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## **Media Supervision on the Threshold of the 21<sup>st</sup> Century What are the Requirements of Broadcasting, Telecommunications and Concentration Regulation?**

Authorities that are responsible for supervising the media and those that control concentrations are, for the most part, not only separate from each other organisationally, but also have different areas of responsibility and objectives. However, they may be brought closer together or even united in terms of their structure and their activities. Various ideas and national examples of both types of body were discussed at a workshop held by the European Audiovisual Observatory and the Institute of European Media Law (EMR). A select group of experts from various European countries debated this difficult subject under the guidance of Gernot Lehr, lawyer and member of the EMR board, and Professor Dr. Alexander Rossnagel, Scientific Director of the EMR. The following article is based on the ideas that were brought to that forum, which have since been embellished with the thoughts of the authors in order to produce the report in its current form. Our sincere thanks therefore go to all participants in the workshop.

This IRIS *plus* brings to an end, for the time being, our rather lengthy series of reports on media convergence; I say "for the time being" because audiovisual media continue to merge together, thus creating new legal challenges.

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# Media Supervision on the Threshold of the 21<sup>st</sup> Century What are the Requirements of Broadcasting, Telecommunications and Concentration Regulation?

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In the light of convergence and globalisation in the media and telecommunications sector,<sup>1</sup> the structure of media supervision at the European and national levels is increasingly a topic of discussion. Consequently, the European Audiovisual Observatory, together with its partner, the Institute of European Media Law (EMR), tackled this theme and published an IRIS *plus* entitled "Media Supervision on the Threshold of the 21st Century: Structure and Powers of Regulatory Authorities in the Era of Convergence" as a supplement to IRIS 2001-8.<sup>2</sup> The present document is an annotated summary of the results of the workshop bearing the same name, held by the aforementioned institutions in Saarbrücken on 28 October 2001.

The previous report dealt mainly with the structure and functions of supervisory bodies from a European law perspective and went on to explain the monitoring of media concentrations, particularly those relating to convergence. This document, however, explains how media supervision and concentration controls are actually organised in the Member States. Participants in the workshop are first given an opportunity to summarise their own contributions. A selection of examples from individual States, which were discussed at the workshop, is then presented.

## I. Media and Telecommunications Supervision - Two Separate Entities, or One and the Same Thing?

*Supervision Structures in the Convergence Era*

### 1. Discussion of Structural Models General Reasons for Regulation and Establishing Relevant Bodies

Supervision as a means of state control is, in many instances, being replaced by objectives-based, adaptable regulation embracing flexible modes of intervention that are not predetermined in every detail by legal provisions and which can be measured against clearly-defined goals.<sup>3</sup> The fundamental principle behind regulation and, thus, behind the establishment of regulatory bodies, nevertheless remains that of state supervision of a body of law for the purposes of preventing dangerous developments or achieving certain goals. Therefore, it is vital to decide first of all whether such a form of regulation is suitable for the media sector and, if it is, with what objectives it should be associated.

Firstly, regulation is a means of directing certain processes and may be introduced as a temporary measure until the political goal sought, e.g. the transition to a competitive market, is achieved.<sup>4</sup> Regulation may also be an inevitable, more permanent necessity for as long as an undesirable situation continues. Thirdly, regulation and supervision can also be a way of guaranteeing basic social or political conditions and standards. In such situations, they are not compulsory, but are meant to be relatively permanent. Regulatory mechanisms and the intensity of regulation are variable and dynamic, depending on the political and social consensus.

Whatever form regulation may take, the primary aim is to achieve certain (possibly sector-specific) interests, set out in the

state's Constitution, in the telecommunications and broadcasting sectors. The main areas concerned are competition, access to the networks of large companies, rules governing access to limited resources (e.g. spectrum), protection of minors and data, and the universal service. In the broadcasting sector, diversity of opinion and minimum journalistic standards for the opinion-forming media are also relevant considerations.

### Criteria for (Convergent) Regulatory Tasks

On this basis, we shall now seek to summarise the various groups of tasks that might be assigned to (convergent) regulatory bodies.

At a time when different media sectors are merging together,<sup>5</sup> it is becoming necessary to combine the regulation of telecommunications and broadcasting. This is true wherever new mechanisms are required to open up a market in pursuit of media policy objectives, such as in the area of access to infrastructure. The following areas of convergence can be identified:

- distribution (must-carry, multiplexer access, electronic programme guides, Applications Programme Interfaces, Conditional Access Systems);
- universal service;
- liberalisation and the dual broadcasting market;
- spectrum policy;
- competitive independence.

It is vital that broadcasting regulation should form part of the market-structuring process (liberalisation, opening of markets for competition, monitoring breaches of competition, formation of competition-orientated conditions). This should include purely content-related tasks such as programming, and those who share this view believe that content and network regulation should not be kept separate.

Running counter to this approach is the suggestion that the object of telecommunications regulation is not identical, but rather contrary, to that of media regulation. For example, broadcasting law aims to prevent market breakdown from the outset, whereas in the telecommunications sector the initial focus is on building the market.

According to this way of thinking, the division between the two must be retained, since a number of objectives - laid down in basic guarantees and the principles of economic regulation - require them to operate side by side. There are also areas where there are clear structural differences in the types of regulation. For example, not only might the regulatory objectives differ; - in addition, regulatory bodies rarely share the same "business culture". Moreover, the principle of separate regulation for network infrastructure and content has prevailed at the European level.<sup>6</sup> If this separation continues, it is important to bear in mind that there are areas where infrastructure and content regulation coincide (e.g. access), which should be defined or for which some kind of coordinated regulation needs to be established.

Consideration is also being given to whether concentration controls in the field of network infrastructure could form part of a convergent regulatory structure. These controls would form part of general cartel law and would be the responsibility of the existing

cartel authorities. Opposed to this idea of giving the cartel authorities sole responsibility for monitoring telecommunications regulation is the fact that different criteria are applied in cartel and telecommunications law. Such an amalgamation of responsibility would only be possible if, as under cartel law, market power were the only criterion to be considered. The telecommunications sector, however, comprises an infrastructure for which the State must bear some responsibility. Regulatory objectives must also be to guarantee universal service, supervision and infrastructure. In particular, the goal of protecting infrastructure can, according to this view, only be regulated by specific telecommunications law, where regulation must take particular account of the consequences of privatisation. Cartel authorities can only partially enforce the specific standards of telecommunications law because they are structured and orientated more towards economic considerations. However, the State's responsibility for the consequences of privatisation or for opening up the market is not the only reason why telecommunications supervision is currently established as a separate regulatory area. Where sector-specific problems such as the confidentiality of communication are concerned, such supervision cannot possibly be incorporated in general competition law in the foreseeable future.

### **Dangers of Convergent Regulatory Structures**

The question of actual parameters is often only addressed once the relevant authority has been set up. In other words, a body sometimes has to be fully established with general responsibilities before it is given a precise role.

The debate on structure, however, is dependent on content. The first task is therefore to define the content-related objectives of regulation.

As an increasing number of regulatory authorities introduce instruments that give them greater powers of intervention, the role of the "regulator" may in fact be weakened. As explained above, regulation is generally seen in a very positive light compared to pure state supervision. Traditional administrative supervision is therefore not necessarily a task for the regulatory authorities in this sense.

Creating a convergent regulatory authority often means bringing responsibility for different areas under one roof without dovetailing the different areas of supervision. The different points of view therefore remain and are particularly obvious in relation to frequency policy. There is also a danger of a top-heavy structure, since the unproductive parts of the authority can grow out of all proportion. From a legal, political and administrative point of view, therefore, optimum co-operation between existing authorities is preferable to a "bundling" (concentration/centralisation) of responsibilities if supervisory objectives, content and practices are not sufficiently harmonised. However, whether and to what extent creating such a convergent authority appears sensible should not only be an economic issue (e.g. staff costs), but should be discussed with reference to objectives such as "public interests".

### **Introducing Different Levels of Self-Regulation**

A structure for setting and enforcing standards in order to achieve social and political objectives is more difficult to create in the media sector than elsewhere. It is therefore proposed that regulatory authorities should not bear the whole burden, but that self-regulation should be encouraged. Nevertheless, those who make such a demand must distinguish between different, graded regulatory models: (i) co-regulation or "regulated self-regulation", which requires a state-run regulatory framework, (ii) self-regulation and (iii) self-monitoring by the players concerned.

Co-regulation can deal with standard, pre-determined criteria in different media sectors that have much in common. A disadvantage as compared to State standard-setting and enforcement is that, in this form of self-supervision, attempts are made to pursue

socially-relevant objectives. This approach is based on the argument that traditional regulatory authorities are no longer effective at providing comprehensive control, since because of the anticipated convergence, those subject to the law are expected to move from one regulatory framework to another. For this model to work, it is necessary to develop a thematic area covering all audiovisual media of an opinion-forming nature (cross-sectoral regulation rather than sector-specific regulations). With regard to the existing problem of distinguishing between different audiovisual services,<sup>7</sup> regulation must be interpreted broadly in terms of scope and its degree of detail graded in accordance with the opinion-forming nature of each particular service. The intensity of regulation may vary.

With this model, it is therefore essential that a content-related regulatory framework, including objectives, is laid down by the legislature. Co-regulation bodies should also be able to operate effectively, since the possibilities created by the law governing societies, for example, are not sufficient even to fulfil implementation-related objectives. These problems are becoming particularly acute in spheres of regulation in which constitutional/legislative provisions are already in place. According to one view, broadcasting diversity cannot be guaranteed through self-regulation (where standard-setting is not influenced by the State), or through self-monitoring (where standards are enforced), whereas advertising regulations, for example, can.

According to a different viewpoint, especially in cases where the Constitution imposes on the State a particular duty to act, for example concerning the protection of minors, a certain degree of state supervision and a regulatory framework are vital. Consequently, these tasks should be carried out as part of a co-regulation system. On the other hand, it can be argued that those under the law should be allowed to practise self-regulation and self-monitoring, since if the supervisory bodies retain responsibility as an "appeal court" for checking justifiability and reasonableness, there is a danger that the scope of those bodies will be difficult to determine under the law and, in cases of doubt, might be interpreted too broadly.

A particular structural advantage of self-regulation in its broader sense is that existing (federal) bodies and organisations can be integrated without endangering their short-term survival.

It should be noted that, according to one particularly controversial point of view, public service broadcasting should also be included in the standard framework of co-regulation. If this were so, sovereign supervision could be restricted to monitoring the functioning of a pluralistic form of self-regulation.

## **2. National Situations**

At this point, it would be useful to consider the current regulatory structure in Austria, where far-reaching reform took place in 2001, directly as a result of the convergence debate. Also, the proposed changes in the United Kingdom, introduced for discussion in the Government's "Communications White Paper",<sup>8</sup> are a response to new technical and economic conditions.

### **Austria**

In Austria, legislative changes were designed to create a so-called integrated authority with responsibility for regulating telecommunications and the audiovisual media. This step was taken in view of the increasing convergence of information technology, telecommunications and the audiovisual media, which now require joint regulation.<sup>9</sup>

Under an initial draft amendment, the powers of the new regulatory body were to be divided between three commissions, one dealing with media regulation, another with infrastructure

regulation and a third with competition matters.<sup>10</sup> The media commission was intended to award broadcasting licences, deal with complaints about programme content, penalise broadcasters who commit administrative infringements, and monitor e-commerce, i.e. information society services. The infrastructure commission was to be responsible for awarding telecommunications licences, carrying out the tasks set out in the *Signaturgesetz* (Electronic Signatures Act) and laying down and enforcing conditions for non-discriminatory access to communications services and transmission channels. An important element of this draft was the transfer of responsibility for enforcing general competition regulations (dealing with infringements) in the telecommunications sector to the competition commission. The corresponding provisions of the *Telekommunikationsgesetz* (Telecommunications Act - *TKG*)<sup>11</sup> were to remain in force.<sup>12</sup> Under the restructuring, the various stages of appeal were also to be governed by new regulations. The decisions of the regulatory authority could be referred for further investigation to a new body, the independent *Bundeskommunikations-senat* (Federal Communications Senate). For such a body to be established, the Constitution would have had to be amended. However, the necessary parliamentary majority for such an amendment was not achieved.

The new regulations, which have now entered into force in the form of a simple Act, provide for a more limited integration of regulatory functions in the telecommunications and media sectors.

For telecommunications, a new body, the *Rundfunk- und Telekom-Regulierungs GmbH (RTR)*, incorporating the former *Telekom-Control GmbH (TKC)*, was created under the terms of the so-called *KommAustria-Gesetz* (KommAustria Act - *KOG*).<sup>13</sup> The *RTR* is particularly responsible for routine regulatory tasks in the telecommunications sector, such as telephone number administration and settling disputes with customers. The *Telekom-Control-Kommission (TKK)* also functions as a regulatory body in this field. According to para 111 of the *TKG*, its role includes awarding, withdrawing and suspending licences, prohibiting or requiring certain behaviour and approving the terms of business of, and fees charged by, companies with significant market power. In this context, the *TKK* was empowered under the terms of the *KOG* to require or prohibit certain behaviour by telecommunications service providers who abuse a position of considerable market power. Due to the scope of its regulatory powers, the *TKK* can access expert reports commissioned by the *RTR*, which is also responsible for managing the *TKK*.

Separate authorities and channels of appeal for telecommunications and media issues were retained, since *KommAustria* was set up as a regulatory authority for the media sector to function in parallel with the *TKK* (paras 1 and 3 of the *KOG*). *KommAustria* can also call on the services of the *RTR*; however, whereas the *TKK* remains independent, *KommAustria* was set up as an administrative authority under the direction of the *Bundeskanzleramt* (Federal Chancellery) (see para 3.3 of the *KOG*). *KommAustria's* decisions must be taken first to the *Bundeskommunikationssenat*, which is now overseen by the Federal Chancellery, before they can be referred to the administrative or constitutional court. *KommAustria* is solely concerned with the media sector, and is responsible for awarding broadcasting licences and monitoring private broadcasters, for example (para 2 of the *KOG*).

Therefore, the bodies responsible for regulating telecommunications and the media have only been integrated insofar as they have been given the same structure, whereas their tasks remain separate, and supervision of the regulators themselves and of the respective channels of appeal is also different. Content-related aspects of convergence are to be dealt with by the *RTR*, which has been entrusted with the task of running a centre for media and telecommunications convergence (para 9 of the *KOG*). This body will, for example, draw up technical reports on issues related to access to new media, the use of new technologies and services, and market conditions in the telecommunications and media sectors.

## United Kingdom

The United Kingdom government presented its ideas on future communications legislation in December 2000 in the aforementioned White Paper. As well as plans to create a dynamic market, ensure universal access, maintain media diversity and pluralism, secure high quality and safeguard consumers' interests, the discussion paper suggests that a new organisational framework is needed.

The proposed joint regulatory authority, the Office of Communications (OFCOM), will be responsible for regulating electronic communications networks and services, including telecommunications systems, and for broadcasting services.<sup>14</sup>

OFCOM will apply general competition law in the communications sector and will be given concurrent powers with the competition authority, the Office for Fair Trading (OFT). However, the OFT and the Competition Commission remain solely responsible for mergers completed in accordance with the Fair Trading Act. In order to safeguard fair competition in the communications services sector, OFCOM will apply sector-specific competition rules. For most service providers, these rules will cover only certain "essential issues",<sup>15</sup> which are yet to be determined. Stronger sectoral competition rules would only be applicable to companies with significant market power.<sup>16</sup> The scope of the competition rules for which OFCOM is responsible includes, as well as telecommunications and broadcasting law, electronic programme guides (EPG) and similar new systems.

According to the White Paper, the content of broadcast services would be subject to different tiers of regulation.<sup>17</sup>

The independent OFCOM will be given sufficient powers to fulfil its remit, particularly powers of enforcement. As well as its concern for effective regulation, however, the proposal also calls for flexibility. Rather than having detailed rules set out in legislation, OFCOM will have the responsibility of developing and maintaining the necessary rules within the statutory framework. This opportunity to vary levels of intervention, combined with the principle that regulation should be kept at the minimum level necessary, means that OFCOM can act at its own discretion, even with regard to the introduction of new regulatory models. OFCOM will be able, under these premises, to choose whatever approach it thinks will best achieve the regulatory objectives. For example, it can encourage co-regulation and self-regulation if it sees fit.<sup>18</sup> However, it can also introduce more formal regulation.

## II. Controlling Media Concentration - A Task for the Constitution?

### General Remarks

### 1. Discussion

Here, we shall investigate the theory supported by the participants in the first part of the workshop, that before discussing the structure of the authorities, it is necessary to define in greater detail the individual objectives that regulation is supposed to achieve. In this context, it is important to determine whether specific measures are required to control media concentration.

Basic economic conditions mean that media concentration is likely at all levels of the market (network infrastructure, content), particularly against the background of technical advances in the electronic media and telecommunications. For example, data compression techniques are increasing the transmission capacity of the electronic media and leading to the commercial integration of programme production, transmission channels, broadcast and service provision and the exploitation of programmes via the new media.<sup>19</sup> We therefore need to decide whether, in view of convergence and digitisation, media concentration requires specific controls and, if so, what structure they should take.



## a) Relationship with General Competition Law

Before considering whether media concentration law needs to be reorganised, we need to decide whether concentration issues in the media sector can be dealt with under general cartel law and whether specific media concentration regulations are therefore superfluous.

### Regulatory Objective

The objective of media concentration regulation is to promote media competition by creating, maintaining and increasing diversity of opinion. Diversity of opinion is fundamentally important for any democratic state. All states must, on the one hand, create a framework for commercial development, which should ensure the greatest possible plurality of opinion and content diversity, while on the other hand establishing a competitive market that attracts new investments and has the potential for further growth.

### Main Emphasis of Supervision

General competition law and media concentration rules have different focuses as far as supervision is concerned. Under cartel law, which is built on the principle of a regulated, functioning market and its inherent competition, investigating a “dominant market position” is distinguished from the media law evaluation of “dominant power of opinion”.

It is questionable whether the aforementioned objectives of media concentration regulation can be achieved via cartel law controls using the measure of “dominant market position”.

### A Bridge to General Competition Law

According to one point of view, which has come in for some criticism, general competition law is sufficient to guarantee diversity of opinion in the broadcasting sector; specific regulations are purely and simply unnecessary.

Particularly in countries with a high number of private broadcasters, simply taking into account individual broadcasters’ dependence on large broadcasting groups under company law as an important criterion of diversity is no longer sufficiently workable. Since a shareholding situation under company law does not always jeopardise diversity, dominant power of opinion should not necessarily be the only criterion for safeguarding diversity of opinion.

Preventing dominant power of opinion, which is often measured as a fixed percentage of audience figures or expressed as a maximum shareholding, is a one-dimensional approach. We have to ask the fundamental dogmatic question whether, for a media-specific merger control, there is any separate, reliable measure, distinct from the definition of a dominant market position set out in cartel law.<sup>20</sup>

As well as this dogmatic aspect, media concentration law has another significant drawback in that it cannot prevent oligopolistic market dominance. This is because of the strict reliance on a particular sector-specific criterion for measuring power of opinion, such as the audience share model or maximum shareholding model, and gauging links between companies. According to this point of view, clear legal principles and legal certainty demand a form of competition control based solely on general, non-sectoral cartel law, with a standard method of measuring market dominance.

In the field of modern communications and information technologies, the need for cross-sectoral regulation through general competition law is very clear. It is also difficult to categorise the various services made possible by new technologies and transmission techniques into different fields of law (media and tele-services, telecommunications, broadcasting). Comprehensive application of sector-specific legal principles must therefore appear arbitrary in cases of doubt. Moreover, even if special provisions are in place, the fact that different approaches are followed means that controls remain part of general cartel law. This leads to inefficiency and uncertainty for the companies concerned.

The inclusion of so-called “related markets” when determining power of opinion, which under media concentration law frequently takes into account the bigger picture, is unjustified. These markets may interact in many different ways, but that alone does not mean that they should be included in any evaluation. If it is argued that other media markets should be included in the evaluation of the TV market, for example, because certain markets, such as advertising, complement one another or may be substituted one for the other, then the scope given to the regulatory authorities through this vague notion of the facts is too broad. Only markets with a direct influence on events in the TV market may be taken into account, rather than those that have a temporary, undefinable and prognostic impact.

According to this point of view, even vertical integration is sufficiently covered by general competition law. By investigating the market position of a company, it is possible to determine its links with upstream and downstream markets. Any related markets in which the companies concerned hold a significant position, and the impact this has on their position in the relevant market would therefore be taken into account in the evaluation.

### Need for Media-Specific Concentration Regulation

However, according to this opposing point of view, general competition law only comes into effect when a merger between companies takes place in accordance with merger rules. This may take the form of a traditional takeover, joint control, acquisition of all or part of a company’s assets, concession of exploitation rights or a link enabling one company to exercise competitive influence over another. Hence general competition law can only control so-called external growth. The internal growth of a company can only be taken into account in relation to regulations concerning abuse of a dominant position. Dominant power of opinion that results from internal growth, however, does not count.

For constitutional reasons, concentration rules in the media sector must be designed to prevent dominance of opinion from developing. As mentioned above, general competition law can only be used for corrective purposes in retrospect, *i.e.* in reaction to a particular event. If media supervision were reduced to dealing with abuses of competition regulations, it would run the risk of becoming a means of controlling journalistic infringements and therefore conflict with the constitutional ban on censorship.

Supervision of abuses under cartel law, even incorporating the “essential facilities” doctrine<sup>21</sup>, cannot solve the particularly controversial issues concerning access rights. This theory, which was developed from a mainly economic perspective, does not embrace the huge significance of access to media transmission channels. For example, despite the supposed economic justification for blocking access to a transmission channel, such access could be required in accordance with objective-based media regulation and the need to safeguard diversity of opinion. This emerges particularly against the background of the Bronner judgement<sup>22</sup> of the European Court of Justice. According to that ruling, general competition law does not stipulate that fully equivalent facilities must be made available by the dominant company. Rather, in certain circumstances, the competitor may be referred to a less advantageous alternative facility. Finally, the demands made by the ECJ concerning the reasonableness of using possible alternatives had the effect of considerably reducing the scope of this “essential facilities” doctrine where access issues are concerned.<sup>23</sup>

The problem of vertical concentration cannot therefore be adequately dealt with using the instruments of general competition law alone. This issue is of particular interest and is also especially dangerous because of (a) the possibility of exploiting a programme in different markets, (b) guaranteed access to programme



resources and, not least, (c) measures to avoid so-called “bottle-necks”,<sup>24</sup> such as the shared ownership of transmission channels by (media) companies. Under media concentration law, however, the “essential facilities” doctrine can be developed in a way that is specific to broadcasting. The primary aim of such regulation can and should be to give broadcasters and customers reasonable, non-discriminatory and equal access to infrastructure and services, which is indispensable where digital broadcasting is concerned.<sup>25</sup>

In general cartel law, a dominant market position can only be diagnosed in an established “relevant” market. Market power in a defined market need not, therefore, coincide with general power of opinion. Commercial free-to-air television, for example, constitutes a different market to pay-TV. However, as far as the objective of diversity is concerned, this purely economic split is irrelevant. Under cartel law, the relevant market for free-TV is often defined according to the advertising market. There is no viewer/listener market, mainly because programmes are received free of charge and so, in that respect, the exchange on which the market process depends is lacking.<sup>26</sup> Broadcast programmes, however, are merely the means of bringing viewers into contact with advertisements. There must therefore be a non-financial exchange between broadcasters and their customers. Rather than money, the viewer gives the broadcaster a certain amount of his time. The time spent by each viewer tuned in to a particular TV or radio station represents a suitable measure under concentration law with which to combat the development of concentrations. Therefore, the digital age is the first time the much-used audience share model has clearly been a more useful gauge than the shareholding model or other methods of measuring concentration.

Under general competition law, the fact that a merger would lead to or strengthen a dominant market position does not necessarily mean it is prohibited. For example, the companies involved may be able to prove that the merger actually enhances competition in other markets and that these improvements outweigh the drawbacks of the new company’s dominance of the “relevant” market. However, an improvement in competition should not necessarily be equated with greater diversity of opinion, so that objectives that are not specific to broadcasting and which are detrimental to diversity may nevertheless justify the authorisation of a merger.<sup>27</sup>

The advocates of media-specific concentration controls believe that the role of cartel law in protecting competition is a necessary, but insufficient, means of keeping the media’s power of opinion in check.<sup>28</sup> Even at European level, it is generally agreed that competition law is applicable alongside media concentration law and that competition law, although vital, is not necessarily adequate on its own (Art. 21.3 of the Merger Regulation).

### **Inclusion of a Media-Specific Section in Cartel Law**

It has also been proposed that general competition law should include a section relating specifically to the media. Competition law would thus become more effective in helping to achieve the objectives of media concentration law. In addition to the sectoral, economically defined media markets (free-TV, pay-TV), a further market could be defined - a general TV audience market, as described above.

However, the aforementioned regulation deficit (internal growth, vertical integration) would still remain. Furthermore, the German Constitutional Court in particular has decided that, as far as press law is concerned, merger controls should only refer to economic criteria and that content is therefore irrelevant.<sup>29</sup>

### **b) Criteria for Media Concentration Controls**

Irrespective of whether media concentration law can be integrated into general competition law, the nature of concentration controls, which may also be sector-specific, should be discussed.

#### **Precise Objective**

The purpose of media concentration regulation must be sufficiently precise, otherwise effective control is impossible. It is therefore important to clarify on what scale the objective of protecting diversity of opinion and pluralism,<sup>30</sup> while safeguarding economic freedom - an objective that is included in the Constitutions of many Member States - is to be achieved.

#### **Relevant Markets and Assessment Criteria**

A condition of regulation in the form of concentration control is that the relevant markets and market players are precisely defined.

According to one rather controversial point of view, the convergence of Internet and broadcasting via broadband communication means that, in future, the Internet and the cable networks should both be covered by media concentration rules. This is because of various problems connected to network structure: the combination of programme resources, access to transmission and distribution channels, and access to terminal equipment. The issues raised by broadband communication would be tempered if a preventive form of control such as the audience share model, which could be developed into a media customer model,<sup>31</sup> could be set up.

The current model relies on the audience share achieved by individual broadcasters over a year within the national territory, via all transmission channels (extensive approach, including all transmission channels). With the liberalisation of the (digital) cable network infrastructure, network operators have huge scope for filling their networks. According to one view, this freedom - despite the broadening (and differentiation) of available channels resulting from greater transmission capacities - supports the idea that only the area covered by the cable systems of the network operator should be used to evaluate diversity. Combating power of opinion involves every transmission channel and network operators should be prevented from reducing diversity by deciding themselves which channels to feed in to their networks.

There was disagreement over whether the network operators themselves (as well as broadcasters, in accordance with the current legal situation) could be included in substantive concentration law. Network operators should definitely be included - in case of system breakdown - if it is decided that the whole national territory should be covered.

Another participant thought that media-relevant markets should only be those that, like broadcasting, are structured for mass communication rather than those that function on the basis of individual dial-up. Therefore, as far as the synchronised, same-content streaming of TV programmes is concerned, the inclusion of individual dial-up services can be justified, since in such cases, the Internet, for example, is merely used as an additional technical transmission channel for broadcast content. Internet services offered by broadcasters to accompany their programmes, on the other hand, are designed to help viewers and could not be considered an independent (replacement) market. Another practical problem is how to convert the number of website “hits” into a market share, particularly since the place of origin of each visitor would have to be determined.

There was also discussion of whether the problems connected to the definition of relevant markets (whether in terms of geography or function) could be solved by considering them in relation to access rules. Although the significance of such rules was generally understood, one view was that access regulation itself did not actually constitute media concentration regulation. However, the majority thought that the areas of access control and concentration control should not be considered as exclusive, but as complementary, instruments.



### Powers of Regulatory Authorities

Following the model for merger control set out in the German *Gesetz gegen Wettbewerbsbeschränkungen* (Competition Restrictions Act - *GWB*),<sup>32</sup> one participant thought that measures to prevent media concentration should include a so-called “enforcement ban”. This would be designed to prevent certain power structures arising in preparation for future developments. Experience with cartel law shows that concentrations cannot be effectively broken up once they have come into existence.

If such an “enforcement ban” is not implemented, the regulator must be given the authority to grant airtime to third parties, to force service providers to co-operate and to force companies to relinquish individual areas of business, limiting the exercise of discretion in order to produce a certain degree of predictability and transparency.

### European Level

In view of the numerous international media companies currently being formed, the need for Europe-wide measures is obvious. In view of the way responsibilities are currently distributed,<sup>33</sup> the idea of a European media concentrations authority with comprehensive powers is highly topical. A body directly responsible for safeguarding diversity of opinion could be set up to operate alongside the European Commission, which already deals with general competition matters.

Two arguments against this idea were put forward.

There is no provision of Community law under which such a body may be established. According to Article 5.1 of the EC Treaty (the principle of limited individual competence), the Community has no specific power to set objectives or requirements to guarantee diversity of opinion. Under the objectives of the internal market, a body may be empowered to issue individual regulations, but no EC body may be assigned comprehensive powers. Even Article 11.2 of the Charter of Fundamental Rights, under which media freedom and plurality must be respected, does not have such an effect.

The establishment of such a body also contravenes Community principles such as the obligation to take the public interest into account, subsidiarity and proportionality, since there is no obligation to protect Europe-wide pluralism or diversity. Pluralism at national level can be more directly and, bearing in mind the national situation, more appropriately protected by broadcasting regulators within the individual States.

In order to link and harmonise the evaluation criteria used in the Member States, the idea of a decentralised co-operation and consultation system should be developed and implemented. Coordination between the national media concentration authorities and the European Commission should also be developed as regards foreign investment in national TV companies, particularly the assessment of ownership structures. This should take the form of official information-sharing and file-inspection procedures.

## 2. National Situations

Media concentration rules in major European States and European merger controls are discussed in detail elsewhere.<sup>34</sup> In our discussions concerning the future development of concentration law, particular attention was paid to the situation in Switzerland, which is dealt with below.<sup>35</sup>

### Switzerland

Switzerland currently has no sector-specific media concentration rules. The law on company mergers is set out in Article 4.3 (Definition), Articles 9-11 (Reference Criteria) and Articles 32-38 (Competition Commission Evaluation Procedures) of the *Kartellgesetz* (Cartels Act - *KG*)<sup>36</sup> and in the *Verordnung über die Kontrolle von Unternehmenszusammenschlüssen* (Regulation on the Control of Company Mergers - *VKU*)<sup>37</sup>. In accordance with the *Missbrauchs-*

*prinzip* (principle of [preventing] abuse), mergers must be registered, but need not actually be authorised. Once a merger has been announced, the Competition Commission can instigate and carry out an evaluation process. For media companies, the value of the general criteria (Article 9.1 *KG*) that create the need for a merger to be registered is reduced to one-twentieth according to Article 9.2 *KG*. However, as part of the review of the Cartels Act, the communication of 7 November 2001 from the Swiss *Bundesrat* (Council of Ministers) to the Parliament concerning the amendment of the Cartels Act proposes that this section of Article 9.2 be abolished.<sup>38</sup> When assessing a dominant market position resulting from a merger (Article 10.2 *KG*), the Competition Commission tends to determine the relevant market according to the customers (Article 11.1 *VKU*, substitutability of service). In the press sector, where most evaluations have taken place so far in Switzerland, the Competition Commission has defined a very narrow market comprising the print media or even just daily newspapers. It has not considered TV, radio and Internet news programmes as being substitute services. In individual cases, the Competition Commission takes into account, alongside traditional criteria, the financial strength of the companies involved and potential competition.

Article 67 of the draft revised *Radio- und Fernsehgesetz* (Radio and Television Act - *RTVG-E*),<sup>39</sup> presented on 20 December 2000, contains, for the first time, detailed sector-specific provisions on media concentration. This is due to concentration trends currently taking place in Switzerland<sup>40</sup> and an attempt to align Swiss law with the law of the EU Member States. According to the new provision, the diversity of opinion and services is particularly jeopardised if (a) a broadcaster holds a dominant position in a relevant market or (b) a broadcaster or another company operating in the radio or television market holds a dominant position in one or more media-related markets. In either case, Article 68 *RTVG-E* states that special measures may be taken, including the granting of airtime to third parties, adaptation of the company's business or organisational structures, or the removal of individual areas of business or shareholdings from the company concerned. These (regulatory) measures, to be taken by a new Media Commission, go beyond the powers assigned to the Competition Commission under general cartel law.

## III. Conclusion

Whereas regulatory objectives for the converging sectors of the media, telecommunications and new services are clearly becoming increasingly important at the European level and whereas it is therefore necessary for national interests to be included in the drawing up of European framework legislation, the idea of entrusting this whole task, with its heavy practical demands, to some form of European media concentration control body is not a satisfactory solution.

The structure of supervisory bodies should primarily be based on the objectives of media regulation and control. As part of this, greater coordination between different sector-specific regulatory procedures and with general supervisory measures should take priority over the desire to bring all tasks and processes, irrespective of content, “under one roof”. Even in long-established or recently created convergent authorities, there is a fundamental separation of regulatory tasks. In the selection of regulatory instruments, it is vital to possess a broad diversity of possible measures that uphold the principle of legal certainty for interested parties as well as meeting the need for efficient, flexible administration of the different types of regulation. In this respect, it would seem desirable for the European institutions to set out supportive, instructive measures. This is particularly true with regard to coordination and co-operation between national authorities, but also at European level as a chance to combat problems that span more than one national market.

- 1) Examples include the companies Vivendi and AOL/Time-Warner. A more detailed explanation of these trends is given in "Towards a dynamic European economy, Green Paper on the development of a common market for telecommunications services and equipment", COM (87) 290, p.19. The concept of "convergence" is explained in the "Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation. Towards an Information Society Approach", COM (97) 623, pp.1 ff.
- 2) Palzer/Hilger: "Media Supervision on the Threshold of the 21st Century: Structure and Powers of Regulatory Authorities in the Era of Convergence", IRIS plus, supplement to IRIS 2001-8.
- 3) See Lehofer, *Die Regulierung der Infrastruktur im Lichte der Konvergenz*, in *Journal für Rechtspolitik* 2000, p.206.
- 4) See also Schulz/Held *Regulierte Selbst-Regulierung als Form modernen Regierens*, interim report, October 2001, p.C 2, available at: <http://www.humanrights.coe.int/media/documents/Zwischenbericht.PDF>
- 5) Palzer/Hilger, *op.cit.* (footnote 2), p.4 f.
- 6) Palzer/Hilger, *op.cit.* (footnote 2), p.5.
- 7) For more information on this problem, see McGonagle, "Does the Existing Regulatory Framework for Television Apply to the New Media?", IRIS plus, supplement to IRIS 2001-6.
- 8) The White Paper is available at <http://www.communicationswhite-paper.gov.uk>. Numerous statements and proposals concerning the White Paper have been submitted by interested parties (media undertakings, regulatory bodies, lobby groups, etc) and are available at [http://www.culture.gov.uk/creative/dti-dcms\\_comms-reform\\_submissions.html](http://www.culture.gov.uk/creative/dti-dcms_comms-reform_submissions.html)
- 9) Freund/Ruhle, *Neuorganisation der Regulierung für Telekommunikation und Medien in Österreich*, in *MultiMedia und Recht* 2001, p.804.
- 10) See minutes of the Federal Chancellery's Advisory Council for the Internet and New Media, 30 October 2000, available at <http://www.bka.gv.at/bka/medien/binprotokoll20001030.htm>
- 11) *Bundesgesetz betreffend die Telekommunikation / Telekommunikationsgesetz* (Federal Telecommunications Act - TKG), 1 August 1997, last amended by the Act contained in Federal Gazette I No. 32/2001 (amendment entered into force on 1 April 2001).
- 12) Freund/Ruhle, *op.cit.* (footnote 8), p.804, are critical of this arrangement, fearing that the integrity of the regulatory authority may be threatened, since it would have to apply the differing regulations of cartel law and the TKG to the issue of dominant market positions. The authors also suggest that, if the competition authorities continue to apply cartel law, they might issue contradictory decisions. Möschel, on the other hand, in *Ist das Verhältnis von TKG und GWB neu zu durchdenken?, Kommunikation und Recht* 2001, p.619, calls for general competition law and telecommunications law to be applied in parallel under German law.
- 13) Federal Act on the Establishment of a Communications Authority for Austria (*KommAustria*) and a *Bundeskommunikationssenat* (Federal Communications Senate) - *KommAustria-Gesetz* (*KommAustria Act - KOG*), Federal Gazette, 30 March 2001, Part 1, p.599.
- 14) Section 8.8, p.80 of the White Paper.
- 15) The White Paper refers to consumer protection, access and interconnection, for example (Section 2.5.1, p.19).
- 16) These include, for example, requirements for vertically integrated companies, rules against unfair cross-subsidies and rules prohibiting undue discrimination or undue preference between the firm's own business and that of third parties, Section 2.5.1, p.19 of the White Paper.
- 17) Under the three-tier model, the first tier would include basic conditions for all services (advertising rules, quota regulations and minimum content standards). In the second and third tiers, OFCOM would be responsible for ensuring the delivery of public service obligations that are easily quantifiable and measurable (broadcast of regional productions, news bulletins, etc), while self-regulation bodies would determine content-related aspects (laid down in the broadcasters' charter and statutes). See Sections 5.5-5.11, pp.52-57 of the White Paper.
- 18) Section 8.11, p.82 of the White Paper.
- 19) P. Mailänder, *Konzentrationskontrolle zur Sicherung von Meinungsvielfalt im privaten Rundfunk*, Baden-Baden 2000, pp.45 ff.
- 20) Paetow, *Die Anwendung der Fusionskontrolle des GWB im Bereich der elektronischen Medien*, in: *Konzentrationskontrolle im Rundfunk und wettbewerbliche Fusionskontrolle*, Berlin, 2001, p.20.
- 21) For more information, see Weber/Dörr, *Digitale Verbreitung von Rundfunkprogrammen und Meinungsvielfalt*, Zürich, 2001, pp.76 ff.
- 22) ECJ, C-7/97, Bronner/Mediaprint, judgment of 26 November 1998, 1998 Digest, I - 7791.
- 23) Scherer, *Das Bronner-Urteil des EuGH und die "essential facilities" - Doktrin im TK-Sektor*, in *MultiMedia und Recht* 1999, p.318.
- 24) For information on access to so-called "bottlenecks", see Hege, *Anforderungen des Wettbewerbs- und Medienrechts*, in: Roßnagel (ed.), *Allianz von Medienrecht und Informationstechnik?*, Baden-Baden 2001, p.45 ff; Helberger/Scheuer/Strothmann, "Non-Discriminatory Access to Digital Access Control Services", in: IRIS plus, supplement to IRIS 2001-2.
- 25) See also Henle, *Die Position der Landesmedienanstalten zum Verhältnis von Medienrecht und Kartellrecht*, in: *Konzentrationskontrolle im Rundfunk und Wettbewerbliche Fusionskontrolle*, *op.cit.* (footnote 20), p.66.
- 26) Paetow, *op.cit.* (footnote 20), p.13.
- 27) K. P. Mailänder, in: *Konzentrationskontrolle im Rundfunk und wettbewerbliche Fusionskontrolle*, *op.cit.* (footnote 20), p.31.
- 28) Weber/Dörr, *op.cit.* (footnote 21), believe that an article on guaranteeing diversity of opinion should be added to cartel law only in areas where no special guarantees exist under media concentration law (such as vertical integration, to which they specifically refer).
- 29) Decision of the *Bundesverfassungsgericht* (Federal Constitutional Court), 13 January 1988, *BVerfGE* 77, p.346.
- 30) For information on the regulatory frameworks of several Member States, see IRIS Special "Television and Media Concentration: Regulatory Models on the National and the European Level", Strasbourg, 2001.
- 31) These models are explained in detail in IRIS Special, *op.cit.* (footnote 30), p. 2 f.
- 32) *Gesetz gegen Wettbewerbsbeschränkungen* (Competition Restrictions Act), version published on 26 August 1998, Federal Gazette I No.59 of 2 September 1998, p.2546; last amended by the Act of 19 June 2001, Federal Gazette 2001 I No.28 of 25 June 2001, p.1149.
- 33) For detailed information about the distribution of powers, see Palzer/Hilger, *op.cit.* (footnote 2), pp.6 ff.
- 34) IRIS Special, *op.cit.* (footnote 30).
- 35) For the current debate in the United Kingdom, for example, see *Consultation on Media Ownership Rules*, available at: [http://www.culture.gov.uk/PDF/media\\_ownership\\_2001.pdf](http://www.culture.gov.uk/PDF/media_ownership_2001.pdf)
- 36) *Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen* (Federal Act on Cartels and other Competition Restrictions - KG), 6 October 1995, last amended on 1 April 1996.
- 37) *Verordnung über die Kontrolle von Unternehmenszusammenschlüssen* (Regulation on the Control of Company Mergers), 17 June 1996.
- 38) *Botschaft des Schweizerischen Bundesrates an die Bundesversammlung der Schweizerischen Eidgenossenschaft über die Änderung des Kartellgesetzes* (Communication from the Swiss Council of Ministers to the Federal Parliament of the Swiss Confederation concerning the amendment of the Cartels Act), 7 November 2001; available at: [http://www.evd.admin.ch/dynamic/dm/LOI\\_SUR\\_LES\\_CARTELS/D/MESSAGE/Botschaft\\_ueber\\_die\\_Aenderung\\_des\\_Kartellgesetzes\\_D.pdf](http://www.evd.admin.ch/dynamic/dm/LOI_SUR_LES_CARTELS/D/MESSAGE/Botschaft_ueber_die_Aenderung_des_Kartellgesetzes_D.pdf)
- 39) Draft available at <http://www.bakom.ch/imperia/md/content/deutsch/aktuel/2.pdf>
- 40) See Sidler, "Tamedia AG's Takeover of Belcom Group Approved", IRIS 2001-10:14.