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## Global Forum on Competition

### COMPETITION ISSUES IN TELEVISION AND BROADCASTING

#### Contribution from BIAC

-- Session II --

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## COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- BIAC --

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on competition issues in television and broadcasting.

### 1. Introduction

2. The subject of this roundtable, competition in TV and broadcasting, reflects competition in many markets segments, at different levels of the production and distribution process, that interact in different ways within and among legal jurisdictions. Indeed, as time passes, the competitive dynamic of TV broadcasting is becoming more complex, requiring a dynamic approach to evaluating competition.

3. The market segments relevant to the analysis include, among others, competition in the creation or production of programming, competition by channels to secure rights to distribute programming, competition within and among means of distribution of programming including evolving distribution technologies, competition for subscribers by distributors, competition for viewers by television channels, and competition to secure advertisers who may desire to reach the viewers of programming.

4. BIAC’s constituency includes members at all levels of competition within this broad field. In some cases, these members have very different views on the extent to which antitrust laws should be utilized, or the point at which regulators should intervene, in the television and broadcasting industry. Indeed, many of the significant disputes between these constituents involve what is, in essence, a zero-sum-gain profit-shifting exercise between different vertical levels of the “product chain” of TV broadcasting. The stakes in these disputes can be very high and the outcome can cause seismic shifts in the profitability and sustainability a business model.

5. In these cases, BIAC takes no specific view on the merit of the antitrust arguments espoused by any particular company or industry segment. Often, these battles reflect the dynamic witnessed in many competitive markets where suppliers and customers in a vertical distribution chain have differential bargaining power based on the value of their asset base and the differentiation of their product offering and, as a result, one group profits at the expense of the other. Where that differential bargaining power stems from superior skill, foresight or business acumen antitrust enforcers should be reluctant to interpose themselves to alter the competitive dynamic.

6. In the television and broadcasting industry, however, differential market power also can result from regulatory restrictions or regimes imposed by governments. Often, these restrictions were put in place long before the current technologies that expand the means of program distribution were introduced. This historical regulatory “drag” can potentially inhibit effective competition. A foremost concern of government regulators (antitrust and otherwise) should be to evaluate whether these government-imposed barriers to competition exist and, if so, to remove or alleviate such restrictions in a way that ensures that competition is conducted on a level playing field.

7. Despite the highly regulated environment in which much of the competition in TV and broadcasting takes place, BIAC is of the view that special rules for the assessment of competition in these markets are not necessary. Established means of evaluating mergers, dominance, exclusive dealing and other competition issues should be relied upon. In particular, the competition authorities should not be more anxious or reluctant to act in respect to TV and broadcasting markets merely because they are in the public eye and often subject to significant political interference. Indeed, TV and broadcasting markets provide an important opportunity for competition authorities to prove their independence from political pressures.

8. Moreover, the focus of competition authorities in TV and broadcasting should remain on economic markets. Competition authorities should focus on competition issues and not base their evaluation on non-competition factors, such as (non-competition) public interest concerns, diversity of “voice,” plurality of media ownership, desirability of public programming, etc. BIAC believes that any regulatory action based on non-competition concerns should be evaluated, decided and effectuated by a specialist regulatory agency charged with specific jurisdiction over such issues. Likewise, where the authority granted to a specialist regulatory agency is arguably broad enough to encompass competition concerns, the competition analysis should be ceded to the national competition authority, thereby allowing each agency to focus on its own core competencies. In conducting its review, a competition authority should not allow non-competition issues to influence the competition review of matters and should not be called upon by governments to enact non-competition policy through a competition review.

9. With these overarching basic principles as a backdrop, BIAC reviews several important aspects of competition within the TV and broadcasting industry below.

## **2. The TV and Broadcasting Industry Is Highly Dynamic**

10. Tremendous changes to the television and broadcasting field have occurred over the past decade. Where television programming traditionally was distributed to end users through over-the-air broadcast, and then cable, it now also is broadcast via satellite, over the internet, and on mobile devices. Moreover, where television programming historically was viewed only in real-time, much of today’s programming is “time-shifted,” with viewers watching on-demand or through playback of a digital video recording that allows them to watch according to their own schedule rather than the broadcaster’s schedule. Additionally, in many countries, TV and broadcasting has gone from a national to international scope, probably most evident in Europe where it has gone from a landscape where each country had a handful of local language channels with predominantly local content to a much more international offering of channels and content. These changes have altered the competitive dynamics of the industry dramatically in the past 10 years.

11. A brief review of industry dynamics, and the competitive incentives they create, may be useful. The competitive landscape for television and broadcasting in many countries is highly regulated. Telecommunications authorities often regulate the television broadcast industry, particularly with respect to the granting and monitoring of broadcasting rights. Because free-to-air broadcasting involves the use of frequencies on the radio spectrum -- historically within the purview of government as a public good -- this layer of competition has been subject to ongoing government intervention that differentiates it from, for example, the production of programming which is largely unregulated.<sup>1</sup> Traditional television broadcast networks, therefore, evolved under a highly regulatory regime, which significantly restricts the conduct of broadcast stations and imposes heavy regulatory costs.

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<sup>1</sup> We note, however, that governments often are involved directly in sponsoring public television channels and may influence the development and broadcasting of programming in such cases.

12. The traditional form of over-the-air TV broadcasting can be seen as a two-sided market. Previously, free-to-air channels were the norm, with channels competing to develop or procure programming and to sell advertising to raise revenues and make profits. These broadcasters drew demand both from viewers and from advertisers and, like other two-sided markets, had to intermediate between the interests of, and account for the interactions of demand between, these two groups. For example, they could reduce the cost of advertising by expanding the time dedicated to ads, but this reduction in quality (since it is well documented that viewers dislike ads) would alienate viewers. Or they could appease viewers by reducing commercial time, but this limitation on advertising output would increase ad prices.<sup>2</sup>

13. There were significant limitations in free-to-air channels, however, in part due to restrictions on the amount of broadcast spectrum available to broadcast the free programming. Technological advances in distribution made it possible to expand, sometimes to a huge degree, the amount of programming available through paid TV distribution services, such as cable or satellite. These advances also made it possible to exclude non-paying viewers, which was not possible with over-the-air broadcasts. This helped to control the costs of free-riding to some degree and facilitated the large investments in physical facilities that were required. The pay-TV model raises revenues principally by charging user fees directly to viewers.

14. Broadcast networks now often distribute their content not only over the airwaves, but also through pay-TV distribution networks that can enhance both the reach and quality of the broadcast. Absent controlling regulatory requirements, broadcast networks that also distribute their channels through pay-TV distribution, maximize profits by choosing a balance between charges to distributors based on the desirability of their content to viewers, and charges to advertisers for selling commercial time, which detracts from the desirability of their content to viewers.

15. Whereas free-to-air distribution prompted significant competition between channels in the end-user markets (i.e., for viewers and advertisers), the pay TV market operates on the basis of different incentives because the distributor (rather than the channels) sets the end-user price simultaneously for all channels (or packages of channels). Pay-TV distributors compete principally on the quality and variety of programming available and on differentiation from other forms of distribution (including free-to-air broadcasting). Pay-TV, therefore, can often promote investments at the programming level that would not be made in free-to-air broadcasting.

16. Online and mobile distributors of video content shift the dynamic even further. They are similar to broadcast networks in that they generate their revenues principally through advertising revenues, yet different in that they do not promote competition between channels. Online distributors, in particular, often have a significant cost advantage over other distribution rivals in that the costs of infrastructure are much lower because (unlike cable and satellite) they rely on the public internet and do not have to build-out their own assets for distribution. At the same time, they can “free-ride” on the advertising and promotion of programming by program developers and distribution competitors.

### **3. Defining Relevant Markets**

17. These changes in distribution have been driven by significant changes in technology. Technological changes have created a convergence in competition among various forms of media distribution. Whereas enforcement agencies, historically, viewed different types of media (television, radio, internet, newspapers, etc.) as separate relevant product markets, a more current evaluation of

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<sup>2</sup> See Hans Jarle Kind, Tore Nilssen & Lars Sorgard, *Price Coordination in Two-Sided Markets: Competition in the TV Industry*, (CESifo Group, Working Paper No. 3004, Mar. 2010), available at [www.cesifo-group.de/portal/pls/portal/docs/1/1185680.PDF](http://www.cesifo-group.de/portal/pls/portal/docs/1/1185680.PDF).

competition in television and broadcasting suggests that a broader market interpretation recognizing the convergence of video programming distribution may be appropriate.

18. This convergence of competition was evident in the recent U.S. enforcement action in the merger of Comcast and NBC, where the Antitrust Division of the Department of Justice acted to prevent potential vertical foreclosure in video program distribution. On December 3, 2009, the Comcast Corporation (Comcast) and NBC Universal, Inc. (NBCU) announced that Comcast would purchase a controlling interest in NBCU.<sup>3</sup> Comcast owns the largest cable distribution network in the U.S., and NBC was one of the country's largest television broadcast networks. Comcast also is a significant provider of broadband internet access (often through a "triple play" offering of cable, internet and telephony services). Although the parties competed to some extent in local advertising, their main relationship to one another was that NBCU provided video programming to Comcast which Comcast then distributed to consumers through its cable network. Both the Antitrust Division of the Department of Justice (DOJ) and the telecommunications regulator, the Federal Communications Commission (FCC), reviewed the merger. The parties required affirmative FCC approval to transfer various telecommunications licenses in order to effectuate the merger. The FCC's authority allows it to evaluate the merger on public interest grounds, which includes considerations of competition, but also involves a review of broader non-competition concerns.

19. The DOJ focused on three potential competitive harms. First, that Comcast would have the ability to control the prices charged to its distribution rivals either by raising the cost of the NBCU content or denying the content altogether. Relevant to this concern are the FCC's program access rules, which prohibit vertically integrated multichannel video programming distributors (MVPDs) from refusing to sell certain popular content to its competitors or selling it on discriminatory terms. Second, that Comcast would have an incentive to slow the growth of Hulu, an increasingly popular online video distribution site in which NBCU had an investment stake, by influencing key strategic decisions. Third, that as a provider of internet access Comcast could have an incentive to block or discriminate against "Online Video Distributors" (OVDs) with respect to content that might otherwise compete with NBCU or Hulu.

20. Under a settlement reached between DOJ and the parties, the joint venture must make available to OVDs the same package of broadcast and cable channels that it sells to traditional video programming distributors. The joint venture must offer an OVD broadcaster cable and film content that is similar to, or better than, the content the distributor receives from any of the joint venture's programming peers. Additionally, the FCC's order requires the joint venture to license NBCU content to Comcast's cable, satellite and telephone competitors, requires the joint venture to license content to OVDs on reasonable terms and includes an arbitration mechanism for resolving disputes, and also allows Comcast's traditional competitors, such as satellite and telephone companies, to invoke arbitration at the FCC to resolve program access and retransmission consent disputes.<sup>4</sup>

21. The scope of the relief, which is intended to ensure that OVDs can continue to develop as a source of programming distribution, signals that online distribution is recognized as a marketplace rival to traditional cable distribution, since the post-merger incentives of Comcast cited by the DOJ would not be credible in the absence of such rivalry.

<sup>3</sup> Press Release, Comcast, Comcast and GE to Create Leading Entertainment Company (Dec. 3, 2009), *available* at [www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=938&SCRedirect=true](http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=938&SCRedirect=true).

<sup>4</sup> Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Allows Comcast-NBCU Joint Venture To Proceed With Conditions (Jan. 18, 2011), *available* at [www.justice.gov/atr/public/press\\_releases/2011/266149.pdf](http://www.justice.gov/atr/public/press_releases/2011/266149.pdf); and In The Matter of Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc., 2011-1 Trade Cases ¶ 77312, 26 FCC Rcd. 4238, 2011 WL 194538 (F.C.C. Jan. 18, 2011).

22. At the same time, the heavily regulatory settlement in Comcast/NBCU, and the oversight necessary to implement the remedy,<sup>5</sup> reflects the vestige of intensive regulation by the FCC to traditional broadcasters such as NBCU and traditional distributors such as Comcast. A merger in an unregulated sector of the economy would be far less likely to see such an expansive remedy. Indeed, although Comcast may have market power in some segments of the country where it owns the cable distribution franchise (which is regulated by States or localities, not by the FCC), NBC's share of advertising revenue would be well below dominant levels, even when regarded in the context of narrow demographic segments.<sup>6</sup>

#### 4. Risks of Regulatory Protectionism

23. The intervention of the state in television broadcasting differs by jurisdiction, but in many markets TV broadcasting involves not only the regulation of private operators, but also the direct participation by the state in the market through state-owned or state-approved television stations. These state-owned channels can distort competition significantly, thwart new entry, and harm private operators by introducing a highly or completely subsidized competitor into the marketplace. The presence of public television channels in the marketplace can also create an incentive for regulators to discriminate against private parties in order to protect the interests of the state in its state-owned television channels.

24. One matter in which discrimination was alleged by the parties and some observers is in the failed attempt by News Corp. in 2010 to acquire the remaining 60.9 percent of BSkyB's shares which it did not already own. News Corp. and BSkyB operate largely in different markets in the UK and Ireland but compete with each other to a limited extent in the wholesale supply of basic pay-TV channels and in the supply of online and TV advertising space. Since the parties are involved in different levels of the market, the European Commission's examination of the deal targeted the potential for "anticompetitive effects arising from vertically linked or neighboring activities in the audiovisual sector, in newspaper publishing, or in advertising." According to the Commission, which cleared the deal in Phase 1 with no remedies, the proposed transaction "would only lead to a small increment on BSkyB's existing share of the market for the supply of basic pay-TV channels in the UK and Ireland." In addition, the parties have a small combined market share in the online and TV advertising market. As a result, the transaction did not raise horizontal anticompetitive concerns. The Commission approved the proposed acquisition on Dec. 21, 2010, but emphasized that its decision covers the competition aspects only and explained that the UK must determine "whether the proposed transaction is compatible with the UK interest in media plurality, which is different from the commission's competition assessment."<sup>7</sup>

25. The UK Secretary of State for Business Innovation and Skills issued a European intervention notice on Nov. 4, 2010, which required the relevant UK authorities to investigate and report on whether the proposed transaction is or may be expected to operate against the public interest in sufficiency of plurality

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<sup>5</sup> Reports of complaints by programming distributors that Comcast is not abiding by the settlement already have surfaced.

<sup>6</sup> The DOJ traditionally has used advertising revenues as the basis for assessing market power in television mergers. *See, e.g.*, Complaint for Injunctive Relief, U.S. v. Univision Commc'n, Inc., (No. CV03-00758) 2003 WL 23781621 (D.D.C. Mar. 26, 2003).

<sup>7</sup> Press Release, European Comm'n, Mergers: Commission Clears News Corp's Proposed Acquisition of BSkyB Under EU Merger Rules (Dec. 21, 2010), *available at* [http://europa.eu/rapid/press-release\\_IP-10-1767\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1767_en.htm); and Case No. COMP/M.5932, News Corp/ BSkyB, SG-Greffe(2010) D/C(2010) 9684, (Dec. 21, 2010), *available at* [http://ec.europa.eu/competition/mergers/cases/decisions/m5932\\_20101221\\_20310\\_1600159\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf).

of persons with control of media enterprises.<sup>8</sup> The plurality review was conducted under specific UK legislation enacted under Section 58 of the UK Enterprise Act of 2002. On December 31, 2010, Ofcom submitted its report to the UK Secretary of State for Culture, Media and Sport<sup>9</sup> who informed the parties that he would entertain remedies prior to referring the case to the Competition Commission. Remedies were accepted in March 2011 and a consultation was launched for third-party views. Revised remedies were submitted by News Corp in June 2011, which included Sky News being spun off to operate independently from BSkyB, and another consultation was launched. But News Corp. withdrew its remedies on July 11, 2011 and on the same day the UK Department for Culture, Media and Sport referred the deal to the Competition Commission.<sup>10</sup> Shortly thereafter, on July 13, 2011 News Corp. withdrew its offer to BSkyB.<sup>11</sup> The Competition Commission formally cancelled its inquiry on July 25, 2011.<sup>12</sup>

26. The News Corp/BSkyB transaction is an example of public interest considerations, in the guise of competition concerns, being used to disrupt a transaction that, by objective standards, would appear not to raise genuine competition concerns. Ofcom's review involved considerations of "sufficiency of plurality" and allegations of bundling that are more properly analyzed in the realm of antitrust economics. In this light, it is difficult to reconcile the conclusions of the European Commission with the UK's determination of a need for remedies based on an "[in]sufficiency of plurality of persons with control of media enterprises."

27. BIAC takes no view on the News Corp/BSkyB transaction, but is of the view that competition enforcers should not be charged with assessing or addressing non-competition concerns relating to potential mergers in the television and broadcasting industry. If such public interest concerns are to be addressed, they should be addressed only by a qualified regulatory authority with a clear and transparent mandate to identify, study, and enforce non-competition standards. The credibility of competition law enforcers generally should not be strained by the introduction of non-competition concerns. Likewise, specialist broadcast or telecommunications regulators should not take the lead in conducting what amounts to competition analysis.

28. Admittedly, the simultaneous application to the same transaction of competition rules and non-competitive public interest concerns by separate agencies can lead to complex situations. One such example is that of the recent approval by the French Autorité de la Concurrence of Canal Plus' takeover of Bolloré Group's free-to-air channels Direct 8 and Direct Star, and the same day the re-approval of Canal Plus' 2006 merger of CanalSat and TPS.<sup>13</sup> These were ostensibly based on a traditional competitive

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<sup>8</sup> Press Release, United Kingdom, Dep't for Bus. Innovation & Skills, Business Secretary Intervenes in Proposed BSkyB Acquisition (Nov. 4, 2010), *available at* <http://news.bis.gov.uk/content/Detail.aspx?ReleaseID=416355&NewsAreaID=2>.

<sup>9</sup> United Kingdom, Ofcom, Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation (Dec. 31, 2010), *available at* [http://www.culture.gov.uk/images/publications/OfcomPITReport\\_NewsCorp-BSkyB\\_31DEC2010.pdf](http://www.culture.gov.uk/images/publications/OfcomPITReport_NewsCorp-BSkyB_31DEC2010.pdf).

<sup>10</sup> United Kingdom, Ofcom, Oral Statement: NewsCorp/BSkyB Merger Update (July 11, 2011), *available at* [http://www.culture.gov.uk/news/ministers\\_speeches/8285.aspx](http://www.culture.gov.uk/news/ministers_speeches/8285.aspx).

<sup>11</sup> Press Release, News Corp., News Corporation Withdraws Proposed Offer for British Sky Broadcasting Group PLC (July 13, 2011), *available at* [www.newscorp.com/news/news\\_494.html](http://www.newscorp.com/news/news_494.html).

<sup>12</sup> Press Release, United Kingdom Competition Comm'n, CC Formally Cancels News Corp/BSkyB Inquiry (July 25, 2011), *available at* [www.competition-commission.org.uk/assets/competitioncommission/docs/2011/media-centre/41\\_11\\_news\\_corp\\_bskyb\\_cancel.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/media-centre/41_11_news_corp_bskyb_cancel.pdf).

<sup>13</sup> See, Press Release, Autorité de la Concurrence, The Autorité de la Concurrence, Ruling Again on the Acquisition of TPS and CanalSatellite by Vivendi Universal and Canal Plus, Has Cleared the Transaction

analysis, and subject to conditions which were probably especially strict in view of the fact that, in a rare move, the first approval of the TPS deal had been repealed in 2011 on account of the failure to implement some of the original commitments. Several weeks later, the sector-specific Conseil Supérieur de l'Audiovisuel (CSA) approved the Direct 8 – Direct Star acquisition, subject to further conditions based on non-competition public interest considerations.<sup>14</sup> Although both agencies had acted in a coordinated fashion, with CSA having provided an official “advice” to Autorité de la Concurrence prior to the latter’s decision, such situations make it extremely difficult for businesses to identify clear standards and draw lessons to frame their own behavior.

29. Even where state-owned or approved television stations do not operate directly in the market, the state often places restrictions or limitations on the content of programming that uses publically-granted spectrum by imposing broadcasting standards and practices. These often are imposed by the telecommunications regulator for various “public interest” reasons that are unrelated to the promotion of competition. In many countries, non-broadcast competitors may not face any such restrictions. For example, broadcasting services are regulated in Europe with regard to consumer protection (advertising, child protection etc.) or reserving a certain share for European content. In contrast to regulated broadcasting services, OTT providers such as YouTube and Netflix are not regulated at all. Since these services are often provided by companies based outside the EU, the enforcement of existing regulatory rules (on a national or European level) is very difficult. In addition, OTT providers usually do not contribute to financing ICT-infrastructures. European network operators, who often are also engaged in the distribution of pay-TV services, are not able to gain transportation fees from OTT players, allowing the OTT players to “free ride” on the investments of their competitors.

30. As cable channels, pay-TV options and online distribution proliferate, and with over-the-air broadcasting representing a dwindling share of television viewership, regulatory authorities should reconsider the application of these standards to broadcast networks and whether they support the principle of a level competitive playing field. Competition authorities should consider the use of competition advocacy with industry-specific regulators to remove or reduce the burdens of public interest considerations to the extent that they create an imbalance in the competitive playing field.

## 5. Horizontal Mergers in TV and Broadcasting

31. Horizontal mergers in the TV and broadcasting industry can be evaluated based on principle that apply equally to other areas of competition.

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Subject to Several Injunctions, July 23, 2012, available at [www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=418&id\\_article=1949](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1949); Décision No 12-DCC-100 relative à la prise de contrôle exclusif de TPS et Canal satellite par Vivendi et Groupe Canal Plus (July 23, 2012), available at [www.autoritedelaconcurrence.fr/pdf/avis/12DCC100decision\\_version\\_publication.pdf](http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC100decision_version_publication.pdf) [in French]; Press Release, Autorité de la Concurrence, The Autorité de la Concurrence Clears the Acquisition of Direct 8 and Direct Star by Vivendi and Groupe Canal Plus, Subject to Conditions, July 23, 2012, available at [www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=418&id\\_article=1953](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1953); and Décision No 12-DCC-101 relative à la prise de contrôle exclusif des sociétés Direct 8, Direct Star, Direct Productions, Direct Digital et Bolloré Intermédia (July 23, 2012), available at [www.autoritedelaconcurrence.fr/pdf/avis/12DCC101\\_decision\\_version\\_publication.pdf](http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC101_decision_version_publication.pdf) [in French].

<sup>14</sup> Press Release, Conseil Supérieur de l'Audiovisuel, Le CSA autorise sous conditions l'achat de Direct 8 et Direct Star par le groupe Canal+, Sept. 18, 2012, available at [csa.fr/en/Espace-Presse/Communiqués-de-presse/Le-CSA-autorise-sous-conditions-l-achat-de-Direct-8-et-Direct-Star-par-le-groupe-Canal](http://csa.fr/en/Espace-Presse/Communiqués-de-presse/Le-CSA-autorise-sous-conditions-l-achat-de-Direct-8-et-Direct-Star-par-le-groupe-Canal) [in French].

32. One example of a straightforward application of common merger principles in the TV industry involves the attempted merger of EchoStar and DirecTV, two competing suppliers of satellite television distribution. On October 28, 2001, EchoStar and Hughes Electronics - owner of DirecTV - announced that they would merge. At the time, the two companies controlled the only orbital slots allocated for direct broadcast satellite service over the continental United States. On October 31, 2002, the U.S. Department of Justice Antitrust Division filed suit to block the merger citing that it would create a "monopoly" in areas without cable TV and would concentrate the market for multi-channel video programming distribution services from three companies to two. As stated by then-Assistant Attorney General Charles James, "This merger would create a monopoly in those areas where cable television is not available, thereby eliminating the only competitive choice for millions of households. It would leave tens of millions of households - for whom DirecTV, DISH Network, and cable now compete to provide multichannel video programming distribution service - with a reduction from three to two competitive choices."<sup>15</sup> The DOJ concluded the parties could not demonstrate that any efficiencies likely to result from the merger were sufficient to outweigh the substantial adverse impact of the transaction on competition and consumers. Similarly, the DOJ found that the parties' proposed remedies were unlikely to become a sufficient replacement for the vigorous competition that existed between Hughes and Echostar within a reasonable period of time.

## 6. Barriers to Entry in Pay TV Distribution

33. Many jurisdictions feature both free-to-air and pay-TV models of distribution engendering competition between the two. As noted, the market success of pay-TV depends strongly on providing both a broader range and higher quality of programming as compared to free-to-air offerings. It is also clear that there is a significant difference in acceptance of the two models, even where both are offered, and that this rate of acceptance differs greatly by jurisdiction.

34. In the U.S., for example, more than 75% of all viewers subscribe to some form of cable, satellite or fiber optic pay-TV service. This excludes those viewers who watch only over the internet or on mobile devices. Many of these pay-TV services offer 400+ channels of video programming.

35. In other countries, free-to-air TV is the predominant form of distribution, with free-to-air channels garnering the large majority of viewership. In these countries, there is a relatively low acceptance of pay TV services. This dynamic often is influenced heavily by public broadcast channels.

36. As an example, in Germany there exist more than 70 free-to-air TV channels, with an overall viewing share of more than 90%. Pay-TV providers are required to make significant investments in order to compete with free-to-air television. The demand for commercial Video-on-Demand-Services likewise is limited in Germany by free offers of fee-based services in Germany (ARD and ZDF<sup>16</sup> with 14 full programs, 6 special interest channels). The expansion of public-broadcasting channels therefore can act to increase the barriers to entry for pay-TV providers, particularly in those countries where there is a high degree of acceptance of pay-TV viewership combined with a large number of public broadcast channels.

## 7. Licensing of Premium Content

37. BIAC has recognized that the success of distributors, particularly pay-TV distributors, depends on the licensing of premium content, without which it is difficult for pay-TV providers to compete with

<sup>15</sup> Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Files Suit to Block Echostar's Acquisition of Hughes Electronics (Oct. 31, 2002), *available at* [www.justice.gov/atr/public/press\\_releases/2002/200412.pdf](http://www.justice.gov/atr/public/press_releases/2002/200412.pdf).

<sup>16</sup> ARD is a consortium of public-law broadcasting institutions of the Federal Republic of Germany based in Munich. ZDF is an abbreviation for "Second German Television," located in Mainz.

free-to-air channels. The licensing of such rights often is the subject of regulations by a jurisdiction's telecommunications regulator.

38. For example, on October 15, 2010, Ofcom launched an investigation against British Sky Broadcasting plc (BSkyB) after a complaint by Top Up TV (TUTV) relating to the terms of its contract with BSkyB for the wholesale supply of Sky Sports 1 and Sky Sports 2 and a restriction on the provision of the channels via CI + CAMs (conditional access modules). Ofcom upheld the complaint on December 13, 2010 ruling that restrictions imposed by BSkyB were in breach of Condition 14A of the Television Licensable Content Service licenses for Sky Sports 1 and 2 and required that the term be removed.<sup>17</sup>

39. On December 13, 2010, BT plc (BT) asked Ofcom to investigate a complaint against BSkyB concerning the requirement on BT to provide BSkyB with information on BT Visions total number of pay subscribers and total number of customers as required by BSkyB's wholesale supply agreement with BT for premium sports channels, Sky Sports 1 and Sky Sports 2. The investigation concluded on March 29, 2011 and found that BSkyB breached its obligation to provide access to the channels on fair and reasonable terms.<sup>18</sup> Ofcom opened another investigation on the same day against BSkyB resulting from a complaint by Virgin Media regarding the wholesale supply of Sky Sports 1 and 2 HD which focused on whether BSkyB breached rules governing licenses by calculating the wholesale price on a per-device basis. Ofcom issued a draft decision to the parties, but subsequently closed the case when Virgin Media withdrew its complaint on March 16, 2011.<sup>19</sup>

40. The acquisition of premium content can also have implications for competition in other non-TV markets. For example, an attractive and sustainable "triple play" offer (telephony, internet, TV) may be driven by the TV offering and, therefore, may depend heavily on access to premium content. Regulated telecommunication companies and cable network operators who are newer entrants to markets with established relationships and exclusive deals sometimes face difficulties in gaining access to premium content on acceptable commercial terms. Moreover, because both cable networks and broadcasting platforms over telecommunication networks often are subject to regulatory "must carry" rules, their ability to avoid carrying less-desirable content may be limited.

41. BIAC recognizes that these issues may give rise to antitrust issues in certain circumstances, particularly where vertical foreclosure by a dominant firm is possible. We emphasize that traditional modes of competitive analysis should be used in these situations. Where it may be necessary to consider regulatory resolution of these issues based on non-competition grounds by imposing open access or must-offer rules, BIAC is of the view that the specialized regulator, rather than the competition authority, should impose such rules in view of its broader regulatory responsibility.

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<sup>17</sup> United Kingdom, Ofcom, Investigation into complaint by TUTV against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2, Case No. CW/TUTV Sky, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_TUTV\\_Sky/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_TUTV_Sky/).

<sup>18</sup> United Kingdom, Ofcom, Investigation into a complaint by BT against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2, Case No. CW/01061/11/10, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01061/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01061/).

<sup>19</sup> United Kingdom, Ofcom, Investigation into a complaint by Virgin against Sky in relation to the contract for wholesale supply of Sky Sports 1 and 2 HD, Case No. CW/01060/11/10, available at [stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_01060/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01060/). See also, [www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited/html](http://www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited/html).

**8. Conclusion**

42. Competition in TV and broadcasting is undergoing a revolution due to significant technological advances in distribution technologies. A primary focus of competition authorities should be to eliminate artificial barriers to competition, particularly those imposed by the government, while recognizing that the proprietary investments made by industry participants at all levels (including regulated participants) should not be considered as “public goods” to be opened-up to the marketplace for broad exploitation.

43. BIAC encourages competition regulators to resist the temptation to act as an industry regulator and to take action only where competition abuses, as measured by traditional standards, warrant intervention.