to maximize advertising revenue. They therefore offer middle-of-the-road programming. Pay television offers special-interest programs, catering to more intense interests, as has been mentioned. If your interest in life is, say, show-jumping, you go to pay television and not to general free-to-air television. In summary, pay and free-to-air television are not close substitutes, but this may change as the number of available free-to-air channels increases significantly.

In response to a question from the Secretariat, the **US** acknowledged that studies have shown that there is some variation in the price of what cable systems charge in markets with an especially large number of over-the-air broadcast stations. In general, the Department of Justice has considered that free-

to-air broadcasting is not a fully effective substitute for cable television. There is some price impact but not enough to fully restrain the ability of cable operators to charge above market prices.

Australia noted that it had also examined those studies. The studies show that where there is more than a certain number of commercial channels in a market the commercial channels offer very differentiated products. Where there are only 2 or 3 channels, everyone has the same sort of programmes, trying to capture the middle ground. As the number of free-to-air channels increases, the differentiation in their content will likely make them closer competitors to pay television.

In response to a question from the Chair, **Switzerland** elaborated on the means by which market shares are measured. In the media markets, the market share units that are generally chosen are the share of the total audience or the share of total advertising revenue. In calculating the market shares it is necessary to take into account the different characteristics of public broadcasting and also, in the case of Switzerland, competition from foreign broadcasters.

The **Chairman** raised an issue regarding the effect of regulatory restrictions on market shares and how such restrictions might be enforced. Such restrictions might be contrary to the consumer interest as the may prevent a broadcaster from showing good quality programs. The UK regime, for example, contains such a restriction.

The **United Kingdom** responded that UK regulation restricts the independent television companies share of the advertising market to 25 per cent. The OFT has considered cases involving regional television markets where television advertising could be viewed as a substitute for advertising on other media. There have also been cases where advertising on one media is considered to be a separate market for advertising on other media. The tendency is to view advertising on different media as being complements rather than substitutes. Often major advertising companies will use all media simultaneously (for example, television advertising backed by a regional poster campaigned to remind the public of the television campaign). Looking to the future, UK broadcasting is considered to be unlikely to be competing with broadcasting on the Internet for some time. This depends, in part, on UK consumer take-up of the new digital services.

Horizontal Mergers and Agreements

Canada noted that the experience of the Competition Bureau in dealing with broadcasting mergers has been relatively limited because the industry regulator (the CRTC) has, until recently, imposed strict ownership requirements for media broadcasting in the television market that go beyond the controls in competition law. The Bureau has however had some involvement in the media market through the newspaper industry. The newspaper cases suggest strongly that print advertising is a relatively weak substitute for broadcast media. By extension, radio advertising is likely to be a relatively weak substitute for television advertising. The CRTC is currently reviewing its ownership rules for media and has recently liberalized the rules for radio station ownership. Some concentrations in that sector are expected, although it is too early to tell how extensive they will be and how they will be treated under the Competition Act.

In Canada there is a phenomenon known as local radio station management agreements. These were a way to get around the restrictive ownership requirements that the regulator imposed. In these agreements radio stations entered into common pooling arrangements for the joint sale of advertising and to pool administrative functions in order to reduce overhead and to become more efficient. In part this was a response to the rather dismal financial situation of commercial radio in Canada. The Bureau has looked at some of these arrangements and has not found any, as yet, in which the agreements have

prevented or lessened competition unduly in the relevant advertising market. The CRTC, having recently liberalized the rules for radio station ownership, is now holding a public proceeding, on which it has yet to make a decision, on how it is going to treat these management agreements in the future.

The **US** pointed out that the action the Bureau has taken on these agreements may be inconsistent with Department of Justice decisions in United States on the same types of agreements. The DoJ has found no pro-competitive benefits of these types of agreements and has found, in some cases, that they could restrain price competition. In some instances the DoJ has ordered common sales agreements and local management agreements to be stopped.

Canada responded that these arrangements are not pervasive throughout the Canadian radio industry and that having reviewed these agreements on a case-by-case basis, the evidence was simply not clear that the stations that had entered into these arrangements accounted for a significant portion of the markets, to the extent that one could argue that competition had been lessened or prevented unduly, which is the standard that the Bureau has to meet. When considering these agreements in the course of merger control, it was found that, in fact, there were significant efficiencies and, in a couple of cases, advertising prices appeared to have gone down following entry into these type of management agreements. It is possible that if these agreements became more pervasive or accounted for a particularly high market share in a particular geographic market, the Bureau might take a case.

In the case of **Norway**, the Norwegian Competition Authority has also had very little experience with mergers in the broadcasting market, with the exception of a 1997 merger between two privately-owned Norwegian broadcasting companies TV2 and TVNorge. This was a horizontal merger between two content providers where TV2 acquired 49 per cent of TVNorge. Through a cooperation agreement TV2 also took possession of TVNorge's programming. This meant that TV2 could decide what kind of program TVNorge should broadcast at a given time. In the same agreement TV2 also made an obligation to TVNorge to increase TVNorge's rating points substantially. If certain levels of rating points were not achieved TV2 would be financially responsible to TVNorge. After the acquisition TV2 and TVNorge's common market share in the Norwegian television advertising market was 85 per cent. The competition authority analyzed the merger and concluded that would lead to a lack of competition in the market for television advertising. The competition authority also found that the barriers to entry into the Norwegian television market were high, mainly as a result of the licensing requirements.

After the competition authority had analyzed both the merger and the cooperation agreement, it concluded that it was not possible to prove that they would lead to less efficient utilization of resources in the television advertising market in Norway contrary to the competition act. The reason was that the companies would maintain individual sales organizations and the cooperation agreement, under which TV2 had made an economic obligation to TVNorge to increase the number of gross rating points, would probably lead to a higher number viewers for TVNorge which would increase the demand for television advertising. The competition authority's final conclusion was to accept both the merger and the cooperation agreement.

Italy noted that in July 1997, the Italian Antitrust Authority expressed its opinion on a provision which was contained in a draft version of the bill instituting the Italian Communications Regulatory Authority. The provision included in this draft of the bill provided for the creation of a common digital broadcasting platform by way of the establishment of a joint venture involving the main undertakings operating free-to-air television (RAI, RTI and the Cecchi Gori group), Telepiù (the Italian pay TV operator), and Telecom Italia. The Antitrust Authority in its formal opinion, which was accepted by the Parliament recognized the importance of a common technological standard for infrastructure in order to permit the rapid development of this new product, but recognized the risks of a restriction on competition

resulting from joint participation in the same company of all the main operators in broadcasting and telecommunications. In particular, there was a risk of horizontal coordination among the three television broadcasters. The proposal was that RAI, the Cecchi Gori group and Telecom Italia, were supposed to acquire a participation in Telepiù. Such commercial cooperation could lead to a significant distortion of competition and the creation of this common digital platform could have raised barriers to entry in the market and could have impeded the development of effective competition for pay television.

The same arguments, more or less, have been treated in some EC cases such as the MSG case, RTL/Veronica, Telefonica/Canalplus, Nordic Satellite and so on. In all these decisions, the **European Commission** has not allowed agreements between operators which hold a dominant position in the contiguous markets of telecommunications, broadcasting and content production. In particular, the Commission stated that the constitution or management of a common infrastructure between operators who hold a dominant position, would impede effective competition and hamper technological and economic progress.

Vertical Agreements and Mergers

The **Chairman** introduced the session on vertical arrangements and mergers noting that vertical arrangements and mergers present some of the most controversial and difficult issues for competition authorities. In the broadcasting area exclusive vertical arrangements are, in many cases, necessary to exploit the full value of the good that is being showed. For example, if everybody had the right to transmit a certain football game, that particular football game would not have any broadcasting value. As is usual, with vertical arrangements, it is necessary to think of the ex ante incentives. If there is no value associated with broadcasting an event then, in future, the event will not be put on. Of course, vertical agreement can also have anti-competitive effects, especially when they restrict competition on a relevant market.

Australia noted that the market structure for pay television in Australia is fairly unusual. Australia has two vertically-integrated cable television companies. These are the two principal telephony companies in Australia that have also vertically integrated into content provision, via exclusive dealing arrangements with the providers of particular channels - in particular, the providers of sports channels and movie channels. There is a recognition in Australia that there may be substantial benefits from vertical integration, as has been touched on. For example, lower transactions costs sometimes come from these arrangements and also a greater diversity in programming. However, the concern in Australia is that these arrangements, may be used to block new independent content suppliers and new independent delivery mechanisms.

The structure that has evolved is that the two cable companies in Australia have both cabled around one-third Australia households - the same one-third. There is around 90-95 per cent overbuild, with two-thirds of the country having no cable. A principal concern is that by deciding not to supply their programming to a new cable operator trying to cable the rest of the country, they can protect their market share. This is not just in the case of the market in which they already competing, in which case new entry would involve a third competitor, but also where there is currently no cable. By refusing to supply content to any new entrant, they may effectively prevent any new cable company from entering and from competing in a market in which they may enter in the future. This allows them to cable the country at their own pace, without any threat of particular entry, and also may ensure that the longer-term outcome is that all of the cabling is carried out by the two principal cable companies who therefore control local telephony, pay television and any interactive services that may develop.

There is also a concern that independent content suppliers may find it difficult to enter the market. The concern here is that any new independent companies that try to introduce content may find

that the downstream cable companies controlled by the vertically integrated companies refuse to take the programming. There is also concern that should these two cable companies decide to move into the satellite delivery market in the future, they have also protected that market. The broad concern is that through control of vertical links, entry is blockaded in a number of markets, not just the market for pay television delivery downstream, but also upstream programming markets and markets for interactive services and markets for satellite television in the future.

The **Chairman** asked whether it is possible for consumers to obtain just a few of the channels from each of the main cable companies, without taking the whole bundle.

Australia responded that the bundling of channels is linked to the vertical arrangements and exclusive dealing established by the two cable companies. Movie channels are bundled with other, lesser interest, channels; and additional channels may be purchased only after the principal movie channels have been purchased. If a subscriber to Australia's largest cable TV company wishes to purchase programming from the other cable company, that subscriber must first purchase a package of more than twenty channels, including premium movie and sports channels from the initial supplier. Another consequence of the existing vertical arrangements is that there is a splitting of movie and sports content across the two principal cable companies. As a result, initial penetration rates for cable television were fairly low. It is impossible for Australian subscribers to access all content unless they subscribe to two separate cable companies, have two separate set-top boxes and purchase two program packages in which there is some duplication of channels.

Finland noted that the Finnish broadcasting Co. YLE is a public service broadcaster which owns the television and radio broadcast networks in Finland. YLE's television viewing share is about 48 per cent and its radio listening share is about 59 per cent. Other market operators have to pay network rents to YLE for the use of the broadcasting infrastructure. A decision has been made that digital terrestrial broadcasting will begin in the year 2000. The Ministry Of Transport And Communications is currently preparing decisions on the use of the new digital frequencies and the multiplex management. The Finnish Competition Authority has recommended that YLE separate its distribution network into its own company, or at least into a separate profit unit, to prevent anti-competitive discrimination in access to the network and to enable the monitoring of potential cross-subsidisation. Recently YLE has decided that its distribution network will operate as a subsidiary starting from next year.

Some years ago, the Finnish cable television company Eurocable complained to the Finnish competition office that the commercial television company, MTV together with YLE had refused business relations with program sellers who were selling their programs to Eurocable. Eurocable maintained that YLE and MTV hold about 65 per cent of the market share of the turnover of the film and television business in Finland, which allows them to pressure program sellers to not sell to Eurocable. The company also claimed that those companies did not abide by the "windows" system (the distribution system under which rights are sold first to cinemas, pay-per-view, release on video, pay television and finally to free-to-air television). In its decision, the competition authority found no evidence of coercion. The companies had also displayed valid business grounds for not buying free TV rights to programs that had already been sold to Eurocable.

The **US** described the Time Warner case in which vertical arrangements were of utmost importance.

In the Time Warner case, the FTC specifically considered the efficiencies from vertical arrangements but ultimately found that they were outweighed by anticompetitive effects of the transactions, particularly given the substantial market positions of the players involved. The background

of the case is as follows: Time Warner is the leading provider of cable networks in the US and is a leading distributor of cable television. Turner is a leading provider of cable networks through well-known stations such a CNN, TNT and the TBS SuperStation. TCI is the largest operator in the U.S. of cable television systems, reaching 27 per cent of U.S. cable households. It also owns interests in number of cable networks and, through a subsidiary, is a leading provider of programming. The transaction involved Time Warner and Turner agreeing for Time Warner to acquire the approximately 80 per cent of the outstanding shares in Turner that it did not already own. TCI held a 24 per cent interest in Turner which they would have exchanged for 7.5 per cent interest in Time Warner and they would be allowed to increase that position to more than 15 per cent of Time Warner. An important feature of the agreement was a mandatory carriage agreement or "programming service agreement" under which TCI would have been required, on virtually all of its cable systems, to carry programming such as CNN and other Turner channels. The complaint alleged that the transaction would have allowed Time Warner to unilaterally raise prices of cable TV programming and would have limited the ability of cable TV systems that supply such programming to take action to avoid price increases. The complaint alleged also that TCI's ownership interest in Time Warner and concurrent long-term contractual obligation to carry Turner programming would undermine TCI's incentive to sign up better or less expensive non-Time Warner programming, that would prevent rivals to the combined Time Warner company to achieve sufficient distribution to realize economies of scale that are necessary to compete effectively with Time Warner.

There are six aspects of the relief imposed in this case that are worth noting. The first is a requirement that TCI divest its interest in Time Warner, in order to eliminate TCI's incentive to forego its own interests in favor of those interests of Time Warner. The second, is a requirement to cancel the long-term carriage agreement on the part of TCI that would have required, for the next 20 years, for TCI to carry Turner programming at the lesser of 85 per cent of the industry average or the lowest price given to any distributor. The third form of relief is the prohibition on Time Warner bundling HBO with Turner programming or conversely, from bundling CNN, TNT or TBS with the Time Warner channels, which would have limited channel capacity in the industry. The fourth remedy was to prevent Time Warner from engaging in price discrimination against rival multi-channel video programming distributors. Fifth, there were conduct-reporting requirements designed to ensure that Time Warner cable cannot discriminatorily deny carriage to non-affiliated programmers. Finally, there was a special-interest in the "all-news" segment, in which CNN has a leading position, and there was a fear that an actual or potential entrant could not secure widespread distribution. The relief was to require Time Warner cable to carry a CNN rival. The order provided some flexibility in the ways of doing that, but it did require that certain penetration targets be met.

The **US** went on to describe developments in the PrimeStar case. This is a transaction involving PrimeStar, a company involving several of the major cable operators in United States, which reached an agreement in June 1997 to acquire a direct broadcast satellite slot from MCI and News Corp, a Murdoch-owned company. This was one of only three slots in the United States that were allocated to high-powered DBS, and it was the last one available. The Department of Justice challenged this transaction in May 1998 and filed a complaint for various antitrust violations. The basis of the suit was the importance of DBS as a potential substitute for cable networks. It was thought there would be a likely loss of competition if this DBS satellite slot was controlled by the satellite companies themselves. In October 1998, facing trial in a few months, the PrimeStar parties decided to abandon their plans to acquire the DBS slot, and as a result, this has now been left open for competition with the cable companies.

The **Chairman** then moved the discussion on to discuss sports broadcasting. He noted that the broadcast of certain sports events exhibits market power and this market power may be used in an anti-competitive way. In particular, antitrust authorities have focused on the collective sale of broadcasting rights by sports leagues and have often found these agreements anti-competitive. It should be noted that

the league is typically the organiser of a tournament. Single games within the tournament do not have value outside the tournament itself. In addition, spectators prefer to watch events where the teams are evenly matched. In the long run, therefore, successful teams benefit from improving the quality of their rivals. One way to achieve this is through transfers between teams organised by the league. The sale of collective rights allows such transfers to be made with a minimum of transactions costs.

The **EC** delegate acknowledged that there are important competition issues in this sector, especially in the light of the large number of complaints that have been filed with the Commission. There has been only one Commission decision on these issues to date - the 1993 decision concerning the EUR (l'Union Européenne de Radiodiffusion). This decision related to the common purchasing arrangements for sports rights by the member of this association, which represented all the public service broadcasters in Europe. At the time, the Commission requested a number of modifications to this agreement, particularly in regard to the arrangements for sub-licences. The Commission has also stated that, as a general rule, exclusive contracts which last for a limited period (for example, one sporting season) do not pose a problem for competition. Problems arise only when the duration of the exclusive contract is particularly long and the scope of the exclusivity is particularly wide. In such cases there is clearly a danger that access to the market will be foreclosed and new operators will be prevented from acquiring such rights. In such cases it is necessary to either limit the duration of the contract or the scope of the exclusivities.

As was noted by the Chairman, sports federations carry out certain efficiency-enhancing tasks. Indeed, in several countries such sports federations are recognised, in official legislation, as having a "public service" mission. It is, of course, necessary to take the characteristics of this public service mission into account when considering an exemption under article 85(3). There are two cases underway which will provide some further guidance on how to balance a public service mission against distortions to competition. These cases concern the transmission rights for Formula One motor racing on one hand, and the statutes of UEFA, on the other.

The **Chairman** noted that in cases such as these competition authorities are, in fact, acting as management consultants in relation to some of the parties in the transactions. For example, in regard to the issue of the length of the contract, by stating that the exclusivity is too long and the market is foreclosed, the competition authority is, in effect, saying that the league did not operate in own interests. As another point, with long-term exclusive contracts there is a danger of a reduction in technological progress. A new competitor may not, of course, present the material in the same way as an existing broadcaster, but could present it in an entirely new way. As a result, long-term contracts may impede technological progress.

The delegate from the **United Kingdom** outlined the facts of the BSkyB case as follows. the Office of Fair Trading has asked the Restrictive Practices Court to rule on a case in which television broadcasting rights for the Football Association Premiere League matches have been sold collectively and exclusively by the Premiere League to the BBC for highlights and to BSkyB for live matches. The first agreement is for five seasons starting in 1992. The second is for four seasons to end at the end of 2001. Neither broadcaster will show all the matches. BSkyB will show only 60 out of 390 matches altogether. The matches are not shown on any other broadcaster. In the UK this situation is regarded as "broad exclusivity" or "buy-to-block". The OFT's view, which will be presented to the Court, is that these arrangements have distorted competition and that they are against the public interest. Key sports, and in particular the Premiere League rights, are considered to be an important element in the development of competition in the broadcasting industry, especially in the view of the incipient development of digital television in the UK. In effect, therefore, the Premiere League is considered to the acting as a cartel and restricting the output of rights by collectively selling to only one broadcaster for the live rights and only one broadcaster for the highlights. Such restrictions on selling, we argue, allow the price of the rights to

be maintained above that which would be sustainable in the event of more open competition. In regard to the market, in this particular case the view was taken that, in the UK, top-quality football, and, in particular, the Premiere League is not a substitute for other sports programming. BSkyB, in acquiring these rights, has acquired for itself market power. The case will commence in January 1999 and is currently scheduled to take about 11 weeks.

There is another case in the UK that has attracted a great deal of publicity at this moment. BSkyB has also sought to acquire the Manchester United Football Club. This matter is under consideration by the Office of Fair Trading. The Director General of Fair Trading has to decide whether or not to advise the Secretary of State to refer the matter to the Monopolies and Mergers Commission.

The **Chairman** asked the UK whether or not the problem in the BSkyB case lies with the way the league sold the rights. BSkyB did not purchase all 380 games one by one and then decide to only show 60. BSkyB bid for all the games as a package, knowing that it could never show more than a proportion. Is it not the case that the way the bidding was organised prohibited another broadcaster from acquiring the remaining games?

The **United Kingdom** responded that it was not possible to comment on the rationale of the Premier League in selling all the rights as a block. In addition, the UK commented that a lot of sports associations are fairly new to market realities. Television has brought a huge amount of money to sports associations. Some sports associations are concerned with obtaining as much money as possible while others are more concerned with reaching as many viewers as possible. Many decisions of sports associations have been made on considerations which do not look to the long-term future.

The delegate from **Denmark** referred to a case arising a few years ago where the competition authority accepted an agreement by which the Danish Football Association sold all the television broadcast rights exclusively for a period of eight years, a rather long period of exclusivity. To understand this it is necessary to note that the agreement was tied with the establishment of a premium sports channel. Denmark has only 2.5 million households and is a small language area. As it turns out, this sports channel was not able to survive. The period of exclusivity may have been necessary in this case.

Canada noted that sports leagues in Canada are very sophisticated and are out to maximize their long-term revenue or their return. In the long run, the leagues are sophisticated enough to know that they want to preserve some kind of the market. Recently the CRTC licensed a second speciality sports channel in Canada. The new channel was quickly able to secure fairly substantial rights with the National Hockey League (an important source of popular sporting events in Canada) despite the existence of a strong incumbent sports channel, TSN. The new Fox channel in the US, on the basis of a similar growth strategy, secured the rights to the National Football League. It is possible that certain sports events, and maybe certain channels such as CNN or TSN, are acquiring the status of quasi “essential facilities” in the sense that without access to such key events or key channels, a new cable distributor is likely to have difficulties being successful in the marketplace.

The **United Kingdom** noted that top-quality football is in its own separate market. In the UK, for example, ice skating, no matter how high quality would not be a substitute for football. Football is currently the best way to develop mass-market audiences for advertisers to monied young men. Clearly different sports have different values in different countries. The issue of whether sports should be exempt from competition law has arisen from time to time. It is interesting to note that, for example, UEFA had until recently considered that its arrangement for broadcasting football was not something that should be considered by competition authorities. However, now that there is an attempt by the media partners

consortium to bring together the top football clubs in Europe to form a breakaway league, it appears that UEFA is now turning to the European Commission to obtain some sort of legal comfort.

The **Secretariat** then addressed the question whether or not exclusive arrangements in sports rights are something to worry about. Sporting organisations have quite a strong incentive to maintain competition in the long run. As Canada noted, sports organisations are sophisticated and know exactly what that doing. They realize that when their contracts expire in five years or 10 years time, they realize that if they are facing a downstream monopoly, there's the potential of being "held up" - the potential that the downstream monopoly will try to extract some of the rent. They therefore consider that it is better for them in the long run to promote competition by selling the rights in a way which allows new entry. This contrasts with the Australian case where we heard that the major Hollywood studios have signed exclusive vertical arrangements with single companies, linked with equity arrangements between these companies. Perhaps there is a dividing line for competition authorities between what could be pro-competitive and what could be anticompetitive: in the absence of any equity links, it could be argued that there is a strong incentive on the part of these sports bodies to assist or promote entry, (or at least not to discourage entry), but in the presence of equity links, (or some sort of vertical integration downstream), then they can overcome the "hold up" problem. In this case, it may in fact be in their interest to restrict competition with a long-term exclusive contract.

The delegate from **BIAC** asked Canada to clarify whether it was implying that free-to-air channels which have become very popular, in themselves, could become essential facilities for the screening of sports events. Is it not the case that to be legally classified as "essential facilities" the requirements include a total absence of possibilities for providers to bypass and to reach the consumers in another way?

Canada clarified that this issue of access (whether or not the technical term "essential facilities" is used) has arisen in a couple of complaints that have been examined, one from a cable company, (which could not get access to a popular U.S. speciality channel), and one from a Canadian DTH service provider (that could not get access to pay-per-view programming of U.S. football telecasts). The question for competition authorities is whether or not certain sports programming or speciality channels are so dominant in their markets that if you could not obtain access, you could not operate a competing cable company or a firm would be so substantially affected in its business that it could not compete effectively. In January 1998 the broadcast regulator, the CRTC, introduced Broadcast Distribution Regulations which apply to cable companies, DTH service providers and other broadcast distribution undertakings. These regulations address, among other things, access to programming and prohibit exclusive arrangements which confer an "undue preference" on a firm or an "undue disadvantage" on a competitor. At the time of writing these rules were the subject of litigation before the Canadian Federal Court of Appeal.

Part III: Conclusions

General Discussion

The **Chairman** raised the issue of plurality and diversity. In the forthcoming digital era, with around 500 or more channels available to the public, why would competition rules alone not be sufficient to maintain a plurality of views? Is there a need for any additional rules?

This was addressed by **Canada**. In Canada, the Broadcasting Act sets out a certain number of cultural and social objectives for the broadcasting system in Canada, including cultural diversity. It is considered important in Canada that there be on Canadian television screens a variety of choices to meet

the requirements of the Canadian population. The regulator is very much aware of this and authorizes and licenses foreign services with this objective in mind. Even in the coming digital world in which there will be a large amount of capacity, the objective is to have cultural diversity as opposed to a homogenization of cultures.

The issue was further picked up by the **Secretariat**. As we move into an era of a large number (or even an unlimited number) of television channels, is there still a need for regulation for diversity? In Paris it is possible to receive, on digital cable, many culturally diverse channels, including channels from Italy, Spain, Germany, the UK, Egypt, Morocco, the United States and other countries. In this context, where there are a large number of commercial television channels responding to the needs and interests of consumers, if there are diverse cultural groups in the population, why will they not be well served by multi-channel commercial television?

The delegate from **Canada** responded that he had recently attended the international forum on global cultural television diversity in Rome. One of the conclusions to emerge from that forum was that diversity cannot be left totally to the marketplace. Certainly many television programs and television series will survive in a competitive environment. However, there is a concern about some types of "cultural" television. Some countries have small domestic markets. Producing quality television programs is costly. Canada is particularly concerned about this because of the proximity to the US, the largest exporter of entertainment products and services. Regulation has been necessary to maintain a "Canadian" broadcasting environment.

The **United Kingdom** added that the debate in Brussels in recent months has shown that there is still a political desire to see national markets delivering national identities, especially in smaller countries. For example, the responses to the convergence Green Paper showed a focus on content delivering national cultural identities. In the discussion on the DGIV paper proposing framework guidelines for public funding of public service broadcasting, no member state was prepared to let go, at this stage, of its public service broadcasting, precisely because it was delivering national diversity. Although there is increasingly a diverse range of multilingual channels available, the political will in the European Union will not leave it at that yet.

The **European Commission** underlined the intervention of Canada, adding that a starting point of the Report of the High-Level Group is the fundamental importance and the absolutely vital role that television plays in the cultural life of European societies. The High-Level Group points out that Europeans on average spend between three and four hours per day watching television. Television is by far the most important medium in terms of forming our view of the world and informing our view of ourselves. We have to be careful about treating television broadcasting as simply an economic good.

The **Chairman** clarified that it had not been stated that cultural diversity is not important. There is general agreement that diversity is important. Nobody believes that we should have just one single channel, one single program, one single language, one single entertainment shown every evening all over the world. What is being discussed is whether the instrument to achieve cultural diversity is the right one and whether attempts to promote cultural diversity would indeed be possible given the non-existence of constraints on the number of channels that each individual TV set can receive. Do we need intervention on the part of the government, or can market forces supply cultural diversity?

The **Secretariat** added that the drive towards regulation is highly understandable when there is the scarcity of channels, but as the number of channels becomes essentially unlimited, some rethinking might be in order. Where there is an unlimited number of channels the broadcasting sector becomes more

like the print media, where there is no real limit on the number of different magazines or books that can be produced for the market. Why is broadcasting not moving into that kind of regulatory paradigm?

Switzerland noted that in most economic markets we assume that the sum of the interests of individuals corresponds to the overall public interest. But, in media markets, this is not necessarily the case. When you are tired in the evening and you sit down and turn on the television you inevitably choose to watch programs that are relatively easy to watch. This is the reason why the sum of individual interests does not correspond to the public interest. Therefore, the question to ask is not whether to have regulation or not, but what type of regulation? The Swiss delegate also noted that a public service mission can also be carried out by a private operator, when it is given a public service mandate and the funds to carry out this mandate.

Canada added that when we speak of diversity we mean a "true" diversity. What is troubling about television is that when you watch television in different countries you find domestic programming and you also find programming that has been purchased on world markets and is therefore the same programme as that screened in another country. On satellite and cable television, especially, you find broadcasting that has been purchased from another country. Is this a "true" diversity? Will programming in the digital future be even more targeted towards the lowest common denominator? If you want to have a certain "equilibrium" of true cultural diversity on television it is necessary to think about the form of regulation that will deliver this objective in the lightest manner possible.

BIAC underlined that when you look at the economics of television markets in various countries you consistently find that the most successful programming on any mainstream television programming channel - the programming which draws the most advertising revenue and the largest audiences - is not imported programs from other parts of the world, but local programming: local game shows, local drama series and so on. In any national market local programming is the most successful and, in the long run, the most audience-drawing programming. How do you stimulate local programming? How do you ensure that new channels have the money to produce local programming? New channels often seek access to relatively cheap programming available on the world market. If they do not have that programming available, they may never be able to finance popular local programming in order to get started in the first place. Do measures which are designed to preserve certain national content have the opposite effect? Do they not prevent the emergence of new competitive channels which could have stimulated the production and investment and local programming by themselves?

The **European Commission** noted that one of the concerns expressed in the consultation on the Green Paper in response to this very argument is that competition between the various channels would force those channels to opt for cheap imported programming, even though, as BIAC pointed out, you can generally achieve higher ratings with local programming. The concern was expressed that competition might be so strong such that broadcasters would be forced to forego producing the local programmes that audiences want and are prepared to pay for, to opt for cheaper imports.

The **Secretariat** asked whether or not countries had found that with the proliferation of channels, demand for local production was increasing?

The **United Kingdom** responded that the answer is broadly yes. BSkyB, for example, began as a new entrant broadcaster in 1989. They had at that time a maximum of 8 per cent European content. They now have more than 40 per cent percent. The reason is that viewers who are paying the subscriptions are actively seeking local product. Because that 40 per cent does not include game shows, sports, advertising or news it represents fairly expensive programming. BSkyB is investing in filmmaking and more generally in the production sector in order to get the local product they need. There is another example of

two Belgian broadcasters who are similarly competing for a limited market in Belgium. One might think that the broadcasters could substitute Dutch programmes (these are both Flemish broadcasters). However, they have found that while they can substitute Dutch programmes they are not as popular as home-grown programming. This illustrates a high degree of taste for local programming - the Dutch programming is in the same language but has not the same "feel" as Belgian-made programs.

The **Secretariat** raised a different issue. Many of the submissions indicate that there are restrictions on advertising of various forms, such as restrictions on the quantity and location of advertising, typically following the EC Directive. Why is it considered that there is a need for controls on the quantity of advertising on free-to-air television? If there was a sufficient level of competition in the industry, broadcasters would have an incentive to present the advertising in away which is as least obstructive and as least offensive to viewers as possible, taking into account both the location of the advertising and the overall quality and quantity. Therefore, one possible reason why we might regulate advertising is that it is a response to concerns about the level of the competition in the free-to-air market. In turn, these concerns about the level of competition may arise because of the strict licensing conditions and the substantial barriers to new entry. As a result, one answer to the question why we need restrictions on advertising is that they are necessary because the regulatory rules restrict competition in various ways and broadcasters respond to the lack of competition by inefficiently increasing the quantity of advertising.

Australia made a general observation about the underlying demand for regulation in this sector. From time to time we talk about theories of the demand for regulation. We sometimes assume that there is a public interest justification, at other times we recognize that some industries are especially prone to capture by particular sectional interests. One would think that the media industry would be a likely candidate for capture by the producer interests. Furthermore, politicians are very sensitive to media relationships and have a somewhat symbiotic relationship (if not a totally captured relationship) with the media. These observations may go some way to explaining the anti-competitive structures that are embodied in legislative decisions concerning the broadcasting sector.

The **Chairman** responded that it could be argued that maintaining the media industry as a public monopoly would ensure that this industry not be captured by some interests. However, this is also questionable because we know that the fact that an industry is public does not ensure that that industry pursues the public interest. In contrast, it generally pursues the interests of its managers (or its clients). A better protection against capture would be the promotion of a large number of competing channels. A logical consequence of Australia's observation then would be the promotion of competition and the free elimination of all regulatory barriers.

Chairman's Conclusions

The Chairman concluded the discussion noting the following points.

Many questions remain unanswered such as the important question: what is public service broadcasting? Why do we need public broadcasting and why do we need subsidies for public broadcasting? Many points were raised in relation to cultural diversity, but how much, if anything, needs to be done to promote cultural diversity is not clear.

One of the most important parts of the roundtable was the discussion of antitrust issues, and, in particular, vertical restraints and exclusivities. The problem here is that vertical restraints are, more often than not, efficient and when we impede them we reduce efficiency and we might also reduce the type and the quantity of programs that are brought to the market. It is clear that at least one aspect of these vertical

restraints can be restrictive - the length of time over which these restraints are applied. On the issue of the appropriate duration of such exclusivities, the European Commission suggested one season, others two to three years. These are not easy questions to answer. It is necessary to take into account transactions costs related to the bidding process. These can be quite substantial.

In regard to the definition of the market, there can of course be administrative definitions of the market related to the different licensing requirements for free-to-air, cable, satellite, pay-per-view and so on. It is likely that competition authorities will have to continue to address the issue of economic substitutability between these different means of distributing programs. It might well be that in the future we have one single market for television broadcasting without any separation between the various means. Certainly, this is not the case now, especially with respect to those countries where free-to-air television is important while other means of transmission (such as cable and satellite) are less developed. In these circumstances there might well be the possibility of abusing a dominant position in the new segment of the market and, in particular, we have to be very careful that entry is not impeded in these markets.

AIDE-MÉMOIRE DE LA DISCUSSION

Partie I : Problèmes de réglementation

Étude des régimes réglementaires

Dans la première séance, on s'est efforcé de dégager les similitudes et les différences importantes entre un ensemble de régimes réglementaires. Les débats sont lancés par la Commission européenne dont les directives concernant ce secteur ont eu une influence importante sur la législation d'un grand nombre de pays de l'OCDE présents autour de la table. Le **Président** demande à la CE d'expliquer pourquoi il est nécessaire d'accorder des subventions aux chaînes de radio télévision publiques, quels sont les services qui sont "achetés" au moyen de ces subventions et quels sont les effets de ces aides sur la concurrence et leurs implications pour les règles du Traité relatives aux aides de l'État.

Le **représentant de la CE** souligne que les règles du Traité concernant les aides de l'État s'appliquent à ce secteur et en particulier aux subventions qui sont accordées aux opérateurs publics. La Commission a été saisie d'un certain nombre de plaintes concernant ces subventions par des opérateurs privés qui faisaient valoir que les subventions faussent de manière déloyale la concurrence. La radio télévision publique a fait l'objet d'une attention particulière dans le Protocole d'Amsterdam. Ce dernier autorise les États membres à soutenir financièrement la mission de service public d'un opérateur de radio télévision (la définition de la nature précise de cette "mission de service public" étant laissée à l'initiative des États) mais ils doivent s'assurer qu'il n'en résulte de ce fait aucune distorsion de la concurrence. Il est trop tôt à ce stade pour savoir ce que seront les décisions de la Commission sur ces affaires. Plusieurs questions juridiques et politiques importantes restent à résoudre notamment celles qui ont trait à la définition de la mission de service public elle-même, aux méthodes de financement possibles et à la proportionnalité entre la mission remplie et les fonds attribués.

La CE poursuit en décrivant la pièce maîtresse du droit communautaire dans ce domaine à savoir la Directive sur la Télévision sans frontières dont l'objectif est d'assurer la libre circulation des émissions de télévision diffusées à l'intérieur de la communauté. Ce résultat est obtenu par la coordination des règles nationales relatives à certains objectifs d'intérêt public notamment des problèmes tels que le contrôle de la publicité, les quotas de programmes réservés aux "œuvres européennes" et aux "œuvres de producteurs indépendants" (la Directive exige que les diffuseurs affectent 10F de leur temps d'antenne à des producteurs indépendants et 50 pour cent de leurs programmes à des œuvres européennes), la protection des mineurs et de l'ordre public et le droit de réponse.

S'agissant des principales évolutions observées au niveau européen, le délégué signale le livre vert sur la convergence qui a été publié à la fin de 1997. La Commission a publié depuis lors un document de travail résumant les résultats de la consultation. Le point le plus marquant est la préférence nette pour une approche "évolutive" plutôt que "révolutionnaire" du changement de la réglementation. Le processus de consultation sur le livre vert n'est pas encore terminé. La Commission a soulevé dans un document de travail récent trois questions supplémentaires concernant des problèmes particuliers sur lesquels elle souhaite un débat plus approfondi et des informations plus détaillées. Il s'agit de certains problèmes particuliers d'accès, du cadre approprié pour l'investissement futur et de la recherche d'une approche équilibrée de la réglementation.

De l'avis de la DGX, il est trop tôt pour dire quelle sera la direction que prendra la politique communautaire dans ce domaine mais certains jalons importants ont été posés. Selon le délégué de la CE, il existe au sein de l'UE un accord sur le fait que la question de la réglementation des services fournisseurs de contenu ne peut pas être abordée en termes purement économiques.

Le **Président** présente la série suivante d'interventions en notant certaines similitudes et certains contrastes révélés par les contributions nationales. En premier lieu, tous les pays n'appliquent pas un système d'autorisation dans chaque marché : la télévision hertzienne en clair peut être soumise à autorisation et non pas la télévision par satellite, par câble ou les autres mécanismes de diffusion au public. En deuxième lieu, se pose un problème d'attribution du spectre et de relation entre cette attribution et le régime des autorisations. En troisième lieu, il existe des règles qui affectent la convergence en empêchant les exploitants de télécommunications de proposer les services de télévision par câble ou vice-versa. Pour mettre en lumière ces contrastes, le Président sollicite le point de vue de la Suisse, du Japon, de la Suède, de la Corée et de la République slovaque.

Le **délégué suisse** convient que le système de radio télévision de son pays est assez rigide et qu'il comporte un élément très important de service public. Il note les points suivants. En premier lieu, la Suisse est un pays plurilinguistique soumis à une forte concurrence des télévisions étrangères. Même si l'opérateur public la SSR (Société Suisse de Radiodiffusion) est virtuellement le seul opérateur national, sa part de marché n'excède pas 25 à 35 pour cent et elle est dépassée certains jours par celle des opérateurs étrangers. La SSR ne reçoit pas de subvention directe de l'État mais elle reçoit une aide indirecte sous la forme d'une taxe sur les auditeurs et les téléspectateurs dont le recouvrement est assuré par un organisme privé. En troisième lieu, le coût de la production de programmes présentant un intérêt général est de l'ordre de 100 millions US$ par an. Il n'est pas possible de produire une télévision de qualité à un coût plus faible. La Suisse est un petit pays et il n'y a pas place pour deux chaînes concurrentes ayant chacune un budget supérieur à 100 millions $. Qui plus est, une chaîne distincte est nécessaire dans chaque région linguistique (il faut donc trois chaînes différentes pour couvrir le pays). En quatrième lieu, une libéralisation partielle est en cours. Une demande concernant une nouvelle concession pour une chaîne de télévision qui émettrait plusieurs heures par jour est en cours d'examen. Cinquièmement les radios locales ont déjà été libéralisées. Sixièmement, l'opérateur de télécommunications Swisscom détient une participation minoritaire dans le principal réseau câblé, ce qui pourrait lui permettre d'empêcher l'usage de ce réseau pour les télécommunications à double sens. Il est possible que Swisscom se retire de ce réseau. En septième lieu, il est nécessaire dans l'examen des effets de la concentration sur les marchés de la télévision de prendre en compte la croissance d'Internet qui semble s'opérer davantage au détriment de la télévision que de la presse.

En réponse à une question du Président, le délégué note que la SSR n'a aucun lien avec les réseaux câblés : elle est complètement indépendante. La majorité du capital de Swisscom est détenue par la Confédération helvétique. Depuis octobre 1998, une minorité des actions est cotée à la bourse des valeurs. Cablecom est une société qui combine un certain nombre de réseaux câblés couvrant environ 50 pour cent de la clientèle du câble notamment les principales villes suisses Zurich et Berne.

Le délégué du **Japon** explique que comme dans la plupart des pays de l'OCDE, il est nécessaire d'obtenir une autorisation pour exercer une activité de radiodiffusion au Japon. Dans le cas de la diffusion par émetteur terrestre et par satellite, le Ministère des postes et télécommunications vérifie si le candidat remplit les 4 critères suivants : (1) la capacité de respecter les normes techniques prévues par la loi, (2) l'existence d'une fréquence disponible, (3) la disposition par le candidat de moyens financiers suffisants pour respecter les engagements stipulés dans la demande, (4) le respect par le candidat des

critères de base pour l'établissement d'une station d'émission fixés par les décisions du Ministère des P et T (y compris les règles relatives aux participations croisées entre médias et le contrôle de la propriété de plusieurs stations d'émission). Dans le cas de la télévision par câble, une autorisation du MPT est nécessaire pour installer des équipements de diffusion et pour diffuser des émissions. Il existe aussi une réglementation de l'investissement étranger dans la radio télévision dont la suppression éventuelle est, toutefois, en cours d'examen par le MPT.

Le délégué mentionne aussi l'activité de la JFTC en matière de promotion de la concurrence dans ce secteur. La JFTC a publié en 1992 un rapport de son groupe d'étude sur l'industrie de la radio diffusion en signalant les deux points suivants : (1) en ce qui concerne le système de licence il est impératif d'assurer la loyauté de la concurrence au stade de l'application et d'examiner le système en vue de renforcer la transparence du processus de prise de décision ; (2) les restrictions affectant la propriété de plusieurs stations d'émission devraient être revues afin que l'éventail des options offertes aux spectateurs soit aussi pris en considération dans le système réglementaire.

Le délégué de la **Suède** note que l'industrie de la radio télévision est soumise, en plus de l'autorité de la concurrence, à trois organismes de réglementation : l'Autorité de la Radio et de la Télévision, la Commission de la radio diffusion et l'Agence des postes et télécommunications. Les conséquences de la convergence font actuellement l'objet d'un examen par un groupe qui évalue la nécessité d'adopter une législation nouvelle. Une Commission parlementaire effectue aussi une enquête sur la concentration dans les médias afin de déterminer si les dispositions du droit de la concurrence en matière de fusions sont suffisantes pour garantir la pluralité.

En ce qui concerne la réglementation, la Suède est soumise aux Réglementations et directives de l'UE. Les autorisations concernant la télévision par voie hertzienne sont accordées par le gouvernement. Il existe, à l'heure actuelle, deux chaînes de télévision de service public analogiques financées par : (a) des redevances de licence, (b) les sponsors des programmes sportifs et (c) les revenus de la vente de produits. Il existe une chaîne commerciale par voie terrestre en analogie. Récemment, 11 chaînes ont demandé des licences de télévision numérique par voie terrestre. Il existe actuellement un débat sur le coût des décodeurs et les conséquences pour les consommateurs de la possibilité d'obtenir accès à un nombre de chaînes plus important. Les câblo-opérateurs ne sont soumis à aucune obligation particulière autre que celle de respecter les règles et les dispositions de la directive sur la télévision sans frontière. La diffusion par satellite n'exige aucune autorisation. La distribution de signaux vidéo par le réseau public n'est soumise à aucune restriction. En fait l'opérateur de télécommunications en place et le deuxième opérateur par ordre d'importance sont l'un et l'autre des opérateurs importants de réseaux câblés de télévision. Le deuxième est une filiale du Groupe Kinnevik qui est un acteur important dans les différents secteurs du marché audiovisuel. Il existe en Suède une concentration assez forte dans les secteurs des télécommunications et de la télévision.

Le régime réglementaire de la **Corée** est original en ce qu'il distingue des fournisseurs de programmes, les opérateurs de systèmes et les opérateurs de réseaux. Cette solution a été retenue pour deux raisons : en premier lieu, on pensait qu'elle maintiendrait un équilibre entre les différents secteurs. Le secteur des opérateurs de systèmes n'est ouvert qu'aux entreprises petites et moyennes. Les grands conglomérats n'y ont pas accès. Le secteur des opérateurs de réseau considéré comme exigeant des capitaux très importants n'est ouvert qu'aux grandes sociétés telles que Korea Telecom ou la Korea Electricity Power Corporation. On a pensé que ce système conduirait à un équilibre entre ces secteurs. Par ailleurs on attendait de ce système unique en son genre qu'il améliore la structure du marché.

La Corée a constaté que cette réglementation était inefficiente. On estime qu'elle constitue la cause essentielle de l'échec du développement de la télévision par câble en Corée. Parmi les nombreux problèmes qui se sont manifestés, l'arrêt des travaux d'installation des opérateurs de réseau a eu par exemple d'importants effets de retombée sur l'ensemble du secteur de la télévision par câble. Qui plus est, ces politiques ignorent les effets des économies d'échelle. La nouvelle loi sur la radio télévision en préparation tente de supprimer ce système à trois secteurs.

En **République slovaque**, le monopole d'État en matière de diffusion radio télévisée a été brisé en 1991 par une loi spéciale qui a transformé la radio et la télévision d'État en institutions de service public et qui a autorisé la diffusion privée de radio télévision. Les opérateurs privés doivent détenir une licence délivrée par le Conseil de la République slovaque pour la radio diffusion et la télévision, organe indépendant de 9 membres désignés et révoqués par le Conseil National de la République slovaque.

Les conditions d'obtention d'une licence de radio diffusion sont fixées par la loi sur la radio diffusion. La première condition est qu'aucun demandeur n'acquière une position dominante dans les médias. En deuxième lieu, les demandes présentées par des sociétés à actionnariat étranger sont évaluées par le Conseil en fonction de la contribution du demandeur au développement d'une production nationale originale ainsi que de la participation de nationaux slovaques à la société. Le nombre de licences pouvant être délivrées dans la même région n'est pas limité par le Conseil mais il est limité par le spectre disponible et les conditions géographiques locales. Le plan national relatif au spectre de fréquences est biaisé en faveur des opérateurs publics. Les opérateurs privés ne se voient attribuer aucun canal à couverture nationale. En ce qui concerne la télévision hertzienne, trois canaux sont attribués : deux canaux à couverture nationale sont réservés aux opérateurs publics le troisième canal qui couvre seulement 65 pour cent du territoire de la République slovaque étant réservé aux opérateurs privés. Le Conseil a délivré une licence de télévision par satellite.

Le **Président** ouvre la discussion sur les questions qui ont été soulevées. Le délégué des **États-Unis** note que les réglementations de l'Union européenne exigent que 50 pour cent au moins des programmes diffusés en Europe soient d'origine européenne et demande si cette règle pourrait opérer de manière potentiellement anticoncurrentielle : Elle pourrait avoir des effets à la fois d'exclusion et de discrimination à l'égard des programmes extérieurs à l'UE.

Le représentant de la **CE** admet que la directive sur la Télévision sans frontières exige que 50 pour cent du temps de programmation des opérateurs européens soit réservé à des œuvres européennes. Plus précisément la règle se réfère à 50 pour cent du temps d'antenne à l'exclusion des informations, de la publicité, des sports, des débats etc.

L'objet de cette mesure est bien connu. Elle vise à protéger l'industrie audiovisuelle européenne contre certains handicaps structurels dont elle souffre : 80 pour cent du contenu audiovisuel de la communauté sont importés. L'objet de la règle relative au contenu des émissions est de remédier à ce qui est considéré comme un déséquilibre structurel entre les producteurs audiovisuels de la communauté et les producteurs extérieurs. Les réponses au livre vert (ainsi que les résultats du Groupe de Haut niveau sur la politique audiovisuelle) ont clairement montré que des mesures réglementaires seraient nécessaires dans l'avenir prévisible pour garantir l'existence de l'industrie audiovisuelle européenne.

La forme particulière des exigences peut évoluer. Les exigences de contenu basées uniquement sur le temps d'émission constituent un instrument grossier et brutal. Étant donné la multiplication des chaînes de télévision (il existe déjà plusieurs centaines de chaînes de télévision dans la communauté), certaines de ces chaînes sont évidemment des chaînes spécialisées par exemple dans le sport ou dans les

films de western. L'obligation de réserver un temps d'antenne aux œuvres européennes n'aurait absolument aucun sens pour les chaînes de ce type.

En réponse à une question du Président qui demande en quoi consiste une "œuvre européenne", la CE répond que la définition est donnée à l'article 6 de la Directive sur la télévision sans frontière. Il s'agit d'une définition longue et compliquée qui se réfère essentiellement aux producteurs œuvres audiovisuelles qui sont établis dans un État de la Communauté mais qui prend aussi en compte les œuvres européennes produites en vertu d'un accord de coproduction avec un pays extérieur à la Communauté. Il s'agit d'une cascade de définitions qui part du lieu d'établissement du producteur, du contrôle de la société, de la nationalité du personnel etc.

Le délégué du **Royaume-Uni** poursuit en soulignant que la directive exige que l'objectif de 50 pour cent soit atteint "lorsque c'est possible" et "au cours du temps". Cette précision introduit un degré significatif de souplesse. L'objectif de 50 pour cent ne peut être réalisé par une chaîne spécialisée dans les "grands Westerns classiques" ni par une chaîne japonaise diffusant en langue japonaise pour les Japonais résidant en Europe. D'autres moyens de réglementer le contenu des émissions sont en cours d'examen. Il nous appartient à tous de trouver une réponse à la question de savoir si un instrument aussi grossier qu'un quota est approprié ou non. Le Royaume-Uni est également préoccupé de la manière dont les accords de coproduction sont définis pour l'application du quota. Par exemple le financement (quatre millions de Livres) du film "4 mariages et un enterrement" a pu être trouvé entièrement au Royaume-Uni. Toutefois lorsqu'il a fallu trouver 50 millions de livres sterling pour produire "Le patient anglais", bien que le metteur en scène et les acteurs soient anglais et que le film soit typiquement "anglais", il a été classé comme un film américain pour l'application du quota parce que le financement venait des États-Unis.

La **Suisse** note que la concurrence entre les opérateurs privés de télévision hertzienne peut les amener dans certaines circonstances à diffuser des programmes similaires au même moment. Elle peut conduire aussi à privilégier certains sports comme le football, la course automobile, la formule 1, le tennis, le ski (dans certains pays alpins), la boxe etc. par rapport à d'autres. Les concours hippiques par exemple ne sont pas couverts parce qu'ils intéressent un public trop faible. Par ailleurs, il faut tenir compte à propos des médias de facteurs autres qu'économiques, en particulier leur influence sur la formation de l'opinion publique.

Partie II : Problèmes de concurrence

Définition du marché

La **Commission européenne** note que la définition du marché pertinent dans le secteur de la radiotélévision est une question à propos de laquelle elle commence à accumuler un certain nombre de décisions et de précédents spécifiques à la suite de l'examen d'une vingtaine d'affaires. Certains concepts ont été précisés au cours du temps. Du point de vue géographique, le marché pertinent reste en général largement national ou s'étend au mieux à une zone linguistique.

En ce qui concerne le marché du produit, un certain nombre de distinctions ont été effectuées, en premier lieu, entre la télévision hertzienne gratuite et la télévision payante. En dehors du mode de financement, la relation avec les consommateurs est différente puisque dans un cas les consommateurs sont des souscripteurs et dans l'autre cas des annonceurs qui achètent du temps d'antenne pour passer de la publicité. Ces deux types de télévision ne sont pas en concurrence suffisamment directe pour pouvoir être considérés comme appartenant au même marché, ce dont témoignent les décisions des distributeurs de

films d'attribuer les droits de diffusion clairement et distinctement dans certaines "fenêtres" successives. La télévision hertzienne est généralement la dernière à recevoir ces droits après qu'ils aient été exploités sur la télévision à péage (et les cassettes vidéo etc.).

La deuxième distinction qui pourrait être opérée est celle entre la télévision analogique et la télévision numérique. La Commission estime qu'il n'est pas nécessaire de distinguer ces deux technologies qui sont en concurrence sur le même marché.

Une troisième distinction pourrait être opérée entre les différents modes de diffusion, c'est-à-dire le câble, le satellite etc. Cette question a été traitée à l'occasion de plusieurs affaires dont la plus récente est l'affaire BIB concernant le marché britannique. Dans la décision relative à cette affaire, les trois modes de transmission ont été considérés comme appartenant au même marché. Dans ce cas (qui est sans doute spécifique au marché britannique), il a été observé que dans les régions câblées, les consommateurs utilisent souvent le satellite et d'autres sources au lieu du câble. Par ailleurs, le consommateur n'est actuellement attaché par aucun lien indissoluble avec une source : les sociétés de câble ont une politique de rachat de l'équipement au consommateur. Enfin, s'agissant des tarifs de location ou de souscription, on constate que leurs niveaux sont comparables d'un mode de diffusion à l'autre. Dans une affaire similaire concernant TPS en France la même définition du marché a été adoptée : le câble, le satellite, etc. font partie du même marché. Ici encore, cette décision a été le résultat d'un examen des politiques de souscription des différents modes de diffusion.

Le délégué note, pour terminer, que la question de savoir s'il convient de distinguer plusieurs marchés séparés de télévision payante n'a pas encore fait l'objet d'une étude exhaustive. La télévision payante traditionnelle par souscription se trouve-t-elle dans un marché différent de la télévision à péage ou de la vidéo à la demande. Dans l'affaire Bertelsmann-Kirch, on a considéré que ces trois modes de diffusion faisaient partie du même marché. La possibilité qu'une distinction entre marchés plus fine soit opérée dans l'avenir reste, toutefois, ouverte.

L'**Australie** note qu'elle serait d'accord avec la quasi-totalité de ces conclusions de la CE en ce qui concerne la nature du marché géographique, la distinction entre télévision payante et chaînes hertziennes gratuites, le fait que les télévisions analogique et numérique fassent probablement partie du même marché et le fait que le mode de diffusion soit sans effet sur la définition du marché. Par ailleurs l'Australie n'a pas examiné la distinction entre télévision payante et télévision avec paiement à la séance.

La définition du marché va dépendre beaucoup des dispositions institutionnelles existantes. Par exemple, en Australie, il existe cinq chaînes hertziennes gratuites : trois chaînes commerciales et deux chaînes publiques. La réglementation empêche l'entrée de nouvelles chaînes supplémentaires. Cette structure a un effet très important sur les problèmes de définition du marché. S'il existait 20 chaînes hertziennes gratuites la télévision payante pourrait être considérée comme faisant partie du même marché que ces dernières.

Existe-t-il un marché du divertissement ? Le cinéma et la vidéo font-ils partie du même marché que la télévision ? Le cinéma offre une expérience différente et originale de "sortie" ainsi que des films en exclusivité qui ne sont pas disponibles en vidéo ou à la télévision. La TV payante n'a pas affecté le développement rapide du cinéma en Australie. Rien n'indique que le cinéma soit actuellement un produit de remplacement de la télévision et de la vidéo. En ce qui concerne cette dernière, il existe à l'évidence une certaine substituabilité avec la TV payante qui diffuse des films récents disponibles en vidéo. Toutefois, la vidéo n'est pas concurrente de l'essentiel des programmes de la télévision payante tels que l'information, les sports, la musique et les autres chaînes spécialisées. Par ailleurs, la plupart des chaînes

de TV spécialisées dans le cinéma ne sont pas vendues séparément en Australie : elles sont groupées avec d'autres programmes spécialisés. La possibilité que les locations de cassettes vidéo concurrencent sur le plan tarifaire la TV payante est donc limitée.

L'ACCC ne considère pas actuellement que la télévision hertzienne exerce une contrainte forte sur la position de force sur le marché de la télévision payante mais cette situation pourrait changer avec la convergence. Superficiellement, la télévision payante et la télévision gratuite semblent offrir des services similaires. Les consommateurs peuvent passer aisément de la télévision payante à la télévision hertzienne gratuite, ce qui suggérerait en apparence un degré élevé de substituabilité mais cette comparaison est en fait superficielle. Le fait que l'on puisse passer aisément d'une chaîne à une autre ne signifie pas que les produits offerts sont substituables. La télévision hertzienne gratuite utilise les mêmes moyens de production que la télévision payante mais ceci n'implique pas que les produits soient en étroite concurrence. La télévision payante offre un choix de programmes étroit, chaque chaîne visant un marché particulier. Elle est également tributaire des souscripteurs comme on l'a mentionné tandis que la télévision hertzienne gratuite dépend des annonceurs. Les chaînes hertziennes commerciales cherchent à obtenir l'audience maximum afin de maximiser les recettes de la publicité. Elles offrent donc des programmes destinés au public le plus large, la télévision payante propose des programmes spécialisés répondant, comme on l'a dit, à des intérêts plus intenses. Si vous êtes grand amateur de concours hippiques, la télévision payante est préférable aux chaînes hertziennes généralistes. En résumé la télévision payante et la télévision gratuite ne sont pas des produits étroitement substituables mais cette situation peut évoluer avec l'augmentation significative des chaînes disponibles.

En réponse à une question du secrétariat, les **États-Unis** reconnaissent que les études ont montré que les tarifs pratiqués par les réseaux câblés sur des marchés où existe un nombre particulièrement important de chaînes hertziennes sont assez variables. En général, le Ministère de la Justice considère que la télévision hertzienne gratuite ne constitue pas un véritable substitut de la télévision par câble. Il existe une certaine incidence tarifaire mais qui n'est pas suffisante pour limiter pleinement la capacité des opérateurs du câble de pratiquer des tarifs supérieurs aux prix du marché.

L'**Australie** note qu'elle a aussi examiné ces études qui montrent que lorsqu'il existe sur un marché un certain nombre de chaînes commerciales, elles offrent des produits très différenciés. Lorsqu'il y a seulement deux ou trois chaînes, chacune diffuse le même type de programme en cherchant à capter le téléspectateur moyen. Etant donné que le nombre de chaînes hertziennes augmente, la différenciation dans leur contenu fera probablement d'elles des concurrentes étroites de la télévision payante.

En réponse à une question du président, la **Suisse** donne davantage de détails sur les moyens de mesurer les parts de marché. Dans les marchés des médias, les unités de parts de marché généralement choisies sont la part de l'audience totale ou la part du total des recettes publicitaires. Pour calculer les parts de marché, il est nécessaire de tenir compte des caractéristiques différentes de la radio télévision publique ainsi que dans le cas de la Suisse de la concurrence des chaînes étrangères.

Le **Président** soulève le problème de l'effet des restrictions imposées par la réglementation sur les parts de marché et des modalités d'application de ces restrictions. Ces restrictions peuvent être contraires à l'intérêt du consommateur si elles empêchent un opérateur de diffuser des programmes de bonne qualité. Le régime du Royaume-Uni, par exemple, comporte une telle restriction.

Le **Royaume-Uni** observe en réponse que sa réglementation limite à 25 pour cent la part du marché de la publicité des sociétés de télévision indépendantes. L'OFT a examiné des affaires concernant les marchés de télévision régionaux dans lesquelles la publicité télévisée peut être considérée comme un

substitut de la publicité dans d'autres médias. Dans certains cas aussi, la publicité dans un média peut être considérée comme un marché séparé de la publicité dans un autre média. La tendance est à considérer la publicité sur des médias différents comme complémentaire plutôt que susbtituable. Il est fréquent que les grands annonceurs utilisent simultanément l'ensemble des médias (par exemple couplage entre la publicité à la télévision et une campagne d'affichage destinée à rappeler au public la campagne télévisée). Dans une perspective future, une concurrence entre la télévision et Internet semble peu probable au Royaume-Uni pendant un certain temps. Ceci dépend en partie de l'intérêt que manifesteront les consommateurs pour les nouveaux services numériques.

Fusions et accords horizontaux

Le **Canada** note que l'expérience du Bureau de la Concurrence en matière de fusion dans le secteur de la radiotélévision est relativement limitée parce que l'organe de réglementation du secteur (le CRTC) a imposé jusqu'à une période récente sur le marché de la télévision des obligations en matière de propriété qui vont au-delà des contrôles prévus par le droit de la concurrence. Le Bureau est toutefois intervenu quelque peu dans le secteur des médias à travers l'industrie de la presse quotidienne. Le cas des journaux suggère fortement que la publicité dans la presse écrite ne soit qu'un faible substitut de la publicité à la radio télévision. Par extension la publicité à la radio remplace probablement difficilement la publicité à la télévision. Le CRTC qui examine actuellement ses règles en matière de propriété dans le secteur des médias a récemment libéralisé les règles concernant la propriété des stations de radio. On s'attend à ce que certaines concentrations aient lieu dans ce secteur bien qu'il soit trop tôt pour en préciser l'ampleur et pour prévoir le traitement qui leur sera réservé par la loi sur la concurrence.

Il existe au Canada un phénomène connu sous le nom d'accords de gestion de stations de radio locales qui sont destinés à tourner les restrictions en matière de propriété imposées par la réglementation. Les stations de radio qui ont conclu ces accords se sont rassemblées pour la vente en commun de la publicité et le regroupement de fonctions administratives afin de réduire leurs frais généraux et d'améliorer leur efficience. Ces accords ont constitué en partie une réaction à la situation financière assez catastrophique de la radio commerciale au Canada. Le Bureau a examiné certains de ces arrangements et n'a pas constaté de cas où ils ont empêché ou réduit la concurrence sur le marché de la publicité pertinent. Le CRTC qui a récemment libéralisé les règles en matière de propriété des stations de radio organise actuellement une procédure de consultation publique sur le traitement qu'il va réserver à ces accords de gestion dans l'avenir, traitement sur lequel une décision n'est pas prise.

Les **États-Unis** signalent que l'intervention du Bureau en ce qui concerne ces accords pourrait être incompatible avec les décisions du ministère de la Justice des États-Unis sur les mêmes types d'accords. Le Ministère n'a observé aucun effet favorable à la concurrence des accords de ce type et a constaté que dans certains cas ils pouvaient limiter la concurrence par les prix. Il a ordonné dans certains cas qu'il soit mis un terme aux accords de vente et aux accords locaux de gestion.

Le **Canada** répond que ces arrangements ne sont pas très répandus au sein du secteur canadien de la radio et qu'après avoir examiné ces accords au cas par cas, il n'apparaissait pas clairement que les stations qui avaient conclu ces accords représentaient une part de marché suffisante pour que l'on puisse prétendre que la concurrence ait été réduite ou indûment entravée, ce qui correspond au critère que doit respecter le Bureau. L'examen de ces accords dans le cadre du contrôle des fusions a montré qu'en fait la conclusion de ces accords de gestion était favorable à l'efficience et que dans un ou deux cas elle avait entraîné une baisse des tarifs publicitaires. Il est possible que si ces accords se multipliaient ou représentaient une part de marché particulièrement élevée sur un marché géographique particulier, le Bureau pourrait prendre des mesures.

En ce qui concerne la **Norvège**, l'autorité de la concurrence n'a qu'une expérience très limitée des fusions sur le marché de la radio télévision, à l'exception de la fusion entre deux sociétés privées norvégiennes TV2 et TVNorge intervenue en 1997. Il s'agissait d'une fusion horizontale entre deux fournisseurs de contenu consistant dans l'acquisition par TV2 de 49 pour cent de TVNorge. TV2 a également pris possession de la programmation de TVNorge en vertu d'un accord de coopération ce qui lui permettait de décider du type de programme que cette dernière devait diffuser à un moment donné. En vertu du même accord, TV2 faisait aussi obligation à TVNorge d'accroître substantiellement ses parts d'audience. Si certains niveaux de parts d'audience n'étaient pas atteints, TV2 serait financièrement responsable vis-à-vis de TVNorge. Après l'acquisition, la part de marché commune de TV2 et de TVNorge sur le marché norvégien de la publicité télévisée était de 85 pour cent. L'autorité de la concurrence a analysé la fusion et a conclu qu'elle conduirait à une absence de concurrence sur le marché de la publicité télévisée. Elle a constaté aussi que les obstacles à l'entrée sur le marché de la télévision norvégien étaient élevés principalement en raison des obligations en matière de licences.

Après avoir analysé à la fois la fusion et l'accord de coopération, l'autorité de la concurrence a conclu qu'il n'était pas possible de prouver qu'ils conduiraient à une utilisation moins efficiente des ressources sur le marché de la publicité télévisée en Norvège dans des conditions qui seraient contraires à la loi sur la concurrence. En effet les sociétés devaient maintenir des organisations de vente séparées et l'accord de coopération en vertu duquel TV2 imposait à TVNorge l'obligation économique d'accroître ses parts d'audience brutes devait probablement conduire à une augmentation du nombre des téléspectateurs de TVNorge qui devait se traduire par une augmentation de la demande de publicité télévisée. La conclusion définitive de l'autorité de la concurrence a été d'accepter à la fois la fusion et l'accord de coopération.

L'**Italie** note que l'Autorité antitrust italienne a donné son avis en juillet 1997 sur une disposition figurant dans un projet de loi instituant l'Autorité italienne de réglementation des Communications et qui prévoyait la création d'une plate forme numérique commune de diffusion par l'établissement d'une entreprise commune regroupant les principales entreprises de télévision hertzienne (RAI, RTI et le Groupe Cecchi Gori), Telepiu (l'opérateur italien de TV payante) et Telecom Italia. Dans son avis officiel qui a été accepté par le parlement, l'Autorité antitrust a reconnu l'importance d'une norme technologique commune pour les infrastructures afin de permettre le développement rapide de ce nouveau produit mais elle a reconnu aussi les risques de limitation de la concurrence résultant de la participation commune dans une même société de l'ensemble des principaux opérateurs de télévision et de télécommunications. Il existait en particulier un risque de coordination horizontale entre les trois opérateurs de télévision. Selon ce qui était proposé, la RAI, le Groupe Cecchi Gori et Telecom Italia étaient supposés acquérir une participation dans Telepiu. Une telle coopération commerciale pouvait conduire à une distorsion significative de la concurrence et la création de cette plate forme numérique commune aurait pu se traduire par une élévation des barrières à l'entrée sur le marché et entraver le développement d'une concurrence effective en matière de télévision payante.

Les mêmes arguments ont été plus ou moins repris dans certaines affaires examinées par la CE comme les affaires MSG, RTL/Veronica, Telefonica/Canal Plus, Nordic Satellite etc. Dans toutes ces décisions la **Commission européenne** n'a pas autorisé des accords entre des opérateurs détenant une position dominante sur les marchés contigus des télécommunications, de la télévision et de la production. En particulier, la Commission a affirmé que la constitution ou la gestion d'une infrastructure commune par des opérateurs détenant une position dominante empêcherait une concurrence effective et entraverait le progrès technologique et économique.

Fusions et accords verticaux

Le **Président** présente cette session sur les fusions et accords verticaux en notant que ces opérations posent des problèmes qui sont parmi ceux qui soulèvent le plus de controverses et de difficultés pour les autorités de la concurrence. Dans le domaine audiovisuel, les accords verticaux d'exclusivité sont très souvent nécessaires pour exploiter pleinement la valeur du produit diffusé. Par exemple, un match de football qui pourrait être librement retransmis n'aurait aucune valeur pour un diffuseur. Comme il est habituel en ce qui concerne les accords verticaux, il est nécessaire de penser aux incitations *ex ante*. Si aucune valeur n'est attachée à la retransmission d'un événement, ce dernier ne sera pas diffusé. Les accords verticaux peuvent évidemment avoir aussi des effets anticoncurrentiels, en particulier lorsqu'ils limitent la concurrence sur un marché pertinent.

L'**Australie** note que la structure du marché de la télévision payante est assez inhabituelle dans ce pays. Il existe en Australie deux sociétés de télévision par câble intégrées verticalement qui sont les deux principales sociétés de téléphone qui ont aussi étendu leur intégration verticale à la fourniture de programmes à travers des accords d'exclusivité avec les fournisseurs de certaines chaînes de télévision en particulier les chaînes de sport et les chaînes de cinéma. Les avantages potentiels de l'intégration verticale sont reconnus en Australie comme on l'a mentionné. Par exemple ces accords se traduisent parfois par une réduction des coûts de transaction ainsi que par une plus grande diversité des programmes. Ce que l'on redoute toutefois c'est que ces arrangements puissent être utilisés pour empêcher l'entrée sur le marché de nouveaux fournisseurs de contenu et de nouveaux mécanismes de prestation indépendants.

Les deux sociétés de câble ont câblé toutes les deux le même tiers environ des ménages australiens. Il existe une surcapacité de 90 à 95 pour cent alors que les deux tiers du pays n'ont pas accès au câble. Une des principales préoccupations est que les deux sociétés sont en mesure de protéger leur part de marché en refusant de fournir leurs programmes à un nouveau câblo-opérateur qui tenterait de câbler le reste du pays. Ceci est le cas non pas seulement sur le marché sur lequel elles sont déjà concurrentes et où une nouvelle entrée supposerait l'arrivée d'un troisième concurrent mais aussi dans les régions qui ne sont actuellement pas câblées. En refusant de fournir des programmes à tout nouvel entrant, elles peuvent effectivement empêcher toute nouvelle société de câble d'entrer et d'être un concurrent sur un marché dans lequel elles peuvent entrer dans l'avenir. Ceci leur permet de câbler le pays à leur propre rythme sans aucune menace d'entrée et à plus long terme de s'assurer que la totalité du câblage est effectué par les deux principales sociétés de câble qui contrôlent donc la téléphonie locale, la télévision payante et tout service interactif qui pourrait se développer.

Une autre préoccupation concerne la difficulté que pourraient éprouver les fournisseurs de contenu indépendants à entrer sur le marché du fait que les sociétés de câble situées en aval qui sont contrôlées par les sociétés verticalement intégrées refuseraient de diffuser les programmes de nouvelles sociétés indépendantes. Il est préoccupant aussi que ces deux sociétés de câbles ont également protégé le marché de la diffusion directe par satellite sur lequel elles pourraient décider d'entrer dans l'avenir. Plus généralement, il est préoccupant que le contrôle des liens verticaux permette de bloquer l'entrée sur un certain nombre de marchés, non seulement celui de la diffusion en aval de la télévision payante mais aussi les marchés des programmes d'amont et les marchés des services interactifs et de la télévision par satellite dans l'avenir.

Le **Président** demande si les consommateurs ont la possibilité de s'abonner seulement à certaines des chaînes de chacune des principales sociétés de câble sans avoir à prendre la totalité du bouquet.

L'**Australie** répond que le groupage des chaînes est lié aux accords verticaux et à la distribution exclusive établis par les deux compagnies de câble. Les chaînes de programmes cinématographiques sont groupées avec d'autres d'un moindre intérêt et des chaînes supplémentaires peuvent être achetées seulement après que les chaînes principales de films aient été achetées. Si un abonné à la plus grande compagnie de télévision par câble d'Australie souhaite acheter des programmes de l'autre société de câble, il doit acheter un bouquet de plus de 20 chaînes, incluant les chaînes cinématographiques et sportives du fournisseur initial. Une autre conséquence des accords verticaux existants est la division des programmes sportifs et cinématographiques entre les deux principales sociétés de câble. De ce fait le taux initial de pénétration de la télévision par câble était assez faible. Il est impossible pour des souscripteurs australiens d'avoir accès à tous les programmes s'il ne s'abonne pas aux deux sociétés de câble ce qui l'oblige à avoir deux décodeurs et à acheter deux bouquets de programmes dans lesquels il y a des chaînes identiques.

La **Finlande** note que la société finlandaise de diffusion YLE est un opérateur de service public qui détient les réseaux de diffusion de la télévision et de la radio. La part d'audience d'YLE est d'environ 48 pour cent pour la télévision et de 50 pour cent environ pour la radio. Les autres opérateurs doivent verser des redevances à YLE pour l'utilisation des infrastructures. Il a été décidé que la diffusion hertzienne numérique commencerait en l'an 2000. Le Ministère des transports et des communications prépare actuellement les décisions concernant l'utilisation des nouvelles fréquences numériques et la gestion du multiplex. L'autorité finlandaise de la concurrence a recommandé que YLE constitue une société distincte ou au moins une unité financièrement autonome pour son réseau de distribution afin d'empêcher une discrimination anti-concurrentielle en matière d'accès au réseau et de permettre le contrôle d'une éventuelle péréquation tarifaire. L'YLE a décidé récemment de créer une filiale pour gérer son réseau de distribution à compter de l'an prochain.

La société finlandaise de télévision par câble Eurocable avait saisi, il y a quelques années, le bureau finlandais de la concurrence d'une plainte alléguant que la société de télévision commerciale MTV et YLE avaient refusé de nouer des relations commerciales avec les sociétés qui vendaient leurs programmes à Eurocable. Cette dernière soutenait que YLE et MTV détenaient environ 65 pour cent du marché du cinéma et de la télévision en Finlande ce qui leur permettait de faire pression sur les fournisseurs de programmes pour qu'ils ne vendent pas à Eurocable. La société soutenait aussi que ces sociétés ne respectaient pas le système des "fenêtres" (système de distribution selon lequel les droits sont vendus d'abord aux cinémas, à la télévision à péage, à la vidéo à la télévision payante et enfin à la télévision hertzienne). L'autorité de la concurrence n'a trouvé aucune preuve de coercition. Les sociétés avaient également fourni des raisons valables du point de vue commercial pour ne pas acheter des droits de TV gratuits concernant des programmes qui avaient déjà été vendus à Eurocable.

Les **États-Unis** présentent l'affaire Time Warner dans laquelle les accords verticaux sont de la plus grande importance.

Dans l'affaire Time Warner, la FTC a procédé à un examen spécifique des efficiences résultant des accords verticaux mais elle a constaté en fin de compte qu'elles ne compensaient pas les effets anticoncurrentiels des transactions, compte tenu en particulier des positions importantes occupées sur le marché par les acteurs concernés. Le contexte de l'affaire est le suivant : Time Warner qui est le principal fournisseur de réseaux câblés des États-Unis est un distributeur très important de la télévision par câble. Turner est un fournisseur important de réseaux câblés à travers des chaînes bien connues comme CNN, TNT et TBS SuperStation. TCI est le principal opérateur des systèmes de télévision par câble des États-Unis avec une part de 27 pour cent des ménages câblés. Il détient aussi des intérêts dans un certain nombre de réseaux câblés et il est, à travers une filiale, un des premiers fournisseurs de programmes des États-

Unis. La transaction portait sur un accord entre Turner et Time Warner concernant l'acquisition par ce dernier des quelque 80 pour cent des actions de Turner qu'il ne possédait pas encore. TCI détenait une participation de 24 pour cent dans Turner qui aurait été échangée contre une participation de 7,5 pour cent dans Time Warner qu'il aurait été possible de porter à plus de 15 pour cent. Une clause importante de l'accord était constituée par un accord de diffusion obligatoire ou un "accord de service de programmation" en vertu duquel TCI aurait été tenu de diffuser sur la quasi-totalité de ses réseaux câblés des programmes tels que CNN et d'autres chaînes de Turner. La plainte alléguait que la transaction aurait permis à Time Warner d'augmenter unilatéralement les tarifs des programmes de TV par câble et aurait limité la capacité des systèmes de TV par câble qui fournissent ces programmes à éviter des hausses de tarifs. Elle soutenait par ailleurs que la participation de TCI au capital de Time Warner et l'obligation à long terme de diffuser des programmes de Turner réduirait l'incitation de TCI à acquérir des programmes meilleurs ou moins chers en dehors de Time Warner ce qui empêcherait les concurrents de la société combinée Time Warner d'atteindre un volume de distribution suffisant pour réaliser les économies d'échelle nécessaires pour concurrencer efficacement Time Warner.

Six aspects des mesures d'atténuation prises dans cette affaire méritent d'être notés. Le premier concerne l'obligation faite à TCI de céder sa participation dans Time Warner afin de supprimer l'incitation pour TCI de renoncer à ses propres intérêts au profit de ceux de Time Warner. Le second se rapporte à l'obligation d'annuler l'accord de diffusion à long terme qui aurait obligé TCI à diffuser pendant les 20 prochaines années les programmes de Turner à un tarif qui soit le plus faible des deux suivants : 85 pour cent de la moyenne du secteur ou le plus faible tarif accordé à un distributeur quelconque. La troisième condition est relative à l'interdiction faite à Time Warner de grouper HBO avec les programmes de Turner ou à l'inverse de grouper CNN, TNT ou TBS avec les chaînes de Time Warner ce qui aurait limité la capacité en nombre de chaînes du secteur. La quatrième mesure a consisté à empêcher Time Warner de pratiquer des tarifs discriminatoires à l'encontre de distributeurs de programmes vidéo multi-chaînes concurrents. En cinquième lieu, étaient prévues des obligations de déclaration visant à s'assurer que le câble Time Warner ne pouvait pas refuser de manière discriminatoire la diffusion de programmes non affiliés. Enfin, un intérêt particulier a été accordé au segment des chaînes "toute information" dans lequel CNN occupe une position de leader et où l'on craignait qu'un entrant potentiel ne puisse pas obtenir une diffusion assez large. Il a donc été exigé de Time Warner qu'il diffuse un concurrent de CNN. La décision prévoyait une certaine souplesse dans le mode d'exécution de cette condition mais elle exigeait que certains objectifs de pénétration soient atteints.

Les **États-Unis** poursuivent par la description de l'affaire Prime Star. Il s'agit d'une transaction impliquant Prime Star, société associant plusieurs des principaux câblo-opérateurs des États-Unis, laquelle a conclu en juin 1997 un accord concernant l'acquisition d'un canal de diffusion directe par satellite auprès de MCI et News Corp, une société du Groupe Murdoch. Ce canal qui était l'un des trois canaux affectés à la diffusion directe par satellite (DDS) de forte puissance aux États-Unis était le dernier à être disponible. Le Ministère de la Justice a contesté cette transaction en mai 1998 et déposé une plainte pour diverses violations de la législation antitrust. La plainte était basée sur l'importance de la DDS en tant que substitut potentiel des réseaux câblés. On pensait que le contrôle de ce canal de diffusion directe par satellite par les sociétés de télévision par satellite elles-mêmes se traduirait probablement par une réduction de la concurrence. Confrontées à la perspective d'un procès dans quelques mois, les parties à Primestar ont décidé en octobre 1998 d'abandonner leurs projets d'acquisition du canal de DDS qui a donc été laissé ouvert à la concurrence avec les sociétés de câble.

Le **Président** propose de passer à l'examen de la retransmission des évènements sportifs. Il note que la retransmission de certains évènements sportifs donne lieu à une position de force sur le marché qui peut être utilisée pour réduire la concurrence. En particulier, les autorités antitrust ont concentré leur

attention sur la cession collective de droits de retransmission par les fédérations sportives et elles ont souvent constaté que ces arrangements étaient contraires à la concurrence. Il faut noter que les fédérations sont généralement les organisateurs de championnats. Les différents matches qui constituent ce championnat n'ont pas de valeur en dehors du championnat lui-même. Par ailleurs les spectateurs préfèrent assister à des rencontres entre équipes de valeur égale. A long terme, les meilleures équipes tirent profit de l'amélioration de la qualité de leurs rivales, objectif qui peut être obtenu par des transferts entre équipes organisés par la fédération. La vente de droits collectifs permet d'effectuer ces transferts avec un minimum de coûts de transaction.

Le Délégué de la **CE** reconnaît qu'un grand nombre de problèmes de concurrence se posent dans ce secteur étant donné, en particulier, le nombre de plaintes dont la Commission a été saisie. La Commission n'a rendu qu'une seule décision sur ce sujet jusqu'à présent : la décision de 1993 concernant l'UER (Union Européenne de Radiodiffusion) qui se rapportait aux accords d'achat commun de droits de retransmission sportive conclus par les membres de cette association qui représentaient l'ensemble des opérateurs de service public européens. A cette époque, la Commission a demandé un certain nombre de modifications de l'accord, en particulier en ce qui concerne les arrangements de rétrocession de licences. La Commission a également fait savoir qu'en règle générale les contrats d'exclusivité d'une durée limitée (par exemple une saison sportive) ne soulèvent pas de problème de concurrence. Des problèmes ne se posent que lorsque la durée du contrat d'exclusivité est particulièrement longue et que la portée de l'exclusivité est particulièrement large. Dans des cas de ce type, il existe à l'évidence un danger de fermeture du marché qui empêchera les nouveaux opérateurs d'acquérir des droits. Il est donc nécessaire de limiter soit la durée du contrat soit la portée des exclusivités.

Comme l'a noté le Président, les fédérations sportives exercent des tâches qui ont pour effet de renforcer l'efficience. En fait, dans plusieurs pays, elles sont reconnues par le législateur comme ayant une mission de "service public". Il est évidemment nécessaire de prendre en compte les caractéristiques de cette mission de service public lorsque l'on envisage une exemption au titre de l'article 85 (3). Deux affaires en cours actuellement vont fournir des indicateurs supplémentaires sur l'équilibre à maintenir entre la mission de service public et les distorsions de la concurrence. Elles concernent les droits de retransmission des courses automobiles de Formule Un d'une part et les statuts de l'UEFA d'autre part.

Le **Président** note que dans des affaires telles que celles là les autorités de la concurrence jouent en fait un rôle de consultants en gestion pour certaines des parties à la transaction. Par exemple, en ce qui concerne la question de la durée du contrat, en affirmant que l'exclusivité est trop longue et le marché fermé, l'autorité de la concurrence indique en fait que la fédération n'opère pas dans son propre intérêt. Un autre aspect concerne le danger de réduction du progrès technologique qui résulte des contrats d'exclusivité à long terme. Un nouveau concurrent peut évidemment ne pas présenter le produit de la même manière qu'un opérateur existant mais il peut le présenter de manière entièrement nouvelle. De ce fait, les contrats à long terme peuvent entraver le progrès technologique.

Le Délégué du **Royaume-Uni** présente les faits de l'affaire BSkyB comme suit : l'Office of Fair Trading a demandé au tribunal des pratiques restrictives de se prononcer sur une affaire dans laquelle les droits de retransmission télévisée des rencontres de football de première division avaient fait l'objet d'une cession collective et exclusive par la Ligue à la BBC pour les résumés des matches et à BSkyB pour les retransmissions en direct. Le premier accord porte sur cinq saisons à compter de 1992. Le deuxième qui concerne quatre saisons s'achève à la fin de 2001. Aucune des deux chaînes ne retransmettra tous les matches. BSkyB ne retransmettra que 60 rencontres sur 390 au total. Les rencontres ne sont diffusées sur aucune autre chaîne. Au Royaume-Uni cette situation est considérée comme une "large exclusivité" ou un "achat en bloc". L'avis de l'OFT qui sera présenté au tribunal est que ces accords ont faussé la

concurrence et qu'ils sont contraires à l'intérêt du public. Les droits concernant les sports les plus populaires en particulier le football sont considérés comme un facteur important de développement de la concurrence dans le secteur de la télévision, en particulier dans la perspective du début du développement de la télévision numérique au Royaume-Uni. En fait, la Ligue de football est considérée comme agissant comme un cartel en limitant la production de droits en ne cédant collectivement qu'à une chaîne pour les retransmissions en direct et à une autre pour les résumés en différé. Ces restrictions de vente permettent, selon nous, de maintenir le prix des droits au-dessus de celui qui s'établirait durablement si la concurrence était plus ouverte. En ce qui concerne le marché, on a considéré qu'au Royaume-Uni, le football de haut niveau et en particulier la première division ne peut pas être remplacé par la retransmission d'autres sports. En acquérant ces droits BSkyB a acquis une position de force sur le marché. L'examen de l'affaire commence en janvier 1999 et devrait prendre, selon les estimations actuelles, environ 11 semaines.

Une autre affaire dont on parle actuellement beaucoup au Royaume-Uni est le projet d'acquisition par BSkyB de l'équipe de football de Manchester United. Cette affaire est en cours d'examen par l'Office of Fair Trading. Le Directeur Général de l'Office doit décider s'il y a lieu de demander au Secrétaire d'Etat de soumettre l'affaire à la Monopolies and Mergers commission (Commission des monopoles et des fusions).

Le **Président** demande au Royaume-Uni si dans l'affaire BSkyB le problème ne tient pas à la manière dont la Ligue vend les droits. BSkyB n'a pas acheté les droits de retransmission de l'ensemble des 380 rencontres une par une et décidé ensuite de n'en retransmettre que 60. BSkyB a soumissionné pour l'ensemble des rencontres globalement, sachant qu'elle ne serait jamais en mesure d'en diffuser qu'une partie. N'est ce pas la manière dont l'appel d'offres a été organisé qui a interdit à une autre chaîne d'acquérir les autres rencontres ?

Le **Royaume-Uni** répond qu'il n'est pas possible de faire des commentaires sur la logique qui conduit la Ligue de football à céder tous les droits en bloc. Il ajoute qu'un grand nombre d'associations sportives sont peu familiarisées avec les réalités du marché. La télévision a versé beaucoup d'argent aux associations sportives. Certaines d'entre elles se préoccupent d'obtenir le plus d'argent possible tandis que d'autres se préoccupent davantage d'attirer le nombre maximum de téléspectateurs. Les associations sportives ont souvent pris des décisions en fonction de considérations qui ne tiennent pas compte de l'avenir à long terme.

Le Délégué du **Danemark** se réfère à un cas datant de quelques années dans lequel l'autorité de la concurrence a accepté un accord en vertu duquel l'Association danoise de football a vendu tous les droits de retransmission télévisée en exclusivité pour une période de huit ans, ce qui représente une durée assez longue. Ceci s'explique par le fait que l'accord était lié à l'établissement d'une chaîne sportive. Le Danemark n'a que 2,5 millions de foyers et constitue une petite zone linguistique. En définitive cette chaîne sportive n'a pas été en mesure de survivre. La période d'exclusivité était sans doute nécessaire dans ce cas.

Le **Canada** note que les fédérations sportives canadiennes sont très sophistiquées et qu'elles s'efforcent de maximiser leurs recettes ou leur rendement à long terme. A long terme, elles sont suffisamment avisées pour vouloir préserver une certaine forme de marché. La CRTC a récemment agréé une deuxième chaîne sportive spécialisée au Canada. La nouvelle chaîne a été rapidement en mesure de s'assurer des droits assez substantiels auprès de la Ligue Nationale de Hockey (qui représente une source importante d'évènements sportifs populaires au Canada) en dépit de l'existence d'une chaîne sportive bien établie et solide la TSN. Aux États-Unis, la nouvelle chaîne Fox qui a adopté une stratégie de croissance similaire a obtenu les droits de la Ligue Nationale de Football. Il est possible que certains évènements

sportifs, et peut-être certaines chaînes comme CNN et TSN, acquièrent le statut de quasi "facilités essentielles" dans le sens où s'il n'a pas accès à ces évènements ou à ces chaînes, un nouveau distributeur de télévision par câble aura probablement des difficultés à réussir sur le marché.

Le **Royaume-Uni** note que le football de haut niveau constitue un marché séparé. Au Royaume-Uni par exemple, le patinage sur glace quelle que soit sa qualité ne peut rivaliser avec le football. Ce dernier constitue actuellement le meilleur support de développement d'un marché de masse pour les annonceurs en direction de la population masculine jeune et aisée. Il est évident que les sports n'ont pas la même popularité selon les pays. La question de savoir s'il convient de dispenser les sports de l'application du droit de la concurrence a été posée à différentes reprises. Il est intéressant de noter par exemple que l'UEFA a considéré jusqu'à une période récente que ses arrangements concernant la diffusion des rencontres de football ne relevaient pas de la compétence des autorités de la concurrence. Cependant face à la tentative d'un consortium des partenaires des médias pour rassembler les principaux clubs de football européens pour créer une ligue indépendante, l'UEFA parait maintenant se tourner vers la Commission Européenne pour obtenir une certaine forme de soutien juridique.

Le **Secrétariat** aborde alors la question de savoir s'il y a lieu de s'inquiéter des accords d'exclusivité dans le domaine des droits de diffusion des sports. Les organisations sportives sont fortement incitées à maintenir la concurrence à long terme. Comme l'a noté le Canada, les organisations sportives sont sophistiquées et savent exactement ce qu'elles ont à faire. Elles sont conscientes que si elles sont confrontées, à l'expiration de leur contrat dans cinq ou dix ans, à un monopole en aval, elles risquent d'être victimes d'un "hold up" : le monopole s'efforcera de s'approprier une partie de la rente. Elles considèrent donc qu'il est préférable pour elles à long terme d'encourager la concurrence en vendant leurs droits dans des conditions qui permettent de nouvelles entrées sur le marché. Cette attitude contraste avec le cas australien où il nous est dit que les "majors" d'Hollywood ont signé des accords verticaux d'exclusivité avec une société liés à des accords de participation entre ces sociétés. Il existe peut-être pour les autorités de la concurrence une ligne de partage entre ce qui peut favoriser la concurrence et ce qui peut lui être contraire : en l'absence de liens en capital, on peut soutenir qu'il existe de la part de ces organismes sportifs une forte incitation à aider ou à encourager l'entrée sur le marché (ou du moins à ne pas la décourager) mais en présence de liens en capital (ou d'une forme d'intégration verticale en aval) ils peuvent surmonter le problème du "hold up". Dans ce cas, il peut en fait être dans leur intérêt de limiter la concurrence au moyen d'un contrat d'exclusivité à long terme.

Le Délégué du **BIAC** demande au Canada de préciser s'il a voulu dire que les chaînes hertziennes en clair qui sont devenues très populaires par elles-mêmes pourraient devenir des installations essentielles pour la retransmission des évènements sportifs. N'est-il pas vrai que pour qu'un équipement puisse être juridiquement classé comme "installation essentielle", il faut qu'il y ait absence totale de possibilité pour les fournisseurs de contourner l'installation et d'atteindre les consommateurs par d'autres moyens?

Le **Canada** précise que ce problème d'accès (que le terme technique "installation essentielle" soit ou non utilisé) s'est posé dans deux plaintes qui ont été examinées, l'une émanant d'une société de câble (qui ne pouvait pas obtenir accès à une chaîne spécialisée populaire aux États-Unis) l'autre d'un fournisseur canadien de service DTH (qui ne pouvait pas avoir accès à la retransmission des rencontres de football des États-Unis par une chaîne à péage). La question qui se pose aux autorités de la concurrence est celle de savoir si certaines chaînes spécialisées ou sportives occupent une position tellement dominante sur leur marché qu'il n'est pas possible, si l'on n'y a pas accès, d'exploiter une société de câble concurrente, ou qu'une entreprise sera tellement pénalisée dans son fonctionnement qu'elle ne pourra pas être véritablement une concurrente. En janvier 1998, l'organe de régulation, CTRC a adopté les

réglementations applications aux câblo-opérateurs, aux fournisseurs d'accès DTH et autres opérateurs dans le secteur de la diffusion.

Ces règlementations concernent, entre autres, l'accès à la programmation et interdisent les accords exclusifs qui octroient une "préférence indue" à une entreprise ou "désavantage indu" à un concurrent. Au moment où cet aide-mémoire est rédigé, ces règles faisaient l'objet d'un recours devant la Cour d'appel fédérale du Canada.

Partie III : conclusions

Discussion générale

Le **Président** soulève la question de la pluralité et de la diversité. Dans l'ère numérique future, avec quelque 500 chaînes ou davantage disponibles pour le public les règles de la concurrence ne suffiront-elles pas à maintenir une pluralité d'opinion ? Y a-t-il besoin de règles supplémentaires.

Cette question est abordée par le **Canada** : la loi sur la radio diffusion définit un certain nombre d'objectifs culturels et sociaux pour le système de radio télévision canadien, notamment la diversité culturelle. Il est considéré comme important que les écrans de télévision canadiens offrent un choix suffisamment varié pour répondre aux besoins de la population canadienne. L'organisme de réglementation est très conscient de cette exigence et autorise et agrée les services étrangers en ayant cet objectif à l'esprit. Même dans le monde numérique de l'avenir qui connaîtra un important volume de capacité l'objectif est de préserver la diversité culturelle par opposition à une uniformisation des cultures.

La question est reprise par le **Secrétariat**. Dans une période où le nombre des chaînes de télévision se multiplie (voire devient illimité) faut-il encore une réglementation destinée à préserver la diversité ? A Paris, il est possible de capter sur le câble numérique un grand nombre de chaînes diverses sur le plan culturel, y compris des chaînes italiennes, espagnoles, allemandes, britanniques, égyptiennes, marocaines, américaines et d'autres pays. Dans ce contexte où il existe un grand nombre de chaînes de télévision commerciales répondant aux besoins et aux intérêts des consommateurs, s'il existe divers groupes culturels dans la population ne seront-ils pas bien desservis par la télévision commerciale à chaînes multiples?

Le Délégué du **Canada** répond qu'il a participé récemment au forum international sur la diversité culturelle à la télévision à Rome. L'une des conclusions qui est ressortie de ce forum est que la diversité ne peut être laissée entièrement au marché. Il est certain qu'un grand nombre de programmes de télévision et de séries télévisées sont appelés à survivre dans un environnement concurrentiel. Certains types de télévision "culturelle" suscitent toutefois des inquiétudes. Le marché intérieur de certains pays est étroit. La production de programmes de télévision de qualité est coûteuse. Le Canada est particulièrement préoccupé de cette situation en raison de sa proximité avec les États-Unis qui sont les principaux exportateurs de produits et de services de divertissement. La réglementation est nécessaire pour maintenir un environnement audiovisuel "canadien".

Le **Royaume-Uni** ajoute que le débat qui a eu lieu à Bruxelles au cours des derniers mois a montré qu'il existait encore une volonté politique pour que les marchés nationaux reflètent les identités nationales, en particulier dans les petits pays. Par exemple les réponses au Livre vert sur la convergence ont fait apparaître le souci que les programmes reflètent les identités culturelles nationales. Lors de l'examen du document de la DGIV proposant des principes directeurs pour le financement public de la

télévision de service public, aucun État membre n'était prêt à ce stade à renoncer à son opérateur de service public précisément parce qu'il reflétait la diversité nationale. Bien que les chaînes en plusieurs langues soient de plus en plus nombreuses la volonté politique au sein de l'Union européenne ne se satisfera pas de cette seule évolution.

La **Commission européenne** souligne l'intervention du Canada en ajoutant qu'un point de départ du Rapport du Groupe à haut niveau est l'importance fondamentale et le rôle absolument vital de la télévision dans la vie culturelle des sociétés européennes. Le Groupe à haut niveau signale que les européens passent en moyenne entre trois et quatre heures par jour devant la télévision. La télévision est de loin le moyen le plus important de formation de notre opinion sur le monde et de notre opinion sur nous-mêmes. Il faut être prudent dans l'assimilation de la télévision à un bien économique.

Le **Président** précise qu'il n'a pas été dit que la diversité culturelle n'était pas importante. Il existe un accord général sur l'importance de la diversité et nul n'imagine qu'il devrait exister une seule chaîne, un seul programme, un seul langage, un seul divertissement chaque soir dans le monde entier. Ce qui est en cause c'est la question de savoir si l'instrument utilisé pour obtenir la diversité culturelle est le bon et si les tentatives pour encourager la diversité culturelle seraient possibles en l'absence de contraintes affectant le nombre de chaînes que chaque récepteur de télévision peut capter. L'État doit-il intervenir ou les forces du marché sont-elles en mesure de fournir la diversité culturelle ?

Le **Secrétariat** ajoute que le mouvement de réglementation se comprend très bien lorsque le nombre de chaînes est très limité mais qu'il faut sans doute revoir la question dès lors que le nombre de chaînes devient essentiellement illimité. Dans ce cas, en effet, le secteur de la télévision se rapproche de celui de la presse écrite où il n'existe pas de limite réelle au nombre de magazines ou de livres susceptibles d'être produits pour le marché. Pourquoi la télévision n'évolue-t-elle pas vers ce modèle de réglementation?

La **Suisse** note que sur la plupart des marchés économiques, on présume que la somme des intérêts particuliers correspond à l'intérêt général. Il n'en est pas nécessairement ainsi sur les marchés des médias. Si vous êtes fatigué le soir et que vous vous asseyez devant la télévision vous choisissez inévitablement de regarder un programme relativement facile. C'est pourquoi la somme des intérêts individuels ne correspond pas à l'intérêt général. La question à poser est donc de savoir non pas si une réglementation est nécessaire ou non mais quel type de réglementation mettre en place. Le Délégué suisse note par ailleurs qu'une mission de service public peut être exercée par un opérateur privé auquel on confie une telle mission et les fonds nécessaires pour l'accomplir.

Le **Canada** ajoute que lorsque l'on parle de diversité on entend une "véritable" diversité. Ce qui est troublant c'est que lorsque l'on regarde la télévision dans des pays différents, il y a des programmes nationaux mais aussi des programmes qui ont été achetés sur les marchés mondiaux et qui sont donc les mêmes que ceux qui sont diffusés dans un autre pays. Sur la télévision par câble et par satellite, en particulier, on trouve des programmes qui ont été achetés à l'étranger. Peut-on parler d'une "véritable" diversité ? Dans l'ère numérique du futur la programmation tendra-t-elle encore davantage vers le plus petit dénominateur commun ? Si l'on veut un certain "équilibre" de véritable diversité culturelle à la télévision, il est nécessaire de réfléchir à la forme de réglementation qui permettra d'atteindre cet objectif de la manière la plus légère possible.

Le **BIAC** souligne que lorsque l'on examine du point de vue économique les marchés de la télévision de divers pays, on constate de manière systématique que les programmes les plus populaires, ceux qui attirent les recettes publicitaires les plus importantes et l'audience la plus large, ne sont pas les

programmes importés de l'étranger mais les programmes locaux, les émissions de jeu locales, les séries télévisées locales etc. Les programmes locaux sont ceux qui ont le plus de succès sur tous les marchés nationaux et à long terme ceux qui attirent la plus large audience. Comment encourager les programmes locaux ? Comment faire en sorte que les nouvelles chaînes aient les moyens financiers nécessaires pour produire des programmes locaux ? Les nouvelles chaînes sont souvent à la recherche de programmes bon marché disponibles sur le marché mondial. Si elles n'ont pas accès à ces programmes, elles risquent de ne jamais être en mesure de financer des programmes locaux populaires afin de pouvoir démarrer leur activité. Les mesures qui sont destinées à préserver le contenu national n'ont-elles pas l'effet opposé ? Ne vont-elles pas empêcher la naissance de nouvelles chaînes compétitives qui auraient pu stimuler la production et l'investissement et les programmes locaux par elles-mêmes ?

La **Commission européenne** note que l'une des préoccupations exprimées lors de la consultation sur le Livre vert précisément en réponse à cet argument est que la concurrence entre les chaînes obligerait ces dernières à opter pour des programmes importés bon marché même si, comme le signale le BIAC, des programmes locaux permettent généralement d'attirer une plus large audience. La préoccupation exprimée a été que la concurrence soit si forte que les chaînes seraient obligées de renoncer à produire des programmes locaux que le public demande et pour lesquels il est prêt à payer au profit d'importations moins coûteuses.

Le **Secrétariat** demande si les pays ont constaté une augmentation de la demande de production locale du fait de la multiplication des chaînes.

Le **Royaume-Uni** indique que la réponse est dans l'ensemble affirmative. Ainsi, BSkyB qui est entré sur le marché en 1989 diffusait à l'époque un maximum de 8 pour cent de programmes européens. Ce pourcentage est actuellement supérieur à 40 pour cent ce qui s'explique par le fait que les souscripteurs recherchent activement des produits locaux. Ce pourcentage de 40 pour cent qui exclut les émissions de jeux, les sports, la publicité et l'information représente donc un volume de programmes assez important. BSkyB investit dans la production de films et plus généralement dans le secteur de la production afin de se procurer les produits locaux dont il a besoin. Un autre exemple est celui de deux chaînes belges qui se disputent un marché limité en Belgique. On pourrait penser qu'elles pourraient utiliser des programmes hollandais (il s'agit de deux chaînes flamandes). Elles ont constaté toutefois que les programmes hollandais, bien qu'ils soient substituables, ne sont pas aussi populaires que les programmes produits localement. Ceci illustre un goût très prononcé pour les programmes locaux : les programmes hollandais sont dans la même langue mais ils n'ont pas la même "touche" que les programmes faits en Belgique.

Le **Secrétariat** soulève une autre question. De nombreuses contributions indiquent l'existence de restrictions de diverses formes affectant la publicité et visant le volume et l'emplacement de cette dernière généralement en conformité avec la Directive de la CE. Pourquoi estime-t-on qu'il faut contrôler le volume de la publicité sur la télévision hertzienne ? Si le niveau de la concurrence au sein du secteur était suffisant, les opérateurs seraient incités à présenter la publicité de la manière la moins gênante et la moins offensante pour les téléspectateurs en tenant compte à la fois de la localisation de la publicité et de sa qualité et de son volume globaux. Une des raisons possibles pour lesquelles la publicité devrait être réglementée serait donc de répondre aux préoccupations relatives à la concurrence sur le marché de la télévision hertzienne. Ces préoccupations peuvent-elles mêmes résulter des conditions strictes imposées pour obtenir une licence et des obstacles substantiels opposés aux nouvelles entrées. Une réponse à la question de savoir pourquoi la publicité doit être réglementée est par conséquent que des restrictions sont nécessaires parce que la réglementation limite la concurrence de diverses manières et que les opérateurs réagissent au manque de concurrence en augmentant de manière inefficiente le volume de la publicité.

L'**Australie** présente une observation générale sur la demande sous jacente de réglementation dans ce secteur. On parle de temps en temps des théories de la demande de réglementation. On suppose parfois qu'il existe une justification d'intérêt général, parfois encore on reconnaît que certains secteurs sont particulièrement prédisposés à une appropriation par des intérêts particuliers. On pourrait penser que les médias sont un candidat probable à une appropriation par les producteurs. Qui plus est, les hommes politiques sont très sensibles aux relations avec les médias avec lesquelles ils sont quelque peu en symbiose (sinon dans une relation totalement captive). Ces remarques peuvent contribuer à expliquer les structures anticoncurrentielles qui sont incorporées dans les décisions législatives concernant le secteur audiovisuel.

Le **Président** répond que l'on peut soutenir que le maintien du secteur des médias en situation de monopole public garantirait que ce secteur ne tombe pas entre les mains d'intérêts particuliers. Cet argument est également contestable car nous savons que le fait qu'un secteur soit public ne garantit pas qu'il agit dans l'intérêt général. Au contraire, il poursuit généralement les objectifs de ses dirigeants (ou de ses clients). La multiplication des chaînes concurrentes constituerait une meilleure protection contre l'appropriation par des intérêts particuliers. Une conséquence logique de l'observation de l'Australie serait donc qu'il faut encourager la concurrence et la suppression de tous les obstacles réglementaires.

Conclusions du Président

Le Président conclut la discussion en notant les points suivants :

Un grand nombre de questions restent sans réponse telles que la question importante de savoir ce qu'est une radiotélévision de service public. Pourquoi un service public de la télévision est-il nécessaire et pourquoi faut-il lui accorder des subventions ? On a beaucoup parlé de diversité culturelle mais on ne sait pas très bien ce qu'il faut faire pour l'encourager.

L'une des principales parties de la table ronde a été l'examen des questions antitrust et en particulier des restrictions verticales et des exclusivités. Le problème est que les restrictions verticales sont le plus souvent efficientes et que les empêcher c'est réduire l'efficience et aussi peut-être le type et le volume des programmes qui sont mis sur le marché. Il est évident qu'un aspect au moins de ces restrictions verticales est à surveiller : la durée pendant laquelle ces restrictions sont appliquées. Sur la question de ce que devrait être la durée appropriée de ces exclusivités, la Commission européenne a suggéré une saison, d'autres deux ou trois ans. Ces questions ne sont pas faciles à résoudre. Il est nécessaire de tenir compte des coûts de transaction résultant de la procédure d'appel d'offres lesquels peuvent être très substantiels.

En ce qui concerne la définition du marché, on peut évidemment se référer aux définitions administratives qui se rapportent aux conditions différentes d'autorisation de la télévision hertzienne en clair, de la télévision par câble, par satellite, à péage etc. Il est probable que les autorités de la concurrence vont devoir continuer à traiter la question de la possibilité de substitution du point de vue économique entre ces différents moyens de diffusion des programmes. Il se pourrait bien que dans l'avenir il n'existe qu'un seul marché de la diffusion de la télévision sans aucune séparation entre les différents moyens de diffusion. Ce n'est certainement pas le cas aujourd'hui, en particulier dans les pays où la télévision hertzienne est importante tandis que les autres moyens de transmission (comme le câble et le satellite) sont moins développés. Dans ces circonstances il peut exister un risque d'abus de position dominante dans le nouveau segment du marché et il faut être très attentif à ce que l'entrée sur ces marchés ne soit pas entravée.