

**PLURALISM IN THE MULTI-CHANNEL MARKET**  
**SUGGESTIONS FOR REGULATORY SCRUTINY \***

by

**Christopher T. Marsden ♦**

**Table of Contents**

<b>1. PLURALISM IN MULTI-CHANNEL MARKETS .....</b>	<b>5</b>
1.1. GENERAL MARKET INTEGRATION AND PLURALISM .....	5
1.2. INTRODUCTION TO MARKETS.....	9
1.3. CONTINUING DOMINANCE OF ANALOGUE.....	10
1.4. FORMATION OF DIGITAL TELEVISION IN WESTERN EUROPE .....	11
<b>2. OWNERSHIP CONTROLS ON BROADCASTING.....</b>	<b>14</b>
2.1. PLURALISM AND MULTI-CHANNEL CAPACITY .....	14
2.2. PLURALISM AND OWNERSHIP DIVERSITY.....	15
2.2.1. US Case Study in 'Unbundled' Pluralism in the Multichannel Environment .....	16
2.2.2. UK Case Study in 'Unbundled' Pluralism in the Multichannel Environment.....	17
2.2.3. Ownership Control Through Viewership Limits: UK-German Case Studies.....	17
2.3. CASE STUDY: DIGITAL TERRESTRIAL TELEVISION LICENCES .....	18
2.4. REINVENTION OF PUBCASTERS .....	20
2.5. ACCESS WITHIN DIGITAL PAY-TV OPERATORS BOUQUETS AND DOMINANT CHANNELS.....	21
<b>3. "MUST CARRY" RULES ON BROADCASTING .....</b>	<b>23</b>
3.1. 'MUST CARRY' AND PUBLIC SERVICE: AN EXAMPLE OF PLURALISM THROUGH ACCESS.....	23
3.2. DEVELOPMENT OF ANALOGUE 'MUST CARRY' ON CABLE SYSTEMS.....	24
3.2.1. Compulsory Licensing/'Unbundling' of Digital Satellite Services .....	25
3.2.2. 'Must Carry' Rules: Turner II (1997).....	26
3.3. DIGITAL CAPACITY AND 'MUST CARRY' REGULATION .....	26
3.4. PUBLIC ACCESS TO EXCLUSIVE PROGRAMMING .....	28
3.5. CONCLUSION: PRINCIPLES FOR 'MUST CARRY' .....	29
<b>4. GATEWAYS AND BOTTLENECKS FOR PLURALISM .....</b>	<b>31</b>
4.1. INTRODUCTION TO NAVIGATION SOFTWARE ACCESS ISSUES.....	31

\* Consultant's Report to the Council of Europe, Directorate of Human Rights, Group of Specialists on Media Pluralism, MM-S-PL [99] 12 def 2.

♦ Lecturer in European Law, Warwick School of Law, [chris.marsden@warwick.ac.uk](mailto:chris.marsden@warwick.ac.uk)

4.2.	DIGITAL TV NAVIGATION: THE APPLICATIONS PROGRAMME INTERFACE [API] .....	32
4.3.	DIGITAL TV NAVIGATION APPLICATIONS: COMPARISON WITH MICROSOFT LITIGATION .....	33
4.4.	GATEKEEPERS AND EUROPEAN LEGISLATION .....	35
4.4.1.	<i>National Market Structures</i> .....	36
4.4.2.	<i>1995 Cable TV Directive</i> .....	37
4.5.	BOTTLENECKS AND STANDARDS BODIES: INDUSTRY SELF-REGULATION? .....	38
4.6.	CONCLUSION .....	39
<b>5.</b>	<b>BROWSER OPEN ACCESS</b> .....	<b>41</b>
5.1.	NEW MARKET DEVELOPMENTS AND ALLIANCES .....	41
5.2.	BROWSERS AND LEVERAGING INTO CABLE.....	41
5.3.	RAPID INCREASE IN COMPETITION .....	43
5.4.	PLURALISTIC CONCERNS.....	44
5.5.	ACCESS TO PUBLIC SERVICE VALUES .....	45
5.6.	TOWARDS REGULATION OF ACCESS? .....	45
5.7.	CONCLUSION.....	45

## Terms of Reference

For the consultant responsible for the study on media ownership/pluralism in the context of convergence. The consultant shall review the following areas:

- The process of integration in Europe between companies from the telecommunications, broadcasting, cable, computer and print media sectors, the nature of such integration processes (whether companies are merging in technical, functional, organisational terms, etc.), the form of such integration (joint ventures, alliances, mergers, agreements, etc.) and the overall impact of such processes on media pluralism.
- The state of development of digital television (terrestrial, satellite or cable) in Europe and its impact on pluralism in the television sector.
- Whether the adaptation or revision of traditional media ownership restrictions (in particular those based on capital share restrictions or on the number of licences held by an operator) to digital broadcasting services would be feasible, and if so, whether criteria based on the audience share of an operator or other possible criteria would be the most adequate for the digital broadcasting environment.
- Whether the extension of traditional “must carry” rules to new distribution means, such as digital satellite broadcasting platforms would be feasible.
- Whether convergence is accelerating the pace of vertical integration and alliances in the pay-tv sector, and if so, whether specific regulations or other policy measures to counter-balance the negative effects of such vertical integration and alliances, such as rules on pluralistic and fair access to digital platforms, would be feasible.

- Whether dominant groups/alliances are emerging in Europe as regards the provision/distribution of on-line services, and whether problems have arisen in this respect (for instance, the commercialisation of software with a specific Internet browser or the order of preference in which Internet browsers present the list of searched web sites). Furthermore, the consultant shall consider whether specific measures to prevent dominant positions or to promote pluralism in the Internet environment would be feasible.

## Methodology Note

The 1st meeting of the Group of Specialists on Media Pluralism (MM-S-PL) noted that “it would be impossible to disassociate between”<sup>1</sup> analogue and digital media in the analysis of pluralism in the digital environment. Equally, the group noted that alliances and structures were “unstable and fragmentary”<sup>2</sup>, marked by mergers between telcos and television companies, where competition authorities permitted such potential foreclosure of digital markets, though competition was not the norm. Specifically, the group authorised the preparation of an outline report on the work of DGIV, the European Commission Competition Directorate<sup>3</sup>. This report does not therefore focus on specific Commission case law, nor on exclusive programming<sup>4</sup>, nor on the Cable Directive<sup>5</sup> prepared by the European Commission<sup>6</sup>. Further, though noting the work of the Groups of Specialists on The Assessment of Digital Developments in the Media Field [see MM-S-AD(99)16] and on Media in a PanEuropean Perspective [see MM-S-EP (99) 5] in particular their work on the role of public service broadcasting in the new technologies, and thus internal pluralism within media organisations, this report examines external pluralism, alluding to public service broadcasting only where to fail to do so would place commercial media ownership out of context.

Where reference is made to public service, the phrase ‘public service broadcasting’ will be used to describe all broadcasters granted licenses subject to specific public service (including the commercial free-to-air channels such as ITV in the UK or TF1 in France), whereas the abbreviated ‘pubcaster’ will be employed to describe the government-designated public service channels (TVE in Spain, ARD/ZDF in Germany, RAI in Italy, BBC/Channel4/S4C in UK). It is recog-

---

<sup>1</sup> MM-S-PL(99)2, Item 1, paragraph 7.

<sup>2</sup> Ibid para 12.

<sup>3</sup> Ibid para 29(I). See Guthus, Gudbrand [1999] MM-S-PL99(9) “Interpretation of DG4 merger cases in the audiovisual sector”. Cases considered are in Scandinavia, Holland and Germany. I later consider markets in Spain, Italy, France and the UK.

<sup>4</sup> Ibid para 26. See Cavallin, Jens [1999] MM-S-PL99(11) “The impact of digitalisation on television content”.

<sup>5</sup> Ibid para 17. Note IP/99/413 of 23 June 1999: “Commission adopts Cable directive a major step towards competition in the local loop.”

<sup>6</sup> Note Marsden, C. (2000 - forthcoming) *The European Digital Convergence Paradigm: From Structural Regulation to Behavioral Competition Law?* in Erik Bohlin et al (eds) *Convergence in Communications and Beyond*, Amsterdam: Elsevier Science

nised that both public service broadcasters as broadly defined here, and pubcasters more narrowly, are in a process of dynamic change, in which the former are decreasing their public service licence conditions, and the latter are increasingly placed under funding pressure in their expansion plans for digital television. The study of these phenomena, though recognisably interdependent with developments in multi-channel (digital, cable and satellite) media, is understood to lie outside the remit of this report and Steering Group MM-S-PL.

## 1. Pluralism in Multi-Channel Markets

THE PROCESS OF INTEGRATION IN EUROPE BETWEEN COMPANIES FROM THE TELECOMMUNICATIONS, BROADCASTING, CABLE, COMPUTER AND PRINT MEDIA SECTORS, THE NATURE OF SUCH INTEGRATION PROCESSES (WHETHER COMPANIES ARE MERGING IN TECHNICAL, FUNCTIONAL, ORGANISATIONAL TERMS, ETC.), THE FORM OF SUCH INTEGRATION (JOINT VENTURES, ALLIANCES, MERGERS, AGREEMENTS, ETC.) AND THE OVERALL IMPACT OF SUCH PROCESSES ON MEDIA PLURALISM.

### 1.1. General Market Integration And Pluralism

It is not only in traditional media that public interest goals without commercial value, such as impartial information gathering, may be defended and renewed<sup>7</sup>. The Consultation Results from the European Union *Convergence Green Paper* state<sup>8</sup>:

*There was particular attachment to the importance of standards in the development of the market for digital services having as their starting point today's digital television platforms. A recurrent theme of the comments received was the role of open European standards in promoting the development and growth of Information Society services by removing technical barriers to access and ensuring interoperability.*

The European Parliament's opinion goes much further towards mandating open standards for accessing public service broadcasters<sup>9</sup>:

*"must carry" obligations should be instituted for network operators...in respect of the programmes of public service programme providers, which should also apply to digital broadcasting and to user guide systems.*

**There is therefore a developing debate about ensuring open access to convergent services. Access in an encrypted environment is the most critical public interest issue. This report seeks to examine issues of access to digital multichannel services with the public interest in media pluralism as its guiding principle.**

**I examine in this section in brief** the development of digital television in market developments **to mid-1999, as revealed in member state responses to the Secretariat questionnaire [MM-S-PL (99) 8rev] and in other published sources.** In as dynamic an environment as digital television, it seeks to identify broad trends, rather than specific national markets, to aid the group<sup>10</sup> in its information gathering on the potential effect of digital markets on pluralism.

---

<sup>7</sup> As the Warsaw Pact nations excluded commercial communication from the west in the Cold War period

<sup>8</sup> COM (1999)108 EN Final Results of the Public Consultation on the Green Paper [www.ispo.cec.be/convergencecp/Com\(99\)108](http://www.ispo.cec.be/convergencecp/Com(99)108) at p8.

<sup>9</sup> Supra n.9 at p12.

<sup>10</sup> See Jacobowicz, K. [1999] MM-S-PL99(10) "The regulation of new communications technologies and services and the extent to which it promotes pluralism". Note the contributions to the pluralism debate made by Jacobowicz (1999) *Normative Models of Media and Journalism, and Broadcasting Regulation in Central and Eastern Europe* 1 International Journal of

In exploring the effect of the multi-channel environment on pluralism, it is first necessary to consider the variety of markets which the terms of reference lay out: a taxonomy in the form of a table is presented. Note that the effect of digitalisation is thus to weaken regulatory effectiveness due to spectrum constraint, rather than to fundamentally alter the relationship of licensee to regulator. Attempts to regulate the Internet face similar logistical problems to those when initially confronted with the ubiquity of consumer video recorders in the period around 1980<sup>11</sup>.

	NARROWBAND ANALOGUE		BROADBAND DIGITAL 'MULTI-CHANNEL'	
	CARRIAGE CONSTRAINT	REGULATORY VENUE	CARRIAGE CONSTRAINT	CONTENT REGULATION
<b>Cable</b>	STRONG	LOCAL	REMOVED	LOCAL
<b>Satellite</b>	WEAK	INTERNATIONAL	WEAKENED	INTERNATIONAL
<b>Terrestrial</b>	VERY STRONG	NATIONAL	STRONG	NATIONAL

Table 1.1: Regulatory Concerns and Stylised Television Distribution Technologies

Arguably, the difference is more fundamentally between free-to-air and subscription TV, rather than between analogue and digital environments. Convergence is exemplified by pay-TV, premium sports and film programming delivered via satellite and cable networks.<sup>12</sup> Pay-TV encompasses two broad markets, for:

- the technical means of securing payment (conditional access systems - CAS - which ensure payment from subscribers via the set-top decoder);
- the programming for which consumers will pay a premium (such as live football and movies).

In each case, a unique property is exclusively secured by corporations, subject to generic competition law, barring government intervention. This intervention can take two forms:

- structurally securing provision of networks and/or programmes in the public interest, either by ownership of the means of production (programming) and ex-

---

Communications Law and Policy 2, [http://www.digital-law.net/IJCLP/2\\_1999/ijclp\\_webdoc\\_12\\_2\\_1999.html](http://www.digital-law.net/IJCLP/2_1999/ijclp_webdoc_12_2_1999.html), considering the role of broadcasting regulators, journalistic autonomy, and the public service role. This article forms part of a special issue on journalism in Eastern Europe, edited by Stefaan Verhulst. Note also the contribution of Cavallin, J. (1998) *European Policies and Regulations on Media Concentration*, 1 International Journal of Communications Law and Policy 1 at [http://www.digital-law.net/IJCLP/1\\_1998/ijclp\\_webdoc\\_3\\_1\\_1998.html](http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_3_1_1998.html)

<sup>11</sup> Consumer penetration may be more rapid given the substantially lower cost of personal computers as compared with video recorders at a similar stage of market penetration.

<sup>12</sup> See further Cave, M. and Cowie, C. (1996) *Regulating Conditional Access in European Pay Broadcasting: Communications and Strategies*, No.23, 3rd quarter at 119

change (transmission and CAS), or licensing thereof via a specialized governmental agency;

- imposing legislative restrictions on the private exploitation of CAS and programming, by for instance 'unbundling' exclusive rights, or enforcing thSTB party access to CAS networks.

Herbert Ungerer of European Commission DGIV states:

*Since the mid-90s, the telecoms sector is undergoing a phase of rapid convergence with neighbouring sectors...attention is generally fixed on the convergence of telecoms and media...from a competition policy point of view, convergence must build on the development of a broad base of pro-competitive infrastructures of telecommunications and cable TV networks.<sup>13</sup>*

Within that context, it is necessary to briefly survey the inheritance of monopolistic telecoms and television provision in the Member States. There are three non-terrestrial spectrum video delivery networks: telecoms, satellite and cable systems:

- Telecoms remains a vertically integrated industry, primarily government-owned until this decade;<sup>14</sup>
- Cable systems, most widely developed in Benelux, Scandinavia, and Germany, were originally an alternative distribution platform for terrestrial channels.<sup>15</sup> The recent upgrading of cable systems and the building of fibre-optic networks has enabled cable operators to offer telephony and Internet access; telecoms networks will also be able to carry video;
- Satellite pay-TV is not a truly convergent network [unlike cable and telephony] in that it does not permit two-way communication.

The pay-TV market represents this convergence of telecoms and TV regulation. Digital compression will permit more efficient use of spectrum - more channels in less space in the ether - and *potentially* lower market entry barriers in the near future. It is a technological advance, which many exponents have presented as a paradigmatic, determinist 'revolutionary' policy choice. By unblocking the government-controlled transmission bottleneck, it has allowed strategic control of bottlenecks in the industry to move both upstream - to exclusive programming - and downstream to the household decoder box. The new European orthodoxy during the 1990s has been replacing government structural regulation (generally through ownership or licensing) by privatization of broadcast spectrum, cable and telephony networks. The introduction of digi-

---

<sup>13</sup> Ungerer, H. (1998) *Ensuring Efficient Access to Bottleneck Essential Facilities: The Case of Telecommunications in the European Union* - Competition Workshop, Florence 13/11/98, at 21, fn 45: <http://europa.eu.int/comm/dg04/speech/index98.htm>

<sup>14</sup> It remained under governmental control due to the high sunk costs, strategic importance and perceived monopolistic nature of the market.

<sup>15</sup> European public policy has explicitly encouraged cable build, through direct investment, state subsidy or deregulation.

tal television therefore creates additional bottleneck problems, some of which are addressed in Table 1.2.

STAGE	KEY FACILITY IN ANALOGUE TERRESTRIAL 'FREE-TO-AIR' TV	KEY FACILITY IN ANALOGUE PAY-TV	KEY FACILITY IN DIGITAL PAY-TV
Programming Rights – e.g. sport and movies	No – monopsony of terrestrial broadcasters	Yes	Yes (more than analogue)
Bundling of content into channels	No – licensed by government agency e.g. ITC in UK	No – limited channel capacity	Yes
Packaging multiple channels into 'bouquets'	No – broadcasters only allocated single channel	No – <b>subject to premium rights acquisition above</b>	No – <b>subject to premium rights acquisition above</b>
Transmission and delivery by Satellite and Cable <sup>16</sup>	No – transmission controlled by state agency	Yes	Yes (less than analogue)
Conditional access - CAS	No – Does not apply to 'free-to-air'	Yes	Yes (more than analogue)
Decoder box (consumer reception equipment)	No – Tax on TV Households; no equipment other than set	No	Yes (proprietary standards similar to Windows)

Table 1.2: Vertical decomposition of the TV industry<sup>17</sup>

Note that the bottlenecks in the vertical value chain in analogue pay-TV are exacerbated in digital. Both programming and CAS become greater problems in digital than transmission (which is no longer allocating scarce resources in the multichannel era). Multiple channels allow vertically integrated operators to acquire a monopoly of programming, which can then be 'bundled' in a 'bouquet' collection of channels, sold through a proprietary CAS. In this way, the premium programming,<sup>18</sup> such as live sports coverage, can be bundled together with more standard fare, the customer obliged to purchase the whole package because the premium program-

<sup>16</sup> Note the environmental restraints which apply to all distributional technologies – both terrestrial and satellite receiving apparatus is unsightly and may be banned in historically preserved areas, for instance parts of London and Amsterdam. Cable installation creates different and temporary environmental disturbance. Local environmental policy may ban one or more of these technologies, substituting a monopoly, which is generally in SMATV – multichannel provision to a single apartment building via cable. This situation pertains in many cities, for instance Stockholm.

<sup>17</sup> Adapted from Cowie, C. and Marsden (1999) *Convergence: Navigating Through Digital Pay-TV Bottlenecks* 1 Info 1 at 55. Flynn offers SIXTEEN separate bottlenecks in the transmission chain: Flynn, B. (1999) *Opening the Box: Issues in Digital Gatekeeping* in Montreux Symposium '99 of 10-15 June, Symposium Records pp698-706 at p699.

<sup>18</sup> Definition of premium programming is problematic. Williams and Cowie explain that economic analysis of substitutability in sports programming is particularly so. The definitional uncertainty of bottlenecks in the value chain is perhaps a symptom of the wider complexity of response to the issues arising in this dynamic market. Cowie, C. and Williams, Mark (1997) *The Economics of Sports Rights*, 21 Telecommunications Policy 7 at 619-634. For a legal viewpoint, see Goldberg, D. and Verhulst, S. (1997) *Legal Responses to Regulating the Changing Media in the United Kingdom* 8 Util L.R. at 12-22.



ming is exclusively contracted to this one operator. Alternatively, where the programme and channel bundler relies on a cable operator to reach customers, a stand-off may develop in which the cable operator refuses to accept the programmer's terms. Consumer welfare is the ultimate loser, as monopolist programmer and monopolist distributor refuse to provide each other with access to their respective bottlenecks. An alternative is that the dominant telecoms provider (telco) which generally also provides the dominant cable TV actor and broadcast transmission provider, leverages its dominance into new product markets domestically – as Internet service provider or digital pay-TV actor – or in cross-border mergers which will inevitably affect the broadcast market. A recent example is the merger of Telenor-Telia, though a similar merger between Deutsche Telekom and Telecom Italia was blocked by the European Commission, resulting in the merger of the latter with Olivetti. I consider the effect of some of these telco-pay-TV combinations (Spain, Netherlands, Germany, Italy, France) in Chapter 3, which examines the European Commission role in both cable TV and conditional access systems (CAS). A policy dilemma is in the hybrid nature of satellite and cable distribution; combining structurally regulated television and behaviourally regulated telecoms. The European Union has generally ceded jurisdiction in pay-TV networks thus far to member states. Under a convergence model, both national and regional regulatory structures should eventually be replaced by a competition-based approach. This legal patchwork remains a complex and piecemeal means of arriving at a pluralistic solution within convergent communications networks.

## 1.2. Introduction to Markets

The state of development of digital television (terrestrial, satellite or cable) in Europe and its impact on pluralism in the television sector.

First, note that the degree of multichannel penetration (though the household figures mask different network capabilities even within national markets) is typically low in Council of Europe territories<sup>19</sup>. Therefore, a combination of terrestrial, cable and satellite avenues to households may be expected to develop under competitive conditions. A combination of programming and technical bottlenecks is the greatest obstacle to such competitive conditions, based on European Commission DGIV analysis. The analysis presented here is therefore generic, rather than specific, and is likely to be of greatest utility to policy-makers in developing multi-channel environments, rather than in highly mature cable-dominated markets. These developing multi-channel environments are found in Western, Southern and Eastern Europe, rather than the territories considered in the Guthus Report, Benelux, Scandinavia and German-speaking territories. Therefore, the most advanced market and regulatory structures in these developing environments may inform regulators in other such territories.

---

<sup>19</sup> An approximate definition of 'multichannel' for the purposes of this survey is a bandwidth of 20 video channels. Spectrum or bandwidth restrictions are somewhat alleviated as networks approach this arbitrary figure. The figure allows for a distinction to be made between analogue and digital terrestrial television (DTT), and between basic terrestrial and all pay-TV, as over thirty channels are available to DTT premium subscribers.

A characteristic of smaller developing multichannel markets is dependence on foreign investment, more especially in the pay-TV market<sup>20</sup>. This is true of eastern and southern European markets, but also of the UK and Ireland. Digital pay-TV foreign investment is predominantly from the United States (notably HBO) or the 'big three' pay-TV actors in western Europe: BSkyB, Canal Plus, and Kirch Gruppe. Cable foreign investment is predominantly from the United States, especially Media One (soon to become part of AT&T should the proposed merger be approved) and United International Holdings. In terrestrial TV, foreign investment is restricted to the operations of CLT-Ufa<sup>21</sup>, Mediaset and Central European Media Enterprises<sup>22</sup>. There are various 'flag of convenience' operations based in London, largely aimed at Scandinavian markets, but the foreign investment nature is somewhat mythical, a feature of regulatory arbitrage rather than production strategy. Continuing attention to this jurisdictional factor is undertaken by the Standing Committee on the Council of Europe Convention on Transfrontier Television<sup>23</sup>

	<b>TV Households</b>	<b>Basic Cable</b>	<b>DTH Satellite</b>	<b>Terrestrial</b>
<b>Western Europe</b>	142.7m	29% [40.6m]	6% [8.6m]	65% [93.5m]
<b>Eastern Europe</b>	92.1m	15% [14.0m]	6% [5.8m]	79% [72.3m]

Table 1.3. Multi-channel Households in Western and Eastern Europe End-1997

### 1.3. Continuing Dominance of Analogue

Within this broad picture, there are huge differences: the UK had 4.0m [17%] DTH subscribers and 2.4m [10%] basic cable, whereas Romania had 2.75m [37%] basic cable and 400,000 [5.4%] DTH subscribers. Italy and Russia's cable and satellite markets are largely undeveloped and growing rapidly, whereas Belgium, Holland, and Switzerland are almost entirely cable subscribers. In viewership, the dominance of analogue terrestrial is even more marked. In the year April 1998-March 1999, non-terrestrial channels received only 13% of UK viewing hours, Sky Television 5.0%, with BBC (40.2%), ITV (31.9%) and Channel 4 (10.2%) the dominant source of television. There is no apparent case for abandoning pluralism rules over the dominant channels, in which the government supplies, through BBC, Channel 4 and S4C, 50.4% of all viewership. The current UK environment continues to be dominated by public service channels, which is also the case in France with TF1. This dominance of free-to-air channels is perhaps particu-

<sup>20</sup> Data taken from *Kagan's European Cable/PayTV Databook 1998*, Kagan World Media, London (March 1998). My thanks are due to Kieron Kilbride for supplying the data.

<sup>21</sup> The RTL brand owned by CLT-Ufa, a Luxembourg-German combine and subsidiary of Bertelsmann GmbH, operates in France, Benelux and Germany. Mediaset, a subsidiary of Italian Fininvest, operates in France and Spain.

<sup>22</sup> Estee Lauder heir Ron Lauder controls CME (Central European Media Enterprises), which operates terrestrial licences in the Czech Republic, Slovakia, Slovenia, Romania, Poland and Ukraine. See "Nova TV: licensed to print money" *Financial Times* 3 September 1997. Czech station Nova's operating profit in the first half of 1997 was over \$20 million.

<sup>23</sup> As amended by the 1998 protocol: see DH-MM(98)8 at pp62-65, and Chapter VI of the consolidated text.

larly exaggerated in the UK and France, which – with Italy and Spain – have the weakest and the least attractive cable sectors in western Europe. These ‘late adopter’ countries are unusual in that subscription to cable lags at under 25% of homes passed. In the rest of Europe, west (63-98%) and east (30-69%), households offered cable more usually accept. Unsurprisingly, these four countries – and Portugal – have hugely underdeveloped cable markets, with only 1.7-10% of homes subscribing. In contrast, all other Western European countries have 40-95% subscribers; and Eastern Europe substantially above the ‘late adopter’ rates.

#### 1.4. Formation of Digital Television in Western Europe

European digital television began in 1996 in France, Germany and Italy. Digital terrestrial television began in November 1998 in the UK. Half of all Western European digital multichannel households in 2006 are predicted to be in the UK and Germany alone, and 84% in those countries, France, Spain and Italy. However, at end-1997, only 1.91m satellite and 334,000 cable households were digital. Predicting market growth is difficult with the market predicted to have more than doubled in 1998. In the UK, where digital satellite [SkyDigital] and terrestrial [ON-Digital] launched in autumn 1998 (cable is not available until autumn 1999), significantly over 2,000,000 customers are claimed by end-1999<sup>24</sup>. From the weekend of 30 May 1999, the companies began a free set-top box offer. The market is obviously highly unstable and rapidly growing, with increasing growth predicted with the marketing of integrated digital televisions for ON-Digital from late summer at under £300 (460 Euros), and analogue switch-off for BSkyB’s 4m existing customers in 2002. However, it does demonstrate that a single large European country can achieve 2,000,000 households (10%) penetration in under a year, resulting from competitive subsidy of set-top boxes.

In Western Europe, most advanced markets are expected to achieve rapid digital penetration. At end-2006, digital multichannel penetration rates in Western European households are predicted by Kagan Media to reach from 11.1% in Austria to 34.7% in Belgium, with a total of 38.9m households subscribing, 15.4% of the total. This is a significant figure, but not when compared to the perhaps optimistic predictions of UK digital operators, who predict 12m (50%) households will subscribe to satellite, cable or terrestrial digital television by 2003. Kagan predicts a more modest 8.45m<sup>25</sup>. IDATE predicts 13million digital households in 2005. At end 1997, five Eastern European countries were served by subscription pay television services: Hungary, Czech Republic, Poland, the Slovak Republic and Latvia. Latvia’s service was local, all other markets being served by HBO (which planned to start a Romanian service in January 1998), and Poland additionally by Canal Plus. The French terrestrial pay-TV broadcaster, Canal

---

<sup>24</sup> ONDigital November 1998 launch 110,000; BSkyB October launch 551,000 subscribers to end-March. <http://news.bbc.co.uk/1/hi/english/business/the%5Fcompany%5Ffile/newsid%5F351000/351585.stm>

<sup>25</sup> It should be borne in mind that Zenith Media hugely over-estimated the UK penetration of analogue satellite services in the late 1980s. The prediction of penetration of these ‘virtual’ network industries is notoriously unreliable, as consumer interest to a large extent depends on a bandwagon or tipping effect, in which a critical mass or momentum develops. This applies equally to many communications devices, especially e-mail and interactive applications, such as mobile telephones.

Plus, had significant cable and satellite pay-TV operations in ten European countries by end-1997.

The conclusions are draft and tentative, as the market is in a state of dynamism which is akin to turmoil. Mergers are taking place almost daily, examples include the purchase of German cable network Telecombus by the power utilities RWE and Veba on 27 May 1999<sup>26</sup>. Further examples include the merger of Telenor and Telia, respectively the dominant telcos in Norway and Sweden, which affects telecom, cable, satellite and online/Internet markets in both countries, and therefore access to communications services.

A trend emerging is that European markets can be stylised and grouped as:

- [1] Cable-Mature;
- [2] Dynamic-Multiplatform; and
- [3] Late-Adopter.

Even within nations and even within cities, however, there are broad divergences between affluent and low-income groups. Crudely, the Benelux, German-speaking and Scandinavian markets form the first group, together with metropolitan areas in other parts of the region; Western and Southern Europe (the British Isles, Iberia, France and Italy) and parts of Central-Eastern Europe form the second group; while Eastern and South-Eastern Europe, together with poorer, often agricultural regions from the first two groups form the thSTB. The high level of cable penetration and thus distributional dominance in the first group is unlikely to pertain to the other groups in the medium term (5-10 years). However, there may be similarities in development between the second and thSTB groups, where there is competition between cable and satellite multi-channel penetration, with digital terrestrial also of potential importance.

In practice, it is the UK digital terrestrial<sup>27</sup> and French satellite environments which inform the debate, in market development, regulatory activity and the ownership regime.

- Both countries have analogue pay-TV operations across all platforms, and rapidly growing digital pay-TV operations.
- France has competition *within* the satellite platform, the UK competition *between* terrestrial and satellite platforms.
- The number of digital households in the UK will exceed 2,000,000 by the end of 1999, and French numbers are similar - greater than in any other country.
- For other Council of Europe members, these markets – despite their uncommon size and wealth – are indicative models because of their competition between platforms and relatively under-developed cable sector.

---

<sup>26</sup> 'Deutsche Bank kauft TV-Kabel', TKR Newsletter Communications News of 31 May 1999.

<sup>27</sup> As noted by Finnish and Norwegian experts, the UK regulatory environment is unique in its early adoption of digital terrestrial broadcasting. Though this provides a useful functioning model, other jurisdictions would do well to also learn from the problems the UK regime faces, particularly in institutional co-ordination and ownership points-based systems.

- Further, the European Commission considers the UK regulation of telecoms and cable networks, and of conditional access, to be a model for wider implementation.
- The UK media ownership regime adopted in the 1996 Broadcasting Act is considered a model for the European Commission draft directive, the Council of Europe Recommendation No.R(99)1, and national legislation such as the 1997 Media Act in Germany<sup>28</sup>.

I must reiterate that a comparison of 41 national markets is fraught with dangerous generalisations and simplification in an attempt to identify general trends, especially where only 14 detailed questionnaires were returned **prior to drafting deadline for the final report**. This statistical survey should therefore be viewed as a snapshot frozen in time in the statistics generally available in summer 1999, rather than any more authoritative analysis.

---

<sup>28</sup> I am grateful to Adjunct Professor Ad van Loon and Professor Dr Bernd Holznagel, as well as Commission officials, for this insight. See further the panel session, 'Media Pluralism and Democracy', at the conference 'Communications Regulation in the Global Information Society' Scarman House, University of Warwick, UK, 3-5 June 1999.

## 2. Ownership Controls on Broadcasting

[1] WHETHER THE ADAPTATION OR REVISION OF TRADITIONAL MEDIA OWNERSHIP RESTRICTIONS (IN PARTICULAR THOSE BASED ON CAPITAL SHARE RESTRICTIONS OR ON THE NUMBER OF LICENCES HELD BY AN OPERATOR) TO DIGITAL BROADCASTING SERVICES WOULD BE FEASIBLE,

[2] AND IF SO, WHETHER CRITERIA BASED ON THE AUDIENCE SHARE OF AN OPERATOR OR OTHER POSSIBLE CRITERIA WOULD BE THE MOST ADEQUATE FOR THE DIGITAL BROADCASTING ENVIRONMENT.

### 2.1. Pluralism and Multi-channel Capacity

The regulatory advantage inherent in the abundant capacity forecast in the digital environment, is that the inequalities in consumer access to programming evident in the analogue environment may be somewhat redressed, with a commensurate increase in the social responsibilities which may be required of market actors. The removal of spectrum constraint offers increased commercial and public service possibilities. Should both result, an increase in pluralism may be predicted. However, this will not occur without regulatory design and prospectively intervention, with attention given to consumer access to diverse programming in an encrypted 'user pays' environment increasingly substituting for ownership and content controls<sup>29</sup>.

Such a design may be expected to invoke contractual constraints on market actors, rather than audience or licence equity limits. As viewer choice increases, government licensing of media outlets liberalises, and in consequence audience will fragment. While it would be premature to suggest any deregulation in analogue pluralism controls<sup>30</sup>, it will be necessary in the digital environment to replace structural with behavioural regulation<sup>31</sup>. Regulation should encourage access to more voices in the mass media, rather than limiting any one player's voice. However, whereas commercial actors frequently reach the same conclusions as outlined above, their proposals suggest a pluralism based on [liberalising] ownership limits, rather than the multifaceted mechanism I will suggest. A combination of three factors is necessary to secure maximum **external** diversity of voice<sup>32</sup>:

- **Commercial** ownership diversity;

---

<sup>29</sup> See T. Gibbons and A. van Loon supra n. 21.

<sup>30</sup> Here I agree fully with the analysis of Prosser, Goldberg and Verhulst (1996) *Consultant Study on the impact of new communications technologies on media concentrations and pluralism*, MM-CM(96)3 def, Council of Europe, Strasbourg, 26 August at s.5.2.3.

<sup>31</sup> Here I develop the final point in the conclusion to Prosser et al (1996).

<sup>32</sup> The second – a form of public service broadcasting in its ideal form - conforms to the Council of Europe analysis of diversity of media types and contents, as well as a partial solution to the requirement that diverse segments of the population be capable of addressing the public. See Prosser, et al (1996) at section 4.

- 'reinvention' of public service broadcasting to encompass viewer access to public service programming across all delivery mechanisms;
- access to bottleneck facilities within media organisations.

Commercial actors' proposals generally focus on the first factor, while suggesting anti-competitive results from the second, and generally avoiding mention of the thSTB<sup>33</sup>. Failure to unbundle the three factors, to consider the effect of each on the goal of diversity, results in blunt and unresponsive regulatory action, with maximum potential for regulatory capture, and confusion of the public interest with the broadcast settlement, and that of protection of pluralism of ownership with that of funding the special interests of the incumbents. I examine the case of the United States in cable television development in the 1970s.

I therefore briefly outline each factor in turn, before examining case studies in increasingly sophisticated understanding of pluralism in the digital environment. I then go on to consider ownership diversity. In following sections, I consider must-carry as a dimension of the reinvention of public service, internal pluralism as a version of the technical bottleneck issue, and a partial solution to pluralism in the digital age as access to impartial information. I aim to address more specifically the critical regulatory issues raised by Prosser et al (1996) in their conclusion: What to regulate? Why regulate? Where to regulate? When to regulate? How to regulate?

## 2.2. Pluralism and Ownership Diversity

CAVALLIN AND DOYLE<sup>34</sup> HAVE RECENTLY SURVEYED ANALOGUE MEDIA REGULATION. CAVALLIN STATES<sup>35</sup>:

*"A number of countries have quantitative restrictions to media control based on:*

- o *the number of channels (Italy, Portugal, Spain, Sweden),*
- o *the share of audience (UK, Germany, France),*
- o *the share of circulation or absolute circulation in the press sector (France, UK),*
- o *the share of foreign holdings (Poland), and*
- o *the shares held in one channel (Norway), or*

---

<sup>33</sup> See Doyle, G. (1999) *Convergence: 'A unique opportunity to evolve in previously unthought-of ways' or a hoax?* Chapter 5 in Marsden, C. and Verhulst, S. *Convergence in European Digital TV Regulation*, London: Blackstone. See also Doyle, G (1998) *Media Consolidation in Europe: The Impact on Pluralism*, Study prepared on behalf on the Committee of Experts on Media Concentrations and Pluralism, MM-CM (97) 12, Directorate of Human Rights, Council of Europe; Doyle, G. (1997) *From 'Pluralism' to 'Ownership': Europe's Emergent Policy on Media Concentrations Navigates the Doldrums* 3 *The Journal Of Information Law And Technology (JILT)* [http://elj.warwick.ac.uk/jilt/commsreg/97\\_3doyl/](http://elj.warwick.ac.uk/jilt/commsreg/97_3doyl/). See further Marsden, C. (1999) *Regulating Media Owners in Digital Television: Lessons from UK Policy Formation*, 17 *Cardozo Arts & Entertainment Law Journal* 3 at 659. This forms part of a special issue devoted to media ownership policy in the UK and European Union.

<sup>34</sup> Doyle (1997) for the Committee of Experts, supra n.34, whose summary of press ownership is particularly noted – constraints on subject matter prevent further analysis of this sector.

<sup>35</sup> Supra n.7 at section 4.2.

- *the right to vote (Sweden).*”

This analogue environment is however viewed as resulting in a protectionist response to new media, which is a reflection of the position in the more developed multichannel environment in the United States. Cavallin aptly describes “German media researcher Gerd Kopper's rather cynical description of the relationship between the political sphere, legislation and the media as a ‘drama of expectations’ might to a great degree be confirmed by the experience of existing legislation”. I would also place the UK media ownership regime under the 1996 Broadcasting Act in this classification<sup>36</sup> - while German legal commentators have described their 1997 ownership regime as a similar process<sup>37</sup>. This renewed emphasis on protection of dominant media interests should be seen in the context of long-standing capture of policy-makers. Humphreys describes it as ‘little more than symbolic politics’<sup>38</sup>.

In view of this common distrust of policy-makers’ intentions towards ownership limits, it is submitted that behavioural control may prove more effective than extending structural regulation. Continuing attempts to nuance, tier, rank and hybridise ownership limits are in this consultant’s view valiant but futile in the face of policy capture by commercial media actors<sup>39</sup>. Case studies indicate this.

### **2.2.1. US Case Study in ‘Unbundled’ Pluralism in the Multichannel Environment**

The experience of the United States in the 1970s, a period in which the media regulator viewed the ‘public interest, convenience and necessity’ as all but synonymous with that of its terrestrial network regulatees, produced an unfortunate combination of the three factors. Maintenance of ownership diversity became enmeshed in the provision of public service broadcasting with commercial funding, with a resulting defence of commercial regulatees to the exclusion of market entrants in the cable and satellite sectors. Internal pluralism was identified as satisfied by the token provision of gender and race appointments to the boards of licensees<sup>40</sup>. Exclusive premium programming (sports events) was denied to cable operators by the ‘anti-siphoning’ regulation of that period. The United States experience in the 1970s is a cautionary tale of reaction to market entry by protection of incumbents. In Chapter 3, I outline regulatory measures

---

<sup>36</sup> Marsden supra n.34.

<sup>37</sup> See Grunwald and Bender in June Warwick conference supra n.29, and Koenig, Christian and Ernst Röder (1998) *Converging Communications, Diverging Regulators? - Germany's Constitutional Duplication in Internet Governance*, 1 International Journal of Communications Law and Policy 1 at [http://www.digitallaw.net/IJCLP/final/current/ijclp\\_webdoc\\_1\\_1\\_1998.html](http://www.digitallaw.net/IJCLP/final/current/ijclp_webdoc_1_1_1998.html)

<sup>38</sup> Humphreys, P. (1997) *Power and Control in the New Media*, presented at ECPR Workshop, Manchester, University of Manchester, at 18. See Doyle (1998) supra n.34 at 39, nevertheless attempting to suggest a tiered scheme for ownership control, based on the now-discredited UK media exchange rate.

<sup>39</sup> See Doyle n.34 and Thomas A. (1999) *Regulation Of Broadcasting In The Digital Age: What impact will digital technology have on broadcasting and communications industries and how should regulation adapt to the new environment?* Released 26 May at <http://www.culture.gov.uk/thomastitle.htm> at s.3

<sup>40</sup> See (1999) special issue of Federal Communications Law Journal: Vol.51, No.3, *New Approaches to Minority Media Ownership*, May.



taken in the 1990s which were more platform neutral, and through which cable penetration is now 60-70% and digital satellite penetration over 10million households in summer 1999.

### **2.2.2. UK Case Study in 'Unbundled' Pluralism in the Multichannel Environment**

In the 1980s, a market-driven, and similarly unsatisfactory, approach was taken in the United Kingdom. Market entry by cable and satellite operators was delayed from the start of the decade by capital crises for domestic players, as a result of which foreign investors 'rescued' the industries, following the provisions of the 1990 Broadcast Act, in exchange for a largely deregulated environment. Though this has resulted in a rapid build of multichannel infrastructure, as compared for instance with Spain, France or Italy which sought domestic solutions, it has denied the pluralism which community regulation has brought to other national markets. The community channel obligation in the cable operators licenses awarded in 1984-6 has never been enforced, though there is some evidence of local news provision, offered in joint ventures with the local newspaper groups in, for instance, Liverpool. The regulatory environment proved so attractive to foreign investors that the government was forced to grant parallel deregulatory treatment to the indigenous market, which was liberalised in two stages, in 1994 regulations and the 1996 Broadcasting Act. As a result, programme quality has been eroded, and ownership restrictions in England have been relaxed in what an industry commentator has compared to a late imperial 'scramble for Africa', which has partially dismantled the former ITV Channel 3 system. Doyle describes the "extravagant claims" of media owners of the benefits of cross-media liberalisation in the traditional analogue media, and the "selective gullibility" of government responses to these claims. Van Loon concludes that the political process has created a "bankruptcy of the system of media ownership regulation" from the UK and German examples<sup>41</sup>. He does, however, hold out the hope that a European Union directive will finally be enacted, though Gibbons and Doyle discount the possibility as unlikely<sup>42</sup>.

### **2.2.3. Ownership Control Through Viewership Limits: UK-German Case Studies**

The difficulty in maintaining analogue restrictions on either licences or share of voice is that governments are increasingly economically challenged by their media corporations to permit liberalisation, in order to foster competitiveness in the deployment of Information Society applications. Given this new paradigm, of which regulators are wary but which politicians embrace, the potential for maintaining even current levels of a specialist media ownership regime are tenuous in the extreme. In the UK, the 15% overall ownership limit on viewership – considered by many observers a model law when passed in 1996 – allows for concentration equal to ownership of both Channel 4 and Channel 5, and regional cross-media concentration of unprecedented levels, such that competition concerns are routinely triggered before pluralism thresholds are reached. This is due to the comprehensive ownership including government-owned services, which as earlier indicated make up over half the audience share. The digital

---

<sup>41</sup> Both at n.29.

<sup>42</sup> Ibid.

points system, which intended to transfer pluralism control to the digital environment, has also proved inadequate for both television and radio services<sup>43</sup>.

This abandonment of faith in viewership limits as the primary means of controlling dominance does not lead to the conclusion that such limits should be abolished. Grunwald explains that the 1996 UK, and 1997 German, reforms took a view of the entire media market, in an attempt to encourage cross-media synergies and convergences<sup>44</sup>. Such horizontal integration between, for example, newspaper and television interests, was the intent of the reforms, with the maintenance of overall pluralism by these viewership or consumption limits. However, it rapidly became apparent that companies sought continued and increased domination of traditional sectoral markets (for example commercial analogue free-to-air television), or control of access bottlenecks, such as premium pay-TV events (for example the various Bertelsmann/Kirch/DTelekom activities in the German market). Thus, while a well-intentioned experiment, the attempt to provide a cross-media market viewership or consumption limit has proved inadequate. It must be stressed that traditional controls are therefore necessary but not sufficient to maintain pluralism. Both traditional controls and increased scrutiny of bottlenecks in digital services are required.

### 2.3. Case Study: Digital Terrestrial Television Licences<sup>45</sup>

Far more important has been control of what one might term 'vertical pluralism' – gateways, and maintenance of security of premium programming. With vertical disintegration of the value chain for terrestrial actors, the abandonment of the publisher-broadcaster model has led to programming and technical bottlenecks, with the intermediary between broadcaster and audience transferred from licensing authority to private multi-channel operator. As I explore in Chapters 4 & 5, it is gateways not viewers, which increasingly exercise communications regulators. The primary motivation is competition, but pluralism is clearly related to this concern. Without means of access to consumers, public service programming is futile.

In this regard, the award of digital terrestrial multiplexes in the UK is instrumental. The preferred bidder, British Digital Broadcasting – which was opposed only by a US cable operator – consisted of the two biggest of the new ITV holding companies, Carlton and Granada, and the pay-TV dominant operator Sky. In order to meet both competition and pluralism concerns (the former a helpful justification for the latter), the ITC chose to eliminate Sky from the venture, by imposing a condition that the Articles of Association of the joint venture be amended. It also required the insertion of a clause ensuring separation of boards of directors of the terres-

---

<sup>43</sup> See Statutory Instrument 1998 No. 3196; *The Television Broadcasting Regulations 1998*. Also: DCMS 275/98 of 13 November 1998, *New DTT Points System Comes Into Effect Tomorrow*, at <http://www.worldserver.pipex.com/coi/depts/GHE/coi8061e.ok>; DCMS 293/98 of 26 November 1998, *Government Seeks Views On Relaxing Digital Radio Licence Ownership* at <http://www.worldserver.pipex.com/coi/depts/GHE/coi8524e.ok>

<sup>44</sup> Supra n.29.

<sup>45</sup> Note that Sweden began experimental DTT broadcasting in early 1999 – see expert's report.

trial joint venture, ONDigital as it was now renamed, and the Sky-Granada satellite joint venture, GSkyB [sic]. Further, it required Sky to guarantee supply of its premium programming for a period of five years. In this way, it recognised three separate forms of influence:

- *contractual through the joint venture,*
- *management in the composition of boards of directors, and*
- *through controls of upstream bottlenecks, in programming.*

The Office of Telecommunications (OfTel) suggested that, despite this three-fold combination of factors, Sky could still control the venture through its *control of technical bottlenecks in the API and EPG*. In Chapter 4 below, I demonstrate that OfTel and ITC have carefully scrutinized this bottleneck, and that evidence of abuse is so far lacking. (For details of the UK DTT allocation, see Appendix 1).

The allocation of digital terrestrial licences in other Council of Europe member states in which commercial marketing is imminent – Norway, Sweden, Switzerland, Netherlands, Finland, from correspondents' reports – has also followed this pattern of established analogue terrestrial broadcasters simulcasting on digital frequencies. Given the economies of scope in simulcasting, and the enormous investment required in smaller markets than the UK in order to recover the initial investment, it appears doubtful whether more actors will be given a voice in DTT. More likely is that, as in the UK, Sweden and Germany, public service broadcasters will be the first to exploit the opportunity to better service their audience, where resources allow. It is unfortunate that questionnaire responses from large European markets including Germany, France, Spain and Italy were not received, as these would have allowed a more definitive prediction than press reports.

The 'guarantee' of DTT success at the expense of competition in the market and the imperative of shareholder support in a globalizing landscape has rapidly eroded real diversity of ownership. The globalization of delivery, aided by the growing ubiquity of the American version of the English language, have demoted municipal regulation to a second-order concern. The primary threat to pluralism and competition in an increasingly converging market of computing, telecoms and television, is not a media bogeyman such as Murdoch, but a digital bottleneck gatekeeper<sup>46</sup>, such as Bill Gates, as examined in Chapter 4.

The early European digital experience is thus mixed, in ownership control and competition regulation, of foreign-owned multichannel distribution and oligopolised domestic media (a hybrid of these two forms is the ownership of UK Channel 5, the new national commercial channel first broadcast in 1997<sup>47</sup>). Any apparent 'national championing' is offset by the support which was offered to public service broadcasting through public funds, and the continuing regu-

---

<sup>46</sup> See Cowie and Marsden (1999) *Convergence: Navigating Through Digital Pay-TV Bottlenecks* in 1 *Info* 1, Camford Publishing, February. Note bottlenecks are not necessarily essential facilities.

<sup>47</sup> See Marsden, C. (1996) *Judicial Review of the Channel 5 TV Licence Award: ITC Exercises Model Care*, 5 *Nottingham Law Journal* 1 at 86-91

lation to ensure pluralism and diversity within the newly formed domestic holding companies. First, the UK tax on television households to support the BBC has been increased in the transition to digital broadcasting<sup>48</sup>. Further, BBC, the ITC and Carlton Television successfully lobbied for digital terrestrial television to be introduced rapidly, a further outcome of the 1996 Broadcasting Act. Finally, the 1996 Act and associated BBC Charter contain provisions, which increase the transparency of both the BBC commercial activities and the enforcement of individual licence obligations on the ITV companies. I consider below the 'reinvention' of **pubcasters**, which this allows (Section 2.4), and the effect of maintaining a form of 'internal pluralism' within **programming platforms** (Section 2.5).

#### 2.4. Reinvention of Pubcasters<sup>49</sup>

BBC research has identified three distinct **pubcaster** groups, based on their broad strategies, closely linked to the method and extent of their funding.

- focus on distinctiveness over market share (e.g., PBS in America, the Australian **SBS**)
- focus on market share over distinctiveness (e.g., RAI in Italy, RTVE in Spain)
- form of equilibrium between the two (e.g., SVT in Sweden, ARD in Germany)<sup>50</sup>.

The BBC, as a self-avowed equilibrium broadcaster – the distinction reflecting the relatively generous non-commercial funding settlement – has set out to 're-invent' itself for digital broadcasting, using its analogue leverage<sup>51</sup>. It is not coincidental that the other **pubcasters** to introduce new digital services are also equilibrium broadcasters, SVT and ARD.

**In the UK, the Davies Committee has reported to the Secretary for State for Media, that BBC licence fee income should be supplemented by a 24pound digital household fee, upon which government is expected to judge by the end of 1999. In exploring new commercial income,** BBC has formed a joint venture with private US-controlled broadcaster Flextech to supply programming across all platforms; a joint venture in the US market with Discovery Communications; launched BBC News 24, a rolling news service considered further below; and from March 1998 BBC Online, which is now the most popular website in Europe. I consider pubcaster access to pay-TV platforms in the succeeding chapters, in terms of 'must-

---

<sup>48</sup> DCMS 310/98of 15 December 1998 *Television Licence Fee Will Rise According To Five Year Formula* at: <http://www.worldserver.pipex.com/coi/depts/GHE/coi9310e.ok>

<sup>49</sup> See Graham, A. (1999) 'Broadcasting Policy on the Multimedia Age' in Graham et al, *Public Purposes in Broadcasting: Funding the BBC*, University of Luton Press.

<sup>50</sup> See 19th May 1999 *BBC Publishes Tough New Fair Trading Policy* at <http://www.bbc.co.uk/info/news/news165.htm> . See also 23rd February 1999, *The BBC: A Licence to Broadcast* by Sir Christopher Bland, Chairman, BBC Board of Governors, based on BBC commissioned study of twenty broadcasting markets on four continents, focusing particularly on the position of Public Service Broadcasters, to Royal Television Society, at <http://www.bbc.co.uk/info/news/news154.htm>

<sup>51</sup> See *BBC Commercial Policy Guidelines 1999* at [http://www.bbc.co.uk/info/commercial/comm\\_policy.pdf](http://www.bbc.co.uk/info/commercial/comm_policy.pdf)

carry' (with a case study of ARD-ZDF in Germany), of access to technical bottlenecks, and of access to Internet browsers.

## 2.5. Access Within Digital Pay-TV Operators Bouquets and Dominant Channels<sup>52</sup>

There is therefore an argument for 'unpacking' the black box of the firm, especially where the vertically integrated operator controls bottlenecks at various stages of the value chain.

- Aspects of the UK evolution to a multichannel environment are especially pertinent to this study: the increasingly sophisticated understanding of pluralism within the operation of a vertically integrated digital broadcaster displayed by UK and European regulators<sup>53</sup>; and the relative failure of the attempt to introduce a comprehensive ownership regime across all media<sup>54</sup>, and to extend this regime into the digital environment, which I examine further in the case of programming and navigation in Chapters 3 & 4.
- Cavallin explains that "the tradition of establishing an agreement between the owner and the journalists on the independence of the editorial staff from the owner exists in several countries (such as Austria, Belgium, Germany, Norway)." While such a model is desirable, it appears a result of the national political dynamic, rather than supranational regulation.
- Within the organisational framework, the possibility of the broadcaster-publisher model retains some support. In this model, the controller of channel packaging and distribution sub-contracts either channel management as a whole, or programming strands within that channel, to independent producers. This introduces a type of 'inset competition', in which producers compete for limited distribution slots, but it is a competition determined by the commissioning producers, rather than an inset pluralism determined in the public interest (though arguably this latter description applies to public service broadcasting commissions from independent producers).
- It has proved highly problematic in the UK, where all terrestrial channels are legally obliged to commission a proportion of independent programming, and was expressly disavowed by the successful bidders for the DTT multiplex, who explained that competition in the market was a feature of 'platform wars' with satellite, not inset competition on any one platform.

---

<sup>52</sup> For an analogue view of internal pluralism, see contributions to Danish Media Committee (1995) *Media Concentration: Transparency, Pluralism and Access*, The Report of the Danish Media Committee's International Hearing on Media Concentration, 12-13 June 1995

<sup>53</sup> See Marsden, C. (1997) *Many Channels, Few Voices: Competition in the multiplex bids* 25 *Intermedia* 2 at 19-21, Institute of International Communications, London, and further Marsden, C. (1999) *Judicial Review of UK Terrestrial Commercial TV Licensing* 10 *Utilities Law Review* 3.

<sup>54</sup> Marsden (1999)supra n.34.

- Such a vertically integrated approach removes an element of diversity of voice from within organisations, leading to the fear of ‘many channels, few voices’<sup>55</sup>.
- The German media law of 1997 contains a provision to allow ‘programme windows’, where any one channel exceeds viewership limits. This is an interesting regulatory tool, but is likely to be less applicable in the more fragmented digital and multichannel environment.
- It is thus more likely that some form of ‘must-carry’ of independent channels will be the avenue to diversity on the digital platforms.
- It is encouraging in this respect, that cable and satellite channels devoted to racial, sexual and linguistic minorities<sup>56</sup> are flourishing in the multi-channel environment.
- The following Chapter 3 explores comparative ‘must carry’ legislation and its implications for regulating channel contracting.

---

<sup>55</sup> See Marsden (1997) *supra* n.69.

<sup>56</sup> Even sexual minorities, with the carriage of a community homosexual channel on A2000.

### 3. “Must Carry” Rules on Broadcasting

WOULD THE EXTENSION OF TRADITIONAL “MUST CARRY” RULES TO NEW DISTRIBUTION MEANS, SUCH AS DIGITAL SATELLITE BROADCASTING PLATFORMS BE FEASIBLE?

#### 3.1. ‘Must Carry’ and Public Service: An Example of Pluralism Through Access

The proliferation of delivery networks, and especially the development of pay-TV networks owned by private groups, has fragmented universal coverage, which is a basic tenet of the public service element of pluralism. While consumers benefit from a choice of platforms, it is generally the case that each household selects a single technology to deliver all programming. As cable delivery has replaced terrestrial aerial in many metropolitan areas, national authorities or local municipalities have required the cable operator to carry nominated public service channels, supplying an unencrypted diversity of opinion over the cable bouquet. This method has been transferred into digital terrestrial in the UK, with regulation allocating multiplexes to public service programmers, which are obliged to broadcast their analogue public service channels on digital. It may be anticipated that a similar regulatory settlement is introduced in other member states, as it has been in the United States digital terrestrial allocation.

Leaving to one side the issue of digital cable and terrestrial allocation, which can be expected to result from national regulation, there is a further, transfrontier issue of digital satellite networks. Should these networks be required to carry public service channels? As the jurisdictional issue has been resolved, solutions to the question of whose public service channel channels (i.e. the nationality) is a practical matter. In principle, two related questions arise. *Should the ‘must carry’ provision extend to all delivery networks, including satellite? The alternate issue is: should public service broadcasters be compulsorily licensed to satellite programme bouquets, and vice versa? In other words, is there a broad public interest in provision of programming to a broad public?* A further issue does arise, which is addressed in the following chapter on EPGs and bottlenecks, which is whether both compulsory carriage and due prominence be assured, to ensure that viewers can find the public service channels on the bouquet.

The proportionality of ‘must carry’ and compulsory carriage will depend on the channel capacity of the system, but this is a negligible difficulty for digital satellite, where hundreds of channels may be carried. The availability of abundant spectrum allows for ‘must carry’ provision, though regulators should note the ludicrous suggestion that United States digital satellite operators carry all terrestrial public service channels within their ‘footprint’, a total of approximately 1600 across the continental United States.

The capacity of digital satellite is such that a lower limit is increasingly physically transmittable. New satellite technology permits ‘spot beam’ transmission, which would allow the signal to broadcast to only a portion of the United States. Jonathan Levy of the Federal Communica-

tions Commission, in a forthcoming article<sup>57</sup>, suggests that this would allow the imposition of must-carry of terrestrial signals on Australian satellite services. It may also therefore be feasible in the near-future to suggest must-carry (and also obligations for compulsory licensing) of terrestrial signals on European satellite services.

Rules covering European satellite footprints would therefore need to be approached with this geographical constraint on 'must carry' in mind. The narrower alternative of 'news service' must-carry would eliminate non-essential channels, but constrain the optimal cultural diversity. US case law provides a basis from which to consider the implications of 'must carry', and the associated difficulties with intellectual property rights and contractual arrangements which 'must carry' inevitably produces in its distortion of the market. I therefore examine, in chronological order, the development of 'must carry' in the US, its obverse – the protection of other platforms where satellite refuses to licence its exclusive programming, and the most recent Supreme Court case of *Turner II*. I then analyse examples of 'must carry' in Europe, use of exclusive programming by satellite which is again the reverse of 'must carry', and legislative provision of solutions to the exclusive programming problem. Given these developments, I hold that 'must carry' on digital satellite is a practical matter for member states within the Ministerial Conference, but that it must be examined in combination with the range of other factors which concern programme bundling and allocation of rights.

### 3.2. Development of Analogue 'Must Carry' on Cable Systems

The issue of thSTB party access to cable network infrastructure has long been an issue in the US, where as far back as 1968, the Rostow task force on communications policy considered the notion of common carriage on cable networks. Much of the US debate on access to bottleneck facilities in television concerns the principle of freedom of expression<sup>58</sup>, rather than the control of monopolistic abuse, which has dominated the debate in Europe. Owen and Wildman highlight a useful distinction between the bottleneck facility and the essential facility.<sup>59</sup> They suggest that even where a cable service provider refuses channel carriage, consumers have numerous alternative means of receiving information, from books and magazines to broadcast television services and now even the Internet.<sup>60</sup>

It is interesting in regard to the pluralism debate, that in the marketing of commercial cable channels, it is the competition authorities who have most frequently intervened, in order to prevent exactly the behaviour which pluralism concerns might dictate: contractual requirements that all households be supplied by a bundle of channels which cannot be chosen *a la carte* by cable operators in response to customer desires, but which are compulsorily carried. A telling

---

<sup>57</sup> Levy, J. (1999) *Competition and Copyright: Retransmission of Free-to-Air Television Signals*, Prometheus, December issue, forthcoming.

<sup>58</sup> Owen, B. M. (1975), *Economics and Freedom of Expression: Media Structure and the First Amendment*. Cambridge, Mass.: Ballinger Publishing.

<sup>59</sup> Owen, B. M. (1992), *Video Economics*, Harvard University Press.

<sup>60</sup> The question remains of whether these delivery platforms are perceived by the consumer to be acceptable substitutes.



example to European regulators extolling a competition-based system, is the difficulty which US courts face. Thomas notes that in the US, where a highly politically motivated case resulted from such compulsory carriage of a commercial channel, FCC 'set-aside' rules allow community access – typically of 3 channels on 25 channel systems - to cable operators' systems<sup>61</sup>. US legislators and courts are willing to regulate programming bottlenecks utilizing competition law.

### **3.2.1. Compulsory Licensing/'Unbundling' of Digital Satellite Services**

Since April 1993<sup>62</sup> under the *Cable Television Consumer Protection and Competition Act 1992*<sup>63</sup>, compulsory licensing<sup>64</sup> has enabled the 'unbundling' of programming to all distribution platforms. The statute was enforced by a vigorous joined case brought by forty state attorneys-general and the Department of Justice against vertically integrated direct-to-home (DTH) operator Primestar<sup>65</sup>. Primestar was a medium-powered analogue satellite service - similar to BSkyB in the UK - owned by a consortium of cable system operators. It was held that these cable operators could potentially foreclose competition, leveraging their dominance of cable into the satellite market. The consortium was substantially diluted as a result of the case. This competitive safeguard enabled the entry of four independent digital satellite broadcasters into the pay-TV market, which was hitherto dominated by cable companies<sup>66</sup>. Competition in the programming market flourishes even though at the end of 1996, the satellite market totalled less than 5% of US TV homes. four digital satellite operators – now reduced effectively to two – have achieved over 10.9 million subscriptions in 4 years, offering real competition to cable pay-TV and terrestrial networks. Critics press for tighter control of cable companies (see Chapter 5 for Internet access)<sup>67</sup>. The provisions ensure that programmers gain access to consumers without fear of abusive practices by either satellite or cable operators. The potential for such abuse of programming is examined in detail in the following section, in which the Supreme Court examined FCC 'must carry' regulation.

---

<sup>61</sup> Thomas, A. supra n.40 at s.3: 'Access for diverse groups (market correcting)'.

<sup>62</sup> FCC (1993) *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order*. MM Dkt. No.92-265, 8 F.C.C. Rcd.3359, 3361

<sup>63</sup> *Cable Television Consumer Protection and Competition Act* (1992) 47 U.S.C.

<sup>64</sup> Poe D. R. (1992) *As the World Turns: Cable Television and The Cycle of Regulation* 43 Fed.Comm.LJ 2 at 141

<sup>65</sup> *United States v. Primestar Partners* (1993), L.P., Proposed Final Judgment and Competitive Impact Statement, 58 Fed.Reg. 33,944

<sup>66</sup> The further layer of regulation provided in the 1992 Act, local rate regulation, may have proved unnecessary given the competitive safeguard against programme bundling. S.628 prevents anti-competitive bundling; S.623 rate regulations impose limited unbundling within rate control. Katz, Michael (1997) paper to *Economics of Pay-TV Regulation*, 10 January 1997, London Business School

<sup>67</sup> Both cable 'must carry' of local terrestrial broadcast stations and a wider common carrier obligation: see Nadel, M. S. (1992) *A Technology Transparent Theory of the First Amendment and Access to Communications Media* 43 Fed. Comm. LJ 2 at 157

### 3.2.2. 'Must Carry' Rules: *Turner II (1997)*<sup>68</sup>

The 'must carry' rule obliges cable operators to broadcast local terrestrial free-to-air stations. The nine Supreme Court justices in this case divided in their judgments on the constitutional validity of the 'must carry' rule. The question the Supreme Court addressed was whether the rule constituted:

- competition regulation entailing light judicial scrutiny<sup>69</sup>;
- industry-specific public policy<sup>70</sup>, or
- content regulation which under the process of strict scrutiny is an unconstitutional breach of the First Amendment<sup>71</sup>.

Stevens J. stressed "if this statute regulated the content of speech rather than the structure of the market, our task would be quite different", in that strict scrutiny would apply. Breyer J. took the view that a 'best fit' public policy solution supported the majority, without adopting strict scrutiny. By this judgment, he ensured a 5-4 majority for the FCC rules. In the dissenting view of O'Connor J: "[F]ive justices of this Court [including Breyer J] do not view 'must carry' as a narrowly tailored means of...preventing anti-competitive behavior [sic]" which in her view compelled strict scrutiny. Under such a test, she believed that the Court would have to concur with her that 'must carry' is thus unconstitutional, and "must surely fail". In her view, industry-specific regulation appeared to "reveal a content based preference for broadcast [public service] programming".

### 3.3. Digital Capacity and 'Must Carry' Regulation

The legal complexity is for European policymakers subject to a simpler prior economic equation: the greater the cable bandwidth and the more mature the cable network, the greater the case for government intervention. The case of A2000, the high bandwidth foreign-owned cable system in Amsterdam, is an extreme case (where alternative means of multichannel reception are largely unavailable due to architectural integrity bye-laws which prevent the addition of satellite dishes), in which community governance of the basic channel tier is highly decentralised, yet provides no disincentive to capital investment. See Chapter 5 for Internet access to digital cable services

---

<sup>68</sup> *Turner Broadcasting System, Inc. et al v. Federal Communications Commission et al* (31 March 1997) 117 S.Ct 1174 at <http://supct.law.cornell.edu/supct/html/95-992.ZC1.html>. For procedural issues, see anon. *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting* (1998) 111 Harvard Law Review at 2312-2329. A more politico-legal analysis of the freedom of speech issues is addressed by Price, M. (1998) *Red Lion and the Constitutionality of Regulation: A Conversation Among the Justices*, in Firestone, C.M. and A.K.Garner (eds)(1998) *Digital Broadcasting and the Public Interest*, Aspen Institute, Washington D.C.

<sup>69</sup> Stevens J. and three others.

<sup>70</sup> Breyer J concurring in part.

<sup>71</sup> O'Connor J joined by Scalia, Thomas and Ginsburg JJ.

An example of competition intervention in developing analogue cable markets, a more typical scenario for Council of Europe member states, is given by the UK. Compulsory licensing, or the unbundling of premium and basic channels for wholesale on an individual basis, was partially achieved by the UK Office of Fair Trading in its 1996 *Review of the Wholesale Pay-TV Market*<sup>72</sup>. BSkyB undertook to stop its practice of 'full line forcing', requiring channels to be transmitted to all cable households in a franchise. ITC is still to report on channel bundling, but BSkyB undertook not to bundle thSTB party premium channels with its own in future<sup>73</sup>. ITC concluded its second consultation period on 30 September 1997, though the ITC Chief Executive speculated<sup>74</sup> on the possibility of rate regulation of unbundled premium channels.

Other channels, such as BBC News 24 and L!ve TV, are also under investigation. In the latter case, L!ve TV alleged that its channel was not offered to subscribers who contracted with CableTel (a cable operator) for telephony, despite the inclusion of four other "free" channels. L!ve argued that this contravened the contractual requirement that CableTel offer its channel free to all cable television subscribers. In court, CableTel undertook to make transparent its commitment to separate telephony and television charges: in practice, this involved charging one penny for the four channels<sup>75</sup>. For L!ve TV it was, at best, a moral victory. It illustrates the thesis that programmers and distributors have conflicting goals, which in imperfect markets require swift and effective intervention by regulators or courts. As Don Cruickshank stated:

*One possible approach would be an explicit obligation on dominant operators to supply premium channels on fair, reasonable and non-discriminatory terms. It is essential to a competitive market in television services that a dominant operator should not be able to leverage market power from premium to basic programmes*<sup>76</sup>.

This approach would institute essential facilities<sup>77</sup> in programme licensing, the approach which in the United States market created competitive conditions. However, it does not acknowledge the pre-eminence which regulation should attribute to pluralism over competition. A pluralistic solution would result from a rather tortuous competition policy analysis, in which pluralistic goals would be a post facto political element which would more transparently be acknowledged as a factor in the initial analysis. BBC News24 provides an example of this unresolved problem.

**BBC News24:** BSkyB in 1998 alleged BBC predatory pricing and abuse of its Licence and Charter, in providing free carriage of BBC News 24 to cable viewers, jeopardizing Sky News paid carriage in over 1.5 million cable homes, a tactic endorsed by the Secretary of State for the

---

<sup>72</sup> OFT Chapter 5 and Appendices G, J, K.

<sup>73</sup> The immediate concern regarding the bundling of Disney Channel with Sky Movies was removed in the parties' agreement to terminate this arrangement.

<sup>74</sup> *Broadcast* 12 September 1997 at 1

<sup>75</sup> 15 *Financial Times* New Media Markets 18 of May 22 1997 at 8

<sup>76</sup> <http://www.oftel.gov.uk/speeches/cca1097.htm> of 21 October 1997

<sup>77</sup> For definitional analysis of essential facilities in the context of pluralism, see Prosser et al (1996) at s.5.2.2.

Media on 9 October 1997<sup>78</sup>. BSkyB has declined to appeal for leave to judicially review that decision. However, it is clear that public funding of 24 hour news channels is more easily defended on grounds of pluralism than of competition, as the public broadcaster is not obliged to secure a return on its investment. BSkyB appears to have secured broad cable access for its service despite the competition from the BBC, and the majority of multi-channel households in the UK now have access to SkyNews (supplied by Reuters news gathering), CNN, and BBC News24. **ARD/ZDF Digital Services:** A case study which examines cultural diversity – children’s programming – is provided in Germany, where ARD and ZDF, the public service broadcasters, produced several joint venture channels. In securing ‘must carry’ distribution for these channels in 1997, state media authorities replaced commercial services, notably foreign channels, thus substantially distorting the market. It illustrates again the cost-benefit in increasing resort to must-carry: it must have a negative impact on commercial operators, which should be assessed against the benefit to the public interest.

These public service cases raise serious issues of public funding for pluralism. In order to achieve the most satisfactory outcome for diversity of news sources and cultural programming, governments need to ensure access to publicly funded services. Should it also ensure access to similarly impartial or at least balanced and editorially responsible journalism, or even children’s programming, from commercial providers? If it is to do so, how should such providers be defined? The Council of Europe Transfrontier Television Convention provides a working definition in which access – universal coverage – is an essential element<sup>79</sup>.

### 3.4. Public Access to Exclusive Programming

Any attempt to impose compulsory unbundling on European digital pay-TV actors is strongest on public policy grounds, rather than generic competition law. European public service broadcasting goals of quality and diversity are not content-neutral. European regulators can be explicit in their embrace of such content-biased policy, unhindered by US precedents for the unconstitutionality of content rules. There is a European precedent for a legislative approach, which brooks no judicial argument. Protocol 32<sup>80</sup> was in 1997 added to the Treaty of Rome. This Protocol establishes a privileged position in competition law for public service broadcasters. This followed concern at European digital satellite pay-TV operators acquiring rights to sporting events. An example of specific regulation in the case of unbundling intellectual property rights, is the revised Article 3A of Directive 89/552/EC<sup>81</sup>. The Article requires national governments hosting pay-TV broadcasters, to permit free-to-air carriage of specific events listed

---

<sup>78</sup> *Financial Times* 10 October 1997 “BBC gets go-ahead for 24-hour cable news”

<sup>79</sup> See Article 9a, Para 1 and para.183 in the Explanatory Report DH-MM(98)8 at p71.

<sup>80</sup> *Protocol (No 32) on the system of public broadcasting in the Member States* (1997) <http://ue.eu.int/Amsterdam/en/traiteco/en/conso2/conso2.htm>

<sup>81</sup> The ‘Television Without Frontiers’ Directive <http://europa.eu.int/dg10/avpolicy/twf/160497en.html>

for the purpose in any other EU member state<sup>82</sup>. This has been followed in the amending Protocol to the Transfrontier Television Convention, in Article 9a.

### 3.5. Conclusion: Principles for 'Must Carry'

As seen in *Turner II* above, constitutional endowments result in a US concern that programming regulation infringes freedom of expression under the First Amendment; historical state ownership of broadcasting stations in Europe has led to an opposing view that national legislators may regulate programming<sup>83</sup>, **though the Swedish example offers even greater constitutional protection for cable operators than in the United States**. Recent cases illustrate the problem: *Primestar* and *Turner* in the US under the 1992 Cable Act illustrate the US courts' reluctance to be seen to condone state interference in programme regulation; the European Parliament and Commission have shown in the listed events debate that they will enforce access to private bottlenecks in programming, where public policy is held to over-ride the rights holders' interests.

However contrived the doctrine examined in this case, for our purposes it is evident that US regulation of pay-TV has broadly resulted in a competitive market. The US example is not alone. In France, three satellite platforms with interoperability between two, were launched in 1996, and digital cable introduced in 1997<sup>84</sup>. The conditions for successful competition were competition between telecom and pay-TV operators in entering the digital market, and the sharing of a common conditional access system and satellite transmitter. The extent to which competitive pay-TV markets were vigorously contested in the traditional dirigiste paradigm France offers an example to the rest of Europe<sup>85</sup>. It has been suggested that this resulted from industrial policy mistakes, with public service broadcasters opposed to the telco, France Telecom, on different platforms<sup>86</sup>.

It is against this background that European 'must carry' regulation should be considered.

- Economic and therefore spectrum feasibility is a necessary precondition to imposing compulsory carriage requirements on terrestrial, cable or satellite broadcasters.

---

<sup>82</sup> See Oreja, Marcellino (1997), *Exclusive Rights for TV Broadcasting of Major (Sports) Events*, SEC[97] 174 final. See further, the broader analysis on competition grounds by DGIV, Commission of the European Communities (1998) *Broadcasting of Sports Events and Competition Law* Competition Policy Newsletter No.2 (June) at 18-28.

<sup>83</sup> Barendt has examined the flaws in the continued and artificial US Supreme Court attempt to separate structure and content: Barendt, E. (1997) *Structural and Content Regulation of the Media: United Kingdom Law and Some American Comparisons*, Yearbook of Entertainment and Media Law 1997 (O.U.P. October 1997)

<sup>84</sup> Puissochet, A. (1999) *Idate News n°109 - 5 July*, announcing the IDATE study "Digital TV receivers and video terminals in 2005". <http://www.idate.fr/maj/welcome.html>

<sup>85</sup> Hughes, J. (1997) *Managing the transition from the old world to the new world – a consultant's view*, Financial Times New Media and Broadcasting Conference, 27 February.

<sup>86</sup> See Lutzhoft N. and Machill, M. (1999) *The Economics of French Cable Systems as Reflected in Media Policy*, 12 Jour. Media Econ. 3 at 181-200, at 194, 197-8.

- Compulsory carriage requirements would be justified where consumers could otherwise not secure access to a diversity of voices – for instance, public service channels.
- The justification for such rules must include provision for transparency in the selection of ‘must carry’ channels. **Unbundling offerings or enforcing compulsory licensing offers greater ‘internal pluralism’ within platforms than ‘must carry’ alone, but would lead to intellectual property licensing restrictions in European markets, where rights cannot be secured for bordering national markets. This problem is less severe in the continental United States market.**
- ‘Must carry’ provisions via satellite should conform to these principles.

## 4. Gateways and Bottlenecks for Pluralism

ARE SPECIFIC REGULATIONS OR OTHER POLICY MEASURES TO COUNTER-BALANCE THE NEGATIVE EFFECTS OF VERTICAL INTEGRATION AND ALLIANCES IN THE PAY-TV SECTOR, SUCH AS RULES ON PLURALISTIC AND FAIR ACCESS TO DIGITAL PLATFORMS, FEASIBLE?

### 4.1. Introduction to Navigation Software Access Issues

The questions addressed here are inter-related with those addressed in both the previous and following chapters (3 & 5). I addressed briefly in Chapter 3 the highly complex trade-off between public interest intervention to secure universal coverage for channels and programming, and the contractual and intellectual property rights of broadcasters and network providers. In Chapters 4 & 5 I address directly the concerns of consumer reception equipment in digital TV and the Internet, which impacts on their immediate access to information provided through the network to which they are connected.

Before embarking on analysis of digital platform technology, note that there are very substantial similarities between the concerns addressed here and in the final chapter of this report, which analyses Internet navigation software<sup>87</sup>. Therefore, general concerns regarding intervention in dynamic and highly unpredictable markets are balanced against the public interest in ensuring access to public service information, especially at the point where those markets develop a *de facto* standard, whether a pay-TV decoder or an Internet browser. It is only at that point that both competition authorities and pluralism authorities should intervene, the former to ensure open standards and prevent abuse of a dominant economic position, the latter to ensure public access to a diversity of media channels, including public service standards of impartiality. It is the latter concern regarding pluralism which separates European concerns from those of the United States 'marketplace of ideas'.

I begin by examining regulation of the API and EPG 'bottlenecks'. In attempting to demonstrate the complexity of addressing the issues of thSTB party access to bottleneck facilities, I adopt as case studies the regulation of key technical elements of the supply chain, associated with consumer reception equipment. Specifically, the necessary set-top box decoder (formally, the Integrated Receiver-Decoder or STB) can itself be decomposed into its technical components, Applications Programme Interface (API) and Electronic Navigation Guide (also referred to as navigation software, Electronic Programme Guide (EPG) or Electronic Scheduling Guide (ESG)). I compare these software applications in the set-top box decoder with the ubiquitous Windows operating system and Internet Explorer navigational software in Personal Computers [PCs], with specific reference to recent case law relating to alleged abuse of dominance in important areas of the PC sector. The United States case law is highly relevant to the discussion, as the technologies subject to legal intervention perform a similar function to the API and EPG and are subject to similar competition concerns. Similarly, the market power is greatly enhanced

---

<sup>87</sup> See further Cowie and Marsden (1999) 1 *info* 1 at 54.

through the vertical control of the key facilities. In fact, abuse only makes sense where the controller is active at both levels, as in the absence of vertical integration there would be little commercial justification for dissuading entry.<sup>88</sup> The problems of the vertical control of technical facilities is being addressed in the *Microsoft* case. I am therefore exploring a case study which bears remarkable similarities to the phenomenon of 'Wintelism'<sup>89</sup>.

#### 4.2. Digital TV Navigation: the Applications Programme Interface [API]

Where technical bottleneck facilities have been made subject to regulatory interference, the issue of the STB party access to conditional access services has been the primary concern. However, some understanding of how digital television reaches the consumer suggests that there are other technical bottleneck facilities that may be equally, if not more, important. This is especially the case for the provision of interactive services. In this section, I focus on the regulatory problems that surround the set-top-box [STB].

The **STB** may itself be broken down into its component parts, primarily the Applications Programme Interface, the Verification software<sup>90</sup> and the Electronic Navigation System<sup>91</sup>. Consider the STB. To a rough approximation it may be regarded as a computer. In the vertical description of the computer system architecture, the API rests between the operating system that shields the user from the complexity of the hardware, and the applications (the individual pieces of software that provide the user with services). The API is an operating language that controls the functioning of the terminal. The API defines the software interface that the applications expect to find on the STB. Many of the digital TV applications will need to interact with the STB API. It is therefore important that service providers are able to use the API in order to deliver their full range of services.

*Example Applications:*

- Side channels
- Digital teletext
- Interactive programming
- Navigation software
- Transactions technologies

---

<sup>88</sup> There would be no gains to any downstream subsidiary to offset the lost profits at the upstream level.

<sup>89</sup> From 'Windows' and 'Intel' – used to describe standard setting in dynamic high-technology markets at intermediate points in the vertical value chain. See further Borrus, M. and Zysman, J. (1996) *You don't have to be a giant*, Working paper 96A, Berkeley Roundtable on the International Economy (BRIE), UC Berkeley

<sup>90</sup> The issue of thSTB party access to the Verification software is not dealt with in this paper although inference can be made to the views of the authors on the appropriate regulatory treatment.

<sup>91</sup> Electronic Navigation Systems are often also referred to as Electronic Programme Guides (EPG) or Event Scheduling Guides (ESG), depending upon their complexity and their user interface.



There are several ways by which the controller of the API could obstruct market entry.<sup>92</sup>

- The procedure of getting applets checked and delivered to the STB could be restrictive and a source of delay.
- The API may be unable to support the desired service.
- The operator may refuse to provide access to the technical specifications necessary to interact with the API.
- Access may be provided but not on advantageous terms.

### 4.3. Digital TV Navigation Applications: Comparison with Microsoft Litigation

In developing the API for the digital TV industry, manufacturers have typically made use of technologies developed for the PC industry. In fact, the origins of the API are found in the PC industry, where Windows is perhaps the best known API. The PC market provides a useful insight into the problems surrounding the API. Technical specifications for the “Windows” API are well defined and licensed to applications programmers. Retailers are therefore able to stock “Windows compatible” software, confident that it will operate on any Windows-based computer. The importance of API compatibility is well known for the PC market. In *US v. Microsoft* (1998)<sup>93</sup>, Williams J. analysed the function of the API:

*the operating system provides a basic support structure for an application via APIs...Each operating system's APIs are unique; hence applications tend to be written for particular operating systems...*<sup>94</sup>

Similarly, if the technical specifications of the STB API are well defined and made easily available then programmers for applications such as interactive software can operate with the confidence that the application will function on all compatible decoding equipment. It should be noted that there is no requirement to define a formal API. For example, PerfecTV (in Japan) digital services provides just an EPG, and so long as agreement can be reached between the relevant parties on transmission specifications then the STB from rival manufacturers can quite easily be made to provide services in a uniform way. An API is, however, necessary where the service provider wishes to offer either new applications or an updated version of an installed application. This function may be useful given that, once installed, updated versions of the software and new software applications will be developed and introduced.

With respect to Internet navigation software, Williams J. analysed the function of browsers:

*Browsers enable the users to navigate the Web and to access information. Most browsers are*

---

<sup>92</sup> These are in addition to the general bottleneck concerns highlighted earlier.

<sup>93</sup> *United States v. Microsoft Corporation* (1998) District of Columbia Circuit Court of Appeal, Cases 97-5343 and 98-5012, decided 23 June 1998, from 94cv01564 available at <http://www.cadc.uscourts.gov/common/opinions/199806/97-5343a.txt>

<sup>94</sup> *Ibid* at 1.

*designed according to a “multiplatform” approach...Microsoft’s Windows 95 licence agreements have required [manufacturers] to accept and install the software package as sent to them by Microsoft, including Internet Explorer, and have prohibited [them] from removing any features or functionality, i.e. capacity to perform functions such as browsing.*<sup>95</sup>

The Department of Justice had previously succeeded in obtaining a temporary stay on such bundling of navigator with API, with the intention of forcing Microsoft to display the Netscape Navigator programme with equal prominence. The success of Microsoft’s appeal on 23 June raises the prospect that it wins the full hearing of the appeal in October of 1998. A very similar competition dilemma arises with the digital pay-TV decoder’s API and navigation browser, the EPG. In the UK, the API and EPG is designed and licensed by vertically integrated actors, who typically also control proprietary conditional access systems, programming rights and subscriber management systems.

Similarly, there are clear links between the navigation software to be used on the digital STB and that found for accessing and browsing the World-Wide-Web (WWW). Navigation software designed for digital television enables consumers to access information on all services that are available to them. The consumer is able to navigate between services without reference to the multiplex that carries them, the EPG thereby concealing the complexity from the viewer. The EPG processes user commands and calls the appropriate file manager to perform the requested function. Although like others, we commonly use EPG as synonymous with navigation software, EPG is only one possible technology. The EPG may be best thought of as a richer system that provides service details for many days in advance, while the term Electronic Services Guide (ESG) describes a far simpler, text based system that provides bare minimum functionality.<sup>96</sup> It is the function of the navigation software to enable the consumer to move easily between services, to review current and near-future services without disrupting current viewing or recording and facilitate the future scheduling of event recording. There are two approaches to the user interface. First, the navigation can be “up/down”, where there are sequentially numbered channels within a bouquet or second, a single key selection where consumers will select services by the programming genre rather than by channel location within the bouquet.

From a regulatory perspective, control of the EPG is important as it provides a daily opportunity to influence viewing shares. The navigation technology provides for strategic control of the digital TV industry, as it is the first service that confronts the viewer and informs her of the services that are available. The EPG will be the *de facto* method by which the consumer will control daily scheduling as well as the means by which service providers will market their content to consumers. As the audience becomes increasingly fragmented across multiple channels, the navigation software will become the crucial tool for influencing viewing patterns. The potential for abuse is obvious given the purpose of the EPG. Consumer selection of programming

---

<sup>95</sup> Ibid at 3: Joint Appendix 81, 86-89, to the case.

<sup>96</sup> For example, the UK Digital Television Group’s defined ESG will only allow the user to view schedules for the next 10 days.

services may be influenced by the navigation software, and any bias in the listing will have serious implications for content providers.

Although there are undoubtedly competition concerns that arise from control of bottleneck facilities on a stand-alone basis, control by vertically integrated<sup>97</sup> service providers of the key facilities yields extra-proportional increases in market power.<sup>98</sup> Consider the route to the consumer, where content suppliers must be able to access all the facilities of the STB, as a package, and it is vertical integration that facilitates the potential for abuse. In May 1998, the UK's Independent Television Commission (ITC) initiated a consultation process on the interoperability of the STBs for competing television service providers.<sup>99</sup> Interoperability, as explained by the ITC is concerned "with establishing mutual technical compatibility between the different digital programme and other services which will be available to viewers no matter the method of original delivery". Compatibility of technical facilities is particularly important where there are likely to be a number of different service providers seeking access to consumers via each of the delivery platforms. With interoperability, the consumer can switch easily between services provided by rival systems, at no additional cost. It also means that the channel suppliers and suppliers of additional services, such as interactive services, can access consumers via more than one delivery platform. Whatever other commercial difficulties arise in attempting to enforce interoperability, seeking to either mandate a particular common standard or to regulate access terms to proprietary facilities is both a difficult task and one which will face opposition from those it would displace from their gatekeeper positions. I briefly identify some of those gatekeeper disputes which have arisen, and which the Guthus paper [MM-S-PL(99)9] further illustrates.

#### 4.4. Gatekeepers and European Legislation

The Commission has attempted to provide a minimal competitive framework for European pay-TV provision. An industry-specific duty to provide 'fair, reasonable and non-discriminatory' access for thSTB parties to defined<sup>100</sup> bottleneck facilities, is to be enforced by either competition authorities or communications regulators. It is the approach narrowly adopted by the Council of Ministers in Directive EC/47/95<sup>101</sup> - a European adaptation of the US 1992 *Cable Act* - that governs digital CAS. The European Parliament attempted to amend the Directive to mandate a common CAS interface in pay-TV markets, in recognition of the lesser scale economies in European linguistic markets compared with the monolingual and continental North American market. The UK with support from Germany [and proprietary DTH satellite

---

<sup>97</sup> For example, see Hart and Tirole (1990) *Vertical Integration and Market Foreclosure*, Brookings Papers: Microeconomics; Bolton and Whinston (1991) *The Foreclosure Effects of Vertical Merger*, Journal of Institutional and Theoretical Economics, 147; Ordober, Saloner and Salop (1990) *Equilibrium Vertical Foreclosure*, American Economic Review 80 (March).

<sup>98</sup> As noted earlier, without vertical integration, the incentive for abuse is removed.

<sup>99</sup> *Digital Television: Interoperability and Open Access*, Independent Television Commission, 13 May 1998.

<sup>100</sup> Definition is currently lacking: for an attempt to so define markets and facilities, see Cowie and Marsden (1999) 1 Info 1.

<sup>101</sup> EC (1995) 95/47 of 24 October 1995 on the use of standards for the transmission of television signals 23/11/95 EN OJ EC No.L281/51-54

operators, notably the UK-based BSkyB, German Kirch and French Canal+] vetoed this version of the 1995 Directive<sup>102</sup>. The approach followed in Directive EC/47/95 is the control of individual monopolists by asymmetrical regulation, effectively declaring their distribution networks to be bottleneck facilities. Until network competition becomes possible, this strict control of the former '**national champion**' – **German Kirch DF-1; French Canal+; UK BSkyB** - appears the only method of introducing 'managed' competition into communications networks.

#### 4.4.1. National Market Structures

Examples from national markets illustrate bottleneck problems.

**Spain:** In Spain, the behavioural attempts by telco Telefonica and partner Canal+ to foreclose competition in cable systems were vetoed by DGIV<sup>103</sup>. The Spanish government's later asymmetrical regulation preference for a single mandatory CAS to foreclose competition to cable from satellite programme rights holders<sup>104</sup>, was stymied by DG XIII under Directive EC/47/95. The Spanish government solution was then to adopt a prohibitive structural approach to share ownership in pay-TV ventures, to favour cable TV operators. This decision was justified [sic] on the public policy ground of pluralism in media ownership, an issue which is currently the sole political competence of member states. This apparent circumvention of EC/47/95 has been the subject of tense and contentious negotiation between the Spanish government and DG XIII. The Spanish scenario demonstrates that CAS regulation cannot fulfil the Commission goal of competition between networks, in telephony as well as cable and satellite pay-TV, so long as telcos control both communications lines into the home, and can freeze out the satellite programmer.

**Netherlands:** A solution which balances structural with bottleneck control was offered in 1996 in the Netherlands. Article 69 of the Netherlands Media Law of 1996 implements EC/47/95, by requiring 'transparent, reasonable and honest' access for satellite programmers to cable networks<sup>105</sup>. Crucially, this was accompanied by government action to curb abusive cable conduct through structural market reform. KPN, the national telco, was ordered to divest its controlling interest in Netherlands' largest cable network, Casema<sup>106</sup>.

**Germany:** In Germany, the Minister of Economic Affairs, the Parliament [Bundesrat] and the competition regulator [Bundeskartellamt] similarly called for the divestiture of the

---

<sup>102</sup> See D.A.L. Levy (1997) *The regulation of digital conditional access systems. A case study in European policy making* 21 Telecommunications Policy 7 at pp 661-676.

<sup>103</sup> *Telefonica/Canal Plus/Cablevision* (1996) Case No.IV/M.709 OJC 228/05 7 August

<sup>104</sup> *Spain backs down over encryption services* Broadcast 18 April 1997 at 13.

<sup>105</sup> 14 *FT New Media Markets* 1 August 1996 at 1

<sup>106</sup> Dellebeke M. (1997) *IRIS Netherlands: Access to Cable Update* at 2:11 - *Ministry of Economic Affairs, Decision Taken Regarding KTA (Cable TV Amsterdam)*; (1997) *IRIS Netherlands: Ownership Limitations on Cable Networks* 3:13

Deutsche Telekom cable network<sup>107</sup>. In October 1999, three years later, this process was ongoing.

**Sweden:** With the merger of Telia and Telenor in October, 1999, DGIV required the divestiture by Telia of its cable network, which was in progress as this report was finalised.

**Switzerland:** In October 1999, Swisscom was seeking a purchaser of its controlling shareholding in Cablecom, the largest Swiss cable company. The sale was complicated by the government's desire to avoid a German purchaser.

**European Commission:** Annemarie Jirritsma of the Netherlands Government<sup>108</sup> recommended that the Commission adopt this structural separation policy on a European scale in a letter to DG IV Commissioner van Miert of 29 January 1997. Van Miert had attempted to do just that<sup>109</sup> during negotiations over the Cable TV Directive in 1994, but was over-ruled by intense lobbying by the dominant telcos, supported by their governments<sup>110</sup>.

#### 4.4.2. 1995 Cable TV Directive<sup>111</sup>

The single European market in digital pay-TV was seriously structurally flawed from the outset. Van Miert concluded in 1994 that the flaw in the value chain lay in telcos' dominance of cable systems, leading to abusive conduct. The relationship by which satellite operators supply programming to cable systems, is an archetypal bottleneck. The telcos, which generally own the cable TV networks and thus access to consumer households, resisted satellite attempts to access their customers. Network competition is largely due to the fact that cable and satellite CAS are incompatible and proprietary. Satellite operators attempted to by-pass the Cable TV Directive provisions, which enable cable TV operators to control subscriber access through CAS.

National governments frustrated van Miert in 1994 due to the reduced privatization receipts<sup>112</sup> which would inevitably have resulted from permitting competition to the cable/telco monopoly. As privatization is still only partial in the major continental markets (Spain, France, Germany, Italy, Holland), the Council of Ministers is likely to continue offering weakened resistance to full structural separation, but on financial rather than competition grounds. The recent telco-cable divestments in Holland have justified van Miert's thwarted original policy. The 1997

---

<sup>107</sup> 15 *FT New Media Markets* 8, 27 February 1997 at 1

<sup>108</sup> Dutch Minister of Transport and Public Works

<sup>109</sup> EC (1994) *Green Paper on the liberalisation of telecommunications infrastructure and cable TV networks*, COM(94) 440, 682; *Financial Times New Media Markets* 21 April 1994: "Phone companies 'must sell off TV'"

<sup>110</sup> See Sauter, W. (1998) *The Liberalisation of Cable TV Infrastructure in the European Union* 9 *Utilities Law Review* 5 at 220-1. He explains that resistance was led by Belgium, Denmark and Spain.

<sup>111</sup> EC (1995) *Commission Directive amending Article 90/388/EC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services* of 18 October 1995, 95/51/EC OJ L256/49

<sup>112</sup> Member state opposition to any threat to privatization receipts was increased by the dramatic revenue implications of entry into Economic and Monetary Union on 1 January 1999.

Cable Review<sup>113</sup> demonstrates that network divestiture can produce rival network supply, a situation now producing strongly pro-competitive effects in the UK and Netherlands. Unfortunately, there are now competing Directives shaped by regulatory capture: the Digital TV Standards Directive which was influenced by satellite operators, and the Cable TV Directive, which was driven by cable-owning telcos. In an overview of competition policy in media markets, Harcourt states<sup>114</sup>:

*Despite these problems, it is clear that there exists a convergence in approach of the EU institutions to regulating European media markets.*

While I agree that this is true, the need for caution in this convergence thesis is entirely evident from the case studies examined, particularly in view of political resistance from some member states and their telcos: Germany, Spain and Italy are examples<sup>115</sup>. *The Communications Review which followed the Convergence Green Paper has resulted in a more holistic approach to access policy, but it is unfortunate that **a fully competitive access policy framework** has been delayed some five years, and the full effects of competition will only follow implementation in 2001/2.*

#### 4.5. Bottlenecks and Standards Bodies: Industry Self-Regulation?

While the issue of the STB party access to technical facilities was central to the 1995 Advanced Television Services Directive, control of the internal functions of the STB were largely ignored. Under the 1995 Directive, the STB party access to conditional access technologies was to be granted on “fair, reasonable and non-discriminatory terms”, with responsibility for ensuring this given to Member State legislation. There are three traditional approaches to standardisation: market driven, government imposed and technology industry driven. The method of standard setting and the structure of the body responsible is highly case specific. With the dynamic technological challenges of convergence, the traditional approaches to standardisation were shown to be inadequate and it rapidly became the norm for the industry to drive the process, and from a commercial rather than technological focus.

The European Digital Video Broadcasting Group (DVB) has been responsible for producing an impressive list of technical specifications for all aspects of digital television, in a very short period of time. The DVB is a consensus-driven voluntary industry group with more than 250 members worldwide. However, its reliance on consensus has demonstrated one weakness in this process. The case of conditional access is well known<sup>116</sup>. The DVB was unable to reach a satisfactory agreement, producing a fudged compromise solution that required European Com-

---

<sup>113</sup> See SEC(97)2390 *Commission communication concerning the review under competition rules of the joint provision of telecommunications and cable TV networks by a single operator and the abolition of restrictions on the provision of cable TV capacity over telecommunications* OJ C 71, 7.3.1998 at p4. Also at <http://europa.eu.int/en/comm/dg04/lawliber/en/cabrev1.htm>

<sup>114</sup> Harcourt, A. (1998) *Regulation of European Media Markets: Approaches of the European Court of Justice and the Commission's Merger Task Force*, 9 *Utilities Law Review* 6 at 276-291, at 289.

<sup>115</sup> See Levy, D.A.L. (1997) *Regulating Digital Broadcasting in Europe: The Limits of Policy Convergence* 20 *West European Politics* 4 at 24-42.

<sup>116</sup> *Ibid.*

mission intervention in an attempt to salvage some credibility for the process. The basic problem with achieving a common standard on conditional access is that there were too many powerful vested interests, that were able to block that which was not in their own interests. The existence of strong private interests among influential members disrupts the consensus-based system, perhaps beyond its degree of usefulness. After an unexplained delay, that may have serious implications for competition in the market<sup>117</sup>, the DVB began to develop technical specifications for the EPG and for the API, as have national industry groupings, such as the UK Digital Television Group. While the DVB specifications do go some way towards facilitating the production of universal STBs, with its specifications for service information and programme service information, they fail in that they permit private data formats for programme information. With this flaw, the specifications enable those who wish to exclude selected STB customer bases. If a common format had been mandated then this would not have been possible. The WWW browser industry provides an excellent illustration of different browser suppliers running on different hardware, but all addressing the same information. This demonstrates that where there is a will, it is possible to achieve comprehensive standardisation. However, the existence of powerful self-interest acts as a barrier to the process of standardisation. Existing providers of proprietary facilities perceive greater value in maintaining their gatekeeper position in the digital environment.

In the US standardisation of digital TV, the conflict of self-interests has acted as a barrier to standardisation and has slowed the development process significantly. On the video format element of the digital TV transmission standard, the conflict between the computer industry and the TV industry threatened to destroy the whole standard (until it was eventually and reluctantly decided to approve two video format standards). Conflict has again arisen between the two groups with regard to the development of a standard for the API, with the computer industry strongly favouring mandating the current computer industry standard API, Win-32. It is clear that the desire for a common standard which would remove the potential to abuse the monopoly position may be futile, and that a standard can raise as many difficulties as it solves. Moreover, the process itself can be used by dominant interests, to inhibit the potential for competition.

#### 4.6. Conclusion

The pluralism objectives which the Group of Specialists seek may therefore best be accomplished within a sophisticated competition law framework. **It has been seen that this framework has not yet been created, even employing the considerable legal resources of the European Commission Directorates-General, which bodes ill for the public interest in diversity. The broad definition of public interest which diversity requires is provided in, for instance, the UK and Norway, but may be absent in many Council of Europe members, where competition policy employs solely economic analysis, or else is com-**

---

<sup>117</sup> The longer the standard takes to develop, the longer the window of opportunity for a proprietary standard to establish critical mass.

**promised by political interference in competition enforcement, which we have seen has dogged the European Union process.**

The principles of diversity of voice and consumer access to a variety of services are ill served by politically challenged or under-developed competition law regimes, **which fail to take into account pluralism and media diversity. The UK provides an example of regulation for diversity within a competition framework, in large part because the EPG is considered both a technical telecoms bottleneck and a broadcast programming bottleneck: in consequence the technical regulator Oftel and the pluralism regulator ITC have worked together to solve access problems.**

A statement of principles governing access to API, EPG and STB, based on those **now** developed by the European Commission, may therefore guide competition and pluralism regulators in their task. It is certainly the case that compromised competition regulation of bottlenecks in both digital TV and Internet navigation is a potential danger to pluralism.



## 5. Browser open Access

[1] WHETHER DOMINANT GROUPS/ALLIANCES ARE EMERGING IN EUROPE AS REGARDS THE PROVISION/DISTRIBUTION OF ON-LINE SERVICES, [2] AND WHETHER PROBLEMS HAVE ARISEN IN THIS RESPECT (FOR INSTANCE, THE COMMERCIALISATION OF SOFTWARE WITH A SPECIFIC INTERNET BROWSER OR THE ORDER OF PREFERENCE IN WHICH INTERNET BROWSERS PRESENT THE LIST OF SEARCHED WEB SITES). [3] FURTHERMORE, THE CONSULTANT SHALL CONSIDER WHETHER SPECIFIC MEASURES TO PREVENT DOMINANT POSITIONS OR TO PROMOTE PLURALISM IN THE INTERNET ENVIRONMENT WOULD BE FEASIBLE.

### 5.1. New Market Developments and Alliances

Digital pay-TV operators and online services are forming ventures in other arenas than technical and programming facilities, as described in the preceding section, using news gathering operations in the television environment to strengthen content provision for online services.<sup>118</sup> Then-CEO of BSkyB, Mark Booth, described the anchor tenancy as “an essential acquisition and retention tool” for the partners.

### 5.2. Browsers and Leveraging into Cable

Cable consolidation through merger and acquisition is rapid in most mature markets, especially in those where hostile takeover is most likely, such as the US, UK (and apparently even Italy). The largest mergers by value are those of TCI and MediaOne by AT&T, the US long-distance carrier, which divested its manufacturing and research subsidiaries in 1995 (NCR computers and Bell Labs, now Lucent Technologies). The most recent spate of mergers indicate a growing interest in cable Internet and digital television from Microsoft. Kaufhold on May 10 reported that:

In one fell swoop, Microsoft has:

- invested \$5 Billion in AT&T that is sure to show a positive return over time so there's no risk
- made the world believe that they are totally committed to Windows CE for set top boxes
- guaranteed the sale of about 5 million Windows CE set top boxes to at least AT&T
- gotten themselves into the headends of TCI and MediaOne
- become a Heavy Hitter technology provider that all Cable TV companies will need to deal with

---

<sup>118</sup> See *AOL and BSkyB announce strategic marketing alliance: Anchor tenancy agreement to form first partnership phase* at: <http://www.sky.co.uk/skytv/press/press9.htm> 10/2/99

- become a major player in the U.K. Cable Television industry with 29.9% of Telewest
- become very well connected with SBC in the United States - Telewest is part of SBC.<sup>119</sup>

Once more, it is the phenomenon of convergence in the form of integration of programming and technical bottleneck facilities – which is driving this market phenomenon. In the case of Sky and AOL, it is content allied to control of the browser, the ‘first screen’; in the case of Microsoft, it is the browser operating system allied to the distribution platforms of cable companies<sup>120</sup>. It is notable that the Symbian alliance between the major manufacturers of mobile communications systems – Nokia, Ericsson, Motorola and Matsushita – to design a rival software platform to Windows CE, based on Psion’s EPOC operating system, has been developing open software operating systems, in part as a defensive measure to deny Microsoft proprietorial control of the market<sup>121</sup>.

In the US, digital capacity in cable systems is under serious threat from both free-to-air carriage<sup>122</sup> and Internet access. In the week of 24 May 1999:

*America Online, MCI WorldCom Inc. and other Internet companies again urged federal authorities to bar cable operators from striking exclusive deals on new high-speed Internet service offerings ... Internet providers want to be sure that consumers will enjoy the same open access to their services via cable networks that they now have over phone lines ... AT&T Corp.'s planned acquisition of MediaOne Group Inc., the long distance giant's second major cable purchase, has renewed the interest of regulators and lawmakers in Congress as well.*<sup>123</sup>

There is therefore a transatlantic precedent for very substantial intervention in the digital cable industry, which is mitigated by the developmental state of European cable, with the exception of those few mature markets. Until the investment climate in Europe approaches that current in the United States (an unlikely prospect), it will only be prosperous municipalities such as Amsterdam which will be able to make such demands on their cable operator. Consider the following US debate:<sup>124</sup>

*Reps. W.J. "Billy" Tauzin, R-La. and John Dingell, D-Mi. detailed provisions of the new Internet Freedom and Broadband Deployment Act of 1999 slated to be introduced in the*

---

<sup>119</sup> Information Alert, May 10, 1999, Volume #18, Kayfold, G. “AT&T makes the big deals, but Microsoft wins the hand” at <http://www.instat.com/infoalert/alt199918.htm#at&t>

<sup>120</sup> See further Konert, B. (1999) *Economics of Convergence: Part 2 – The Microsoft Strategy*, in SIS Briefings June at pp6-10.

<sup>121</sup> ‘Symbian’s friends’, *The Economist* 28 May 1999, Business.

<sup>122</sup> See “Digital Must Carry will “disconnect” local phone competition for Cable TV systems” reporting on Kufhold, G. (1999) *Digital Must Carry: Cable TV vs. The World* at <http://www.instat.com/index.htm>

<sup>123</sup> 05/24/99 - **Internet firms urge FCC to ensure cable open access**, supra n.1.

<sup>124</sup> Communications News: 07/15/1999 - Created for TKRNEWS-L (International Communications Law and Policy) 07/01/99 Broadband Deregulation Bill Introduced In House

*House today. Tauzin, chairman of the House Commerce Subcommittee on Telecommunications, Trade and Consumer Protection, and Dingell, the Commerce Committee's ranking member, drafted the legislation.*

The bill frees regional Bell operating companies (RBOCs) to compete with incumbent cable companies in offering high-speed Internet access to consumers, assuring the RBOCs can compete nationwide with cable operators. Specifically, the legislation would encourage all companies to develop and deliver "advanced telecommunications services" by deregulating both high-speed data and Internet access services, and create more choice by allowing both the cable and telephone wires to compete head-to-head in the broadband delivery market. Additionally, Internet service providers (ISPs) could collocate and interconnect with an RBOC's high-speed network so ISPs could have access to at least one broadband network and consumers are guaranteed a choice among providers, under the bill. Though its chances of becoming legislation are extremely slight, its principles can inform the European debate:

*Overall, the bill makes sure that "Internet service will not become a de facto monopoly for any one provider," Dingell said. "Our bill (also) protects consumers against the increasing concentration of market power in the Internet backbone business." AT&T, which is quickly gaining the nickname "Ma Cable," is trying to put the kebabash on open access plans, when it comes to its recently acquired cable systems from Tele-Communications Inc. (TCI) and other companies. AT&T doesn't want to open its cable systems to competition, citing cost and complexity, among other reasons. Tauzin even threatened to take away the protection the bill would provide companies from federal and state regulation, if those companies - specifically, AT&T, he said - "can't help us create competition."<sup>125</sup>*

### 5.3. Rapid Increase in Competition

Nor is convergence in Internet browsing confined to traditional digital actors such as cable companies: the decision of a conventional retailer in the UK, Dixons, which sells consumer electronics, to offer a 'free' Internet Service Provider, *Freeserve*, on 22 September 1998, has completely transformed the UK ISP market, now growing at the fastest rate of any European market. In 18 weeks, *Freeserve* attracted over one million accounts<sup>126</sup>, forcing most other incumbents and all market entrants to abandon monthly subscription charges<sup>127</sup>. On July 12 *Freeserve's* parent (Dixons Group plc) announced that the company would be floated on 2 August with a valuation of about 2.5 billion Euros, having over 1.3 million active accounts<sup>128</sup>. Therefore, in under a year, the company will have created 3 billion Euros-worth of value from nothing. What is emerging is an environment in which competition is driving down costs and creating the conditions for a mass market to develop. In April 1999, the electrical retailer Tempo offered a free ISP with

<sup>125</sup> Full Story at: <http://cnnfn.com/news/>

<sup>126</sup> See *Woman Nets Bonus As Freeserve's Millionth Sign-Up* at [http://www.dixons-group-plc.co.uk/Press\\_Release\\_990201.asp](http://www.dixons-group-plc.co.uk/Press_Release_990201.asp)

<sup>127</sup> See Dixon's PR/68/99 of 19 May: *Freeserve Launches Ground Breaking Low Cost Telephony Service* at [http://www.dixons-group-plc.co.uk/Press\\_Release\\_990519.asp](http://www.dixons-group-plc.co.uk/Press_Release_990519.asp). Figures are of necessity provisional and company audited.

<sup>128</sup> BBC Online: Monday, July 12, 1999 Published at 11:08 GMT 12:08 *UK Business: The Company File - Freeserve gets a price tag* [http://news.bbc.co.uk/hi/english/business/the\\_company\\_file/newsid\\_391000/391480.stm](http://news.bbc.co.uk/hi/english/business/the_company_file/newsid_391000/391480.stm)

free local access<sup>129</sup>, a potential model for further penetration. In June 1999, AOL Europe began offering a free computer to new subscribers in the UK, a further sign of the fiercely competitive environment. As this report was finalised, in the first week of October 1999, the market price of *Freeserve* had halved from its closing price on 2 August, due to the rapid increase in competition. This re-emphasises the extreme turbulence in Internet markets, in which a year has marked the introduction, maturing and apparent decline of the 'dominant' free ISP model in the UK. Such a cycle, which conforms to the observation that Internet months are like years in traditional industries, makes predictions even one year ahead extremely unstable.

#### 5.4. Pluralistic Concerns

There are pluralistic concerns, notably that the market is driven by commercial – essentially retail<sup>130</sup> – concerns with no public service values, and that market entry for non-profit organisations is unlikely in the face of below-cost deployment of commercial 'loss-leader' services. Moreover, most services are offered via Microsoft's Internet Explorer browser, thus cementing the dominance of this browser platform. However, despite this exponential increase in market size, the biggest increase in any site has been that secured by BBC Online<sup>131</sup>. While there is continuing cause for vigilance in researching the browser market, the growth in the UK, if replicated elsewhere, is such that regulation is of lesser value than providing what Graham terms a 'positive force', extending public service values onto the Internet. The BBC site is an exemplar in this regard, with 114m page views in May, making it the most popular content site in Europe. Recent events in both Europe (coverage of the Balkan conflict) and the United States (the 'Monicagate' revelations on Matt Drudge's site) have shown the potential mischief of unregulated websites, as well as consumer appetite for such uninhibited non-governmental information.

Where a proprietary ISP offers content cached – stored – on a server local to the consumer, speed of access to that content is exponentially higher than for non-proprietary content. This is even more the case for digital cable modem ISPs, such as @Home and Roadrunner. The result in the case of analogue ISPs is that America Online (AOL), the dominant ISP in the United States, claims that 75% of pages accessed by its subscribers are AOL pages. AOL's strength in content, helped by joint ventures with BBC and News Corporation as already noted, will increasingly help this high local usage by its subscribers. Whether at this stage of Internet development in Europe, the US model will prove equally successful in the case of dominant European ISPs, is debatable, but it does point towards further research on the degree to which subscribers access non-proprietary pages. Should consumers prove reluctant to move outside

---

<sup>129</sup> Though only off-peak, and only on households signing contracts to transfer telephone accounts to a telephone subsidiary. The business model requires that telephony business to offset the cost of off-peak Internet access.

<sup>130</sup> Including multimedia groups such as Virgin, supermarket groups such as Tesco, and leisure groups such as Arsenal football club.

<sup>131</sup> Though note that one-third of traffic is non-UK, thus eroding the justification for licence fee funding in a manner impossible for broadcast services. Note also that the BBC spends 15million pounds per annum on the site, which may be unsustainable as a model for other European PSBs.

the locally cached and easily downloaded pages, and thus be confined largely to an 'intranet' owned by the ISP – e.g. AOL – that would create a monopolistic position in provision of content to such subscribers for the ISP.

### 5.5. Access to Public Service Values

The BBC site demonstrates the countervailing influence which public service can provide, should consumers choose to accept the decreased download speed in venturing outside their portal site. The outgoing Director-General of the BBC, Sir John Birt, has suggested that, to combat the download advantage of the proprietary portal: "there should be a guaranteed and appropriately prominent position for the BBC on every gateway in the UK"<sup>132</sup> There is a case for including the Internet, as the 'next generation' medium, in this calculation of access to public service information. It has been seen that the EPG in digital television performs the same function as the Internet browser. Given the argument that satellite broadcasters may desire public service channels on their bouquets, in order to encourage viewers to migrate to their network, there appears a stronger argument in this case, where many potential users are wary of the explicit and inaccurate content on the Internet. Andrew Graham suggests that mass participation in the Internet will be encouraged by encouraging the placement of trusted 'brands' from analogue television in prominent positions<sup>133</sup>. Thus, this regulatory intervention should prove a positive influence in encouraging Internet penetration amongst the computer illiterate.

### 5.6. Towards Regulation of Access?

Two comments may aid discussion. First, the Internet may be regulated should political will exist, as demonstrated by the Munich *Compuserve* trial<sup>134</sup>: cyberspace can be governed. Second, the 'Internet bubble' on equity markets may prove less durable in the short term, as illustrated in the 20% fall in U.S. Internet stock values in the week of 24 May 1999. There is therefore the uncertain prospect of regulatory intervention, should it be deemed necessary. Further research is absolutely critical in informing regulatory debate in the immediate future.

### 5.7. Conclusion

- The obvious alternative to the obviously economically chilling effect of legislating for default browsers is to nominate an icon to be displayed prominently on the default home page of each browser, linking to the government's nominated public service provider. This would allow consumers the choice of a non-proprietary site, though speed of download would still be a frustration in gaining access to the

---

<sup>132</sup> Birt, J. (1999) *The Prize and the Price: The Social, Political and Cultural Consequences of the Digital Age*, The New Statesman Media Lecture, Banqueting House, London, 6 July, at p9.

<sup>133</sup> Supra n.29 and in Marsden ed. (2000 – forthcoming) *Regulating the Global Information Society*, Routledge, London.

<sup>134</sup> Bender, Gunnar (1998) *Bavaria v. Felix Somm: The Pornography Conviction of the Former CompuServe Manager* [http://www.digital-law.net/IJCLP/1\\_1998/ijclp\\_webdoc\\_14\\_1\\_1998.html](http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_14_1_1998.html)

non-proprietary site. It would therefore offer some equality of notice rather than equal access.

- Given the UK government's declared intention to conduct 25% of its business online by 2002<sup>135</sup>, and similar declarations from for instance Austria, there is evidently an economic efficiency argument for the possibility of a second icon linking to the government's electronic 'commerce' site, from whence hyperlinks to the tax, social security, health, and other government service sites, would be displayed.
- However, there is certain to be resistance from the industry, and possibly even measures to avoid the jurisdiction by failing to develop sites registered to that domain (e.g. .uk or .de). This might be particularly the case in less economically critical states, where the business case for investment is marginal.
- It should be noted that ISP opposition to this proposal would be a matter of political principle, rather than economic necessity: though banner advertising would be marginally restricted by the positioning of the icons, it is the concept of regulation which continues to be strongly resisted in the Internet business community.
- For this reason, it may be that a Council of Europe position would be more politically acceptable than an individual state action in this regard.
- Any legislative action at this stage may be considered premature, given the rapid growth in the market. Research and monitoring of the market must be an absolute regulatory priority. The degree to which consumers actually browse a diversity of content sites is a critically important research question in the interest of diversity.

### Appendix 1: UK Digital Terrestrial Television Allocation

The allocation of multiplexes was originally intended as revealed in Table A. There would be six multiplexes, with ample opportunity for new and diverse services. The Act separates transmission capacity licensing ('multiplexing') from channel packaging in the award of DTT contracts. Each multiplex is expected to carry between three and six channels. The public service broadcasters, including ITV, are required to simulcast their analogue channels on their reserved capacity<sup>136</sup>; in exchange, they are guaranteed multiplexes with most complete coverage of the UK. The competitive bidders in multiplexes B,C,D are obliged to retune several thousand households' reception equipment in order to maximize their reach<sup>137</sup>. The central promise of DTT allocation was necessary in order to secure the entire project as a *fait accompli*. Digital com-

---

<sup>135</sup> See Department of Trade and Industry (5 March 1999) *Building Confidence in Electronic Commerce: A Consultation Document* analysed in Epilogue, Marsden, C. and Verhulst, S. (1999) *Convergence in European Digital TV Regulation*, London: Blackstone

<sup>136</sup> Finally signalling their intention to do so on 15 October 1996; there had been some doubt as to ITV's commitment. DNH Press Release 96/314 of 16 October.

<sup>137</sup> See Elstein, D. in *The Guardian Media* 7 April 1997 at 7.

mercial services are statutorily subject to relaxed programming requirements under the 1996 Act. A precondition of DTT success, given that reception requires a decoder box whose unsubsidised cost is estimated at £400 each, is sustainability [s.8(2)c]of consumer subsidy [s.8(2)e] and rapid deployment [s.8(2)a&b] of digital services.

MULTIPLEX	OPERATOR	SERVICES
1	BBC	Augmented terrestrial with simulcasts
2	ITV/Channel 4/Teletext	Simulcasts and ITV2
A	Channel 5/Gaelic/S4C	Simulcasts and other <sup>138</sup>
<b>B</b>	<b>BDB or DTN</b>	<b>ITC to judge</b>
<b>C</b>	<b>BDB or DTN</b>	<b>ITC to judge</b>
<b>D</b>	<b>BDB or DTN</b>	<b>ITC to judge</b>

Table A: Multiplex Provision Under UK 1996 Broadcasting Act

ITC was required under s. 7(4) of the Act to consider: technical planning of transmission; programming; financial sustainability; and decoder box subsidy. The ITC received two bids to operate multiplexes B,C,D: British Digital Broadcasting (BDB – now ONDigital) was a consortium of equal partners Carlton Communications, Granada Group and BSkyB; DTN was initially wholly owned by International CableTel. International. The thSTB of the ‘Big Three’ ITV companies, UN&M, took a provisional 30% share in DTN in April 1997. ITC stated that “this did not constitute an unfair enhancement of DTN’s application” [ITC at 3]. CableTel was an entrepreneurial US-owned cable operator, which had recently expanded into transmission by purchasing the former IBA transmission operation, NTL. Under the terms of the franchise process, each multiplex was to be awarded separately, though both consortia bid exclusively for all three.

The arguments put forward by each consortium reveal different approaches to multichannel television. BDB offered ‘more of the same’, a hybrid of BSkyB’s analogue satellite offering and ITV programming<sup>139</sup>. The selling point for this consortium was the “Britishness” and quality of ITV programming<sup>140</sup>, and the proven success of the pay-TV channels offered by BSkyB.

<sup>138</sup> S4C/SDN awarded the half multiplex; sole bidder. CableTel and UN&M in 1998 negotiated 30% stakes in the consolation prize of S4C half-multiplex Licence A. Source: ITC Press Release 62/97 of 21 July 1997, and Broadcast for late autumn. S4C can control no more than 50.1% of the licence, presumably to ensure effective capitalisation by passive investors.

<sup>139</sup> Reflected in *The Guardian* headline of 25 June 1997 at 6: “Second-rate’ group wins TV”.

<sup>140</sup> The word *British* in the BDB application signals a willingness by the consortium to source original production in Britain, which may reverse the trade deficit with the US in audiovisual products, growing alarmingly in the UK as elsewhere in Europe.

The consortium partners dominated both satellite and terrestrial commercial television. Their bid was well resourced both financially and in programming expertise. Additionally, BDB had first option on the much-heralded BBC/Flextech joint venture television channels<sup>141</sup>, which appeared at the bid deadline to have trumped their only rival, though BBC/Flextech unsurprisingly agreed that in the event of DTN winning all three multiplexes, their services would be carried by DTN. DTN's bid claimed to be more faithful to the vertical separation which was the intent of the Act, in that DTN intended to operate a platform for its programming 'clients'<sup>142</sup>. A further crucial factor was the interactivity offered by each consortium [s.8(2)d]. DTN set great store by its intention to offer new services, providing a clear choice for the ITC between two philosophies. ITC declared itself "more attracted by the innovative programme proposals (supported by additional services<sup>143</sup>) designed to appeal principally to a wide range of different audiences which were put forward by DTN"<sup>144</sup>.

Leaving aside programming, it was the judgment of the consortium's commitment to securing audience penetration rather than profits during the implementation of DTT which would grant the winner the edge in decoder subsidy [s.8(2)e]. ITC is likely to have paid heed to the collapse of BSB in 1990, opting for 'critical mass' rather than infrastructure competition. BDB had clearly made a judgment that the 'grand alliance' offered would prove irresistible, and ITC indeed made much of the fact that "[DTT] is a new and high risk development, and one which is of key strategic importance" [ITC at 2,5]. BDB funds would be generated internally from Granada and Carlton, "both of whom are substantial FTSE 100 companies", the advantage of a publicly owned UK-based multinational consortium. ITC was effectively required to measure the patience as well as financial resources of the consortia. It regarded UK equity as better placed than debt for these purposes, but decisively preferred "the revenue assumptions in BDB's business plan ... [as] ... more cautious than those of DTN" [ITC at 2], which had expected greater interactive revenues – home shopping and banking, for example - than most commentators considered feasible. The BDB consortium combined the two newly dominant ITV holding companies with the dominance in the pay-TV market of BSkyB, tying in the world's largest cable operator<sup>145</sup> and UK's primary programme producer, BBC. The public interest in diversity was potentially threatened by the rival consortia plans to monopolise commercial multiplexing. Little diversity of voice would enter the system should BDB win all three multiplexes. The consortia clearly sought to reintegrate the separated process, bundling their programming into a carriage franchise bid. In the event, by 24 June, ITC had agreed, stating that it considered that:

---

<sup>141</sup> See *Financial Times*, 7 February 1997, "CableTel claims BBC reneged on digital deal", detailing an outgoing BBC World-wide executive's letter offering DTN support on 20 January. This was reversed on 24 January.

<sup>142</sup> S.8(2)(f) of the Act. "The ITC did not consider that either application gave rise to concerns within the limited scope of this statutory provision." [www.itc.co.uk/factfile/dttnr.htm](http://www.itc.co.uk/factfile/dttnr.htm) at 3

<sup>143</sup> The 1996 Act's terminology for interactive services.

<sup>144</sup> On 24 June 1997, ITC [www.itc.co.uk/factfile/dttnr.htm](http://www.itc.co.uk/factfile/dttnr.htm) at 3

<sup>145</sup> TCI, controller of Flextech plc.



*a split award would be likely to lead to a less focused and coherent promotional strategy to consumers and increase the risk of confusion in the development of receiving equipment, impacting adversely on the development and success of the whole digital platform [at 4].*

By 'the whole platform', ITC refers to the guaranteed multiplexes offered to incumbent public service terrestrial broadcasters: BBC, C4, C5 and ITV<sup>146</sup>. Following this logic, coherence in the whole platform would more easily be secured by offering commercial multiplexes to those same broadcasters.

DTN had however set great store by a statutory requirement for the ITC to foster a DTT multiplexer separated specifically from satellite, under s.8(1) of the Act. This was clearly designed to ensure that BSkyB dominance in satellite did not jeopardise DTT. BSkyB had little apparent interest in DTT success. Its monopoly rents from analogue satellite under *laissez faire* OFT regulation meant that its interests were best served by delaying digital satellite and terrestrial for as long as possible. Hence the surprise that it actually participated in the BDB consortium, and fears that it had joined with Granada to jeopardise rather than promote BDB. While Carlton's commitment to DTT is well known over a period of years, its partners in News Corporation and Granada Group had been pursuing satellite as their preferred digital platform. Much of the investor interest in BDB's bid was due to relief that Carlton would not be in competition with its largest rivals<sup>147</sup>. ITC on 24 June 1997 offered the licences to BDB, subject to the withdrawal from the consortium of BSkyB<sup>148</sup>. ITC stated:

*BDB informed the ITC that its shareholders had reached a legally binding agreement that BSkyB will withdraw as a shareholder in BDB and will continue to supply its programming as envisaged in BDB's application ... BDB's licences will contain a condition restricting Granada from acquiring control of BDB in the light of Granada's significant shareholding in BSkyB.*

It had been assumed that Granada's close association with BSkyB, sharing Gerry Robinson as chairman as well as being a BSkyB shareholder and joint venture partner in GSkyB, meant that the two would act in concert, hence the licence condition. ITC had to judge whether BSkyB's dominance was a useful addition to the Carlton/Granada programming alliance, or whether it confirmed a gatekeeper position dominating all platforms, DTT, cable and satellite. It stated that it "consulted the Office of Fair Trading and the European Commission...and took the preliminary views of those bodies into account [ITC at 3]."<sup>149</sup> Effectively, ITC chose to *have its cake* - the proven subscriber dominance of Sky Movies, The Movie Channel and Sky Sports 1,

---

<sup>146</sup> Carlton-Granada-UN&M bluntly.

<sup>147</sup> In contrast, DTN's bid was initially viewed as weakening commitment to a cable-carriage solution to digital, DTT and programming seen as unhelpful diversions from the core CableTel business.

<sup>148</sup> [www.itc.co.uk/factfile/dttnr.htm](http://www.itc.co.uk/factfile/dttnr.htm) of 24 June 1997. See *Financial Times* 23 June 1997 at 1: "BSkyB agrees deal to quit UK digital TV partnership"

<sup>149</sup> Legal justification of the DGIV advice is provided in Temple-Lang, J. (1998) *The Duty of National Authorities under Community Constitutional Law* 23 *European Law Review* 109 at 119.

to underwrite consumer take-up of DTT - and *eat it* - decoupling Granada from Sky. There was a requirement that BSkyB premium channels continue to be supplied to BDB:

*it would not be acceptable for BSkyB's programme services to be removed in connection with BSkyB's withdrawal as a shareholder since those services were part of the core proposals in BDB's application.*

This eliminated the competition concern of Sky leveraging its pay-TV dominance into DTT multiplexing. BDB would gain from the pay-TV expertise of BSkyB, most crucially in film and sports rights, including Premiership football. Murdoch's perfect record of never securing control of a domestic UK television licence continues. Indeed, no foreign multinational has secured sole control of any UK terrestrial TV licence. The DTT awards were the culmination of the government's regulation of digital television, which included the imposition of the new ownership limits. Capture by business interests, and the 'globalisation' hypothesis pursued by government, contributed to the maintenance of the terrestrial oligopoly. The final twist in the policy equation is the imponderable of political interference. Just as earlier franchises<sup>150</sup> were shaped by political pragmatism, so DTT licensing was a fundamentally political process.

## Bibliography

- Anon. (1998) Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting (1998) 111 Harvard Law Review at 2312-2329
- Barendt, E. (1997) Structural and Content Regulation of the Media: United Kingdom Law and Some American Comparisons, Yearbook of Entertainment and Media Law 1997 (O.U.P. October 1997)
- BBC (1999): Monday, July 12, 1999 Published at 11:08 GMT 12:08 UK Business: The Company File - Freeserve gets a price tag [http://news.bbc.co.uk/hi/english/business/the\\_company\\_file/newsid\\_391000/391480.stm](http://news.bbc.co.uk/hi/english/business/the_company_file/newsid_391000/391480.stm)
- BBC (19th May 1999) BBC Publishes Tough New Fair Trading Policy at <http://www.bbc.co.uk/info/news/news165.htm>
- BBC (1999) Commercial Policy Guidelines 1999 at [http://www.bbc.co.uk/info/commercial/comm\\_policy.pdf](http://www.bbc.co.uk/info/commercial/comm_policy.pdf)
- Bender, G. (1998) Bavaria v. Felix Somm: The Pornography Conviction of the Former CompuServe Manager [http://www.digital-law.net/IJCLP/1\\_1998/ijclp\\_webdoc\\_14\\_1\\_1998.html](http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_14_1_1998.html)
- Birt, J. (1999) The Prize and the Price: The Social, Political and Cultural Consequences of the Digital Age, The New Statesman Media Lecture, Banqueting House, London, 6 July, at p9.

---

<sup>150</sup> Both satellite in the forced merger of BSB with officially-sanctioned offshore Sky, and terrestrial in the politically-motivated reforms which led to the 1991 ITV franchise round.

- Bland, Sir Christopher (23rd February 1999) The BBC: A Licence to Broadcast Royal Television Society, at <http://www.bbc.co.uk/info/news/news154.htm>
- Bohlin, E. et al (eds)(2000) Convergence in Communications and Beyond, Amsterdam: Elsevier Science
- Bolton and Whinston (1991) The Foreclosure Effects of Vertical Merger, Journal of Institutional and Theoretical Economics, 147
- Borras, M. and Zysman, J. (1996) You don't have to be a giant, Working paper 96A, Berkeley Roundtable on the International Economy (BRIE), UC Berkeley
- Broadcast 12 September 1997 at 1
- Broadcast 18 April 1997 Spain backs down over encryption services at 13.
- BSkyB (1999) AOL and BSkyB announce strategic marketing alliance: Anchor tenancy agreement to form first partnership phase at: <http://www.sky.co.uk/skytv/press/press9.htm> 10/2/99
- Cable Television Consumer Protection and Competition Act (1992) 47 U.S.C.
- Cavallin, J. (1998) European Policies and Regulations on Media Concentration, 1 International Journal of Communications Law and Policy 1 at
- Cavallin, Jens (1999) MM-S-PL99(11) "The impact of digitalisation on television content".
- Cave, M. and Cowie, C. (1996) Regulating Conditional Access in European Pay Broadcasting: Communications and Strategies, No.23, 3rd quarter at 119
- CEC (1994) Green Paper on the liberalisation of telecommunications infrastructure and cable TV networks, COM(94) 440, 682
- CEC (1995) 95/47 of 24 October 1995 on the use of standards for the transmission of television signals 23/11/95 EN OJ EC No.L281/51-54
- CEC (1995) Commission Directive amending Article 90/388/EC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services of 18 October 1995, 95/51/EC OJ L256/49
- CEC (1996) Case No.IV/M.709 OJ C 228/05 7 August Telefonica/Canal Plus/Cablevision (1996)
- CEC (1997) 'Television Without Frontiers' Directive <http://europa.eu.int/dg10/avpolicy/twf/160497en.html>
- CEC (1997) Protocol (No 32) on the system of public broadcasting in the Member States (1997) <http://ue.eu.int/Amsterdam/en/traiteco/en/conso2/conso2.htm>
- CEC (1998) Broadcasting of Sports Events and Competition Law Competition Policy Newsletter No.2 (June) at 18-28.
- CEC (1999) 108 EN Final Results of the Public Consultation on the Green Paper [www.ispo.cec.be/convergencegp/Com\(99\)108](http://www.ispo.cec.be/convergencegp/Com(99)108) at p8.

- CEC (1999) IP/99/413 of 23 June 1999: Commission adopts Cable directive a major step towards competition in the local loop
- CEC (1997) 2390 Commission communication concerning the review under competition rules of the joint provision of telecommunications and cable TV networks by a single operator and the abolition of restrictions on the provision of cable TV capacity over telecommunications OJ C 71, 7.3.1998 at p4 at <http://europa.eu.int/en/comm/dg04/lawliber/en/cabrev1.htm>
- Council of Europe (1996) Consultant Study on the impact of new communications technologies on media concentrations and pluralism, MM-CM(96)3 def, Council of Europe, Strasbourg
- Council of Europe (1997) Media Consolidation in Europe: The Impact on Pluralism, MM-CM (97) 12
- Council of Europe (1998) DH-MM(98)8
- Council of Europe (1999) MM-S-PL(99)2.
- Council of Europe (1999) MM-S-PL99(10) "The regulation of new communications technologies and services and the extent to which it promotes pluralism"
- Council of Europe (1999) MM-S-PL99(11) "The impact of digitalisation on television content"
- Council of Europe (1999) MM-S-PL99(9) "Interpretation of DG4 merger cases in the audiovisual sector"
- Cowie, C. and Marsden, C. (1999) Convergence: Navigating Through Digital Pay-TV Bottlenecks in 1 Info 1 at 53-67 Camford Publishing
- Cowie, C. and Williams, Mark (1997) The Economics of Sports Rights, 21 Telecommunications Policy 7 at 619-634.
- Danish Media Committee (1995) Media Concentration: Transparency, Pluralism and Access, The Report of the Danish Media Committee's International Hearing on Media Concentration, 12-13 June 1995
- DCMS 275/98 of 13 November 1998, New DTT Points System Comes Into Effect Tomorrow, at <http://www.worldserver.pipex.com/coi/depts/GHE/coi8061e.ok>
- DCMS 293/98 of 26 November 1998, Government Seeks Views On Relaxing Digital Radio Licence Ownership at <http://www.worldserver.pipex.com/coi/depts/GHE/coi8524e.ok>
- DCMS 310/98 of 15 December 1998 Television Licence Fee Will Rise According To Five Year Formula at:
- Dellebeke M. (1997) IRIS Netherlands: Ownership Limitations on Cable Networks at IRIS 3:13
- Dellebeke M. (1997) Netherlands: Access to Cable Update - Ministry of Economic Affairs, Decision Taken Regarding KTA (Cable TV Amsterdam); at IRIS 2:11
- Department of Trade and Industry (5 March 1999) Building Confidence in Electronic Commerce: A Consultation Document
- Dixon's (1999) PR/68/99 of 19 May: Freeserve Launches Ground Breaking Low Cost Telephony Service at [http://www.dixons-group-plc.co.uk/Press\\_Release\\_990519.asp](http://www.dixons-group-plc.co.uk/Press_Release_990519.asp)

- Dixon's (1999) PR/990201 Woman Nets Bonus As Freeserve's Millionth Sign-Up at [http://www.dixons-group-plc.co.uk/Press\\_Release\\_990201.asp](http://www.dixons-group-plc.co.uk/Press_Release_990201.asp)
- DNH Press Release 96/314 of 16 October.
- Doyle, G. (1998) Media Consolidation in Europe: The Impact on Pluralism, Study prepared on behalf on the Committee of Experts on Media Concentrations and Pluralism, MM-CM (97) 12, Directorate of Human Rights, Council of Europe
- Doyle, G. (1997) From 'Pluralism' to 'Ownership': Europe's Emergent Policy on Media Concentrations Navigates the Doldrums 3 The Journal Of Information Law And Technology (JILT) [http://elj.warwick.ac.uk/jilt/commsreg/97\\_3doyl/](http://elj.warwick.ac.uk/jilt/commsreg/97_3doyl/)
- Doyle, G. (1999) Convergence: 'A unique opportunity to evolve in previously unthought-of ways' or a hoax? Chapter 5 in Marsden, C. and Verhulst, S. Convergence in European Digital TV Regulation, London: Blackstone.
- Economist (1999) 28 May 1999, Business 'Symbian's friends'.
- Elstein, D. (1997) The Guardian Media 7 April 1997 at 7.
- FCC (1993) Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order. MM Dkt. No.92-265, 8 F.C.C. Rcd.3359, 3361
- Federal Communications Law Journal (1999) Vol.51, No.3, New Approaches to Minority Media Ownership, May.
- Financial Times (1997) 10 October 1997 "BBC gets go-ahead for 24-hour cable news"
- Financial Times (1996) 14 New Media Markets 1 August 1996 at 1
- Financial Times (1997) 15 New Media Markets 18 of May 22 1997 at 8
- Financial Times (1997) 15 New Media Markets 8, 27 February 1997 at 1
- Financial Times (1997) 23 June 1997 at 1: "BSkyB agrees deal to quit UK digital TV partnership"
- Financial Times (1997) 23 June 1997 at 1: "BSkyB agrees deal to quit UK digital TV partnership"
- Financial Times (1997) 3 September 1997 "Nova TV: licensed to print money"
- Financial Times (1994) New Media Markets 21 April 1994: "Phone companies 'must sell off TV'"
- Financial Times (1997) 7 February 1997, "CableTel claims BBC reneged on digital deal"
- Financial Times (1997) 7 February 1997, "CableTel claims BBC reneged on digital deal"
- Firestone, C.M. and A.K.Garner (eds)(1998) Digital Broadcasting and the Public Interest, Aspen Institute, Washington D.C.
- Flynn, B. (1999) Opening the Box: Issues in Digital Gatekeeping, in Montreux Symposium '99 of 10-15 June, Symposium Records pp698-706 at p699.

- Goldberg, D. and Verhulst, S. (1997) Legal Responses to Regulating the Changing Media in the United Kingdom 8 Util L.R. at 12-22.
- Graham, A. (1999) 'Broadcasting Policy on the Multimedia Age' in Graham, A. et al (1999) Public Purposes in Broadcasting: Funding the BBC, University of Luton Press
- Graham, A. et al (1999) Public Purposes in Broadcasting: Funding the BBC, University of Luton Press.
- Guardian (1997) 25 June 1997 at 6: "Second-rate' group wins TV".
- Guthus, Gudbrand (1999) MM-S-PL99(9) "Interpretation of DG4 merger cases in the audiovisual sector".
- Harcourt, A. (1998) Regulation of European Media Markets: Approaches of the European Court of Justice and the Commission's Merger Task Force, 9 Utilities Law Review 6 at 276-291, at 289.
- Hart and Tirole (1990) Vertical Integration and Market Foreclosure, Brookings Papers: Microeconomics;
- Hughes, J. (1997) Managing the transition from the old world to the new world – a consultant's view, Financial Times New Media and Broadcasting Conference, 27 February.
- Humphreys, P. (1997) Power and Control in the New Media, presented at ECPR Workshop, Manchester, University of Manchester
- ITC (Independent Television Commission) 13 May 1998 Digital Television: Interoperability and Open Access.
- ITC (Independent Television Commission) Press Release 62/97 of 21 July 1997
- ITC (Independent Television Commission) [www.itc.co.uk/factfile/dttnr.htm](http://www.itc.co.uk/factfile/dttnr.htm) at 3 of 24 June 1997
- Jacobowicz, K. (1999) MM-S-PL99(10) "The regulation of new communications technologies and services and the extent to which it promotes pluralism"
- Jakubowicz, K. (1999) Normative Models of Media and Journalism, and Broadcasting Regulation in Central and Eastern Europe 1 International Journal of Communications Law and Policy 2, [http://www.digital-law.net/IJCLP/2\\_1999/ijclp\\_webdoc\\_12\\_2\\_1999.html](http://www.digital-law.net/IJCLP/2_1999/ijclp_webdoc_12_2_1999.html),
- Kagan World Media (1998) Kagan's European Cable/PayTV Databook 1998 Kagan World Media, London
- Katz, Michael (1997) paper to Economics of Pay-TV Regulation, 10 January 1997, London Business School
- Kayfold, G. (1999) "AT&T makes the big deals, but Microsoft wins the hand" at <http://www.instat.com/infoalert/alert199918.htm#at&t> Information Alert, May 10, 1999, Volume #18
- Koenig, Christian and Ernst Röder (1998) Converging Communications, Diverging Regulators? - Germany's Constitutional Duplication in Internet Governance, 1 International Journal of Com-

munications Law and Policy 1 at  
[http://www.digitallaw.net/IJCLP/final/current/ijclp\\_webdoc\\_1\\_1\\_1998.html](http://www.digitallaw.net/IJCLP/final/current/ijclp_webdoc_1_1_1998.html)

- Konert, B. (1999) Economics of Convergence: Part 2 – The Microsoft Strategy, in SIS Briefings June at pp6-10.
- Kufhold, G. (1999) “Digital Must Carry will "disconnect" local phone competition for Cable TV systems” reporting on Digital Must Carry: Cable TV vs. The World at <http://www.instat.com/index.htm>
- Levy D.A.L. (1997) The regulation of digital conditional access systems. A case study in European policy making 21 Telecommunications Policy 7 at pp 661-676.
- Levy, D.A.L. (1997) Regulating Digital Broadcasting in Europe: The Limits of Policy Convergence 20 West European Politics 4 at 24-42.
- Levy, J. (1999) Competition and Copyright: Retransmission of Free-to-Air Television Signals, Prometheus, December issue, forthcoming.
- Lutzhof N. and Machill, M. (1999) The Economics of French Cable Systems as Reflected in Media Policy, 12 Jour. Media Econ. 3 at 181-200, at 194, 197-8.
- Marsden, C. (1996) Judicial Review of the Channel 5 TV Licence Award: ITC Exercises Model Care, 5 Nottingham Law Journal 1 at 86-91
- Marsden, C. (1997) Many Channels, Few Voices: Competition in the multiplex bids 25 Intermedia 2 at 19-21, Institute of International Communications, London
- Marsden, C. (1999) Judicial Review of UK Terrestrial Commercial TV Licensing, 10 Utilities Law Review 3.
- Marsden, C. (1999) Regulating Media Owners in Digital Television: Lessons from UK Policy Formation, 17 Cardozo Arts & Entertainment Law Journal 3 at 659
- Marsden, C. (2000 forthcoming) The European Digital Convergence Paradigm: From Structural Regulation to Behavioral Competition Law? in Erik Bohlin et al (eds) Convergence in Communications and Beyond, Amsterdam: Elsevier Science
- Marsden, C. (2000 forthcoming) Regulating the Global Information Society, Routledge, London (ed.)
- Nadel, M. S. (1992) A Technology Transparent Theory of the First Amendment and Access to Communications Media 43 Fed. Comm. LJ 2 at 157
- Oftel (1997) <http://www.oftel.gov.uk/speeches/cca1097.htm> of 21 October 1997
- Ordover, Saloner and Salop (1990) Equilibrium Vertical Foreclosure, American Economic Review 80 (March).
- Oreja, Marcellino (1997), Exclusive Rights for TV Broadcasting of Major (Sports) Events, SEC[97] 174 final
- Owen, B. M. (1975), Economics and Freedom of Expression: Media Structure and the First Amendment. Cambridge, Mass.: Ballinger Publishing.

- Owen, B. M. (1992), Video Economics, Harvard University Press.
- Poe D. R. (1992) As the World Turns: Cable Television and The Cycle of Regulation 43 Fed.Comm.LJ 2 at 141
- Price, M. (1998) Red Lion and the Constiutionality of Regulation: A Conversation Among the Justices, in Firestone, C.M. and A.K.Garner (eds)(1998) Digital Broadcasting and the Public Interest, Aspen Institute, Washington D.C.
- Prosser, Goldberg and Verhulst (1996) Consultant Study on the impact of new communications technologies on media concentrations and pluralism, MM-CM(96)3 def, Council of Europe, Strasbourg, 26 August
- Puissochet, A. (1999) Idate News n°109 - 5 July, announcing the IDATE study "Digital TV receivers and video terminals in 2005". <http://www.idate.fr/maj/welcome.html>
- Sauter, W. (1998) The Liberalisation of Cable TV Infrastructure in the European Union 9 Utilities Law Review 5 at 220-1
- Statutory Instrument (1998) No. 3196; The Television Broadcasting Regulations 1998.
- Temple-Lang, J. (1998) The Duty of National Authorities under Community Constitutional Law 23 European Law Review 109 at 119.
- Thomas A. (1999) Regulation Of Broadcasting In The Digital Age: What impact will digital technology have on broadcasting and communications industries and how should regulation adapt to the new environment? Released 26 May at <http://www.culture.gov.uk/thomastitle.htm>
- TKRNEWS-L (International Communications Law and Policy) 31/05/1999 'Deutsche Bank kauft TV-Kabel',
- TKRNEWS-L (International Communications Law and Policy) 05/24/99 - Internet firms urge FCC to ensure cable open access
- TKRNEWS-L (International Communications Law and Policy) 07/15/1999 - Created for 07/01/99 Broadband Deregulation Bill Introduced In House
- TKRNEWS-L Communications News 07/15/1999 - 07/01/99 Broadband Deregulation Bill Introduced In House
- Turner Broadcasting System, Inc. et al v. Federal Communications Commission et al (31 March 1997) 117 S.Ct 1174 at <http://supct.law.cornell.edu/supct/html/95-992.ZC1.html>.
- Ungerer, H. (1998) Ensuring Efficient Access to Bottleneck Essential Facilities: The Case of Telecommunications in the European Union - Competition Workshop, Florence 13/11/98, <http://europa.eu.int/comm/dg04/speech/index98.htm>
- United States v. Microsoft Corporation (1998) District of Columbia Circuit Court of Appeal, Cases 97-5343 and 98-5012, decided 23 June 1998, from 94cv01564 available at <http://www.cadc.uscourts.gov/common/opinions/199806/97-5343a.txt>



United States v. Primestar Partners (1993), L.P., Proposed Final Judgment and Competitive Impact Statement, 58 Fed.Reg. 33,944