OECD Journal of Competition Law and Policy



OECD

Volume 5/No. 4

OECD Journal of Competition Law and Policy

Volume 5, No. 4

OECD

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

THE OPINIONS EXPRESSED AND ARGUMENTS EMPLOYED IN THIS PUBLICATION ARE THE SOLE RESPONSIBILITY OF THE AUTHORS AND DO NOT NECESSARILY REFLECT THOSE OF THE OECD OR OF THE GOVERNMENTS OF ITS MEMBER COUNTRIES.

*
* *

Publié en français sous le titre :
Revue de l'OCDE sur le droit et la politique de la concurrence
volume 5, n° 4

© OECD 2004

Permission to reproduce a portion of this work for non-commercial purposes or classroom use should be obtained through the Centre français d'exploitation du droit de copie (CFC), 20, rue des Grands-Augustins, 75006 Paris, France, tel. (33-1) 44 07 47 70, fax (33-1) 46 34 67 19, for every country except the United States. In the United States permission should be obtained through the Copyright Clearance Center, Customer Service, (508)750-8400, 222 Rosewood Drive, Danvers, MA 01923 USA, or CCC Online: *www.copyright.com*. All other applications for permission to reproduce or translate all or part of this book should be made to OECD Publications, 2, rue André-Pascal, 75775 Paris Cedex 16, France.

Foreword

The OECD Journal of Competition Law and Policy *is a unique resource for competition experts in business, law, economics, consulting and academia. Drawing on the best of the recent work of the OECD Competition Committee, it provides insight into the thinking of competition law enforcers while focusing on the practical application of competition law and policy.*

We regret that we are unable to take unsolicited contributions to this Journal. We welcome, however, feedback from our readers. Your views on how to improve the Journal are welcome and can be sent to:

The Editors, OECD Journal of Competition Law and Policy:
OECD, 2 rue André-Pascal, 75775 Paris Cedex 16, France
Fax: (33-1) 45 24 96 95
Email: dafcomp.contact@oecd.org.

Extensive documentation on competition law and policy is available through the OECD. Readers are invited to consult our Internet site: www.oecd.org/competition

The Editors

2003 Subscription (4 issues)

ISSN 1560-7771

Prices: € 175 US$185 £113 ¥ 24 950 MXN 1 400

24 2001 21 1 P ISBN 92-64-19094-5

24 2001 22 1 P ISBN 92-64-19095-3

24 2001 23 1 P ISBN 92-64-19096-1

24 2001 24 1 P ISBN 92-64-19097-X

Editors

Editor in Chief
BERNARD J. PHILLIPS

Executive Editor
PATRICIA HÉRIARD-DUBREUIL

Advisory Board

ALLAN FELS, Dean
Australian New Zealand School of Government (ANZSOG) (Australia)

FRÉDÉRIC JENNY, Vice-Chairman
Competition Council (France)

TIMOTHY J. MURIS, Chairman
Federal Trade Commission (United States)

ROBERT PITOFSKY, Professor of Law
Georgetown University Law School (United States)

JAMES F. RILL,
Howrey Simon Arnold and White (United States)

JOSEPH STIGLITZ, Professor of Economics
Columbia University (United States)

TOSHIAKI TAKIGAWA, Professor of Economic Law
Kansai University (Japan)

HOWARD WETSTON, Vice-Chairman
Ontario Securities Commission (Canada)

DIANE P. WOOD,
United States Court of Appeals for the Seventh Circuit

Table of Contents

Competition law and policy in South Africa 7
Michael Wise

Media mergers 71

1. Synthesis by the Secretariat 73
2. Background note 79
   Gary Hewitt
3. Summary of the Discussion 147
4. Country Contributions 171

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Competition law and policy in South Africa

by
Michael Wise*

One of the elements of South Africa's peaceful revolution over the last decade was reform of its competition policy institutions. The previous system had supported the previous economic system, characterised by autarky, protection, government direction, and high concentration. The new system promised to use competition policy to correct the faults of the old system and to promote policy goals of employment and empowerment. South Africa aspires to a modern competition policy regime, to deal with the well-resourced sophistication of much of the South African economy. Its new institutions, whose novelty responds in large part to the post-1994 imperative for fundamental restructuring of government institutions, have shown a capacity to deal confidently with complex structural issues in deciding dozens of merger cases. A legalistic business and government culture has challenged these new bodies to prove their competence and tested their jurisdiction. Now that the merger review process has been established, more attention should be paid to non-merger matters and probably to advocacy as well. Resources are stretched, and there is a critical need to improve the depth and strengthen the capacity of the professional staff. Maintaining consistent competition policy in regulated sectors will requiring reinforcing the relationships with sectoral regulators.

Note by the Editor

Due to its history, South Africa has both a developing economy and a developed one. It was thus appropriate that this country be the first one to be reviewed by peers from some 60 countries at all stages of economic development in the OECD Global Forum on Competition (GFC), which gathers national competition authorities from around the world and some economies that do not have yet competition authorities. The attached report by the Secretariat was the basis for a three-hour peer review discussion at the GFC meeting in Paris on 11 February 2003. This report was drafted by Michael Wise.

* Michael Wise is a member of the OECD's Competition Division.

1. Competition policy foundations

The setting for South Africa's historic economic policies, of state ownership, protection, and import substitution, differed from what is often found in transition and developing country situations. In South Africa, these policies were coupled with strong property rights and well-developed market institutions. The challenge for competition policy in South Africa was to "hit the ground running" when historical patterns were broken. New institutions have had to deal on equal terms with the established, sophisticated, well-resourced legal culture, while representing new ideas about the political economy and a new level of participation in public life.

1.1. *Context and history*

Economic policy in South Africa has been shaped by dependence on extractive industries and isolation from many world markets. Some of the economy's basic structures were set when diamonds and gold were discovered in the second half of the 19th century. Major, modern industries grew up around the extraction of natural resources for a world market. Policies about economic development in the 19th and 20th centuries protected the investors in these operations, many of them foreign. Recognising the risks of over-specialisation, though, governments also adopted policies that were intended to reduce reliance on the mining sector, by encouraging farming and local manufacturing. Monopoly concessions were granted to some industries around the turn of the 19th century. Manufacturers benefited from low costs of inputs such as steel and electricity, which were supplied by state monopolies, and from a protective tariff barrier. State-owned enterprises dominated manufacturing by the end of the 1930s. Another theme of policy in that era was racial discrimination, one effect of which was to keep labour costs down. Discrimination and protection were combined in policy measures that shielded white farmers and businesses against African competition, by reserving most of the land for white ownership and giving white farmers and white-owned firms preferences in subsidy and support programs. Black entrepreneurs were outside of the formal economy.

Policies of import substitution, market controls, and state ownership in key sectors persisted through the 20th century. The government's role in the economy did not decline in the post-war expansion. While the private sector diversified, as the mining-based investment conglomerates extended their

operations, the government continued to extend its support and direct investment in agriculture and manufacturing, still pursuing the goal of reducing the economy's dependence on mining. Industries such as textiles and pulp and paper owe their existence to support from the state-owned Industrial Development Corporation. Other state-owned firms produced steel, fertiliser, oil, chemicals, and arms. The value of manufacturing output exceeded that of mining by the 1970s. But the government owned or managed nearly 40 percent of the country's productive assets, and the economy remained vulnerable to the characteristic cyclicality of the agriculture and resource sectors. And in the 1980s, policies of autarky and import substitution intensified in response to increased international economic sanctions against apartheid.

Product markets and capital ownership have been unusually concentrated. High market concentration has been characteristic not only of scale-dependent heavy industry but also of some consumer products. For example, there is a virtual monopoly in beer. Some of the high concentration is the legacy of the history of monopoly concessions, and some of it is due to scale factors. Although South Africa is the largest market in Africa, its local market is nonetheless relatively small. For many manufactured products, it could be served by a small number of firms operating at globally efficient scale. South Africa is distant from many other major markets and production centres, which makes it harder for international trade to compensate for these conditions, even though trade has expanded since 1994, particularly with the EU and the US. Tariff levels have declined, on average, but anti-dumping duties protect key industries such as steel, where the state has long had an interest and an exclusive export agent can prevent arbitrage between export and local markets. Would-be entrants are challenged by South Africa's history of import substitution and the attendant habits of business practice and government policy that favoured local insiders. The insiders were historically a closely confined group. At the time of the regime change in 1994, 5 investment conglomerates, with roots in the mining houses of the 19th century, accounted for 84% of the capitalisation of the stock exchange — and one of them accounted for 43% all by itself. The complex network of cross-holdings and other interlocks magnifies the phenomenon of insider influence, while simultaneously increasing the difficulty of pinning down who is in control.

The economic situation of South Africa is difficult to classify. To a significant extent, it has a well-developed market economy. But the need to reform long-standing habits of central ownership and control in order to improve efficiency presents issues that are also found in transition situations. In addition, much of the population operates in a less developed economic environment. On average, South Africa ranks as a middle-income country.[1] The average masks a strongly bipolar distribution of wealth and income,

though. At one end, a significant minority enjoys a standard of living comparable to OECD Member countries.[2] The infrastructure of financial, legal, communications, and transport services is well-developed and modern. The stock exchange is among the world's 10 largest. But at the other end, a substantial majority do not yet enjoy this wealth. Income disparity in South Africa, as measured by the Gini coefficient, is about twice as great as is typical of most OECD Member countries. In the black townships, unemployment is much higher than the already high national rate of about 30%, and incomes are far below the national average. South Africa contains both a developing economy and a modern one.

The political system of minority government over most of the 20th century divided the population in order to preserve this inequality. Mounting determination to change that political system, which led to the country's profound constitutional rebirth in the 1990s, also produced changes in economic policies. Economic as well as political issues were on the agenda of the African National Congress (ANC) during its years in opposition. For those in the ANC who favoured state intervention and socialism, the concern was not the extent of state involvement, but its nature and the identity of the officials who were responsible for it. Some in the ANC resisted the government's privatisation efforts in the late 1980s, fearing that the assets would end up in private, white hands. Since 1994 and the transfer of power, though, calls for extensive national ownership have declined. One political-economy element of its platform for peaceful social revolution, discussed in more detail below, was a stronger competition law.

Law is important in South Africa. The country's well-developed legal culture combines elements of several traditions. Much of the law about property, sales, and contracts can be traced to the Dutch-Roman law that European settlers brought with them in the seventeenth century. Company, financial, and intellectual property law derives more from English sources, a connection with the 19th century development of large-scale undertakings related to mining. In the legal aspects of government organisation and administration, too, South Africa appears to draw on its experience in the British Commonwealth. The 1994 constitution launched an effort to rebuild the state and the law on a broad, democratic, local foundation. The central historical importance of this new constitution embodies a feature of South Africa that helps to explain its approach to competition policy. Basing policy on law and implementing policy according to proper legal procedures are important values.

Some principles about competition, and even some precursors for competition law, appear in these legal traditions. Monopoly had been a crime under the Dutch-Roman law, where an intention to prevent anti-competitive conditions that are contrary to the public interest can be traced all the way

back to a sixteenth century edict of Charles V. But there is no record that anyone was ever tried for the offence of monopoly. By contrast, other features of the early Dutch-Roman law, which supported the vigorous commerce of the Netherlands' golden age, may have tolerated anti-competitive practices. Notably, the law presumed the validity of contracts, even contracts that implemented anti-competitive restraints. In any event, the criminal aspects of the Dutch-Roman law were probably not taken up in South Africa's national law, and thus problems of monopoly had to be dealt with through statutes. Those statutes took a tolerant approach, perhaps influenced by the tolerant tradition of the law about contracts. Some particular competitive situations were addressed in specific laws beginning as early as 1907. Under legislation that was effective from 1923 to 1944, the Board of Trade and Industries could offer advice about competition policy problems. It was a report by that Board which led to South Africa's first general competition law, the Regulation of Monopolistic Conditions Act of 1955.

The 1955 competition law was cautious and permissive. It defined and controlled a number of "monopolistic conditions," that is, potentially anti-competitive practices. None of these practices was prohibited per se. Instead, the law provided for an administrative process to examine particular cases and recommend action. The standard of analysis was simply the "public interest." The Board of Trade and Industry was charged with investigating conduct, recommending remedies, and negotiating and supervising compliance. Its decisions could be appealed to a special court. But that Board had no independent powers, either of investigation or relief. Rather, the Minister of Trade and Industry decided what was to be investigated and what relief, if any, would be applied. The law's remedies and sanctions were prospective only, such as orders to withdraw from restrictive agreements and to correct their consequences. A violation of such an order might be subject to criminal prosecution. Perhaps recognising that a principal source of monopoly was protection from international competition, one of the law's potential remedies was a request to the Minister of Finance to suspend duties on imports of goods like those involved in the monopolistic condition. The law did not deal with mergers or dominance as such. In theory, the law probably applied to the activities of the state, but such an application would have been unlikely because enforcement depended on Ministerial action. One of the law's principal exemptions was in favour of the state-sanctioned agricultural control boards and co-operatives. In any event, the law was rarely invoked. Over 20 years, the Minister ordered only 18 investigations. The Board found some restraints that were contrary to the public interest, such as agreements fixing prices and trade discounts, resale price maintenance, exclusive dealing, and boycotts. Sectors where problems were found included groceries, sanitary-ware and hardware, motion pictures, cigarettes and processed

tobacco, books, newspapers and periodicals, and building construction. Nearly all of these findings resulted in negotiated settlements. The Minister took action only once. The most significant proceedings under this law, in 1969, prohibited resale price maintenance (except for books, periodicals, tyres, and petrol). Restraints in liquor, pharmaceuticals, tyres, and matches were upheld, as consistent with the public interest. No decision or action was ever brought to the special court. The Board's principal function seemed to be overseeing compliance with the handful of directives and orders that had been negotiated. There were a few actions against violators of those orders, but no significant penalties were imposed.

A commission of inquiry, appointed in 1975, criticised the enforcement system of the 1955 law. Making investigations depend on the Minister's direction subjected enforcement to too much political influence. And the Board's roles were in conflict. Its chief role was to determine tariff levels to protect local business, which was hardly a strong position from which to challenge the conduct of those businesses. The commission of inquiry called for a new competition body with more resources, stronger penalties against violations of orders, and extension of the law to cover mergers. The commission of inquiry recommended a new institutional structure that would have followed the UK's "tripartite" system of a supervising ministry, a separate "enforcement" body, and a more independent decision-making tribunal. Not all of its recommendations were adopted, though. The new legislation, enacted in 1979, created a Competition Board, appointed by the Minister of Trade and Industry, which could investigate matters on its own initiative. The 1979 law authorised actions against anti-competitive mergers, and it created a new category of "monopoly situation," determined chiefly by industry structure. In most other respects, the new competition law resembled the old one. The statute contained no explicit prohibitions, its substantive standard was ultimately the undefined "public interest," a special court was to hear appeals (but never actually did), and actual decisions and orders were up to the Minister. Proceedings at the Competition Board were mostly informal. The Board did use its power to initiate investigations, and it produced some 75 formal reports. Few of these reports dealt with what was probably the most important single source of anti-competitive restraints, namely the role of the state. The Competition Board's membership tied it to the government. Six of its positions were designated by statute to be filled by officials or nominees of other ministries, notably those responsible for finance and agriculture. All members except the chairman served part time. The most important substantive action under the 1979 Act was a regulation, issued by the Minister after a Competition Board investigation begun in 1984, that declared some practices to be per se unlawful: resale price maintenance, horizontal collusion about price, terms, or market share, and bid rigging.[3] Violations of these

prohibitions were to be treated as crimes; however, there were no prosecutions (except for one negotiated guilty plea). These prohibitions have endured, because they were carried over into the overhaul of competition policy that followed the change of South Africa's government regime.

Reviewing competition policy was high on the agenda of the first broadly democratic government, which was elected in 1994. The African National Congress (ANC) had promoted socialist economic policies during its decades as a liberation movement, by calling for measures such as nationalising industry and breaking up the major investment houses. By the time the ANC was able to take part openly in South African politics, though, the context was changing. The prospect of becoming responsible for the government, coupled with the broad decline of doctrinaire socialism, led to moderation of those goals, in particular, to de-emphasising the nationalisation of private enterprises. Competition policy took its place as the preferred means of controlling private enterprise in the public interest. Five years of debate and formal consultations explored, developed, and refined the scope of this major reform.

An ambitious competition policy reform was part of the ANC's 1992 Policy Guidelines for a Democratic South Africa. One goal of this reform was to remedy concentration of "economic power," on the grounds that it had been detrimental to balanced economic development. The plan was not only to adopt a law that followed international norms and practices, but also to curb "continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector." The policy vision in this document is all-inclusive:

- The competition policy proposed here accepts the logic of free and active competition in markets, the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets — all within a developmental context that consciously attempts to correct structural imbalances and past economic injustices.
- Competition policy seeks to incorporate the interests of consumers, workers, emerging entrepreneurs, and other corporate competitors, and to protect the ability of our large corporations to penetrate international markets, just as we must allow foreign investors to do business in South Africa in the interests of enhancing overall efficiency and growth.
- Competition policy has to assume that the resolution of competition law cases be conducted in a procedurally-fair, coherent, expeditious and decisive manner, and that new institutional arrangements for pursuing the policy will entail an appropriate division of labour within the relevant agency and independence.

- Finally competition policy seeks to be sufficiently flexible to incorporate existing policies and future modes of market regulation that extend in a coherent manner across the full spectrum of industrial and trade policy, foreign exchange policy, the attraction of foreign direct investment, the restructuring of state assets, tax reform, labour market policy, financial market regulation, consumer protection, research and development incentives, small business and affirmative action programmes, corporate governance instruments, and revised company law.

The general framework for policy during the post-1994 period was set out in the ANC's Reconstruction and Development Programme (RDP) and its macro-economic strategy for Growth, Employment and Redistribution (GEAR). The RDP promised to "introduce strict anti-trust legislation to create a more competitive and dynamic business environment." The listing of objectives began with reforming the structure of the political economy, "to systematically discourage the system of pyramids where they lead to over-concentration of economic power and interlocking directorships," followed by abolishing anticompetitive practices and preventing the exploitation of consumers. The RDP called for a commission "to review the structure of control and competition in the economy and develop efficient and democratic solutions." The 1994 RDP White Paper[4] expanded on these themes while also calling attention to the interests of small and medium sized enterprises and the problem of oligopoly:

- A credible competition policy is crucial to the proper functioning of the economy. Objectives of this policy are to remove or reduce the distorting effects of excessive economic concentration and corporate conglomeration, collusive practices, and the abuse of economic power by firms in a dominant position. In addition, the policy will ensure that participation of efficient small- and medium-sized enterprises in the economy is not jeopardised by anti-competitive structures and conduct.
- Government will also seek to increase the competitive nature of domestic markets and to influence the behaviour of the lead participants in highly-concentrated markets in a socially-desirable manner. Government will identify and eliminate practices that restrict entry of new businesses into certain industries, seek to eliminate illegal practices such as the maintenance of resale prices, collusion between firms in market distribution, and horizontal collusion in respect of supply and tendering.

In 1995 the Department of Trade and Industry (DTI) embarked on a three-year project of consultation with experts and stakeholders to develop a new competition policy framework. The result was released in November 1997, as DTI's Proposed Guidelines for Competition Policy, to stimulate public debate about how competition policy could contribute to restructuring the economy.

The proposal described the goal as a more "effective" economy, requiring a better definition of the public interest with respect to firm structure and behaviour. With properly aligned policies, DTI believed that competitiveness and development would be mutually supporting, not contradictory. That mutual support would require achieving consistency of trade and industrial policy, restructuring state assets, and empowering emerging entrepreneurs — tasks and goals that were conceived as associated with competition policy. Dealing with the legacy of economic distortions would call for a unique approach in South Africa. Promoting competitiveness and efficiency would also have to ensure access to those who had been denied an equal opportunity to participate. The 1997 DTI Guidelines found the competition law of 1979 to be deficient, lacking adequate powers and proper political context. The then-current law did not deal with vertical or conglomerate combinations or ownership concentration, and it lacked both pre-merger notification and meaningful post-merger power of control. Its prohibitions against anti-competitive conduct were weak. DTI proposed a new competition law that would include familiar elements of competition policy, such as a stronger law and more independent and powerful administrative authority. Because one motivation was to deal with ownership concentration, DTI also called for stronger divestiture power. And recognising the larger context of competition policy, DTI called for review of securities laws and institutions overseeing corporate structure, of corporate governance, of the Harmful Business Practices Act concerning consumer interests, and of the competitive interface between public corporations and the private sector.

Providing formally for broadly inclusive participation is an important political theme in post-1994 South Africa. Debate over the proposed competition policy framework was structured through NEDLAC, the National Economic Development and Labour Council. NEDLAC had been set up in 1994 as the vehicle for consensus-building among government, business, labour, and community NGOs. Its predecessors in the previous era, with more limited membership and scope, were the National Economic Forum and National Manpower Commission. NEDLAC's enabling legislation calls for NEDLAC to consider all significant changes to social and economic policy, and for an effort to seek consensus about them there, before they are implemented or introduced in Parliament. NEDLAC's trade and industry chamber considered the DTI competition policy proposals in early 1998. NEDLAC was consulted about the principles and the proposed policy framework, but not about the detailed text of the law. Labour and business agreed about the principles and the design of the institutions, while recording differences of opinion about some matters of policy and institutional detail. The NEDLAC report was ratified at a meeting of the Trade and Industry Chamber convenors in May 1998. (NEDLAC, 1998)

The result of this extended process, which also included 4 days of hearings and dozens of written submissions to the Parliamentary Committee on Trade and Industry, was the Competition Act no. 89, which was adopted in 1998 and became effective as of 1 September 1999 ("Competition Act"). (The Competition Act was amended in 2000, in part to clarify the relationship between general competition law and other regulatory bodies). Experts and academics from 8 countries and from multi-lateral agencies and academic institutions also helped. South Africa's Competition Act and the institutional structure draw heavily from developed country experience and practice. The Competition Act sets up three institutions, to be directly involved in its application. Each of these institutions — the Competition Commission ("Commission"), the Competition Tribunal ("Tribunal"), and the Competition Appeal Court ("CAC") — is, to slightly different degrees, independent of the government. The Competition Act includes features that respond directly to the unique situation of South Africa. In some contexts, it permits consideration of equity issues such as empowerment, employment, and concern for small and medium sized enterprises. DTI believed that a competition law focused on economic efficiency and applied by politically independent bodies was appropriate for South Africa's well-developed industrial and service sectors. Despite the prominence in the debate of equity and political economy concerns and issues, they are not principal drivers of its application, and appeals to them cannot be made through purely political channels. Decisions about other public policy issues are up to the independent enforcement bodies, and there is no ministerial power to override or direct their decisions.

1.2. Policy goals

The Competition Act's policy purposes begin with economic efficiency, but they extend much further. The primary, general purpose, to "promote and maintain competition," is supplemented by six particular sets of goals. The first of these is the efficiency, adaptability, and development of the economy. This goal corresponds to the DTI interest in a competition policy based on economic analysis. The second goal, competitive prices and choices for consumers, recognises the foundation of an economics-based policy in concerns about consumer welfare. The other 4 sets of policy goals represent other public interest issues that have been important to stakeholders in the debate: employment and social and economic welfare, opportunities to participate in world markets (and to recognise foreign competition in South Africa), equitable opportunities for SMEs to participate in the economy, and increasing the ownership stakes of historically disadvantaged persons. (Sec. 2)

The law's preamble restates the law's political motivations. They include policies of equity and distribution as well as efficiency, and they clearly

incorporate goals and ideals for competition law derived from the early ANC positions and the stakeholder debate.[5] The preamble characterises the problem that the law seeks to address, that past practices, including apartheid, led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. The preamble states that "the economy must be open to greater ownership by a greater number of South Africans." All of these are concerns about equity and justice. Consistently with a rhetoric focused on equity, the preamble describes restrictions on free competition as "unjust," rather than as "inefficient." The preamble does recognise the problem of inefficiency and waste, but connects these too with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that "an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans."

Achieving coherent results requires disciplined choice among multiple and potentially inconsistent goals. In the early debate, choice had been avoided. The many-faceted characterisation of the "public interest" in DTI's 1997 Proposed Guidelines makes no effort to assign priorities. Rather, DTI contended that the law would have to achieve both greater competition and promotion of the other objectives, and resisted any presumption that economic efficiency and the public interest would be in conflict. Including other objectives attracted a broader base of support for the principle of having a competition policy. Businesses feared that they would be invoked arbitrarily, to justify outcomes that were actually driven by unstated political considerations. Concerns about such abuse have been allayed as the law has been implemented, for the competition and efficiency aspects of the law have proven to be most important in practice. The Tribunal interprets the law as intended chiefly to promote and maintain competition. In only one decision[6] so far did the Tribunal's decision depend principally on the other public interest factors. Experience is confirming the wisdom of making the public interest factors explicit. Decisions can invoke these factors directly and transparently, rather than try disingenuously to justify actions on competition grounds when they really respond to other interests.

Interest groups have planted their flags in the competition law and process. Most interestingly, unions have a formal role in the merger review process, where they can directly raise their concerns about job losses. Small business interests are recognised not only in the potential for exemptions from statutory prohibitions, but also in some detailed provisions about abuse of dominance and price discrimination.

The issues of corporate structure and ownership that were prominent in the debate about the law have proven to be less prominent in practice. Corporate structures of holding companies and extensive networks of cross-ownership are found in many economies. This pattern of control over capital is often suspected of inhibiting economic competition or concentrating political power. A few countries, notably Korea, have tried to control and undo such corporate structures by using the tools of competition policy. Whether or not this would represent a coherent implementation of competition policy, intervention to force restructuring of South Africa's investment houses may prove to be unnecessary. As the market has opened, they have been restructuring themselves, often to prune extraneous branches and concentrate on fewer sectors. Consequences of this restructuring that might impair economic competition would of course remain subject to the merger control process.

The most distinctive public interest policy is empowering historically disadvantaged persons. South Africa's Constitution Sec. 9(2), authorises, if not requires, affirmative action programs, stating that "[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken." The 1997 DTI proposals called for using competition policy to allow greater ownership participation by black persons in the economy, particularly in manufacturing. That goal is now in the statute, and decisions in a few merger cases have examined how best to achieve it.

The policy goal about participation in world markets might be understood as a response to business arguments about competitiveness, that is, to the claim that competition policy should permit the creation of large firms — even ones with local market power — in order to improve competitiveness in international markets. That is not how the industrial policy aspect of competition policy was conceived in South Africa, though. The discussion of industrial and trade policy in the 1997 DTI proposals shows an interest in using what were called "industrial strategies." But the purpose would be to overcome past distortions and to correct the results of market failures that were said to have compromised human and technological resource capacities and hindered capital market access. In order to avoid distorting competition, DTI proposed that such "industrial strategy" interventions would target "clusters and collectivities" rather than single firms. Moreover, the 1997 DTI proposals denied that competition policy should be relaxed in order to create stronger international competitors, contending out that strong domestic competition is preparation for strong international competition. Liberalising trade and inviting foreign investment were recognised as important factors in promoting competition. Intervention

strategies could be applied, though, for example to facilitate the entry of small and black-owned firms into international markets. DTI envisioned that the competition authorities would try to channel foreign investment into links with local partners to increase competition (as contrasted with financial acquisitions or mergers involving existing firms). The government also wanted to reserve the power to extend trade protections in some cases, which would make vigilant domestic competition policy even more important. (DTI, 1997, ch. 4)

The Competition Act's policy statements about economic efficiency and consumer benefits leave room for flexibility in application. The term "efficiency" is not necessarily to be understood in the sense of static welfare analysis, although that reading is possible. Rather, coupling it with "adaptability" implies a greater concern for dynamic considerations about entry and mobility. The additional concept of promoting "development of the economy" also shows the breadth of the economic perspective. And the provision about consumer interests mentions both prices and choices, implying that preserving outlets or brands might be considered important, even if that meant a somewhat higher price level.

2. Substantive issues: content of the competition law

The Competition Act incorporates familiar elements that are found in the antitrust laws and concepts of many other jurisdictions. The law even encourages international comparisons. South Africa is jump-starting its competition jurisprudence by authorising the consideration of foreign and international law in the interpretation and application of its Competition Act. (Sec. 1(3)) The Competition Act's rules about restrictive agreements use some of the language found in the EU treaty, its merger standards are similar to those of Canada, and its rule about price discrimination looks like a revised, improved version of the US Robinson-Patman Act. A few practices are prohibited per se, but in general finding a violation of the Competition Act depends on a showing of net anticompetitive effect. The prohibitions of horizontal restraints and vertical restraints are set out separately. Single-firm issues are treated in terms of abuse of dominance, rather than monopolisation. Procedures for merger control are elaborate. But except for merger review, where the Commission and the Tribunal have been surprisingly active, so far there has been little enforcement action, producing only a few decisions.

The Competition Act's system of prohibitions is balanced by a scheme for exemptions that incorporates policy considerations other than competition. Few exemptions have been granted under this system, though. The Commission has the power to grant an exemption from the prohibitions

against restrictive agreements or abuse of dominance. (Sec. 10) An exemption may be for a particular agreement or practice or for a general category of them. An exemption must be limited to a specified term. Grounds for exemption include maintenance or promotion of exports, promotion of small businesses or firms controlled by historically disadvantaged persons to become competitive, changing capacity to stop decline in an industry, and the "economic stability" of an industry designated by the Minister of Trade and Industry, after consultation with the minister responsible for that industry. (Sec. 10(3)(b)) The process for granting or revoking exemptions calls for investigation and an opportunity for public notice and comment. In concept, granting an exemption is not a matter of discretion. The Commission must grant an exemption if the conditions are met, and it must refuse if they are not (or if the conduct at issue would not have violated the Competition Act at all). The Commission's actions concerning exemptions may be appealed to the Tribunal.

These standards for exemption are extraordinarily broad, implying that even price fixing and market division could be excused if they promoted exports, propped up minority businesses, permitted mutual rationalisation to maintain profits, or simply helped firms maintain their traditional competitive positions against each other. Even an otherwise per se violation might meet the terms for exemption. The scope of Sec. 10 does not foreclose that result, and the terms for a Sec. 10 exemption are independent of competitive effects.

Designation of an industry for exemption to ensure "economic stability" was intended as an avenue for ministerial input about matters of industrial policy or national interest. A minister's designation does not confer exemption by itself, though. Designation authorises the Competition Commission to do so if the Commission decides that the statutory standard is met. This provision has only been used once, about liquid fuels, but requests for designation have also been submitted about shipping and motor vehicles. The Commission announced its opposition to the request for designation of motor vehicles in December 2002. DTI is working on a general framework for dealing with these demands. A general procedure would help avoid non-transparent, ad hoc responses to political pressure for special-interest deals and protection.

A prominent example of the use of the exemption power was the decision in 2001 to permit a code sharing agreement between South African Airlines and Qantas. South African Airlines claimed that the agreement would improve export earnings, and it also threatened that it might otherwise exit this service. But, it did not contend, and did not show, that it was actually losing money on the prior service. The exemption for this market division arrangement was granted for one year, subject to conditions. The conditions included regular reporting about fares and sales, no pooling of revenue, and

independent pricing. Extension of the exemption beyond the 1 year grant would be contingent on demonstrating that the claims about promotion of exports were realised. The parties applied for, and eventually received, an extension, but only for another year.

2.1. Horizontal agreements

The Competition Act's first rule about horizontal restraints is a prohibition based on the rule of reason. Restrictive horizontal practices — that is, agreements, concerted practices, or decisions by an association of competitors — are prohibited if the have the effect of substantially lessening or preventing competition in a market. The characterisation of the kinds of arrangements that are prohibited is modelled on terms used in EU competition law. The prohibition can be overcome by a showing that pro-competitive gains outweigh the anti-competitive effect. (Sec. 4(1)(a)) The range of interests that may be considered under Sec. 4(1)(a) is limited to technology, productive efficiency, or other factors related to the competitive effect of the restraint. Consideration of other policies is a matter for the exemption process under Sec. 10.

In practice, a per se rule is likely to be more important enforcement tool. The horizontal agreements that threaten the most serious anti-competitive effects — price fixing, market division, and collusive tendering — are prohibited per se, without requiring a showing of actual harmful effect or permitting a showing of net efficiency. (Sec. 4(1)(b)) These prohibitions are carried over from the regulation that had been issued under the pre-1998 competition law. What appears to be a flexible catch-all in the per se rule, prohibiting agreements about "any other trading condition," is read narrowly in context to apply only to factors that are intimately connected with price, quantity, and quality. It is not considered a basis for expanding the per se rule.

If firms engaged in a common practice have a common director or substantial shareholder, or significant ownership interests in each other, then they are presumed to have agreed, although that presumption can be rebutted by a showing that the practice was a normal response to prevailing market conditions. (Sec. 4(1)(b), Sec. 4(2)) The effect and intent of this presumption are obscure, particularly because the statute's definition of "agreement" is already expansive. The presumption about agreement among related entities may have been intended as a means to apply stricter control over parties that are related through complex, loosely-connected investment structures, and thus to encourage them to dismantle those structures or make the control relationships in them more transparent. Agreements that are entirely among the members of a corporate group of wholly-owned subsidiaries or similar structure are not prohibited, either in the per se or the rule of reason categories. Sec. 4(5)

The exemption process under Sec. 10 permits consideration of the Competition Act's other social or economic policies, notably the promotion of small business competitiveness. An example is an exemption that was granted to an association of individually owned pharmacies, which permits them to advertise and market jointly in order to compete with larger chains. Joint marketing supported the group's growth from 10 members to 33, and its success persuaded the Commission to extend the exemption another 5 years.

There has been very little enforcement action against horizontal restraints, either under the previous prohibition based on regulation or the present one based on statute. Some investigations are underway now involving major domestic manufacturing industries. In one of the most interesting matters to date, the Commission declined to accept a proposed consent order and fine concerning an export cartel, because the cartel intended to continue the sales practices by routing transactions through a third country. The only reported action against restraints in self-regulated service sectors involved the legal profession, and it failed in court. The Commission tried, but failed, to impose conditions on an exemption for the legal profession's rules about practices and fees.

2.2. Vertical agreements

Unlike most competition statutes, which typically group all restrictive practices into a single rule, South Africa's Competition Act separates the rule about restrictive practices between parties in a vertical relationship from the rule about horizontal restraints. The competitive effects of vertical agreements are more complex, and thus they are usually assessed under a rule of reason. In jurisdictions where the law prohibits restrictive agreements without distinction, differences in their likely effects must be recognised or developed through enforcement practice or guidelines. Under South Africa's statute, a vertical agreement is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party can prove that any technological, efficiency, or other pro-competitive gain resulting from that agreement outweighs the anti-competitive effect. (Sec. 5(1)) Thus finding a violation usually depends on showing an actual anti-competitive effect. The only practice that is prohibited per se is minimum resale price maintenance. A supplier may recommend resale prices as long as they are clearly not binding. If the resale price is indicated on the product, it must be labelled "recommended price." (Sec. 5(2), 5(3))

Here too, there has been very little enforcement action. There have been only one final Tribunal decision on the merits about a vertical restraint, although there have been interim proceedings and procedural rulings, most of them in a complex, long-running controversy about distribution arrangements for pharmaceutical products.

2.3. Abuse of dominance

South Africa's law about single-firm conduct is based on abuse of dominance, but it also includes a rule about price discrimination that resembles North American statutes. Dominance is defined in terms of market share and market power. (Sec. 7) Any firm that actually has market power is considered dominant, regardless of its market share. (Sec. 7(c)) The definition of market power includes concepts from the EU's definition of dominance: "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers." (Sec. 1(1)(xiv)) A firm with a market share over 45% is conclusively considered dominant. A firm with a market share between 35% and 45% is presumed to be dominant, but the firm may rebut that presumption by showing it does not have market power. If the firm's share is below 35%, the enforcer has the burden of showing that it has market power.

Abuse of dominance is dealt with mostly through a list of prohibited practices. The first of these is charging an "excessive price" that harms consumers. (Sec. 8(a)) This term is separately defined: an "excessive price" must have no reasonable relationship to economic value and be in excess of that value. (Sec. 1(1)(ix)) The second is refusing a competitor access to an essential facility (provided it is economically feasible to grant access). (Sec. 8(b)) This term too is specially defined, as an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide their customers. (Sec. 1(1)(vii)) These two practices are prohibited per se, without considering net competitive effects. As with other parts of the competition law, though, the forbidden practices might be permitted if the terms for exemption under Sec. 10 are met.

The Competition Act prohibits some other particular exclusionary acts by dominant firms: requiring or inducing exclusive dealing, refusing to supply scarce goods to a competitor, tying or forcing unrelated contract conditions, selling below marginal or average variable cost, and cornering the supply of intermediate goods needed by a competitor. (Sec. 8(d)) These acts are presumed to be harmful, but a rule of reason applies. A dominant firm could avoid liability for exclusive dealing, refusal to supply, tying, predation, or cornering by showing that the net effect of the conduct on competition in the relevant market is positive. In addition, there is a general, rule-of-reason prohibition against exclusionary acts by a dominant firm. Under this general rule, which applies to acts that are not specifically identified in the statute, the enforcer has the burden of showing that the anti-competitive effect outweighs the pro-competitive gains to technology or efficiency. (Sec. 8(c)) The distinction between these rule-of-reason matters and the per se prohibitions is carefully policed. The Competition Appeal Court has reversed the Tribunal's

effort to interpret a refusal to deal as denial of access to an essential facility. The Tribunal contended that the two concepts were equivalent as a matter of economics, but the CAC was more concerned that different characterisations would lead to sharply different treatment as a matter of law.[7]

Dominance is defined in terms of particular, defined markets, not in terms of firm size alone. But there is a provision for general exemption based on firm size, evidently to ensure that small firms will not be considered dominant in small markets. The Minister has the power to define a threshold below which the abuse of dominance prohibitions do not apply. This can be based on turnover or assets, and it can be defined either in general or for specific industries. This is to be done in consultation with the Competition Commission and pursuant to public notice and comment. (Sec. 6) Under this authority, a general de minimis threshold has been set, at R5 million in turnover or assets in South Africa. (Brassey et al., 2002, p. 181)

A separate section prohibits price discrimination. It appears to be modelled on the US Robinson-Patman Act, but with variations that address the oddities and problems of the US law. The Competition Act prohibits discrimination in price, discounts, rebates, allowances, credits, services, or payment terms, for products or services. But market power is a prerequisite. Only a dominant firm acting as a seller can be liable. Liability is subject in all cases to a competitive effects test, that the discrimination is "likely to have the effect of substantially preventing or lessening competition." This test is the same regardless of whether the effect is felt at the primary or secondary and further levels of competition. There is a requirement that the transactions be equivalent and involve products or services of like grade and quality. Differential treatment can nonetheless be defended based on cost justification or meeting competition. Cost justification can be based on quantity or other listed factors. Meeting competition is subject to a showing of good faith. Differential treatment can be a justified response to market conditions, such as imminent deterioration of perishable goods, obsolescence, liquidation, or going out of business. (Sec. 9) Providing an explicit rule about price discrimination may demonstrate to small businesses that the competition law is looking out for their interests. There have been few complaints so far under this section, perhaps because it is crafted to exclude competitively unimportant claims.

The first prohibited practice, charging excessive prices, makes the Competition Act a basis for price control. That possibility is now being tested with respect to the prices of medications for AIDS. In 2001, the Commission received a complaint from a Cape Town pharmaceutical company about allegedly excessive prices for retroviral drugs. The complaint, which names a number of international pharmaceutical firms, contends that the complainant could produce cheaper generic versions of the drugs and that the

patentees had entered into exclusive licensing and other arrangements that prevented distribution or marketing of cheaper products. In September 2002, an NGO, the Treatment Action Campaign ("TAC"), submitted another complaint to the Commission. The TAC complaint, on behalf of patients and medical professionals, also alleges that the prices have been too high. The TAC submission includes dozens of expert and individual affidavits and other materials, and it demands that the Commission give it top priority and impose stiff penalties on the pharmaceutical companies. The Commission and the Tribunal may thus have to decide about how the Competition Act can be used to control prices in a case that presents two complicating factors: the relationship between competition policy and intellectual property rights, including international recognition of those rights, and the public interest in dealing with the large-scale public health problem represented by AIDS. The "public interest" as such is not a basis for decision under the Competition Act, of course. A Commission or Tribunal decision about these complaints will have to be motivated by considerations of competition policy and the particular policies and goals that are identified in the Competition Act.

There have been few matters so far about access to network facilities, even though denial of access to an essential facility is defined in a way that could make it an easy rule to apply. The lack of cases is probably due in large part to uncertainty about jurisdiction. Until the Competition Act was amended in 2000, its application to regulated network industries was in doubt. The amended Competition Act now calls for establishing agreements about working relationships with sectoral regulators. Reform of monopolised network infrastructure is just getting underway in South Africa. The monopoly in telecoms ended in 2001, and the Commission is beginning to work on complaints from other service providers about network access, in conjunction with the sectoral regulator, the Independent Communications Authority of South Africa (ICASA).

The Competition Act's presumptions about the effect of dominant firm conduct are strong. Despite the rule-of-reason language, for excessive pricing and access to an essential facility the law appears equivalent to the EU treatment of abuse of dominance, that is, prohibition without exemption. And additional requirements to make a case of denial of access might make that less of a per se rule in practice. But the strong language implies that South Africa's law is suspicious of large-firm behaviour and aims to control and overcome the history of highly-concentrated industry. The absence of actual cases so far suggests that the tool is not being used for that purpose, though.

2.4. Mergers

The legal standards for merger control are general and evidently permissive. The competition policy standard, which must be assessed first, is

Box 1. **Efficiencies and Consumer Benefits**

The language about efficiencies in Sec. 16 of South Africa's Competition Act was modelled on the efficiency provision in Sec. 46 of Canada's competition statute. In *Trident Steel (Pty)* Ltd and Baldwins Steel, the Tribunal examined closely how to deal with claims of efficiency, in the context of a merger to near monopoly in specialty steel. After an exhaustive review of how efficiencies have been treated in the US and Canada, the Tribunal panel decided on an inverse sliding scale. The stronger the showing of real efficiencies, the less need there would be to show how consumers would benefit directly. In this context, the Tribunal was willing to consider "dynamic efficiencies, production efficiencies ranging from plant economies of scope and scale to research and development efficiencies that might not be achieved short of merger." But "[p]ecuniary efficiencies would not constitute real economies nor would those that result in a mere redistribution of income from the customers, suppliers or employees to the merged entity." And the Tribunal said it would be skeptical about administrative efficiencies, which can be claimed for most mergers.

whether the merger "is likely to substantially prevent or lessen competition." That determination requires a multi-factor analysis, set out in the statute, to assess the probability that firms will compete or co-operate after the merger. Factors to consider include import competition, ease of entry, tariff and regulatory barriers, concentration, any history of collusion, countervailing power, dynamic characteristics such as growth, innovation, and product differentiation, vertical integration, business failure, and removal of an effective competitor. (Sec. 12A(1))

If the competition analysis indicates a problem, the next step is to determine whether technological, efficiency, or other pro-competitive gains would be likely to offset the anti-competitive effects — and would not likely be obtained absent the merger. (Sec. 12A(1)(a)(i)) Whether efficiencies must be passed on to, or demonstrably benefit, consumers depends upon the nature of the claimed efficiencies. The Tribunal distinguishes "real," quantifiable efficiencies, for which a clear showing of consumer benefit is less necessary, from "less compelling" claims for which there should be a demonstration that the benefit is passed through to consumers.

A merger may also be approved, or disapproved, based on "substantial public interest grounds." The public interest grounds are broad, but they are not unlimited: effect on a particular sector or region, employment, international competitiveness of South African industries, or the ability of small business or firms controlled by historically disadvantaged persons to become competitive. (Sec. 12A(1)(a)(ii)) These grounds are slightly different

from the policy objectives that may be considered in granting an exemption from the Competition Act's prohibitions.

The thorough approach to merger analysis, the relevance of the public interest factors, and some of the jurisdictional problems are illustrated by the Nedcor-Stanbic case, one of the first major cases to come up under the Competition Act. In reviewing a proposed merger of 2 major banks, the Commission performed a standard analysis, defining service markets, finding high concentration, and focusing on likely actual competitive effects. The Commission identified 8 out of 12 product markets in corporate, investment, and merchant banking as worrisomely concentrated and thus problematic, despite the likelihood of significant foreign competition. In retail and small business services, there was even greater concern because entry of foreign banks was less likely to be a constraint on market power over these services. Efficiencies were considered, but the claims were rejected because they were unlikely to benefit consumers. The employment impact was also important, because the consolidation would eliminate 4000 jobs. (Competition Commission, 2000) In the end, these conclusions had to be submitted as advice to the banking regulator rather than implemented through a decision under the Competition Act, because the court ruled that the Competition Act did not apply if an industry was subject to regulation. The Competition Act has been amended to narrow that reading substantially.

Whether a transaction amounts to a merger that is subject to notification and review depends upon the acquisition or establishment of control, either direct or indirect. "Control" is a matter of fact, which the statute characterises in two ways. In formal terms, it is beneficial ownership of a majority of the capital or the power to control a majority of shares or to appoint (or veto) a majority of the directors or equivalent officers. In functional terms, it is the ability to materially influence firm policy in a way comparable to a person who can exercise "control" as understood in ordinary commercial practice. (Sec. 12(2)) The Commission has declined to issue guidelines defining control in even more precise terms. Its unwillingness has been criticised, as adding uncertainty and hence costs to business decisions. On the other hand, the Byzantine complexity of cross investments in South Africa may make it unusually necessary to preserve a flexible conception of control. The same concerns arose under the pre-1998 law, and the Competition Board then also tried to avoid a formalistic conception of "control" in order to preserve its options.

The lack of greater certainty may frustrate devices that are designed to facilitate transfers of firms in liquidation or to ease reporting obligations about international transactions. One advantage of a formal, explicit rule, at least from the business perspective, is that clear boundaries make it easier to design deals to be inside or outside of them. Businesses would often prefer not

to notify multi-jurisdictional transactions in South Africa and other smaller countries until after it is clear whether they will be approved or subject to conditions in major markets. Attorneys have proposed clever constructions about what constitutes control in order to rationalise failure to notify in South Africa. For example, noting that the Competition Act says that parties may not "implement" a merger until it is approved (Sec. 13A(3), some have contended that acquisition of corporate control does not actually implement the transaction, so notification or approval can be postponed until the latter event, that is, until those who possess the power of control actually take some action that effects the combination. More credibly, parties may offer to "ring-fence" the South African operations that are affected, by making some commitment to hold operations separate, in South Africa or even elsewhere, until completion of the review and approval process. The Commission would prefer enforceable commitments within South Africa. Moreover, the Commission doubts that managers in an entity that is supposedly held separate pending approval will actually behave independently of the interests of the prospective future owners.

Deadlines and procedures differ depending on the magnitude of the transaction. Mergers are classified as small, intermediate, or large, according to thresholds of turnover or assets that are determined by a regulation issued by DTI, after notice and comment and in consultation with the Commission. (Sec. 11) The threshold has been increased significantly since 1998 to reduce the number of transactions that are subject to mandatory notification and review. "Large" means over R3.5 billion in combined turnover or assets (and over R100 million for the acquired firm), and "small" means below R200 million in combined turnover or assets (and below R30 million for the acquired firm). Filing fees have been cut in half, to R250,000 for larger mergers and R75,000 for intermediate ones.

Small mergers ordinarily need not be notified to the Commission. The Commission may require notification of a small merger if it believes the merger might have an anticompetitive effect or might not be in the public interest. The Commission must take this action within to 6 months after the transaction, and the parties must suspend implementation until the review is completed. Intermediate and large mergers must be notified in advance to the Competition Commission, and notice must be given to the union (or the employees) of the primary acquiring firm and the primary target.

The notification package must include a number of documents along with the required forms: the merger agreement, "a document assessing the transaction with respect to competitive conditions," documents about the transaction prepared for the board of directors, recent annual reports, business plans, and reports to the securities regulator. The parties typically use the document describing the transaction and competitive conditions to

present their case for approval. Pre-existing documents prepared for the firm's board are also supposed to be provided, but they rarely are. In some cases, parties have withheld documents and information that the Commission has requested, only to bring them forward at the Tribunal when that appears necessary to bolster their case. The Commission has found that information submissions with merger filings are often incomplete, and increasingly the Commission has been moved to "stop the clock" because the information in the filing is inadequate. When the notification process was new, the Commission wanted to encourage firms to comply, and so it had accepted incomplete filings. Compliance with notification and other formal requirements is enforced by administrative penalties, which may be imposed by the Tribunal. The penalty for proceeding with a merger without the required approval can be up to 10% of the parties' turnover.

For small and intermediate mergers, the Commission is the principal decision-maker. The Commission must reach its decision within 20 business days after the notification is completed. That period may be extended once, up to 40 business days. If the Commission does not act within the deadline, the merger is approved. The Commission must publish the reasons for its action if it prohibits a merger or imposes conditions — or if the parties request that it do so, even if the Commission approves it. (Sec. 13) For large mergers, the Commission must refer the notice to the Tribunal and the Minister of Trade and Industry. Within 40 business days after the notification is completed, the Commission must forward its recommendation. The Tribunal may extend that deadline, 15 business days at a time. If the Commission misses the deadline, the parties may petition the Tribunal to proceed without a Commission recommendation. For a large merger, the Commission's failure to act does not mean that the merger is approved. (Sec. 14A)

The Tribunal is the decision maker about large mergers. The Tribunal may also be asked to decide about small and intermediate mergers in some circumstances. If the Commission prohibits a small or intermediate merger or imposes conditions on it, the parties may ask the Tribunal to consider the conditions or the merger. If the Commission approves an intermediate merger or imposes conditions, the union or employees who were given notice may ask the Tribunal to consider the approval or conditions (but only if they had participated in the Commission's proceedings). (Sec. 16(1)) In all merger cases, the Tribunal must reach a decision by a deadline, which is set by regulation, and it must publish its reasons. For large mergers, there is no "silence is consent" rule.

Decisions about public interest issues as well as about competition issues are up to the Commission and the Tribunal. The original draft of the Competition Act would have given the Minister the power to apply the public interest criteria, that is, to override the competition policy decision on those

grounds. But the Minister at the time decided to decline that power. The Minister may participate as a party before the Commission or the Tribunal in considering intermediate or large mergers, in order to make representations concerning the public interest grounds. (Sec. 18(1)) In only one sector, banking, is there a provision for ministerial invocation of other policy interests to displace the Competition Act: a bank merger may not be subject to Competition Act notification or review if the Minister of Finance certifies that it is in the public interest for it to be subject only to the jurisdiction of the Banks Act. (Sec. 18(2)) Because public involvement or regulation does not create an exemption from competition policy, restructuring or privatisation transactions carried out pursuant to government policies would not be exempted from merger notification and review. The Commission and Tribunal would normally examine them if the requisite threshold requirements were met. (Competition Commission, 2002)

The parties to a proposed merger, or their unions or employees, may appeal the Tribunal's action to the Competition Appeal Court (CAC). The Commission may not appeal if the Tribunal rejects its recommendation, though. The CAC may confirm, amend, or set aside the Tribunal's decision. It is not clear whether the CAC could send the matter back for further proceedings. If not, then if the CAC sets aside the previous decision, it must issue its own decision, to approve or prohibit the merger or impose conditions. (Sec. 17)

The Commission tries to focus its resources by identifying quickly the mergers that are likely to be approved and those that are likely to be problematic. The Commission has offered a "fast track" process in its service standards, set out in a December 2001 memorandum describing the types of transactions that would qualify for this expedited treatment. Two types that virtually never have competition implications are property transfers and management buy-outs. The Commission will also deal quickly with transactions in which there is a failing firm or in which one party is a new entrant. Fast-track treatment is promised if there is no product or geographic market overlap among the firms. If the combined share exceeds 15%, fast-track treatment depends on the level of concentration and the magnitude of the increase. The structural thresholds for fast-track treatment are similar to those applied in North America: HHI below 1000, or HHI between 1000 and 1800 and increase less than 100, or HHI over 1800 and increase less than 50. The parties must provide the factual basis for their contentions about the market and the effects and efficiencies, and there must be a "comfort letter" from the unions abjuring an intention to raise issues about employment. For qualified transactions, the Commission undertakes to reach a decision in 20 days. (The period must be at least 10 days, because that is how long the minister has to indicate whether he intends to call attention to any public

interest issues). Decisions on larger mergers are often issued on the day of the hearing. In 2000-01, this was true for 24 out of 35 such matters. In that period, only 2 merger decisions took longer than a week after the Tribunal's hearing. About a quarter of the large mergers notified over that period were elements of multinational transactions, and all of those were approved.

The public interest considerations are independent of those based on competition and efficiency, and they are equally important. A merger that raises no competition policy concerns may still be barred because of other public interest considerations. At least one merger has been permitted only after the parties accepted conditions related to employment security, despite a finding that the transaction raised no competition concerns.[8] Considerations of the public interest often appear along with arguments about efficiency. The Tribunal has permitted otherwise anti-competitive mergers where there were strong showings of productive efficiencies that would outweigh the anti-competitive effect.[9] Public interest concerns have been prominent in decisions about others, but they were not necessarily reasons to permit them. The Tribunal considered the risks of monopoly in educational practices severe enough to call special attention to, in imposing conditions on an acquisition involving franchising educational services.[10] The Competition Appeals Court has implied, though, that public interest factors should not prevent a merger if there are no competition policy reasons to do so.[11]

Merger control may be used to promote statutory policies of general interest. One of these is expanding the business ownership stakes of historically disadvantaged persons. For example, a firm acquiring machinery from another that was exiting claimed that its plan would increase employment and sales opportunities for black farmers; however, the firm would also have achieved a dominant position as processor in the region with the largest share of this product (cotton). The Commission required restructuring so the "empowerment partners" would be the acquiring firm, to introduce a new competitor. (Competition Commission, 2001, p. 9) There have been disagreements about what it means to implement these policies. The Commission once tried to impose conditions on the acquisition of a minority-controlled business, in support of the statutory criterion of supporting firms controlled or owned by historically disadvantaged persons. The Tribunal disagreed, reasoning that the goal of empowerment would be achieved by permitting the minority owners to sell out and apply their capital elsewhere if they wanted to. The only issue was this public interest factor, as the acquired firm, one of the only black-owned firms in the oil business, was not a significant competitive factor, having a market share under 1%.[12]

The merger control process also gives labour interests an explicit role. Unions must be notified of proposed intermediate and large mergers, so they can decide whether to participate in the review. Unions participate in about

20% of the merger proceedings, and about 20% of the unions that are notified decide to participate. (Competition Commission, 2001) These interested unions may also pursue appeals if they are dissatisfied with the outcome. Unions report that the notifications are prompt, but their participation in the process beyond that point is sometimes uncertain. Whether unions are notified about subsequent stages of the review and whether they can obtain access to the file may depend on the particular case handler and the willingness of the filing parties to permit access to confidential material. Unions have participated actively in several cases, notably SFW-Distillers and Unilever-Robertsons, making presentations about competition and consumer effects as well as about employment impacts. Clearly, though, the employment effects are important, and unions are interested being sure that the merger review process can be used to protect those interests. Unions complain that firms delay filing their notification in South Africa in order to effect labour force changes before the unions must be alerted, and that the merging parties' representations about labour force impacts and plans are not accurate. Consideration of employment effects is not a novelty of the 1998 Competition Act, although the formal process of notification and participation is an innovation. Under South Africa's 1979 law, among the considerations relevant to the public interest determination was the effect on employment, and the old Competition Board occasionally rejected mergers because of adverse employment effects.

General concerns about the structure of the political economy have not been elements of merger control, despite the prominence of these issues in the debate about the law in the 1990s. The Commission and the Tribunal take a standard competition-policy approach to merger analysis and actions. Concerns about aggregate concentration and pyramid-like investment structures, although still of some interest, have not been issues in deciding particular cases.

To a surprising extent, competition policy in South Africa is merger policy. Even before the new law was adopted in 1998, merger control was the task that occupied most of the competition policy attention. That pattern has continued under the new, stronger merger control processes. The bar preferred the previous system because it was comparatively informal and low-key. On the other hand, it was also less transparent. The evident overbreadth of the review obligation that had been imposed by the original thresholds was a matter of some criticism in the business community. The revisions in 2000 to reduce the scope of mandatory filing, and the "fast track" policy adopted in 2001 to focus effort on the most significant transactions, have tried to meet those criticisms. The decisions to date show that, in terms of substantive economic analysis and sensitivity to policy context, merger review in South Africa is done at a high level of sophistication.

Box 2. **Challenging Issues in Merger Dedicions**

In a short period of experience with wide-ranging, mandatory merger review, South Africa's competition policy institutions have issued dozens of decisions. The number is due no doubt to the obligation to review each large transaction and produce a decision about it, however brief. The range of issues the Tribunal and the Commission have addressed is impressive, as is the economic sophistication of their approach.

Market definition: In *JD-Ellerines*, the Tribunal prohibited a combination between retail furniture chains. The Tribunal used its powers to obtain additional evidence and looked beyond superficial statistics to examine actual marketing strategies in detail. It concluded that the merger would reduce competition in local market service to poorer customers who are more likely to need to buy on credit terms.

Regulation: In *Tongaat-Hulett Group Ltd-Transvaal Suiker*, the Tribunal prohibited a merger in the sugar industry. The parties had argued, with no apparent sense of irony, that their merger would not affect competition because regulations set the price and so there was no competition to be affected. The Commission feared already-high concentration, de facto market division between industrial and consumption sales, and lack of imports or countervailing power. And one of the firms involved was the industry "maverick." (Competition Commission, 2001) The Tribunal sought additional evidence in its proceeding. In the end, the Tribunal thought it best to preserve the possibility of competition against the day that the regulations might be reformed. Written assurances from DTI that regulations would be reformed to stimulate competition did not persuade the Tribunal to permit the transaction to proceed.

Efficiencies: In *Trident Steel (Pty) Ltd-Baldwins Steel*, discussed above, the Tribunal determined that claims of efficiency were credible enough to justify a merger to near monopoly in specialty steel. The decision provides a nuanced guide to treating efficiencies and balancing claims about productive efficiency and consumer harm.

Small business: In *National Sorghum Breweries-South African Breweries*, a restrictive licensing agreement affecting the sorghum industry persuaded the Commission to prohibit the transaction. But then the reformation of that agreement permitted it to proceed. The Commission believes that result helped small business interests to compete.

Vertical foreclosure: In *Schumann Sasol-Price's Daelite*, the Tribunal tried to prevent a supplier of raw material, with a 70% market share, from acquiring a downstream customer, which had a 40% share of that product. The Commission had recommended approving the transaction, which resulted from settlement of a contract controversy between the parties, but the Tribunal rejected it because of the foreclosure of a large share of the market

Box 2. **Challenging Issues in Merger Dedicions lkit** *(cont.)*

and the resulting two-stage entry requirement imposed on downstream firms. The Competition Appeal Court had the last word, though, and in its first substantive consideration of a merger, it reversed the Tribunal. The court contended that there is a world market for the raw material, wax, and that a producer of the downstream product, candles, would have no trouble getting the raw material. The court chided the Tribunal for relying on speculation, but the court's decision cites only counsel's argument in support of its own contrary conclusion, and the court relies mainly on presumptions from academic treatises about how vertical mergers might affect competition.

International markets: In *Nampak-Malpak*, the Tribunal permitted a combination between major producers of packaging, despite the objections of many customers who argued that they did not have countervailing power. The Tribunal noted that the market was in fact bifurcated. One part is sales to multinationals that increasingly concentrate global production in one place rather than distribute it around markets. In that sector, a firm in South Africa must be unusually large and sophisticated to serve what might be global or continental-scale production. And in that sector, the new firm would rank only 31st in the world. The other part is sales to national firms, operating at smaller scale — but this sector can be served by the remaining, smaller firms. Moreover, the Tribunal found that entry at the smaller scale would not be that difficult. And a multinational buyer might sponsor entry (or support expansion of one of the remaining fringe firms) in response to abuse by the merged firm. The Tribunal did impose a condition, requiring divestiture of a plant making an insulation product, for which the market was local and the buyers dispersed

Differentiated consumer products: In *Pioneer Foods-SAD*, the Tribunal approved a merger that appeared to result in a near-duopoly in ready-to-eat cereal. One reason for approval was the apparent ease of entry into the meusli-type products that were the acquired firm's principal item. Moreover, internationally branded firms that are not already in the South Africa market, such as General Mills, CPW, and Nabisco, could enter too. Comparative elasticity analysis was used to identify the degree of local market power, if any, of Kellogg and the new firm. The extent of product differentiation was found to make collusion unlikely. And the Tribunal noted that retailers might have an interest in sponsoring new entry to control abuse.

Multi-market contact: In *Mondi-Kohler*, the Tribunal agreed with the Commission's recommendation to prohibit what looked like a vertical combination involving an obscure industrial product, the cores used for winding textiles and paper. The raw material supplier was buying the core maker. In the broadly conceived "paper products" industry, South Africa is a duopoly, and the Tribunal determined that this combination would simplify aspects of overall duopoly co-ordination, particularly when considered in the context of another transaction that was pending at the same time.

3. Institutional issues: enforcement structures and practices

South Africa's new institutions are trying to implement an economics-based policy in an enforcement culture whose preoccupation with legalism is a connection to the old way of doing things. Merger review processes are established, but the procedures for enforcement and exemptions now need more attention.

3.1. Competition policy institutions

The principal innovation in the 1998 Competition Act was independent, effective enforcement bodies. The power of decision was taken away from the Minister and given to an independent Competition Tribunal. Even the office that is responsible for investigations and recommendations was moved out of DTI and reconstituted as the new Competition Commission. The Competition Act also created a special court, the Competition Appeal Court. Much is made of the novelty of these institutions, but there is some continuity with their predecessors in roles and in personnel. The chairperson and the other permanent member of the Tribunal were members of the old Competition Board, and several senior staff at the Commission had held similar positions at DTI in the secretariat of the Competition Board.

The Commission is the investigative and executive body. Despite the implication of the name, the Commission is an executive administration, not a collegial body, with power vested principally in the Commissioner as its chief executive officer. The only other required appointment is the Deputy Commissioner. The term of office is 5 years, and it may be renewed. (Sec. 22) The Commissioner may only be removed for cause, that is, for serious misconduct, permanent incapacity, or engaging in activity that may "undermine the integrity" of the Commission. The Minister of Trade and Industry appoints the Commissioner and Deputy Commissioner and sets their compensation and conditions of employment, in consultation with the Minister of Finance. The Commissioner has an annual performance agreement with DTI and is responsible to the Minister. The Commission and staff are subject to the generally applicable rules against conflict of interest and misuse of confidential information. (Sec. 20(2)) The Commissioner is responsible for managing the Commission and staff, supported by an office at DTI for administrative details. A principal difference between the independent Commission and the old Competition Board secretariat is that the Commission has more resources. Supported by substantial filing fees for mergers, the Commission has a staff of nearly 100 employees at its office in Pretoria.

Although the Commission is the first stop for the application of the Competition Act, the Competition Act's list of its functions does not begin with law enforcement, but with promoting market awareness. The

Commission is to "implement measures to increase market transparency" and "to develop public awareness" of the Competition Act. The Commission investigates and evaluates violations, grants exemptions, reviews and authorises or refers mergers, and appears before the Tribunal. The Commission has several regulatory roles. It negotiates agreements with other regulators to harmonise their respective jurisdictions and participates in proceedings at other regulatory authorities. And it is to review legislation and regulations and report to the minister about any that permit non-competitive behaviour. (Sec. 21(1)) The Commission may inquire and report to the Minister of Trade and Industry on matters "concerning the purposes" of the Act. The Minister is to present such reports, as well as reports about competition problems in legislation and regulations, to the National Assembly.

The Competition Tribunal operates as a collegial body. It is considered a tribunal of record, although not a formal court. By law, it is to have from 3 to 10 members plus a chairperson, all of them nominated by the Minister of Trade and Industry and appointed by the President of South Africa. (Sec. 26) The members' tenure is like that of the Commissioner, that is, they serve 5 year terms and are removable only for cause; however, the chairperson may only serve 2 consecutive terms in that office. (Sec. 29) Membership is not formally representative of interest groups, but the members are to represent a "broad cross-section of the population." The members must be qualified and experienced in the matters the Tribunal deals with, and they may not be officials of political parties or movements. (Sec. 28) One constraint on the members' qualifications is the need to include enough lawyers to assign at least one lawyer to each panel dealing with a case. Remuneration and terms of employment, which are set by the Minister, may not be reduced during a member's term. (Note that the Commissioner, who may serve longer and is more like a civil servant, does not enjoy this protection against a pay cut). In 2001, the members included 6 lawyers, 3 economists, and a chartered accountant.

The Tribunal is the first-instance decision-maker about larger mergers and complaints about restrictive practices and abuse of dominance. It also adjudicates appeals from Commission decisions about smaller mergers and exemptions. (Sec. 27) It has the power to issue interim relief, and this procedure has been its principal task, after merger reviews. The Tribunal has some power to conduct its own inquiry, and thus it is not limited to hearing the evidence and arguments presented to it by the Commission and parties. Matters are heard and decided by panels of 3 members.

All but 2 of the Tribunal's members serve part-time. The pay for their service is not very high. The combination of those factors may create problems in dealing with complex cases. The Minister disagreed with the Tribunal's interpretation of the compensation formula and cut the members' daily rate by more than 50%. That dispute has not yet been fully resolved. (Competition

Commission, 2001, p. 4, 7) Several members recently left the Tribunal for private practice or other purposes — one of them to join the staff of the Commission — in part because of the low compensation for their time. Relying on part-time service will be make it difficult to assemble panels to hear complex non-merger matters, for which many days of hearing time are needed to take evidence.

The role of the Department of Trade and Industry is principally in policy and legislation, as well as the appointment process. DTI is responsible for the budgets of the Commission and Tribunal. (Competition Commission, 2002) Despite these ties, the decision-making independence of the Commission and the Tribunal are well-established. Independence of enforcement from political influence was considered necessary for the new competition policy structure to be credible to the markets and to the citizenry. The Commission's law enforcement functions are not subject to political direction, even though the Commissioner is officially responsible to the Minister. The Commission is enjoined by statute to be "independent and subject only to the Constitution and the law," to be impartial and "perform its functions without fear, favour, or prejudice." (Sec. 20(1)) Other officials and institutions of national, provincial, and local government are instructed to assist the Commission to maintain its independence and impartiality. (Sec. 20(2)) The Tribunal, like the Commission, is similarly enjoined to be independent and impartial. The Minister has made representations about public interest considerations in some matters, as provided by statute. There has been no indication of any political effort to influence enforcement decisions about the competition merits, though.

The Competition Appeal Court has the status of a High Court. In fact, the members must be High Court judges. It has at least 3 members, appointed by the President on the advice of the Judicial Services Commission. Other High Court judges may be seconded to the CAC as acting judges. Terms of service are set by the President at the time of appointment. The judges' compensation and tenure protection are based on their service on the High Court. (Sec. 39)

The Constitution requires that there be an avenue of appeal to an independent court. The CAC serves that role, while, it is hoped, developing a particular expertise about complex competition matters. The CAC may review any decision of the Tribunal concerning legal error and jurisdiction. The CAC may consider an appeal concerning the substantive merits of any final decision of the Tribunal (except a consent order) and of any interim decisions for which the Act permits an appeal. The CAC may confirm, reverse, amend, or remand. The CAC hears and decides cases in panels of 3 judges, although a single judge may decide interlocutory or procedural matters. The CAC has only issued about a dozen decisions in 3 years. Most of the CAC decisions are about questions of procedure and jurisdiction. There is little record yet to show how the CAC is developing or applying expertise about the substance of competition law.

The new institutions are turning out a flurry of decisions, mostly about mergers. Of the Tribunal's nearly 175 decisions in just over 3 years of operation, 125 are about large mergers (nearly all of which were approved). All basic statutory materials and the decisions of the Tribunal and the CAC are available on clear and straightforward websites. The Commission publishes annual reports and quarterly bulletins, which also appear on the Commission's website. These do not necessarily report all Commission actions, though. Advisory opinions are not usually publicised, and thus they are not available as guidance for others. There have been few formal guidelines so far. The merger guidelines that the old Competition Board issued in 1981 are still considered useful by practitioners, particularly with respect to the threshold issue of characterising the change of "control." (Brassey et al., 2002, p. 229) The Commission has resisted issuing a new guideline on this subject under the 1998 law, contending that more experience is needed with the new system.

3.2. Competition law enforcement

Application of the law combines administrative and quasi-judicial approaches. The Commission has the first responsibility with respect to every matter arising under the Competition Act. Decisions in contested matters are made by the Tribunal, on the record and after an open hearing of the views of the Commission and the parties. The Tribunal also has the power to impose sanctions. And parties may appeal any final Tribunal decision (and some other ones as well) to the CAC. Actual experience with the enforcement process is limited, except for mergers. Most non-merger matters have been resolved by consent agreements or delayed by applications for interlocutory relief. (Competition Tribunal, 2002)

The Commissioner has the power to initiate a complaint against a prohibited practice. On receiving a complaint or information from a third party about a prohibited practice, the Commission must initiate an investigation. (Sec. 49B) The matter must be referred to the Tribunal or closed within a year. If it is closed, the complainant must be notified. (Sec. 50) The 1-year deadline for Commission action may be extended, by order of the Tribunal or by the agreement of the respondent. The Tribunal may order interim relief in order to prevent serious or irreparable damage while the Commission's investigation is pending. The interim relief process, discussed further below, has become the primary means for litigating private disputes and claims.

A consent order negotiated with the Commission must be confirmed by the Tribunal, which can refuse to accept it or indicate needed changes. A consent order can include an award of damages to the complainant. (Sec. 49D) Although the Tribunal must agree with a consent order, the CAC has no power

over it. The consent order process requires that the respondent admit wrongdoing. The admission of wrongdoing is a necessary predicate to a follow-on civil action. To avoid that onus and reduce the exposure to civil liability, respondents have tried to settle matters without a consent order. The Commission would like to find a way to support that approach, to increase its success rate. At first, the Competition Act invited firms to request advice about whether a practice was prohibited, and it provided for "comfort letters" from the Commission in response. That section (formerly Sec. 10(2)) was deleted in the 2001 amendments. Now, firms have to ask for exemption or formal advisory opinion and pay a fee for that service. Those fees range from R2500 for a plain advisory opinion up to R100,000 for processing an exemption application for a professional association.

Investigative powers are broad, but they are subject to judicial oversight in sensitive areas. Any premises may be entered and searched if there are reasonable grounds to believe that a prohibited practice is taking place there (or has taken place, or is likely to), or that there is anything connected with an investigation under the Competition Act in the possession or control of someone on the premises. Such a search requires a warrant, issued by a High Court judge or magistrate. (Sec. 46) A warrant may not be needed to enter and search business premises, though, if the owner or person in control consents to the entry, or if the official reasonably believes that a warrant would be issued but that delay to obtain one would defeat the object of the search. (Sec. 47) That is, the statute permits an ex parte "dawn raid" search of business premises. The investigators may examine documents, ask for information about them, take notes and make copies, use computer systems to search and reproduce electronically stored information, and attach and remove evidence. (Sec. 48) Due process protections apply. A search must be done with due respect for decency and order and for personal dignity, security, freedom, and privacy, and persons must be advised of their right to an attorney or advocate. But the statute also authorises means to make searches effective. Police may accompany the investigators and overcome resistance with reasonable force, such as breaking a window to gain entry. (Sec. 48, 49) The Commission may compel testimony (subject to protection against self-incrimination) and production of documents or other evidence. (Sec. 49A) The Commission has had to use the search and seizure powers, against a company that reneged on a promise to provide information in response to a summons (which was withdrawn in view of the promise); the High Court upheld this exercise of power, which was done pursuant to a warrant. (Competition Commission, 2001, p. 35)

Confidentiality is the first subject in the section of the Competition Act on investigation powers. This position probably reflects its priority to the business community and perhaps to the government too. A firm's designation of its material as confidential is binding on the Commission. The Commission

may ask the Tribunal for a ruling on whether the information so designated meets the statutory requirements, and if so, for an order about access to it. (Sec. 44) Other persons may apply to the Tribunal for access subject to an appropriate order, and they may appeal denial of access to the CAC. (Sec. 45)

Tribunal hearings must be public, except to the extent necessary to protect confidential information, but procedures may be flexible. Telephone and video conferences are authorised, for example, and the hearing may be conducted either informally or inquisitorially. (Sec. 52) Parties (respondents and complainants) and some third parties with a material interest (such as the parties entitled to notice about mergers) may participate in Tribunal hearings, with the right to put questions and examine evidence presented. (Sec. 53) The Tribunal has the powers to summon witnesses and compel their testimony, subject to protection against self-incrimination, and to require production of documents. (Sec. 54, Sec. 56) The Tribunal is not bound to act just like a court in all respects. For example, the Tribunal may accept evidence that is unsworn or that would not be admissible in court. (Sec. 55)

In merger matters, the Commission must act within at most 40 days. There have been complaints about delays. Different reports about the timeliness of Commission action may be related to differences in the complexity of the cases involved, the degree to which parties have been forthcoming in the Commission's investigation, and to the style and reputations of the legal representatives involved in different matters. Processing generally meets target dates, at least for mergers. But the Commission is still taking the time to review each matter, in part because it is using the merger filings as an opportunity for the staff to learn more about industries. The "fast track" process offered in early 2002 seems to be working. Some of the complaints about delays appear to come from disputes about whether the parties' filings qualified for fast track treatment. The Tribunal is not subject to statutory deadlines in merger cases, although it has generally moved expeditiously, convening hearings promptly (within 10 days) after receiving CC recommendations. For advisory opinions and action on exemption applications, the Commission has set targets in its service standards, which it claims to be meeting, at least on average. These targets range from 5 days for clarifications to 8 weeks for advisory opinions about complex prohibited practices. That the average time taken is almost exactly equal to the target for many categories implies that there are some matters taking quite a bit longer (or that the Commission is always using all of the time up to its self-imposed deadline).

The Tribunal has the power to order a wide range of remedies. These can include stopping prohibited practices, requiring a respondent to supply another party on terms reasonably required to end a prohibited practice, ordering divestiture, declaring conduct to constitute a prohibited practice in

order to establish the basis for a civil action, declaring an agreement to be void, or ordering access to an essential facility on reasonable terms. (Sec. 58) An administrative financial penalty may also be imposed against the prohibited practices that are specifically named in the Competition Act: horizontal price fixing, market division, and collusive tendering, minimum resale price maintenance, exploitative pricing, and denial of access to an essential facility. Other prohibited conduct may also be subject to administrative financial penalty if it is repeated after the Tribunal orders it to stop. And the administrative penalty may be imposed against non-compliance with merger reporting requirements and processes. The amount of the penalty depends on the nature, duration, gravity, and extent of the violation, any loss or damage suffered, the respondent's behaviour, the market circumstances, the profit from the violation, the respondent's co-operation with the authorities, and whether there have been previous violations. The maximum penalty is 10% of the firm's annual turnover in and exports from South Africa. (Sec. 59) The Commission has the power to initiate High Court proceedings to collect these penalties. (Sec. 64) Divestiture can be required to undo a merger that contravenes the statutory requirements, or to remedy abuse of dominance if no other remedy would be adequate or if the respondent has repeated a previous violation. Divestiture orders must be specifically confirmed by the CAC, though. (Sec. 60) These sanctions and orders provided by statute are largely theoretical, so far, as the Tribunal has issued very few final remedial orders or orders enforcing compliance with process.

Criminal penalties against individuals might be invoked for recidivism or for hindering the enforcement process or breaching confidentiality requirements. Breaching the rules protecting confidentiality, failure to comply with investigative requirements, and other acts that subvert the process are offences punishable by fines up to R2,000 and imprisonment up to 6 months. Much more substantial penalties can apply against failing to comply with interim or final orders of the Tribunal or CAC, namely fines up to R500,000 and imprisonment up to 10 years. (Sec. 73, 74) These offences and penalties too are still theoretical, as there have not been any actual cases yet.

The CAC is intended to be the first and last level of appeal on the merits from Tribunal decisions applying the Competition Act. Its decisions about the interpretation and application of the Competition Act are final. Its decisions about the jurisdiction of the Commission and the Tribunal or about constitutional matters may be appealed to the Supreme Court of Appeal or the Constitutional Court, respectively. (Sec. 62) That further appeal is not a matter of right, however; leave to appeal must be obtained from the CAC or from the higher court, and that leave may be conditioned on an order concerning security for the costs of appeal. (Sec. 63) Where the Commission and the

Tribunal have disagreed, a party's further appeal to the CAC could produce curious results. The Tribunal, as a court of first instance, does not defend its position before the CAC. And the Commission, whose views the Tribunal rejected, may choose not to defend the Tribunal's position either. Unless there is another party ready to take that position (including perhaps a third party ready to make the argument as an amicus), the CAC might hear only the appellant's views. In the candle wax case, the Tribunal was not present to defend its own reasoning, and the unbalanced argument probably explains the CAC's somewhat unbalanced opinion. One option in this situation is to appoint an amicus to present the unrepresented position. This procedure has a parallel in South Africa's Constitutional Court. The amicus would probably be appointed by the CAC, but it is not clear who would pay the amicus. One obvious source is the Commission's budget, although that would mean applying the Commission's funds to advocate a position with which the Commission disagrees.

Combining the powers of investigation and application has raised sensitivity about the quality of investigative process. The Commission intends to litigate thoroughly claims related to access to restricted information, whether they involve internal deliberative documents or company confidential documents. As the new institutions test the new tools, there have been some embarrassments and growing pains. Parties have sometimes challenged errors though suit in the High Court rather than through petitions for review or appeals to the specialised CAC. One matter was thrown out in a High Court challenge when it appeared that the Commission's referral to the Tribunal had not been authorised formally by the Commissioner or Deputy Commissioner, but instead by the Executive Committee of division heads. The first Commission enforcement effort stumbled when the Commission investigators took the media with them on a dawn raid, a tactic that drew severe criticism from the Supreme Court of Appeal. The Commission had to return all the documents.

An injured party has some power to initiate an action to obtain relief, but only after first submitting a complaint to the Commission. If the Commissioner declines to refer a complaint to the Tribunal, the complainant can then do so itself. (Sec. 51) The complainant can proceed independently only after the Commission issues a certificate of non-referral, or after the statutory one year period has passed without Commission action, which is deemed to be equivalent. The Commission inaction is deemed to be dismissal, but that has no estoppel effect against the complainant. The Tribunal must conduct a hearing about every matter referred to it, whether by the Commission or by a complainant. (Sec. 52(1)) Normally, parties bear their own costs, but the Tribunal may award costs to the prevailing party. (Sec. 57) The number of "non-referral" matters that have been brought to the Tribunal by complaining parties is about the same as the number of complaints referred by the Commission — a fact that

is evidence mostly of the low priority and long delays for non-merger matters at the Commission. Some matters were "non-referred" because the Commission did not finish its investigation and recommendation within a year.

A more common way for a party to demand Tribunal action is through a claim for interim relief. A party that has made a complaint to the Commission may petition the Tribunal for an order of interim relief pending the completion of the Commission's investigation. (Sec. 49C) The complainant must persuade the Tribunal that the respondent has engaged in a prohibited practice, that relief is necessary to prevent serious or irreparable damage to the complainant, and that the "balance of convenience" favours granting the order. The standard of proof is prima facie. The process is similar to, and built on, the provisions for preliminary relief pendente lite in South African courts. Interim relief may be ordered for up to 6 months or until the completion of the hearing on the merits. The Tribunal may extend the period if the hearing has not been completed when the 6 months is up. Out of 14 applications, the Tribunal has granted interim relief 4 times. Each time, the respondent has appealed further. Interim relief cases tend to proceed independently from the underlying complaint process at the Commission. Indeed, it appears that parties may prefer to keep the Commission out of the Tribunal process, so they have more control over the procedure and proof in a familiar, court-like adversary setting.

A party that has suffered loss or damage from prohibited conduct may sue for damages in court, if damages were not already provided in a consent order with the Commission. But that suit depends on a prior finding from the Tribunal or the CAC, which the plaintiff must file with its lawsuit. Conduct that is prohibited by the Competition Act is not void for other legal purposes until the Tribunal or CAC declares it void. If the Tribunal certifies that conduct constituting the basis for a claim of damages has been found to be prohibited by the Competition Act, that certificate is conclusive proof, binding on the civil court. If an issue concerning prohibited conduct arises in another kind of civil suit, the judge in that action may not consider it on the merits, but instead must apply the order of the Tribunal (or CAC), if there is one. If there is no order, the judge must refer the issue for the Tribunal's consideration, provided its resolution is necessary for the final outcome of the suit and it has not been raised simply for delay or distraction. (Sec. 65)

3.3. International trade issues in competition policy and enforcement

Conduct that has an effect in South Africa may be subject to the Competition Act. (Competition Commission, 2001) It is not necessary to show that the effect in South Africa is anti-competitive, so the per se rules could prohibit conduct outside South Africa. A merger outside South Africa may have to be notified and approved if the parties' sales or assets in South Africa exceed the notification thresholds. Looking in the other direction, South

Africa has considered adopting an exemption from its Competition Act for export cartels, that is, for restraints whose effect is felt entirely outside the country. (Competition Commission, 2001)

The extent and nature of international trade, or constraints on international trade, are considered in analysing the facts of particular cases. For example, in a merger case in the highly distorted sugar market, the Tribunal considered the impact on competition of regulatory interventions in other jurisdictions. But the competition bodies do not have a formal role in the application of the laws that directly affect international trade. Antidumping disputes and other trade matters are the responsibility of the Board of Tariffs and Trade (BTT). The connection between trade and competition institutions had been much closer under the old law, but one reason was that competition policy was subordinated to protectionist trade policy. The Board of Trade and Industries, the precursor to the Competition Board, was also responsible for tariff issues (indeed, it was generally known as the "Tariff Board"). The Commission could participate in BTT proceedings, and it might be important for it to do so, in view of South Africa's long history of import substitution and protection. The legacy of a closed, protected economy still colours policy, and the application of the Competition Act must be sensitive to that history.

In principle, application of the law is non-discriminatory with respect to location or status. Foreign firms have invested or operated in South Africa for a long time. There have been no formal complaints that the competition law is applied to foreign firms differently than it is to domestic ones. In theory, perhaps, a foreign firm might be in a different position with respect to some public interest factors. No difference in treatment has appeared in fact, though. Foreign status sometimes affects the ability to get information, mostly because of the practical difficulties of distance. To overcome some of those difficulties, in one investigation of a US export cartel the Commission relied on contacts with other jurisdictions that were pursuing the same problem.

South Africa has no formal co-operation agreements with other competition agencies. But even without formal arrangements, the Commission has worked with the European Commission, Canada, Australia, and the US in merger matters. Ongoing relationships are maintained with other competition authorities in the region, notably in Zimbabwe, Zambia, and the other countries of the Southern African Development Community (SADC). (Competition Commission, 2001) South Africa's central role in the regional economy makes it a potential hub for a regional competition policy capacity.

3.4. *Agency resources, actions, and priorities*

At the Commission, 91 posts are authorised, although the actual complement has been somewhat below that level. At the Tribunal, there is a

support staff of about 11. Of the 10 authorised members of the Tribunal itself, all but 2 serve part-time, and 3 of the part-time positions are vacant. The 4 staff divisions at the Commission that are most directly responsible for substantive competition issues — compliance, mergers, enforcement-exemptions, and policy and research — each has about 12-14 people. There are also a legal division, which is somewhat smaller, and an administrative support division, which is much larger, accounting for over 30% of the Commission's staff — despite the Commission's ambitions to take full advantage of information technology and become a paper-less office and to rely heavily on electronic information sources rather than build a conventional library.

The budget comes almost entirely from fees, nearly all of which come from merger notification filings. In 2001, 89% of the Commission and Tribunal budgets came from merger fees. (Competition Tribunal 2001, p. 21; Competition Commission, 2001, p. 17) That proportion will probably decline due to the reduction in the fee levels and the increase in filing thresholds. Reliance on fees for income is risky. The legislature has provided back-up funding of R2 million per year for 3 years, to make up for a shortfall in fee income if necessary.

The Commission's enforcement-exemptions division, which does all of the enforcement matters other than mergers, is well short of filling the 21 positions that are authorised. The compliance division, which is responsible for maintaining contacts with stakeholders, deals with communications, outreach and education, and corporate compliance. One of the principal corporate compliance services is providing non-binding advisory opinions about notification and compliance issues. This means that informal advice about whether conduct complies with the law and enforcement for non-compliance are done in different offices. This division of labour probably improves the efficiency of the enforcement division by eliminating distractions, but it may also dilute the authority of the advisory opinions.

Mergers receive by far the greatest attention. The Commission expends 38% of its resources on merger evaluations. Nearly all of the Tribunal's time and attention have been devoted to merger matters, although some of the

Table 1. **Resources**

	Person-year	Budget
2001	96	R15.4M
2000	77	R10.6M
1999	8	

Source: Competition Commission, 2002

non-merger interim relief cases have been time-consuming and complex. The other major commitment at the Commission, accounting for 28% of its resources, is investigation of prohibited practices. Other significant functions are education and information (13%) and policy research (11%). Relatively less attention goes to advisory opinions (5%) or exemption applications (4%) and even less to legislative review (2%). (Competition Commission, 2001) Some exemption applications appeared to be unusually resource-intensive, or else the exemption process was less efficient. The average cost per action for exemptions was much greater than for other actions, and the rate of staff output was much lower. In the first year of operation, mergers were turned around in an average of 48 days, and complaints took an average of 112, but exemption applications averaged 149. (Competition Commission, 2001, p. 11)

Priorities may shift away from mergers toward enforcement of the other parts of the Competition Act. The initial merger workload strain has eased. The backlog of notifications that greeted the new institutions is now gone, and the rate of filings has declined significantly. Management changes at the enforcement-exemptions division, where there was considerable turnover in the first year of operation, may improve efficiency. That division, like the mergers division, has been reorganised into units defined by industry, in part to develop staff expertise about industry issues and increase the staff's credibility with the parties they must deal with outside the Commission.

It has been a challenge to attract and retain professional staff who can deal effectively with the private sector's experienced and well-paid representatives. The Commission sometimes retains outside counsel. Outside law firms are used principally for procedural issues and for appearances where local practice requires using an advocate in court. Some veteran competition lawyers have been retained under long-term arrangements to present cases to the Tribunal. In the past, some were willing to do this for a

Table 2. **Enforcement Actions**

	horizontal agreements	vertical agreements	abuse of dominance	mergers
2001: matters opened	13	21	25	220
sanctions or orders sought	4	4	5	
orders or sanctions imposed	2	1	2	0
2000: matters opened	15	22	48	407
sanctions or orders sought	2	3	3	
orders or sanctions imposed	1	1		6
1999: matters opened				331
sanctions or orders sought				
orders or sanctions imposed				8

Source: Competition Commission, 2002

fraction of their normal rates. The Commission's litigation budget is R3 million, or about 20% of its total.

The principal gap in capacity is in mid-level professionals. The Commission can pay salaries that are equivalent to those paid by South African law firms to relatively junior attorneys, with about 2 years of experience. But the private sector can offer better prospects for the long term. Thus, the Commission, like enforcement agencies everywhere, finds that either it cannot attract ambitious, bright younger staff, or it cannot keep them after they have enough experience to be most effective. The private sector has offered to detail junior-level professionals to the Commission, but the Commission believes it has a greater need for people with more experience than the private sector has offered. The skill shortage is a general problem in South Africa. Private-sector professional firms also find that they must offer partnerships and other inducements relatively quickly in order to attract and retain the people they want. And the Tribunal too may find that it will be difficult to attract and keep members with the qualifications that the positions demand.

4. Limits of competition policy: exemptions and special regulatory regimes

4.1. *Economy-wide exemptions or special treatments*

The Competition Act does not contain a rule for determining what to do if another law or regulation permits or requires actions that might be considered anti-competitive. Most likely, if a case of conflict arose the courts would apply the general rule of construction that general laws do not override special ones (even special ones that had been enacted previously) unless the intention to do so is explicit.

This issue has required second thinking. At first, the 1998 Competition Act excluded "acts subject to or authorised by other legislation." Courts began to interpret this phrase so that firms in regulated industries escaped Competition Act oversight whether or not the other regulatory process also controlled anti-competitive conduct. First, the Supreme Court of Appeal found that there was no Competition Act jurisdiction over bank mergers, because the banking regulator also passed on them.[13] Then, a High Court judge found there was no Competition Act jurisdiction over an agricultural co-operative because it was subject to regulation under a marketing statute.[14] The problem was repaired just in time. The High Court decision was reversed on appeal, because there were no regulations actually in place and the mere potential for regulation was not sufficient to oust Competition Act jurisdiction. And the legislation was amended to avoid the problem in the future.

As amended in 2000, the Competition Act now provides that if another regulatory scheme applies to competition matters, concurrent jurisdiction with the Competition Act is presumed. The amended law also instructs the relevant regulatory bodies to work out procedures and agreements with the Commission for avoiding duplication and exposure to multiple liability. (Competition Tribunal, 2001, p. 7) The Competition Act neither explicitly defers to other regulation nor explicitly claims preference over it. No case of purported conflict has arisen since the law was amended. The competition agencies probably would not take law enforcement action against conduct that was authorised by another law or regulation, even though that might be jurisprudentially conceivable now. Instead, the Commission would probably advocate changing that law or regulation.

The Competition Act contains only one general exemption, covering collective bargaining and labour agreements. (Sec. 3(1)(a), (b)) In addition, a related type of concerted action is also exempted, namely "concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose." (Sec 3(1)(e)) The evident purpose of this provision is to prevent the use of the Competition Act against boycotts or similar actions with social justice themes. Much may depend on the interpretation of "designed." No doubt the goal of labour picketing about wages and job conditions, although it is economic, would be considered "non-commercial."

The Competition Act applies to the state itself, and thus government-owned entities are fully subject to it. Cases involving the behaviour of state-owned entities include a predation complaint against South African Airlines (SAA), which is now wholly owned by the government after the failure of its private partner. The complaint was dismissed because the complainant did not show that SAA's prices were below the relevant measure of cost. Thus the Tribunal did not have to decide whether the government ownership made it credible for SAA to threaten to absorb losses in order to drive out competition. A more interesting complaint is pending against Transnet. a parastatal whose Portnet division owns and controls the nation's ports. A logistics company alleges that it is excluded from the market by a long term lease from Portnet that gives a rival preferential access. The complainant demands either an equivalent lease or an order giving it access to the "essential facility." But Portnet contends that granting piecemeal relief under the Competition Act will compromise its attempt to revise the regulation of the harbours in order to promote competition. One of Portnet's proposed reforms would be the establishment of a port regulator with competition jurisdiction.

Although there is no general exemption in favour of small businesses, the Competition Act includes a clear policy of recognising and supporting their interests. Support for small business is closely related to the policy of empowering historically disadvantaged populations, as their business

operations are often small ones. Small business support and empowerment are among the criteria for exemption under Sec. 10. Moreover, concerns about the position of smaller businesses may also be an element in enforcement priorities. Decisions of the Tribunal and the Commission about the claims of small farmers against national co-operatives and about the claims of franchisees against dominant franchisers are consistent with the Competition Act's explicit purposes to give SMEs an equitable opportunity to participate in the economy. The policy of increasing the ownership stakes of historically disadvantaged persons often means trying to support Black Economic Empowerment companies (BEEs). Choices in particular cases can be complex, though. BEE claims may be a front for anti-competitive conduct. Sometimes it is not clear which outcome actually promotes the statutory goal. The Tribunal once decided that mandating the preservation of BEE positions could actually contradict the purpose of empowerment. Small businesses and BEEs have the right to participate in the consideration of public interest factors in reviewing mergers.

4.2. Sector-specific exclusions, rules and exemptions

The possibility that other regulators could be involved in competition policy matters is a question that predates the Competition Act. Before 1998, some other statutes gave sectoral regulatory bodies jurisdiction over competition matters. The Telecommunications Act 1996 required the South African Telecommunications Regulatory Authority to ensure fair competition within the telecoms industry. The Airports Company Act 1993 established a Regulating Committee and empowered it to outlaw restrictive practices by the Airports Company Ltd.; moreover, the restrictive practices that this Committee was to oversee were the ones defined in the Maintenance and Promotion of Competition Act 1979. These sectoral laws did not formally derogate from the Competition Board's power to deal with restrictive practices and acquisitions in these sectors; however, these laws did not provide a way to sort out jurisdictional conflicts, either. (DTI, 1997)

When the Competition Act was amended in 2000 to preserve its jurisdiction over regulated industries, the details of concurrent oversight were left to be worked out by agreements among regulators "to the extent possible." (Sec. 3(1A)) These agreements are to set procedures, promote co-operation, and provide for exchange of information and protection of confidential information. (Sec. 82) The Commission's compliance division is working to develop such agreements with other regulators for financial services and banks, telecoms, and electric power. The process has gone furthest for telecoms and electric power. These agreements probably cannot explicitly demarcate or allocate respective jurisdictions, because the regulators and the Commission could not decline to exercise powers that are assigned by law.

Rather, the agreements are likely to serve as guidelines about how the regulators and the Commission will manage their relationships. The Commission has made it a priority to conclude these agreements. To achieve harmony and provide an occasion for sharing views among the community of regulatory officials, the Commission has promoted the establishment of a regulators forum, which meets quarterly.

In practical fact, if not as a matter of law, jurisdiction under the Competition Act may depend upon the completion of an agreement with the sectoral regulator. The Tribunal recently heard an argument that the port operator, Portnet, being a division of a state entity, is a "regulatory authority" established by national legislation responsible for regulating the transport industry, with concurrent jurisdiction. And Portnet argued that, since no agreement had yet been reached between the Commission and its parent Transnet about sharing jurisdiction, the Tribunal had no jurisdiction over its conduct. The Tribunal determined that it could decide the matter without reaching this question, so it remains unresolved.

4.2.1. Banking

The banking sector presents the thorniest jurisdictional situation. It was a bank merger that precipitated the crisis about regulatory authorisation and shared jurisdiction. In that merger, the acquiring firm (in a hostile bidding situation) claimed that, because bank mergers were subject to control by the Registrar of Banks under the Banks Act, 1990, there was no jurisdiction under the Competition Act. The target claimed that the deal would be anti-competitive and sought the Tribunal's assistance in resisting it. The matter was taken to the Supreme Court of Appeal, which ruled that bank mergers were subject only to the Banks Act. The bank employees' union appeared in the process to oppose the merger, because of the threat to jobs. The union is concerned about a merger process that bypasses the Competition Act, because only in the Competition Act process does the union have a formal stakeholder role. The bank regulators, the Registrar of Banks and the South Africa Reserve Bank (SARB), did not disagree with the Commission about the substantive merits of this case. Some later cases suggest that disagreements between the bank regulators may motivate the arguments about the need for special sectoral treatment here.

The Minister of Finance may remove a banking merger from the jurisdiction of the Competition Act if he deems it to be in the public interest. (Sec. 18) The public interest is not defined, but it was understood that the Minister would use this section only to facilitate urgent regulatory approval where the acquisition of a failing bank was necessary to prevent systemic risk. The Minister of Finance has used this power on several occasions. Even if Sec. 18 is invoked, the Minister, through the Registrar of Banks, may ask for the

Commission's opinion in connection with the review of the transaction under the Banks Act. Some bank merger agreements have been made contingent on the Minister's invocation of Sec. 18 to avoid the Competition Act notification process. The Commission has sometimes questioned whether the exercise of the Sec. 18 power was appropriate, where the merger did not involve a failing firm but it did significantly increase concentration in some markets.[15]

The decision to invoke Sec. 18 begins with a recommendation from SARB's Bank Supervision department. The Minister of Finance makes the final decision, though, and on at least one occasion, the Minister did not agree with the SARB recommendation to invoke Sec. 18. SARB has been concerned that the Competition Act process adds time, and that even the provision for invoking Sec. 18 can exacerbate systemic problems by calling public attention to a bank's difficulties. Review of mergers of second-tier banks for which the Minister issued Sec. 18 notices have been wrapped up in 2 or 3 weeks, but processing one for which the Minister declined to invoke Sec. 18 took several months. The Commission contends that it can respond quickly, even overnight, if there is an emergency threat of failure, and the Tribunal can also be convened promptly. The merger review process need not result in a public announcement before their action is complete, especially if maintaining confidentiality is important to protecting other values such as banking system stability. The Minister's decision and action under Sec. 18 is privileged and would be known only to the applicants. If the Minister's action becomes public, it is probably because the parties decided to make it public.

SARB's Banking Supervision Department has resisted concurrent jurisdiction. In its annual report for 2000, it argued that concurrent jurisdiction might lead to uncertainty and thus impair stability. Because the Banks Act, Sec. 37(2)(b), calls for consultations in aid of SARB action, the SARB questions what the value of consultations on some other basis would be, and it worries that a disagreement and then deadlock between the agencies would undermine certainty and stability. SARB has not reached an agreement with the Commission about shared jurisdiction. Its preferred resolution would be for all bank mergers, of healthy banks as well as problem banks, to be handled only by the bank regulators, with no formal role for merger notification or review at the Commission or the Tribunal. Instead, the competition bodies would be invited to comment to SARB on the competitive implications of transactions. Despite the disagreements, and no doubt in an effort to work toward resolving them, a senior SARB official has been tapped for the steering committee of the regulators' forum.

4.2.2. Agricultural co-operatives

Competition problems in agriculture stem from long-standing government policies of protection. Marketing boards were established early in

the 20th century to stabilise production and fix or subsidise prices. The government intended to reduce their importance in the 1990s, as the Marketing of Agricultural Products Act 1996 withdrew state sanction for the single-marketing channels in order to increase market access and promote efficiency. Old patterns have persisted in contract relationships, though, where they are no longer required by law. Some co-operatives reorganised themselves as companies, perpetuating the single-market effect through exclusive supply arrangements that foreclosed supply to new entrant processors and distributors. Former members are resisting efforts to hold them to previous output commitments. (Competition Tribunal, 2001, p. 17)

An early battle was fought in the raisin industry. The raisin marketing board converted to a company in 1998. It had a market share of about 90%. A would-be competitor filed a complaint and application for interim relief to prevent enforcement of the new company's exclusive supply agreements. The monopoly's enforcement tool was a newly adopted rule that accelerated the debts of members who did not comply with their obligations. When the Tribunal issued the requested order, the monopoly obtained an order from the High Court that the Competition Act did not apply to the raisin industry at all. The Supreme Court of Appeal reversed that decision, restoring the Tribunal's jurisdiction. More recently, a Tribunal decision in 2002 found that a local citrus packing company, also the successor to a co-operative, was dominant and that its exclusive-supply demands upon its shareholders were an abuse. These marketing boards and co-operatives no longer have any explicit or even implicit exemption. But the habit of collective action is long-standing, and efforts to revive some form of formal exemption would not be surprising.

4.2.3. Professional services

Professional associations may apply for exemption for their rules of self-government that otherwise have the effect of substantially preventing or lessening competition. A special schedule to the Competition Act sets procedures and standards for such exemptions. The Commission may exempt the rules if, "having regard to internationally applied norms," the anti-competitive restraint is reasonably required to maintain professional standards or the ordinary functioning of the profession. The Commission must consult the responsible Minister or member of the Executive Council about an application for this exemption. Professional associations that are subject to this procedure include those authorised by statutes for accountants and auditors, architects, engineers, estate agents, attorneys and advocates, scientists, surveyors, urban planners, appraisers, doctors, dentists, nurses, dental technicians, pharmacists, veterinarians, chiropractors, and other allied health care professionals and para-professionals. Others may be added, by notice published by the Minister.

The only association to apply so far for such an exemption was the General Council of the Bar of South Africa (GCB), on behalf of its constituent bar groups. The Commission exempted the bar groups' rules about recommended fees as a benchmark for adjudicating complaints about overcharging. The Commission objected to a rule requiring prior bar approval before entering a contingent fee agreement, and to the rule preventing advocates from dealing directly with clients. (The government was planning to eliminate this rule in pending legislation). The Commission also declined to exempt rules that would prevent truthful advertising. For this decision, the Commissioner cited international experience, including the OECD CLP roundtable on professional services. But the Commission signalled its willingness to accept tight controls on untruthful advertising and a rule prohibiting self-laudatory ads. Other rules to which the Commission objected were those that controlled premises and prevented associations among advocates. (Competition Commission, 2001, p. 39)

The GCB took the Commission to court over its action. It did not appeal to the Tribunal and then to the CAC, though, but petitioned directly for review in the High Court. The GCB objected to the Commission's failure to consult with the Minister of Justice and Constitutional Development and to procedural defects in the Commission process. One formal defect, which the Commission conceded, was that the provisions for Schedule 1 exemption do not provide for the imposition of conditions in the same way that the Sec. 10 exemptions do. But the Commission denied that procedural deficiencies gave the High Court jurisdiction to assess the substantive merits of the Commission's action, because that would amount to empowering the High Court to create exemptions from the Competition Act, contrary to the legislation's grant of exclusive jurisdiction for that purpose to the Commission and the Tribunal. The High Court ruled in favour of GCB, in an opinion that was highly critical of the Commission. The High Court did not limit itself to ruling on the claimed deficiencies in process, either, but also opined about the net competitive effect and hence the exemption for the GCB's rules.

4.2.4. Electric power

The National Electricity Regulator (NER) has been established to regulate the incumbent state-owned electricity supply company, ESKOM. Eskom is a vertically integrated operation with a monopoly-level share of generation (well over 90%) and control of the high-voltage transmission system. Restructuring to encourage competition is just getting underway. Eskom has recently been corporatised, so it now pays taxes and dividends to the government. When the restructuring is further along and parts ESKOM are privatised or commercialised, NER will have more to do, as will the Commission in this sector. NER advocates setting up a competitive structure

before privatisation. One project is to rationalise the distribution sector, by combining Eskom's national system and 250 municipal grids. The plan is to rebuild it into 6 geographically based distributors, which would be jointly owned by Eskom and the municipalities. These are conceived as local monopolies in retail supply, although some large customers would be able to choose among suppliers. There would be wholesale competition to supply these retail monopolies and the large single-site customers. The second project is to restructure generation and transmission. One proposal is to set up 5-7 generating firms with similar cost structures (with the nuclear facilities to be kept separate). But Eskom would still account for 70% of generation capacity. The Commission staff doubts that this will amount to competition, but NER believes it is the best that can be done in the circumstances. NER wants to separate Eskom from the market maker-power exchange and the transmission system-ISO, while Eskom is trying to keep the transmission lines. One issue of uncertainty and dispute is where to draw the line between distribution and transmission.

The statute that now governs the electric power sector, which dates from 1987, does not mention competition. The upcoming Electricity Supply Act will include provisions about promoting competition, but it will not set a criterion or standard. Looking toward the day when there will be a role for the Competition Act in this sector, the Commission and NER have put together an agreement to work out their respective jurisdictions in the future. The two agencies are setting up a technical working team to identify the likely issues. The Commission had not been on the inter-departmental team planning the change in the industry, although there had been informal staff contacts. Commission participation in the future will be more formal.

4.2.5. Telecoms

Another independent regulator, the Independent Communication Authority of South Africa (ICASA), is responsible for telecoms and broadcasting. The regulator has power to investigate and resolve complaints about abuses by the state monopoly, a function that obviously overlaps with the Competition Act's rules about abuse by a dominant firm. The Commission and ICASA have entered a memorandum of agreement, under which both bodies can act pursuant to their authorising statutes, while allocating a lead role to one or the other in a particular case. The Commission would take the lead if the issue is access to an essential facility, and ICASA would take the lead if it is breach of a tariff or licensing condition. The agencies will establish a joint working committee to co-ordinate responsibilities for particular investigations.

ICASA can regulate mergers, to the extent that it must consent to licence transfers. There has been one disagreement between ICASA and the Commission, about a broadcasting merger. The Commission found no

competition or public interest problems with it, but ICASA rejected it because it found that the applicants did not qualify for an exemption from rules promoting greater black ownership in the sector. ICASA evidently concluded that the acquiring firm's share ownership structure was less representative of the black population to be supported than that of the target firm. ICASA also may have jurisdiction over anti-competitive behaviour, if that conduct breaches a licence condition or a prohibition in the telecoms legislation (Sec. 53) that overlaps in content, if not in literal text, the prohibitions of the Competition Act.

The fixed line telecoms monopoly was due to expire in May 2002. Telecoms is still a monopoly in fact, though, because a second operator does not yet exist. In mobile service, there have been 2 operators since 1994, and a third entered last year. The incumbent fixed line operator interpreted its statutory licence as granting it the exclusive right to perform certain services and thus authorising it to deny access to competitors. Disputes over this interpretation of the licence that have been referred to ICASA have not yet been resolved. A similar complaint has now been lodged with the Commission. With the ending of exclusivity, presumably the Tribunal now has the power to order access under the Competition Act.

5. Competition advocacy and policy studies

Advocacy and policy studies have received less attention than enforcement. Economists in the Commission's policy and research division have interests and capacities for these matters. But the compliance division has had the primary responsibility for advocacy, because most of these efforts have been aimed at raising public awareness of the Competition Act, rather than studying and advising about the effect of laws and regulations on competition.

DTI has the principal responsibility for examining the competitive implications of legislative proposals. Some of these items are sent to the Commission for comment. Authority for Commission advocacy can be found in Sec. 21 of the Competition Act. Among the Commission's responsibilities are to participate in the proceedings of regulatory authorities, to advise and receive advice from other regulatory authorities, and to review legislation and public regulations, and to report to the Minister concerning provisions that permit uncompetitive behaviour. The Commission can undertake other, similar studies in response to a request from the Minister. Ministerial requests for studies and reports may deal with headline issues, such as the 20% increase in food prices in 2002. Another headline issue has been import-parity pricing, as downstream manufacturers complain of having to pay world-market prices for domestically produced raw materials, getting no break for savings in transport costs. Exchange rate changes probably had something to do with the appearance of both of these complaints. For food prices, the result was a Commission report about market conditions and a government resolve

Box 3. **Consumer Protection — The next High-Priority Reform?**

Consumer protection policies and institutions in South Africa appear weak. The Department of Trade and Industry has been reviewing consumer policy and the potential for linking it to competition policy. There is no explicit link now. Marketing practices and consumer protection issues are not included in the Competition Act or in the responsibilities of the Commission and Tribunal. Complaints of unfair competition are matters for private dispute resolution under common law rules. They may also come to the attention of DTI's Consumer Affairs section, which applies the Harmful Business Practice Act.

Consumer protections are included in some specific laws about gambling, estate agents, time shares, and other common problems. But there is no broadly applicable national law about misleading advertising or unfair marketing practices, in part because consumer protection is a concurrent function between the national government and the provinces. The Consumer Affairs Act[16] follows the model of the pre-1998 competition law, giving the Minister discretion to outlaw practices after the fact. Aimed mostly at frauds, the legislation contains no mandatory rules to guide conduct in the future. The Consumer Affairs Act also provides for special consumer courts, which operate on an ad hoc basis.

The Commission, through its compliance division, has tried to increase awareness of consumers' interests in competition. Among the groups it has contacted are the South African National Consumer Union, the National Consumer Forum (an umbrella group of about 80 other organisations), the Consumer Institute of South Africa, the Department of Trade and Industry's National Consumer Affairs Office, and the South African Bureau of Standards. The Commission wants to increase awareness of the Competition Act among consumer groups, educate and inform consumers about the Act, and network to promote consumer welfare. It set up a Consumer Education Unit to do much of this.

Despite this plethora of entities, an autonomous, general-interest consumer movement has not yet formed in South Africa. Labour or civic organisations have on occasion engaged in consumer-related activism and boycotts, targeted at particular situations and problems. The Tribunal's rules allow for participation of consumer interests in its proceedings, but few consumer representatives have appeared. A notable exception is the Treatment Action Campaign (TAC). In the consideration of the Glaxo-SmithKline merger, TAC participated in order to advocate accessible HIV/AIDS drugs. And TAC has submitted a complaint to the Commission about the prices for HIV/AIDS drugs on behalf of consumers.

to monitor competition more closely. For import parity pricing, there may be enforcement action against some South African suppliers.

The Commission has engaged in some advocacy concerning sectoral regulation. Shortly after it began operation, the Commission made submissions to the financial regulators objecting to a proposed merger that would have created the largest commercial bank in Africa. Commission comments have been solicited concerning proposals to restructure telecoms, electric power, and ports concessions and regulation. Parliament is considering legislation to create a port regulator with competition jurisdiction. The Commission has argued that the general competition enforcement bodies should be responsible for competition issues in the sector. The Commission has also supported studies by academic consultants of regulatory issues in water, electric power, telecoms and media, aviation, and agriculture.

Commission economic studies also support enforcement decisions or address the public interest considerations in the Competition Act. The Commission's research division has analysed how mergers in South Africa have affected employment, using a one-year sample of 125 transactions. Overall, the net effects were modest. All employment gains were in industries that were moderately concentrated (CR4 between .4 and .6, at the 5-digit SIC level), while most job losses were in the more concentrated industries. Another project is collecting information about concentration of ownership at the relevant market level, using data from the African Statistics project. That research has traced ownership patterns and relationships, again at the 5-digit SIC level. From this, the Commission derived a table of the top 10 "ownership companies," indicating which groups had interests in broadly defined sectors, for assessing conglomerate mergers. Four groups that were found to be broadly diversified: Anglo-American (in 35% of the sectors), Sanlam (22%), Old Mutual (20%) and Rembrandt (18%). And the policy and research division has applied a structure-conduct-performance screen to identify manufacturing sectors where closer inspection is called for. Based on HHIs, concentration ratios, and conduct measures such as price-cost margins, advertising expenditure, and capital-labour ratios, the potential problem areas were found to be tobacco products, petroleum refining, office machinery, batteries, and television and radio sets. These findings were not consistent with the pattern of complaints, though, which have tended to deal more with chemicals (including pharmaceuticals) and paper products than with these industries that the study had identified as potential problem areas.

6. Assessment and policy options

South Africa's competition policy institutions should be assessed in a developed, market-economy context. Moreover, the law and institutions are

best appreciated in terms of how they have evolved from the previous regimes. A comprehensive competition law has been in place since 1955. The present law and institutional structure are the latest in a series of reforms, each of which was intended to create a broader, stronger system. South Africa's situation thus differs from the transitions of central and eastern Europe, where competition laws had never existed at all or where laws dating from the early 20th century had been repealed or forgotten. The extent of state intervention in South Africa's private-property, capitalist-market economy implies there might be policy challenges similar to those of the transition from plan to market, at least in some sectors. But there is no similar need to develop the institutional culture to support a system of private investment and market exchange. The development setting also differs from the usual transition situation. At an aggregate level, South Africa is a middle-income country comparable to some central European economies. But the variation in the level of economic activity in South Africa is much wider. A substantial part of the economy operates at the same level of corporate and market sophistication as the most developed economies. This is the part of the economy that has occupied the attention of the competition policy institutions. The development dimension does appear in some of the Competition Act's goals and criteria for exemption, but those issues have been second-order matters in practice. To be sure, aspects of the development challenge were important in the process of reform. One theme of South Africa's constitutional transformation in the 1990s was to redress economic imbalances, which corresponded to the racial divisions in the society. Stronger competition policy was proposed as a tool to help undo corporate structures that were charged with having prevented broader development and participation. These theme is reminiscent of the motivation of competition policy reforms in countries such as Hungary, Mexico, and Korea. In these countries, vigorous competition policy was also proposed as an element of a deliberate strategy of large-scale restructuring and reform. And the development dimension underlies current enforcement matters, notably the TAC complaint about the prices of pharmaceuticals to treat AIDS. The combination of perspectives and circumstances in South Africa makes it an obvious venue for this controversy. The complaint was asserted on behalf of patients that come mostly from the population that are not part of the fully-developed economy, and it is aimed at international pharmaceutical companies, which are. And the complaint was filed under a Competition Act that promises to make available the capacities of analysis and remedy that are familiar in other jurisdictions.

South Africa's competition enforcement agencies are taken seriously. The higher profile of the Commission and the Tribunal, compared to the institutions that preceded them, is due in part to their new independence. In

addition, the Competition Act sharpened the tools used on merger control, a subject that is of particular interest to the corporate and investor community. The degree to which the Commission and the Tribunal have concentrated on merger control would be unusual for new agencies in a developing, transition economy. But it is understandable in the context of South Africa's experience and level of development. Mergers had been the principal concern under the pre-1998 competition policy regime, too. In the political climate of the regime change, focus on mergers carries forward the theme of correcting excessive concentration of economic power. The new system of pre-notification and control produces a stream of public decisions demonstrating quickly how the law is making a difference. Merger decisions can be an opportunity for a newly formed agency to demonstrate and develop its capacities. Merger control can be less resource-intensive than enforcement against clandestine price-fixing or monopoly, because investigation is simplified by the process of notification, and the parties' interest in approval gives them an incentive to co-operate. Although the analysis of a merger often appears unusually complex to a non-specialist, it can be relatively straightforward for an experienced economist, once the facts are presented thoroughly. Here the continuity in experience at senior levels of the Tribunal has been particularly important to the successful implementation of coherent merger control under the Competition Act. On the other hand, devoting resources to merger control also helps develop specialists. Using merger review as a training opportunity, in which inexperienced staff can learn about how businesses actually operate, is more common in true transition settings, where there are few professionals in or out of government who have first-hand experience of the market economy. The regime change in South Africa led to a parallel situation, though, as it brought people who had had relatively little professional experience with business onto the staff of organisations like the Commission and the Tribunal.

Strong economic analysis has marked the decisions applying the Competition Act. Merger decisions show a confident application of standard approaches to market definition, entry, structure, and competitive effects, and a persuasive treatment of efficiency claims. The concepts applied are up-to-date, and the decisions are generally well-motivated and persuasive. To be sure, the CAC has occasionally disagreed, and not all parts of the business community in South Africa have been persuaded. Other policy features and motivations of merger control, such as the invocation of public-interest factors and pursuit of the goal of de-concentration, have been treated judiciously. Market developments have contributed to avoiding controversies, too. As conglomerates have restructured in response to management, corporate, and financial market considerations, opportunities have been created to promote the empowerment goal.

South Africa's process for considering public interest claims recognises that those claims may be legitimate, but it tries to ensure that decisions which invoke them are transparent and insulated against direct political control. In South Africa, political officials can make the case for the public interest issues, by participating as parties in the proceedings, but they cannot decide the outcome. Other parties, particularly unions, can also appear in the process to make claims about the public interest issues. That avenue is being used less than had been anticipated. The low level of participation may be due to lack of resources, if not to lack of concern. Another avenue for invoking other policies, which is now being tested, is the process of designating an industry as deserving of exemption to protect economic stability. In principle, a ministry could not by its own decision override competition policy. Rather, the designation is the necessary predicate for the Commission and the Tribunal to consider this factor in their decisions. The designation power has not been used much yet, and whether a ministry's designation would be conclusive on the Commission and Tribunal, in effect requiring them to grant an exemption, remains to be seen. Such a reversal of priorities could reduce competition policy to ceremonial ineffectiveness.

The base of support for stronger competition policy remains uncertain, despite the educational and advocacy efforts of DTI and the Commission. In the absence of clear support for a consistent competition policy, lobbying for special exemptions and protections is more likely to succeed. Consumer organisations, which often support competition policy initiatives, are not prominent in South Africa. At the national level, consumer protection legislation only addresses some particular sectoral issues. DTI is working on measures to reform the consumer protection laws and institutions. One option that does not appear to be under consideration is to combine consumer protection and competition jurisdictions. Because South Africa already has a functioning market economy, it does not present the situation that is found in some transition countries, where a new competition agency can start out policing deceptive practices and demonstrating how markets can be made to work to benefit consumers while businesses reorganise into more efficient structures. There is less need for the Commission to play such a role in South Africa.

The Commission, and the Tribunal too, need rather to deal effectively with their counterparts in South Africa's well-developed legal and business community. For a long time, this community concentrated on promoting and defending the interests that benefited from policies of protection and monopoly, and thus they were content with a weak, discretionary, politicised competition policy. Now that the market is opening, some in the business community would defend the continuation of hands-off competition policy, but now on the grounds that South African business needs to modernise and

consolidate to be competitive in world markets. Long accustomed to a low-key approach of negotiated accommodation, some business leaders reacted with marked hostility the first time the Tribunal formally and publicly rejected a proposed merger. Their lawyers have picked up the theme. Enforcement initiatives are resisted by vigorous litigation over procedural and jurisdictional matters. It is of course appropriate to ensure that the law is observed in the process of applying it. Constitutional protections, the rule of law, and observance of due process are core values, and they are of particular importance in South Africa today. But experience shows how claims under these principles can be deployed to thwart action completely. In Mexico, for example, well-resourced respondents routinely resort to the constitutional amparo process to challenge procedures and jurisdiction and thus paralyse the application of public policy.

Such challenges are unavoidable in South Africa's highly legalistic enforcement culture. Where efforts to obtain information face the threat of legal challenges, effective investigations require competent legal technique in drafting and executing information demands. In the face of constant challenges, Commission management has had to decide whether it is worth the cost to continue to insist on compliance. The Commission has elected to fight these procedural battles now in order to establish basic principles, clarify the rules where necessary, and familiarise the courts with new processes. The Commission and the Tribunal are in slightly different positions with respect to these issues, although both bodies have faced the withering fire of collateral legal controversy. The Commission needs to improve its tactical litigation skills, or else outsource that function to private sector experts. The Tribunal needed to improve is appreciation of the precise observance of legal formalities in its decision process. These were unfamiliar to many of its members, who came to the subject from the perspective of economics and policy. Parties in Tribunal proceedings about interim relief have used every device and every opportunity to gain advantage over each other in what often looks like the scorched-earth motions practice of hard-ball private litigation. The Tribunal's decisions are paying more attention to process formalities now than they did at first, but the Tribunal has also shown some resistance to worrying too much over process detail. In South Africa's legal culture, overlooking process details as mere technicalities is a risky course. Parties are likely to encourage the High Court judges who sit on the CAC to insist that the Tribunal adhere to procedural standards that they are familiar with, and to seek other avenues for review if that course is unsuccessful.

Many in the legal and business community have perceived a kind of cultural dissonance with the Commission staff. The Commission's management has been moving to correct this situation, which may simply have been a sign of growing pains. Some staffers' suspicions about the private

sector, and about lawyers in particular, were probably due to anxiety about being hoodwinked. Other factors, including differences in experience and background, probably play some part too. Firms have learned how to cope with this resistance. Concluding that the Commission staff would handle a merger faster if there were no lawyers involved, some companies submit the notifications that their lawyers have prepared as though they had done them on their own. A more important concern, though, is that the level of professionalism and expertise at the Commission and the Tribunal is uneven. The top managers at the Commission and the permanent members of the Tribunal are well respected. But concerns are expressed about consistency beyond that level. Most of the Tribunal's important decisions have been authored by the permanent members. The contributions of other members are unclear. The skills, responsiveness, and professionalism of the case handlers at Commission are reportedly variable. Reports of variability may have identified growing pains at the new institutions, and they may also reflect the skills shortage that affects the private sector in South Africa too. The effects of that shortage were no doubt exacerbated by the need to staff two independent bodies in South Africa's complex institutional structure. And the effects were compounded further by the imperative to create institutions that could be called "new." This probably encouraged rejection of some potentially valuable professional expertise because of connections with the previous regime. Another result was that people were put into positions that called for skills and judgement capacities that they had not yet developed. Some of the reported problems may have been localised to a few individuals, and improvements have been noted recently. Durable improvement will require developing a deeper "bench" of mid-level professional staff. Because of the nature of South Africa's enforcement culture, it will be particularly important to develop stronger legal capacities, in both technical skills and strategic judgement. Many observers find there is room for improvement here.

Another concern is the comparative lack of results so far in matters other than mergers. With mergers evidently receiving the top priority, the section of the Commission that handles complaints about restrictive practices and applications for exemption may have been starved of resources. Complainants were disappointed that consideration of their complaints typically took the full year, the process appeared unguided, and few cases resulted. Parties applying for exemptions and advisory opinions reported similar frustrations. And the Commission and the Tribunal have not been notably active in advocacy, either. The Commission's management has taken several steps to shift resources to non-merger matters and to improve how they are handled.

The resource level is adequate, but it is somewhat lower than several comparable-sized countries. The total number of personnel at South Africa's

two competition policy bodies is about the same as at the two similar bodies in Spain, that is, about 100. But that is significantly smaller than the total staff in Poland (about 190), and much smaller than in Korea (over 400). Having more resources would ease the problem of setting priorities. But finding those resources will require creativity, especially in view of the demand for qualified persons in South Africa. At the moment, the Commission has enough funds to pay competitive salaries, particularly to entry-level people with only a few years of experience. The problem is finding those people and persuading them to work with a government body rather than the private sector, which can promise larger rewards in the long run.

The role of the Competition Appeal Court, and thus the value of having a special judicial body for this subject, remain to be established. Of the 3 institutions created by the Competition Act, the CAC is the only one for which there was no experience with an antecedent. The provision for a special court under the previous legislation had never actually been used, because there were no formal decisions for anyone to complain about. In the absence of the CAC, the ordinary course of appeal from actions applying the Competition Act would probably have been to a panel of High Court judges. All of the CAC's judges are High Court judges; thus, what distinguishes the CAC from the most likely alternative is the fact that its members may be self-selected for a long-term interest in competition matters. One would hope that the CAC will develop more perspective and expertise about substantive issues than the High Court itself has shown in the handful of review matters that have come to it. But so far, the CAC's formalistic decisions look more like those of a High Court of general jurisdiction than those of a court with specialised substantive expertise. In the only CAC decision on the merits of a merger, the reasoning is doctrinaire and derivative, revealing that the judges are more comfortable referring to treatises and legal presumptions about economic effects than they are deferring to the Tribunal's assessment of economic evidence. To be sure, that proceeding may have been distorted, because the Tribunal did not participate to explain and defend its decision, and the CAC's result, to permit a vertical merger because it was not convinced there were any reasons for concern about foreclosure, is facially sound. But with only about 4 cases a year to decide, the CAC may not have enough to do to develop familiarity with the subject.

The relationship between competition and regulation is unsettled, although the rapid recovery from potentially crippling early decisions denying jurisdiction is a positive sign. The disposition on appeal of the second jurisdiction case probably corrected the lower courts' aberrations adequately, but amendment to the statute makes the correction more permanent. At the same time, the amendment introduced some uncertainty. The Competition Act's admonition to the agencies to reach agreements raises new problems, in

the guise of moving toward resolution of old ones. As the ports litigation now shows, the law invites the interpretation that as a matter of law, jurisdiction under the Competition Act depends on the existence of a co-operation agreement between the Commission and the relevant sectoral regulator. There is evidently a predisposition in South African government to divide responsibilities rather than establish single bodies with broad authority. Thus a division of competition policy competence to parallel the division of sectoral regulatory competence may appear natural. South Africa's shortage of specialists in competition and economic regulation makes this hard to do, though. It might be more efficient to consolidate competition and regulation functions in a smaller number of entities. Before decision-makers will be willing to consolidate all competition policy responsibilities, over all sectors, under the Competition Act alone, the competition bodies may need to prove themselves to the public, the government, and the other regulators. Of course, that may also stimulate an opposite reaction from the parties that are subject to regulation. As enforcement of the Competition Act becomes more effective, businesses may argue for a sectoral regulator because it can be captured more easily. A new sectoral regime with competition policy responsibility is being proposed for ports. It is probably not coincidental that the Commission has been dealing with complaints about anti-competitive practices by an entity with ties to the agency that would become the new regulator.

Despite the concerns and reported problems, the competition policy bodies are recognised in South Africa as notably competent and serious. The Tribunal is comparatively well known and respected. The Commission has come in for more criticism, but many private sector observers are supportive, finding that the Commission has met the challenges of being a new body, with a new law, facing inevitable constraints on its capacities. The Commission and the Tribunal have listened to their critics and introduced improvements such as the service standards for timely responses and handling of non-merger matters. They are striving to follow best practices from the experience of other enforcement agencies around the world, knowing that is the measure being applied to them by South Africa's legal and business communities.

7. Policy options for consideration

- ***Complete the agreements with other regulatory bodies providing for concurrent jurisdiction, to ensure consistent application of competition policy in all sectors***

Clear understandings about how to handle potentially overlapping or conflicting powers would represent good policy co-ordination even if the Competition Act did not require them. To be sure, agencies might be able to work out problems as they come up without having reached a formal

agreement on procedures in advance. This may be particularly easy in smaller countries with close-knit government communities. But the larger the community and the more formalistic the culture, the more important it is to have either explicitly separate laws or explicit agreement among the enforcers. The Competition Act's provision about these agreements has sparked another controversy, though, namely the claim that in the absence of an agreement, there is no Competition Act jurisdiction as a matter of law. That reading could lead to ineffective policy, balkanised by sector, obtained not by a formal, transparent legislative decision to separate the jurisdictions but by regulator's intransigence at the behest of a regulated industry. The courts may have to resolve this question. Another dimension that must be watched carefully is the tendency to proliferation of special sectoral regimes with independent competition policy responsibility. Too often, this represents an industry's effort to devise a producer-friendly regulator. The Commission and the Tribunal should continue to present the case for a unified approach. And they should continue to support and assist other regulators facing unfamiliar and complex competition problems within their jurisdictions. In telecoms, for example, the Competition Act may provide a valuable alternative method of dealing with access controversies.

- *Improve handling and increase priority and resources for non-merger matters.*

This issue, which has been recognised for some time, has already received considerable attention. More experienced management is now in place. The Commission's service standards about dealing with applications for exemption and responding to complaints are a promising step. The Commission claims it is achieving generally good compliance with these standards. Some private sector observers demur about compliance with the promised deadlines, but their experience and data may date from before the service standards. Actions already taken or underway about steel pricing and boycotts by agricultural co-operatives illustrate the scope for action against abuses and restraints.

- *Bolster resources by accepting offers of third-party support — carefully.*

The Commission needs to strengthen the ranks of its mid-level professional staff. Doing this by development from within its ranks is a long-term project. The Commission needs to be able to offer higher pay over the long run, to persuade people to stay after they have learned the job. And it has to have the capacity to train the staff, or the patience to endure the consequences while they learn from their mistakes. An alternative that could bring faster results, and that might be necessary in any event even if the long-term goal is to develop the Commission's own staff, is to bring in mid-level people from other offices or even from outside the government. Flexible career

paths, in which a person might move between private sector and government positions several times, in both directions, is not common in South Africa, so recruiting from the private sector may be difficult. But there are signs of interest that the Commission could pursue. Law firms have offered to send junior-level professionals to work at the Commission on short-term details. They and their firms would obviously benefit from this exposure to the enforcement agencies' perspective and process. The Commission believes, accurately, that its greater need is for mid-level professionals with enough experience to exercise judgement independently and to lead, manage, and train others. The Commission should nonetheless consider the offer seriously. Having Commission staff and private sector professionals working together, even if they are at about the same level of experience, could improve overall skill levels and foster more productive long-term understandings among counterparts at the operating level. It would be even better for the Commission's long-run personnel development if the detail included individuals with significant litigation experience.

Another source of third-party support is complainants. In the South African system, the Commission is a gatekeeper. Private parties must go to the Commission first before they can pursue a claim on their own. But there is no impediment to their helping the Commission pursue it for them. The TAC AIDS complaint represents such an opportunity, where the private sector representative is more than willing to help. Help may be particularly necessary in dealing with the complex issues, which would stretch the capacities of many competition agencies. To be sure, the high profile of the case implies that the process at the Commission and the Tribunal is likely to serve mostly as a fulcrum on which to turn the levers of public relations and political pressure. But the subject is timely and important, not only to South Africa but to many other countries. The legal, economic, and policy issues raised are at the cutting edge of developments in international competition and intellectual property law and policy. The case could be an occasion for inviting international co-operation, not just to get information but also to compare views about the thornier legal and analytic issues about intellectual property rights and the relationships with international trade commitments and obligations.

- *Discourage abuse of interim relief process*

Although the Competition Act does not provide for pure private lawsuits, parties have found a way to create a close substitute. The Tribunal has had to entertain implausible, conclusory claims for interim relief about vertical agreements and allegations of dominance. The Tribunal is aware that many of these cases represent competitors' efforts to use the Competition Act to gain tactical advantages. Faster Commission action on these non-merger matters

could help clear the dockets, by getting to the merits (or to an indication of where the merits probably lie) more quickly.

- *Make more use of formal substantive guidelines.*

Clear procedures and guidelines for substantive analysis can compensate to some extent for lack of staff experience. But developing guidelines is not cost-free; it can divert the time and attention of the very people whose greater experience makes them most valuable as managers. Most competition agencies now use similar analytic methods, and thus the Commission might save some effort by drawing on the efforts of others.

- *Clear up the compensation terms for the Tribunal, to attract and retain qualified members*

The Tribunal, like the Commission, needs experienced people. Indeed, because of its final decision-making responsibility, the Tribunal's need for experience in its membership may be the greater. Attracting and retaining qualified members is difficult, for service that is part-time and at pay levels that are not competitive. The Tribunal's work to date is widely respected. To sustain a level of performance that maintains that reputation, vacancies on the Tribunal must be filled with fully qualified, experienced appointees. The appropriate level of professional qualification is implied by the link between the members' compensation and that of High Court judges. But because of disagreements about methods of computation, the members' compensation level now may be too low, particularly in view of the time demands of serving on Tribunal panels in extended evidentiary hearings. The Tribunal could not maintain the quality of its decisions if its members were willing to devote the necessary time at lower pay only because they could use the time to learn something about competition law. The Tribunal needs members who are already expert in the subject.

- *Use economic resources of the Commission more effectively in advocacy settings.*

There has been little experience with advocacy in South Africa. This function often represents a major part of a new competition agency's workload. Moreover, because state control under the previous regime was extensive, there are likely to be many lingering regulatory problems that deserve attention and correction. The Commission's economic resources would be more profitably applied to these matters than to maintaining data series about aggregate concentration and conglomerate cross-ownership.

Notes

1. Reports average per capita GDP (PPP basis) vary greatly, ranging from about $2700 (EIU) to about $8500 (CIA).
2. In the Deininger and Squire dataset, the Gini coefficient for incomes in South Africa is .63 (1993), topped only by Gabon. The dataset is at http://www.worldbank.org/research/growth/dddeisqu.htm. The figure is based on the higher-quality, more inclusive data in the dataset.
3. GN 801, 2 May 1986.
4. Notice 1954 Gazette 16085, 23 November1994
5. Although these statements do not control the law's application, they are not superfluous. They are still important enough for stakeholders to pay attention to their details. The first paragraph was amended in 2000, evidently to correct a misinterpretation or send a signal about a policy interest.
6. ISCOR Limited & Saldanha Steel (Pty) Ltd, Tribunal case no. 67/LM/Dec01.
7. Glaxo Wellcome, Case no. 15/CAC/Feb02.
8. Telkom SA Ltd./TPI Investments/Praysa, Tribunal case no. 81/LM/Aug00.
9. Trident Steel (Pty) Ltd and Baldwins Steel.
10. Naspers Limited/The Education Investment Corporation Limited.
11. Schumann Sasol and Price's Daelite, Case No. 10/CAC/Aug01. After rejecting the Tribunal's conclusions about competitive effects, the court found it unnecessary to consider whether public interest factors are relevant.
12. Shell-Tepco, Case No. 66/LM/Oct01.
13. Standard Bank Investment Corporation Ltd v. Competition Commission and Others; Liberty Life Association of Africa Ltd. v. Competition Commission and Others 2000 (2) SA 797 (SCA).
14. South African Raisins (Pty) Ltd. and Another v. SAD Holdings Ltd and Another 2001 (2) SA 877 (SCA).
15. Nedcor-B.O.E Bank.
16. Consumer Affairs (Unfair Business Practice) Act 71 of 1988.

Sources

Brassey, Martin, et al., (2002), *Competition Law*, Lansdowne.

Government of South Africa (2001), Competition Commission, *Annual Report 2001*.

Government of South Africa (2001), Competition Commission, *Annual Report 2000*.

Government of South Africa (2001), Competition Commission, *Annual Report 1999*.

Government of South Africa (2001), Competition Tribunal, *Annual Report 2000/2001*.

Government of South Africa, Department of Trade and Industry (1997), *The Evolution of Policy in SA: Proposed Guidelines for Competition Policy; A Framework for Competition, Competitiveness and Development*.
www.compcom.co.za/aboutus/EvolutionOfPolicyInSA.asp

Library of Congress, Federal Research Division (1996), Country Study: South Africa, ed. Rita M. Byrnes

National Economic Development and Labour Council (1998), *Report on Competition Policy*, http://www.nedlac.org.za/docs/agreements/index.html.

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Media Mergers

Reviewing media mergers may be more complicated than reviewing other mergers because of the huge variety of possible media content and the two-sided market aspect of many media, i.e. those earning advertising revenue. A wide variety of content means that market definition is rendered more complex. The two-sided market characteristic has important and sometimes far from obvious impacts on how mergers affect economic efficiency, media plurality and content diversity.

Vertical integration can produce real efficiencies in media markets notably when it eliminates a double-marginalisation problem but it can sometimes create competition problems as far as access to content and final delivery to the consumer are concerned. Behavioral remedies which are more frequently applied than divestiture impose high enforcement costs on competition authorities.

Adequate trade off between economic welfare and non-economic effects on social welfare, e.g. on pluralism, which are two separate goals, are difficult to make in reviewing media mergers. Although Competition authorities tend to protect pluralism, most often they are reluctant to include pluralism considerations in merger reviews as they want to preserve their reputation for objectivity and even-handed dealing.

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Media Mergers

1. Synthesis by the Secretariat

Synthesis by the Secretariat

Considering the discussion at the roundtable, the delegate submissions and the background paper, a number of key points emerge:

1. *Market definition in media markets is a particularly difficult and time consuming exercise. Nevertheless, market definition and market share analysis is as necessary in reviewing media mergers as in reviewing any other mergers.*

Market definition in media markets is especially complex because of: a multiplicity of products; pervasive price discrimination (including versioning) and bundling; rapid change; and sometimes an absence of transactions (due to vertical integration) and prices (as in free-to-air broadcasting)

Despite apparent difficulties, there appears to be considerable similarity across jurisdictions in market definition methodology and in resulting definitions.

2. *Due to significant first mover advantages and two-sided market effects, media markets sometimes manifest positive feedback cycles and downward spirals that need to be taken into account when predicting the effects of a merger.*

One of the best examples of first mover advantages, seen in a number of country submissions, arises in pay-TV markets. The pay-TV company with an initial lead in share of subscribers may be in a favoured position to obtain exclusive rights to the premium movie and sports content critical to building market share. Exclusive rights to particularly desirable content could translate into a rapid growth in market share thus increasing the initial advantage in obtaining exclusive rights, and the positive feedback cycle would grow stronger. Mirroring this positive feedback cycle is a downward spiral by other pay-TV companies who are placed at a growing disadvantage compared to the first mover.

There could also be a positive feedback cycle/downward spiral effect in two-sided media markets, i.e. media supported at least in part by advertising revenue. Daily newspapers carrying advertisements are a good example of this. A newspaper's initial edge in content quality could translate into a larger readership which in turn would normally lead to higher advertising revenues both in an absolute and a per reader sense. The greater revenues would permit the newspaper to either increase its content

quality edge and/or lower its newsstand and subscriber prices. The result of those moves would typically be a further increase in the number of readers and so on.

The positive feedback cycle/downward spiral effects in media might justify making upward or downward adjustments in market shares before using them to make preliminary assessments of a media merger's potential to harm competition. Alternatively, one could simply recognise that market shares may be a less reliable preliminary indicator of market power in two-sided media markets as compared with markets not subject to positive feedback cycle/downward spiral effects.

3. *In two-sided media markets, one cannot assess the impact of a merger on one side without taking into consideration effects on the other. Difficult trade-offs might be unavoidable.*

In two-sided markets, suppliers compete on price structures as well as price levels. For example, some newspapers carry little advertising and charge relatively high subscriber and newsstand prices. Others may carry a great deal of advertising and charge relatively low subscriber and newsstand prices. A merger could lead a media firm to change its price structure, and that means some media mergers might improve welfare on one side of the market while reducing it on the other, sometimes for paradoxical reasons.

Consider, for example, free-to-air TV. Provided most viewers do not like advertising, it could happen that a merger reducing viewer choices could permit a post-merger increase in the advertising/content ratio and reduced welfare for the viewers disliking advertising. The resulting increase in advertising time on offer could simultaneously mean that television advertising prices decline despite what seems to be a less competitive advertising market.

4. *Vertical integration and associated risks of foreclosure can be an important concern in some media mergers. Remedies in problematic cases are often behavioural in nature as competition authorities try to eliminate anti-competitive effects while permitting the parties to reap substantial efficiencies.*

There are several reasons why vertical integration could produce real efficiencies in media markets. Reduced transactions costs are an obvious one, but there is also the contribution vertical integration could make to efficient price discrimination, an important factor in an industry where fixed costs are an unusually high percentage of total costs. In addition, vertical integration can increase economic welfare when it eliminates a double-marginalisation problem. Such a problem could arise, for example, if a monopolist cable TV operator is negotiating for critical sports content from a seller with market power.

The competition problems sometimes associated with vertical integration in media largely have to do with access to content and final delivery to the consumer. As in other industries, competition authorities will have to make predictions about how markets will likely evolve and what consumers may be able to do to protect themselves if foreclosure actually materialises. An apparent ability to reduce competition may not translate into a profitable post-merger strategy. The rapidly changing nature of the media, including convergence trends, will have an important bearing on all this and could well affect both the analysis of competitive effects and the remedies fashioned.

Divestitures are one way to reduce foreclosure risks in media mergers. Behavioural remedies are another and might sometimes offer a more customised, efficiency preserving approach to avoiding potential problems. For example, if a merger gives a TV broadcaster control over a major premium content producer, that broadcaster could be required to deal in a non-discriminatory fashion with other content purchasers. In rare cases, it might also be necessary to require the TV broadcaster to purchase a minimum share of its content from independent producers in order to preserve competition in the content market.

Although attractive in terms of reducing government interference in rapidly changing markets and of offering a customised approach to preserving efficiencies, behavioural remedies may suffer from the disadvantage of imposing high monitoring and other enforcement costs on competition authorities. This is especially pertinent if it is expected that the behavioural remedy will have to be altered as market conditions change. The advantages of such flexibility have to be weighed against the associated administrative costs.

5. *Media mergers could affect content diversity and quality, and could do so in ways that present competition authorities with awkward trade-offs.*

In addition to possible effects on advertising/content ratios, media mergers can have other important effects on non-price dimensions of economic welfare such as content diversity, and general quality of the text, images and/or presentation. Media mergers can also have significant non-economic effects on social welfare, e.g. on pluralism.

Diversity, as the term is used here, refers to the variety of available content, whereas pluralism is reserved for describing the number and nature of independent providers of media services on the market.

To the extent content consumers are heterogeneous in tastes and preferences, media companies have an incentive to offer differentiated content to increase what consumers are willing to pay and to avoid competing on price. The profitability of such differentiation is strongly

influenced, as in other markets, by economies of scale and competition considerations. For media companies in two-sided markets there is a further very important variable in the equation.

Given the offsetting incentives, it is difficult to predict how a media merger will affect diversity. Suppose, though, that diversity would be reduced, would that be a good reason to block it? Not necessarily. A reduction in diversity could induce greater reliance on price competition that may benefit consumers even more than the lost diversity did. In addition, a decline in diversity could be inseparable from increases in general quality made possible through reaping greater economies of scale. This means there could be another difficult trade-off to make, this time extending across different consumer groups. Consumers with main line tastes may not mind giving up diversity if that means higher quality in main line programming and/or a lower price, but those with more esoteric tastes could be net losers from the merger-induced change.

6. *The difficulties inherent in measuring diversity and quality, and in predicting how a merger might affect them is not a good justification for ignoring them in merger review. This is especially true if there is little or no sector regulation dealing with these matters.*

The non-price effects of media mergers can have just as significant an impact on economic welfare in media markets as they have in other markets. It is quality-adjusted changes in prices that are pertinent for determining effects on economic welfare.

There could be jurisdictions where diversity and quality are so tightly regulated, through detailed content rules for instance, that competition authorities can justifiably assume that media mergers will leave diversity and quality unchanged or even improved. Absent such regulation, there is no a priori reason why the diversity and quality effects of media mergers should not be examined by competition authorities when diversity and quality changes have a direct effect on economic welfare.

7. *Economic welfare and pluralism are separate rather than coterminous goals, and there could be difficult trade-offs that need to be made between them in media merger reviews. Competition authorities will tend to protect pluralism whenever they block anti-competitive media mergers, but even media mergers not harming competition may sometimes harm pluralism.*

The concern to protect pluralism is rooted in non-economic considerations having to do with supporting and preserving democracy and the rule of law by ensuring a multiplicity of voices are heard in the "marketplace of ideas".

If pluralism is measured simply by the number of independent voices present in the marketplace of ideas, then merger review will protect

pluralism whenever it results in blocking a media merger. In this simplified world though, maximising pluralism would suggest blocking all media mergers including those which are neutral in their competitive effects or even pro-competitive. Such a policy would merit close scrutiny.

From the social welfare perspective, it might make little sense to maximise either pluralism or economic welfare without regard to effects on the other goal. For competition authorities mandated to include pluralism in reviewing a merger, trade-offs would seem to be a better policy as long as the resulting flexibility does not unduly increase business uncertainty.

8. *There are at least two ways to deal with the issue of potentially diverging economic welfare and pluralism goals in media mergers, but there is no consensus on which is best.*

One way to proceed would be to follow a division of labour approach, i.e. have the competition authority pay attention only to economic welfare, and the media regulator consider only other matters including pluralism. Under this approach, media mergers which reduce substantially either economic welfare or pluralism would presumably be blocked. Beyond that, it is difficult to predict the impact on both goals. Canada basically follows a division of labour approach, while the United States follows a variant of it. In the United States, the Federal Communication Commission considers effects on "diversity" (including pluralism) and local control, but looks as well at effects on competition whereas the United States Department of Justice is concerned only with the effects on competition of a merger

Another way is to require the competition authority to take direct account of pluralism issues in their merger reviews, or at least to formally assist the final decision-maker in assessing both competition and pluralism concerns. Examples of this approach can be found in Spain, Austria, the United Kingdom, and Ireland.

Judging from the country contributions to the roundtable, competition authorities are often reluctant to include pluralism considerations in merger reviews or even to advise concerning them. This reluctance is sometimes explained by referring to measurement difficulties, and a lack of synergy in terms of the expertise required to assess economic and pluralism effects. There are also concerns to safeguard a competition authority's independence from political pressure and to preserve its reputation for objectivity and even-handed dealing.

Note

1. This should rarely be a concern because the broadcaster will normally have a strong interest in enhancing its ratings by purchasing a variety of the best content available.

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Media Mergers

2. Background Note

Background Note

by
Gary Hewitt*

The question of who owns our newspapers, television and radio is vital to democracy. The information and opinion we draw on must reflect a range of different voices and views if we are to be able to understand and debate the issues of the day. The Government's task is to create a framework for media ownership which protects that plurality of voices and encourages a diversity of content whilst, at the same time, promoting the most competitive market for media businesses and attracting new investment.[1]

Newspapers and broadcasters are not simple firms reducible to profit-generating equations but rather are large, complex social, cultural, and political institutions, and they need to be analyzed through an institutional economic model that takes into account externalities, both positive and negative, that have an impact on the public welfare.[2]

1. Introduction and key points

Few would dispute that competition law should be applied to media mergers to ensure consumers and advertisers are not over-charged or experience quality degradation because of a merger. There is considerable debate, however, about what sort of customized approach might be necessary to deal with special public policy interests arising in the media. Populations derive significant benefits through access to a wide range of political views and cultural offerings. These constitute important externalities that are not fully taken into account by persons consuming media products and advertisers seeking to reach them. Most countries have used subsidies and/or public ownership plus various regulations to ensure that favourable media externalities are preserved at a higher level than would otherwise be the case.

Media, as the term is used in this paper, refers to means of communication used to reach large numbers of people, i.e. to facilitate communication on a one-to-many basis. It therefore includes newspapers,

* Gary Hewitt was a member of the OECD Competition Division.

magazines, radio and television broadcasting, cinema and the World Wide Web ("Web"). Strictly speaking, it also encompasses books and "billboards" (outdoor advertising). To simplify matters, books and billboards will largely be ignored in this paper, and cinema will only be briefly mentioned. Most of the discussion will in fact be focused on newspapers, television and radio broadcasting (including satellite and cable broadcasting services), and the Web. These are the sectors where the majority of the difficult media merger cases have so far arisen. These are also the media most likely to raise important diversity and pluralism issues, and to involve difficult analytical issues related to "two-sided markets".

Many media are at least partly financed by advertising, and the markets pertaining to such media can accordingly be regarded as being essentially two-sided. On the one side are advertisers, and on the other, content consumers, henceforth simply referred to as "consumers". When "consumers" could lead to some confusion we will instead refer to "content consumers".

The existence of important externalities would pose less of a problem for media merger review if it were not for certain other special features of media markets. Chief among them are the enormous economies of scale associated with producing and sometimes distributing content,3 and the two-sided nature of media markets. These two factors, together with some others, tend to increase concentration in many media markets to the point where mergers could pose significant risks for both externalities and other matters of interest to competition authorities.

This paper is intended to assist competition authorities in identifying and analyzing the special problems presented by media mergers, including pluralism issues. We will begin by surveying the special features of media markets of relevance to merger review. Market definition issues will be tackled next, followed by a focus on vertical mergers. The paper will then turn to quality, diversity and pluralism issues, and end with a brief look at remedies and some final remarks.

1.1. Key points

1. The two-sided nature of many media markets present special challenges for merger assessment. One cannot assess the impact of a merger on one side of the market without taking into consideration effects on the other. This includes how content consumers may be affected by expected changes in the amount of advertising they will be exposed to.
2. Two-sided media markets could present difficult trade-offs for competition authorities, e.g. the same merger might lower advertising rates and simultaneously raise direct and indirect costs for consumers.

3. Owing to a multiplicity of products, pervasive price discrimination (including versioning) and bundling, market definition in media merger review can be a very time consuming process. It can also be very difficult because of rapid change and the absence of transactions (due to vertical integration) and prices (as in free-to-air broadcasting). Market definition based on the identification and assessment of substitutes can nevertheless play an important role in merger review by facilitating a preliminary assessment of the competitive effects of media mergers based on changes in market shares, and by helping to frame the analysis generally.
4. Divestments and/or mandatory access provisions may be required to deal with possible foreclosure effects associated with certain vertical media mergers, but they must be sensitive to the efficiencies lying behind the widespread use of vertical arrangements found in media markets.
5. Despite difficulties in measuring content quality and diversity, and in predicting how media mergers might affect them, merger review should not ignore these considerations.
6. Merger review can make a positive contribution to preserving media pluralism, but cannot alone adequately protect it.

2. Some special features of media pertinent to merger review

2.1. High fixed costs and resulting use of value-based pricing and versioning

The content delivered over a media commonly costs a great deal in the way of fixed costs to produce and distribute, but very little in the way of marginal costs occasioned by the addition of another consumer. This is especially true in free-to-air broadcasting, but is less applicable to newspapers and magazines where additional copy costs are more significant.

Because of enormous fixed costs, prices will not be set equal to marginal costs. Instead, media companies will have to set prices above marginal costs and likely engage in various forms of value-based pricing. Price discrimination, especially if the economies of scale lead to some degree of market power, is highly likely provided arbitraging can be prevented and differences in demand elasticities can be identified. Redesigning the format or delivery, i.e. versioning, is one way to meet both those requirements.[4] Some examples of versioning in the media, including the consumer sorting characteristic presumed to be related to willingness to pay, are indicated in the following list:[5]

Delay	Patient/impatient users
User interface	Casual/experienced users
Convenience	Business/home users

Image resolution	Newsletter/glossy users
Speed of operation	Student/professional users
Format	On-screen/printed uses
Capability	General/specific uses
Features	Occasional/frequent users
Comprehensiveness	Lay/professional users
Annoyance	High-time-value/low-time-value users
Support	Casual/intensive users

Much of the creativity in media management revolves around adding to or modifying this non-exhaustive list and finding new ways of following the "create once, place everywhere" business strategy that characterises both the content and distribution side of media businesses.

2.2. Tendency towards high concentration

Other things equal, the greater are economies of scale in relation to the potential size of the market, the higher concentration will tend to be in that market. One might therefore expect to find high concentration levels in media markets. There are other forces as well that press in the same direction, i.e. spectrum scarcity, reliance on advertising and sometimes network effects.

The amount advertisers are willing to pay for advertising time or space is based on the expected size of audience reached. This means that the concentrating tendency linked to economies of scale could be substantially reinforced in media at least partly financed through advertising revenues. This is sometimes referred to as giving rise to a "downward spiral" effect. For newspapers, this effect has been described as follows:

> The newspaper with the larger circulation will tend to attract more advertisers. As the larger newspaper's revenues increase and the smaller newspapers' revenues decline, the latter have less money to spend on news, editorial departments, features and so forth. Their quality declines thereby reinforcing the decline in circulation which in turn causes a further drop in advertisers and advertising revenues. Charging a lower rate for advertisements will not necessarily help the smaller newspapers. Advertisers look not at the rate per line charged by the newspaper but at the rate for reaching a given number of readers with that line. Advertising with the larger circulation newspaper may therefore ultimately be cheaper. The smaller newspapers thus find themselves in a downward spiral which, if it does not result in their failure, at least results in one newspaper becoming increasingly dominant.[6]

The downward spiral effect is not confined to newspapers, and it will tend to be stronger: i) the more media depend on advertising; and ii) the more their prospective consumers regard advertising as a good rather than a bad.[7]

It also will depend on the degree of overlap among media, meaning the degree to which consumers patronise more than one of a number of media. To take an extreme example, consider two free-to-air television channels (A and B) that split the audience during the 21:00 to 23:00 time slot. Suppose that few if any viewers ever switch between A and B. To reach the total audience, it will be necessary to advertise on both A and B. Things would be different if viewers do not have a strong loyalty to either channel, but A regularly captures 90% of the viewers at any particular time. In that situation, advertisers may decide to patronise only channel A.

There is still another factor that could contribute to creating or maintaining high levels of concentration in media markets. This has to do with standards and network effects. A particularly good example has to do with digital platform technology. To obtain access to digital television channels provided by various channel aggregators, consumers must purchase a set-top box decoder. To the extent that channel aggregators choose not to provide inter-operability in their set-top boxes, consumers will face considerable switching costs to change aggregators. Consumers will want to choose the set-top box likely to be chosen by most other consumers in order to have access to more and better content.[8]

Spectrum scarcity has had an obvious concentrating influence on free-to-air *terrestrial based* radio and television broadcasting, but it is considerably less important for broadcasting taken as a whole.

The advent of cable television and satellite broadcasting services has greatly increased available spectrum and simultaneously provided a ready means of excluding non-payers. The relevance of the extra spectrum offered depends, though, on whether free-to-air terrestrial based radio and television broadcasting are in the same market as cable television and satellite broadcasting services, a point we come back to later when discussing market definition.

2.3. Convergence/digitalisation

A European Commission Green Paper noted that convergence was difficult to define precisely "…but is most commonly expressed as: the ability of different network platforms to carry essentially similar kinds of services; or the coming together of consumer devices such as the telephone, television and personal computer."[9]

A background paper for an OECD roundtable held in October 1998 ("OECD broadcasting paper"), noted that convergence was a result of the following developments:

- digitalisation (which allows all forms of information content, including audio and video to be handled over the same networks in the same manner);
- the fall in the price of computing (allowing the development of sophisticated and affordable consumer equipment for encoding/decoding signals and interacting with the multimedia information);
- reduced costs of bandwidth (and compression technologies which allow existing bandwidth to be used more efficiently); and
- telecommunications liberalisation (allowing new firms to enter previously protected markets)[10]

The European Commission Green Paper noted that digital compression was cost-effectively reducing capacity restraints and fostering the emergence of digital television featuring "programme bouquets and thematic channels", "near video on demand", and "pay-per-view" services.[11] Digital television has the potential to considerably improve not just picture and sound quality but the range of consumer choice as well.

Despite its apparent promise, digitalization may not deliver as much consumer benefit as initially hoped, at least not as quickly as some have anticipated and not without intervention by competition authorities to ensure that market access remains open. Digital television in particular is very expensive and risky to introduce and so far seems to be the preserve of existing well-established analogue television broadcasters.[12] In addition, digitalization appears to create a number of significant gateways or potential bottlenecks surrounding the conditional access systems, subscriber management systems, and electronic programme guides which are all necessary to enforce payment and assist the consumer in navigating through the much wider choice on offer.[13]

The OECD broadcasting paper drew out three implications of convergence. The first was a "...tendency for both broadcasters and telecommunications firms to offer high-bandwidth two-way communication services which simultaneously provides access to a number of different channels of video programming, voice telephony and access to the Internet."[14] The second related to overlap in the market for content for newspapers, television, film and Internet publishing. The third was particularly relevant to the review of media mergers:

> ...convergence in the multimedia/broadcasting industry is not unambiguously expected to increase competition. Strong concerns have been raised that companies will be able to position themselves to exploit new "bottlenecks" as they arise.[15]

2.4. Extensive regulation

The spectrum scarcity issue coupled with an inability to exclude non-payers presented potential problems for diversity in broadcasting. Many countries sought to resolve these, as well as ensure satisfactory levels of pluralism, through some combination of public broadcasting and regulation of both content and ownership. The impact of cable TV, satellite broadcasting services and the Internet have undermined the apparent need for such regulation and touched off a substantial debate in many countries about liberalising broadcasting.[16] In the future there could be a considerable reduction in ownership regulation which could lead to a substantial increase in merger activity.[17]

2.5. Two-sided markets

Many media support themselves partly, some even totally, on advertising revenues. This necessarily means that antitrust analysis must focus on both advertising and consumer markets. Owing to a number of important interactions between them, the existence of "two-sided markets" has effects reaching well beyond increasing the number of markets that might need defining.[18] These can be explored by taking the perspective of a media owner.

Media owners must initially decide what general content to carry, hence define their medium's overall character or position in product space. For example, a newspaper could choose to concentrate on news, entertainment, sports, etc., or instead try to offer a bit of all those categories. A medium's position in product space could have an important impact on how much competition it will face in both the short and long run, especially if there are substantial sunk costs involved in changing that position. After selecting an overall character, a medium owner must then continually decide what specific quality and nature of content to offer in specific issues or program slots.

In making general and specific content choices, a medium owner simultaneously affects programming costs, the number and type of consumers attracted, and what they can be charged (presuming there is a charge). These content and charging decisions will have significant ramifications for advertising revenues which are the product of the expected number of media consumers exposed to advertising and what the industry refers to as the CPM, i.e. cost per thousand people exposed to the advertising.[19]

Assuming the *supply* of advertising is increasing in price, the CPM will be affected by the underlying strength of advertisers' demand which itself depends on the degree to which advertisements carried by the medium can be expected to increase advertisers' profits by influencing media consumers to spend more on the advertisers' products. This means that the CPM will be

affected by the medium's typical consumer profile, i.e. per capita disposable income, age and leisure activities. In addition, if the medium enjoys any market power, its CPM will be influenced by the quantity of advertising it offers.

In making content and advertising decisions, the media owner must also pay attention to how consumers may react to the volume of advertising s/he chooses to offer. Too much advertising, at least in media where it may generally be disliked such as radio and television broadcasting, could result in reduced audience sizes and possibly lower advertising revenues (this would depend on the price elasticity of the demand for advertising). On the other hand, if advertising is liked, as may be the case in local newspapers (especially their classified advertisements), more advertising might increase the medium's number of consumers.

Rochet and Tirole (2001) stress that in two-sided markets, including advertising supported media, "platforms" must choose both a price level and a price structure. In solving the chicken and egg problem that such media face, there is a wide range of possible price structures. In media, the price structure adopted will be closely related to the advertising/content ratio. For example, a newspaper could choose to carry almost no advertising and charge a high copy cost, or carry a great deal and charge a low copy cost. Which strategy is best depends partly on how sensitive reader demand is both to copy price and to the advertising/content ratio.

Suppose one is dealing with free magazines or free-to-air broadcasting, could these be regarded as two-sided "markets" even though consumers pay nothing? Economic theorists answer in the affirmative.[20] A competition authority may disagree, especially if its law requires defining a market and courts insist that markets do not exist unless a price is paid. The problem is aggravated if a competition authority is wed to using a hypothetical *price* increase in order to identify available substitutes.

In the case of freely distributed media, merger reviewers are compelled to return to first principles. Is the objective solely to protect consumers from rising prices, or should potential deterioration in non-price dimensions such as innovation, variety and quality factors also be considered? Robert Lande, in the course of arguing that competition policy should centre on preserving consumer choice, highlights the media as one of the best examples of markets in which non-price competition clearly matters to consumers, particularly as regards range of diversity and number of editorial voices.[21] We will return to these issues when discussing pluralism concerns.

Even if the consumer does pay something, quality issues can present difficult problems in reviewing media mergers. Consider for example a merger of cinema chains in which the parties argue that the post-merger

entity will finally be large enough to earn revenues through pre-show advertising.[22] This could be treated as the pro-competitive introduction of a new advertising channel, but it simultaneously represents a possible reduction in quality at least for theatre goers who dislike advertising and do not wish to disturb other patrons (or take the last seats) by arriving just before the advertising ends. The analysis is further complicated through the introduction of a difficult trade-off if merger induced cinema advertising is expected to cause post-merger ticket price reductions, and/or if some cinema patrons like advertising. In any event, the main point of this example is to highlight that there is no *a priori* reason that quality effects should be ignored in media mergers.

The cinema example brings up another important question this time having to do with a media merger's potential effect on diversity. What if two merging free-to-air television stations intend to make much more use of exactly the same programming post-merger. This will reduce both diversity, which may reduce consumer welfare, and programming costs, i.e. produce an efficiency. An awkward trade-off seems unavoidable here, and as always when quality is involved, it will be difficult to make since quality effects are hard to quantify.

There is another aspect of two-sided media markets requiring comment. There will naturally be a considerable overlap between consumers (of media) and the set of people buying the advertised products. If there is not, the advertiser is clearly wasting his money! In what sense then are free media truly free?[23] They would only be unambiguously free if advertising lowered prices (because of economies of scale effects) or left them unchanged. That may be true of advertising that is strictly informative, but to the extent it also has a brand-building, product-differentiating aspect, advertising could have the effect of reducing competition and raising prices.[24]

Many competition statutes' merger review provisions do not require or necessarily even permit assessing how a merger might affect markets outside of those served by the merging parties. It could be argued that price increases linked to an increased supply of brand building advertising are outside the scope of review. It might also be argued that such effects are too speculative to be concerned about. Brand-building advertising could well raise the prices of advertised products, but a drop in the price of brand-building advertising could have the opposite effect. This is because the price drop would permit other perhaps smaller firms with weaker brand images to counter at lower costs than before the accumulated brand building effects of their larger, stronger branded competitors.

Since a media merger will generally reduce or leave unaltered the vigour of competition prevailing in a medium's advertising market, it is counter-

intuitive that a media merger could lower the CPM. Nevertheless, this paradox could occur because of the two sided nature of media markets. Consider for example a merger in free-to-air broadcasting and assume that advertising is disliked by media consumers. A merger of two free-to-air broadcasters could so reduce competition for audiences that the broadcaster will be less constrained than before in raising its advertising/content ratio. An increase in that ratio, assuming both broadcasters continued to operate post-merger, would translate into an increased supply of advertising and a consequent drop in CPM.

Continuing with the paradoxical declining CPM example, how would one assess its welfare effects? Assuming the increased advertising either lowered or left the advertised products' prices unchanged, one would conclude that the merger might have improved welfare. The final effect would depend on whether the associated gains in advertiser profits and consumer surplus on the advertised products markets outweighed the decline in media consumer satisfaction occasioned by a higher advertising/content ratio. Things are less favourable, however if the increased supply and incidence of advertising had the effect of raising the prices of advertised products, i.e. the advertising was strongly brand- building in nature. The advertisers would be the obvious winners from this media merger. The merged media and possibly their competitors could also be better off depending on the price elasticity of demand for advertising, and whether or not they could afford to reduce program costs (and quality) while simultaneously raising the advertising/content ratio. Consumers are clearly losers in this scenario because the media product has deteriorated and advertised products' prices have risen. Consumers might suffer a further negative impact, and this applies whether the advertising is mostly informative or brand-building in nature. To the extent the media merger reduces competition among the media, it might also affect the degree of program diversity on offer, a point returned to in a subsequent section of this paper.

A falling CPM is not the only paradox that a media merger could present. A media merger could also produce a price drop for consumers (in non-free media) despite *reduced* competition on the consumer side of the business. Once again this is largely due to the two-sided nature of media markets. Consider for example a newspaper that could obtain or increase market power on the consumer side of the market by merging with a competitor. Before the merger suppose the newspaper was charging $1 a copy. After the merger the newspaper might wish to take advantage of its increased market power by cutting the number of copies sold and raising the price to $1.20. Before it does so, however, it must consider the effects that would have, other things equal, on the newspaper's:

1. sales revenues (which would rise assuming the merger renders demand either inelastic or more inelastic than it was pre-merger);
2. its total costs (which would decline very little since most of the newspaper's costs are fixed); and
3. advertising revenues (which would tend to decline along with circulation).

The seriousness of the circulation related decline in advertising revenue will be greater if in addition to reducing competition on the consumer side of the market, the newspaper merger also has the effect of increasing the CPM. Each consumer lost because of the increase in copy cost will therefore produce a larger opportunity cost in foregone advertising revenues. Having worked through all these estimated effects, the newspaper *may* paradoxically find that its profits would be higher if it dropped its copy price post-merger.[25]

The literature dealing with the effect of media concentrations on the CPM (plus the related impact of changes in advertising on consumer welfare) and the price charged consumers suggests that a media merger's actual effects will be highly dependent on specific fact patterns.[26]

2.6. Summing up

The main points to retain from this section are:

a. media markets are likely to be characterised by a multiplicity of products plus extensive use of versioning and other forms of price discrimination;

b. important economies of scale in both production and distribution, plus the effects of dependence on advertising revenues and the presence of significant network effects could produce high levels of concentration in media markets;

c. the process of convergence in media and telecommunications industries is not unambiguously expected to increase competition in media markets;

d. media are commonly subject to regulation affecting diversity and pluralism;

e. the prices of media products and media advertising could rise or fall because of a media merger, and if they move in opposite directions, competition authorities could be confronted with a difficult trade-off; and

f. the welfare effects of a media merger are difficult to estimate since they should include price as well as non-price factors (including quality aspects and consumer dis-utility from advertisements in certain media).

This is a good point to take up market definition. After doing so, and looking at vertical merger issues, we will return to the quality dimensions in media mergers including content diversity and pluralism.

3. Market definition

As is typically the case in other markets, the review of media mergers normally includes making a market definition. In some countries this may be legally required in order to challenge a merger. Even where that is not the case, the market definition exercise can be a useful way to organise thinking about how a media merger could harm competition.

Since the primary concern of competition authorities in reviewing a merger is to determine whether it will be detrimental to consumers, market definition should focus on the substitutes they could turn to should the parties raise prices or lower quality post-merger. If the available substitutes are good enough, the merging parties would not find it profitable to raise prices or lower quality in the first place. As an illustration of some of the difficulties encountered in identifying substitutes on the advertising side of media markets, consider the following material relating to a Canadian newspaper merger:

> The extent to which a proposed transaction will affect the rates that the papers can charge to advertisers will largely depend on the paper's market power. But market power is not simply a question of how many newspapers, for example *Le Droit* might sell as compared to the *Journal de Montréal*. Other factors will influence this analysis, including the availability of substitutes. If the local paper raises its rates, an advertiser may switch to another medium - to television, radio, billboards, flyers or the Internet. Whether one medium can be substituted for another depends in large measure on what the switch will cost the advertiser. "Cost" in this sense is assessed broadly, encompassing more than just the additional expense of the new medium, but also how effectively the new medium will allow the firm to target its customers. A drop in sales as a result of switching would also be factored into a firm's "switching costs." Of course, costs might also be favourably affected by the switch - a dealer in used cars, for example, might find profit by switching from the *Ottawa Citizen* to the *Auto Trader*. However, an electronics retailer might not have such available substitutes. Demographic studies indicate that certain audiences tend to prefer certain media. People with university education, for instance, are more likely to read the *Globe and Mail* or the *National Post* than the *Sun*. Other demographic groups may rely on magazines, television, the Internet or radio as their source of information. For example, market studies indicate that the *Sun* is the paper of choice for males between the ages of 18-25 with a high-school education. Accordingly, an advertiser aiming its product at that demographic may have very limited substitutes, even in a seemingly competitive market such as Toronto, a city with four major dailies.[27]

The above description reflects that, because of the focus on the consumer, market definition centres on the demand side of the market. That does not exhaust the analysis, however. In some situations, a post-merger price increase would be unprofitable because of what the United States Horizontal Merger Guidelines treats as "uncommitted entry". This refers to entry that could be made quickly and without significant sunk (i.e. irrecoverable) costs of entry or exit. Where there are uncommitted entrants, the extra capacity they could add to the market should form part of the denominator when calculating market shares for both existing firms and uncommitted entrants. Market shares are subsequently used to calculate various concentration ratios to make *preliminary* estimates of the probability of a post-merger price increase. If these preliminary estimates indicate there could be a competition problem, competition authorities typically proceed to assess other factors such as the existence and extent of countervailing buyer power, barriers to entry, efficiencies and whether one of the parties is a failing firm.

It is worth digressing at this point to indicate that barriers to entry could be quite significant in media markets because there could be significant sunk costs associated with entry. This is true despite the convergence associated with digitalisation, a factor having greater influence in broadcast as opposed to print media. Some of the barriers to entry that arise because of sunk costs will be dealt with immediately below in the discussion of vertical mergers. One barrier to entry that has been alluded to but not developed has to do with the sunk costs associated with choosing a particular position in product space. This point is relevant to assessing the power of both new entrants and potential incumbents to constrain a post-merger price increase. For example, review of a television station merger in the United States revealed that:

> Other broadcast television stations in the Salt Lake City DMA would not change their programming in response to a price increase imposed by News Corp after the acquisition. Not only are television stations often committed to the programming provided by the network with which they are affiliated, but it often takes years for a station to build its audience. Programming schedules are complex and carefully constructed taking many factors into account, such as audience flow, station identity, and program popularity. In addition, stations typically have multi-year contractual commitments for individual shows. Repositioning would require changing many of the shows in a station's line-up, and would be risky, difficult, and time-consuming. A television station is unlikely to take such a risk simply to capitalize on a small but significant price increase by News Corp after the acquisition.[28]

Returning to market definition itself, one increasingly common way of identifying product and geographic substitutes can be referred to as the hypothetical monopolist approach to market definition. This involves

repeated application of the SSNIP (i.e. small but significant non-transitory increase in price) test. A good description of this approach can be found in the United States Horizontal Merger Guidelines.[29] Beginning with each product sold and geographic market served by the merging parties, the SSNIP test is applied by asking whether a 5% (or some other fixed percentage) price increase would be profitable post-merger. It will not be if the price increase causes a sufficiently large number of current buyers to switch to good substitutes offered by other suppliers. If it indeed turns out that the hypothetical price increase would not be profitable, the product and geographic dimensions of the market are widened to include what appear to be the best substitutes. Within the expanded market, one again asks whether a 5% price increase would be profitable if imposed by a hypothetical monopolist. If not, one again adds the best substitutes to the market definition and repeats the exercise. This process of progressively widening the market stops as soon as a 5% price increase would be profitable. The set of products and geographical points of supply at that stage of the analysis constitute the market as defined for antitrust purposes. Existing customers of the merging parties are a prime source of information for applying the SSNIP test. Useful information might also be supplied by the merging parties, competitors and suppliers.

Although analytically straightforward, the SSNIP test can be very complex in practice. This is particularly true in media markets.

The European Commission recently commissioned two major studies on market definition in the media sector, one from Europe Economics, which we will refer to as the "Europe Economics study",[30] and the other by the law firm of Bird & Bird, i.e. the "Bird & Bird study".[31] The Europe Economics study noted that:

> Our analysis of the typical economic features of media industries indicates that the fundamental methodological problem of defining markets in the media sectors arises from rapid change. In addition, the analysis is sometimes complicated by the need to consider markets in which no or very few transactions take place.
>
> These features make the economic understanding of markets inherently difficult, since they require an analysis of competitive constraints to be performed without the support of a significant track record of the operation of the markets, and in particular without any of the price and volume data that are required by some quantitative techniques for market definition.[32]

The few transactions issue has more to do with vertical integration than with the absence of payment from content consumers in the case of freely distributed media. A history of substitution behaviour may be available in a

merger involving freely distributed media, but this will not be the case where, owing to vertical integration, "transactions" are currently entirely internal to a firm. This could be the case for example if the sole provider of satellite delivered broadcasting chose to offer Internet access services but did not allow independent Internet access providers to use his satellite.

Another special complicating issue, this time related to the SSNIP test, arises from the two-sided nature of media markets. Consider a newspaper merger that might alter competitive conditions on both the advertiser and consumer sides of the market. One cannot determine the profitability of raising the newsstand or subscription price or advertising rates without considering effects on both sides of the market. To the extent that an increase in the former will reduce the newspaper's circulation, it will also depress advertising revenues.[33]

Two-sided markets are only the tip of the iceberg of another problem that is particularly acute in many media mergers. This has to do with the sheer multiplicity of markets, an issue already mentioned in connection with the price discrimination and versioning often found in media markets. Where price discrimination is already established or would likely be introduced post-merger, it will have the effect of multiplying the markets that must be defined if the objective is to protect all consumers from harm.

In considering media markets, both the content and the means of delivery could be important to consumers and may lead to separate markets. One cannot assume, for example, that there is an overall market for news reporting and that it makes no difference whether it is delivered by newspapers, radio, television or the Internet. Similarly one cannot assume that different television delivery formats are equivalent, i.e. there is no difference between news carried on pay-TV and within that domain, between cable and satellite delivered pay-TV. Gomery (2002, 11) observes:

> Ultimately, each component of the media system — newspapers, broadcast networks, cable, satellite, and the Internet — provides a distinct product of news, information, and analysis, and each has its own institutional framework, geographic orientation, and relationship with the user. Thus, far from being homogenous or interchangeable media outlets, the various print and electronic media organizations currently have distinct roles in informing and engaging citizens.

Using an extensive database, a United States Federal Communication Commission staff research paper recently looked at consumer substitution among media and stated:

> What do we find? Standing back, there is clearest evidence of substitution between Internet and broadcast TV, both overall and for news; between daily and weekly newspapers; and between daily newspapers and

> broadcast TV news. There is also evidence of substitution between cable and daily newspapers, both overall and for news consumption; between radio and broadcast TV for news consumption; and between the Internet and daily newspapers for news consumption. There is little or no evidence of substitution between weekly newspapers and broadcast TV, or between radio and either Internet or cable. There is also some indirect evidence of substitution in the greater use of national media by groups less targeted by local media. This study leads to several conclusions. First, we can reject the view that various media are entirely distinct. As noted above, certain media appear to compete with each other for consumers' attention. Second, the study provides evidence of substitution by consumers between and among certain media outlets. It cannot completely answer the question of whether substitution is sufficiently effective that all media should be considered substitutes for news and information purposes. Existing research, however, may provide useful clues. While entertainment provided through media channels is an end in itself, news makes it easier for citizens to know what is at stake in electoral contests and, in turn, can make them more likely to vote. If substitution were complete, then the decline of local daily newspapers would be offset by increased use of other media. The civic behaviours affected by media consumption would also be unaffected by changes in availability or use of any particular medium. Yet, existing research on media consumption and voting – reviewed in the study conclusion – suggests that, even if substitution operates, it is not complete in this sense.[34]

Somewhat related to the price discrimination and versioning issue, there is another way in which transactions in the media industry can involve a multiplicity of markets requiring definition. This has to do with widespread bundling in media industries. This can take the form of bundling two separate media such as when a cable TV operator also offers Internet access service. It can also show up as the offering of a number of media products that could be and often are sold separately such as happens when a cable TV operator offers different bundles of channels, or when a magazine subscription includes a discount if another magazine is also purchased. The Europe Economics study analyses the ways in which pure and mixed (i.e. the separate elements of the bundle can also be purchased separately) bundling could be used to price discriminate, reap economies of scope or deter new entry. More particularly about market definition, the study notes:

> Like price discrimination, bundling does not change the principles on which market definition is based. Instead it increases the number of products that need to be considered as potential competitive constraints on each other, as substitutability must be assessed between different

> bundles as well as between bundles and individual components. Furthermore, it is quite possible that there is a relevant market for the supply of a bundle of products and separate relevant markets for the supply of the individual components.[33]

There is a final complication in media markets that could bear significantly on market definition. This has to do with the importance and high incidence of vertical integration and arrangements in media markets. Where one or more parties to a media merger have important vertical links, their merger could raise significant competition issues at various levels of the value chain, i.e. content origination, content and service packaging, service provision, infrastructure provision and terminal vending.[36] It may be necessary to define markets at each of those levels even though only one of the merging parties is active on it.

The Europe Economics study extensively discusses the special problems connected with a substitution based approach to market definition in media mergers, and recognises that the necessary data may be difficult to obtain. It nevertheless urges caution regarding using alternative sources of evidence not based on substitutability:

> When relevant data are missing, they must either be collected (for example through customer surveys), or reliance must be placed on reasoned assumptions that lead to inferences on substitutability and can be subjected to scrutiny by interested parties and/or the courts. *The scarcity of relevant evidence cannot justify the use of irrelevant evidence*.[37]

This study also makes four important general points about market definition in the media sector:

a. First, little reliance can be placed on similarities or differences between products, for example in terms of the technology that they use, as a guide to market definition. In particular, convergence of products and/or technologies is not a good guide to changes in market definition.

b. Second, the value of market definition precedents will often be quickly eroded by rapid change, and conclusions on market definition can rarely be transferred to new cases even if they appear superficially similar.

c. Third, the analysis is often complicated by the fact that competition in many media activities occurs on dimensions other than price, for example in circumstances where media content is provided for free.

d. Fourth, many potential markets need to be considered in connection with a competition inquiry, adding to the effort required to determine robust market definitions. For example, markets may need to be defined by time, by customer group, in terms of different bundles, and at different levels in a

> complex chain of production, as well as by the traditional characteristics of product type and geographical location.[38]

Europe Economics suggests three practical steps for market definition. Paraphrased, they are: identify precisely the products likely to be relevant (in mergers, the starting point would presumably be the products supplied by the merging parties), apply the SSNIP test to assess substitutability between the products, and check the results using other evidence such as precedents and price evidence to confirm or refute the tentative market definitions. The study also contrasts these three steps as applied in media and other markets:

> …in steady and simple industries Step 1 seems to be a formality, Step 2 is (or appears to be) difficult, and Step 3 often provides sufficient evidence to settle many market definition issues. In the media sector, by contrast, it is more typical for Step 1 to be an essential component of the analysis, where chains of production are analysed and trade (or potential trade) is identified, and for Step 2 to be at the heart of the delineation of markets, with Step 3 being often limited to a formality because indirect evidence cannot be used to disentangle the effects of rapid change from those of substitutability and competition.[39]

The Bird & Bird study has a different focus than the Europe Economics study. The former concentrates on providing comparative European legal analysis on market definition in media markets. Among its conclusions, Bird & Bird noted:

> Overall, it is difficult to identify throughout the case law the existence of a specific reference test to be used in the media sector to define relevant markets. As mentioned earlier, that absence is particularly blatant concerning the geographic market. However, even on the product/service market, there is a certain lack of consistency in the criteria applied and upheld. This does not mean that the market definitions finally upheld are inconsistent. Quite on the contrary, practice throughout the EU tends to show similarities or identities in such definitions. However, legal certainty and anticipation concerns should probably dictate the creation of a consistent and *ex ante* market definition test.[40]

Based on that finding and a desire to improve legal certainty with regard to the application of competition law to media markets, the Bird & Bird study considered a variety of criteria that have been used in market definition and then asked whether the "solution [may] lie in a more economic approach". While offering considerable criticism of the SSNIP test, including its supposed over-concentration on quantitative as opposed to qualitative factors,[41] the Bird & Bird study does not advocate its wholesale replacement. It does urge, however, that it be applied "very cautiously" and adds:

> At the end of the day, the perception of the consumers and companies present in a given sector may represent a more subjective approach to market definition, but not necessarily a less reliable one.[42]

Few persons supporting the SSNIP test as it is actually practiced would likely disagree with that statement especially since the views of consumers are critical to its application.

Before leaving the topic of market definition, some brief comments are offered in particular on market definition in relation to broadcasting. These are not intended as definitive conclusions that can be applied without analysis in any particular media merger. Instead they should be treated as thought- provoking guideposts.

3.1. Broadcasting as a separate market

Based on country submissions received for the OECD's earlier roundtable on broadcasting, the executive summary pertaining to it noted that:

> In the case of the consumption habits of consumers, although it is acknowledged that broadcasting competes with other forms of media (such as newspapers, cinema, magazines), in no case was it indicated that a market definition was adopted in which broadcasting and other forms of media were held to be sufficiently substitutable as to be in the same market from the perspective of consumers. In general, broadcasting has fewest substitutes (and therefore the greatest potential for market power) in the broadcasting of content for which timeliness is important (such as live sporting events).
>
> Furthermore, although there is clearly some substitution between the various forms of broadcasting, a market for pay television was systematically distinguished from the market for free-to-air television. Although it is clear, that, at one level, free-to-air (which relies on support from advertisers) will never be able to offer identical services to pay television, it appears that the extent of the substitutability between these products may depend upon the extent of regulation of free-to-air television. There is some evidence from Italy, Germany and the US that the growth of pay television is slower (and its market power more limited) in markets which have a large number of free-to-air channels. It is not clear whether or not the various forms of pay television (cable, satellite and microwave) operate in the same market. Mexico notes one case where an incumbent cable operator was held to not have market power as a result of competition from microwave and satellite services. In contrast, in one US case, a market for cable television was distinguished from the market for satellite or microwave television.

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

The situation with regard to the advertising market is similar. Most countries reported finding that different forms of media advertising were relatively weak substitutes (and, in some cases, may in fact be complements). In most cases the geographic scope of the market is national. Even within the EU, which has sought to reduce barriers to trade in television services, markets remain largely national in scope, probably partly as a result of language and cultural barriers. Only Switzerland, probably because of the special language characteristics of its population noted a significant level of cross-border competition.[43]

3.2. Radio and television as separate markets and some possible divisions within television

Following changes made to its telecommunications statute in 1996 that significantly liberalised the ownership of multiple radio stations, the United States experienced a wave of radio mergers. In a speech about a year later, based on the Department of Justice's experience in reviewing over 1000 radio mergers, Joel Klein noted that radio was very probably a separate antitrust market. The speech implied that radio mergers were analysed mostly if not entirely from the perspective of possible anti-competitive effects in advertising markets, and noted that:

> ...our view of radio as a distinct market doesn't mean that there are no advertisers who can divert their advertising to other media to avoid a price hike, but only that such behaviour will not ultimately defeat an anticompetitive price increase. A key reason that leads us to this conclusion is that radio owners can, and routinely do, charge different rates to different customers depending on the customer's demand for radio. That is, radio stations raise prices for those customers who don't have other realistic options available, while they maintain prices for customers who do have such options. For example, if an advertiser is interested in reaching a particular demographic group -- let's say females aged 18 to 34 -- an owner who has all the stations that cater to that group will have more market power with respect to that advertiser than with respect to an advertiser who isn't aiming at that particular demographic group. When price negotiations take place, both sides are aware of these considerations. And since radio advertising rates are negotiated with each advertiser individually, the radio station owner is able to charge a higher price to the advertiser with fewer options, while keeping prices

> low to the advertiser with more alternatives. Again, I want to stress, we're not making this stuff up; our investigations have found business strategy memos indicating that this is precisely the kind of activity that takes place when it comes to pricing decisions.[44]

Klein's views receive support as well from empirical explorations of cross-elasticities of demand undertaken by the United States Federal Communications Commission. Focusing on local advertising, the FCC study suggests that:

> ...local newspaper and television ads are complementary inputs in the sales efforts of local businesses. These results also suggest that local radio and television ads are also complementary inputs.[45]

There also appears to be evidence that television should be treated as a separate from radio and print media, and that free-to-air and cable television may not be good substitutes. The following was contained in material filed by the United States Department of Justice in opposition to a television merger proposed in 2001. Again the focus is on the advertising side of the market:

> Broadcast television spot advertising possesses unique attributes that set it apart from advertising using other types of media. Only television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target market and is therefore especially effective in introducing and establishing the image of a product. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Such customers would not switch to another advertising medium -- such as radio, cable, or newspaper -- if broadcast television spot advertising prices increased by a small but significant amount.
>
> For example, cable television, like broadcast television, is a visual medium, but it is not a meaningful substitute for broadcast television spot advertising because the audience for any one cable channel is typically very limited and specialized compared to the audience of broadcast television stations. Moreover, it is much more difficult for advertisers to predict the impact of a cable advertisement because information about program ratings is not as complete or readily available as it is with broadcast television. Other media, such as radio or newspapers, are even less desirable substitutes.
>
> Even though some advertisers may switch some of their advertising to other media rather than absorb an increase in the price of broadcast television spot advertising, the existence of such advertisers would not prevent stations from profitably raising their prices a small but significant

> amount. During individualized negotiations between advertisers and broadcast television stations, advertisers provide stations with information about their advertising needs, including their target audience. This enables television stations to identify advertisers with strong preferences for broadcast television advertising. At a minimum, broadcast television stations could profitably raise prices to those advertisers who view broadcast television as a necessary advertising medium either as their sole method of advertising or as a necessary complement to other advertising media.[46]

The fluid nature of media markets is also evident in competition between satellite and cable delivered broadcasting. In the past, satellite providers had an important edge in this because they were able to deliver both analogue and digital signals. This meant they were able to offer considerably more channels and interactive programming guides. Cable companies apparently responded by making huge investments to enable them to offer digital signals. A recent newspaper article notes:

> Today, the technological differences between satellite and cable are mostly a matter of delivery systems – land lines versus satellite dishes. Dishes offer the advantage of allowing less expensive, more widespread installation, because they do not entail laying cable in the ground.
>
> But the cable companies have ready ability to use their land lines to offer services, like video on demand and Internet access. And cable technology is more developed than satellite at this point to carry two-way data traffic.
>
> [Video on demand technology as offered over cable TV] lets consumers buy movies and other programming when they want to watch it, then use their remote controls to fast forward, rewind and pause as if the programming were on videotape. In fact, the programming is kept on the cable company's servers.
>
> But the satellite industry has its own answer to video on demand. It has aggressively moved to deploy personal digital video recorders that allow consumers to record hours of programming and surf through them with a remote control. The satellite industry maintains that these digital recorders effectively allow video on demand, because consumers can download the programming they want and watch it when they want to.[47]

The competition in video on demand is apparently a three-way race because consumers can also buy digital television recorders making it possible for them to record, store and play back programs obtained from either satellite or cable TV.

It is clear that technological factors have an important bearing on substitutability. It is also true that competition authorities cannot assume

that either technological factors will stand still or will be determinative in terms of what advertisers and consumers might be willing to do to protect themselves from potential adverse effects associated with a media merger.

4. A focus on vertical mergers

As in other markets, media mergers combining different levels of the vertical value chain can present threats to competition as well as offer efficiency gains. Vertical issues are particularly pertinent in the media sector because of pervasive links between content producers, packagers and infrastructure providers. The earlier mentioned OECD broadcasting paper examined these links and deduced that:

> …competition concerns were mostly likely to arise at opposite ends of the chain of production - i.e., in access to certain forms of content (such as major sporting events) and in the market for broadband access to consumers. As a result, policy makers and competition enforcement authorities should be most concerned about two categories of horizontal mergers: first, mergers which restrict the number of paths to the consumer (such as a merger between the PSTN and a cable operator, or between a significant satellite operator and a cable operator); second, mergers between two content providers with a strong position in the market for certain categories of content.[48]

That OECD broadcasting paper went on to explore the "one-monopoly-rent theory" according to which a dominant firm at one level of the value chain can obtain all the profit related to its market power by simply charging an appropriately high price for its output. Against that view, it was argued that exclusive arrangements or vertical integration might be necessary to efficiently extract rents in the presence of various problems related to:

- double marginalization (as when a monopolist content provider sells to a monopoly broadcasting network and the latter adds a margin without considering how that reduces profit upstream);
- price discrimination; downstream provided marketing services requiring a significant investment and giving rise to a free-rider potential; and
- sunk costs specific to the relationship between the firms which would have to be duplicated without exclusive vertical relationships or integration.

As has already been seen, economies of scale, advertising related factors, and network effects combine to increase concentration levels in both content production and network distribution, and therefore the possibility of various degrees of market power. Double marginalization is accordingly a very real issue and price discrimination tends to be more feasible in many media markets. The OECD broadcasting paper remarked that:

> If the upstream firm cannot identify in advance all of the potential sub-markets and carefully restrict each downstream firm to a single market, it may be able to increase its overall rents by selling [the rights] in the downstream market to a single downstream firm who then has both the willingness and the ability to fully exploit the different sub-markets.[49]

Both the double marginalisation and price discrimination issues may have become more serious in the broadcasting sector as a result of the huge increase in demand for content linked to the proliferation of channels occasioned by the roll-out of cable and satellite TV.[50] Although the barriers to entry may be low for content production taken generally, this is probably not the case for the new feature film and high-interest sporting event content apparently vital to ensure the profitability of pay-TV.[51]

Vertical integration could be a two-edged sword in terms of effects on economic welfare. It could mitigate the double marginalisation problem and facilitate efficient price discrimination, but it could also create or increase market power either upstream or downstream. The OECD broadcasting paper notes that economic theory does not provide a clear guide as to when vertical arrangements, including vertical integration, will likely reduce economic welfare.[52] This is immediately qualified, however, with:

> There is…a fairly straightforward argument as to why vertical foreclosure will be inefficient in certain specific cases. In many cases the downstream production technology will be subject to economies of scope. Economic entry into the downstream market in this circumstance requires production of the full range of downstream products. Although restricting access to a key input necessary for the production of just one of the range of products, will not enhance the market power of the integrated firm over the downstream market that requires the essential input, it will enhance the market power of the integrated firm over all of the other products sold using the downstream technology.
>
> The application to the broadcasting industry is straightforward. Suppose that the downstream technology is the broadcasting infrastructure. This can be used for providing a variety of broadcasting services, such as entertainment, sport, films, interactive multimedia and home shopping. If a firm can acquire a dominant position with respect to an input necessary for the provision of one of these services (by, say, acquiring the rights to broadcast major sporting events), the firm may limit the ability of other firms to provide that service and thereby restrict or prevent the entry of competitors in the infrastructure market. Doing so does not increase the value of the sports rights, but does reduce the level of competition (and therefore increases the monopoly rent) available on all of the other services that can be provided through the broadcasting infrastructure.

> The same arguments might also apply in an upstream direction in the chain of production. There are economies of scope in producing some forms of content for, say, both film and television. If an integrated broadcaster with a dominant position in infrastructure were able to deny a competitor access to the television audience, it may thereby be able to restrict competition in the joint market for film and television content and thereby also earn monopoly profits in the market for film content. This effect might explain why dominant national broadcasters have traditionally been highly vertically integrated and why, in most countries, relatively few films are produced without the involvement of a dominant national broadcaster. It might also explain why some countries require dominant national broadcasters to purchase content from independent producers. Such a restriction enhances competition in the market for films by providing access to the television market necessary to fully exploit the benefits of economies of scope.[53]

Miguel Pereira has recently provided an interesting review of various vertical integration issues encountered in three high profile European Commission cases: the Vizzavi joint venture between Vodafone and Vivendi; the AOL/Time Warner merger; and the Vivendi/Canal+/Seagram merger.[54] He organised his comments into five categories namely gate-keeper, source, path, leveraging and network issues.

In AOL/Time Warner the Commission was concerned about the merged entity apparently being in a position "…to dictate the technical standards for on-line music delivery, i.e. streaming and downloading of music from the Internet." If it could acquire that power, "Winamp" (i.e. AOL's on-line music player) would essentially support new gatekeeper power for AOL/Time Warner.[55]

Turning from gatekeeper to source issues, Pereira opined that the AOL/Time Warner merger together with the practically simultaneous merger, later abandoned, between Time Warner and EMI, would have given the new entity control over what was estimated to be "…about half the music content available in Europe for on-line delivery."[56] This was believed to raise the danger that AOL/Time Warner would either refuse to supply music to its on-line competitors or supply it only on disadvantageous terms.

Pereira noted that the source issue arose as well in the Vivendi/Seagram merger but here it included both film and music. He developed this as follows:

> Vivendi is a leading company in the telecommunications and media sector, with interests in mobile telephony networks, cinema production and distribution, and pay-TV services [i.e. Canal+]. Seagram was a Canadian company which, among other interests, controlled the Universal music and filmed entertainment businesses. In terms of

> content, the merged entity would have the world's second largest film library and the second largest library of TV programming in the EEA. It would also be number one in recorded music combined with an important position in terms of publishing rights in the EEA.
>
> The position of Vivendi/Universal concerning music rights became particularly relevant in respect of the Vizzavi portal, a portal run by a joint-venture between Vivendi and Vodafone. The Vizzavi joint-venture had itself been notified to the Commission just some months before the Vivendi/Universal merger.[57]

The Vizzavi joint-venture provided Pereira with a good transition to path-related foreclosure issues. This transaction was described elsewhere as follows:

> Vizzavi was a joint venture between Vodafone and Vivendi, the purpose of which was to create an Internet portal service bringing together various information and transactional services accessible through standard PCs, television and mobile phones. The parent companies planned for Vizzavi to be the default portal for subscribers to Vivendi and Vodafone's mobile phone services and to Vivendi unit Canal+ pay TV offerings.[58]

Pereira believed that the Vizzavi joint venture proposal presented a clear path issue in respect of Internet access because of Vodafone's significant market position for mobile telephony in various European countries:

> Vodafone already had a very significant customer basis in these countries and therefore a solid path to the future customers of the JV was already established. As regards Internet access via TV set-top boxes, a similarly solid distribution channel was also owned by Canal+ in respect of its customer basis for pay-TV services. The concern therefore arose in respect of the ability of both Vodafone and Canal+ to migrate their customer basis from the mobile telephony and pay-TV markets to the Internet access markets by using the already existing distribution channels or paths.[59]

Turning to leveraging issues, Pereira stated that the Vizzavi joint venture "…raised concerns in respect of the ability of the parties to leverage their market power in the market for mobile telephony into the market for mobile Internet access."[60] He briefly motivated those concerns by referring to the stated purpose of the transaction and noting the parties' strong market position in various EU countries for mobile telephony services. He also referred to the Vivendi/Seagram/Canal+ merger noting that it might have allowed Canal+ to leverage "…its strong market position in the pay-TV market into the market for Internet access via set-top boxes."

Returning to the Vizzavi joint venture, Pereira added:

> A clear vertical leveraging issue arose still in the Vizzavi case, as regards the buying power of the J-V parties. Already before the operation, Canal+ was an important buyer of content for pay-TV, such as TV-programming, sports and films. Furthermore, it had a large customer basis accustomed to pay for content. The Vizzavi portal would combine a powerful new Internet access mechanism with paid-for content. Given the dominant position that the parties would acquire on the Internet access markets which I mentioned before, the operation would allow the parties to leverage their market power in the markets for Internet access into the market for the acquisition of paid-for content for the Internet. Moreover, the structural link between Vivendi and Canal+ and AOL France (55%) made the concern in respect of the increase in the bargaining power of the parties even more serious. The leverage allowed for by the operation would naturally work in detriment of the parties. competitors in the markets for mobile telephony and pay-TV.[61]

Pereira added that concerns about possible anti-competitive effects increased as regards the Vizzavi joint venture when Vivendi announced its intention to acquire Seagram's and with it the music and films business of Universal Studios.[62]

Pereira's discussion of network effects was confined to the AOL/Time Warner merger which combined a huge music library with a large Internet subscriber base:

> The network effects would work both ways: more subscribers would bring more content and more content would bring more subscribers. Newcomers would also be attracted to AOL community because the larger the community, the more the possibilities to chat and communicate through AOL.[63]

Pereira had earlier noted that AOL's two instant messaging services had "…tens of millions of members…."[64]

In all three of Pereira's case examples, the European Commission fashioned a remedy taking into account both the risks to competition and the efficiencies the parties were seeking through their vertical integration. The basic thrust of the remedies adopted "…was to ensure *access*, access to the source, access to the path and access through the gate."[65] In addition the Commission severed various structural links, such as AOL's links with Bertelsmann, believed to aggravate the source or path problems.

One can agree with the emphasis on ensuring access as a means to address the problems allegedly arising in Pereira's examples, without necessarily accepting that the problems were significant or certain enough to justify the remedies imposed, especially if they led to some efficiency losses. Pereira did not provide sufficient detail to allow one to conclude that the

studied transactions not only *could* raise serious competition problems, but also that they *probably would*. The latter step requires going beyond demonstrating an ability to harm competition to examine as well the incentive, i.e. profitability, of doing so. That in turn calls for a thorough investigation into how competitors and customers might be able to protect themselves should anti-competitive conduct materialize. Assessing how thoroughly and convincingly this was done in the three transactions lies beyond the scope of this paper.[66]

In blocking joint ventures and mergers in an effort to keep access open in rapidly evolving media markets, there is a risk that competition authorities might end up blocking the development of new platforms. This may have happened as regards the digital pay TV sector in Germany.

In March 1994, Bertelsmann, Kirch and Deutsche Telekom proposed to form a joint venture, MSG Media Service. It was reported that:

> The new company…will initially focus on providing pay-TV and pay-per-view services and eventually video-on-demand and TV-shopping services to the 14 million households wired up by DT's cable television network.
>
> While the joint venture will not provide any content services, other media companies will become its clients to transmit their own movies, home-shopping and other programming.[67]

In 1994, Bertelsmann had interests in book and magazine publishing, book clubs, printing, music publishing, sound recording and commercial television. It was also active in foreign markets and made about 6% of its turnover outside Germany. Its arch rival Kirch was the leading German supplier of feature films and television programming and was active in commercial television. Kirch also had interests in pay-TV suppliers outside Germany. Deutsche Telekom was the incumbent telecommunications operator in Germany and was also the owner and operator of "nearly all the German cable-television networks." [68]

At the end of December 1994, the European Commission blocked this joint venture because of concerns arising in three vertically related markets:

1. technical and administrative services for pay-TV and other payment-financed communication services in Germany – the Commission concluded that MSG would acquire a "durable dominant position" in this market;[69]
2. pay-TV – the Commission deduced that:

   If MSG held a dominant position on the market for technical and administrative services, this would considerably strengthen the position of Bertelsmann/Kirch on the downstream market for pay-TV. It would have to be expected that the setting-up of MSG would give Bertelsmann and Kirch a durable dominant position on the market for pay-TV.[70]

3. cable networks – the Commission deduced that:

> It can be expected that the proposed concentration will in the long-term also adversely affect to a considerable extent effective competition on the market for cable networks in Germany….There is a danger that, by jointly operating the pay-TV structure together with the leading pay-TV suppliers, Telekom will strengthen its position as a cable network operator in such a way that, following liberaliszation, competition in the cable network market will be substantially impeded and thus Telekom's dominant position safeguarded.[71]

The parties offered a number of undertakings that the Commission considered insufficient to remove the competition concerns, mainly because they were mostly behavioural rather than structural in nature, and their enforceability was open to question.[72]

Humphreys (1998, 22) describes this failed joint venture as, "…a first attempt [in Germany] to set the scene for the digital age…." Following the Commission's prohibition, the parties went their separate ways to try, in concert with other partners, to develop digital television in Germany. Kirch in particular made major investments in a digital platform, but ended up going bankrupt in 2002.

De Streel (2002) has reviewed the *MSG Media Services* decision along with many other Commission merger decisions in the electronic communications markets. He acknowledged that anti-competitive vertical effects in emerging markets were an important potential problem,[73] that merging markets should be left open to competition, and that such markets often involved substantial network effects hence were vulnerable to tipping in favour of the first mover. He questioned, however, whether the prohibitions and remedies imposed with regard to these mergers were truly warranted. In particular he believed the Commission should have looked deeper to see whether the parties really enjoyed enduring dominant positions in content or infrastructure which they might be able to leverage. He also thought that more analysis should have been undertaken spelling out why monopoly rents could not be taken without vertical integration. In other words, he questioned whether leveraging market power from the market with a pre-merger dominant position to an emerging market was the real motive for the merger.[74]

Kovacic and Reindl (1997, 26-27) also discussed the *MSG Media Services* case and noted that, "A similar relationship between parents and their planned joint venture situation led to a negative Commission decision in *Nordic Satellite Distribution*."[75] Kovacic and Reindl believed that this joint venture was blocked, as in *MSG Media Services*, because of the parents' market power in vertically related markets.[76] The parties in *Nordic Satellite Distribution* apparently argued, unsuccessfully, that "…the planned development of an

integrated digital Nordic encryption system which could be used for the reception of cable and satellite signals outweighed any potential anticompetitive effects of the joint venture."[77] Kovacic and Reindl noted that both cases raised the possibility that due to vertical links, companies with significant market power might use a joint venture to leverage their market power so as to control at an early stage access to "newly developing markets".[77] They went on to state:

> Both cases also demonstrate the "vertical integration dilemma" which is not untypical for rapidly developing high tech markets. It appears almost unavoidable that major companies with the necessary financial background, rights to premium content and communications know-how will be the first to provide new services and use newly developed technology in markets where investment costs are high and consumer reception is still uncertain. Vertical integration therefore is a natural and necessary development. It also may create efficiencies, for example if companies that control the media "software" integrate forward in markets related to program delivery markets or *vice versa*. As the two decisions also demonstrate, the most significant problems arise if few powerful players cooperate in the development and distribution of new technologies and obtain a gatekeeper position in the chain from program production to delivery of programs to consumers.[79]

Crossing the Atlantic, the merger announced in September 1998 between Viacom and the Columbia Broadcasting System (CBS) raised some difficult vertical as well as horizontal issues. This merger was intended to combine:

> ... the extensive motion picture and television production, cable network, video retailing, television station, television network, and publishing assets of Viacom, Inc. with the television network, radio station, and cable programming holdings of CBS, Inc., to create the world's second largest media conglomerate (behind Time-Warner), having combined 1998 revenues of $18.9 billion.[80]

The vertical concerns had to do with the combination of Viacom's substantial television production and programming resources with CBS' television network. As a result of the merger Viacom-CBS would be in an enhanced position to favour its own programming to the exclusion of programming sourced from independent and unaffiliated producers. The merger would also raise the possibility that Viacom-CBS would have an incentive to deny programming to its television rivals. Waterman (2000, 538) noted that there were significant economies of scope and transactions costs savings that could flow from integrating television production and distribution, and that if it resulted in the foreclosure of access to CBS by independent and unaffiliated producers, "...the viewing public would suffer

from reduced diversity and quality of programming." Waterman described why vertical integration could produce foreclosure:

> There are several economic reasons why we might observe this tendency toward self-dealing in television production and distribution. One is that contracting costs tend to be lower if business is conducted within the same corporation. For example, opportunistic behaviour by a producer whose show becomes more successful than expected will not materially affect a corporation that owns both the network and the show. The network also desires to control the production process to ensure that quality and content conform to expectations. That control is probably easier with commonly owned facilities. A related factor is reduced risk. Under common ownership, the network has no need to fear unexpected migration of the program to another network, and vice versa with respect to cancellations. Also, it may be that information about programming ideas are more effectively conveyed to networks and programming needs conveyed to producers within integrated companies.[81]

Waterman found evidence from the two other vertically integrated U.S. television networks (ABC/Disney, and the Fox Network/Fox television studios) suggesting that competition concerns involving foreclosure probably were over-rated as regards television media.[82] More generally, he observed that:

> Unlike widgets, entertainment products—such as movies or television series—are unique and, in advance of their production, have notoriously uncertain demand and probably, to some degree, uncertain demographic appeal. It is thus very difficult for the owner of a distribution facility, such as a television network, to predict in advance the source of products that will be most appropriate for exhibition on that network. Complete vertical integration is thus impossible to achieve, inherently leaving open opportunities for independent suppliers. As expressed by one television executive: "You can't consolidate creativity."
>
> As a matter of definition, any degree of self-dealing due to vertical integration in television has some foreclosure effect on unaffiliated producers. From a public policy perspective, however, the most important issue is access by the creators of those programs. Obviously, producers provide important creative services. Nevertheless, the same writers, talent agents, and other agents of production still have the ability to sell their ideas to the production entities of the major integrated networks. The result of integration is likely to be replacement of some independent producers with vertically affiliated producers. The continued access of other creative agents to network decision-makers, however, mitigates restraints on the effective flow of ideas through the system to viewers. Also, independent producers can cooperate with vertically affiliated

> producers, as evidenced by co-produced prime-time programs appearing on both the Fox and ABC networks.[83]

After making these points Waterman homed in on a critically important issue. He emphasized that after the merger there would still be four major broadcast networks in the U.S. (excluding WB and UPN):

> What determines the diversity of programming available to viewers is not whether those gatekeepers choose to make their decisions on a program-by-program basis or through some ownership relation, but on the number and horizontal market power of separately owned gatekeepers that are making those decisions.

The Department of Justice apparently came to a similar conclusion and permitted the merger to go ahead after the parties agreed to a number of divestments that helped preserve horizontal competition among networks.

The United Kingdom's Competition Commission faced similar vertical issues in a proposed merger in 2000 involving Carlton Communications Plc, United News and Media plc and Granada Group plc.[84] The programming related issues were not found to be significant, even in the absence of divestments required to preserve competition in the television advertising market. The reasons cited had to do with the ease of entry into program production, evidenced by the existence of some 1200 producers, and the way the resulting network would be structured. Presumably, the latter referred to considerable decentralization in programming decisions by individual ITN television stations.

Summing up

It is clear that vertical mergers in media markets can present important efficiencies as well as real problems for competition. Difficult trade-offs may be required. The competition problems largely have to do with access to content and final delivery to the consumer. As in other industries, competition authorities will have to make predictions about how markets will likely evolve and what consumers may be able to do to protect themselves if anti-competitive effects materialise. An apparent ability to reduce competition may not translate into a profitable post-merger strategy, and this may especially be true of risks of foreclosure as regards content. The rapidly changing nature of the media, including convergence trends, will have an important bearing on all this and could well affect both the analysis of competitive effects and the remedies fashioned.

5. Effects of media mergers on general program quality and diversity

One possible non-price effect of a media merger on consumers (including in their capacity as consumers of advertised products) has already been discussed. That involves a merger induced change in a media's advertising/content ratio. We turn now to non-price effects linked to the benefits consumers derive from the information and entertainment provided by a medium.[85] As with any other product, media content has important quality dimensions. Three in particular stand out: diversity in content; general quality of the text, images and/or presentation; and pluralism of views presented.

"Diversity" and "pluralism" (or plurality) are often referred to in discussions of the media but display considerable variation in meaning. To facilitate discussion, this paper will adopt the formulation contained in a United Kingdom consultation paper, i.e.: "Diversity refers to the variety of available programmes, publications and services, whereas plurality is about the choice people can make between different providers of those services."[86] Diversity therefore refers to the variety of *content* on offer, while pluralism refers to the number of different *providers* of media services, i.e. the number of different voices competing for attention. Greater diversity tends to improve consumer welfare in two different ways. First, it improves the match between consumer preferences and what is available from the media. Second, greater diversity may assist in the maintenance and development of particular national or community cultures. Greater pluralism, on the other hand, has more of an indirect effect on welfare. It contributes to public debate on important political issues and helps ensure that both private and public decision-makers are held accountable for their actions. It is worth flagging that there could be a great deal of diversity in a media market despite a simultaneous lack of pluralism, and the converse could also be true.

This section of the paper will consider diversity issues and the next will focus on pluralism.

Diversity issues are complex and can only be briefly explored here. Before doing that, it is necessary to digress by making a distinction between what is sometimes referred to as "internal" versus "external" diversity. Media offering a large variety of content can be described as more internally diverse than media specialising for example in news or targeting a specific type of audience, e.g. theme TV channels for children. External diversity refers to the variety of content available at any particular time to a consumer. There might be very little external diversity despite high levels of internal diversity. That would be the case for example if free-to-air TV channels all offered soap operas in the morning, news programs in mid-afternoon, cartoons in the late

afternoon, news over the supper hour, etc. Although content regulators appear to be concerned about both internal and external diversity, perhaps because some consumers have a highly restricted set of media to choose from, attention in this paper will focus exclusively on external diversity referred to simply as "diversity".

Diversity is important in media mergers essentially because consumers are *not* what we will refer to as "strongly homogeneous". They would be strongly homogeneous if they have either the same single interest or the same set of interests and identical preference rankings across that set. If they were strongly homogeneous, what little diversity there would be in the media would be rooted in the comparative advantages enjoyed by different types of media in covering aspects of essentially the same interest (e.g. breaking news for TV, less time sensitive news stories in magazines).

Media consumers are presumably willing to pay more for content that more closely matches their preferences. That would push competing media, especially those not distributed for free, towards differentiating their content offerings. As in other industries, this pressure in favour of increasing product differentiation could be weakened by cost considerations. In media this refers primarily to a desire to spread any fixed costs of content and distribution/diffusion as thinly as possible. There is also the potentially homogenising pressure exerted by a desire to increase advertising revenues. *Other things equal*, advertising supported media will choose content likely to generate as large a number of consumers as possible. To the extent different content genres have different audience drawing power, the drive to maximise audience size may contribute to reducing content diversity.

Making the "other things equal" assumption masks at least two important considerations affecting diversity. *First,* a medium might find it advantageous to serve a smaller niche audience rather than a larger general one. This is partly because advertisers are presumably willing to pay a premium to target their advertising on the groups of consumers most likely to buy their products.[87] To take an obvious example, local businesses are willing to pay a higher CPM for advertisements in local interest newspapers than in national newspapers. *Second*, niche markets might also be attractive to media owners simply because they will be able to charge consumers more, or impose a higher advertising/content ratio on them, the more the content interests them and cannot readily be found elsewhere. This second effect could reinforce the first to the extent that niche market consumers patronise very few other media. In that case, advertisers are driven to patronise the niche market medium to be sure of reaching the set of consumers wed to it.

The relationship between concentration levels and diversity, hence the degree to which merger induced increases in concentration could affect

diversity, could easily vary across media markets. In some markets, the different content genres could vary a lot in their power to draw audiences thus making for little diversity regardless of the level of media concentration. In other media markets, there could be little such difference in drawing power so that a good deal of diversity could materialise, hence opening the way for concentration levels to have a significant effect. Similarly, differences in the degree to which content diversity in fact shields a medium from competition would affect the relationship between concentration and diversity. The impact of a merger on diversity is further complicated by a likely non-linear relationship between concentration and content variety.

A simple example may help explain why there might be a non-linear effect of concentration on diversity. Let us assume that 80% of free-to-air television viewers will only watch sports programming while the other 20% are exclusively interested in news programs. Assume further that the CPM paid by advertisers is the same regardless of whether an audience is composed of sports or news lovers, that the costs of producing sports and news content are identical, and that the only product differentiation possible is sports versus news (i.e. there is no difference in audience drawing power as regards any two sports or any two news programs). Under these assumptions, as long as content costs are sufficiently modest, a medium with an unassailable monopoly will find it attractive to offer one sport and one news channel, i.e. optimal diversity is supplied. But if instead of monopoly there were two, three or four television broadcasters each offering a single channel, none would offer news programming. Once the number climbs to five, however, a news channel would probably be offered.[88]

Generally speaking, the effect of a media merger on content diversity will depend on three factors. The first is the importance of content related fixed costs. The more significant these are, the more the post-merger firm will tend to offer the same content over all its constituent parts, hence tend to reduce content diversity from what it was pre-merger. The second factor relates to a desire to reduce cannibalisation, i.e. post-merger competition between the merged units. This is more pertinent the closer the merging entities are in product space. The third factor is a desire to pre-empt entry into the market. These three effects are discussed by Berry and Waldfogel (1999) who concluded that it was difficult to make a clear prediction on the basis of economic theory alone.[89] They therefore turned to empirical evidence and found a non-linear relation between concentration and diversity.[90] These results were based on what happened in program variety in U.S. radio broadcasting after the 1996 *Telecommunications Act* loosened restraints on the number of stations that could be owned in the same local market.

If it could be determined that a media merger would reduce diversity, would that provide a reason to block or condition a merger? The answer to

that is not entirely straightforward. The problem is that diversity reduction could be inseparable from increases in general quality. Consumers with main line tastes may not mind reduced diversity and could stand to benefit from increased content quality or perhaps a lower price. This could present competition authorities with the need to trade-off benefits for one group of consumers against costs borne by another. Such a trade-off will arise, however, only if a media merger will indeed lead to a decrease in price or an increase in content quality. The previous section on two-sided markets indicated that a price drop was a possibility, but far from a certainty. As for a quality increase, this too can hardly be assumed.

A media merger will affect content quality if it alters either the marginal costs or revenues associated with changes in content quality. While it is not obvious why a media merger would systematically affect the marginal cost side of that equation, it is easy to see that it could impact on marginal revenues. The simplest way in which a merger could have such an effect is by increasing the number of consumers for each article/program carried on the combined media. Consider for example a newspaper merger in which one of the newspapers is simply closed down post-merger. This would probably result in a larger circulation for the merged entity. That in turn should translate into higher sales and advertising revenues per article printed and could increase the marginal revenue associated with an increase in content quality. Whether the merger and subsequent shut down of one of the papers will have such an effect depends in part on how much, if at all, the merger reduces competition for consumers. Reduced competition for consumers will translate into diminished incentives to maintain let alone increase the quality of articles printed.

An important implicit assumption in the previous paragraph is that media produce all their own content, i.e. there is no content market. If there is such a market, one cannot determine the effects of a media merger on quality without considering how the merger would impact on the content market.[91]

Summing up

This section has argued, that the effects of a media merger on both advertisers and consumers, cannot properly be assessed without considering how the merger might affect quality and diversity. One might agree with that statement and opt, however, to put very little emphasis, if any, on quality and diversity when reviewing media mergers. This is because these attributes are inherently difficult to measure and the effect of a media merger on them is highly complex. Even worse, a media merger could increase quality and reduce diversity or *vice versa*. In addition, many countries address diversity issues through content regulation and subsidised public broadcasting. Given

these complications and difficulties, competition authorities could well decide to leave diversity at least to the regulators.

As a final point about diversity, it should be noted that at least as regards television, the development and expansion of pay-TV, and the increase in spectrum availability due to compression technologies plus the advent of new distribution channels (i.e. satellite and Internet) together mean there are less reasons to be concerned about the effects of mergers on diversity.[92]

6. Media mergers and pluralism

In this section of the paper, attention shifts away from a concern for economic welfare, but economic concepts remain relevant. In particular there are important externalities that apply to the media. The principal externality has to do with the benefits all citizens receive when each voter makes wise choices. Given that externality, one might expect an undersupply of the kind of information needed to make such choices.

The media make two important contributions to establishing and preserving vibrant democracies and the closely related rule of law. First, the media serve as watchdogs to inform the public of shortcomings and wrongdoing both by private and public actors. Sometimes this leads to new laws and regulations being passed. More often, it simply ensures that a price is paid when the public trust is betrayed. Second, the media constitute the channels through which alternative political choices are communicated to the public, and subjected to critical assessment.

One can rely on politicians and political parties to finance their own advertising, and to some extent to expose the weaknesses of each other's proposals. That will likely fall short of providing the variety and completeness of background information, analysis and critique required to maintain a healthy democracy.

When it comes to the news and commentary functions of the media it is helpful to think in terms of a "marketplace of ideas", i.e. the "…sphere in which intangible values compete for acceptance."[93] In a document prepared by Ireland's Department of Enterprise, Trade & Employment, one reads:

> Political concern with media pluralism is born of a sense of the value of free speech, a recognition that speech in this context is intimately connected with an entitlement to read, watch and listen to a diversity of views and the shared value that such diversity is essential to the healthy functioning of a democracy. The conventional free speech philosophy is defended and characterised by the image of an atomistic market-place of ideas in which ideas freely jostle and compete with each other for the attention, loyalty and ultimately the belief of the citizen. Just as the process of competition in the market-place for goods leads to the more

> efficient production of better refrigerators for the benefit of the consumer, so it is envisaged that debate, disagreement and diversity will lead, in the end, to truth.[94]

A desire to ensure that many, if not all, points of view are represented in the marketplace of ideas is frequently referred to as the need to maintain pluralism in the media.

6.1. Why might pluralism be relevant to media mergers?

While it is self-evident that media mergers reduce the number of owners ultimately controlling the media, several reasons are sometimes advanced as to why this might not have any great significance for pluralism. *First*, there is a very large variety of *sources* of news and a merger is not likely to change that. Against that view, however, one must remember that a multiplicity of sources matters little if they are denied access to the media. Media mergers could create or reinforce important bottlenecks.[95] *Second*, even if one particular type of media, say newspapers, were monopolized there might remain a sufficient number of alternative media. This clearly raises an important empirical issue which cannot be explored properly here. Suffice to say that the evidence reviewed in the section on market definition suggests it would be unwise to assume that consumers can readily substitute among different types of media as sources of news and news related commentary.

There is yet a *third* reason why concentration in media ownership may not matter much for pluralism. It has to do with the incentives and abilities media owners may have to determine media content. Baker (2002) provides an extensive discussion of this point beginning with elaborating the argument that profit maximising media owners are driven by competition to supply the range of content consumers want, presumably including content of a political nature. As in other markets, if barriers to entry are low competition among media could be vigorous even if concentration levels are high.

If competition is weak, however, and results in a certain degree of supra-competitive profits, media owners will acquire some lee-way to sacrifice profits in order, in effect, to subsidise content ideologically pleasing to them.[96] In addition, as the number of competitors declines, rivalry could produce the same kind of homogenising influence as it might regarding content diversity. Gabszewicz et al. (1999, 2) considered how both advertising and consumer financing of newspapers both tend to encourage the presentation of centrist as opposed to minority views:

> The first source of financing [from readers] calls for some matching between the political "image" presented by the editor of a newspaper, and the political preferences of his readers. Otherwise they could be tempted to buy the newspaper supporting the opposite opinion since the latter

> becomes a closer substitute to the former. On the other hand, the second source of financing, relying on advertising receipts, requires a sufficiently sizable readership in order to make the newspaper attractive as a media support for the advertisers: The impact of the advertising message increases with the size of the audience. It turns out, however, that confirming the political preferences of the readers in order to stabilize his readership may well have a negative impact on the advertising receipts of the editor. Take, as an example, a newspaper politically targeted to the left. If the editor decides to present his leftist ideas in a too extreme manner, confirming thereby the political preferences of his extreme left readership, he may well loose his customers who are closer to the centre, to the benefit of his rightist competitor! The resulting reduction of his market share makes him less attractive to the advertisers: The advertising messages promoting their products have now a weaker impact. On the contrary, the rightist competitor, now enjoying a larger audience, becomes more appealing to the advertisers! This dependence of advertising receipts on the political image displayed by the editors may lead them to moderate the political message of their newspapers. This tendency must be expected to be particularly significant when the readers do not give too much weight to the political content of the newspaper, or when advertising receipts are strongly correlated with the size of the readership. (footnote omitted)

Baker also presents, and later questions, the view that owners simply cannot effectively control the content of their media:

> Daily news is produced by the collective action of many journalists and editors who operate with set routines and behave largely according to professional standards. An owner is simply not in a position to dictate the practice of journalism and it is this practice, not ownership, that mostly determines the content of the news that people receive. Parallel, even if slightly weaker, claims can be made about the assertedly more creative world of entertainment content as well as about genres such as magazine writing.
>
> Rather than being controlled by owners…[the practices of the people constructing the news]…are overwhelmingly determined by some combination of professional education, on-the-job acculturation, and institutional or organisational imperatives that themselves often reflect the economic necessities of media production.[97]

Baker cites sociological evidence supporting these views but offers two principal critiques:

> …owners either directly or through top management whom owners…select can substantially affect the creation of the workplace

> culture and notions of acceptable and unacceptable routines….[O]wners can [also] vary dramatically in their orientation toward expertise, ideology, or diversity among employees. These factors mean that owners' choice of employees – or their choice of those employees (e.g., top editors) who choose other employees – can have tremendous consequences for the newsroom capabilities, culture, and biases that can translate into the orientation of the content finally produced. Finally, although direct interventions may be rare, their occasional occurrence can queue the direction and stimulate the practice of employee self-censorship, which journalists report to be a major determinant of content creation in most corporately owned media.[98]

Baker also suggests two positive reasons for preferring dispersed media ownership. They are:

1. "…it is plausible to expect that a larger number of competing "watchdogs," each of which competes to discover abuse, will better perform this role than would only a few…."; and
2. "Those that most need to be watched, those with political or economic power, often seek to control or co-opt the media. Control or corruption is likely to be easier the fewer media entities these co-opters need to control. A few can be purchased, threatened, bribed, intimidated, or appealed to. Control of larger numbers of *influential* media is more difficult."[99]

Baker's anecdotal evidence supporting these points highlights certain advantages and disadvantages of media conglomerates. On the one hand conglomerates present more points through which pressure can be exerted against a medium. On the other hand, to the extent conglomerates are large and diversified, they should be better able to withstand economic and political pressures, and to afford the high fixed costs required for investigative reporting. Against the latter position, Baker cites Eric Severeid, "…one of the United States most prominent television news commentators of the last generation…" who reportedly said:

> …the bigger the information media, the less courage and freedom of expression they allow. Bigness means weakness….Courage in the realm of ideas goes in inverse ratio to the size of the establishment.[100]

6.2. How does merger review under competition law contribute to media pluralism even when it is not explicitly concerned with that objective, and is such support enough?

Assuming ownership is critical to media pluralism, merger review focusing only on economic markets (i.e. ignoring the marketplace of ideas) nevertheless makes an important contribution to pluralism. It does this by preserving freedom of choice for both consumers and advertisers. It is through

protecting freedom of choice that competition authorities shield consumers and advertisers from anti-competitive increases in copy or viewing costs, reductions in content quality and diversity and increases in advertising rates potentially linked to a media merger. Where there is sufficient freedom of choice to prevent these negative effects, will there also be enough media pluralism to ensure the media can play their democracy enhancing roles? That is a much debated question, and there are good reasons to doubt a positive answer.[101]

It could happen that some media markets are highly concentrated or would become so if a media merger were permitted to proceed. If these same markets are also characterized by low barriers to entry and exit, media mergers might not reduce economic welfare. They might nevertheless have significant negative effects on media pluralism. A United Kingdom communications White Paper states:

> Fostering competition is the first step to promoting plurality in the media. A competitive market is likely to be one with many voices and diverse content, though there is no guarantee that this will be the case. Competition experts accept that the threat of potential new entry into the market is a factor which can act as a constraint on the pricing behaviour of larger companies and act as a deterrent to the exploitation of market power. However, in relation to media markets, if new entry does not occur, or existing companies fail to develop a diverse range of services, the number of sources of independent views might be limited. Given the democratic importance of the media, we are concerned to see that diversity of opinion and expression is actually maintained and increased. Therefore, we may continue to need backstop powers to underpin plurality of ownership and a plurality of views in the media.[102]

A subsequent United Kingdom consultation paper exploring the wisdom of ownership limits as a means of fostering pluralism added:

> Competition rules can address issues of concentration, efficiency and choice, and will tend to encourage dispersed ownership and new entry. They should do all this more effectively once the Enterprise Bill comes into force. However, they cannot guarantee any of it. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice.[103]

Bolstering the supposed asymmetrical effect of potential entry, i.e. it could ensure economic efficiency without protecting pluralism, there is also the point that product homogeneity is normally treated as indicative of a high

potential for competition. When it comes to the media, however, highly homogeneous hence readily substitutable content is inimical to pluralism.[104]

Further to the potential entry point, it could happen that competition authorities justifiably rely on such entry to ensure a merger does not reduce economic efficiency, but it may prove quite inadequate to protect pluralism. Price or advertising rate changes are presumably noticed very quickly by consumers and potential entrants. It may take considerably longer for a significant number of citizens to recognize they are being served with biased or incomplete reporting. By the time they begin to search for alternative sources, perhaps linked to new entry, too much damage might already have been done to the body politic.

6.3. Should pluralism concerns be explicitly incorporated into competition law review of media mergers?

Some observers believe that something can and should be done to address pluralism in the course of competition law review of media mergers. This point of view is advocated, for example, by Stucke and Grunes (2001).[105]

Stucke and Grunes begin by noting that the "marketplace of ideas" is generally not part of United States antitrust analysis of media mergers.[106] They argue, though, that the legislative history of U.S. antitrust laws and some leading Supreme Court and lower court antitrust cases, "…support the inclusion of the marketplace of ideas in the antitrust analysis of media mergers."[107] Stucke and Grunes fully acknowledge, however, that there would be significant difficulties in applying the U.S. Horizontal Merger Guidelines, especially their concentration presumptions, to marketplace of ideas issues. The whole notion of product substitution might not really apply when pluralism is the issue. Referring to newspaper mergers, but the point has wider application, Stuckes and Grunes state that:

> …the marketplace [of ideas] is not about consumers switching from one homogeneous product to another. Rather, it is the net increase in consumer welfare from having many competing news sources and editorial voices. As Judge Hand aptly stated about the marketplace of ideas [in the *Associated Press* wire service merger] – and it bears repeating – "it is only by cross-lights from varying directions that full illumination can be secured." Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternatives but the overall societal impact is not significant), for restraints in the media, the alternatives may be inherently unsatisfactory and the costs imposed on society may be significant.[108]

Stucke and Grunes made three proposals to guide how a merger's impact on the marketplace of ideas could be taken into account:[109]

1. "…antitrust agencies should look beyond price effects generally, and advertising prices specifically, in media mergers and consider other non-price dimensions of economic competition, such as diminished quality and choice."[110]
2. "…efficiencies need to be viewed against the backdrop of the marketplace of ideas." More particularly, "…when efficiencies are claimed in media mergers, one should recognise the tension between the efficiencies that arise from the homogenization and uniformity of products, on the one hand, and the desire for diversity in the marketplace of ideas."[111]
3. "…direct evidence of anticompetitive effects should be given significant weight by the agencies and the courts."

The third proposal refers to evidence of reduction in diversity and plurality.

Stucke and Grunes' first proposal is more straightforward and less controversial than the last two. Points two and three may require competition authorities to make problematic, essentially political trade-offs. As Gibbons (1999, 173) states:

> …it should not be assumed that a formula can be devised to determine the acceptable level of pluralism. Economic criteria can provide *presumptive* thresholds for political decisions. But media pluralism is a *political* issue and judgments about the appropriate amount of diversity in a society are based on experience and prudence.

Given the non-quantifiable, complex and inherently political nature of pluralism concerns, it is not surprising there are those who advocate leaving pluralism issues, including those arising from media mergers, to content and ownership regulation perhaps buttressed by public broadcasting.[112] This view is in line with what seems to be a general trend in favour of concentrating competition laws on economic welfare rather than larger public interest questions.[113]

A parliamentary inquiry into possible amendments to Canada's *Competition Act* devoted a chapter to how the *Act* applies to the newspaper industry and how that might be changed. It identified two approaches to dealing with "social capital" issues in newspaper mergers. The first was to amend the *Act* to create industry-specific provisions for newspapers so as to widen newspaper merger review to include non-economic factors.[114] It presented several arguments against that course of action. One of them was:

> In essence, there are simply no analytical models for expressing social concepts in an objective and meaningful way. Ultimately, to challenge a proposed transaction, the [Competition] Commissioner must be able to provide compelling and objective analysis detailing the expected impact

> of the deal on markets. Expanding the objectives of the Act to take account of such considerations would require Canada to make a complete paradigm shift, away from the analytical approach currently used by antitrust authorities the world over, towards a more holistic model relying not on economics, but on the disciplines of psychology, sociology and political science.[115]

The Canadian parliamentary inquiry also briefly considered a hybrid model mixing traditional antitrust analysis along with a more "holistic". This was immediately critiqued with some rhetorical questions:

> Which of the two factors would be given greater weight? The economic or social? How would the Tribunal gauge the merit of the parties' arguments on the social impact of the transaction?"[116]

Examples of customised approaches to media market merger review that appear in part to be motivated by pluralism concerns can be found in a number of countries. In the European Union, a specific derogation is provided to the European Commission's Merger Regulation, i.e. Article 21(3), to allow member states to adopt specific measures to promote plurality in the media. The United States *Newspaper Preservation Act* allows newspapers in financial difficulties, but falling short of the failing firm exception, to merge all but their editorial desks.[117] The United Kingdom also applies a special merger regime to newspapers but is currently discussing changing that.[118] Germany has formulated a modified approach to newspaper mergers. Through imposing lower thresholds for notification requirements and for deciding whether to subject newspaper mergers to extensive examination, Germany ensures they receive extra scrutiny.

Ireland's new competition statute, adopted in 2002, included a more far-reaching special regime for some media mergers. It applies to: "…a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; a business of providing a broadcasting service; or a business of providing a broadcasting services platform." The special regime works as follows:

> When the Authority receives notification of a merger which it considers to be a media merger, it must inform the parties that it is of this opinion, and forward a copy of the notification to the Minister. The Minister can direct the Authority to carry out a Phase 2 investigation, and can override Authority approval with or without conditions. In other words, if the Authority blocks a media merger, the Minister cannot unblock it, but if the Authority approves a merger, either absolutely or conditionally, the Minister can block it or can apply new or stricter conditions. In making such a determination the Minister must have regard to, and only to, the "relevant criteria", which are (Section 23(10)):

a. the strength and competitiveness of media businesses indigenous to the State;

b. the extent to which ownership or control of media businesses in the State is spread amongst individuals and undertakings;

c. the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings;

d. the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State; and

e. the share in the market in the State of one or more of the types of business activity falling within the definition of "media business" in this subsection that is held by any of the undertakings concerned, or by any other individual or other undertaking who or which has an interest in such an undertaking.

In dealing with a media merger at the Phase 2 stage, the Authority is to form an opinion on how the application of the relevant criteria should affect the exercise by the Minister of his powers, and shall inform the Minister of the opinion it has so formed on his request.[119]

With or without a customised approach to media market merger review, it is quite likely there will remain a need for regulation to preserve satisfactory levels of pluralism. As Baker (1999, 917-918) expressed it:

> …at least two considerations support subjecting media ownership to additional regulation. Pragmatically, the advantage of dual legal regime and dual agency enforcement is that lack of political will within one agency or narrow judicial interpretation of laws enforced by one agency will be less damaging. More fundamentally and conceptually, media specific concerns reflecting both features of media economics and special democratic roles of the media require media specific policies. Antitrust laws, even on their broadest interpretation, simply do not respond to all the media specific reasons to limit concentration. An expansive antitrust law interpretation may be sensitive to a merged entity's power to narrow consumer's content choice even when the merger did not lead to any power over pricing. However, antitrust law's focus on consumers is unlikely to embody the democratic concerns with assuring maximum numbers of separate owners participating in the "marketplace of ideas" or with democratic worries about concentrated power to influence public opinion. (reference omitted)

Where there is regulation, whether it be focused on diversity or pluralism issues, competition authorities should engage in competition advocacy to

ensure the regulations reduce competition to the minimum extent necessary to permit the regulations to attain their objectives. They should also work out means of co-operating with media regulators to ensure that merger review is as quick and predictable as possible. Canada provides an example of how this can be formalised through a written agreement setting out a clear division of labour and describing how competition authorities and regulators will co-operate.[120]

Summing up

Pluralism presents a number of difficult and highly important questions for media merger review, but there is no consensus about how to answer them. Although competition authorities can make a positive contribution to pluralism even when not explicitly trying to do so, it is unlikely that review focused only on economic efficiency will adequately address pluralism concerns. This may be why many countries have ownership regulations that supplement merger review under competition law. There is no reason to expect a conflict between those regulations and merger review conducted by competition authorities, i.e. companies can abide by both the regulation and the competition statute. There could, however, be situations where competition authorities would allow a merger that the ownership rules would block, and *vice versa*.

7. Remedy issues

Analysis of remedies actually used in media merger cases is beyond the scope of this background paper, but should be available in the many country submissions expected to be received, and eventually published, in connection with the roundtable discussion this paper pertains to. We confine ourselves to a few general remarks.

It is clear that media markets, or at a minimum broadcasting, are for the most part qualified to be treated as what an earlier OECD roundtable discussion referred to as "emerging high innovation markets".[121] In such markets, competition authorities are under pressure to take a minimalist approach to remedies on the grounds that competition problems, if they arise at all, will prove very short lived. The counter-argument is that first mover advantages connected to economies of scale and network effects could make it very difficult for the market to self-correct should competition be restricted post-merger.

Competition authorities generally prefer structural as opposed to behavioural remedies for anti-competitive mergers. There are good reasons though to give special attention to behavioural remedies, despite their inherent monitoring costs and difficulties, in markets characterised by rapid

change. This is primarily because such remedies can be changed as market conditions evolve, and can also be time limited. Both features can make behavioural remedies considerably less interventionist than mandatory divestments. It should also be noted that in rapidly changing markets, competition *for* the market may be substantially more important than competition *in* the market. In such an environment, it might be very difficult to find a buyer for divested assets that will be able to employ them in a way that makes a significant ongoing positive contribution to competition.

There is one area in particular where competition authorities have shown a penchant for using behavioural remedies for problematic media sector mergers. This has to do with mergers creating or reinforcing a type of gatekeeper power. Often this has to do with controlling access to content essential to new entrants, e.g. premium content, especially sports rights, for new television and video platforms.[122] It also shows up in terms of access to final consumers.

In the section of this paper dealing with vertical mergers, reference was made to de Streel's (2002) review of a considerable number of European Commission reviews of electronic communication's mergers. One of de Streel's two main conclusions from that review was that: "…intervention in these cases is often more efficiently done by sector-specific regulation than merger remedies, which calls for an enhanced cooperation between the Commission and [national regulatory authorities]."[123]

8. Final remarks

There is no need to repeat the key points of this paper since they have already been listed in the introduction. There are three important points, however, that warrant a final emphasis.

The *first* point is that media mergers may present difficult trade-offs. In particular competition authorities might be confronted with a merger having beneficial effects on one side of a media market while having harmful effects on the other, e.g. advertising prices may go down but prices to content consumers go up. Competition authorities might also have to deal with situations where content diversity declines but its general quality rises, with the result that content consumers with majoritarian tastes are better off while other consumers are worse off. Another trade-off could arise if a merger will increase the quantity of advertising. Consumers disliking advertising, especially when it is difficult to avoid (as in free-to-air television and radio), could be harmed by an increase in its quantity, while other consumers who like advertising may be pleased with that development. Finally, a difficult trade-off could materialise if a media merger changes the incidence of price

discrimination or versioning. Once again, some consumers might be better off as a result, while others are harmed.

The *second* point warranting special emphasis is that although advertising and gatekeeper effects can be important in media mergers, they are not the only issues that should be considered. Effects on general quality and diversity should also be considered by competition authorities, even though they are difficult to measure and assess.

The *third* point has to do with pluralism. There may be considerable international variation in the degree to which competition authorities are willing and able to consider pluralism issues when reviewing media mergers. There might also be differences of opinion among competition authorities concerning the wisdom of including pluralism within the scope of merger review. All would likely agree, however, on a number of important points:

1. When media mergers are blocked or conditioned in order to prevent anti-competitive effects linked to higher levels of ownership concentration and/or higher barriers to entry, competition authorities simultaneously make a positive contribution to pluralism;
2. Since pluralism issues are hard to measure, complex and inherently political, competition authorities mandated to enhance or protect pluralism should also be given as much guidance as possible about how to make trade-offs involving pluralism and economic efficiency; and
3. Whether or not competition authorities include pluralism in their media merger reviews, they should co-operate closely with media regulators in order to economise on investigative resources and to ensure that regulatory goals are attained with minimal negative effects on competition.

Notes

1. United Kingdom (2001, 5)
2. Gomery (2002, 2)
3. Some might insist that the main economies of scale in media are actually better described as highly significant fixed costs. Economies of scale technically refer to what happens to unit costs as all factors of production are proportionately increased, i.e. measured over the long run in which there are no fixed costs. It appears, however, that most articles on the media industry refer instead to economies of scale and that convention will be followed here.
4. Europe Economics (2002, para. 2.2.20) describes this as follows:

   > Versioning can extract consumer surplus provided the menu of choices offered to consumers creates incentives for high-valuation consumers to opt for high-price versions, whilst low-valuation consumers still have an opportunity to purchase the cheaper products. The arbitrage problem is circumvented as the strategy involves offering the same options to all consumers but priced in such

a way that consumers with different levels of willingness to pay for the same basic product choose different options, self-selected according to the product variation. The information problems associated with price discrimination by customer group may also be alleviated, if a correlation between consumer preferences and the value of product to them can be identified and used to design a suitable menu of products.

5. Europe Economics (2002, para. 2.2.21) citing Shapiro and Varian (1999, 62). This list was titled: "Product Dimensions Susceptible to Versioning and their Likely Users/ Uses" and the two columns were headed "Product dimension" and "Likely users".

6. Ireland (2001, 3). See also United States (Department of Justice) (2000, 8).

7. There will probably be substantial variation across media as concerns consumers' attitudes to advertising. Perhaps informative advertising, i.e. of prices and points of sale, is more appealing to consumers than brand building advertising. But what if the brand building advertising operates by offering an image that consumers hope to be acquire by using the product? That advertising may generally be liked by consumers, including those who already own the product and want to be reassured concerning their purchase. It might also be true that advertisements are less disliked by some content consumers the easier they are to avoid. Newspaper and magazine advertising would fall at one end of the easy to avoid spectrum and radio advertising at the other. Television advertising would fall somewhere in the middle, thanks to the mute buttons on remote control devices and increasing use of recording devices that can be programmed to remove advertising.

   Gabsszewicz and Sonnac (2002, 1-3) cite various theoretical and empirical studies suggesting that attitudes to advertising in different media may well differ across countries. That suggests that what makes advertising liked or disliked is not necessarily straightforward or much explained by the factors mentioned just above.

8. Readers are referred to: Marsden (1999, 31-40) for a good description of the standards issues involved in set-top box decoders, and how these could produce important gatekeeper effects; and to MacKie-Mason (2000, 15 & 17) who notes that network effects linked to proprietary, non-interactive standards can give rise to powerful tipping effects and also constitute a powerful barrier to entry in some media markets.

9. European Commission (1997, 5)

10. OECD (1999, 43)

11. European Commission (1997, 11-12)

12. See Humphreys (1999, 9).

13. See *loc.cit.*

14. *OECD* (1999, 43)

15. *Ibid.*, p. 44

16. See for example: United Kingdom (2000) and (2001)

17. There was a veritable merger wave in the United States when the 1996 Telecommunications Act relaxed certain ownership restrictions in radio broadcasting. See Klein (1997).

18. For a general introduction to the economics of two-sided markets, see Rochet and Tirole (2001), Armstrong (2002), Evans (2002) and Evans and Oldale (2003). In Evans (2002, 34) one reads:

> A market is two-sided if at any point in time there are (a) two distinct groups of customers; (b) the value obtained by one kind of customers increases with the number of the other kind of customers; and (c) an intermediary is necessary for internalizing the externalities created by one group for the other group. Two-sided markets tend to result in businesses that supply both sides of the market, that adopt particular pricing and investment strategies to get both sides of the market on board, and that adopt particular pricing and product strategies to balance the interests of the two sides. (reference omitted)
>
> After noting that economists use the term "indirect network effects" to refer to benefits each customer group receives when members of another customer group are on the same platform (see page 2), Evans and Oldale state:
>
> …firms in multi-sided markets secure profit opportunities from internalizing indirect network effects from distinct customer groups whose demands are interdependent. (4)
>
> Rochet/Tirole and Evans stress that two-sided markets involve an important "chicken and egg" problem that must be solved to get a business up and running, and that there are many different ways of doing this even within what may be the same market.

19. The relevant interactions, seen from the perspective of television stations have been succinctly summarised as:

> Broadcast television stations compete for advertisers by choosing programming to attract viewers to their stations. In choosing programming, a station tries to select shows that will appeal to the greatest number of viewers, and also tries to differentiate itself from other stations by appealing to specific demographic groups. Advertisers, in turn, are interested in using broadcast television spot advertising to reach a large audience, as well as to reach a high proportion of the type of viewers that are most likely to buy their products.
>
> United States (Department of Justice) (2001, para. 18)

20. See Rochet and Tirole (2001) and Evans (2002). The latter distinguishes between two types of two-sided markets, i.e. "market makers" and "audience makers" – see pp. 15-17 of his paper. Media firms clearly fall in the latter category.

21. See Lande (2001, 517-518).

22. A certain size might be necessary to garner a sufficiently large and predictable audience to interest advertisers.

> The author wishes to thank Allen Grunes of the U.S. Department of Justice for suggesting the cinema example.

23. Rochet and Tirole (2001) discuss the phenomenon that in some two-sided markets one side ultimately pays the total price regardless of how it is initially apportioned. See also Ludwig (2000).

24. See Dukes (2001) for an analysis of the importance of the informative versus brand-building advertising distinction. Dukes makes the argument that advertisers wishing to engage in brand-building advertising may desire media that are less competitive on the consumer side because these will tend to offer more advertising and lower advertising rates. The implicit assumption is that in

such media, consumers generally dislike advertising so reductions in competition for consumers may be needed to make a higher advertising/content ratio profitable. In contrast, advertisers undertaking advertising of a more informative nature may prefer media to be more competitive on the advertising side because they will tend to offer less advertising at higher advertising rates. The result will be less informative advertising by producers taken together and, other things equal, higher profits for the advertisers.

For a brief overview of how advertising can help or harm consumers, see Tirole (1988, 289-295)

25. See George and Waldfogel (2000, 5-6 & footnote 9) for references to arguments that consumers might be better off with monopoly newspapers. Their footnote 9 included a reference to Chaudhri (1998) who found that newspaper prices are lower in monopoly as opposed to duopoly served cities in Australia. George and Waldfogel's footnote 9 points as well to three empirical studies for the newspaper industry apparently showing that "…concentration may in some cases benefit consumers."

26. Interested readers are referred to:
    - George and Waldfogel (2000) – see n. 23 supra
    - Dukes (2001) – considers how the degree of competition on the consumer side of the market will affect the quantity of advertising offered to advertisers and how that in turn will affect advertisers profits. As noted in n. 22 supra, that profits effect could depend on whether advertising is brand-building or informative in nature.
    - Cunningham and Alexander (2002) – the main finding of their model was that the profit-maximizing response of broadcasters to a change in concentration depends in part on how consumers will respond to a change in the ratio of advertising to non-advertising content. These authors also consider the welfare effects of advertising induced increases in product prices.
    - Gal-Or and Dukes (2002a) – this article notes that if advertising is informative, hence pro-competitive in nature, there is an additional reason to expect a media merger that increases the supply of advertising will reduce advertising rates. It is that the demand (i.e. the demand curve rather than quantity demanded) will decrease due to advertising tending to reduce rather than enhance advertisers' profits.

27. Canada (House of Parliament) (2000, 3)

28. United States (Department of Justice) (2001, para. 21)

29. See United States (Deparment of Justice and Federal Trade Commission) (1997, 4-8)

30. See Europe Economics (2002).

31. See Bird & Bird (2002).

32. Europe Economics (2002, paras. 1.4.3 and 1.4.4)

33. For a more general discussion of market definition problems specific to two-sided markets, see Evans (2002, 49-51).

34. Waldfogel (2002, 3-4)

35. Europe Economics (2001, para. 2.3.15)

36. This was the value chain identified in OECD (1999, 34). The Bird & Bird study presents a somewhat more extensive list: raw content; production of content;

content aggregation; financing (i.e. advertising and public funding); wholesale distribution; and retail distribution. See Bird & Bird (2002, para. 184).

37. Europe Economics (2001, para. 1.5.6), emphasis added

38. *Ibid*., para. 1.4.5

39. *Ibid*., para. 3.5.32

40. Bird & Bird (2002, para. 1003)

41. Its final criticism, at para. 26, was:

> …the SSNIP test is exclusively focused on a quantitative approach to substitutability, i.e., the reaction of consumers to a variation in price. Consequently, that test takes little if not no account of qualitative criteria such as strategic competition and innovation decisions, on the grounds of which a company may decide to compete not only on prices but also on services. However, that criterion may be crucial, particularly in the media environment, where innovation plays a key role. Companies would therefore tend to compete with new tools, which are often considered as more important than price. The likely reaction of consumers to a theoretical price increase may therefore be of limited use.

42. *Ibid*., para. 27

43. OECD (1999, 12-13), footnotes omitted

44. Klein (1997, 5). Empirical support for treating radio as a separate antitrust market can be found in Ecklund et al. (1999).

45. Bush (2002, 14). These conclusions were qualified because of some data problems, but following the qualification, Bush notes: "The estimated elasticities are not, however, inconsistent with economic theory and do not appear unreasonable." (14)

46. United States (Department of Justice) (2001, paras. 11 & 13)

47. Richtel (2003)

48. OECD (1999, 55)

49. Ibid., p. 58

50. See Pereira (2002, 2) and Humphreys and Lang (1998, 25).

51. See Humphreys and Lang (1998, 25) and Abbamonte and Rabassa (2001, 219)

52. This view is roughly supported by Abbamonte and Rabassa (2001, 215-216).

53. OECD (1999, 60 references omitted)

54. See Pereira (2002). Mr. Pereira was writing in a personal capacity rather than as a member of the European Commission's Competition Directorate (Media and Music Publishing Unit).

55. Pereira (2002, 3-4) outlined two ways in which this could come to pass:

> First, AOL/Time Warner would be in a position to develop a closed proprietary formatting technology for all the downloads and streaming of Time Warner and Bertelsmann tracks. The formatting language of AOL/Time Warner could become an industry standard and competing record companies wishing to distribute their music on-line would be required to format their music using the new entity's technology. Because of its control over the relevant

> technology, the new entity would be in a position to control downloadable music and streaming over the Internet and raise competitor's costs through excessive license fees.
>
> Alternatively, AOL/Time Warner could format its music (and Bertelsmann's) to make it compatible with its own software Winamp only, ensuring at the same time that Winamp could support and play different formats used by other record companies.
>
> …By formatting its music and the music from Bertelsmann to make them compatible with its own software Winamp only, the new entity would cause Winamp to become the only "player" in the world capable of playing virtually all the music available on the Internet. By refusing to license its technology, the new entity would impose Winamp as the dominant music player as no other player would be able to decode the proprietary format of TW and Bertelsmann music. As a result of the merger, the new entity would control the dominant player software and could charge supra-competitive prices for it. Consequently, AOL/TW could end up holding a dominant position on the emerging market for on-line music delivery.

It should be noted that both Time Warner and Bertelsmann were among the five largest owners of music content, and Time Warner had, through contractual links, preferential access to Bertelsmann music. See also Rabassa (2001, 46-47) where the gatekeeper issue around Winamp is mentioned. In addition, Rabassa discusses the foreclosure effects believed to arise in the Vivendi/Seagrams merger and Vizzavi joint venture.

56. Pereira (2002, 4)

57. *Ibid*., pp. 4-5

58. Griffiths, Mark (2000, 2 & 12)

59. Pereira (2002, 5)

60. *Ibid*., p. 6

61. *Ibid*.., pp. 6-7

62. In specific, Pereira stated, at page 7:

> The Commission considered that Canal+ would further increase its dominant position on a number of European pay-TV markets at national level. Already before the operation Canal+ enjoyed an almost monopolistic position in respect of the acquisition of the exclusivity on Hollywood films produced by the major studios (in France, Spain and Italy). The acquisition of Universal Studios would further strengthen Canal+'s position as purchaser of Hollywood films, not only in respect of Universal itself but also in relation to other studios due to underlying financial links. Due to the vertical integration of Universal and Canal+, Canal+ would be able to leverage its position in order to secure the renewal of the exclusive agreements for pay-TV with all of the Hollywood studios and in fact also to enter into new deals. The bargaining power of Canal+ vis-à-vis the film studios would therefore be increased, allowing Canal+ to further foreclose the pay-TV markets where it already was active.

Abbamonte and Rabassa (2001, 216, reference omitted) fleshed this out a bit by noting that Canal+ would increase its power to acquire Hollywood films because "…Universal had a number of structural links and arrangements, such as film co-financing, with the other majors."

63. Pereira (2002, 7)

64. *Ibid*., p. 6

65. *Ibid*., p. 8. The access theme was strongly reiterated in Pereira's conclusion: "The keyword is access and the approach consists in ensuring that, no matter how far companies integrate, access is granted in respect of those inputs or those paths that may foreclose a given market or contribute to the creation of a dominant position." *Ibid*., p. 9

66. For more information regarding how the Commission analysed the Vivendi/Seagram and AOL/Time Warner mergers, see Abbamonte and Rabassa (2001).

    We note in passing that the United States Federal Trade Commission (FTC) and Federal Communications Commission (FCC) also reviewed the AOL/Time Warner merger. Time Warner operated an important cable TV network in the U.S. but not in Europe, and it was cable TV related issues that principally attracted the FTC's attention. The FTC concluded that the merger would have had an anti-competitive impact on Internet access services, last mile Internet connection, and the market for interactive television which AOL had recently pioneered. It accordingly imposed access related conditions to address those concerns. The FTC did not find major problems in relation to AOL's Winamp and instant messaging services. Instant messaging was a concern however to the FCC. It restricted the merged entity in providing such services until it interoperated with other instant messaging services. [this footnote relies on details provided in Case Associates (2001)]

67. Press Review (1994, 1)

68. See European Commission (1994, paras. 5, 6 & 7)

69. *Ibid*., para. 73

70. *Ibid*., para. 74

71. *Ibid*. para. 92

72. See *Ibid*., paras. 94-99

73. He referred to a vicious circle: "Firstly, the parties, joining their forces to enter an emerging market, foreclose any entry by leveraging their market power from the traditional content or infrastructure markets. Secondly, the parties reinforce their power in the traditional market, by leveraging from their secured position in the emerging market.." (11)

74. See de Streel (2002, pp. 13-14 & 17).

75. Kovacic and Reindl (1997, 27). The cite for Nordic Satellite Distribution was O.J.L. 53/20 (1996).

76. See *ibid*., p. 27

77. *Ibid*., p. 29

78. *Loc. Cit*.

79. *Ibid*., pp. 29-30, omitting footnotes referring to two other European Commission cases.

80. Waterman (2000, 531-532)

81. *Ibid*., p. 538

82. Summing up, Waterman stated: "Thus, while there is clear evidence of "self-dealing" in television programming and exhibition within both the Disney and Fox corporations, majorities of the prime-time programs exhibited by both networks are produced by other studios, and the production branches of both firms do business with competing networks. (537)

83. Waterman (2000, 539)

84. See United Kingdom (Competition Commission) (2000).

85. Some might include access to interactive services including electronic commerce as a further media service. This seems better characterised however as belonging to telecommunications than to media.

86. United Kingdom (2001, para. 1.3)

87. For further discussion of this point in the context of "broadcasting versus narrowcasting", see Chae and Flores (1998). The targeted advertising phenomenon might be stronger in the newer interactive media, such as the Web because of information consumers provide about themselves – see Hargittai (2000, 17). Experience in the last couple of years, however, suggests that targeted advertising might not be that easy to implement and sell on the Web.

    The more specialised a medium's content, the more the medium's audience might also hold an additional attraction for an advertiser. The more advertising is confined to such a medium, and the more its audience exclusively patronises that medium, the easier it is for an advertiser to predict how many exposures a typical consumer has received and thus avoid buying advertising subject to significant diminishing (perhaps even negative) returns. This effect depends on an assumed correlation between specialisation in content and consumer loyalty to a medium.

88. For a general discussion of the effect noted in this paragraph, usually involving reference to the product differentiation model ascribed to Hotelling (1929), see Gabszewicz, Laussel and Sonnac (1999), and Hargittai (2000, 15-19). In addition to reviewing the relevant literature, Hargittai suggests that in sufficiently concentrated advertising supported media, a merger might lead to less content diversity as a means of tacitly coordinating the creation of a more competitive consumer side of the market.

    Many of the economic models dealing with the Hotelling effect in the media assume a very small number of firms, i.e. focus on content diversity expected in monopoly or duopoly markets or situations where there are just three or four firms. Tambini (2001, 30) points out the shortcomings of such models:

    > Hotelling proposed that economically rational competitors will always tend to crowd in the middle of the spectrum of consumer tastes rather than provide a diverse range of products (Hotelling, 1929). Although valid where there are three or four suppliers (for example, broadcast channels), this claim may be less convincing when viewed in context of media abundance, where there are ten competitors versus three. There has to be a critical point after which it is more rational to pitch products and services to a market niche than to intensify already hot competition in the middle-of-the-road. Thus Hotelling's analysis helps explain the evolution of parallel schedules and programmes of BBC1 and ITV, but may be less useful in a world of tens, if not hundreds, of media channels, competing on price as much as on quality. Applied to new media, Hotelling's effect suggests that the middle ground of each niche market may be crowded, but does not imply proliferation of hundreds of identical general

entertainment channels with the explosion of bandwidth. The theory does, however, reinforce the recognition that a limited number of suppliers in a particular market may be inimical to pluralism. There may also be effects less easily written into the assumptions of the economists, such as a tendency for individuals to value certain 'common knowledge' – shared facts and cultural practices – simply because they are shared.

89. See Berry and Waldfogel (1999, 5). Van der Wurff and Cuilenburg (2001, 214-215) come to a similar conclusion in their review of the debate concerning whether or not competition among oligopolists tends to produce excessive sameness of content. See also Hargittai (2000, 15-19) for a review of the literature investigating whether the market can or cannot be relied on to produce an optimal amount of diversity.

90. For some generally supporting empirical work, though using a different measure of diversity and focusing on the effect of competition (defined somewhat unconventionally), see van der Wurff and van Cuilenburg (2001). This article examines what happened as the number of free-to-air television channels has increased in Holland.

91. To better appreciate this point, let us continue with the newspaper example, but make some simplifying assumptions. In particular, let us assume that both pre- and post-merger, the content market is completely monopolised by a firm not vertically integrated into newspapers and newspapers buy all their content from this monopoly firm. Let us further assume that no newspaper has any negotiating power, newspaper readers are "strongly homogeneous", in the previously mentioned sense, and the total number of newspaper readers will not be affected by the merger. The last assumption is equivalent to assuming either that the merger creates no market power on the consumer side of the market, or that demand in that market is completely inelastic.

    Under the above very strict assumptions, both before and after the merger the content monopolist will charge all newspapers the same price per reader and that price will not be altered by the merger. In addition, the total number of expected readers and revenues for any particular article should not change because of the merger, and neither should the marginal revenue associated with changes in content quality. In sum, there is no obvious reason, at least on the marginal revenue side, to expect that the merger will affect content quality. One would reach the same prediction if in place of a non-integrated content monopolist, one were to assume that the content market functioned perfectly in the sense that there were no incentives for or against vertically integrating into content production. In that case, both before and after the merger, any articles the merging parties produce themselves are and will continue to be made available to other newspapers at efficient and unchanged prices. It is beyond the scope of this paper to determine how the deductions derived from these two stereotyped models would be altered by relaxing one or more of their constituent assumptions.

92. This view is, however, contested. See for example: Humphreys and Lang (1998) and Hooper (2002).

93. Stucke and Grunes (2001, 251, citing the Webster's dictionary)

94. Ireland (2001, 1), reference omitted. Gomery (2001, 15) expresses similar views:

    Media industries ought to facilitate free speech and political discussion. A democracy needs freedom of expression to make it work, and the mass media ought to be open enough to promote debate of all points of view. The

marketplace of ideas calls for criteria of accuracy and completeness, and these qualities must count in any definition of diversity. Public regulations must seek to create as many voices as possible, realizing how central various means of expression are to a robust democracy. This goal should not be considered secondary, but rather equal to efficiency as a criterion to maximize.

95. Baker (2002, 894-899) provides a discussion of the view that the Internet substantially reduces the importance of media bottlenecks, and concludes (at 898-899):

> Thus, although the Internet certainly changes the competitive situation in various ways, there is no reason to believe that it eliminates even narrow antitrust concerns with concentration in various areas of content creation. Potential power of control over major portals remains an area for policy concern. Most excitingly, there is some possibility that the Internet will increase the number of "volunteer" (that is, non-profit oriented) publishers. But most dangerously, it also could lead – as firms such as AOL Time Warner or Disney presumably hope – to increased concentration in the production of professional quality media and an increase in the portion of the time that people spend on these concentrated media.

Tambini (2001, 33), looking at things from the angle of digitalization and resulting convergence, also doubts that bottleneck issues will soon cease to be important for pluralism:

> A digital dream is gripping the minds of media broadcasters and policymakers throughout the world. It is a dream of an infinitely plural media environment, in which the consumer is in complete control, and problems of pluralism, diversity and media control have vanished.
>
> The digital dream is unfortunately far from reality….It is precisely the abundance of new digital media that creates demand for new intermediaries and aggregators of content who occupy the position of powerful media gatekeepers. It is precisely the transition to digital that spurs the development of new vertically integrated media companies. Even where channel choice is huge, as in the US, consumers tend still to get the majority of their information from one or several sources. And the appearance of freedom on the net can be deceptive: search engines, commercially driven linking and searching and preferred placement strategies in fact mean that new digital media will provide at least as many challenges to media pluralism as did the old media. Many consumers will stay with the core broadcasting channels, and it is the overall share that we are concerned with, rather than the means of delivery. Even if the digital dream describes the future, there is no guarantee of how quickly we will get there. The challenge in this context is to devise an approach to pluralism that will protect it in the transition to digital. (reference omitted)

96. See Baker (2002, 873-883).

97. *Ibid*., pp. 899-900

98. *Ibid*., p. 902

99. *Ibid*., pp. 906 & 907. Interesting anecdotal evidence is offered in support of these propositions on pp. 908-909.

100. *Ibid*., p. 914

101. For two overviews of this debate, see Iosifides (2002), and Sauvageaux and Giroux (2001).

102. United Kingdom (2000, para. 4.2.6) Tambini (2001, 30) comes to a similar conclusion:

> First, competition policy might tolerate a market with a restricted number of providers, or indeed a single provider provided that this dominant player did not engage in anti-competitive behaviours. Economic efficiency might result in service from a huge, efficient provider. If there were no barriers to entry and the market in question was deemed to be contestable…, a regulatory regime based in competition policy might find this unexceptionable. The relevant market might be defined as including companies not currently making the product or offering the service in question but which could switch to doing so….Such a 'winner takes all' market might (or might not) be competitive but would not be characterised by pluralism of source, content or exposure.

See also Atkinson (1999, 2) where it is stated that: "…competition policy could tolerate what democratic theory would disallow: a huge but efficient provider in a contestable market with no barriers to entry."

103. United Kingdom (2001, para. 1.10)

104. See Tambini (2001, 32)

105. Stucke and Grunes work for the United States Department of Justice (Antitrust Division), but the views expressed in their article were strictly personal.

106. They noted in passing, though (at 257) that the Antitrust Division "…challenged [a recent newspaper merger] in part based on the loss of editorial competition."

107. *Ibid*., p. 273

108. *Ibid*., p. 283, references omitted.

109. See *Ibid*., 297-299

110. Lande (2001, 517-518) makes a similar point:

> The most important area where optimal levels of price competition may be insufficient to provide optimal levels of diversity and innovation may be the independent editorial programming of a communications medium. If one communications medium were to buy another of the same kind, the acquisition might not concentrate the market sufficiently to threaten price competition. Being competitive, the market might also soon produce the product menu that consumers desire, in terms of types and formats of shows. But the market would inevitably sustain a loss of editorial diversity. This loss cannot be recreated through the normal mechanism of non-price competition among the surviving firms; the new products would necessarily bear the editorial stamp of their common owner. This scenario suggests that media mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming. Where that loss is sufficiently severe, such mergers should be challenged under the Clayton Act, even if there has been no showing of harm to price competition. (references omitted)

111. Stucke and Grunes note that such efficiencies are grounded in the high fixed costs typical in media markets – see ibid., p. 299.

112. Ownership restrictions, including cross-ownership restrictions exist in many countries. See United Kingdom (2001,13). Tambini (2001, 21) pointed out that such restrictions promote but do not guarantee pluralism. Feintuck (1997, 6) apparently agrees: "There is a real sense in which the focus on competition via

control of ownership can be viewed as surrogate for regulation for plurality in output."

113. The background paper for a recent OECD Global Forum on Competition discussion on the objectives of competition law and policy deduced from a number of country submissions that: "The gradual shift away from use of competition laws in OECD countries to promote public interest objectives suggests that a consensus may be emerging that it is sub-optimal, at least once a country has reached a certain level of development, to use competition law and policy to promote such goals." OECD (2003b, para. 4). Two of the main reasons for this are well expressed in a submission for the same meeting received from Ireland:

> Policy makers may seek to use competition policy to further other (broader) policy objectives, such as industrial policy, regional development or the "public interest", as for example in a public interest test for mergers. There are two reasons why it is best not to use competition policy as a wider policy instrument. Firstly, broadly specified policy objectives can be ambiguous and as such are subject to "capture" or "hijack" by the politically strongest private interests, usually those of producers or workers. Thus de jure public interest objectives may de facto serve private interests. Secondly, non-competition policy mechanisms are generally superior for achieving non-competition policy objectives. To elaborate, restricting competition in an attempt to achieve a broader policy objective will have inevitable anti-competition side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be both ineffective and socially wasteful. Ireland (2003, para. 1.2)

A similar view can be found in the questionnaire responses provided by Mexico, Morocco, Spain and South Africa to the same Global Forum.

114. As currently practiced, Canada's review of media mergers is confined to economic factors, particularly effects on advertising rates. See: Canada (House of Parliament, Standing Committee on Industry) (2000, 3), and Canada (Competition Bureau) (2002c, 3).

115. Canada (House of Parliament, Standing Committee on Industry) (2000, 6). Tambini (2001, 26) takes this a step further: "Notions of pluralism, diversity and the marketplace for ideas are at best vague and malleable, at worst adjusted to the purpose of whoever invokes them."

116. *Loc. Cit.*

117. For a good overview of how this works, see United States (Department of Justice) (2000).

118. See United Kingdom (2001).

119. OECD (2002, paras. 22 & 23)

120. See Canada (Competition Bureau) (1999).

121. The issues paper for that roundtable identified the following characteristics of such markets:

> 1. high R&D intensity and dependence on intellectual property rights (IPRs) coupled with a closely related heavy reliance on human instead of physical capital;

2. rapid technological change and short product cycles;

3. increasing returns to scale;

4. important network effects;

5. significant compatibility and standards issues; and

6. a high degree of technical complexity.

OECD (2003a, 20). See also Evans and Schmalensee (2001).

122. See Ungerer (2002, 9-12).

123. De Streel (2002, 17)

Bibliography

Abbamonte, Giuseppe and Valerie Rabassa (2001) "Foreclosure and Vertical Mergers – The Commission's Review of Vertical Effects in the Last Wave of Media and Internet Mergers: AOL/Time Warner, Vivendi/Seagram, MCI Worldcom/Sprint", *European Competition Law Review*, [2001, Issue 6], pp. 215-216

Adelstein, Jonathan S. (2003) "The Last DJ?: Finding a Voice on Media Ownership", remarks by the FCC Commissioner at The Future of Music Coalition Policy Summit 2003, Georgetown University, Washington, D.C., January 6. Downloaded on March 29, 2003 from: http://www.fcc.gov/Speeches/Adelstein/2003/spjsa301.html

Anderson, Simon P. and Stephen Coate (2000) "Market Provision of Public Goods: The Case of Broadcasting", mimeo, revised November 2002. Downloaded March 6, 2003 from: http://www.virginia.edu/economics/papers/anderson/broad11.pdf

Armstrong, Mark (2002) "Competition in Two-Sided Markets", mimeo - preliminary: Comments welcome - October 2002. Downloaded on March 5, 2003 from: *http://www.nuff.ox.ac.uk/economics/people/armstrong/venice.pdf*

Atkinson, Joe (1999) "Broadcasting and Cross-pressures: Reflections on a Failed Experiment", paper prepared for the New Zealand Broadcasting School Conference on "The End of the Fee: What Now for NZ Broadcasting," Christchurch, July 16. Downloaded on March 4, 2003 from: *http://www.arts.auckland.ac.nz/online/politics328/BCxpressures.htm*

Baker, C. Edwin (2002) "Media concentration: giving up on democracry", Florida Law Review, Vol. 54, No. 5, pp. 839-919

Balto, David and Robert Pitofsky (1998) Antitrust and high-tech industries: the new challenge", *The Antitrust Bulletin*, Vol. 43, Nos. 3-4, (Fall-Winter), pp. 583-607

Barnett, Steven R. (1999) "Statement to the Committee", delivered to the San Francisco Board of Supervisors' Finance and Labor Committee meeting July 13, 1999, about the impending sale of the San Francisco Chronicle. mimeo, downloaded March 7, 2003 from: *http://www.sfbg.com/News/joa/barnett.html*

Berry, Steven T. and Joel Waldfogel (1999) "Mergers, Station Entry, and Programming Variety in Radio Broadcasting", National Bureau of Economic Research, Working Paper 7080 (April) Available at: *http://www.nber.org/papers/w7080*

Bird & Bird (2002) "Market Definition in the Media Sector – Comparative Legal Analysis", Report for the European Commission, DG Competition. Downloaded on February 7, 2003 from: *http://europa.eu.int/comm/competition/publications/studies/legal_analysis.pdf*

Bush, C. Anthony (2002) "On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales", Media Bureau Staff Research Paper 2002-10, Media Ownership Working Group, United States Federal Communications Commission (September). Downloaded on March 5, 2003 from: *http://www.fcc.gov/Daily_Releases/Daily_Business/2002/db1001/DOC-226838A19.pdf*

Canada (Competition Bureau) (1999) "CRTC/Competition Bureau Interface", *Competition Bureau, Media Room – Backgrounder* – October 8, 1999; downloaded on February 26, 2003 at: *http://strategis.ic.gc.ca/SSG/ct01544e.html*

Canada (Competition Bureau) (2002a) "Comments of the Commissioner of Competition to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System", April 3, 2002. Downloaded February 26, 2003 from: *http://strategis.ic.gc.ca/SSG/1/ct02358e.html*

Canada (Competition Bureau) (2002b) "Statement by Konrad von Finckenstein, Q.C., Commissioner of Competition (Competition Bureau) to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System", May 7, 2002. Downloaded February 26, 2003 from: *http://strategis.ic.gc.ca/pics/ct/broadcasting_e.pdf*

Canada (Competition Bureau) (2002c) "Remarks by Konrad von Finckenstein, Q.C., Commissioner of Competition (Competition Bureau)] to the Standing Committee on Canadian Heritage on the Study of the State of the Canadian Broadcasting System", December 12, 2002. Downloaded February 26, 2003 from: *http://strategis.ic.gc.ca/SSG/1/ct02480e.html*

Canada (House of Parliament, Standing Committee on Industry) (2000) Interim Report on the Competition Act, June 2000. Chapter 8: The Newspaper Industry, A Diversity of Views and the Competition Act. Downloaded on February 27, 2003 at: *http://www.parl.gc.ca/InfoComDoc/36/2/INDU/Studies/Reports/indu01/15-ch8-e.html*

Case Associates (2001) "AOL/Time Warner", Casenote, Competition Issue #22 (June)

Center for the Creative Community (2002) "FCC Rulemaking Issues". Downloaded on April 1, 2003 from: *http://www.creativecommunity.us/page/page/255114.htm*

Chae, Suchan and Flores, Daniel (1998) "Broadcasting versus narrowcasting". *Information Economics and Policy*, Volume 10, Issue 1 (March), pp 41-57.

Chaudhri, Vivek (1998) "Pricing and efficiency of a circulation industry: the case of newspapers", *Information Economics and Policy*, Vol. 10, pp. 59-76.

Collins, Richard (2002) "Comments on the Consultation on Media Ownership Rules". Downloaded March 4, 2003 from: *http://www.culture.gov.uk/PDF/media_own_open_u.PDF*

Council of the European Communities (1989) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Consolidated Text) – Official Journal L 395, December 30, 1989 (corrected version OJ L 257, August 21, 1990, p. 13) with amendments introduced by Council Regulation (EC) No 1310/97 of June 30, 1997 (published in OJ L 180, July 9, 1997, p. 1, corrigendum OJ L40, February 13, 1998, p. 17)

Council of Europe – Committee of Ministers (1999) "Recommendation No. R(99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism", Adopted the by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies. Downloaded February 28, 2003 from: *http://www.ebu.ch/departments/legal/pdf/leg_ref_coe_r99_1_pluralism_190199.pdf*

Cunningham, Brendan C. and Peter J. Alexander (2002) "A Theory of Broadcast Media Concentration and Commercial Advertising", *Media Bureau Staff Research Paper*, #2002-6, Media Ownership Working Group, United States Federal Communications Commission (September). Downloaded on March 5, 2003 from: *http://www.fcc.gov/Daily_Releases/Daily_Business/2002/db1001/DOC-226838A11.pdf*

de Streel, Alexandre (2002) "European Merger Policy in Electronic Communications Markets: Past Experience and Future Prospects", Mimeo, draft 4 September 2003; downloaded on April 26, 2003 from: *http://intel.si.umich.edu/tprc/papers/2002/99/EuropeMergerPolicy.pdf*

Dukes, Anthony (2001) "Product Prices, Branding, and Media Competition", mimeo, September 2001. Downloaded March 6, 2003 from: *http://www.core.ucl.ac.be/media/Adbrand.pdf*

Ekelund, Robert B. Jr., George Ford, and John D. Jackson (1999) "Is Radio Advertising a Distinct Local market? An empirical analysis," *Review of Industrial Organization*, Vol. 14, pp. 239-256.

Europe Economics (2002) "Market Definition in the Media Sector – Economic Issues", Report by Europe Economics for the European Commission, DG Competition (November 2002) – downloaded on February 7, 2003 from: *http://europa.eu.int/comm/competition/publications/studies/european_economics.pdf*

European Commission (1994) "Commission Decision of 9 November 1994 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.469 – MSG Media Service)", OJ L364, December 31, 1994. Downloaded on April 26, 2003 from: *http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=31994D0922&lg=EN*

European Commission (1997) "Green paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach". Downloaded on March 11, 2003 from: *http://europa.eu.int/ISPO/convergencegp/97623.html*

Evans, David S. (2002) "The Antitrust Economics of Two-sided Markets", paper published by the AEI-Brookings Joint Center for Regulatory Studies, September 2002. Downloaded on March 10, 2003 at: *http://www.kiet.re.kr/files/econo/20021024-antitrust.pdf*

Evans, David and Alison Oldale (2003) "Come Together: Competition Policy for Two Sided Markets", Competition Policy Insights – A Nera Perspective, March/April

Evans, David S. and Richard Schmalensee (2001) "Some economic aspects of antitrust analysis in dynamically competitive industries", *NBER Working Paper Series*, Working Paper #8268, downloaded March 5, 2003 from *http://www.nber.org/papers/w8262*

Feintuck, Mike (1997) "Regulating the Media Revolution: In search of the public interest", *The Journal of Information, Law and Technology*, Vol. 3. Downloaded on February 6, 2003 from: *http://elj.warwick.ac.uk/jilt/commsreg/97_3fein/feintuck.htm*

Fullerton, Lawrence R. (1996) "Current Issues in Radio Station Merger Analysis", address before the Business Development Associates Antitrust 1997 Conference, Washington, D.C., October 21, 1996. Downloaded March 6, 2003 from: *http://www.usdoj.gov/atr/public/speeches/8210.pdf*

Gabszewicz, Jean J., Didier Laussel and Nathalie Sonnac (1999) "Does Press Advertising Foster the "Pensée Unique"?", mimeo, July. Downloaded on March 13, 2003 from: *http://www.core.ucl.ac.be/services/psfiles/dp00/dp2000-8.pdf*

Gabszewicz, Jean J., Didier Laussel and Nathalie Sonnac (2000) "TV-Broadcasting, Competition and Advertising", *Core Discussion Paper*, 2000/6 (February), Centre for Operations Research & Econometrics, Unviersité Catholique de Louvain

Gabszewicz, Jean J. and Nathalie Sonnac (2002) "Attitudes toward Advertising and Competition in the Media and Advertising Markets", mimeo, February. Downloaded on March 6, 2003 from: *http://www.fhk.eur.nl/evenementen/acei2002/InvitedPapers/JeanGabszewicz.pdf*

Gal-Or, Esther and Anthony Dukes (2002a) "Minimum Differentiation in Commercial Media Markets", mimeo, June 2002. Downloaded March 6, 2003 from: *http://www.pitt.edu/~esther/papers/Adlocate2002(Total).pdf*

Gal-Or, Esther and Anthony Dukes (2002b) "On the Profitability of Media Mergers", mimeo, February 2002. Downloaded March 6, 2003 from: *http://www.pitt.edu/~esther/papers/Admerger.pdf*

George, Lisa and Joel Waldfogel (2000) "Who Benefits Whom in Daily Newspaper Markets?", NBER Working Paper Series, Working Paper 7944. Downloaded on March 5, 2003 from: *http:www.nber.org/papers/w7944.pdf*

Gibbons, Thomas (1999) "Concentrations of Ownership and Control in a Converging Media Industry", Chapter 6 of C. Marsden & S. Verhulst, (eds.) Convergence in European Digital Television Regulation, Warwick Law in Its Social Setting Series, (Blackstone Press), pp. 155-173

Gomery, Douglas (2002) "The FCC's newspaper-broadcast cross-ownership rule: an analysis", Economic Policy Institute (Washington, D.C.). Downloaded March 6, 2002 from: *http://www.epinet.org/books/cross-ownership.pdf*

Griffiths, Mark (2000) "Commission Dilemma: The Application of EC Competition Law in the New Economy", *Eurowatch*, Vol. 12, No. 19 (October 31)pp. 1-2, 12-14

Häckner, Jonas and Sten Nyberg (2001) "Advertising and Media Market Concentration", mimeo dated May 28, 2001. Downloaded March 5, 2003 from: http://www.core.ucl.ac.be/media/news.pdf

Hampton, Celia (2003) "Competition in European Media Markets: Rival suggestions for improved analysis", *EuroWatch*, Vol. 15, No. 2 (January), pp. 1, 5-7

Hargittai, Eszter (2000) "Open Portals or Closed Gates? Channeling Content on the World Wide Web" A pre-print version of the final paper forthcoming in Poetics, Vol. 27 (4) (2000). Downloaded on March 4, 2003 from: *http://www.princeton.edu/~eszter/hargittai-portals.pdf*

Hooper, Richard (2002) "Regulating Communications in the Age of Convergence", presented at a lunch at the Institute to Economic Affairs, February 14, 2001, Revised January 10, 2002. Downloaded on March 4, 2003 from: *http://www.radioauthority.org.uk/newsroom/speeches/archive/REGULATING%20COMMUNICATIONS%20IN%20THE%20AGE%20OF%20CONVERGENCE.htm*

Hotelling, Harold (1929) "Stability in economic competition", *Economic Journal*, Vol. 39, pp. 41-57

Humphreys, Peter (1999) "Regulating for Pluralism in the Era of Digital Convergence: The Issues of Media Concentration Control and the Future of Public-Service

Broadcasting", Paper presented to the European Consortium for Political Research Joint Research Sessions, Mannheim, 26-31 March 1999: Workshop 24: "Regulating Communications in the Multimedia Age" – downloaded February 6, 2003 from: *http://www.essex.ac.uk/ecpr/jointsessions/Manpapers/w24/Humphreys.PDF*

Humphreys, Peter (2000) "Regulation for Media Pluralism: Issues in Ownership and Competition", chapter 4 of Joe Andrew, Malcolm Crook, Diana Holmes and Eva Kolinsky, editors, *Why Europe? Problems of Culture and Identity*, Vol. 2 – Media, Film, Gender, Youth and Education (New York: Macmillan)

Humphreys, Peter and Matthias Lang (1998) "Digital Television between the Economy and Pluralism", chapter 1 of Jeanette Steemers, editor, *Changing Channels: The Prospects for Television in a Digital World* (John Libbey Media, 1998)

Iosifidis, Petros (2001) "Communications Reform White Paper - Comment on: Reform of Cross-Media Ownership Rules", Response to the British government Communications White Paper, published on December 12, 2000. Downloaded February 26, 2003 from:
http://www.communicationswhitepaper.gov.uk/pdf/responses/p_iosifidis.PDF

Iosifidis, Petros (2002) "The limits of competition policy", *Intermedia*, Vol. 30, No. 2 (April), pp. 22-25

Ireland (Department of Trade and Employment) (2001) "Culture and Economics in the Newspaper Industry", mimeo, October 19. Downloaded on March 7, 2003 from *http://www.entemp.ie/tcmr/C&E.htm*

Ireland (2003) "The objectives of competition law and policy and the optimal design of a competition agency", CCNM/GF/COMP/WD(2003)17, January 15. This is available at: *http://olishdweb.oecd.org/2003/01/15/JT00137655DOC/index.asp*

Klein, Joel I. (1997) "DOJ Analysis of Radio Mergers", address presented at ANA Hotel, Washington, D.C., February 19, 1997. Downloaded on March 6, 2003 from *http://www.usdoj.gov/atr/public/speeches/jik97219.htm*

Kovacic, William E. and Andreas P. Reindl (1997) "Entertainment Industries, New Technologies and Antitrust", unpublished manuscript supplied to the author

Lande, Robert H. (2001) "Consumer Choice as the Ultimate Goal of Antitrust", *University of Pittsburgh Law Review*, Vol. 62 (Spring) pp. 503-525

Lind, Robert C., Paul Muysert and Mike Walker (2002) "Innovation and Competition Policy", Office of Fair Trading, *Economic Discussion Paper 3*, A report to the Office of Fair Trading prepared by the Charles River Associates (March)

Ludwig, Johannes (2000) "The Essential Economic Problem of the Media: Working Between Market Failure and Cross-Financing", *The Journal of Media Economics*, Vol. 13 (3), pp. 187-200

MacKie-Mason, Jeffrey K. (2000) "An AOL/Time Warner Merger Will Harm Competition in Internet Online Services, Mimeo, October 17, 2000. Downloaded March 6, 2003 from: *http://www-personal.umich.edu/~jmm/papers/aol-tw00-public.pdf*

Marsden, Christopher T. (1997) "The European Digital Convergence Paradigm: From Structural Pluralism to Behavioural Competition Law", *Journal of Information, Law and Technology*, 1997, Vol. 3. Downloaded February 27, 2003 from: *http://elj.warwick.ac.uk/jilt/commsreg/97_3mars/default.htm*

Marsden, Christopher T. (1999) "Pluralism in the Multi-Channel Market", *International Journal of Communications Law and Policy*, Issue 4, Winter 1999/2000. Downloaded on March 18, 2003 at: *http://www.ijclp.org/4_2000/pdf/ijclp_webdoc_5_4_2000.pdf*

Minárik, Matús (2002) "Media Policies in Italy & United Kingdom", *IPF Interim Report* (September) Downloaded February 27, 2003 from: *http://www.policy.hu/minarik/MediaPoliciesItalyUK.pdf*

OECD (1999) "Regulation and Competition Issues in Broadcasting in the Light of Convergence", *OECD Series Roundtables on Competition Policy*, No. 21, DAFFE/CLP(99)1 – can be downloaded from: *http://www.oecd.org/pdf/M000015000/M00015206.pdf*

OECD (2002) "Ireland – New Competition Act", DAFFE/COMP(2002)12/10/ADD1, 28 June (For Official Use)

OECD (2003a) "Merging Review in Emerging High Innovation Markets", *OECD Series Roundtables on Competition Policy*, No. 39, DAFFE/CLP(2002)20 (January 24) – can be downloaded from: *http://www.oecd.org/pdf/M00038000/M00038594.pdf*

OECD (2003b) "The Objectives of Competition Law and Policy", unclassified background documentation for the OECD Global Forum on Competition, February 10-11, CCNM/GF/COMP(2003)3 (January 29). This is available at: *http://olishdweb.oecd.org/2003/01/29/JT00138411DOC/index.asp*

Pereira, Miguel Mendes (2002) "EU competition law, convergence, and the media industry", Presentation to the Law Society of England and Wales, April 23. Downloaded February 28, 2003 from: *http://europa.eu.int/comm/competition/speeches/text/sp2002_016_en.pdf*

Press Review (1994) "Editorial – A multimedia giant is born in Germany", *Press Review – Information Society*, Issue number: 3 (January 1-13). Downloaded on April 26, 2003 at: http://europa.eu.int/ISPO/docs/services/trends/docs/3.pdf

Producers Alliance for Cinema and Television (PACT) (2002) "Response to consultation on Media Ownership". Downloaded on March 4, 2003 from: *http://www.culture.gov.uk/PDF/media_own_pact.PDF*

Rabassa, Valérie (2001) "The Commission's review of the media merger wave", EC Competition Policy Newsletter, 2001, No. 1 (February), pp. 46-51

Richtel, Matt (2003) "Satellite vs. cable: Entertainment battle is revving up", *International Herald Tribune*, April 16, p. 12

Rochet, Jean-Charles and Jean Tirole (2001) "Platform Competition in Two-Sided Markets". Downloaded on March 14, 2003 from: *http://www.idei.asso.fr/Commun/Articles/Tirole/PlatformNov26.pdf*

Rubinfeld, Daniel L. (2000) "The Primestar Acquisition of the News Corp./MCI Direct Broadcast Satellite Assets", *Review of Industrial Organization*, Vol. 16, No. 2 (March) pp. 193-209

Sauvageau, Florian and Daniel Giroux (2001) "Media Cross-ownership in Canada", Report presented to the Canadian Radio-television and Telecommunications Commission and Canadian Heritage (February) Downloaded on February 6, 2003 from: *http://www.pch.gc.ca/progs/ac-ca/progs/esm-ms/crois1_e.cfm*

Shapiro, Carl and Hal Varian (1999) *Information Ruels – A Strategic Guide to the Network Economy* (Boston: Harvard Business School Press)

Stucke, Maurice and Allen Grunes (2001) "Antitrust and the Marketplace of Ideas", *Antitrust Law Journal* (2001), Vol. 69, Issue 1, pp. 249-302

Tambini, Damian (2001) "Through with ownership rules? Media pluralism in the transition to digital", Chapter 3 of Damian Tambini with Liz Forgan, Clare Hall and

Stefaan Verhulst, *Communication: Revolution and Reform* (London: Institute for Public Policy Research, 2001)

Teece, David J. and Mary Coleman (1998) The meaning of monopoly: antitrust analysis in high-technology industries", *The Antitrust Bulletin*, Vol. 43, Nos. 3-4, (Fall-Winter), pp. 801-857

Tirole, Jean (1988) *The Theory of Industrial Organization* (Cambridge: MIT Press)

Ungerer, Herbert (1996) "Clarifying how recent EU Policies and Decisions will foster effective competition: Who should be Europe's Digital Gatekeepers", speech before the European Cable and Satellite 96 Conference, Paris 20 March 1996

Ungerer, Herbert (2002) "Media in Europe: Media and EU Competition Law", presentation to the Conference on Media in Poland by the Polish Confederation of Private Employers, Warsaw, 13 February 2002. Downloaded February 28, 2003 from: *http://europa.eu.int/comm/competition/speeches/text/sp2002_006_en.pdf*

Ungerer, Herbert (2003) "Competition Policy and the Issue of Access in Broadcasting Markets: The Commission Perspective", presentation to Vision in Business – Broadcasting Competition Law, Brussels, January 14-15, 2003. Downloaded February 28, 2003 from *http://europa.eu.int/comm/competition/speeches/text/sp2003_001_en.pdf*

United Kingdom (2000) *A New Future for Communications – Communications White Paper* (London: Department of Trade and Industry and Department of Culture, Media and Sport) – downloaded February 7, 2003 from: *http://www.communicationswhitepaper.gov.uk/pdf/index.htm*

United Kingdom (2001) *Media Ownership Consultation Paper 2001* (London: Department of Trade and Industry and Department of Culture, Media and Sport). Downloaded March 7, 2003 from: *http://www.culture.gov.uk/creative/media_ownership.html*

United Kingdom (Competition Commission) (2000) "Carlton Communications Plc and Granada Group PLC and United News and Media plc – A report on the three proposed mergers", Presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty, July 2000. Downloaded February 7, 2003 at *http://www.competition-commission.org.uk/fulltext/441c1.pdf*

United Kingdom (OFCOM) (2003) "About Ofcom – How will Ofcom Regulate?", downloaded on February 27, 2003 from *http://www.ofcom.org.uk/about_ofcom/how_ofcom_regulate/index.htm*

United States (Department of Justice and Federal Trade Commission) (1997) "1992 Horizontal Merger Guidelines"[with April 8, 1997, Revisions to Section 4 on Efficiencies]. Available at: *http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html*

United States (Department of Justice) (2000) "Report of the Assistant Attorney General in Charge of the Antitrust Division In the Matter of: Application by the E.W. Scripps Company and MediaNews Group, Inc. For Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. SS 1801-1804. Downloaded March 7, 2003 from *www.usdoj.gov/atr/cases/f6500/6508.htm*

United States (Department of Justice) (2001) "Complaint for Injunctive Relief: United States of America v. The News Corporation Limited, Fox Television Holdings, Inc., and Chris-Craft Industries, Inc.", United States District Court for the District of Columbia, Judge Colleen Kollar-Kotelly, Civil Action No. 1:01CV00771, filed April 11, 2001. Downloaded April 8, 2003 from *www.usdoj.gov./atr/cases/f8000/8039.htm*

Van der Wurff, Richard and Jan van Cuilenburg (2001) "Impact of Moderate and Ruinous Competition on Diversity: The Dutch Television Market", *Journal of Media Economics*, Vol. 14, No. 4, pp. 213-229

Waldfogel, Joel (2002) "Consumer Substitution Among Media", *Media Bureau Staff Research Paper*, #2002-3, Media Ownership Working Group, United States Federal Communications Commission (September 2002). Downloaded on March 5, 2003 from:
http://www.fcc.gov/Daily_Releases/Daily_Business/2002/db1001/DOC-226838A8.pdf

Ward, David (2002) *The European Union Democratic Deficit and the Public Sphere – An Evaluation of EU Media Policy* (Berlin: IOS Press)

Waterman, David (1999) "Viacom-CBS Merger: Media Competition and Consolidation in the New Millenium", Testimony before the Senate Judiciary Committee, Antitrust Subcommittee, October 28, 1999. Downloaded on March 29, 2003 from: *http://judiciary.senate.gov/oldsite/10289dw.htm*

Waterman, David (2000) "CBS-Viacom and the Effects of Media Mergers: An Economic Perspective", *Federal Communications Law Journal*, Vol. 52, No. 3. Downloaded on April 1, 2003 from: http://www.law.indiana.edu/fclj/pubs/v52/no3/waterman1.pdf

Young, David P. T. (2000) "Modeling Media Markets: How Important is Market Structure?", *Journal of Media Economics*, Vol. 13, No. 1, pp. 27-44

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Media Mergers

3. Summary of the Discussion

Summary of the Discussion

1. Introduction

The Chairman made three general opening points: market definition is an important issue in most jurisdictions, and seems to be fairly similar across countries; behavioural remedies are heavily used and are highly case specific; and competition authorities are wrestling with the relationship between competition and pluralism issues but generally try to avoid it. Some competition authorities believe that promoting competition in itself promotes pluralism so nothing else is needed from competition authorities. Some contributions note, however, that competition authorities are criticised for not going far enough in protecting pluralism.

The Chairman decided not to spend much time on market definition because there appeared to be a fair amount of consensus on methodology and results. He flagged, though, three contributions dealing with some particularly interesting aspects of market definition: Australia (supply side issues); United States (price discrimination); and United Kingdom (product differentiation).

2. Virtuous circles and downward spirals in two-sided markets

The Chairman remarked that the Australian contribution includes a fairly detailed discussion of this issue including with regard to the *Foxtel-Optus* matter in which two major pay-tv operators attempted to get closer together. He called on Australia to develop the virtuous circles and downward spiral theories and to discuss the *Foxtel-Optus* case in particular.

An Australian delegate pointed out that there are significant first mover advantages associated with an early start in gaining a significant market share of subscribers. This confers an important advantage in terms of obtaining exclusive rights to content. It might well be that the largest operator pays a premium for it, but exclusivity, particularly for premium movies and sports, confers a significant advantage in gaining subscribers. A larger subscriber base in turn makes it possible to spend more on content thus obtain still more subscribers etc. A market like this could tip rapidly in favour of the dominant firm.

The virtuous circle effect can also occur in other media such as newspapers where it is based on the interaction between dual revenue sources,

i.e. copy price and advertising revenues. To attract readers the newspapers need to provide outstanding general content or serve a specialised niche. Better content leads to more readers which in turn increases advertising revenues and makes it possible to both improve content further and to diminish the cover price, which in turn increases circulation etc. The result is often just one mainstream mass market newspaper in each geographical market plus maybe some specialist, usually financial newspapers.

In 2002, Australia's two metropolitan pay-TV operators, both cable companies, approached the ACCC regarding a content sharing arrangement. The larger of the two was Foxtel, a joint venture between Australia's largest telecommunication company (the former government monopoly Telstra) and Rupert Murdoch's News Corporation. Foxtel would obtain exclusive access to Optus' content and in turn share its own much superior content with Optus. Crucially important to the ACCC was the fact that Optus' pay-TV business was in decline, caught in a downward spiral. The ACCC was concerned that the decline in Optus' pay-TV business would ultimately reduce its power to compete in telephony and broad-band cable business.

The ACCC ultimately approved the *Foxtel-Optus* joint venture subject to a very broad content access regime. Under the arrangement, Australian controlled content, which is generally held by Foxtel, must be made available to all other pay-TV providers. The ACCC was concerned that Foxtel's control of content was hindering the development of cable-TV competitors. Since Telstra is Foxtel's largest shareholder one could legitimately be concerned that Foxtel might refuse content if that would hinder the development of potential competition not just for pay-TV but also for Telstra in the broad-band Internet access and telephony markets.

3. Vertical issues and market foreclosure

To address this issue, the Chairman turned first to the Finnish contribution which included the statement: "The assessment of media mergers does not differ from the assessment of mergers in other sectors." (para.23) This view can also be found in a number of other contributions. The Finnish contribution also acknowledges that concerns about vertical relationships are especially important in the media sector. A good example can be found in the *Sonera/Talentum* merger which raised both upstream and downstream competition concerns.

The Finnish delegate noted that in *Sonera/Talentum* the Finnish Competition Authority (FCA) analysed the electronic media market. It conditionally cleared the acquisition thereby allowing Sonera to obtain joint control of the WOW Web Brand Corporation previously solely owned by Talentum.

In this transaction, Sonera, the leading Finnish telecommunications operator, acquired the web services developed by the biggest Finnish new media company, Talentum. In previous decisions, the FCA had determined that Sonera held a dominant position in the Finnish mobile communications market. The competitive effects of the acquisition were assessed in several product markets: Internet advertising; web content procurement; and the Internet connection market. The geographical market for all three products was considered to be Finland.

The FCA found that the transaction would raise impediments to competition and prevent market entry. As a content packager and telecommunications operator, Sonera was seen as an important party to many content producers in obtaining entry to the web content market, as well as the new mobile communications content market. The primary competition risk was that Sonera would focus its content procurement and information transfer and consumer behaviour know-how on its joint venture.

Sonera's vertical integration with a content production company would have seriously affected the competitive options of small and medium-sized new media companies. To remove the competition problem, the parties committed to Sonera treating the joint venture and its competitors evenly in the procurement and delivery of web content, and not to focus its know-how on the joint venture alone. The parties also committed to conditions that secured continued competition between the joint venture and Sonera in selling advertising space.

The Chairman commented on several aspects of the Mexican contribution. One was its list of regulations applying to the media sector. The Mexican contribution notes that because of all the regulation taking care of public interest goals, the competition authority can focus exclusively on competition issues. In discussing those issues, it presents several cases, including two on radio, one of which involves significant vertical concerns. The Chairman wished to learn more about those mergers.

A Mexican delegate noted that despite the current heavy regulations, historically substantial aspects of radio and TV programming were unregulated. For example, the Federal Law on Radio and Television did not restrict the concentration of concessions. The result was high concentration in the market before the Competition Law was issued and the Federal Competition Commission (FCC) created in 1993.

The Competition Law fully applies to the broadcasting industry but focuses only on protecting the competition process and free entry. Before turning to specific cases, the delegate noted that the Mexican television industry is dominated by two broadcasters: Televisa with 59 percent of the market and TV Azteca with 36 per cent of the market. Both broadcasters are

vertically integrated, engaging in program production, packaging and delivery. In the case of radio broadcasting, the industry structure varies. In Mexico City, by far the largest market, there are 55 commercial radio stations, 64% owned by 5 broadcasters, and the frequency spectrum is saturated.

At the end of 1994 Radio Centro notified its plans to acquire Radio Red. Both firms had their main radio stations in Mexico City. Due to advertisers' preferences, the relevant market was defined as radio broadcast advertising services in Mexico City.

The acquisition would increase the number of radio stations controlled by Radio Centro from 10 to 13, a 24 percent share of all stations in Mexico City. However, it would account for 39.2 percent of advertising revenues and 45.6 percent of radio audience. The main reason for these differences in shares was that the acquisition included the highly popular news program "Monitor".

The FCC imposed a number of conditions on the acquisition including the elimination of exclusivity terms in Infored (the firm producing Monitor) contracts applying to news services, informational programming and special events. Radio Centro was also required to refrain from tying the purchase of advertising in several of its radio stations.

The *Televisa/Acir* case is the most important media merger the FCC has dealt with. In 2000, Televisa notified its intent to merge its subsidiary Radiópolis, with Acir, one of the country's top radio groups. Televisa has a 59 percent market share in the TV sector, and its subsidiary Radiopolis operates several radio stations nationwide with a participation of 11 percent in the number of radio stations in Mexico City. Acir owns several radio stations nationwide including 13 percent of the radio stations in Mexico City. The FCC considered that the relevant market was the market for radio advertising which is strongly complementary with TV advertising. The FCC objected to this transaction because it believed it would have anticompetitive effects on the relevant market.

At this point the Chairman turned to the European Commission and drew attention to two particular aspects not covered in other contributions. The Commission stated that it: "…accepts first mover advantages which accelerate the emergence of new services and markets and therefore benefit consumers. However, the European Commission is also very concerned about any potential for market foreclosure. Therefore, it does not hesitate to intervene to ensure effective and open market access." (para. 17) The Chairman wanted to learn more about how these dynamic and static considerations are balanced in concrete cases. He also highlighted Article 21 (3) of the Merger Regulation which allows member states to take appropriate measures to protect the plurality of the media. The Chairman asked for more detail about this Article as well as examples of it resulted in blocking mergers the Commission would have cleared.

A delegate from the European Commission stated that first mover advantage is a tricky concept because sometimes it is offset by second mover advantages, i.e. benefiting from learning about what works well in the market. In terms of balancing the static and dynamic effects, the Commission does not really have much room for manoeuvre. Article 2 of the Merger Regulation states that the Commission will include in its assessment the development of technical and economic progress provided it is to the consumer's advantage and does not form an obstacle to competition. In practice this means that if a merger creates or strengthens dominance the Commission will have to block it even if it also creates efficiencies.

Concerning pluralism, the delegate noted that Article 21 provides a clear legal framework. The Commission has exclusive competence to deal with mergers of Community dimension, and it applies a solely competition based assessment. At the same time, however, the Merger Regulation provides that member states can take more severe, tougher measures on grounds of pluralism once the Commission has ruled on competition grounds. For example, in a newspaper case, the Spanish media group PRISA, the Italian media group l'Espresso and a British group the Mirror Group notified a joint acquisition of Independent Newspaper Publishing plc. The Commission did not find a competition problem and cleared the case. The parties, however, also had to satisfy British requirements having to do with preserving the expression of free opinion, accurate presentation of news etc. All the Commission requires in such a case is that it be kept informed by the member state authorities of conditions eventually imposed. The Commission will check to ensure the conditions are proportional, aimed at achieving plurality, not likely to discriminate among European companies and unlikely to reduce trade among member states.

Referring to the United Kingdom's contribution, the Chairman noted it included an extensive discussion of *Carlton/Granada* in which two of the largest programme producers would be united with one of the biggest purchasers of TV content in the U.K. This case revealed that the Office of Fair Trading (OFT) may be more sceptical of foreclosure effects than some other competition authorities. The Chairman cited the following passage from the submission: "Whilst there is concern that such a merger may result in foreclosure of the distribution outlet to third party providers, there is a strong commercial incentive for media firms to use the best available content to attract viewers or readers, and hence advertisers. In our analysis of the Carlton/Granada case we concluded that the comparative value of programme supply as against advertising revenue and the incentive to maximize viewers for the lowest cost, combined with a regulatory quota for independent production, would offset the possibility of foreclosure." [para. 8(2)] The Chairman wondered how much OFT's view of the foreclosure risk in this case

was influenced by the fact that there was a quota for independent production. This in itself seemed to ensure there would be a certain amount of market openness for other content providers.

A United Kingdom delegate clarified that although the OFT had no concerns in the first phase of the investigation, the *Carlton/Granada* merger was being referred for a second phase investigation on another issue. Carlton and Granada are both regional ITV licensees and broadcast content purchased through the ITV network. So one of the considerations was whether gaining control over the ITV network would change their incentives. The Chairman mentioned the 25 percent minimum quota for independent program production and acquisition. When the case was examined, Carlton and Grenada were comfortably exceeding that.

There were several reasons the OFT did not object to *Carlton/Grenada*. One was that their advertising revenue greatly exceeded the income received from programme production, and consequently it was not clear they would ever have an incentive to put that at risk through favouring their own programming. In addition, the independent production sector has been very vibrant in the U.K., having over 50 medium and 500 small active programme producers. This tends to indicate an absence of significant barriers to entry into the sector. Those were the main reasons why the OFT was not concerned about vertical foreclosure. The 25% quota was really only a supporting consideration.

4. Merger remedies

The Chairman reiterated that behavioural remedies are heavily relied on by competition authorities in media mergers. An example is found in the Danish contribution's *FAS* case in which the Competition Council was confronted with the three largest Danish newspaper groups forming a joint venture to merge their archive database and certain affiliated activities. The Council was concerned about the joint venture having three year exclusive use of news from its parent companies and the consequent risk of foreclosure. It did not oppose the merger, however, because the parties agreed to condition the three year exclusivity on the joint venture's market share remaining below 30% in the first year, and also agreed to treat third parties on a non-discriminatory basis after the exclusivity period. The Chairman wondered how easy it is to monitor such a condition, what exactly the joint venture has to do to ensure it remains below the 30 percent market share, and what would happen if that share were exceeded.

The Danish delegate stated that three separate product markets were delineated in the *FAS*: news databases; press surveillance; and the market involving rights to exploit news articles in electronic format, which is the

market where the parent companies are active. The geographical market was Denmark. The delegate believed the commitments in the *FAS* case are fairly easy to monitor because they are based on objective criteria. It is too early to conclude, however, whether that is in fact true. As to the question of whether the Competition Council will review FAS' market share at the end of 2003, the exact nature of follow-up has not yet been decided. Competitors will be sure to keep the competition authority focused on developments in this case.

Turning to Brazil, the Chairman noted its enormous experience in media merger cases. Over 62 had been analysed in the two years preceding the roundtable. The Chairman was particularly interested in the *Globosat/ESPN* merger in 2000, in which concerns about foreclosure led to a long list of approval conditions, in particular the elimination of exclusivity clauses and tied sales practices. The Chairman wanted to know whether a) these conditions are easy to monitor, and b) whether entry has subsequently occurred or there is other evidence of market openness.

A Brazilian delegate mentioned that Globosat, belonging to Brazil's main media group, i.e. Globo, is a content provider and the main supplier of local TV programs for pay-tv in Brazil including Sportv, a "premium" or "national" sports channel. ESPN Inc., a subsidiary of The Walt Disney Company, is a major worldwide supplier of sports channels. In Brazil, this Group supplies two pay-TV sports channels: the ESPN International, focused on international sporting events, and the ESPN Brasil, focused on both national sporting events and journalism. ESPN was Globosat's Sportv main competitor in the Brazilian pay-tv markets for distribution of sports channels and for acquisition of broadcasting rights for "premium" sporting events, especially soccer matches – regional or national championships. In the few years preceding the merger, ESPN Brasil was losing its main broadcasting rights to Globosat. In addition, ESPN Brasil was not distributed by the Globo Group's, which harmed ESPN Brasil's ability to reach the minimum scale needed to maintain its operations.

The parties defined the relevant market as the passive visual entertainment market, which would include pay-TV, broadcasting, home video/DVD and cinema. The Secretary for Economic Monitoring (SEAE), an antitrust body linked to the Ministry of Finance, considered this definition too broad and produced its own narrower delineation.

The acquisition resulted in Globosat having a monopolistic position on the premium sports channels for pay-tv market and in a monopsonic position in the market for the acquisition of pay-tv broadcasting rights for national/premium sporting events. Some important barriers to entry existed in each relevant market, namely: (i) high sunk costs related to advertising of a new premium sport channel; (ii) difficult access to national sport content; (iii) difficult access to the distribution windows needed for a new channel to reach

minimum viable scale; (iv) high costs for broadcasting rights for national sporting events; and (v) the degree of vertical integration in the Brazilian pay-TV market.

The Globo Group held about 63% of the Brazilian pay-TV service providers market. The refusal of the pay-tv service providers affiliated to this group to distribute a new premium sport channel could make it difficult for a new entrant to achieve the minimum viable scale to operate in the Brazilian pay-tv market. Outside of ESPN Brasil and Globosat, no other program supplier has succeeded in launching a new premium sport channel in Brazil. The analysis made it clear that the exercise of market power by Globosat would be likely after the acquisition including with regard to the Globo group's vertical integration.

SEAE tried to compare the possible welfare losses with possible gains in efficiency, but the parties chose not to supply evidence of efficiencies and instead concentrated on challenging SEAE's market definition. Finally SEAE suggested a number of restrictions to neutralize the likelihood of abuse of marker power by Globosat, including: (a) forbidding ESPN for at least five years from exclusively selling ESPN Brasil channel to pay-TV service providers affiliated to Globo Group; (b) compelling ESPN, on non-discriminatory conditions, to sell ESPN Brasil to companies wishing to distribute this channel in Brazil,; (c) forbidding for ten years tied sales of channels by both Globosat and ESPN Brazil; (d) dropping exclusivity clauses from every ongoing Globosat or ESPN Brasil contract related to broadcasting rights in pay-tv for national sports events. In addition to the restrictions, SEAE suggested that the Secretariat for Economic Law (SDE), another antitrust body linked to the Ministry of Justice, start an administrative investigation of Net Brasil (a Globo subsidiary) and Globosat to determine whether certain refusals to deal, exclusivity agreements and the use of "English clauses" could be regarded as an infringement of the Competition Law. SEAE believes that the Brazilian players in the pay-TV market are going to help the Brazilian System for Competition Defense to monitor the accomplishment of these conditions.

After *Globosat/ESPN*, SEAE has worked on increasing its knowledge of media mergers, especially in pay-TV and new media markets. At the end of 2001, a sub-Coordination unit for Media and Digital Convergence Affairs was created inside the General-Coordination for Commerce and Services Affairs. Media mergers continue to be analyzed according to the same rules, practices and tools used in other markets, although SEAE is considering changing that.

The Chairman next focused attention on Israel whose contribution included a merger in 2002 between three non-overlapping cable TV-operators, possessing about 70 percent of the multi-channel TV market. This merger raised both competition concerns and possible efficiencies. He quoted from the contribution: "The [Israel Antitrust Authority – IAA] found that the merger

would lead to efficiencies and to greater competition in the various telecommunication markets due to the convergence tendency. These efficiencies are expected to result mainly from the ability of the merged firms to become an actor in the national telephone and Internet infrastructure market." (para. 7). The Chairman also noted that the IAA imposed conditions on the merger instructing, "…the merged cable company to enter the telephony services market within a predetermined period of time, and indicated the required minimal scope of customers." (para. 15) The Chairman asked whether the cable companies wanted to enter the telephony market, and wondered what would happen if they do enter but do not get enough costumers within the set period. He was also concerned about possible encouragements to engage in predatory practices to meet the market share target.

An Israeli delegate referred to four major competition concerns in this case. The first was the loss of potential competition. This was not believed to be a serious issue because the possibility of such entry was low. The second concern was the possible creation of monopsony power with regard to content providers. This too was not believed to be a significant risk because a satellite company remained a potential program buyer. The third concern was coordinated effects between duopolists, i.e. the satellite company and the united cable company. This threat was dismissed because of highly differentiated products. In addition ongoing convergence pointed to some kind of cluster competition emerging.

The fourth concern was the one behind the conditions imposed. There was a potential for mutual forbearance between the national telephony monopoly and the united cable company. For years both have had monopolies in their respective businesses. This situation was potentially altered in 1997 when the government declared that the international telephony market would be opened to competition. Some of the cable companies entered this market. Just one year later the telephony monopoly announced it would enter the multi-channel TV market, and did so quite aggressively in 2000. A multi-contact market situation had emerged and with it the possibility of a strategic game involving either mutual forbearance or competition in all markets.

The cable companies had made plans to extend their entry into local telephony, so the IAA did not create that. It merely acted to increase the chances the plans would be executed.

The remedy adopted in this case was quite extraordinary, but not necessarily very risky. Having invested some 70 million euros, i.e. what the IAA required in the way of cable upgrading, the cable companies are almost certain to offer competition in local telephony.

Referring to the Czech Republic contribution, the Chairman drew particular attention to a merger between two cable TV providers, i.e. *Baring*

Communications Equity (TES)/Vision Networks Tsjechie Holding case. He asked for more information about this merger and particularly the potential for greater competition for the dominant telecommunications provider.

The Czech delegate stated that alongside the application of standard competition law, there are also special rules (i.e. content and ownership regulations) applying to media mergers designed to safeguard media plurality. These rules are applied by the Council for Radio and Television Broadcasting, an administrative authority independent from the Czech government.

The *Baring…/Vision…* merger created a clear duopoly structure in the cable-TV sector. The competition authority unconditionally cleared it. The parties to the merger operated on different geographic markets, and the concentration resulted in the strengthening of the economic and financial power of the merging entities. In addition, any resulting increase in market power was counterbalanced by the market power of UPC, a major free-to-air TV broadcaster, and Czech Telecom, the principle Czech telecommunications operator. These companies are, or will in the medium term become, competitors of the cable TV operators as regards new technologies for broadcasting television signals, namely classic phone lines using xDSL technology, video streaming via Internet, digital terrestrial broadcasting, and the Multimedia Wireless System. The merger analysis included examining the possibility of collective dominance among the merged entity and UPC as regards content purchasing, advertising rates and general marketing.

The cable-TV operators will need to invest in modernising their networks in order to provide alternative data transfer and voice services, which are key aspects for maintaining their competitiveness. The merger will presumably increase the new entity's investment potential and facilitate eventual competition with UPC and with Czech Telecom. The latter company has a modern network capable of offering parallel voice, data and picture transfer to virtually every household in the Czech Republic. The merger creates conditions for setting up a similarly developed infrastructure able to compete with the dominant provider of telecommunication services. In this, the delegate fully agreed with what the Israeli delegate said.

5. Pluralism – Should competition authorities be directly involved in preserving pluralism in the media? How should they relate to media regulators? What are the pros and cons of ownership restrictions?

5.1. *Ownership Restrictions*

The Chairman began by considering the ownership restrictions existing in many countries. Three contributions in particular deal with this: Chinese

Taipei, Japan and Germany. The contribution from Chinese Taipei basically says that ownership restrictions are natural complements of competition laws. Japan's contribution notes that there has been a call by a study group to relax the rule on ownership, and Germany's is extremely sceptical, and even extremely critical of ownership rules.

The delegate from Chinese Taipei explained that to prevent over-concentration and maintain plural channels for expression of opinions and ideas, Chinese Taipei applies a dual regulatory process for mergers in the cable TV market. The Fair Trade Law, administered by the Fair Trade Commission (FTC) requires prior notification of mergers above a certain size or market share threshold. The FTC determines whether the overall economic benefits of a proposed merger outweigh any disadvantages resulting from possible restraints on competition. In addition, the Cable Broadcasting Law, administered by the Government Information Office (GIO), stipulates that system operators, their affiliates, and their directly or indirectly controlled system operators must abide by the following restrictions: 1) the number of subscribers acquired must not exceed one-third of the total number of subscribers in the nation; 2) the number of system operators acquired must not exceed one-half of the total number of system operators in an administrative district; and 3) the number of system operators acquired must not exceed one-third of the total number of system operators in the nation.

The Fair Trade Law is mainly concerned with overall economic benefit produced by efficiency, rather than with plurality of competitors in the relevant market. It is possible that the FTC could approve a merger generating a greater than one-third national market share. The Parliament therefore believes that competition law is inadequate to guarantee plurality in the cable TV market and has assigned that task to the GIO.

Turning to Japan, the Chairman noted that a study group on broadcasting policy released a report suggesting that: "…appropriate relaxation of the principle of excluding multiple ownership of the media is basically justified by considering the changes in the media environment…." (para. 21) He called on Japan to present its views on media ownership constraints.

The first speaker from Japan's Fair Trade Commission (JFTC) conceded that limits on mass-media concentration made sense in terms of under-girding democracy through protecting freedom of speech. However, from the viewpoint of competition policy, the JFTC believes that broadcast media ownership restrictions should be limited as much as possible and less restrictive means should be sought to achieve the legitimate public policy objective.

A speaker from the Ministry of Public Management, Home Affairs, Posts and Telecommunications, i.e. the broadcasting and telecommunications

regulator and policy maker, added that media ownership rules are applied through limiting shareholding in the broadcaster to a specified ratio, with the object of ensuring plurality and diversity of speech. The Ministry believes that the principle of media ownership rules continues to be needed. It recognises, however, that there is a need to relax a portion of the media ownership rules because of changes in the media environment, namely increased media choices for viewers. The media ownership rules are currently under review at the Ministry.

The principle behind the media ownership rules is based on cultural policy and plurality of speech, a concept derived from the Constitution, and the rules are comparatively easy to apply to two sided broadcasting markets. Despite the increased means to provide information to public, there are still risks entailed in media concentration, and once such concentration occurs it is difficult to undo. It is also worth noting in Japan there are still people who only view one specific media such as free terrestrial TV. Half of the Japanese population watch free-to-air terrestrial TV and do not subscribe to either cable or satellite broadcasting services.

The Chairman next drew attention to the German contribution and its view that the control of concentration through the media law has been ineffective. In spite of this law there are two major media groups in Germany. The Chairman wanted to know whether that was a consequence of both the competition law and media law, or amounts only to a criticism of the media law? If the latter, is it a result simply of bad design or are ownership rules ineffective *per se*?

A German delegate from the Federal Cartel Office (FCO) began by clarifying that the scepticism about control over media concentration attaches only to the media law constraints not to review under general competition law. The media law's restrictions apply only if a company obtains a dominating influence over public opinion. This is presumed to occur if a company reaches 30 percent of the viewers.

There has been no case in Germany of a merger being cleared under either the competition or media law but running into problems under the other law. For example the pay-TV joint venture between the two German private TV groups, Bertelsman and Kirch, was prohibited by the FCO and also presented difficulties under the media law. Given this record, one can really doubt whether an additional control under media law is necessary. In any case, the protection of economic competition as a rule also ensures pluralism and diversity in the media.

Specifically with regard to ownership limits, the delegate made three points. In Germany there are no restrictions on foreign investments in the media and this helps to create diversity. Second, there has been a negative

experience with the media law limitations on share ownership in TV companies, i.e. 25 percent. This did not prevent the emergence of oligopolies but did prevent a clear allocation of media responsibility which is perhaps why the restriction was amended. Third, there are no limits on cross ownership in German competition law. If the TV market and the newspaper markets are different markets, bearing in mind the possibility of substitutability among different media, and competition is maintained in these properly defined markets, this should also ensure sufficient diversity and plurality.

A delegate from the Ministry of Economics and Technology added that specific media control is the exclusive competence of the *Länder* not of federal institutions, and the *Länder* face a kind of conflict of interest. They are concerned about restricting cross-ownership, but they also wish to attract investments from the big media companies. That is perhaps one reason why media control is not as effective as it might and should have been.

5.2. Countries in which there is a strong feeling that the competition authority should not address the issue of pluralism

The Chairman divided the next set of contributions into two groups. The first group takes the view that the competition authority should have nothing to do with pluralism or broader social concerns, and usually institutes a division of labour between a sectoral regulator and the competition authority. The second group practices a much less obvious separation of competition and pluralism protection. The United States and Canada fall in the first group.

A delegate from the United States' radio, TV, cable and telecommunications regulator stated that the Federal Communications Commission (FCC) media ownership rules have worked well during the past fifty-to-sixty years. This is partly due to the fact that the FCC took a dynamic approach in regulating the media marketplace. The FCC's policy of limiting the number of radio stations in a given community that can be owned by the same entity was codified in the FCC's rules during the early 1940s. Since then, many more ownership and cross-ownership rules have been adopted. The objective has been to promote three important goals: diversity, competition, and localism, without harming consumers or infringing constitutionally protected freedom of expression.

The media ownership rules landscape experienced a drastic change as a result of passage of the *1996 Telecommunications Act*. It repealed the cross-ownership rule affecting common ownership of cable TV and telephone systems, and made other changes affecting media ownership generally. Among these other changes, the Act eliminated the national cap on the number of radio stations a single operator can own and increased the cap on

the number of local TV broadcasters (measured in terms of national audience reach) a national TV network can own. More importantly, the Act required the FCC to review its entire slate of media ownership and cross-ownership rules every two years to determine whether they are still necessary in the public interest. This biennial review focuses, among other things, on changes in the status of competition in the media industries.

The courts, until recently, were supportive of the FCC's media ownership rules. But in a series of challenges by the owners of media companies during the late-1990's, the courts vacated the cable-TV broadcaster cross-ownership rules, remanded the rules setting a cap on the number of local TV broadcasters a national TV network can own, and remanded the rules pertaining to the number of subscribers a cable operator can reach. In some cases, the courts have pointed out inconsistencies in the FCC's various media ownership rules. For example, the court opined that when determining the number of independent "voices" present in local TV broadcast markets for the purpose of implementing the national TV audience-reach cap, the FCC included only local TV broadcasters in its definition of local markets, while for the purpose of implementing its radio-TV broadcast cross-ownership rules, the FCC included other media "voices" in addition to local TV broadcasters.

The combination of the *1996 Telecommunications Act*, recent court decisions, and the rapidly changing media marketplace forced the Commission to review all of its media ownership rules in 2003. Some of the issues currently under consideration were included in the U.S. contribution for this roundtable. For example, the FCC is considering the appropriate measure for diversity, i.e., whether diversity should be measured in terms of view point, source, ownership, or number of programming outlets; and whether or not new media outlets and new types of media such as the Internet should be included in the number-of-voices test determining media diversity. Significant changes in the ownership rules are expected in the course of 2003.

The Chairman remarked that the Canadian contribution reveals a possible trade-off when it comes to competition law and pluralism. It asserts that competition and social policies should be kept separate because if combined under a single authority, the result too frequently would be unsatisfactory trade-offs for the parties, consumers and the industry. Later in the contribution one also reads: "Frequently… commentaries have focussed on the perceived shortcomings in the Bureau's review, particularly the fact that the Bureau has focussed solely on the economic impact of a change in control and has not adopted a broader approach in its review." (para. 2) Observing that it seems the purer one is the less relevant one becomes, at least in the eyes of the general public, the Chairman then asked why trade-

offs are better made through combining the decisions of two different authorities instead of being concentrated within the competition authority.

A Canadian delegate confirmed that the Competition Bureau focuses only on the economic competition aspects of media mergers, for example the effects on advertising rates, to the exclusion of diversity issues. This focus also means that distinct antitrust markets are examined despite media critics preferring that attention be paid to effects in several markets simultaneously.

The Competition Bureau only has skills in analysing legal and economic issues and also has a single Commissioner. In contrast, the Canadian Radio-Television and Telecommunications Commission (CRTC) is a multi-member body with different skill sets and makes social policy decisions on the basis of public hearings. The CRTC is accordingly much better suited to ascertain and determine social policy and national interests. For example, the *Broadcasting Act* provides that the broadcasting system should serve to safeguard, enrich, and strengthen the cultural, political, social and economic fabric of Canada.

If the merger review process were consolidated into one regulator, how would the regulator balance the impact of higher prices against the superior news reporting that higher revenues might produce? Reliance on two regulators allows both economic and social policy to be independently assessed. If a merger substantially lessens competition, remedies can be designed to address this. If it allows the parties to improve their reporting on social issues, another regulator can weigh and report on that aspect. Transparency is inherent in this model because there is no trade-off involved in the decision-making process. There is no need, as there would be in the one regulator model, to resolve the conflict in favour of one goal over another.

As a follow-up question, the Chairman asked whether having a full commission instead of a single commissioner would make much difference. The Canadian delegate responded that the single commissioner is responsible for competition aspects only. There is no other commissioner responsible for other policy aspects.

Countries in which the competition authority addresses (at least partially) the issue of pluralism

The Chairman noted that Canada's views might be particularly interesting to Austria. Paragraph 42c of its *Cartel Act* provides that media mergers can be prohibited if media diversity is impaired. The Austrian contribution traces this provision to an amendment adopted in 2002, "…as [a] reaction to [strong public criticism] after the clearance of the merger in the Formil case." (para. 13) So the Federal Competition Authority (FCA) is forced to make difficult tradeoffs. The Chairman asked how it was going to do that.

Merger control, the Austrian delegate stated, was introduced into Austria 10 years ago. In that period of time, only a few decisions have been taken

dealing with special considerations affecting media mergers. The *Formil* case was a merger of several weekly news magazines. Since the merging parties belonged to two major media groups, Bertelsmann and Mediaprint, the merger had horizontal effects. In its analysis of pro- and anti-competitive effects, the Cartel Court first explained the meaning of the *Cartel Act's* two justifications for permitting an anti-competitive merger, namely: 1) improvements in competition that outweigh the disadvantages of the domination of the market; or 2) improvement of the international competitiveness of the businesses involved, if justified by the national economy. It found that neither criterion was met in the case.

Since the *Formil* merger produced a quasi-monopolist position, the Court mentioned the danger of diminished diversity and media criticism especially as regards one of the parent companies. The Court concluded there would be an impairment of media plurality and also noted that the two media groups would likely support each other by way of advertising for their own companies and this was apt strengthen Mediaprint's dominant position on the market for daily newspapers. The merger was cleared with conditions.

Concerning how the FCA will protect diversity and pluralism in reviewing media mergers, the delegate stated that the FCA, set up only in July 2002, is unable to decide mergers itself. It must bring them to the Court, and this is what it will do if doubts arise about media pluralism and diversity. So at the end of the day, the difficult trade-off will be made by the Cartel Court.

The Chairman next turned to the United Kingdom whose contribution noted that: "From the perspective of the Office of Fair Trading…, mergers in the media sector follow the same path as mergers in other sectors." (para. 1) Yet in the current system the OFT has no role in newspaper mergers. Instead, the Secretary of State and the Competition Commission have a duty to consider plurality, diversity and competition in coming to a conclusion on whether a merger is against the public interest. Furthermore, according to the Communications Bill, the OFT will in future be assess the effect of newspaper mergers on competition. Ofcom, the new media regulator, will assess the effect of newspaper mergers on plurality and diversity, but the OFT "…can pass any representations about plurality and diversity to Ofcom or to the Secretary of State." (para. 5) The Chairman asked how the Competition Commission assessed the issues of plurality and diversity in the past. He also queried whether the OFT will be in a position to pass comments to Ofcom about plurality and diversity in newspaper mergers in the future if it analyzes media mergers like any other mergers?

A United Kingdom delegate began by saying that newspapers are rather different from TV and radio, in the U.K. at least. There are no sets of rules relating to plurality or diversity of ownership. All of the issues are dealt with

on a case by case basis when mergers are proposed and then referred through the system. The special nature of newspapers was recognized in legislation establishing separate provisions for newspapers whereby OFT is not implicated in referring mergers to the Competition Commission. Such mergers are instead directly referred by the Secretary of State if various thresholds are exceeded.

Current proposals call for newspaper merger review to be brought more into line with what happens in other products and media, and for the government to withdraw from direct involvement in competition policy. The proposed changes represent more a rearrangement of administrative procedures than a major change in substance. They will probably result in fewer newspaper mergers being referred to the Commission.

Concerning plurality, it should be clarified that the Commission is required to look at the need to maintain accurate presentation and free expression of opinion. In the past the Commission generally interpreted this primarily as a need to examine how a merger would affect editorial freedom. This issue has arisen in very few of the mostly local rather than national newspaper mergers over the past 30 years. It has not raised particular problems or resulted in a merger being blocked, except for one interesting case. In that merger, two newspapers representing opposite sides of the sectarian divide in Northern Ireland would have merged. It was felt very unlikely that a single owner would be able to maintain editorial freedom to the point where the views of both sides of the divide would be reflected accurately.

Concerning OFT's particular role in newspaper mergers, OFT focuses predominantly on competition issues and in practice that means focusing on advertising markets. The currently proposed system will give Ofcom a strong role specifically as regards diversity and plurality. Another delegate added that OFT will simply pass plurality concerns on to Ofcom and will refrain from assessing them.

The Chairman said that the situation in Spain seems to be a bit complicated because the Supreme Court recently decided that a 1994 Government decision regarding a merger of two radio operators was void since: "…it did not take appropriately into account "information pluralism" considerations." (para. 4) So the competition authorities have to consider information pluralism. This led the Government to include in the conditions attaching to a merger of two pay-TV operators (*Sogecable/Via Digital*) a provision relating to "information pluralism". This is a particularly interesting case because it involved some efficiency considerations stemming from offering the same content to the subscribers of the two merging parties. The

Chairman wished to know more about the efficiency/diversity trade-off made in this case.

A Spanish delegate noted that in *Sogecable/Via Digital*, the focus was on the national pay-TV market. The markets for rights to premium cinema and football content were also examined as were other markets in the fields of audiovisual production and telecommunication (one of the operators was controlled by Telefónica, Spain's principal phone company). The convergence of technologies and especially the fact that there are new means which can convey different services, such as cable and telephony (via ADSL), along with TV, argued in favour of considering telephony.

The parties to the merger were the two main pay-TV companies in the market, both of which were in financial difficulty. It was believed that blocking the merger would probably lead to there being just one operator. The market was also thought to be very dynamic with rapid technological change and no significant barriers to entry apart from control of premium content such as football or films. After the merger, Sogecable would be the main player in pay-TV, cable operators being the principal remaining competitors. Therefore, the Government focused on remedies to compensate the disappearance of one operator, to hinder the establishment or reinforcement of barriers to entry in the various affected markets, and to reduce negative effects on pluralism and diversity.

Various conditions, related to the non-discriminatory provision and limited duration of exclusivity in relation to content contracts, were designed to assist new operators, especially cable operators which were already active in pay-TV in Spain. Remedies were designed as well to facilitate access to the satellite platform's information and content channels, and there were restrictions on common strategy in media.

These remedies were believed to have a positive impact on pluralism. Nevertheless, competition law is an inefficient way to guarantee pluralism, which is in any case difficult to define. In addition, due to rapid evolution of the market, any regulation related to pluralism concerns should perhaps be periodically reviewed and, if necessary, revised. In media mergers, the sectoral regulator supplies input and makes a report. The final decision is taken by the government which can consider competition issues, including efficiencies, and the regulator's report.

Finally, attention was paid to ensuring the transfer of merger induced efficiencies to consumers. In that regard, it was required that the new entity not transfer any costs of the merger to consumers (e.g. the costs associated with changing satellite dishes or decorders). One effect of that was the new entity decided to maintain the old set of decoders so consumers did not have to bear the cost of changing them. The merger was also subject to a three year

price increase limit. This was not expected to have a negative effect on innovation because it only applied to products of the same quality. For different products, such as a greater number of channels, different prices are permitted. The price restriction is easy to monitor because prices are published.

Turning to the last contribution, the Chairman said that the Irish *Competition Act* of 2002 recognises to some extent the importance of plurality in media merger review. Media mergers receive special treatment in two ways. First, there are more extensive notification requirements. Second, there is an interesting interaction between the competition authority and the Minister. The law provides for phase one and phase two investigations. Even if the competition authority finds in phase one that there is nothing wrong with the merger, the Minister can order it to enter into a phase two investigation. If that phase also reveals no problems, the Minister can decide to apply other criteria. The Chairman wanted to know what the focus of the phase two investigation would be in a situation where phase one failed to find a problem, and also wondered about the extent to which the Minister's other criteria would be considered in the course of a phase two investigation.

An Irish delegate stated that the competition authority had just received its first media merger filing and the phase one investigation had begun. Other than that there was no experience with media mergers. Concerning the Chairman's question about what to examine in a phase two investigation if phase one revealed no problem, the delegate suggested there were several options. First, the authority could simply redo its SLC analysis perhaps in greater detail. The second option would be to undertake a phase two analysis focused on the plurality criteria set forth in the statute. For that task, the competition authority has neither the expertise, nor a comparative advantage. A third, and probably most attractive, alternative would be to assist the Ministry in analyzing plurality effects, such as the strengths and competitiveness of the media businesses indigenous to the pertinent state, while at the same time refining the competition analysis.

6. General Discussion

A United States delegate pointed to a general tension inherent in merger review that might be still stronger in the case of media mergers. On the one hand, there is a concern to protect competition in media markets, which some say should go beyond protecting advertisers to include concern for plurality issues. But on the other hand, there is a need to avoid undue interference in the marketplace, a concern highly pertinent to media markets because the idea of free media is freedom from undue government interference. The concern about competition enforcers looking at plurality issues is that unlike

in straight economic competition issues where economics based evaluation standards can be applied, the standards for assessing pluralism are much less clear. How many media outlets are enough? The answer could well vary depending on who is sitting in the enforcer's chair.

If one cannot entirely trust the free markets in the media, and if competition in advertising is an inadequate proxy for sufficient diversity of viewpoints in the media, the probable solution is a regulatory rather than a case by case approach. At least this will mean clear, up-front standards are applied, and the public can comment on whether those seem suitable.

A Brazilian delegate supported the Canadian and U.S. views regarding competition authorities and pluralism. He noted, however, that although price competition had become the sole standard for competition analysis, consumer welfare also involves other dimensions and there could be trade-offs that have to be made. Perhaps this should be done, as Canada argued, by separate agencies, but things could get difficult. Consider for example the possibility of two newspapers entering a joint venture to fund reporting on some foreign war. This might produce less diversity, but without the joint venture perhaps there would be no indigenously sourced reporting of the war at all. Or consider a joint venture between broadcasters to fund polling for presidential elections. In the U.S. this resulted in several synchronised mistakes in calling the last presidential election. When the antitrust authorities considered the joint venture they did not think this could happen. In both the newspaper and broadcasting joint venture examples, there were efficiencies plus diversity and quality considerations, but good antitrust enforcement would presumably lead to opposite results. So it is sometimes unfortunately difficult to separate things out in media mergers and one cannot avoid quality and diversity considerations.

The Chairman interjected that a number of scientific articles based on the Hoteling-model of competition show how the content of the newspaper will depend on the competitive circumstances. This tends to show that quality of output and quality of competition are somewhat inseparable.

A United States delegate noted that in complex merger analysis one has to consider not just what might go wrong if a merger is permitted, but also what consumers might lose if it is blocked. And in making difficult judgement calls, as in the broadcasting case mentioned by Brazil, it is good to avoid coming down on the side of too much government interference especially in dictating what viewpoints ought to be preserved or sacrificed.

The Brazilian delegate registered his agreement, and noted that the desire to avoid government intervention could be an argument in favour of episodic involvement by a competition authority versus more frequent involvement by a sector regulator.

A Korean delegate noted that one must distinguish between the advertising and content consumer markets and the former should be treated as subordinate to the latter. Companies want to advertise in papers with many readers. Also the price elasticity of demand in the content consumer market is quite low, because a reader or viewer of a certain media chooses the content based on his or her personal tastes. On the other hand the price elasticity of demand in the advertising market is quite high. The delegate therefore endorsed the views of the Secretariat's paper supporting a behavioural rather than structural approach to media merger remedies. However the behavioural approach should be taken not just because of market related change, but also because there is low price elasticity in the content market.

A BIAC delegate, introduced Campbell Cowie, Director of Public Policy for AOL Time Warner Europe, as someone who brings an economic perspective to media mergers. Commenting on the Secretariat's paper, Mr. Cowie said that it would be good to add further consideration of the impact of digitalisation on the scale of entry barriers, as distinct from the impact on entry barriers of the convergence of TV and telecoms. Although related, the two are very different phenomenon and have different effects on barriers to entry. He questioned the view that barriers to entry are high in all media markets and asked that any supporting economic evidence be included in the paper. Instead, the Secretariat's paper should recognise that entry barriers are different at different stages of the market and in different markets. He also drew the Secretariat's attention to the recent finding of the European Commission in the *Telepiu/Stream* merger. That decision, he said, reflects a sensible shift in approach from one which supports platform competition at almost any cost towards one which is more willing to recognise that platform competition is not always sustainable and that the correct focus of the investigation should be on the identification of appropriate remedies to ensure fair access to a dominant (but financially viable) platform. An outstanding concern is that not all OECD members have specific regimes for regulating access to Conditional Access, services, access to API technology, access to verification software and other technical bottlenecks. Where there are no appropriate regulations in place, competition authorities may have to specify what is meant by fair and reasonable terms. Mr. Cowie also would welcome more analysis in the Secretariat's paper on methods by which competition authorities might assess the incentives that a firm has to abuse a dominant position resulting from a merger. Merger simulation models provide one analytical technique for identifying commercial as opposed to theoretical incentives firms have under certain market conditions.

Mr. Cowie drew attention to proposals from the European Commission to reform its Merger Regulation, in particular the proposal to place greater

weight on efficiency arguments. He invited more detail on the kinds of efficiency arguments that would be acceptable in media merger cases and the data that would be required to support these arguments. Mr. Cowie expressed concerns that many of the efficiency benefits merging parties might cite as efficiency benefits, might equally be used against them as arguments to prohibit the merger. A review of efficiency gains that have resulted from previous mergers in the media sector would be a welcome contribution. The OECD is well placed to undertake that kind of review.

On the matter of the separation in many cases of competition law from other public policy and socio- political rules, Mr. Cowie referred the Committee to ICN work on merger review regimes around the world, especially as concerns how various jurisdictions incorporate other socio-economic and social-political considerations into their analyses.

A European Commission delegate agreed that the *Telepiu/Stream* decision contrasted with the Commission's normal preference for platform based competition, but in this case such competition was no longer viable. Ensuring free access was the best that could be done for consumers. The case does not represent a general shift in policy. There may be a parallel in certain telecom cases where facility based competition may be a better long term solution, but service based competition also benefits consumers. Concerning the relationship between competition law and plurality, the Commission agrees with the U.S. and German focus on competition and economic assessment, leaving pluralism to other agencies.

A German delegate mentioned the merger of two Berlin newspapers that illustrates the antagonism between pluralism and competition concerns. The merger was blocked by the Bundeskartellamt on purely competition grounds, but the parties asked for a ministerial over-ride based partly on pluralism arguments. Concerning remedies in such a case, the delegate stated that pluralism for a newspaper has to do with editorial freedom and this cannot be assured by a government agency. The parties proposed to create a private foundation, financed on a stable basis for 20 years, charged with controlling the editorial freedom of the merged newspapers. The merger is still under consideration by the Minister.

7. Chairman's summary remarks

There appear to be three different ways competition authorities explain their aversion to dealing with pluralism. First there is the absence of objective measures for pluralism, hence the ostensible need for it to be regulated by someone outside applying somewhat arbitrary criteria known to everybody. But one could ask, where are the objective criteria for assessing efficiencies or for making market definitions and using data on market shares? Competition

authorities may fabricate objectivity in using HHI thresholds even though theory does not fully support their significance. Secondly, there is the reputational concern, which seemed to be reflected in the Canadian and Austrian remarks. One can get a bad name by getting it "wrong" and that can be done by coming down on either side of a merger. Competition authorities looking at pluralism can be criticized and this could be seen as undermining their reputation for objectivity. The problem with this argument is exactly what is written in the Canadian contribution. Competition authorities could be criticized as well for being irrelevant or having too narrow a view. This could lead to the reaction seen in both the U.K. and Austria. Legislators may require competition authorities to go beyond merely looking at competition issues to consider pluralism as well, knowing that this is where the real problems may be. Finally, there is the desire to reduce risks associated with possibly being wrong by clearly demarcating what will be the responsibility of the competition authority and what will lie outside. Where the line is drawn is really a question of personal taste in terms of risk taking and philosophy. The roundtable discussion has at least clarified the debate and demonstrated competition authority uneasiness about pluralism and diversity.

ISSN 1560-7771
OECD Journal of Competition Law and Policy
Volume 5, No. 4
© OECD 2003

Competition and Regulation Issues in Telecommunications

4. Country Contributions

Further information from the following jurisdictions on the topic of Media Mergers is available at: *http://www.oecd.org/competition* under the topic "Best Practice Roundtables".

Country contributions

Australia	Ireland
Austria	Israel
Brazil (SEAE and CADE)	Japan
Canada	Mexico
Chinese Taipei	Spain
Czech Republic	United Kingdom
Denmark	United States
Finland	European Commission
Germany	

OECD PUBLICATIONS, 2, rue André-Pascal, 75775 PARIS CEDEX 16
PRINTED IN FRANCE
(24 2003 23 1 P) ISSN 1560-7771 – No. 53559 2004