EU competition policy and concentrations in the media sector

| A contribution for *La Société Radio-Canada*

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1. Introduction

European Union (hereafter: EU) competition policies are meant to reconcile two conflicting objectives (Pauwels, 1995:660&ff.). On the one hand, sizeable corporations are essential for accomplishing internal market objectives and strengthening European competitiveness. Improving technical efficiency, referring to the production and introduction of a given set of (new) services at the lowest possible cost and the overcoming of fragmentation are important criteria in the industrial economic analysis of alliances. On the other hand these holdings should be deterred from taking advantage of their increased market power to undermine competition, i.e. their potential for anti-competitive behavior towards both their competitors and suppliers and the abuse of dominant position vis-à-vis the users.

As regards the media, EU competition policies add an extra dimension stemming from the added cultural value of the software product. Here decisions regarding competition may have an impact on media pluralism and diversity, policy principles which in Europe are traditionally associated, among other things, with a public service mission, but as such do not belong to the specific objectives of EU competition policy which is concerned solely with fair competition. The Commission has nevertheless been seeking a specific media approach, but in this it has always been hindered by the EU Member States, which consider the media very much a national matter. Consequently, EU competition policy-making in general, media concentration issues in particular, have to be situated within two tension fields. Not only is it always necessary to strike a balance between supranational versus national concerns, the media concentration issue is at the same time linked to the traditional discussions relating to cultural versus economic concerns. In practice, ambivalence has reigned all too often with cultural considerations being swept under the carpet of subsidiarity (Pauwels & Cincera 2001: 14), as the discussions surrounding the Green Paper on media pluralism below will exemplify.

Although the early competition policy questions in the media sector primarily concerned the breaking up of national monopolies, or the assessment of state aid mechanisms considered to be discriminatory, the recent bulk of media-related competition decision are either made in the field of merger control or related to the abuse of a dominant position. Market forces indeed have prompted a major shift in the involvement of the competition authorities in the media industry. The old battles against protectionist Member States in the 1980s and 1990s have by and large been won, liberalization is underway (even if it is far from complete) and, as in the case of any other type of business, competition policy now aims to ensure that the competitive process of the media market functions properly (Cincera & Sitter 2007:6; Harcourt 2005). As a result, EU considerations related to trade and competition affect traditional national cultural priorities and measures in a way that goes beyond cultural policy.

2. The enforcement and application of EU competition policy: a brief overview of the main actors involved

A particular characteristic of EU competition policy is the fact that it has to be situated within a multi-level political and legal system. This encompasses both the different EU institutions

(in particular the European Commission and the Community Courts) and the now 27 EU Member States.

In the field of competition policy, the **European Commission** (hereafter: Commission) in particular is vested with quite a number of competences, contrary to other policy domains and moreover often against the will of the Member States. It is responsible for the implementation of the competition policy and can act on its own initiative or after a complaint by a private actor or a Member State. The Commission as such fulfills the role of executer, judge and even legislator, and can take decisions without interference by the European Parliament or the Council of Ministers.

While the Commission still plays the central role in the enforcement of the competition rules, the recent modernization/decentralization of EU competition policy has handed greater responsibility to the **national competition authorities** as regards the enforcement of the antitrust provisions (Articles 81 and 82 of the Treaty establishing the European Community (hereafter: EC), see below). Indeed, from the 1st of May 2004, national competition authorities and national courts are now also empowered to apply fully these provisions. With regard to merger control, the competences allocated to the Commission likewise do not entail a complete transfer of competition policy-making to the EU level. Even though the Commission has the exclusive competence to deal with mergers with a "Community dimension" (see below), this does not lead to an absolute separation between the Commission and the national competition authorities. As the discussion of the Merger Regulation below will demonstrate, there are several qualifications to this principle of exclusive competence (e.g. Member States can refer a merger case to the Commission even though it does not have a Community dimension (the so-called Dutch clause) and the Commission can similarly refer merger cases to the national authorities (the so-called German clause)) (Navarro et al. 2005:398). Moreover, the Member States continue to regulate most mergers that have no Community dimension and are also allowed to invoke national regulation in the name of "legitimate interests" to take further-going protection measures against mergers authorized by the Commission (Article 21(4) of the Merger Regulation, see below). Notwithstanding the significant powers for the Commission in the competition field, tensions with the national regulators thus persist and make competition policies certainly to a high degree the result of political compromise. The pressure exerted by Member States furthermore makes implementation of a truly independent supranational competition policy very difficult (Pauwels & De Vinck (forthcoming):18-19).

Next to the Commission (and the national competition authorities), the **Community Courts** (and national courts[1]) are important actors as well, as all competition decisions are subject to judicial review. Since the establishment of the Court of First Instance in 1989, this court has been given the competence to review the legality of the Commission's competition decisions. Appeals against decisions of the Court of First Instance can be brought before the European Court of Justice, the highest Community Court, albeit only on points of law. Next to the actions for annulment, the Community Courts are also of great importance for their more general task of ensuring the correct interpretation of the Treaties/Community law. As such, they have significantly contributed to the way the EU competition rules are put into practice (and continue to do so). In this context, some authors and observers have argued that the rulings of the European Court of Justice and the Court of First Instance in the media sector have the tendency to further market integration, rather than e.g. the defense of national laws protecting pluralism (Harcourt 2005:23). The Community Courts are indeed often accused of pursuing *"une certaine idée de l'Europe"* with a too strong emphasis on market integration, resulting in what some would define as a "communautarian integrist" approach (Focsaneanu 1976; Dehousse 1998). This criticism can be nuanced, however, as the Community Courts only do what can be expected from them within the framework of the

[1] As the Community Courts are the highest courts in the European legal system, the jurisprudence of the national courts is of limited relevance in comparison to the case law of the Court of First Instance and the Court of Justice. It should also be noted that the national courts always have the possibility to ask preliminary questions to the Community Courts when questions arise as regards the interpretation of European (competition) law provisions.

Treaties and Community legislation. Hence, the EU competition rules too must always be seen in light of the general Community framework and thus also in light of the overarching goal of market integration, something which makes EU competition policy clearly distinct from other competition regimes.

3. The EU competition instruments of relevance for media concentration

The following paragraphs will shed some light on the particular provisions the EU has set up in order to deal with media concentration issues and the actual shape the EU policy-making thus takes in practice. Three levels of intervention can be discerned:

- First, the direct enforcement of the competition rules contained in the EC Treaty, namely Articles 81 (restrictive practices - former Article 85) and 82 (monopoly policy/abuse of dominant position - former Article 86). Article 86 on services of general interest has to be noted in this regard as well;
- Second, the 1989 Merger Regulation, as revised in 1997 and 2004;
- Third, consultative moments as for instance the Green Paper on pluralism and media concentration (1992) and the Green paper on Services of General Interest (2003).

3.1 The EC antitrust rules

A number of EC Treaty articles with regard to competition are of direct significance for the audiovisual industries in the context of media concentration.

Firstly, Article 81 EC Treaty deals with concerted practices and agreements between undertakings and mainly targets cartels. As such, Article 81(1) prohibits *"all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market"*. Under a number of cumulative circumstances, related to the promotion or improvement of the production and distribution process, however, agreements or concerted practices may be exempted from this general prohibitive rule (under Article 81(3) EC Treaty). Previously the Commission had sole power to declare Article 81(1) inapplicable, as was for instance the case when it granted the American distribution major UIP an exemption on the competition rules.[2] This particular case is a clear example of the EU's ambivalent policy-making: while on the one hand, it is trying to augment the competitiveness of its audiovisual industries, among others through the support of several distribution projects, the UIP decision was in fact encouraging a further trade deficit vis-à-vis the United States, even though the distribution of European films had been set as a condition for the authorization (Pauwels, 1995: 582-583). The recent reform of EU competition policy has now abolished the Commission's exemption monopoly (cf. *supra*). Indeed, as mentioned above, all national competition authorities are since May 2004 also empowered to apply fully Article 81. Furthermore, the notification system has come to an end: it is no longer the Commission but the undertakings themselves which must scrutinize whether their agreements satisfy the conditions for an exemption from Article 81(1) EC Treaty.

Secondly, Article 82 EC Treaty declares the abuse of a dominant position by one or more firms incompatible with the common market, in so far as it negatively affects trade between the Member States. While relevant terms such as "dominant position" have not been defined in the Treaty, the Commission and the Court have established a description of it. Not

[2] In February 1983, three of the main Hollywood studios (Paramount, Universal (MCA) and MGM) notified their plans to set up a joint venture, Universal International Pictures (UIP), to license worldwide the exclusive rights to their films. These agreements were caught by the general prohibition of Article 81 EC Treaty, yet the Commission granted an exemption given the efficiencies the agreements were said to generate for the European film distribution market. Several remedies were imposed, however, to protect the European film industry from the pressure exerted by the vertically integrated Hollywood studios. In 1999 the Commission renewed the exemption for a period of five years.

the holding of a position of power as such is forbidden, but rather the misuse of such a position. Before a dominant position can be established, the Commission or the national competition authorities must first of all define the relevant market and more specifically the relevant product market (do various competitive or substitutable products exist?) and the relevant geographical market (Pauwels, 1995:446; Cini & McGowan, 1998). This means that the responsible departments first assess the market power, primarily on the basis of market shares. Only then do they set out to assess the abuse of a position of dominance[3] (Cini & McGowan, 1998:80). Contrary to Article 81, an exception on these provisions is only possible for public undertakings or those that are granted with special or exclusive rights, like for instance public service broadcasters. Indeed, according to Article 86 EC Treaty, such undertakings can be exempted if the application of the competition rules would run counter the task they have to fulfill. Moreover, Article 86 states that undertakings that perform "services of general economic interest" are only subjected to the Treaty rules in so far as this does not obstruct the performance of these tasks. However, the precise meaning and scope of this article and the terms included in it (e.g. "general economic interest") is unclear (Bartosch, 2002: 202; Cini & McGowan 1998:137; Nitsche, 2001:137-139; Pauwels, 1995:449-451).

3.2 The Merger Regulation (1989, revised in 1997 and 2004)

In spite of the Commission being granted a decisive role on antitrust issues, the original EEC Treaty did not provide a specific provision for controlling mergers. Consequently, the Commission could only act *a posteriori* against certain concentrations and cases on the basis of Articles 85 and 86 (now Articles 81 and 82 EC Treaty). As this obviously undermined its capability to ensure free competition in the common market, the Commission has striven to obtain *a priori* control over concentrations since 1972 (Cini & McGowan 1998:116), something that was perceived by a number of Member States as an unjustified interference with national competition policies. With the adoption of the EC merger regulation in 1989, however, *a priori* control became a fact. Ever since the regulation came into force (21 September 1990), the Commission has the exclusive prerogative of ruling on proposed mergers with a view to pronouncing beforehand on mergers with a "Community dimension" and investigating whether they can be deemed compatible with the internal market. According to the merger regulation, and more particularly to its revised 2004 version, mergers with a Community dimension are those that create entities with worldwide sales above 5 billion euros. Furthermore, internal market sales of at least two participating companies should be above 250 million euros separately.[4] In addition to this, the regulation foresees *a priori* control by the Commission for merger cases which do not meet these thresholds but which nevertheless have a significant cross-border effect (in the case of three or more national notifications). A different combination of criteria, amongst them a combined worldwide turnover of more than 2.5 billion euros and 100 million euros for EU turnover, apply to such merger cases (Pauwels & Cincera, 2001). There can be exceptions to this rule, however. The Member States can take further-going measures to protect so-called "legitimate interests". Article 21(4) of the Merger Regulation explicitly mentions media pluralism as one of these. This clause means that, with respect to media concentrations with a Community dimension, the EU regulation does not apply exclusively. National legislation can be invoked. If the Commission allows a certain merger, a Member State can have it rendered null and void under the protective ruling of media plurality. The reverse is not possible however: a merger forbidden by the Commission cannot be approved by the Member States (Pauwels & Cincera, 2001:17-18).

As the Merger Regulation does not contain a presumption in favor or against the legality of concentrations (Van Rompuy & Pauwels, 2007:22-24), concentrations need to be notified to

[3] These include unfair pricing, discriminatory pricing, unfair trading conditions, tying agreements, refusal to supply etc. (Cini & McGowan, 1998:88).

[4] "unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State" (Europa, 2004c).

the Commission in so far as they meet the applicable thresholds (concentrations without a significant cross-border effect will have to be notified to the national competition authorities instead). The Commission will then assess the compatibility of the concentration in light of the substantive test defined in the Merger Regulation. Article 2(3) stipulates in this regard that *"a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position"* has to be declared incompatible with the common market. The creation or strengthening of a dominant position is thus no longer a prerequisite for opposing a merger, as was the case under the substantive test in the original 1989 Merger Regulation. The central question is rather whether or not sufficient competition will remain after the proposed transaction (Navarro et al. 2005:144-145). An important difference between the treatment of cases under the Merger Regulation and under the antitrust rules is that the decision of compliance under the former has to be taken within a clearly defined timeframe, whereas the treatment of co-operative agreements under the antitrust rules implies a more open-ended investigation, with the result of often long lasting legal procedures (Kiessling and Johnson, 1998:161, Cini and McGowan, 1998). The fact that the merger review procedure is more time-constrained is of course logical, as it must be prevented that this procedure would hamper the flexibility of undertakings to engage in restructuring processes. Normally the Commission has 25 working days either to authorize the notified concentration where it does not raise serious doubts as to its compatibility with the common market or to open an in-depth investigation when the concentration does raise such concerns. In case of the latter, a final decision will have to be taken within 90 working days after the initiation of the second-phase proceedings, albeit extensions are possible (Article 10 of the Merger Regulation). Albeit certainly desirable from the viewpoint of the notifying parties, these time-constraints also pose difficulties for the Commission. The recent tendency towards a more economic approach in particular puts the efficiency of the Commission's merger review process to the test, as it adds further complications to the Commission's handling of complex cases (see below).

3.3 The Green Paper on pluralism and media concentration (1992) and the Green paper on Services of General Interest (2003)

Ever since the beginning of the 1980s the Commission has to a large extent been encouraged by the Economic and Social Committee, and most of all by the European Parliament, to establish a specific approach with regard to media concentration (Lensen 1991; Harcourt 1998). Contrary to common competition policy rationale, the EP did not see media concentration as a problem of market inefficiency. Rather it was viewed politically as a threat to democracy, freedom of speech and pluralist representation (Harcourt, 1998b). As the Television Without Frontiers Directive did not really address the issue of media concentration[5], despite emphasizing the need of an open media marketplace with no distorted competition, the EU announced in the early 1990s that it would set up a Directive on the concentration of media ownership (Wheeler, 2004: 357).

First, the long awaited Green Paper on pluralism and media concentration within the internal market was published in December 1992, at the behest of the Commission, more specifically Directorate-General III/XV (internal market) (European Commission, 1992; Harcourt, 1998). The Green Paper, through a process of negotiations with the parties involved, purported to inquire into the potential need for Community-level action on media concentration and pluralism in radio, TV and print media (Van Loon 1993: 32&ff; Wheeler, 2004:357). From the outset the option was for a narrow approach, and the result was limited in scope as well, with the Commission concluding that pluralism can be achieved primarily by harmonizing ownership regulations. Control and guarantee of transparency and pluralism are left to the national authorities, whereas items of vital necessity to the internal market,

[5] Only article 5, establishing the 10% quota for independent production, can be seen as significant in this regard, and even then it had a liberal-economic inspiration.

economics and, increasingly, the information society, were viewed as falling within EU competence.

In the subsequent years, some initiatives were taken, targeted at the harmonization of national ownership regulations, but without achieving concrete results. A draft Directive presented in 1996 by Commissioner Mario Monti could not overcome conflicts between the European Parliament and the Member States concerning the flexibility of ownership threshold provisions, and was abandoned in 1998. The EU decided to establish a number of rules through several policy documents and research reports instead, but the recommendations and rulings that came out of these texts remained limited in scope and content, and might give way to ambivalences and inconsistencies. The subsidiarity-supranationality tension field is particularly to blame for the failure of achieving a consensus. Not only do ownership rules fall within the competence of the Member States according to the EC Treaty, the sensitive character of the issue at stake makes it extremely hard to establish a consensus between the different EU countries. On top of this, the media industries themselves were not very enthusiastic about the idea of a harmonization of the rules on cross-media ownership (Wheeler, 2004:358).

Going against the Commission's view that a specific EU intervention in the media sector is not necessary, the European Parliament has taken several actions during the subsequent years in view of a European approach towards pluralism and media concentration. This led the Commission to consider the re-examination of this issue during the course of the broader consultation on the *Green paper on Services of General Interest* (2003). Up till now, however, it sticks to its conclusion that the issue should be left to the Member States (European Commission, 2005; Europa, 2004), albeit the Commission did decide to step up its monitoring efforts on media pluralism. For this purpose, the Commission's Task Force for Co-ordination of Media Affairs launched a three-step plan in January 2007. [6] A first step was the publication of a Commission Staff Working Paper on media pluralism (SEC(2007) 32), which gives a concise overview of the national media ownership regulations and other relevant regulatory models of all the 27 EU Member States. Secondly, the Commission has ordered an independent study on media pluralism in EU Member States to define concrete and objective indicators for assessing media pluralism. On the basis of the results of the study, the Commission will, thirdly, publish a communication on the indicators for measuring media pluralism in the Member States in 2008 and will organize a broad public consultation on the issue.

4. Case-law/trends

Since the Merger Regulation came into effect, a number of mergers involving audiovisual media and allied services have been reported. Of the 3388 cases that have been notified to the Commission between 1990 and April 2007 on the basis of the Merger Regulation, about 80 decisions are related to the media sector and circa 230 to the telecommunications sector (see Table in annex for an overview of the media cases).[7] More importantly, however, six of the 19 negative decisions made until now under the Merger Regulation directly affect the media sector: MSG Media Service (1994), Nordic Satellite Distribution (1995), HMG (RTL/Veronica/Endemol) (1995), Bertelsmann/Kirch/Première (1997), Deutsche Telekom/Betaresearch (1997) and MCI Worldcom/Sprint (2000). Other negative decisions such as Telefonica/Sogecable and Time Warner/EMI were avoided at the very last minute by the withdrawal of the alliance (Pons 1996; Gunther, 1998; Kiessling and Johnson, 1998; Motta and Polo, 1997). But just as important as the rejected mergers are of course the approved alliances, including those of Warner/AOL (2000), Vivendi/Canal Plus/Seagram (2000), Newscorp/Telepiù (2003) and Universal Music Group/BMG Music Publishing (2007)

[6] Commission Press release IP/07/52 of 16 January 2007 "Media pluralism: Commission stresses need for transparency, freedom and diversity in Europe's media landscape"

[7] This count is based on the NACE codes. Double counting of telecommunication/media is, however, possible in the context of convergence trends.

that were all approved, albeit with certain strings attached (Pauwels & De Vinck (fortcoming):18).

While the wave of mergers in the late 1990s – early 2000 in the media and related sectors (fuelled by the internet "dotcom" boom) slowed down in the following years, reaching a stage of consolidation there are signs that concentration activity is increasing again. In parallel with a general rising trend in the number of notified merger cases since 2004, a new burst of media mergers and acquisitions can be discerned, this time mainly driven by the growth in emerging telecommunications markets.[8] In light of this, one must be careful not to underestimate the continuing importance of merger control in the media sector, despite the observations that the trend has not translated itself (yet) in a remarkable increase of the "media" concentration case law (cf. Table) and that the last negative media-related decision dates from 2000. It is certainly true the audiovisual sector was particularly targeted during the first years of merger control in terms of refusals, a finding that remains very remarkable given the fact that this sector only represents approximately 2 % of all merger cases (Idot 2006:177-178). However, it must be considered that because of technological and economic convergence the media sector is at least indirectly affected by reorganizations in the telecommunications sector. Furthermore, one must bear in mind that where the Commission initially appeared quite rigid by deeming commitments insufficient, it has become much more flexible of late. This practice of commitments, by which the Commission may mold a notified transaction to fit its requirements, has frequently been used in the media sector. It is indeed telling that as of today, in the case of notified media concentrations referred to an in-depth investigation, all approval decision were coordinated upon far-reaching commitments by the merging parties (Idot 2006: 180-189). The Newscorp/Telepiù case (2003) is a clear example of this: the Commission eventually authorized the merger but only because of the comprehensive remedy package including both structural and behavioural commitments (e.g. the waiving of exclusive content rights, the use of mandatory licences and the divestiture of Telepiù's digital and terrestrial broadcasting activities).[9] Likewise, the Commission recently approved the acquisition of the music publishing activities of BMG by Universal only in light of the commitment to divest a number of important music catalogues.[10]

Nevertheless, several authors do raise the question whether raise the question whether the Commission is not too lenient in its treatment of merger cases. Critics indeed refer to the overwhelming majority of cases that have been approved, and the very small number that have been prohibited - only 19 negative decisions until now (Cini & McGowan 1998:126). Another important criticism voiced in the literature is that efficiency in control presupposes a well-staffed department, but an increasing case workload, an undermanned Directorate General and the like make the regulation more an instrument for economic efficiency and rationalization than for the protection of fair competition (Cini & McGowan, 1998:47). The resoluteness by which the Court of First Instance recently annulled the Commission's approval of the SonyBMG merger (2004) for its analysis of the evidence and the rigor of its decision is quite illustrative in this regard. In fact, this decision should have been representative for the recent economic sophistication of EC merger control, one of the main pillars of the reform package that the Commission implemented as a response to the consecutive annulment of three merger prohibition decisions by the Court of First Instance in 2002 (*Airtours v Commission*, *Schneider Electric v Commission* and *Tetra Laval v Commission*). The fact that the SonyBMG decision was equally quashed by the Court of First Instance for not meeting the required standard of proof painfully demonstrates that the Commission has not yet succeeded in its attempt to improve the quality of its merger decisions, despite all the recent reforms (Van Rompuy & Pauwels 2007). Lastly, the referral

[8] The takeover of BellSouth Corp by AT&T was even the biggest deal of 2006 with a value of more than $89bn. A. Edgecliffe-Johnson, "Six years on, interest is renewed", *Financial Times*, 25 January 2007.
[9] *Newscorp/Telepiù* (CASE COMP/M.2876) Commission Decision C(2003) 1082 [2004] OJ L 110/73.
[10] Commission press release IP/07/695 of 22 May 2007 "Mergers: Commission approves Universal's proposed takeover of BMG's music publishing business, subject to commitments"

to national legislation (subsidiarity principle) has been evaluated negatively as well. Anything under the thresholds, and possibly even above them, can be referred to national legislation, but this presupposes that an adequate national legislation and regulation instrument effectively exists, that it is being implemented and that it is indeed meant to enhance and protect media pluralism. Decisions made at the national level indeed often serve an economic interest rather than a cultural objective (Pauwels & De Vinck (forthcoming):18; Lensen 1991:16; Motta and Polo, 1997). In this respect, it is telling that to this date no Member State has made use of Article 21(4) of the Merger Regulation (cf. supra) to impose additional constraints on a media concentration that had already received the green light from the Commission (Idot 2006:182).

5. Conclusions

On the basis of the preceding overview of the existing instruments, the case law and trends within EU competition policy, some conclusions can be drawn.

First of all, it is clear that, because EU competition policy positions itself on the crossroads of several fields of tension, ambivalence all too often characterizes the decisions and actions taken at the EU level. Notwithstanding the availability of a well-articulated antitrust framework - encompassing both *a priori* and *a posteriori* control - the combination of cultural considerations of diversity and media pluralism with economic considerations of market efficiency continues to be a difficult balancing exercise. Even if subsidiarity is quite rightly invoked, the alignment of actions and objectives on the national and EU level certainly leaves ample room for improvement.

Secondly, as illustrated by the recent jurisprudence of the Community Courts, the Commission appears to struggle with the more central role it has recently given to economics in the context of the merger control reform. The debate about the economic soundness of the Commission's decisions was initially triggered by the Court of First Instance's consecutive annulment of three prohibition decisions in 2002. The Commission accepted the Court's harsh criticisms and responded to them by recognizing the need for a sounder economic framework (which resulted e.g. in the appointment of a Chief Economist and an accompanying team of economists to advance the use of economics in its decision-making). The annulment of the Commission's Sony BMG decision in 2006, however, shows that the Commission is not yet capable of fulfilling the intentions to economically sophisticate its merger decisions. Moreover, the Sony BMG case demonstrates the drawbacks of an asymmetrical standard of proof for prohibition or clearance decisions. Whereas a remarkable number of negative media-related decisions were delivered in the early years of EU merger control, the dialectics between the Commission and the Courts have indeed given rise to a more 'cautious' or at least more pragmatic Commission. However, the Court of First Instance's annulment of the Sony BMG clearance decision makes clear that the Commission cannot opt for authorization just to be on the safe side but rather must always take a fully reasoned decision based on sound evidence. This obviously poses difficult challenges for the Commission, not in the least because e.g. the obtainment of reliable data from third parties on a timely basis is far from self-evident. Nevertheless, to ensure that its analysis can withstand judicial scrutiny in the future, the Commission will have to find ways to improve the quality of its decision-making in an effective manner.

Thirdly and finally, the discrepancy between the inherent flexibility of the relevant instruments to address media pluralism issues on the one hand and the political will to put this into practice on the other hand, proves a certain uneasiness at both the national and the EU level. Indeed, it is telling that media pluralism has never been invoked in antitrust decisions or that Member States have never made use of Article 21 of the Merger Regulation to impose additional constraints on a merger. One could argue that up till now there has never been a

true need to explore these *de jure* possibilities. A more likely explanation, however, is the enduring lack of consensus concerning the ways to measure media pluralism and the ways to operationalize related concerns in objective criteria. Whether the envisaged study on media pluralism in the EU, ordered by the Commission as part of its three-step plan, and the subsequent public consultation will be able to change the tide, still remains to be seen. At the least it might empirically challenge the idea that he who guarantees economic efficiency also and automatically protects cultural policy and democratic principles would appear. As Tongue points out, it is indeed a fallacy to think that the free market will deliver all that society needs.[11] When asked if he were in favor of a draft harmonizing media concentration, former EU commissioner Van Miert declared pretty directly (quoted in Harcourt, 1998:447): *"My personal opinion is that I am convinced of a need for European legislation on media concentration. From a democratic point of view, it is necessary. When we said no to the Nordic satellite case, the ruling was considered difficult. We cannot use competition rules to govern democratic issues"*.

6. Table: media cases under the EU Merger Regulation

Nb	Date of notification	Companies	Authorization	Authorization with conditions	Prohibited
1	03.12.1990	Matsushita/MCA	X		
2	07.08.1991	ABC/GeneraleDesEaux/Canal+ / WHSmith	X		
3	27.11.1991	Sunrise	/		
4	01.07.1994	Kirch/Richemont/Telepiù	X		
5	04.08.1994	Bertelsmann/NewsInternational / Vox	X		
6	21.11.1994	VOX (II)	X		
7	23.02.1995	Nordic Satellite Distribution (NSD)			X
8	23.03.1995	Blockbuster/Burda	X		
9	28.03.1995	Kirch/Richemont/Multichoice/ Telepiù	X		
10	07.04.1995	CLT/Disney/SuperRTL	X		
11	21.04.1995	RTL/Veronica/Endemol *Holland Media Group* (HMG)			X
				X	
12	21.04.1995	Seagram/MCA	X		
13	09.10.1995	Canal+/UFA/MDO	X		
14	21.11.1995	Channel Five	/		
15	22.02.1995	Viacom/BearStearns	X		
16	12.08.1996	N-TV	X		
17	04.09.1996	Bertelsmann/CLT	X		

[11] Between 1984 and 1999 Carole Tongue was a member of the European Parliament, where she worked (amongst other things) on issues related to Public Service Broadcasting. She was author of the Parliament's report on the future of Public Service Broadcasting in the digital age. Tongue is an acknowledged expert on broadcasting and audiovisual regulation and has published various articles and book chapters on the subject.

18	08.11.1996	BellCablemedia/C&W/Videotron	X		
19	13.11.1996	Cable&Wireless/Nynex/Bell Canada	X		
20	16.01.1997	RTL 7	X		
21	24.01.1997	Castle Tower/TDF/Candover/ Berkshire	X		
22	01.12.1997	Bertelsmann/Kirch/Premiere			X
23	08.12.1997	Deutsche Telekom/Betaresearch			X
24	11.12.1997	DowJones/NBC-CNBC Europe	X		
25	18.08.1998	Seagram/Polygram	X		
26	28.04.1999	Telia/Telenor		X	
27	30.06.1999	Kirch/Mediaset	X		
28	22.12.1999	BVI Television/SPE EuromoviesInvestments/Europe Movieco Partners	X		
29	07.02.2000	BSkyB/KirchPayTV		X	
30	18.02.2000	CLT-UFA/Canal+/VOX	X		
31	05.05.2000	Time Warner/EMI	**Aborted or withdrawn** 05.10.2000		
32	16.05.2000	Canal+/Lagardere/LibertyMedia/ Multichoice	X		
33	16.05.2000	Canal+/Lagardere/CanalSatellite	X		
34	16.05.2000	Canal+/Lagardere/LibertyMedia/ Multithematique	X		
35	24.05.2000	Bertelsmann/GBL/PearsonTV	X		
36	25.05.2000	Telecom Italia/News Television/ Stream	X		
37	08.06.2000	Telefonica/Endemol	X		
38	31.08.2000	Vivendi/Canal+/Seagram		X	
39	30.10.2000	ISP/ESPN/Globosat-JV	X		
40	30.01.2001	Thomson Multimedia/Technicolor	X		
41	25.06.2001	Accenture/Lagardère/JV	X		
42	11.09.2001	Time/IPC	X		
43	27.09.2001	Group Canal + / RTL/GJCD/JV	X		
44	22.10.2001	Blackstone/CDPQ/Deteks NRW	X		
45	22.10.2001	Blackstone/CDPQ/Deteks BW	X		
46	27.03.2002	Vivendi Universal/Hachette/Multithématiques	X		
47	12.04.2002	RTL/Prosiebensat.1/VG Media	X		
48	03.07.2002	Sogecable/Canalsatélite Digital/Vía Digital	**Referral to the Spanish competition authorities**		

49	29.07.2002	Bertelsmann/Zomba	X		
50	02.10.2002	RTL/CNN/Time Warner/N-TV	X		
51	11.10.2002	Charterhouse/CDC/Telediffusion de France SA	X		
52	16.10.2002	Newscorp/Telepiu		X	
53	14.11.2002	Mediatrade/Endemol/JV	X		
54	13.01.2003	Schroders Ventures Limited/Premire	X		
55	28.02.2003	Mediaset/Telecinco/Publiespaña	X		
56	02.07.2003	Onex/Kieft/Neue Filmpalast	X		
57	01.08.2003	Apollo Soros/Goldman Sachs/Cablecom	X		
58	09.01.2004	Sony/BMG	**Authorization decision annulled by the Court of First Instance** 13.07.2006		
59	13.02.2004	RTL/M6	X		
60	26.04.2004	Advent/Sportfive (4064)	X		
61	21.09.2004	JPMP/Apollo Group/AMC	X		
62	04.10.2004	Sony Pictures/Walt Disney/ODG/Movieco	X		
63	22.11.2004	Charterhouse/TDF	X		
64	28.01.2005	Cinven/France Telecom Cable – NC Numericable	X		
65	18.02.2005	Sony/MGM	X		
66	09.03.2005	3i/Providence/Crown Entertainment	X		
67	26.04.2005	Lagardere/France Televisions/JV	**Aborted or Withdrawn** 03.06.2005		
68	29.07.2005	Bertelsmann/Channel 5	X		
69	02.09.2005	Permira-KKR/SBS Broadcasting	X		
70	20.02.2006	Alliaz Group/Sofinim/United Broadcast Facilities	X		
71	24.04.2006	Providence/Carlyle/UPC Sweden	X		
72	16.05.2006	KPN/Heineken/ON	X		
73	08.06.2006	Cinven/UPC France	X		
74	01.08.2006	Cinven/Wouburg Pincus/Lasema/Multikabel	X		
75	18.08.2006	Permiza/All3media group	X		
76	03.11.2006	Universal Music Group/ BMG Music Publishing		X	
77	05.12.2006	Lagardere/Sportfive	X		
78	18.01.2007	KKR/Permiza/Prosiebensat.1	X		
79	22.01.2007	LGI/Telenet	X		

Based on NACE code. (Source: European Commission, http://europa.eu.int/comm/competition/mergers/cases/index/by_nace_o_.html)

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