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ACCESS TO BROADCASTING PLATFORMS IN MULTI-SIDED MARKETS

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To Marco, for all his reproaches

Contents

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Presentations

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Abstract

Chapter 1 gives a brief introduction to the dissertation.
Chapter 2 describes the functioning of the broadcasting market, with particular emphasis on the platforms involved, in order to prepare the reader for the analysis of platform competition strategies that follows. I discuss so-called *"multi sided market theory"*, and describe some examples of platforms. In this context I point out that the broadcasting sector involves both vertical integration, horizontal integration and multi-sided market platforms, and the theme of access to platforms is discussed with reference to all three types.
In chapter 3 I stress that multi-sided platforms are pervaded by externalities. For this reason I deal with price allocation on the two sides of the market in order to demonstrate that price allocation by the platform is not neutral. Then I discuss the existence of price differences in one-sided and two-sided markets with both single homing and multihoming, and with exclusive and non-exclusive services.
In chapter 4 under the *leitmotiv* of the evolution of pluralism of information, I review the main Italian Constitutional Court judgments on this topic and the *ex ante* regulation of the broadcasting sector in Italy, verifying whether the existing antitrust limits are still consistent with the current level of technology, considering the DVB-T broadcasting technique and the sale of frequencies on the secondary market.
In chapter 5 I describe the various relevant broadcasting markets in accordance with European Commission case decisions. I demonstrate that the activities of multi-sided broadcasting platforms are subject to Article 81 and 82 of the European Treaty, just like any other integrated platform, since in any case they can determine input or customer foreclosure. Furthermore I deal with the relationship between media

broadcasting and the social value of sport with reference to the many antitrust cases in the broadcasting sector concerning the sale of sports event rights to media platforms, and I discus Italian Law 9/2008 which establishes the collective trading of such rights.
Chapter 6 considers the issue of access to content by focusing on emerging multi-sided platforms. I compare them with the vertically integrated platforms and discuss the potential of multi-sided platforms to remove entry barriers to the sector by means of unbundling, which is made possible by the must-offer and must-carry obligations introduced into Italy by the most recent legislation.
Chapter 7 contains my conclusions.

Chapter 1

Introduction.

In recent years the trend among broadcasting companies is to produce, distribute and transmit television content via a single platform that integrates the various steps in the chain under its sole control. In contrast to horizontal integration, which by eliminating competition between companies or increasing the scope for collusion may give rise to a significant loss of effective competition, vertical platforms are less likely to produce negative economic effects. Indeed, vertical agreements might even have some positive impacts on consumer welfare such as the elimination of the problem of double marginalisation and the reduction of opportunistic behaviour, as well as lower transaction costs, thereby increasing efficiencies in input choices and other static and dynamic efficiencies.

Yet although the vertical integration of resources into one platform still appears to be the prevalent business model in the broadcasting sector, the provision of broadcasting services to third parties is evolving in response to the development of new transmission techniques and new kinds of business are being conducted.

We refer here to so called *multi-sided broadcasting platforms,* which are platforms that do not integrate all the production and distribution phases but simply involve a number of economic operators (e.g. content providers, advertisers and viewers), chosen on a non-discriminatory and impartial basis for the provision by the platform of broadcasting services without exclusive rights.

The growth in the sector of this new kind of platform is partly hampered by the established broadcasters, who have to give up their

exclusive rights to content and grant access to emerging platforms ("must offer") or are obliged to broadcast the content of external content providers who request such a service ("must-carry").

To prevent the foreclosure from the market of emerging multi-sided platforms due to abuse of the existing platforms' dominant position, it has been necessary to create a new regulatory framework *ex ante* and invoke the intervention of competition watchdogs.

Recently, as a result of moral suasion stemming from European law, the Italian Parliament passed legislation aimed at safeguarding access to platforms by emerging broadcasters.

For this reason, after describing the general features of the relevant economic theory, we wish to analyse the legislation and regulatory practice concerning multi-sided platforms in the broadcasting sector.

We will also discuss the agreements between platforms and content providers and their effects with respect to competition regulations.

The broadcasting sector is heavily influenced by two closely related components: (i) audiovisual content and (ii) advertising. Indeed advertisers are the sector's main source of income, far more important than other purchasers (e.g. viewers or programme makers) or financiers (e.g. government). For example in 2008 Italian television advertising accounted for 46.4% of broadcasting revenues, TV license fees 18.9% and viewer subscription revenues 31.5%. However, this situation is likely to change since in 2008 the demand for digital Pay TV content increased by 2.2% compared to 2007, so that if this trend continues, in a few years television advertising revenues will be overtaken by viewer subscription fees[1].

[1] See Annual Report 2009 of the Italian Communications Authority, sections 1.2.3 and 1.2.6. Available from http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=17.

Chapter 2

Broadcasting platforms: an overview.

2.1 Introduction.

In this chapter we give a brief description of the functioning of the broadcasting sector, which is characterized by two basic kinds of business, that is (i) one based on in-house integration within a single company of the network and the content and (ii) one based on the sharing of content among a plurality of companies and the provision of this content to the viewers through a third party.
In both cases the broadcaster plays the role of a platform, with distinctions that we will explain later, which exploits the externalities associated with various business strategies. In this context the economic literature provides a new theory to explain the phenomenon of content sharing among platforms called multi-sided market theory. This is considered an evolution of the concept of positive network effects. Indeed in the broadcasting markets, network effects occur in a context of convergence between several technologies and infrastructures. For this reason a brief introduction to the topic of multi-sided broadcasting platforms is necessary at this juncture. Here we aim to introduce the reader to the topic of multi-sided markets, citing some examples of platforms which share content among different economic operators (advertisers, content providers, viewers).
In any case, the question of access to platforms has important implications for those platforms that vertically integrate content production within a single company.

For a complete description of the broadcasting industry, starting from the beginning, we will make reference to relevant broadcasting markets as identified by the European Commission.
Then in Chapter 3 we will come back to the matter of multi-sided markets, adding further information with reference to their functioning, and dealing with the issue of competition among platforms. Therefore let us first focus on what a platform is.

2.2 Multi-sided market platforms: a brief introduction.

In general terms the word "*platform*" is widely used in various fields. Even in the broadcasting sector it is sometimes used generically to identify the technological infrastructure that enables the transmission of information, that is, as a synonym of "network". At other times, however, the term "*platform*" refers to the technology used in the transmission (analogical or digital). Let us now discuss the meaning of "*platform*" for the purposes of our research.
The word '*platform*' has its origins in the field of computer science. Originally it referred to a hardware or software architecture that served as a foundation or base. Historically, most application programs have had to be written to run on a particular platform. Each platform provided a different application program interface for different system services. Initially it concerned only hardware, and it may still refer to a Central Processing Unit model or a computer family. The terms "platform" and "environment" in this case can be used interchangeably.
Platforms can also be "Software Only" or "Operating Systems". In the latter case the hardware is generally implied, whereas "Software Only" indicates an operating system that applications must interface with. An application can also be a platform if it functions as a base for other programs. For example, web browsers accept third-party plug-ins, which are small software components that add functions. The browser

thus becomes a platform for these extra components. A messaging or groupware platform is a base program that e-mail, calendaring and other client programs communicate with.

Whatever their type, software platforms are always a two-way street; they provide basic functions and communicate back and forth with other software. A single application that runs in isolation is not a platform. For example, a simple photo editor that does not accept third-party plug-ins cannot be called a "platform".

This dual dimension inherent in information platforms led to the word "platform" being used in all circumstances where it was necessary to rely on the dichotomy between two or more dimensions. Consequently, the term "*platform*" has been used to refer to other things which are not strictly related to computers.

One case is the formal declaration of principles by which a group, such as a political party, makes its appeal to the public during an election campaign. In geology it means the ancient, stable and inferior layer of a continental craton, composed of igneous or metamorphic rocks covered by a thin layer of sedimentary rock.

In economics the word "*platform*" has been used to refer to the environment *where economic operators meet to share information, content and images*[2]. In order to determine the business model on which the platform is founded (integrated or multi-sided) we need to look at content integration or non-integration within the same entity.

Here we discuss multi-sided market platforms and in the following sections we will also deal with integrated platforms.

As Evans, one of the most important proponents of two-sided market theory, said in 2003: "*Dating clubs, for example, enable men and women to meet each other; magazines provide a way for advertisers to find an audience; and computer operating system vendors provide software that applications users and applications developers can use together*." Thus all these phenomena, i.e. dating clubs, magazines, and computer operating

[2] EVANS D.S. (2003) "Some empirical aspects of multi-sided platform industries", *Review of Network Economics*, vol. 32, pp. 309-328.

systems, are examples of platforms. As in the original information view, these platforms coordinate the demands of distinct groups of customers who need each other in some way[3]. For the purposes of our research we may keep the definition of the two-sided market adopted by Evans[4].

A market is said to be two-sided if: "*at any point in time there are (a) two distinct groups of customers; (b) the value obtained by one kind of customers increases with the number of the other kind of customers; and (c) an intermediary is necessary for internalizing the externalities created by one group for the other group*". The presence of two different user groups calls for a modification to the standard analysis of externalities.

Evans described three types of multi-sided platform markets:

a) matchmakers, such as stock exchanges or real estate agents, who bring buyers and sellers together on a single platform;
b) audience-makers, such as newspapers or yellow pages, which serve as intermediaries between interdependent readers and advertisers;
c) demand-coordinators, such as computer operating systems, credit cards, or Bloomberg, which do not fall into the first two categories but nevertheless balance the interests of two or more customer groups.

He focused on operating system producers, which coordinate the following three classes: (i) applications developers, (ii) computer end-users, and (iii) hardware manufacturers. In principle, the operating system producers could charge both developers and users. But to balance the market, they often charge the software developers little or nothing, and pass costs on to the operating system users[5].

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[3] Ibidem.

[4] EVANS D.S. (2003) "The Antitrust Economics of Multi-Sided Platform Markets", *Yale Journal on Regulation*, vol. 2, pp. 325-382. See also REISINGER M. (2004) *Two sided markets with negative externalities* [online]. Available from http://epub.ub.uni-muenchen.de/478/1/munichtwsi.pdf.

[5] EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

This theory posits an evolution of traditional industries based on the concept of positive network externalities. In this scenario a consumer (or rather a system user) is a positive function of other economic agents. In any case a two-sided market implies another element in addition to a simple market characterised by the effects of network externalities, which is the contemporary presence of two or more different user types seeking to purchase the same company's services (or products) in one market. They need each other so that a particular transaction can happen.

For example, in order for the broadcasting sector to exist, content providers and viewers are both necessary, since the audiovisual activity and the respective demand function are interdependent.[6]

In other network industries, even those which are one-sided, the value of the externality for one economic agent can be described as follows: the surplus gained by the first agent increases as a function of the number of members of the other kind. Thus, price variations on one side of the demand also have effects on the other side. It would be more appropriate to define this situation as characterized by cross-positive externalities, which should not be confused with the cross elasticity of demand.

The presence in the market of the platform is justified by its function as an intermediary between or among users, to the extent that it internalizes the value created by one user group for the second one. As Evans said: "*Firms profit themselves and society by figuring out ways to internalize these externalities*"[7]

In two-sided markets it is not possible to determine price according to the normal economic theory based on the condition of equivalence between profit and marginal cost because the supply and demand functions for the two kinds of users are different. Thus any mistake in

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[6] For a description of this theory applied to the electronic communications sector, see RENDA A. (2005) "Domanda e offerta di contenuti multimediali: la strategia competitiva", *VIII Rapporto IEM*, FONDAZIONE ROSSELLI, Rome.

[7] See EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

determining the price on one side involves a risk of a reduction in supply for the other side, which may withdraw from the platform, thus reducing its appeal for the first kind of user.

In competition terms the 'chicken-and-egg' dilemma is the creation of the market by the first company that is able to create a network composed of a sufficiently large number of users to attract the other kind of users. In the start-up phase the entry strategy is iterative and the number of users must be built up by adapting to the situation as it develops ("learning by doing").[8] Time behaves as a cross-subsidy among the various parties of two sided markets which "learn" about each other over time[9].

Time is even more significant for digital TV, where uncertainty exists over both the demand side (e.g. it is not certain whether consumers are willing to adopt any new technology) and the supply side (e.g. content providers have not yet decided on the type and variety of programmes they will offer over a digital platform)[10]. Regulation of television is also influenced by time.

For an optimal degree of intervention by the public authorities, the related framework has to be dynamic, and adapt to a mature market rather than a infant market where uncertainty is high and the parties are still learning the fundamentals of the market.

With reference to the number of parties involved in the platform, when there are more than two, the platform is called multi-sided, based on the interactions among the demands of multiple groups of customers.

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[8] See ARMSTRONG M. (2006) "Competition in Two Sided Markets", *RAND Journal of Economics* Vol. 37, No. 3, pp. 668–691.

[9] This point was made by VALLETTI T. at the Seminar on *Competition among multiproduct platforms*, Rome 7-8.06.2007.

[10] For a model enriched with a stochastic dimension, where the two sides "learn" about each other over time, see ARMSTRONG M., "Competition", *supra* at footnote 8.

2.3. Multi-sided platforms: functions and scope.

Most markets are one-sided in nature, as in the case of customers interested in buying a book. But a multi-sided market involves a number of players, each one with its own interests to be served, and they are all interdependent. For instance, hair salons can choose to serve either men or women or both. By contrast, dating clubs must serve both men and women.

Examples of multi-sided markets are pervasive in today's economy and range from financial exchanges, real estate listings, online intermediaries like eBay (buyers and sellers), ad-supported media (ad sponsors and readers/viewers), computer operating systems (application developers and users), videogame consoles (game developers and users), shopping malls (retailers and consumers), digital media platforms (content providers and users), dating clubs (men and women) and many others. These multi-sided markets are platforms that serve two or more distinct groups of customers who value each other's participation.

Two- and multi-sided markets are markets in which firms need to get two or more distinct groups of customers who value each other's participation on board the same platform in order to generate economic value. In traditional one-sided markets, firms serve different types of customers, but they lack interdependency.

Multi-sided markets in general are not new at all. They have been around for ages. However, it was only recently that economists realized that there are interesting common threads linking markets which, on the face of it, have nothing to do with each other: credit cards, videogames and media for example.

It is also true that certain categories of two-sided markets have become more numerous, mostly due to technological evolution. The Internet has spawned many two-sided platforms, and the software platforms that run our computers, PDAs, and mobile phones have emerged only recently. Credit card companies make their revenues mostly from retailers rather than from consumers. More interestingly, vendors of operating systems like Apple, Microsoft, Symbian, and Palm derive their profits from users through licensing fees and do not charge much

to allow application developers to access their platforms. In contrast, videogame console makers like Sony, which makes the PlayStation, and Microsoft, which makes the Xbox, make their profits from game developers through royalties and incur losses on the sale of consoles to users by pricing them below cost.

The key reason for this is that two-sided platforms must solve a chicken-and-egg problem. For example, without sufficient applications developed for it, an operating system has no value for users, and therefore cannot attract them. Conversely, without a solid user base, no application developer will be interested in supporting that operating system. If the platform vendor decides to charge positive prices on both sides, it might end up attracting neither. So the idea is to subsidize one side in order to attract it more or less regardless of the other side and then turn to the second side and charge it positive prices. Of course, depending on the market, the timing and mechanism of adoption by the two sides varies, and there are interesting differences to look at, but the fundamental chicken-and-egg issue is the same.

A market has network effects (also known as network externalities or positive-feedback effects) when the value consumers place on a product increases in relation to its frequency of use by other consumers. The direct network effect means that the consumer values the product because others have purchased it as well. In the case of indirect network effects, the consumer values (and therefore has a stronger demand for) the product because his or her purchase means that the demand for complementary products is higher and the suppliers of those complementary products will benefit.

The fundamental functions performed by platforms are the following: reducing search costs (this helps in matchmaking contexts: typically buyers and sellers); creating audiences (this is essentially the function of advertising platforms); and saving on shared costs (i.e., providing an infrastructure that can be used for many transactions between the different sides of the platform).

All multi-sided platforms perform at least one of these three functions and many perform more than one. Let us look at some examples.

The interchange fee for credit card purchases is the payment for the service provided by the issuer of the credit card, a service which

involves at least four parties, i.e. the consumer, the seller and their two respective banks, allowing them to save on shared costs.[11]
Operating systems save the shared costs of providing low-level functions that all applications can use.
Shopping malls save on shared costs by pooling together many retailers in the same place and thereby also reducing search costs.
EBay creates value by reducing search costs for buyers and sellers, and at the same time it saves on shared costs by offering PayPal as a convenient payment platform. In performing these services, it is also creating audiences for advertisers.
In all these cases and in order to determine the optimal pricing structure (that is, how much to charge one side compared to others) we need to carefully analyze the related interdependencies among the multiple sides as well as their willingness to pay and join the platform.
The scope of the multi-sided platform is also a key decision variable. As already mentioned, the scope of the intermediation between or among users is the internalization of the value created by the user groups involved in the platform. In the next chapter we will discuss this topic in greater detail, focusing on the broadcasting markets in particular.
Let us now take a look at the other kind of platform that is commonly found in the broadcasting sector, that is, integrated platforms.

[11] For a description of the credit card industry with three or four parties, see PARDOLESI R. and GUARNIERI M. (2006) "La concorrenza nell'industria delle carte di credito. Riflessioni preliminari", *Diritto Bancario* I, p. 3; TRIFILIDIS M. (2004) "Carte di pagamento e tutela della concorrenza. Funzione ed effetti della commissione interbancaria multilaterale – MIF'", *Merc, Conc., Reg.*, 3, p. 559; CHANG H.H. and EVANS D.S. (2000) "The Competitive Effects of the Collective Setting of Interchange Fees by Payment Card Systems", *Antitrust bulletin* 45, pp. 641-644.

2.4. Vertical and horizontal platforms: foreclosure from the market.

Multi-sided platforms are just one part of the broadcasting sector. Given the object of our research (i.e. access to platforms), we cannot avoid making reference to those broadcasting platforms which internalize broadcasting content and services.

The vertical and horizontal business scopes of a platform are critical because they determine the platform's ability to create viable ecosystems by getting the relevant sides on board, generating interactions among them, and extracting profits.

Vertical scope in particular has to do with the decision to integrate upward or downward content in the value chain. Whereas allocative efficiency is reached by pushing prices towards marginal costs, dynamic efficiency is achieved through the invention, development, and distribution of new products and processes that either reduce costs or increase wealth.

On this point we should stress that vertical integration does not result in a multi-sided market, because in vertically integrated platforms content is integrated in a single company that purchases or licenses it from content providers; in multi-sided markets, content is broadcast by a third party, i.e. the platform, which does not have exclusive rights to the content.

Therefore the vertically integrated platform is one-sided in the sense that the platform (which owns both content and networks) cuts transitional costs among different services and content providers and is able to provide customers with a more competitive price and quality compared to a non-integrated platform.

The economic literature on vertical integration in platforms is huge[12]. In general terms we can say that integration among firms is the process by

[12] See for example SINGER H.J. (2007) "Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators", *Review of Network Economics*, Vol. 6, Issue 3; GABSZEWICZ J.J. and ZANAJ S. (2006) *Competition*

in successive markets: entry and mergers [online]. Available from: http://www.core.ucl.ac.be/services/psfiles/dp06/dp2006_97.pdf; RUBINFELD D.L. and SINGER H.L. (2001) "Vertical foreclosure in broadband access?", *The Journal of Industrial Economics*, Vol. 49 Issue 3, pp. 299-318; HASS D.A. (2008) "First, Assume a Monopoly: The Failure of Vertical Foreclosure Theory on the Never-Was-Neutral Internet", *Journal of Systemics, Cybernetics and Informatics*, Vol. 6, No. 5, p. 42; HANN M. (2001) "The Economics of Free Internet Access", *Journal of Institutional and Theoretical Economics JITE*, Vol. 157, No. 3; VAN LONG N. and SOUBEYRAN A. (2003) *Favoritism in Vertical Relationship: Input Prices and Access Quality,* CIRANO Working Paper No. 14; ALEXANDER C. and REIFFEN D. (1995) "Vertical Contracts as Strategic Commitments: How Are They Enforced?", *Journal of Economics and Management Strategy*, vol. 4, issue 4, pp. 623–649; CHEMLA, G. (2003) "Downstream Competition, Foreclosure, and Vertical Integration", *Journal of Economics and Management Strategy,* vol. 12, issue 2, pp. 261–289; CHEN. Y. (2001) "On Vertical Mergers and Their Competitive Effects", *RAND Journal of Economics*, vol. 32, pp. 667-685; CHOI J. and Yi S.S. (2000) "Vertical Foreclosure with the Choice of Input Specifications", *Rand Journal of Economics*, vol. 31, pp. 717-743; CHURCH J. and GANDAL N. (2000) "Systems Competition, Vertical Merger and Foreclosure", *Journal of Economics and Management Strategy*, vol. 9, pp. 25-51; COOPER J. et al. (2005) *Vertical Antitrust Policy as a Problem of Inference*, Mimeo, Federal Trade Commission; HART, O. and TIROLE J. (1990) "Vertical Integration and Market Foreclosure", *Brookings Papers on Economic Activity, Microeconomics*, pp. 205-285; KATZ M.L. (1987) "Vertical Contractual Relations*", Handbook of Industrial Organization*, Vol. 1, Amsterdam: North Holland; ORDOVER J.A,, SALONER G. and S. SALOP (1990) "Equilibrium Vertical Foreclosure", *The American Economic Review*, vol. 80, pp. 127-142; ORDOVER J.A., SALONER G. and SALOP S. C. (1992) "Equilibrium Vertical Foreclosure: Reply", *The American Economic Review*, Vol. 82, No. 3, pp. 698-703; REY P. and TIROLE J. (2005) *A Primer on Foreclosure*, Institut d'Economie Industrielle (IDEI) Working Paper No. 203; SPENGLER, J. (1950) "Vertical Integration and Anti-Trust Policy", *Journal of Political Economy*, 58, pp. 347-352; VALLETTI T. (2004) "Vertical integration and exclusivity contracts when consumers have switching costs", *Southern Economic Journal*, Vol. 71, No. 1 pp. 36-59; SALINGER M. (1988) "Vertical Mergers and Market Foreclosure", *The Quarterly Journal of Economics*, Vol. 103, pp. 345-356.

which several steps in the production and the distribution of content are controlled by a single company or entity, increasing its power in the marketplace.

Vertical integration between companies which co-operate at different levels of the supply chain may have anti-competitive effects when the merged entity's behaviour limits or eliminates competitors' access to supplies (input foreclosure) or markets (customer foreclosure)[13].

For us to understand the risk of foreclosure for platforms in the broadcasting sector, the study of the literature on the topic of vertical integration in platforms is crucial[14].

In the following analysis we seek to ascertain whether, and if so in what ways, an integrated platform which produces its own content and/or has its own network will find it profitable to discriminate against network providers and content providers.

First we define the downstream market as the "*broadcasting signal transport service*", which is a market served by terrestrial, satellite and cable providers and any other firm that provides consumers with a broadcasting signal link between their homes and a platform and also provides them with ancillary services.

Second, we define the upstream market as the "*audiovisual programmes packaging service*", a market served by all firms that devise, package and distribute broadcasting content.

From this point of view a platform can discriminate against network providers and content providers that do not join it and an anti-competitive strategy may thus arise.

An integrated platform can refuse to grant access to its content to other networks; this behaviour can be called "*network discrimination*". On the

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[13] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on 28.11.2007 [online] Available from http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, at par. 29-30.

[14] See papers mentioned s*upra* at footnote 12.

other side, an integrated platform can refuse to grant other content providers access to its network, thus implementing so-called "*content discrimination*"[15].

The use of vertical foreclosure as a means of extending a firm's monopoly power was criticised by the Chicago School, who formulated the "*one bottleneck monopoly theory*", according to which a vertically integrated firm with monopoly power in the downstream market can charge the monopoly price for the downstream service, thereby extracting all the profits of the upstream producer[16]. The vertically integrated firm in this case does not gain anything from the elimination of its own upstream rivals. Although this fact should not give rise to regulatory intervention, some scholars believe that it is necessary in any case[17].

Over the past few decades many authors have discussed the ability of vertical foreclosure to generate harm. Ordover, Saloner and Salop said that refusal by the vertically integrated firm to grant access to rivals of its downstream division implies that the remaining upstream suppliers will face less competition in serving the foreclosed downstream firms. If these non-affiliated upstream suppliers then raise their prices to the rival downstream firms, the latter will respond by raising prices for end users[18].

Hence, diminished upstream competition increases the integrated firm's downstream market share and supports higher downstream prices and increased profits. Because the foreclosure equilibrium

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[15] See CORTADE T. (2006) *A strategic guide on two-sided markets applied to the ISP market* [online]. Available from: http://mpra.ub.uni-muenchen.de/2602/1/MPRA_paper_2602.pdf.

[16] RUBINFELD D.L. and SINGER H. L., "Vertical foreclosure in broadband access?", *supra* at footnote 12.

[17] CARLTON D.W. (2001) "A General Analysis of Exclusionary Conduct and Refusal to Deal — Why Aspen and Kodak are Misguided", Antitrust Law Journal, Vol. 68, Issue 3, pp. 659-683.

[18] ORDOVER J.A., SALONER G. and SALOP S.C., "Equilibrium Vertical Foreclosure", *supra* at footnote 12.

involves higher prices for all downstream firms without any offsetting efficiency gains, overall social welfare decreases.

With reference to the television market, Church and Gandal said that conflict over access to content will arise with the development of the information highway and competition between alternative technologies and vendors. They demonstrated that foreclosure by a single firm can occur if the products of the downstream markets are highly differentiated and the marginal value in the upstream market is small, or when downstream product differentiation is not very high[19].

Furthermore Whinston[20] recognized that in the presence of scale economies in the production of complementary goods, the unaffiliated rival would not be insulated from the actions of the vertically integrated firm. If the refusal to deal with the unaffiliated rival causes the rival's output to drop below an economically efficient scale, the rival might consider exiting the industry. Assuming that at least some consumers of the integrated firm wanted only the service produced by the rival firm, those consumers would suffer harm from reduced competition.[21]

From an antitrust point view, in order for the possibility of foreclosure to arise, a number of aspects must be established:

a) the ability of the vertical firms to foreclose;
b) the incentive to foreclose; and
c) the overall impact on effective competition[22].

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[19] For an application of the vertical foreclosure theory to the hardware and software markets see CHURCH J. and GANDAL N., "Systems Competition, Vertical Merger, and Foreclosure", *supra* at footnote 12.

[20] WHINSTON M. (1990) "Tying, Foreclosure and Exclusion", *The American Economic Review*, p. 837, p. 859.

[21] CARLTON D.W., "A General Analysis of Exclusionary Conduct", *supra* footnote 17; for a description of the Time Warner and Turner Case see RUBINFELD D.L. and SINGER H.J., "Vertical Foreclosure in Broadband Access?", *supra* at footnote 12.

[22] See Non-Horizontal Merger Guidelines, sections 31 and 60 onwards.

As recognised by the Non-Horizontal Merger Guidelines of the European Commission, in order to be *able* to foreclose competitors, the new entity must have a significant degree of market power (which does not necessarily amount to dominance) in one of the markets concerned. Specifically, the Non-Horizontal Merger Guidelines note that the merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in terms of price or quality.[23]

2.5. The distinctive features of broadcasting platforms.

As we already mentioned, both the above-described kinds of platform (multi-sided and vertically integrated) exist in the broadcasting sector.
In fact, regardless of whether content production is integrated in the platform, all platforms act as a physical space where many economic operators, such as audiovisual content providers, advertisement makers, network providers, service providers and viewers, can meet. Each platform can be regarded as integrated or non-integrated depending on how it behaves with respect to those economic operators.
In Italy for example the Free to Air (hereinafter "**FTA**") TV companies Rai Radiotelevisione Italiana (hereinafter "**RAI**") and Mediaset S.p.A. (hereinafter "**Mediaset**") and the satellite Pay TV company Sky Italia (hereinafter "**Sky**") are considered as broadcasting platforms; content integration in Rai, Sky and Mediaset makes them vertically integrated whereas the broadcast of content provided by a third party makes the same platforms multi-sided.

[23] See par. 36 of the Non-Horizontal Merger Guidelines.

With reference to the number of parties involved in a multi-sided platform, it is three-sided if it involves at least a viewer, a content provider (or a programme maker) and a seller who sells its products to customers and advertises them on television (as with FTA TV); in contrast the platform is two-sided if it involves just a content provider and a viewer (as in case of Pay TV).

As far as FTA television companies are concerned, the viewers are not charged for watching programmes and the editorial responsibility for content is in the content provider's hands.

With reference to revenues, the FTA TV company that owns the broadcasting infrastructure and the radio spectrum (on a concession or licence basis) charges only one side, as in the following situations:

a) the programme makers, with whom the FTA TV company shares a portion of the broadcasting spectrum (thus providing a service of carriage) in return for payment;
b) the advertisers, when the FTA TV company sells them the sponsorship slots.

As far as Pay TV is concerned, the platform charges both viewers and advertisers a price that is in any case cheaper than the price they would pay without platform intermediation in buying content from content providers. This is possible because for advertisers and content providers there are positive externalities arising from participation in the platform due to the large amount of consumers it involves[24]. For this reason the platform charges one side more than the others as a result of the higher value it attributes to that side's participation.

There is also the case when a channel's producer, who is not the owner of the broadcasting infrastructure or the radio spectrum, edits the full programme schedule of a channel (like Eurosport, Bloomberg and FashionTV for example), sells the advertising slots to advertisers and provides the broadcasting platform with the finished channel (as composed of both advertising slots and programmes).

[24] See Chapter 3, par. 3.2 of this dissertation.

In this case the channel itself become a two-sided platform, i.e. a technological environment where two different customers with no direct relationship meet: (i) the advertisers and (ii) the broadcasting company that owns the radio spectrum. In this case the channel producer is not the buyer of the broadcasting platform, but is one of the platform's suppliers[25].

Obviously from the consumer's point of view, only the viewer's relationship with the platform matters (in terms of FTA or Pay TV access), since the commercial agreements between the programme maker and the broadcasting platform or between the programme maker and the product sellers are unknown to the viewers.

Furthermore when an FTA or a Pay TV company is the producer of its own channels and the owner of the broadcasting network, it is a vertically integrated platform in the sense that the platform has exclusive rights to the content. Let us give an example to explain.

When Sky buys content from its providers and broadcasts it to the viewers (for example via the Sky Cinema or Sky Sport channels), the transactions it conducts with members of the two groups – content providers and consumers – are largely independent of each other and have little to do with two-sided market theory.

But Sky is considerably more sophisticated than that. It also rents parts of its own radio spectrum to third-party channel producers like ClassEditori S.p.A or Rai Sat S.p.A. for example. The latter companies are responsible for supplying, displaying and advertising their programmes within the spectrum allocated to them by Sky. In this case Sky is a two-sided platform in the interaction between these programme publishers and the viewers, who are charged by the platform via the access fee and the subscription fee respectively.

The situation is considerably more complicated from the consumer's point of view. Since Sky is Pay TV, when the viewers subscribe to the

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[25] With reference to the idea of considering a channel as content that can be provided to a platform, see European Commission Case Decision COMP/M.5121 *Newscorp/Premiere* of 25.06.2008.

whole bouquet, that is, they subscribe to all the channels produced by Sky (including Sky Cinema and Sky Sport) and the channels produced by other content providers. But viewers are not conscious of paying for content published by providers other than Sky. Indeed, companies such as ClassEditori S.p.A or Rai Sat S.p.A do not charge Sky subscribers, but rather the product sellers who buy advertising slots in the schedules of their channels. Thus although such channels (Class NBC and Raisat Cinema for example) are broadcast by a third party platform (like Sky), they are also platforms in themselves, in that they bring together advertisers and broadcasting companies. The functioning is similar to that of a FTA television company as described above: only one side is charged (the advertisers) for advertising slots, whereas it is assumed that the other side (the consumer) will buy those products on the market.

2.6. Relevant broadcasting markets.

From the regulatory point of view, the broadcasting sector is highly fragmented. According to the European Commission's description of the relevant broadcasting markets, a basic distinction in terms of distribution of content can be made between Pay TV and FTA TV companies[26]. The established distinction between Pay TV and FTA TV is based upon several features. Firstly, there is the difference in the type of financing. Pay TV establishes a commercial relationship between the platform and the viewer, whereas FTA TV only establishes a

[26] See European Commission Case Decisions COMP/M.4504 – *SFR/Télé2 France* of 28.112006; COMP/M.4204 – *Cinven/UPC* France of 13.07.2006; COMP/M.3411 – *UGC/Noos* of 17.05.2004; COMP/M.2876 – *Newscorp/Telepiù* of 02.04.2003.

relationship between the broadcasting company and the advertisers (i.e. the product sellers). Secondly, while there is undeniably interaction between the two markets from the viewer's perspective, a distinction can be drawn based on whether the TV service is provided at no specified cost or is the result of a subscription allowing access to certain programmes not otherwise available. Thirdly, from a viewer's perspective, the programmes and the "premium" content (i.e. content with more appeal for viewers) exclusively distributed via Pay TV often cannot be replaced with programmes and content available on FTA TV, since viewers do not consider Pay TV and FTA TV services as fully interchangeable. Obviously, the more attractive the content offered by an FTA broadcaster, the smaller the incentive for a viewer to opt for a Pay TV subscription. However, this interaction does not render FTA TV a simple substitute for Pay TV, as demand-side substitutability is limited by the fact that, unlike Pay TV, viewers of FTA TV generally do not have to pay a subscription fee to get access to a particular type of content or programme. Finally, there are major differences with regard to the business models of the two types of broadcasters, so supply-side substitutability is limited. While FTA channels are chiefly financed by advertising revenues and, in the case of the public broadcasters such as RAI in Italy, by public funds, Pay TV operators still largely rely on revenues from subscription fees and, to an insignificant extent, from advertising[27].

With reference to the nature of the audiovisual content, entertainment products involve several kinds of content that are not good substitutes for each other (e.g. films, sport, TV programmes and channels). TV broadcasting rights to this type of content belong to their publishers, who license them to broadcasters. From both the demand-side and supply-side perspectives, certain types of content bought by Pay TV operators are not mutually substitutable, since (i) sports events, (ii)

[27] See European Commission Case Decision COMP/M.5121 *Newscorp/Premiere* of 25.06.2008.

premium films and (iii) other TV content (such as documentaries, youth programmes, etc.) are sold in separate markets.[28]

The European Commission also stresses the difference between FTA TV and Pay TV companies in terms of their product differentiation strategies: FTA TV seeks to offer substantially similar products to their viewers (the so-called generalist channels), whereas Pay TV channels tend to be extremely differentiated (into so-called thematic channels).

In recent years the broadcasting sector has undergone significant changes in terms of financing and the collecting of resources. Unlike what happened in the past, the broadcasting sector today involves Pay TV and FTA TV companies competing directly in terms of similar programmes (scripted and unscripted content[29]) and convergence through digitalization. There is also convergence of business models in the sense that Pay TV operators are increasingly financed not only by subscription fees but also by advertising revenues, whereas FTA broadcasters (traditionally financed primarily via advertising revenues) have started offering encrypted channels for which viewers have to pay a subscription fee. Furthermore both FTA and Pay TV broadcasters compete for the same content and audience. Despite this the European Commission's approach has changed little, although a different description of the relevant market would be probably more consistent with reality.

With reference to the geographical dimension, the broadcasting sector is national in scope due to the regulatory regimes, language and local

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[28] See European Commission Case Decisions COMP/M.4504 – *SFR/Télé2 France* of 28.11.2006; COMP/M.4204 – *Cinven/UPC France* of 13.07.2006; COMP/M.3411 – *UGC/Noos* of 17.05.2004; COMP/M.2876 – *Newscorp/Telepiù* of 02.04.2003.

[29] We can define "scripted content" as content which is established and thus entirely known by the programme maker before broadcasting (for example fiction, documentaries and animation). In contrast, "unscripted content" is known by the programme maker only with reference to the general characteristics of the format; the final result cannot be foreseen from the beginning and is subject to the evolution of the programme (as in the case of reality TV, talk shows, game shows and comedy shows).

culture, which also act as restraints on the entry and circulation of new content in a country[30].

2.7. Conclusions.

The question of access to broadcasting platforms is a broad one. For this reason we shall limit our research to specific aspects. From a competition point of view the ownership by a broadcasting platform of both content and network matters in terms of their affordability by third parties. Thus, to avoid dominant positions and guarantee competition in the market, it needs to be regulated. In recent years, as a remedy against monopolistic behaviour, public competition authorities have decided to grant other platforms access to the content and networks of the dominant broadcasting platforms.

But a platform can also broadcast content provided by independent producers, which are third parties that retain ownership of the broadcasting rights. In this case the platform is a multi-sided one in the sense that it becomes a technological environment where different economic operators meet and become purchasers of platform services. The number of purchasers involved in the platform determines the number of the platform's "sides", for example whether it is two-sided (with content providers and viewers) or three-sided (with advertisers, broadcasting rights owners and viewers).

The broadcasting platform charges its customers in accordance with the positive externalities they derive from the interaction with the other

[30] See European Commission Case Decisions COMP/M.4504 – *SFR/Télé2 France* of 28.11.2006; COMP/M.4204 – *Cinven/UPC France* of 14.07.2006; COMP/M.3411 – *UGC/Noos* of 17.05.2004; COMP/M.2876 *Newscorp/Telepiù* of 02.04.2003.

parties in the platform. Thus, it imposes the highest charges on the party that derives the greatest advantage from the largest number of members of the other parties. For example FTA broadcasting platforms do not charge viewers at all, in order to attract as many consumers as possible and therefore to increase the number of advertisers interested in the platform and hence its total revenues.

In the following pages we will return to this point and discuss the broadcasting platforms' strategies for maximizing their profits. In general it may be said that as in the other sectors, competition among broadcasting platforms is based on product differentiation and price differentiation[31].

Obviously the goal of maximising profit (by attracting ever more viewers, content providers and advertisers) influences the platform's programming. It should also be pointed out that the relevant broadcasting markets are different in terms of both the demand side and the supply side. With reference to the affordability of the content for viewers, FTA TV and Pay TV are different markets; furthermore with reference to the acquisition of content rights, each type of content (e.g. films, sport, TV programmes and channels) forms a separate market since it cannot be replaced with another type[32]. The assumption of the European Commission on this point confirms our intuition about the fact that within multi-sided market theory, even a single channel is a type of content that can be provided to a platform, just like any other scripted or unscripted programme. When the channel publisher sells the finished channel (composed of programmes and advertising slots) to a broadcasting platform and the advertising slots to the advertisers the channel itself becomes a multi-sided platform. With reference to the price strategy, in this case there is no direct relationship between the advertisers and the viewers or between the channel publisher and the viewers. Furthermore if the broadcaster is an FTA TV company, then

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[31] See Chapter 3, sections 3.3 onwards, of this dissertation.

[32] See European Commission Case Decision COMP/M.5121 - *Newscorp/Premiere* of 25.06.2008.

viewers are not charged at all for watching the third-party channel, but even in the context of Pay TV they have no direct relationship with the channel producer or the advertisers. Obviously part of the subscription fee paid by the consumer to the Pay TV company is used to cover the cost incurred by the platform in buying the channel, but the mechanism of financing by means of advertising slots is the same as any FTA TV company: viewers are expected to buy in the shops the products advertised on TV.

This argument, together with the observation that Pay TV and FTA TV companies compete for the same content and audiences and also compete directly in terms of similar programmes and business models (Pay TV operators are increasingly financed not only by subscription fees but also by advertising revenues, whereas FTA broadcasters have started offering encrypted channels for which viewers have to pay a subscription fee), demonstrates that the current separation between FTA TV and Pay TV markets is set to progressively disappear. From the antitrust point of view, public authorities should take this into consideration in their decisions.

In a system of technological convergence among different transmission technologies, broadcasting has become a sector where information is broadcast via various media that can deliver the same content to the end user. For some researchers vertical integration is a typical response of some players to the convergence of scope, and the co-existence of multi-sided channel providers implies that there is a risk of anti-competitive behaviour (e.g. the AOL-Time Warner debate)[33].

Furthermore competition policy and antitrust rules coexist in broadcasting markets together with regulatory aspects such as the *ex ante* control over the timing of advertising, the variety and quality of programming, and pluralism of information.

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[33] See RUBINFELD D.L. and SINGER H. J., "Vertical Foreclosure in Broadband Access?", *supra,* at footnote 12.

In the following pages our focus will shift away from the technical problem of integration among different networks towards competition among platforms and the issue of access to multi-sided platforms[34].

[34] See Chapter 6, section 6.2 of this dissertation.

Chapter 3

Pricing strategies in multi-sided broadcasting platforms.

3.1. Introduction.

Until now we have made reference to the multi-sided market theory in broadcasting platforms without properly explaining the features and the consequences of this theory in terms of competition policy. The literature on multi-sided markets is copious[35].

[35] See for example ANDERSON S.P. and GANS J.S. (2008) *TiVoed: The Effects of Ad-Avoidance Technologies on Broadcaster Behaviour* [online]. Available from: http://works.bepress.com/cgi/viewcontent.cgi?article=1020&context=joshuagans ; DUKES A. (2006) "Media Concentration and Consumer Product Prices", *Economic Inquiry*, Vol. 44, No. 1, pp. 128-141; RENDA A., "Domanda e offerta di contenuti multimediali", *supra* at footnote 6; GARELLA P.G. and PEITZ M. (2006) *Alliances between competitors and consumer information*, Working Paper No. 613, University of Crete, Department of Economics; STENNEK J. (2006) *Exclusive quality. Why Exclusive Distribution may Benefit the TV-Viewers*, Working Paper Series No. 691, Research Institute of Industrial Economics; JEON D.S. and ROCHET J.C. (2007) *The Pricing of Academic Journals: A Two-Sided Market Perspective*, Working Paper No. 458, Institut d'Economie Industrielle (IDEI); LEE R. S. (2007) *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, Working Paper No. 39, NET Institute; ARGENTESI E. and FILISTRUCCHI F. (2007) "Estimating market power in a two-sided market: The case of newspapers", *Journal of Applied Econometrics*, vol. 22, pp. 1247-1266;

In the next few pages we will describe the major trends in the economic literature on multi-sided platforms, the effects of competition on price strategy and the effects of competition on market share among platforms. Subsequently we will discuss price discrimination in the broadcasting sector. We will focus on the nature of the externalities involved and their implications for the prices set by platforms.
We will describe the main externalities in a multi-sided market and deal with price allocations on the two sides, demonstrating that price allocation by platforms is not neutral. Then we will discuss the existence of different pricing strategies in one-sided and two-sided markets, in the case of both single homing and multihoming, and with exclusive and non-exclusive services.

LOEBBECKE C., RADTKE S. and HYSKENS C. (2006) *Innovative Media Technologies: Digital Video Recorders Changing the Ad-TV Business Model*, Proceedings of the Twelfth Americas Conference on Information Systems (AMCIS), pp. 1798-1804; ANDERSON S.P. and COATE S. (2005) "Market Provision of Broadcasting: A Welfare Analysis", *The Review of Economic Studies*, Vol. 72, No. 4, pp. 947-972; BROWN K. and ALEXANDER P.J. (2005) "Market structure, viewer welfare, and advertising rates in local broadcast television markets", *Economics Letters* 86, pp. 331-337; GAL-OR E. and DUKES A. (2003) "Minimum Differentiation in Commercial Media Markets", *Journal of Economics & Management Strategy*, Vol. 12, No. 3, pp. 291–325; GABSZEWICZ J.J., LAUSSEL D. and SONNAC N. (2006) *Advertising and competitive access pricing to internet services or pay-TV*, Discussion Paper No. 2006/86, Center for Operations Research and Econometrics (CORE), Catholic University of Louvain.

3.2. Externalities in multi-sided platforms.

We can distinguish between two main sets of externalities in multi-sided markets: membership externalities and usage externalities.
In such market a consumer on one side earns a positive net surplus by means of interaction with another consumer on the other side. This feature represents usage externality, whereas membership externality refers to the greater likelihood of deciding (*ex ante*) to join a platform when the numbers on the other side are higher. The positive net surplus comes from the number of members a consumer can meet in the platform.
Usage externality results from interaction between the two user groups. Usage externality arises from one or several interactions, facilitated by the platform, between content providers and viewers. There are markets where only one type of interaction exists, such as real estate agencies; and markets with several interactions, as is the case of the broadcasting sector, in which the interactions can even be repeated. From this point of view, each agent receives some benefit from each interaction[36]. This happens for example for the viewers of the Sky platform, which offers subscribers ancillary services such as betting on the results of football matches by means of their remote control.
The set of membership externalities closely resembles classical externalities, such as positive network effects. Membership externality is the principle that the higher the number of consumers connected to the platform, the greater the desire on the part of other consumers to join this platform.[37] For example, the greater the number of consumers connected to a broadcasting platform, the more consumers will be willing to pay to join the same platform in order to be able to view the same content. In two-sided markets, however, the membership externality results from the presence of two different user groups. This

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[36] ROSON R. (2004) *Platform Competition with endogenous multihoming*, Working Paper No. 20.05, Fondazione Eni Enrico Mattei.
[37] ARMSTRONG M., "Competition", *supra* at footnote 8.

means that the greater the number of consumers of one group connected to the platform, the more attractive the latter becomes for the other group of consumers[38]. These are cross externalities.

3.3. General implications of externalities for platform pricing strategies.

The presence of externalities in two-sided markets has implications for the prices set by platforms, allowing us to draw a distinction between multi-sided markets and their classical counterparts.
Externalities impact both price level and price structure. In this respect, Rochet and Tirole argue that price structure can provide a basis for identifying two-sided markets[39]. Since there are two different user groups, the platforms face two distinct types of demand. Thus the overall end price is composed of a price paid by content providers and a price paid by consumers. The presence of externalities and the existence of two different prices raise the issue of price allocation.
Two key questions arise. What are the efficient price levels and an efficient allocation of prices from the platform's point of view? And what are the implications of the presence of positive externalities? To answer these questions we will briefly describe the relevant economic

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[38] KATZ M.L. and SHAPIRO C. (1985) "Network Externalities, Competition, and Compatibility", *The American Economic Review*, vol. 75(3), pp. 424-440; FARRELL J. and SALONER G. (1986) *Competition, Compatibility and Standards. The Economics of Horses, Penguins and Lemmings*, Economics Working Paper No. 8610, University of California at Berkeley.
[39] ROCHET J.C. and TIROLE J. (2005) *Two-sided markets: a progress report*, Institut d'Economie Industrielle (IDEI).

literature on this point without reference to any specific econometric model.

Evans affirms that the price on each side can be different[40]. In cases where demand is high on both sides, price levels and allocation play an important role in maintaining the loyalty of two different types of consumer.

We agree with Rochet and Tirole[41] that since there is a membership externality, the price charged by platforms for a transaction decreases with the size of the installed base. Again, this effect closely resembles network positive externality.

However, the usage externality may be internalised by the user groups through the price structure established by the platform. In this case Evans[42] argues that the service is jointly consumed by the two types of users in two-sided markets, and the usage externality exists only if transactions with the platform take place. Consider the Pay per View system, where the viewers buy content they are interested in. The platform is the third party that allows supply (the content providers) to meet demand (the viewers).

It is worth noting that in some other cases, such as advertising in newspapers, potentially negative externalities also exist. For example, consumers are willing to pay more to have less advertising.[43]

Therefore the presence of externalities implies that the aim of the platform is not to offer cost-oriented and symmetric prices, but to balance demand, for example between advertisers and customers. In other words, a reason for discrimination arises.

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[40] EVANS D.S., "Some Empirical Aspects"., *supra* at footnote 2.

[41] ROCHET J.C. and TIROLE J. (2003) "Platform competition in two sided-markets", *Journal of the European Economic Association*, vol. 1, pp. 990-1029.

[42] See EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

[43] For a more detailed analysis of this point see GABSZEWICZ J.J., LAUSSEL D. and SONNAC N. (2005) *Newspapers' market shares and the theory of the circulation spiral*, Discussion Paper No. 2005/84, Center for Operations Research and Econometrics (CORE), Catholic University of Louvain .

In this situation the distinction proposed by Rochet and Tirole between the price level (the total price set by the platform) and price structure (allocation) becomes clear[44]. Thus there is no evidence that the two types of users equally share the total price for access to the platform. As underlined above, the benefit gained by a consumer (content provider or viewer) comes from their interaction via the platform.
Rochet and Tirole explain the features of two-sided markets in the following way. They argue that from a theoretical point of view, it is impossible to apply Coase's theorem to two-sided markets, since the transaction between content providers and viewers takes place only if there is a platform. This implies the presence of a third party, which owns the platform, and prevents direct bargaining between the two participants. The authors conclude that, in a Coasian world, the price structure would be neutral. In other words, there would be neutrality in the allocation of the total price. However, as explained above, this is not the case in two-sided markets. Since there is no pricing neutrality, platform strategy is likely to be based on price allocation[45].

3.4. Pricing allocation factors for platforms.

Introducing the topic of price allocation, a distinction can be made between internal (i.e. *intra-platform*) competition occurring within the same platform, and external (i.e. *inter-platform*) competition, which occurs between two or more platforms[46].

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[44] ROCHET J.C. and TIROLE J., *Two-sided markets, supra* at footnote 39.
[45] See ROSON R. (2005) "Two-Sided Markets: A Tentative Survey", *Review of Network Economies*, Vol. 4: Issue 2, Article 3.
[46] See ROSON R., *Platform Competition, supra* at footnote 36.

In this context, externalities have major implications for price structure. Therefore if the price on one side of the market decreases, for viewers for example, they tend to use the platform more. However, at the same time, the content providers also stand to benefit from this as the platform may charge the content providers less as well. Indeed when the price to the viewers decreases, the direct effect is that there are more viewers, so the incentive for the content providers to join the platform increases.

This result is not surprising. However, interaction between the different user groups modifies the standard results of competition *à la Bertrand*, since the prices are cost-oriented. Thus the utility derived by one group depends on the number of users in the other group. In this context price allocation is an important issue.

Armstrong and Rochet and Tirole present an overview of the price allocation problem[47]. Their study focuses on externalities and their implications for prices. More precisely, they consider a platform as a monopoly in order to explain how price allocation is affected by factors such as:

a) multihoming;
b) user costs;
c) platform differentiation;
d) a platform's capacity to apply a price based on the number of transactions[48];
e) the number of users[49],
f) externalities between user groups[50]; and
g) externalities within a group[51].

Let us examine these factors.

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[47] ARMSTRONG M., "Competition", *supra* at footnote 8; ROCHET J.C. and TIROLE J., "Platform Competition", *supra* at footnote 41.

[48] ROCHET J.C. and TIROLE J., *Two-Sided Markets, supra* at footnote 39.

[49] ARMSTRONG M., "Competition", *supra* at footnote 8.

[50] ROCHET J.C. and TIROLE J., "Platform competition", *supra* at footnote 41.

[51] ARMSTRONG M., "Competition", *supra* at footnote 8.

3.5. A theoretical framework: a monopolistic platform.

In line with Armstrong and Rochet and Tirole, we consider that a monopoly offers linear prices on both sides. In this situation the aim of a platform should be to define price level, but also efficient price allocation between content providers and viewers.
Armstrong compares a situation whereby a platform maximizes the overall welfare of the industry to a situation whereby it sets prices to maximize its own profits.
In cases where platforms maximize social welfare, prices for viewers for example are below fixed costs, since they are the result of this cost minus the value of the externality associated with the other side of the market.
In cases where the platform maximizes its own profit, the price is equal to the fixed cost minus the externality plus a factor related to the demand elasticity of the group in question and the participation of the other side.
Armstrong concludes that the member externality determines the allocation of prices.
In contrast Roche and Tirole focus on the usage externality; for them the price depends on the elasticity of demand from both the viewers' side and the content providers' side (i.e. *cross externality*).

3.6. Platform competition with single-homing.

In line with the principles described above (network effect and elasticity), this section considers competition between platforms in the case of single-home connection i.e. where each side can only be connected to one platform.
Armstrong focuses on competition between platforms that provide services perceived as different by users. The author supposes that the

two groups of users can be connected to one exclusive platform only. The first insight provided by this study is that the net surplus for each group is a function of the external benefit of having an additional consumer in the group. Its main conclusion is that the platform should consider this external benefit as a measure of the opportunity cost[52].
This means that since there is competition between platforms, the strategy should be based on avoiding price hikes to discourage consumers from switching to a competitor's platform. The expression of price is simple. It is the sum of fixed costs plus the value of a service perceived as non-substitutable, minus the value of the inter-group externality resulting from the transaction. Moreover, this means that pricing is generally not cost-oriented.
The impact of single-homing on pricing strategy can be summarised as follows. In the presence of single homing, the higher the value the users on one side place on the presence of the other group, the lower the price for both sides should be. However, the single-homing hypothesis is not really consistent with the platform market. Content providers in particular can be connected to several platforms and viewers can subscribe to more than one contract with different television platforms. Probably then in our context multihoming is more realistic and this will be discussed in the next section.

3.7. Platform competition with multihoming.

Following Armstrong and Rochet and Tirole, this section considers cases where one side of the market can multihome, i.e. it can connect to several platforms. In these conditions the result is naturally as follows.

[52] ARMSTRONG M., "Competition", *supra* at footnote 8.

Users who multihome place a higher value on membership and usage externalities[53].

Rochet and Tirole propose a more general model than Armstrong. They suppose that advertisers are connected to two different platforms, and that end-users choose the platform where transactions take place. Transactions happen when the benefit to each user on each side (buyer and seller) is higher than the price set by the platform.

At first the authors postulate that the price levels proposed by each platform are the same. In these conditions advertisers and platforms interact under three conditions:

a) advertisers perform no transaction if the price is higher than the value generated by the transaction;
b) advertisers make the choice of connection to one or two platforms according to the trade off in terms of demand from the viewers and service costs in the two situations (multihoming versus single-homing);
c) thus, the platform's strategy consists of setting a price lower than its rivals in order to limit the incentive for adopting multihoming. Indeed, when a platform decreases its price, it increases its own demand and attracts content providers or users that were previously multihoming.

Therefore Rochet and Tirole conclude that there are cross subsidies between the two sides. The authors call this principle the "*topsy-turvy principle*", which can be defined as follows: an increase in the price on one side implies an increase in the mark-up for the platform, but also implies a decrease in price on the other side, in order to attract users and to preserve balanced demand.

As a result, the more widespread multihoming becomes, the more platform competition implies a decrease in price on the advertiser side. Finally, the volume of transactions depends not only on the overall

[53] ROCHET J.C. and TIROLE J., "Platform competition", *supra* at footnote 41.

price, but also on price allocation. Again, the price structure is not neutral in the presence of competition with multihoming[54].

Therefore platform pricing strategy should be guided by the following factors, which all have an impact on price allocation:

i) elasticity: for example, if the installed base on one side increases and if this side is captive, then it is profitable for the platform to increase its prices for this group (the advertisers, for example) in order to decrease the price on the other side and attract new viewers;

ii) the advertiser's market power: if advertisers enjoy significant market power, then the platform could decrease the price it charges for its services to decrease the double marginalization effect;

iii) in the platform viewers can be seen as "marquee buyers". Indeed, their presence has a high value for advertisers and thus modifies the price structure. This effect implies that the platform could set a lower price for viewers and a higher price for advertisers[55].

The consequences of multihoming are not clear. Indeed, if some on the viewers' side are connected to several platforms then price sensitivity appears to increase on this side (higher elasticity). Platforms can react by charging viewers more and advertisers less, thus creating an incentive for those viewers to stop multihoming. Moreover, a higher access price charged to some content providers by one platform may lead to their foreclosure from the platform. Because of the resulting absence of their favourite channel, some viewers could then decide to cancel their subscription to the platform, shifting in this way to single-homing.

According to Evans other factors, such as investment on one side of the market, also impact price structure, since investment allows the platform to decrease the price on this side. As a result, this strategy

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[54] ROCHET J.C. and TIROLE J., *Two-Sided Markets, supra* at footnote 39.

[55] Ibidem

makes it possible to attract new consumers on the other side. Moreover Evans argues that multihoming offers a key insight into the study of two-sided markets, and that multihoming implies higher competitive pressure and tends to decrease prices[56].

3.8. Competition for market share among platforms.

The above analysis explains how the features of two-sided markets affect price structure, making them subject to economic consequences that differ from standard effects. Under such circumstances, a platform may have an incentive to modify price structure according to the value of the usage externality, since the demand from one side tends to decrease if the demand from the other side is too low. In this context the following two questions arise:
What strategy should a platform adopt to attract both sides and reach critical installed bases on each side?
On which side should demand be stimulated first by the platform?
In a competitive market platforms must be able to defend their existing market share, while bidding for new clients.
Following Caillaud and Jullien, who looked at this issue in greater detail, it can be argued that a platform must have a significant number of content providers in order to attract viewers. However, advertisers will only be willing to pay if they anticipate a large number of viewers, and on this point there is uncertainty from the content providers side.
The authors argue that one possible strategy for platforms is to "divide and conquer" the market. This strategy is based on dividing one side in order to conquer the other, by means of price discrimination. Caillaud

[56] See EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

and Jullien focus on market structure and platform strategies. Their study considers imperfect competition with a two-part tariff between platforms, whereby the services provided can be exclusive (single home) or non-exclusive (multihome) [57].

3.9. Competition for market share with exclusive and non-exclusive services.

Exclusive services denote a single-home subscription. In this case, all users on both sides prefer to belong to the same platform. The platform's strategy is consequently based on giving subsidies to one side in order to keep them on board and maintain high market share. As a result, exclusive service externalities tend to favour market concentration. This appears to be an efficient market structure, which generates low profits as a result.

Caillaud and Jullien explain this effect as follows. Let us suppose that two platforms compete against each other for exclusive services. This implies that all users are single-homing. A platform could decrease the price on the viewers' side in order to attract more advertisers, which stand to gain a higher net surplus from connection to this platform. This process can be continued until the platform becomes a monopoly with an efficient structure and low profits.

In other words, when services are exclusive, competitive pressure is high. This is true however only as long as transaction prices are not

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[57] CAILLAUD B. and JULLIEN B. (2003) "Chicken & egg: Competition among intermediation service providers", *Rand Journal of Economics*, vol. 34, pp. 309-328; JULLIEN B. (2001) *Competing with network externalities, and price competition*, mimeo, Institut d'Economie Industrielle (IDEI).

distorted, that is, as long as the platform does not seek to collect all the profit on one side while subsidizing the other. Under such circumstances subsidies would appear to represent a competitive strategy and entail a concentrated market structure. When there is intense competition for market share with exclusive services, a concentrated market may offer an efficient market structure[58].

In many cases users are connected to several platforms (multihoming). This is particularly true for broadcasting users.

Caillaud and Jullien show that service providers have incentives to offer non-exclusive services as this reduces competitive pressure and allows them to exercise their market power. In such cases it is easy to divide but more difficult to conquer, since it is more difficult to attract new users[59].

Finally Armstrong and Wright provide an analysis of this topic based on endogenous users' decisions when choosing between exclusive and non-exclusive services. Their results closely resemble those cited above. We can consequently argue that an optimal strategy for platforms is to sustain losses on one side in order to achieve a critical installed base on the other. In this "divide and conquer" strategy, platforms subsidize consumers on one side in order to attract them[60].

Once their participation is obtained, there is a bandwagon effect that allows the platform to recover the subsidy through the fixed fee paid by advertisers on the other side. This platform strategy is based on the idea of "buying" the participation of one side in order to create value for the other due to the presence of intra-platform externalities.

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[58] See CAILLAUD B. and JULLIEN B., "Chicken & Egg", *supra* at footnote 57.

[59] Ibidem

[60] ARMSTRONG M. and WRIGHT J. (2005) *Two-sided markets, competitive bottlenecks and exclusive contracts*, Working Paper No. 124, ELSE Working Papers. ESRC Centre for Economic Learning and Social Evolution.

3.10. Conclusions.

It seems that the usual principles of competition in terms of price level and allocation are modified in multi-sided markets. More specifically, membership externality and usage externality lead to a platform strategy that is not based on cost-oriented prices, but on the ability to achieve balanced demand.

We have shown that price strategy depends not only on competitive pressure and elasticity, but also on externalities and their value for each group, which in turn depend on whether there is multihoming or not. The different value of these externalities impacts on both pricing strategy and on competition to maintain and conquer market share. Under such circumstances, a pricing strategy could consist of subsidizing one side to attract consumers on the other. For example some platforms offer to provide their clients with the set-top box for free in order to spread their own technology in the market.

Some insight is afforded by the impact of externalities on price structure, which is not neutral in two-sided markets. An efficient price structure is no longer cost-oriented. However, it seems essential to take into account the surplus received by each consumer from transactions.

Indeed, interactions between the two sides imply counter-intuitive effects. As shown with the "divide and conquer" strategy, we can affirm with Evans that the estimation of market power should take both sides of the market into consideration. This is particularly true if a price is higher than marginal cost on one side, and below marginal cost on the other side[61].

Competition policy in a traditional market can embrace price distortion (price below marginal cost) in the short term; but it is opposed to this principle once the market becomes mature.

Thus, competition policy cannot consider prices on the two sides separately. Such a policy would not be appropriate for two-sided markets, where goods or services are only sold if the platform attracts

[61] See EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

sufficient users on both sides. In this framework the competition authority is unable to analyse collective welfare without taking price level, price allocation and the external effects created by the presence of the two sides into account.

Rochet and Tirole compare a two-sided market with a vertically integrated market structure. They suppose a vertical organization in which there is no direct relation with viewers (downstream market), but only with advertisers. In two-sided markets, advertisers benefit from the significant market power of the platforms, who may have an incentive to subsidize prices in order to increase the viewers' surplus and their willingness to pay.

Another strategy according to Rochet and Tirole is to encourage competition on one side, in order to attract users on the other side. Platforms thus have an incentive to offer cost-oriented prices. This stimulates interactions and tends to make the volume of transactions optimal[62].

If we consider a vertical market structure such positive effects are limited because there is no internalization of the benefits resulting from transactions when platforms contract with advertisers only. The authors demonstrate that foreclosure is less likely in two-sided markets.

The key insight of their study is the existence of differences in the economic effects of one-sided and two-sided markets. According to Rochet and Tirole a platform is able to control or regulate interactions, which is not the case in a vertically integrated market. Their analysis becomes valid if we consider a price lower than marginal cost, which does not necessarily imply a predatory pricing strategy, since the aim is usually to achieve a balance between the two sides. In a two-sided market, it is essential to consider that a given service is provided to each user on each side at the same time.

[62] ROCHET J.C. and TIROLE J., "Platform competition", *supra* at footnote 41.

Furthermore, increasing the number of firms in a market, as is the case in a competitive multihoming scenario, has no positive impact on price structure.

Under such circumstances we have seen that consumers may pay a lower price, since a platform's strategy consists of reaching a critical installed base on this side. On the other side, advertisers are usually willing to pay a higher price to participate in transactions. As a result, a more competitive two-sided market does not imply that the price structure is more balanced.

Moreover, if we consider a merger between platforms as Evans does, it can be argued that when competition policy faces a merger between two platforms, the presence of the two sides must be considered. In general terms, competition policy accepts or rejects the merger in view of the evolution of prices.

However, in two-sided markets it is the total price that must be considered. Indeed, a price increase applied by the platform to one side can reflect a decrease on the other in order to preserve balanced demand, since a price decrease on one side increases willingness to pay on the other side. In the end the variation in the total price may be low, although the price structure has changed significantly[63]. By prohibiting this type of price discrimination, regulation runs the risk of preventing one side from participating.

With reference to price we can argue that competition policy is not neutral if it attributes a competitive advantage to unregulated firms.

In two-sided markets Wright points out that a non-regulated firm will not want to match a suboptimal price structure imposed on a regulated firm.

The first impact of regulation is to decrease prices. However, users may prefer to pay more to access the non-regulated platform if installed

[63] See EVANS D.S., "The Antitrust Economics", *supra* at footnote 4.

bases are larger, thus enabling the non-regulated firm to increase its market share and profits[64].

This analysis of regulatory policy can be extended in line with Laffont et al.[65]. They provide a model which considers a reciprocal access charge in a two-sided market. The framework of the analysis is as follows: suppose two platforms compete at the same time for final users and for content providers. The platforms set a reciprocal access charge for all users. This means that the platform at the origin of the traffic must pay an access charge to its rival for any user. In addition, the users' decision to join one exclusive platform (i.e. single-homing) is endogenous.

The platforms are considered as perfect substitutes from the consumer's point of view. The total price set by both platforms consists of the price set for consumers, plus the price fixed for content providers. The authors adopt the "off-net cost principle" and assume that the "balanced calling pattern" hypothesis is respected. This reflects an important difference between their views and the theoretical literature on the telecommunications industry. The receivers of traffic pay a price to have access to the platform.

This has two major implications. The first is related to prices, while the second is linked to competition stability.

The impact on prices is as follows: when a viewer watches television without paying, the platforms pick up the perceived marginal cost. However, when viewers pay for watching, the perceived marginal cost is only equal to the opportunity cost of losing a consumer who may switch to another platform. This is the result of the usage externality in two-sided markets. Moreover, competition stability is stronger in this context.

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[64] WRIGHT J. (2004) "One sided logic in two-sided markets", *Review of Networks Economics*, vol. 3, pp. 42-63.

[65] LAFFONT J.J. et al. (2003) "Internet Interconnection and the off-net cost pricing principle", *Rand Journal of Economics*, vol. 34, pp. 370-390.

Indeed, when viewers do not pay for watching programmes, then equilibrium can only exist if the access charge is close to the marginal cost or if the platforms are close substitutes. Yet in the scenario outlined above this is never the case, since the sum of the prices (for each side) is just equal to the traffic cost, independently of the access charge level. The access charge only determines how cost is allocated between the two sides. As a result, the price structure implied by the externalities modifies the access pricing problem. Here again, it is the study of the total price that is relevant[66]. All these features can potentially influence the tools used by competition policy.

In short, two main difficulties for competition policy arise with regard to two-sided markets. The first is the issue of the benefits received by consumers, since there are usage and membership externalities to be considered. Although it is difficult to measure these externalities, they must be taken into account in studies of two-sided markets.

The second difficulty concerns the advantages that consumers derive from price structure that enable them to perform transactions at the lowest possible cost. It is important to consider that the benefits on one side increase with participation on the other. Again, it is not easy to take this effect into account in competition policy.

However, there is no reason to believe that non-competitive behaviour is more widespread in two-sided markets. In fact, behaviour is just different, with prices not based on cost on either side, for example. Moreover, price level and allocation must maximize output. From this point of view, Caillaud and Jullien show how dominant firms prefer to set prices related to volumes of transactions, rather than a fixed fee. Like Armstrong, Caillaud and Jullien show that the pressure of competition is more intense without multihoming[67].

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[66] This point is made in LAFFONT J.J., REY P. and TIROLE J. (1998) "Network Competition: I. Overview and Non-discriminatory Pricing", *RAND Journal of Economics*, vol. 29(1), pp. 1-37.

[67] ARMSTRONG M. and WRIGHT J., *Two-Sided Markets*, *supra* at footnote 60; CAILLAUD B. and JULLIEN B., "Chicken & Egg", *supra* at footnote 57.

Therefore there are difficulties for competition and regulatory policy with regard to the features of two-sided markets.

At first, our analysis shows that two-sided markets differ from their classical counterparts because there is a third party involved that is subject to two different types of demand. As pointed out earlier, there are two types of externality: users of the platform benefit from the presence of members on the other side and from transactions on the platform.

Such interactions have an impact on price level, and especially on the allocation of the total price between the two sides of the market. Indeed, platforms charge each side a price. In such cases, it is possible for the third party to charge one side a price below marginal cost and the other a price that is higher than this cost. However, as demonstrated above, such prices do not express cross subsidies or market power. Price allocation is not neutral.

As a result, we believe that competition policy tools should be modified to take account of such features of two-sided markets. The most efficient market structure is not always competition (multihoming). On the contrary, concentrated markets can be justified by their strong externalities. Similarly, mergers are not necessarily detrimental to the industry. Another point concerns the impact on competition and regulatory policy of the presence of externalities. In a two-sided market, a price higher than marginal cost does not necessarily reflect market power, while cross subsidies are not necessarily predatory. Thus a concentrated market is not an inefficient market structure and price regulation in two-sided markets would be not neutral.

Chapter 4

Pluralism of information and *ex ante* regulation in the broadcasting sector.

4.1. Introduction.

One of the principles governing broadcasting services is pluralism of information, which entails freedom of expression and the right to be informed by a broad variety of content. In Italy this principle has been upheld by legislation and the courts. In fact the Italian Constitutional Court has played a key role in promoting pluralism of information, and many times legislation has been adapted to its judgments. Today pluralism of information has to be seen in the context of a new idea of "public" broadcasting that is no longer limited to state broadcasters. Technological evolution and convergence among platforms has prompted the state to protect pluralism through *ex ante* regulation that is of course coordinated with antitrust legislation. We shall now review the *ex ante* regulatory framework to assess the level of liberalization of the broadcasting sector ahead of the planned switch-off of analogical television.

4.2. Freedom of information in the European Union.

The first recognition of freedom of information in international law can be found in Article 19 of the Universal Declaration of Human Rights of 10 December 1948, which states explicitly: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*". This article establishes the principles of plurality of information sources and the right of access to them, principles which have been repeatedly cited in doctrine and case law.

Furthermore Article 10 of the European Convention on Human Rights and Fundamental Freedoms (herewith the "ECHR") of 4 November 1950 expressly states: "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

The European Court of Human Rights stressed the importance of article 10 of the ECHR as the foundation of the principle of freedom of expression, understood as the right to profess one's own opinion (active freedom) and the right to receive information (passive freedom)[68]. The latter means that the right to information has to be

[68] See MANGIONE G.M.R. (1995) "Pluralismo e concentrazione dei mezzi di comunicazione di massa nel mercato interno e valutazione della necessità di

pluralistic, and thus not influenced by the dominant position of certain enterprises. The innovation of article 10 ECHR lies in its reference to the broadcasting and television industry. This principle has become part of the constitutional traditions of European countries, since the holding of dominant positions in the communications sector is *per se* incompatible with regulatory objectives. Therefore the European Court of Human Rights supports the legitimacy of *ex ante* market regulation by the State for the protection of the citizens' right to pluralistic information[69]. The defence of pluralism is then pursued through state regulation of the audiovisual sector and protection of competition in broadcasting markets.

In the Court's opinion the general antitrust regulations are not in themselves sufficient to avoid the creation of dominant positions in the broadcasting sector, and a common communications policy is thus necessary[70]. In this way broadcasting is considered to be just like any other public service and as such its provision can be limited by the State[71].

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un'azione comunitaria. Il libro verde della Commissione delle Comunità europee del 23 dicembre 1992", *Dir. Inf. Inform.*, p. 157 onwards.

[69] See MASTROIANNI R., *La disciplina in materia di televisione tra diritto interno e diritto comunitario*, presentation at the Conference on "L'evoluzione del sistema delle comunicazioni tra diritto interno e diritto comunitario" held in Florence on 23.04.2004, www.cesefinalbertopredieri.it. See also European Court of Human Rights Cases *Informationserverin Lentia v. Austria* of 24.04.1993 in *Human Rights Law Journal*, 1994, *Jersild v. France* of 23.09.1994, Series A no. 298, and *Piermont* of 27.09.1995, Series A, no. 314. More recently, in the Case *Cgt Verein gegen Tierfabriken v. Switzerland* of 28.06.2002, 34 EHRR 4, the Court ruled that the State is the ultimate guarantor of the right of information.

[70] On the relationship between the EU regulatory framework and Member States' legislation see CARETTI P. (2004) "Le fonti della comunicazione", *Quaderni costituzionali*, 2, p. 313.

[71] An argument against this is to be found in BOGNETTI G. (1996) *Costituzione, televisione e legge antitrust*, Giuffrè, p. 16, who says that if television is subject to public regulation, the people involved in broadcasting are passive subjects who are not able to maintain freedom of information by themselves.

Furthermore for the same reason the European Commission, as obliged by the Court of First Instance[72], has justified the financing of the broadcasting service by means of license fees together with advertising. The European Commission said that a Member State can impose a license fee in the following cases: (i) to finance public broadcasting networks; (ii) to finance public programmes designed to satisfy democratic, cultural and social needs; and (iii) to finance the activities of private companies, selected through transparent procedures, that perform the public broadcasting service[73].
Financing of the public broadcasting service by a State is in any case permitted under Article 86 of the EU Treaty if the financing of the broadcasting service does not damage competition in the sector and commercial trade in the European Union. Therefore, Member States are responsible for ensuring the smooth running of broadcasting by the various operators in accordance with domestic legislation, and the European Commission may call those who do not comply with their obligations to account.

4.3. The protection of pluralism in the European Union before the Amsterdam Treaty.

Originally the regulation of broadcasting did not fall under the competence of the European Economic Community (hereinafter the

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[72] See Court of First Instance Case Judgment T-95/96 - *Telecinco* of 15.09.1998, [1998] ECR II-03407.
[73] See MASTROIANNI R. (1999) "Il protocollo sul sistema della radiodiffusione pubblica", PREDIERI A. and TIZZANO A. (eds.) *Il Trattato di Amsterdam (II),* Giuffrè, p. 279.

"**EEC**"), the matter being left to Member States in view of the scarcity of the radio spectrum and high infrastructure costs.
Furthermore, the concept of public broadcasting was considered relevant to the EEC only in terms of competition policy, since broadcasting was regarded as a free economic activity subject to state intervention only in the case of market failures[74]. In 1996 the European Commission listed the general characteristics of services of general interest for the first time, defining them as services considered by the authorities to be public which are subject to some specific obligations[75].
However, public services became a European concept with Article 16 of the Amsterdam Treaty, according to which services of general interest can promote social and territorial cohesion among Member States although the latter retain their responsibility for such services under the Treaty.[76] Protocol 32 of the Treaty of Amsterdam expressly says: "*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism;* […] *The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common*

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[74] CARETTI P. (2007) "Pluralismo informativo e diritto comunitario", CARTABIA M. (ed.) *I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Il Mulino, p. 415 onwards; CARTEI G.F. (2002) "Servizio pubblico ed influenza comunitaria: profili evolutivi", in CARTEI G.F. and VANNUCCI V. (eds.) *Diritto comunitario e ordinamento nazionale*, Giuffrè, pp. 81-115.
[75] See European Commission Communication no. 443 of 11.09.1996, as revised by European Commission Communication no. 580 of 20.06.2000, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0580:FIN:EN:PDF.
[76] See RADICATI DI BRONZOLO L. (1998) "La nuova disposizione sui servizi di interesse economico generale", *Il diritto dell'Unione europea*, p. 530.

interest, while the realisation of the remit of that public service shall be taken into account".

Thus Protocol 32 was the EEC's first act of recognition of the public broadcasting system, since the Treaty of 1957 contained no express reference to State intervention in the broadcasting sector aimed at protecting freedom of information. At that time the European Economic Community saw pluralism of information as a restraint on economic initiative and not an essential principle for citizens' freedom of information.[77] Thus the Amsterdam Treaty marks a turning point regarding the free movement of ideas, which are the product of communication, and television regulation became part of the EU's remit[78].

A ruling by the ECJ also confirmed that broadcasting lies within the purview of the European Union. It pushed for the harmonization of Member States' legislation on television broadcasting and the creation of a common legal framework for the sector[79]. The consequence was the so-called Television Without Frontiers Directive (89/552/EEC) of October 3, 1989. Therefore the European Union has competence in this matter; in accordance with the principle of subsidiarity, it dictates the minimum requirements to ensure freedom of broadcasting, on the basis of which Member States regulate the sector in their specific countries.

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[77] See MASTROIANNI R. (1997) "Telecomunicazioni e televisioni", CHITI P. and GRECO G., *Trattato di diritto amministrativo europeo,* vol. II, Giuffrè, p. 1187; STROZZI G. and MASTROIANNI R. (1999) "La disciplina comunitaria delle attività televisive: recenti sviluppi in tema di tutela del pluralismo e la revisione della direttiva 'Televisione senza frontiere'", ZACCARIA R. (ed.) *Informazione e telecomunicazione*, CEDAM, pp. 476-477.

[78] D'ARIENZO M. (2005) *Profili costituzionali e regimi amministrativi nell'assetto del sistema radiotelevisivo*, Editoriale Scientifica, p. 27.

[79] See ECJ Case Judgments C-33/74 - *Van Binsbergen* of 03.12.1974, [1974] ECR 1299, and C-52/79 - *Debauve* of 18.03.1980, [1980] ECR 833.

4.4. Pluralism of information in the Nice Charter.

Article 11 of the Charter of Fundamental Rights of the European Union no. 364/01 signed in Nice on December 7, 2000, entitled "*Freedom of expression and information*", says that "1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected*". Although this article has much in common with Article 10 of the ECHR it differs in part. In fact the expression "*freedom and pluralism of the media shall be respected*" promotes the pluralism of information as a principle of the European system.

No longer a simple restraint on private initiative applied for competition reasons, pluralism of information has become a "value" of equal rank to those listed in Article 2 of the EU Treaty: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a Society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*." Violation of the pluralism of information principle therefore represents an offence punishable under Article 7 of the EU Treaty, which requires European Council intervention if there is a "clear risk of a serious breach by a Member State". This was confirmed by the European Parliament Resolution of 15.01.2003.

However, it should be stressed that Article 7 makes effective protection of the principle difficult, since European Council intervention in defence of pluralism is possible only when the breach is serious.

Furthermore, the ECJ does not appear to provide much protection of pluralism either, because its jurisdiction is limited to verifying the procedural aspects of infringement control by the European Council.

4.5. Pluralism of information content.

Under Article 10 of the ECHR as well as Article 11 of the Nice Charter, the European Union is committed to the protection of pluralism of information as an essential pillar of the right to information and freedom of expression.

In fact since the early nineties there has been much discussion on pluralism of information content within the European Union. The European Commission published a series of documents in order to stimulate debate on the need for Community action in this field. The various consultations led to the conclusion that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the European Commission underlined that it would continue to monitor the situation closely[80].

The audiovisual and media sectors are central areas for economic growth and for the fulfilment of the Lisbon agenda. Yet concentration of ownership and restrictions on market access limit the potential of the European economy. The protection of pluralism of information is essential for the harmonious development of the audiovisual and media sectors, although smaller and specific markets may not provide the economic basis for more than one player.

Pluralism of information is closely connected with the principles underlying the Audiovisual Media Services Directive (2007/65/EC) of December 11, 2007 (hereinafter the "**AVMSD**" or the "**Directive**)[81]

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[80] See Media pluralism in the Member States of the European Union, SEC 32 16.01.2007 [online]. Available from http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf.

[81] Directive 2007/65/EC, OJ L 332 of 18.12.2007 amended the Television without Frontiers Directive and renamed it the "Audiovisual Media Services Directive". The amended directive came into force on 19.12.2007. Member States have two years to transpose the new provisions into national law, so that the modernised legal framework for audiovisual media services will be fully applicable by the end of 2009. The AVMSD provides a comprehensive legal framework that

which is concerned with the free movement of European television broadcasts, free access to important events, promotion of independent European and recently produced works, protection of minors and public order, protection of consumers through clearly recognisable and transparent advertising and the right of reply, which are all basic pillars ensuring freedom of expression and information.

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covers all audiovisual media services (including on-demand audiovisual media services), with less detailed and more flexible regulation and new rules on TV advertising that allow for better financing of audiovisual content. The new rules, which were called for by the European Parliament especially, respond to technological developments and aim to create a level playing field in Europe for emerging audiovisual media services. The Directive reaffirms the pillars of Europe's audiovisual model, which are cultural diversity, protection of minors, consumer protection, pluralism of information, and the fight against racial and religious hatred. In addition, the new Directive aims to ensure the independence of national media regulators. The innovation of the AVMSD lies in the fact that it covers all "audiovisual media services", which means both traditional television ("linear audiovisual media services") and video-on-demand ("non-linear audiovisual media services"). The enlarged scope of the Directive responds to the increasing importance and relevance of on-demand audiovisual media services. There are stricter rules for television broadcasts concerning advertising and the protection of minors, due to the greater degree of choice and control users can exercise with regard to on-demand audiovisual media services. It defines audiovisual commercial communications broadly, to include sponsorship, product placement, teleshopping, etc. and subjects them to a common set of rules. To enforce the responsibility of the makers of audiovisual programmes, the Directive obliges audiovisual media service providers to indicate all relevant data necessary for identification. With regard to satellite broadcasters operating from outside the European Union, the AVMSD reverses the subsidiary jurisdiction criteria. The criterion of "satellite up-link in a Member State" has precedence over the criterion that the "satellite capacity appertains to a Member State". This means that when a broadcaster established outside the Union uses a satellite up-link in one of the Member States, that Member State will have jurisdiction. When there is no up-link inside the European Union, the Member State to which the satellite capacity appertains will have jurisdiction.

The AVMSD obliges Member States to encourage such mechanisms at national level in the fields it covers. The Directive recognizes both the existence and the role of Member States' independent regulators. It envisages close cooperation between national regulators and the European Commission, notably on issues of jurisdiction, in order to ensure the correct application of the Directive. The national authorities can set out *ex ante* regulation while the European Commission intervenes only *ex post* in ruling on infrastructure matters.

Pluralism of information is a concept that embraces mainly two aspects: (i) diversity of ownership, i.e. *external pluralism* and (ii) variety in sources of information and in the range of content available, i.e. *internal pluralism*[82].

With reference to external pluralism, the concentration of ownership is to be feared, since it may result in a skewed public discourse in which certain viewpoints are excluded or underrepresented. Furthermore, since some viewpoints are represented while others are marginalized, abuse of political power can occur through the lobbying of powerful interest groups – political, commercial and so on. Although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring pluralism of information. Media ownership rules need to be complemented by other provisions.

Indeed, internal pluralism is best guaranteed by a diversity of output and/or content, which can be stimulated and monitored by imposing programme requirements and obligations in the law or licence. It can be achieved by imposing structural obligations such as the creation of management or other bodies that are responsible for programme/content selection. These measures ensure citizens' access to a variety of information sources, views, voices etc., in order that they may form their opinions without the undue influence of one dominant opinion-forming power.

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[82] See ZACCARIA R. (2006) *Diritto dell'informazione e della comunicazione*, CEDAM, p. 95 onwards.

Obviously, discussion of media pluralism must also reflect the reality of the market and the structure of the media. During the past few years discussion has mainly been predicated on the notion that print, television, radio and the upcoming new media were separate. However the media today face radical changes and restructuring as a result of new technologies. We agree with those[83] who consider pluralism to be a "relative" concept, shaped by technological reality and the structure of the market. The aim should be to allow access to the full range of information sources and if the technological profile changes then the *ex ante* regulation should also be modified. For example, in European legislation the main way of guaranteeing pluralism in the television sector was to limit the number of channels that could be controlled by any broadcaster; with the switch-off of the analogical signal and the passage to a purely digital signal, new *ex ante* regulation has become necessary, governing for example the resources controlled by operators as well as the number of channels[84].

4.6. Broadcasting finance and the competition rules.

Article 86 (2) of the EU Treaty precludes the application of competition rules to firms engaged in a service of general interest only when it might prevent the fulfilment of the mission assigned to them. Thus the broadcaster who receives financial resources from the State, since it performs a service of general interest, is obliged to broadcast certain kinds of programme, but balanced programming also has to be able to

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[83] MASTROIANNI R., "Il protocollo sul sistema della radiodiffusione pubblica", *supra* at footnote 73.

[84] For example in Italy, Law 177 of 31.07.2005 and Law 249 of 31.07.2007.

maintain a certain level of audience[85]. According to the Commission Resolution of January 25, 1999[86] the license fee paid by viewers to the broadcasting company, together with capital investment, debt relief and direct financing by the state of that company are all forms of state aid that are subject to Article 87 (3), letter d) of the Treaty[87]. In fact the

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[85] See MASTROIANNI R., "Il protocollo sul sistema della radiodiffusione pubblica", *supra* at footnote 73.

[86] OJC, 05.02.1999, no. 30. The Communication proclaimed the following principles: "(1) The Amsterdam protocol confirms that it is the unanimous will of the Member States to stress the role of public service broadcasting; (2) thus the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account; (3) the fulfilment of the public service broadcasting's mission must continue to benefit from technological progress; (4) broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting; (5) according to the definition of the public service remit by the Member States, public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies; (6) the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age; (7) public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences".

[87] See DANIELE L. (2006) *Diritto del mercato unico europeo*, Giuffrè, p. 247 onwards; BIONDI A. (2006) "Gli aiuti di Stato" FRIGNANI A. and PARDOLESI R. (eds.) *La concorrenza*, Giappichelli Editore, p. 447 onwards.

Commission Communication of November 15, 2001[88] says that "*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism […] The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".*

First the European Commission needs to consider whether the state financing of broadcasters may be regarded as "existing aid" under Article 88 (1), which requires the Commission to "*keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market*". Under Article 1, letter b), point i) of Regulation 659/1999/CE, existing aid is "*all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty*". If at the end of the evaluation the European Commission thinks that it counts as existing state aid, it follows a different procedure because it cannot issue the state with a penalty for lack of notification[89]. The Commission first

[88] OJC, 15.11.2001, no. 320. See also CORTESE B. (2007) "Il testo unico della radiotelevisione e la disciplina comunitaria in materia di aiuti di stato e libera concorrenza: alla ricerca di un equilibrio tra tutela del mercato e garanzie del pluralismo", in CARLASSARE L. (ed.) *Il pluralismo radiotelevisivo tra pubblico e privato*, CEDAM, p. 73.

[89] For the differing areas of competence of the European Commission and the Member States see CAGIANO G. (2006) "Il ruolo della Commissione per la compensazione del servizio pubblico nella disciplina generale e televisiva", *Studi sull'integrazione europea*, Vol. 1, No. 1, p. 70 onwards; SINAGRA A. (2001)

needs to verify the fulfilment of the exemption conditions of Article 87 (2) and (3), and then the authorization envisaged in Article 86 (2) can only be given if the following conditions also apply: "*The public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference)"* and *"the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking*". Furthermore "*Public service duties"* imposed on the public broadcaster *"may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred".* Finally "*the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. Separation of accounts between these two spheres is normally already required at national level to ensure transparency and accountability when using public funds. A separation of accounts is necessary to allow the Commission to carry out its proportionality test*"[90].

Moreover the European Court of Justice has set out further criteria for funding to be considered valid which are outside the scope of Article 87 (Altmark Case)[91]. These include: (i) the expectation of certain obligations on the part of the company or other entity providing the public service, (ii) the transparent and objective determination of the economic criteria for the provision of financing, (iii) the limit of net

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La disciplina comunitaria del settore televisivo. Con riguardo all'ordinamento italiano, Giuffrè, p. 59 onwards.

[90] See POLETTINI F. (2007) "Antitrust televisivo: da Gasparri a Gentiloni", *Diritto Industriale*, Vol. 14, No. 3, p. 246 onwards.

[91] ECJ, 24.07.2003, C-280/00.

additional costs beyond which the benefit cannot be granted (iv) the comparison with normal, healthy and properly managed enterprises[92].
In addition, the rules of competition law are applied to the broadcasting sector in order to enforce pluralism of information by enhancing cultural debate and increasing the choice of programmes. Private broadcasting companies can also observe the duties imposed on the public company but they are not obliged to. Often they choose to observe the regulations applied to the public broadcaster in order to obtain subsidies or some fiscal advantage[93].

4.7. Pluralism of information: the regulation of Italian broadcasting.

In Italy the first legal measure governing pluralism in the broadcasting sector was Law 395 of 1910 by which the Italian Government reserved for itself the right to install and use broadcasting equipment. At that time the exclusive rights referred only to technical aspects (i.e. the equipment) and not to broadcasting *tout court*. The legislation changed

[92] See BIONDI A., "Gli aiuti di Stato", *supra* at footnote 87; MARTINELLI M. (2004) "Aiuti di Stato e compensazioni di obblighi di servizio pubblico: atto secondo", *Servizi pubblici e appalti*, No. 1, p. 108 onwards; FRATINI A. and FILPO F. (2005) "Verso una nuova disciplina comunitaria in materia di aiuti di Stato per la compensazione di oneri di servizio pubblico", *Rassegna Giuridica dell'Energia Elettrica* , p. 15 onwards.
[93] D'ALFONSO S. (2003) *Pluralismo dell'informazione e mezzi di comunicazione*, Giappichelli Editore, p. 38.

in response to the technical evolution of the equipment and infrastructure[94].

Royal Decree 2191 of 14 October 1924 established exclusive state control over broadcasting, and granted a concession of six years to a single company, composed of a group of radio stations, named Unione Radiofonica Italiana (U.R.I.). To obtain the concession, the company agreed to observe a number of conditions concerning stakeholder control and management which the state imposed in order to maintain its power over it. State influence on the company became even stronger in 1927 when Royal Decree 2207 transformed the U.R.I. into the Ente italiano per le audizioni radiofoniche (E.I.A.R.) and transferred the controlling stake in the company to the Istituto per la Ricostruzione Industriale (I.R.I.), the public institution that managed the state's shares in all companies. In 1947 the E.I.A.R. changed its name to RAI – Radiotelevisione Italiana and with that name it was the sole public concession holder for about thirty years.

In the meantime some private companies started to broadcast their own channels using some free frequencies but problems of interference occurred. For this reason legislation to regulate the sector become necessary and on April 14, 1975 the Italian Parliament passed Law 103, the first to govern the broadcasting sector as a whole.

After a key ruling by the Italian Constitutional Court (no. 202 of July 28, 1976[95]), liberalization of the broadcasting sector began, a process that

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[94] See CARETTI P. (2002) *Diritto pubblico dell'informazione e della comunicazione*, Il Mulino, p. 61; SANDULLI A.M. (1987) "Radioaudizioni", *Enc. del dir.*, Giuffrè, p. 191 onwards; CAPOTOSTI P.A. (1980) "Modelli normativi della concessione radiotelevisiva: il problema del servizio pubblico", BARILE P., CHELI E. and ZACCARIA R. (eds.) *Radiotelevisione pubblica e privata in Italia,* Il Mulino, p. 93 onwards; PALADIN L. (1979) "Problemi e vicende della libertà di informazione nell'ordinamento giuridico italiano", in PALADIN L. (ed.) *La Libertà d'informazione*, UTET, p. 2 onwards; ZACCARIA R. (1977) *Radiotelevisione e Costituzione*, Giuffrè, p. 19 onwards; SANTORO E. (1969) "L'evoluzione legislativa in materia di radiodiffusioni circolari: notizie e spunti", *Dir. radiodif.*, pp. 3 onwards.

continues to this day[96]. The laws that followed were responses to various rulings by the Constitutional Court, which played a key role in promoting legislation governing the broadcasting sector[97]. Examples are Italian Constitutional Court ruling no. 225 of July 10, 1974[98], which was followed by the above-mentioned Law 103 of April 14, 1975; ruling no. 826 of July 14, 1988[99], the origin of the so-called "mixed system", followed by Law 223 of August 6, 1990 (named the "Mammì Law " after its parliamentary sponsor); ruling no. 420 of December 5, 1994[100], followed by Law 247 of July 31, 1997 (the "Maccanico Law"); ruling no. 466 of November 20, 2002[101] and Law 112 of May 3, 2004 (the "Gasparri Law") and Law 177 of July 31, 2005 (the "Consolidated Law on Television")[102]. We shall discuss these acts in more detail in the next section.

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[95] See *Gazz. Uff.* no. 205 of 4.08.1976.

[96] See ZACCARIA R., *Diritto dell'informazione e della comunicazione*, p. 1, *supra* at footnote 82.

[97] See FARES G. (2008) *L'apertura del mercato radiotelevisivo*, Giappichelli Editore, p. 1.

[98] See *Gazz. Uff.* no. 187 of 17.07.1974.

[99] See *Gazz. Uff.* no. 169 of 20.07.1988.

[100] See *Gazz. Uff.* no. 291 of 14.12.1994.

[101] See *Gazz. Uff.* no. 47 of 27.11.2002.

[102] For a description of the evolution of broadcasting regulations in Italy see ZACCARIA R., *Diritto dell'informazione e della comunicazione*, *supra* at footnote 82, p. 231 onwards.

4.8. Antitrust limits in the ex ante regulation of broadcasting in Italy until 2002.

Initially the intervention of the Italian Constitutional Court in defence of pluralism of information was necessary, since the scarcity of television frequencies in the broadcasting sector meant that the need to provide a public service had to be balanced with the need for affordability by private enterprises. In Italy, the state has a monopoly on the radio spectrum, and it allows private companies to use broadcasting frequencies under concession (ruling no. 225 of July 10, 1974)[103].

The Court also set out the characteristics of television. In its opinion television is a means of spreading ideas, due to its well-known capacity for immediate and widespread circulation in the social field thanks to its penetration into people's homes. It uses the evocative force of images and words, so that it has a special capacity for persuasion, influencing public opinion and social habits more than the press.[104]

For these reasons legislators have intervened to impose limits on television broadcasting that are stricter than those on any other means of communication, such as print media. There is now a large body of regulations governing use of the radio spectrum in Italy, which also seek to limit the market power of any operator deemed to be in a dominant position in the television market.

In 1988 the Italian Constitutional Court emphasized the need to regulate access to the market by economic operators in order to protect pluralism of information in view of the progressive constitution of

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[103] ZACCARIA R. (1974), "L'alternativa posta dalla Corte: monopolio pluralistico della radiotelevisione o liberalizzazione del servizio", *Giur. Cost.* p. 2177.

[104] Italian Constitutional Court Judgment 148 of 21.07.1981, *Gazz. Uff.* no. 207 of 29.07.1981; see PARDOLESI R. (1998) "Etere misto e pluralismo annunciato", *Foro It.*, I, c. 2477.

dominant positions in the television and publishing markets by private groups.[105]

On this occasion the Court analyzed the concept of pluralism of information with special reference to television. It defined external pluralism as *"a central principle of all democratic societies which is achieved above all, by enabling the largest technically possible number of participants to enter the field of public and especially private television broadcasting, in order for external pluralism to be real and not merely theoretical – so that people with different opinions can express themselves without the risk of being marginalised as a result of the concentration of technical and economic resources in the hands of one or few persons and without losing their autonomy*" [our translation]. With reference to internal pluralism, it stated: "*In other contexts, pluralism results from the concrete possibility afforded to all citizens to choose from a plurality of information sources. Such a choice would not be real if the citizens, to whom the audiovisual means of communication address themselves, were not able to receive programmes that guarantee the expression of heterogeneous tendencies in both the public and private sectors*." [our translation].

In 1990, taking into consideration the widespread practice of broadcasting without authorization or government concession and the emerging problems of interference between network frequencies on a local level, the Italian parliament intervened in the broadcasting sector with the Mammì Law, which established the responsibilities of public and private broadcasters and set quantitative limits on the combined ownership of broadcasting and publishing enterprises. Article 15 of the Mammì Law, regarding the prohibition of dominant positions within the media and the obligations of private concession holders, allowed a broadcaster to hold no more than 25% of total frequencies. It also specified that they could either a) hold up to three television networks on condition that they relinquished any previously acquired controlling stake in a company publishing daily newspapers; or b) hold up to three broadcasting concessions and a minority stake in a publishing company; and c) hold a maximum of one or two broadcasting concessions and controlling stakes in

[105] See Italian Constitutional Court Judgment 826 on 14.07.1988, *supra* at footnote 99.

companies publishing daily newspapers with a combined circulation of between 8% and 16% of the market[106].
In 1994 the Italian Constitutional Court ruled that the limit of 25% was too high and did not respect the principle of pluralism of information[107].
Thus the Maccanico Law of 1997 imposed new limits on the television sector. The Constitutional Court ruling of 1994 reduced the limit on control of the radio transmission spectrum to 20%, matching the criterion set for the printing sector, and imposed a new limit of 30% of national broadcasting sector revenues.
The Maccanico Law envisaged a transitional period for the final implementation of these limits. This period was to be established by the Italian Communications Authority which, however, was in danger of postponing it indefinitely. Thus in ruling no. 466 of 2002[108] the Italian Constitutional Court noted that nothing had changed with reference to the implementation of the antitrust limits set out in the Maccanico Law, and set December 31, 2003 as the deadline by which those limits should be enforced[109]. Any channels still exceeding the above-mentioned limits by that date would have to be broadcast only via cable or via satellite.

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[106] In 1995 the referendum to limit ownership of television channels to just one per subject was not successful. See ZACCARIA R., *Diritto dell'informazione e della comunicazione*, p. 410-411, *supra* at footnote 82.
[107] Italian Constitutional Court Judgment 420 of 05.12.1994, *supra* at footnote 100.
[108] See Italian Constitutional Court Judgment 466 of 20.11.2002, *supra* at footnote 101.
[109] See MAGNANI V., *Radiotelevisione: per la Corte serve un termine certo al regime transitorio previsto dalla legge n. 249 del 1997* [online]. Available from http://www.associazionedeicostituzionalisti.it. See also CUNIBERTI M. (2006) "Televisioni e posizioni dominanti", CUNIBERTI M. et al., *Percorsi del diritto dell'informazione*, Giappichelli Editore.

4.9. The Gasparri Law and the Consolidated Law on Television.

The last stage of the long journey of Constitutional Court jurisprudence regarding the broadcasting system was ruling no. 466 of November 20, 2002 in which the Court declared the Maccanico Law to be unconstitutional since it did not set out a time frame for its implementation. Consequently, the Court set a deadline of 31 December 2003 for the application of the 20% limit on control of the radio spectrum and the 30% limit on total revenues.

Parliament therefore tried to pass a new law to reform the broadcasting system by that date and to implement the Constitutional Court ruling, considering that 20% of the radio spectrum would allow each operator to hold up to two channels broadcast over a maximum of twelve total frequencies, with dangerous consequences for the existing operators (Mediaset and RAI), who would have to give up part of their terrestrial frequencies and switch off one of their programmes.

But the new law on the reform of broadcasting soon ran into trouble. On December 13, 2003 the Italian President of the Republic sent the bill for the reform of the broadcasting sector, promoted by Minister Gasparri, back to Parliament with a message that emphasized three basic points:

- the text did not specify a realistic and short term within which the transition to Digital Video Broadcasting – Terrestrial (hereinafter "**DVB-T**") was to take place;
- the 20% limit on control of the Integrated Communications System (i.e. the total revenues of the various communications sectors) could still lead to the rise of dominant positions, and as such was contrary to what the Italian Constitutional Court had said in rulings no. 420 of December 5, 1994 and no. 466 of November 20, 2002;

- there was a danger that excessive use of advertising would dry up freedom of expression[110].

For this reason at the end of 2003 a decree was approved by the government to prevent the enforcement of the time-limit envisaged in the Maccanico Law. That decree was later converted into Law no. 112, which came into force on May 3, 2004 (the "Gasparri Law").

The Gasparri Law repealed Articles 2 and 3 of the Maccanico Law[111] and replaced the previous antitrust guidelines with Articles 14 and 15.

In 2005 the government then issued the first Consolidated Law on Television (hereinafter the "**Consolidated**") which applied the dictates of the Gasparri Law to the letter[112].

Firstly the new law gave rise to some confusion between the rules on the total pluralism of information (which do not allow the consolidation of dominant positions) and antitrust laws (which merely prohibit abuse of a dominant position[113]). Indeed, the Maccanico Law's technical limit of 20% remained but now it referred to a radio spectrum where broadcasting is conducted in digital format. Although the radio spectrum was the same, the new broadcasting technique increased the potential number of channels and created room for a much higher

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[110] See PACE A., *Per una lettura "in controluce" del messaggio presidenziale su pluralismo e imparzialità dell'informazione* [online]. Available from http://www.associazionedeicostituzionalisti.it; OLIMPIERI P., *Il messaggio del presidente della Repubblica sul pluralismo e l'imparzialità dell'informazione. Brevi considerazioni "a caldo"* [online]. Available from www.associazionedeicostituzionalisti.it.

[111] See GRANDINETTI O. (2002) "TV: Dalla legge Maccanico al digitale", *Giorn. Dir. ammin.*, 3; CASSESE S. (2002) "Il concerto regolamentare europeo delle telecomunicazioni", *Giorn. Dir. Ammin.*, no. 6.

[112] See MAMMONE M. (2006) "La delega del testo unico in materia radiotelevisiva e il vincolo comunitario", *Dir. Econom. Mezzi Comunic.*, p. 55 onwards.

[113] See ZACCARIA R., *Diritto dell'informazione e della comunicazione*, p. 410-411, supra at footnote 82.

number of operators because it allowed better exploitation of the same resource[114].

Article 15 of the Consolidated contains provisions that are more permissive with regard to advertising than the Maccanico Law, since the limit of 30% of total revenues was repealed.

The Consolidated increased to 20% the percentage of hourly advertising, despite the Italian Council of State's recommendation that this should be kept within the 18% limit[115].

Furthermore the Consolidated introduced a new economic concept, the "ICS" (Integrated Communications System), with which to evaluate the new antitrust limit of 20%. The ICS includes all revenues from public financing, national and local advertising, sponsorship, Pay TV subscriptions and sales of newspapers, periodicals and books including electronic publishing over the Internet.

This means that the basis for calculating the 20% limit has increased significantly (in the opinion of Il Sole 24 Ore the ICS is worth around 26 billion euros annually). Therefore incumbent companies such as Rai and Mediaset could continue to increase their share of the advertising market despite the fact that the Italian Communications Authority had already stated that it considered them to hold a dominant position[116].

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[114] ZENO-ZENCOVICH V. (2006) "Motivi ed obiettivi della disciplina della televisione digitale", in FRIGNANI A., PODDIGHE E. and ZENO-ZENCOVICH V. (eds.) *La televisione digitale: temi e problemi*, p. 11.

[115] See Council of State Opinion, Section II, 16.01.2002 and 10.07.2002, issued at the request of Agcom.

[116] For criticism of the Consolidated antitrust limits see GRANDINETTI O. (2006) "Il Testo Unico sulla radiotelevisione", *Giorn. Dir. ammin.*, p. 124 onwards; POLETTINI F. (2005) "Concorrenza nel settore televisivo: il punto dopo il varo del Testo Unico", *Diritto industriale*, 6, p. 591; POLETTINI F., "Antitrust televisivo: da Gasparri a Gentiloni", *supra* at footnote 90, p. 244 onwards; DE BENEDETTI F. (2007) *Quarantacinque percento*, Soveria Mannelli, p. 23 onwards; ZACCARIA R., *Diritto dell'informazione e della comunicazione*, *supra* at footnote 82, p. 410-411.

4.10. The secondary market for the sale of frequencies.

The Italian broadcasting system has been called "mixed", since all broadcasting platforms compete for the purchase or the production of audiovisual products, thus influencing the price. The Consolidated abandons the idea of public service, intended as a service of general interest, placing broadcasting in the category of supply of services envisaged in Article 49 of the EU Treaty.

This new regulation falls within the process of network convergence, which started in Italy with Decree 318 of September 19, 1997, issued under the influence of the EU[117].

The concession of terrestrial radio frequencies is no longer the fundamental means for allowing broadcasting, since other means of transmission are now used (e.g. cable and satellite). For this reason the Consolidated cited the need for "a general broadcasting licence", granted to service and network providers by the Ministry of Communications. Programme makers on the other hand have to register their channels with the Italian Communications Authority. This new practice was introduced experimentally by Resolution 435/01/CONS of the Communications Authority, under Article 2-bis, paragraph 5 of Law No. 5 of January 23, 2001, and was converted into Law 66 of March 20, 2001. In any case the Consolidated subsequently enshrined the principle of comprehensive reform in view of the switch-

[117] See Green Paper no. COM/97/623 on the convergence of the telecommunications, media and information technology sectors and the implications for regulation in 1997. According to this paper, the Commission was to begin public consultation on the implications for Community regulation of the convergence of the telecommunications, media and information technology sectors. The outcome of this consultation was given in Communication COM/99/0108/final (no longer published) to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.

off of the analogical signal which is supposed to be completed in Italy by the end of 2012[118].

At present, the openness of the market is evident. The frequencies remain a finite resource and state control via the granting of concessions for the terrestrial radio spectrum is still necessary, but the Digital Video Broadcasting market will allow the number of platforms involved in the sector to expand. The incumbent companies can sell or license their frequencies or a portion of them to newcomers, the owners of network licences who will succeed them. The sale will in any case be subject to approval by the Ministry of Economic Development and the Communications Authority[119], but the frequencies will be traded in a "secondary market"[120]. This is what should happen in theory but in practice the selling-off of frequencies has been not very common. In fact although the number of DVB-T channels has increased dramatically, relatively few new platforms have entered into the market[121]. This is because content providers prefer to avoid the entry costs involved in building up their own network, relying instead on the infrastructure of

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[118] See the calendar for the switch-off in each region of Italy in the Ministry of Economic Development Decree of 10.09.2008.

[119] See Article 14 of Law 259 of 01.08.2003 (the Electronic Communications Code).

[120] See ZENO-ZENCOVICH V., "Motivi ed obiettivi della disciplina della televisione digitale", *supra* at footnote 114, p. 19, who also discusses the impossibility of withdrawing existent concessions and returning them to the state for fresh assignment, as an alternative to the secondary frequencies market.

[121] For example in Sardinia, where the switch-off was completed on 31.10.2008, only two new local platforms were created. See the Italian Communications Authority's Annual Report of 2009 [online]. Available from http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=17, pp. 81-83. However the number of local channels in the Region increased from the initial 16 up to the current 67. See the III Report on digital terrestrial television in Europe and in Italy written by DGTVi [online]. Available from http://www.dgtvi.it/stat/Allegati/DIGITA_n_5_novembre_08.pdf, p. 2.

existing platforms. In this way content providers maintain control over their content and licence or sell their products to more than one platform who can package them as they prefer. This enables them to control access to content by the various platforms despite the European Commission's call for translation of the network neutrality principle to the television sector.[122]

4.11. The Italian guidelines for switching off the analogical signal and conversion to DVB-T.

The Italian regulatory framework on DVB-T has yet to be defined. Among other reasons, this is because the European Commission has expressed doubts concerning the anti-competitive effects of Article 2bis of Law 66/01 and Articles 23 and 25 of the Gasparri Law, which are held to infringe Article 9 of Directive 2002/21/EC and Articles 3, 5 and 7 of Directive 2002/20/EC. Furthermore, until recently, Italian law attributed special rights to the existing analogical operators, thereby infringing Articles 2 and 4 of Directive 2002/77/EC, which require the abolition of such special rights[123].

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[122] See Media pluralism in the Member States of the European Union, *supra* at footnote 80.

[123] The Commission sent Italy a letter of formal notice as part of infraction procedure no. 2005/5086 following a complaint from the Italian consumers' association Altroconsumo claiming that the Italian legislation regulating the passage from analogical to digital terrestrial broadcasting technology infringes EU Directives 2002/21/EC (Framework Directive), 2002/20/EC (Authorisation Directive) and 2002/77/EC (Competition Directive), as well as other provisions of EU law.

For this reason, on June 6, 2008 the Italian Parliament modified the offending articles of the Consolidated by passing Article 8-novies and 8-decies of Law 101/2008, and on September 10, 2008[124], the Ministry of Economic Development issued a calendar for the implementation of the switch-off of the analogical signal.
Subsequently, in response to the letter of formal notice regarding infringement procedure no. 2005/5086 brought by the European Commission against Italy, on April 7, 2009 the Italian Communications Authority, which is responsible for the implementation of the switch-off, issued Regulation 181/09/CONS, setting out the criteria for the complete digitalization of terrestrial television in Italy
The Italian Communications Authority (hereinafter "**Agcom**") used the phrase "*horizontal entry model*" to refer to the regulatory model based on three distinct regimes governing the three main players in DVB-T (content providers, service providers, network operators), which was introduced by Law 66 of 2001 and Regulation 435/01/CONS.
It limited to 20% the proportion of digital terrestrial television programmes that can be broadcast by a single provider at national level.
Until the implementation of the total switch-off across the country, 40% of the transmission capacity is reserved for content providers that are independent of any network operator. The frequencies can be obtained by means of the so-called "frequency trading" envisaged in Resolution No. 109/07/CONS of March 7, 2007, in accordance with the handbook issued by Resolution No. 645/07/CONS. Agcom states that firms that are not vertically integrated (that is enterprises that do not own broadcasting infrastructure but rent it without any broadcasting licence) can also compete for the assignment of frequencies.

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[124] According to Article 1, paragraph 6, letter c), n. 6, of Law 249 of 1997 and Article 29 of Legislative Decree 259, 2003, the Ministry of Economic Development (formerly Ministry of Communications) invites candidates to compete for rights to use television frequencies in accordance with procedures established by the Communications Authority .

In the case of vertically integrated national players, the structural separation between content providers and network operators is necessary but only for DVB-T and not for cable or satellite broadcasting. The framework of digital terrestrial television is complemented by a set of "best practice" rules aimed at safeguarding the interests of third parties, such as the requirement for network operators to not discriminate in providing transmission capacity to third parties. For example all analogical operators who have invested in the process of digitization are entitled to convert each analogical network they have into a digital one.

The allocation of frequencies to network operators as a result of the switch-off has to be conducted in accordance with EU Directives on DVB-T and is therefore required to exploit the digital dividend (i.e. "*the spectrum over and above the frequencies required to support existing broadcasting services in a fully digital environment, including current public service obligations"*[125]).

Agcom will apply the SFN (Single Frequency Network) technique[126] in order to allow for the largest possible number of television channels in each region, which will be divided between national networks and local networks. One third of these is reserved, in accordance with existing legislation, to local television stations.

The allocation plan provides for 21 DVB-T multiplexes with national coverage, accounting for approximately 80% of the spectrum, and a further 4 national networks to be used for Digital Video Broadcasting Handheld (hereinafter "**DVB-H**").

Agcom guarantees appropriate safeguards for the significant investments made in the past by existing analogical television

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[125] See European Commission Communication to the European Parliament, the Economic and Social Committee and the Committee of Regions (COM/2007/700) of 13.11.2007 [online]. Available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0700:FIN:EN:PDF.

[126] The SFN technique has already been used successfully in the Sardinia Region.

companies by assigning at least one multiplex to each broadcaster, taking into account technological developments such as High Definition (HD) and interactivity. In accordance with the principle of non-discrimination, this rule will also apply to Europe 7, recently assigned a TV channel.
Based on these criteria the conversion of all channels currently broadcast via the analogical transmission system would require 8 out of the 21 multiplexes available for national DVB-T networks.
In accordance with the administrative procedure, the national and local network operators operating legitimately by virtue of their acquisition of spectrum frequencies on the basis of Article 2-bis, paragraph 2 of Law 66 of 2001 and Article 23, paragraph 3 of Law 112 of 2004, have to relinquish the analogical frequencies they currently use in each region and return them to the state; in return, they will be assigned a single digital frequency for each network.
The rationalization of existing DVB-H networks, deployed by operators through the trading of frequencies, allows the operators to keep the same frequencies and convert them into networks in recognition of the investments made for the development of such networks in compliance with the laws and regulations, and also in view of recent technological developments.
Agcom has managed to ensure that the digital dividend is much higher in Italy than the average available in most European countries, and this is possible thanks to the use of SFN.
A digital dividend of at least 5 national television networks, in addition to possible DVB-H networks, raises the possibility of allocating them through selective procedures based on objective, proportionate, transparent and non-discriminatory rules.
The selective procedure is to be carried out in five lots divided into two stages as follows: (i) three lots are reserved for new entrants and incumbents with less than two national analogical television networks and (ii) two lots will be awarded by open tender in accordance with a beauty contest procedure. In any case, the number of assignable multiplexes is capped at 4. Thus in the case of the vertically integrated operators that currently operate 3 national analogical networks the cap is set at one additional multiplex.

In the case of the integrated operator that currently operates 2 national analogical networks the cap is set at two additional multiplexes.
If any of the vertically integrated operators that currently have 3 national analogical networks is the winner of the allocation procedure, it will be obliged to cede 40% of the transmission capacity of the additional multiplex to third party content providers that are not vertically integrated. If the vertically integrated operator which currently has 2 analogical television channels is the winner of two multiplexes in the allocation procedure, it will be obliged to give up 40% of the transmission capacity of one of these two multiplexes to third party content providers that are not vertically integrated.

4.12. Regulation of the Digital Dividend: some criticism.

Even though the regulation is not yet definitive, some authors have criticised Regulation 181/09/CONS of the Italian Communications Authority with reference to the allocation to third parties of the digital dividend, i.e. the frequencies that will remain free after switching off the analogical signal and converting to DVB-T, by the "beauty contest" procedure[127].
According to point 6, letter b) of the new ruling, Agcom reserves a fair number of frequencies for the existing broadcasters, to safeguard their investments and to allow them to continue their commercial activity, taking into account recent technological developments such as High Definition (HD) and interactive services. In this way the beauty contest

[127] See VALLETTI T. (2009) *Se lo Stato non vuole incassare il dividendo digitale* [online]. Available from http://www.lavoce.info/articoli/pagina1001077-351.html of 24.04.2009.

will be used for the minority of the spectrum, in accordance with a different approach from that of other countries where the majority of the freed-up spectrum will be assigned by auction.

In UK for example "*Ofcom is making preparations for the spectrum that will be freed up from switchover known as the digital dividend to be released. Last year [it] decided that the majority of the spectrum should be released through auction*." And in order *"to align more of the digital dividend with other European countries […] This could significantly enhance the potential to create value through use of this spectrum for new wireless services, particularly mobile broadband in the UK and across Europe"*[128].

In the United States in 2008 the government auctioned broadcasting frequencies corresonding to 700 MHz of bandwidth, earning $19 billion from the sale of licenses won mainly by Verizon, AT&T and new entrants.

However, Italy does not have a consolidated tradition of assigning frequencies by auction. The only two auctions were held in 2000 and 2008 for UMTS and Wimax technologies respectively. Indeed, analysts complain that the Italian Government often foregoes the high revenues arising from the sale of frequencies by auction.

In addition to the economic benefits of public auctions for the allocation of frequencies, the auction selects the highest bidders for the radio spectrum, when demand is higher than supply. In contrast, reserving a large number of frequencies in favour of the existing broadcasters does not guarantee effective protection of pluralism of information and is not in line with the path taken by other Member States on the issue of exploitation of the Broadcasting Digital Dividend arising from the analogical switch-off[129] .

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[128] See www.ofcom.org.uk/about/accoun/reports_plans/annrep0809/market/ of 23.06.2009.

[129] See CAMBINI C. and VALLETTI T. (2009) "L'Asta fantasma" [online]. Available from http://www.lavoce.info/articoli/pagina1001188-351.html of 3.07.2009.

4.13. Conclusions.

On the basis of the above-described regulation in Italy it can be stated that pluralism of information in the country has made much progress but there is still a long way to go.
Whatever happens, DVB-T is a good opportunity for the entrance of newcomers to the broadcasting sector. However, since the multiplexes will be assigned by the beauty contest method, based on the best broadcasting project, it will clearly be easier for the existing operators, who already have specific know-how in broadcasting, together with substantial capital to invest in technology and infrastructure.
Companies that already enjoy a dominant position in the broadcasting sector are thus the favourites.
Concerning the parameters used to evaluate dominance in the ICS, we need to make a few considerations. Firstly, the sale of advertising in television programmes constitutes a relevant market in which independent broadcasters sell space on their channels to advertisers, either in person or through dealers.
The broadcasting industry has an important role in the European economy[130]. For this reason, as we have already said, the Audiovisual Media Services Directive and the Consolidated relaxed the advertising constraints.
As confirmed by the Italian Antitrust Authority in its deliberations on the purchase of advertising slots, investors think that television is not replaceable by any other means of communication. Therefore, the relevant market includes all advertising space on television (whether FTA or Pay TV), but not the space available in other media (such as radio or publishing)[131].

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[130] RANIERI M. (2006) *La libertà dell'esercizio dell'impresa di comunicazione di massa*, Giappichelli, p. 33 onwards.

[131] According to the Italian Antitrust Authority (Resolution no. 15632 on 28.6.2006, case A362, Football rights, in Bull. No. 26/2006, paragraph 28), investors consider advertisements on Free-to-air television to be substitutable

According to the Italian Antitrust Authority, this market is characterized by a "two sides" system in which television operators occupy an intermediate position between two distinct groups of customers: first, television platforms broadcast content to viewers; second, they sell advertising space to content providers at a price that depends mainly on the size of the first group, the audience[132].
In this context, the two main variables that drive the choice of an investor to buy TV advertising slots – and determine, therefore, the capacity of a platform to make advertising space available to the market – are: (i) the audience (i.e. the number of people reached by the programmes in which advertising is inserted), and (ii) the target (or type) of viewers to whom the television programme is addressed, which should coincide as much as possible with groups of potential customers for whom the advertising is intended.
With reference to the structure of the Italian broadcasting market and its financial resources we can draw the following outline.
According to the latest official figures from the Italian Communications Authority (for 2008), the Mediaset group occupies a dominant position in the market for the sale of advertising space on television, with a share of 55.1%. RAI follows with 27.9%, and Sky accounts for 5.9%[133].

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with advertisements on Pay-TV, but do not consider television advertising to be substitutable with advertising via other means of communication. Furthermore according to Agcom, advertising transmitted through different television platforms retains common characteristics in terms of competitive conditions. Thus the television advertising market can be considered as a single market, regardless of whether the message is conveyed over FTA-TV or Pay-TV (see Resolution No. 136/05/CONS on 1.03.2005, *Gazz. Uff*. of 11.03.2005, Annex n. 35, § 19).

[132] See the Consultation on Television by the Italian Antitrust Authority, IC23, enclosed with Resolution no. 13770 of 16.11.2004 (in Bull. No. 47/2004), p. 39.

[133] Annual Report 2009, p. 80 [online]. Available at http://www.agcom.it/Default.aspx?message=visualizzadocument&DocID=3239.

The Italian Antitrust Authority has also recognized the dominant position of Rai and Mediaset in the advertising market[134].
Indeed, as noted by the European Court of Justice (ruling of 13 February 1979, Hoffmann-La Roche, paragraph 41 of the reasoning in Case 85/76), "*very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.*" This ruling was cited in Case C-62/86, *AKZO Chemie BV*, 1991, I-3359, § 60, which added: "*That is the case where there is a market share of 50%*"[135].
Furthermore, according to data cited by the Italian Communications Authority, the Mediaset group and Sky are the only operators who have increased their market share compared to 2007, while in the same period of time RAI decreased its market share.
With regard to the dominance of RAI, the legislation places stringent limits on the broadcaster concerning the sale of advertising space. As pointed out by the Italian Communications Authority, the transmission of advertisements by the general public broadcasting service licensee may not exceed 4% of weekly programming and 12 percent of any hour, and the excess must be recovered before or after the hour, without exceeding 2 percent in those adjacent hours. In contrast, for other broadcasters the limit is set at 18 percent per hour (Article 38, paragraphs 1 and 2, of the Consolidated).
Moreover, as acknowledged by both the Antitrust Authority and the Communications Authority in Italy, the Rai and Mediaset groups have a decades-long dominance over the entire panorama of free-to-air TV in Italy[136]. In a further demonstration of this dominance, the Italian

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[134] See Italian Antitrust Resolution no. 15632 of 28.6.2006, Case A362, *Football rights* (in Bull. n. 26/2006).
[135] ECJ Case C-62/86 *AKZO Chemie BV* of 03.07.1991 [1991] ECR I-3359, § 60.
[136] See AGCOM Resolution no. 544/07/CONS dated 31.10.2007 (available at http://www2.agcom.it/provv/d_544_07_CONS/d_544_07_CONS.htm), § 174, 442 and 470. In § 470 of this Resolution, AGCOM noted that RAI and RTI had a joint dominant position in terrestrial analogical television. Therefore, in Resolution no. 159/08/CONS of 9.4.2008, AGCOM imposed a number of remedies on RAI and RTI. See also television survey no. IC23 by the Antitrust

Communications Authority obliged Mediaset to adopt transparent, fair and non-discriminatory practices in the sale of advertising space (see Article 1.1.d.2 of Resolution No. 136/05/CONS of the Italian Communications Authority), in order to avoid harming competition and pluralism in relation to other operators and customers as a result of its significant market power.

Thus, all these remedies have been recently introduced in the Italian context to increase competition, to prevent the foreclosure of other companies interested in entering the market, and to safeguard the right of viewers to pluralism of information.

Looking to the defence of pluralism of information and the further opening up of the television industry, some attempts have been made to amend the current regulatory system with reference to the limits on revenues. For example, recent reform proposals have focused on the advertising market, as it is widely believed that dominance in the advertising sector endangers pluralism of information by negatively affecting content production and distribution[137].

The idea was to cap the share of advertising revenues accruing to any single operator at 45%, in order to safeguard the pluralism of information[138].

A rational policy of supporting pluralistic provision of services should start from the consideration that the television market is founded on

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Authority, which notes that the television market has the characteristics of a duopoly: because of the presence of Mediaset and RAI at all levels of the television industry (technical transmission services, advertising revenues, measurement of ratings), the two broadcasters have little incentive to compete fairly and tend to align their behaviour (see pp. 56, 103-105, 151-154, 157).

[137] BORRELLO R. (1988) "Cronaca di un'incostituzionalità annunciata (ma non dichiarata)", *Giurispr. Costituz*., p. 3960.

[138] See for example the bill drawn up by Communications Minister Gentiloni and subsequently dropped. See also MAZZOLENI G. and VIGEVANI G. (2006) "L'anomalia italiana non è per niente finita", *Reset*, 98, p. 36 onwards. For criticism see DE BENEDETTI F., *Quarantacinque percento*, p. 23, *supra* at footnote 116.

the multi-sided markets theory. As already explained, a broadcasting platform offers at least two services that are complementary to the market: entertainment to the viewers on one side and advertising space to marketing companies on the other hand.

In some cases the broadcasting companies get separate revenues from viewers and advertisers for the distinct services provided; this happens for example with Pay TV platforms. In other cases, as with FTA television, the system works differently, with the revenues from the sale of advertising space enabling the platform to broadcast content for free to viewers.

The consequence of this phenomenon has been that the advertisers started to identify certain groups of consumers at whom their products should be targeted, and they started to select specific times of day when their advertising slots should be broadcasted.

However the public was not conscious of asking for any specific content and moreover they were not paying a fair price for it. The viewer was simply considered to be more likely to appreciate some products than others.

Thus in an FTA channel there is a relationship among three parties: **i)** the platform; (ii) the viewer; and (iii) the producer of the advertised good.

The platform sells advertising space to the producer of the advertised good who pays a price for the service. The platform broadcasts entertainment content to the viewer who does not however pay any price for the received content.

The producer of the advertised good is prepared to pay the platform for advertising space, so it has a role in determining the kind of entertainment the platform broadcasts and consequently what the viewers can watch on TV. In any case the transaction between the producer and the viewer is anomalous, since the latter has the power of influencing the production of the advertised goods by buying some products more than others in the shops, or more simply through audience share, at least in the long run. But in any event, the viewer cannot participate directly in the transaction with the FTA platform because it does not pay any price for watching the content.

If the television market was characterized only by FTA television there would be serious problems of allocative efficiency. In this context Pay TV, including video-on-demand services, represents a real step forward for the viewer, who would otherwise be cut out of a market dominated by advertising. This leads us to suppose that the market itself will spontaneously become more competitive and that the general antitrust rules described above are sufficient to regulate the market, although governments persist in interfering with the sector. Indeed, today a market share of 50% of total advertising revenue in the broadcasting market is considered illegal.

But this approach could change, in consideration of the rapid development of broadcasting technologies now in progress. As in any other sector, it may be sufficient to apply the general antitrust rules against dominant companies, i.e. forbidding discrimination, predatory prices, and the binding and tying clauses that limit the advertisers' freedom of choice; it may be that these rules can guarantee the pluralism of information as well[139].

However, despite the promising technological scenario, legislators continue to regulate this sector based on the opinion that resources are limited.

At the moment the broadcasting market is made up of a small number of public and private oligopolistic companies that compete on the side of the resources and therefore in the advertising market. The consequence of this is that they excessively orient the entertainment on offer towards those programmes that gather the largest audiences among the type of public that is most sensitive to advertisements.

Another aspect of competition among platforms is the quality of content they provide. Indeed, the different quality of the content can determine a significant variation in the attractiveness for the viewer, who will be more interested in some content types than others.

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[139] See LIBERTINI M., Report presented at the AREL seminar on *Direttive per le comunicazioni elettroniche. Prime riflessioni*, 1.11.2007, 2007/OC-4.

Content is divided into *premium content* and *basic content*. The former has greater appeal for the viewer (for example the final of the football world championship). The latter includes less popular events or content that has been already broadcast. In this case Pay TV can induce the consumer to subscribe through bundling of content and tying of services.

To ensure access to impartial and pluralistic information, the viewer should be able to select content even via FTA TV, using video on-demand for example.

The market share of the broadcasting platforms is likely to diminish as users enjoy increasing choice in a market already near saturation in terms of the individual potential for consumption of audiovisual services within a 24-hour day.

Moreover, escalating prices for premium content could subject platforms to budgetary pressures that might outstrip the capabilities of existing funding mechanisms. The issue is whether FTA broadcasters can continue to have access to attractive content in the face of fierce competition for the acquisition of programme rights.

This is also stressed for example by point 3 of the AVMSD, which states that "Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services".

Consumer protection is one of the aims of EU jurisprudence, so the state is expected to intervene to balance the interests at stake in the advertising market (e.g. economic distribution and freedom of expression on one side and copyright and consumer protection on the other)[140].

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[140] See ECJ Case Judgment C-412/93 - *Leclerc-Siplec* of 09.02.1995, [1995] ECR I-179, and the comment in FLAMINI E. (1995) "La televisione nella giurisprudenza comunitaria", *Diritto Dell'Informazione*, p. 579 onwards; see also ECJ Case Judgment C-245/01 - *RTL Television of* 13.12.2003, [2003] ECR I-12489.

The solution to the problem lies in the public nature of the broadcasting service. The role of competition watchdogs in this case remains essential, but their intervention ought to be *ex post*, not only in terms of regulating competitiveness among platforms, but also to safeguard viewers against unfair use of electronic communications.

See also RENZULLI A. (2005) "La sentenza RTL: verso un nuovo rapporto tra diritti fondamentali e libertà economiche nell'Unione europea", *Dir. Un. Eur.*, p. 567 onwards.

Chapter 5

Multi-sided broadcasting platforms and competition law.

5.1. Introduction.

In antitrust and state aid cases (under Articles 81, 82 and 87 of the Treaty) and the merger notification within the broadcasting sector (under Regulation 139/2004), the European Commission described the relevant markets in which each economic operator involved in the platform (advertiser, content provider, viewer) carries out their activities. National competition watchdogs do not usually deviate from the descriptions of relevant markets made by the Commission.
Identification of the relevant markets in the broadcasting sector is necessary for assessment of competition law infringement by platforms (*inter*-platform competition) or by the economic operators involved in the platform (*intra*-platform competition).
According to Commission Communication No. 2004/C 101/07 and the Guidelines contained in Articles 81 and 82 of the Treaty[141], the effect on Community trade must be interpreted in the light of direct or indirect, actual or potential trade flows between Member States. With reference to the possible violation of Articles 81 and 82 of the Treaty, in assessing whether the impact is "significant", competition authorities must determine whether vertical agreements and the presence of a dominant

[141] See OJC C 101/81 on 27.04.2004.

position throughout the territory of a Member State is likely to make access to the market so difficult as to bring about the foreclosure of competitors or customers. Let us now discuss the relevant markets of the broadcasting sector and the main antitrust cases under Articles 81 and 82 of the Treaty.

5.2. Relevant markets: a) the provision of TV services to end users.

In terms of content delivery via a broadcasting platform, there are essentially two relevant markets: (a) the provision of TV services to end users; and (b) the acquisition of TV broadcasting rights.
With reference to the provision of TV services to viewers, the relevant products and geographical markets must first be defined.
Although the notifying party of a merger often tries to extend their relevant product by affirming that it includes the provision of both Pay TV and FTA TV channels, via all means of distribution (i.e. satellite, cable, and DBV-T), as well as the provision of nonlinear services such as pay-per-view (hereinafter "**PPV**") and video-on-demand (hereinafter "**VOD**"), the European Commission distinguishes between Pay TV and FTA TV products.
Providers of these two products compete directly for the same content and audience. They have similar products on offer, and there is convergence of technology through digitalization. There is also convergence of business models in the sense that Pay TV operators are increasingly financed not only by subscription fees but also by advertising revenues, whereas FTA broadcasters (traditionally financed primarily via advertising revenues) have started offering encrypted channels for which viewers have to pay a monthly subscription fee. For this reason the European Commission's consistent practice of

considering the distribution of Pay TV and FTA TV as two separate product markets is being called into question[142].

The established distinction between Pay TV and FTA TV is based upon several features. Firstly, for the European Commission there is a difference in the type of financing of Pay TV as opposed to FTA TV. Pay TV establishes a commercial relationship between the content provider and the viewer, whereas FTA TV only establishes a relationship between the viewers and the advertisers. Secondly, while there is undeniably interaction between the two TV markets from the viewer's perspective, a distinction can be drawn based on whether the content is received for no specified cost or as the result of a subscription allowing access to certain programmes not otherwise available. Thirdly, from a viewer's perspective, the programmes and the "premium" content exclusively distributed via Pay TV are often not substitutable with programmes and content available on FTA TV. For this reason viewers do not consider Pay TV and FTA TV services as fully interchangeable.

Obviously, the more attractive the products on offer from an FTA broadcaster, the smaller the incentive for a viewer to opt for a Pay TV subscription. However, this interaction does not render FTA TV a simple substitute for Pay TV, as demand-side substitutability is limited by the fact that, unlike Pay TV, viewers of FTA TV generally do not have to pay a subscription fee to get access to a particular type of content or programme.

Finally, there are major differences with regard to the business models of the two types of broadcasters, which means that supply-side substitutability is limited. While FTA channels are chiefly financed by advertising revenues and, in the case of public broadcasters by public funds, Pay TV operators still largely rely on revenues stemming from

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[142] European Commission Case Decisions COMP/M.4504 – *SFR/Télé2 France* of 04.12.2007; COMP/M.4204 – *Cinven/UPC France* of 13.07.2006; COMP/M.4338 – *Cinven-Warburg Pincus/Casema-Multikabel* of 06.09.2006; COMP/M.3411 *UGC/Noos* of 17.05.2004, COMP/M.2876 *Newscorp/Telepiù* of 02.04.2003.

subscription fees and, to an insignificant extent, from advertising. Given these differences in financial models, Pay TV operators cannot readily switch to FTA TV in the short term and vice-versa, without incurring significant additional costs or risks.[143]

As regards the Pay TV market, in many decisions the European Commission has also made a further distinction between classical or "linear" channels and non-linear channels such as PPV, "near-video-on demand" and VOD[144].

Whereas for the competition authorities there may be a clear distinction between types of content, they do not tend to break down the Pay TV market any further on the basis of the technical means of delivery. In other words, they do not distinguish between markets based on the different broadcasting technologies such as cable, satellite or DSL. The reason for this is that producers of Pay TV programmes usually want their channels to be distributed as widely as possible in order to maximise revenues and, at the very least, to have a presence on all the broadcasting platforms.

According to the European Commission the relevant markets "for the provision of TV services to end-users" are national in scope, since they are national in nature or related to linguistically homogeneous areas[145], primarily due to differences in regulatory regimes, cultural factors and other differences in the conditions of competition prevailing in the individual Member States (e.g. the structure of the market for cable TV). The restriction of broadcasting to national markets, including

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[143] See the European Commission's note on the definition of relevant markets for the purpose of Community competition law, 97/C 372/03, paragraph 20. The short term is to be understood as "*such a period that does not entail a significant adjustment of existing tangible and intangible assets*."

[144] See European Commission Case Decisions COMP/M.2211 *Universal Studio Networks/De Facto 829 (NTL) Studio Channel Ltd*. of 20.12.2000; COMP JV 37 *BskyB/Kirch Pay TV* of 21.03.2000.

[145] See European Commission Case Decisions COMP/M.4504 – *SFR/Télé2 France* of 28.11.2006, COMP/M.4204 – *Cinven/UPC France* of 13.07.2006, COMP/M.3411 *UGC/Noos* of 17.05.2004, COMP/M.2876 *Newscorp/Telepiù* of 02.04.2003.

encrypted satellite channels that could theoretically be received in neighbouring countries, also depends on content copyright considerations.

5.3. Relevant markets: b) the acquisition of broadcasting rights (audiovisual content).

According to the European Commission[146], the audiovisual content market involves all "entertainment products" (e.g. films, sport, TV programmes and channels) that can be broadcast on TV. TV broadcasting rights belong to the creators of these products, who license them to broadcasters.

The Commission distinguishes between the licensing of broadcasting rights for Pay TV and the licensing of broadcasting rights for FTA TV in terms of the way broadcasters use the content (e.g. different programming, specific target groups, packaging)[147]. Furthermore the Commission has also found that, from both a demand-side and a supply-side perspective, certain types of content bought by Pay TV operators are not substitutable with each other. For instance, a feature film and a made-for-TV film do not have the same value in terms of attractiveness to consumers; pricing structure and economic value are not the same, and suppliers of specific content are not able to switch production between different types of TV content.

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[146] See European Commission Case Decision COMP/M.5121 – *NewsCorp/Premiere* of 25.06.2008.

[147] See European Commission Case Decision COMP/M.2876 – *NewsCorp/Telepiù*, of 02.04.2003.

The European Commission considers (i) premium sports events, (ii) premium films[148] and (iii) other TV content (such as documentaries, youth programmes, etc.) as separate markets.

Premium sports events and premium films, which are expensive content, cannot usually be viewed on FTA TV. Rights to recent premium films and most regular football events with major teams tend to be acquired on an exclusive basis by Pay TV operators and constitute the essential factor (the driver) that leads consumers to subscribe to a particular Pay TV channel/platform. For this reason they must remain distinct from other TV content.

In its most recent decision (COMP/M.5121 – News Corp/Premiere of June 2008), the European Commission preferred not to make any pronouncements concerning the differentiation of audiovisual content with reference to the Pay TV windows – VOD, PPV, 1st window, 2nd window – neither did it say anything about the distinction between US movies and European Movies. It only said that the public interested in European movies is a niche market, which might imply a separation of the market between US movies and European ones. The different appeal they have for the public determines the size of the audience who are interested in the platform that broadcasts them, so that the two kinds of movies have different markets. In addition, content shown in the 1st window of Pay TV cannot be substituted with content shown in the 2nd, just as live broadcasting of events cannot be substituted with delayed broadcasting.

The European Commission considers that the markets for the acquisition of audiovisual TV content (films and other content) and for the production and acquisition of Pay TV channels are national in scope or relate to linguistically homogeneous areas. For this reason, audiovisual content is different from any other intangible content, like software products for example. Indeed, the European Commission pointed out that the software market is global since intangible products

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[148] See European Commission Case Decision COMP/M.2876 – *NewsCorp/Telepiù*, of 02.04.2003.

are broadly identical across different countries, customers consider offers from vendors from all parts of the world and there are no technological barriers that restrict vendors from supplying all over the world[149].

5.4. Wholesale and retail markets for television services.

The above-described relevant markets for a) the provision of TV services to end users and b) the acquisition of broadcasting rights for audiovisual content are simply the retail and wholesale markets for television services respectively.

The former is the market where television companies provide television programmes to end-users, i.e. the viewers, independently of the transmission technique (cable, satellite and terrestrial)[150].

The geographical market for the retail distribution of broadcasting services is national in scope, mainly because it includes infrastructure and platforms which are not restricted to certain areas as is usually the case with cable networks. Initially the European Commission considered that the geographical market could be either limited to the coverage area of each cable operator or national in the case of platforms other than cable[151]. The European Commission stated for example that

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[149] See European Commission Case Decision COMP/M.5080 – *Oracle/BEA*, of 29.04.2008.

[150] See European Commission Case Decision COMP/M.4521 – *LGI/Telenet*, of 26.02.2007, paragraph 25.

[151] See European Commission Case Decisions COMP/M.4338, *Cinven-Warburg Pincus/Casema-Multikabel* of 06.09.2006; COMP/M. 4217, *Providence/Carlyle//UPC* Sweden of 02.06.2006.

if a separate market for transmission via cable is distinguished, this market should be defined geographically in such a way that each cable network constitutes a separate geographic market, given that those customers who are connected to a specific network can only be reached through that network[152].

In contrast, the wholesale market for the distribution rights of television services is the market where content providers and broadcasters negotiate the terms and conditions for the distribution of television content to end-users. Broadcasting platforms provide carriage (or transmission) services for signals based on different infrastructures (i.e. cable networks, satellite, DSL networks).

Content providers are the enterprises that package radio or television content, either internally produced or bought from external suppliers, into channels. While content providers need transmission services provided by a network in order to reach the end-users (i.e. the viewers), the platforms need the content packaged by the content providers, which constitutes the products on offer to their subscribers.

The European Commission admits that even though "it is conceptually possible to distinguish between the acquisition by the broadcasters of transmission services, on the one hand, and the acquisition of distribution rights over radio and television channels by the platform, on the other hand, there is in practice one single negotiation where both issues are jointly addressed"[153].

Depending on the respective bargaining positions of the content provider and the platform concerned, the outcome of the negotiation will be that either the content provider will pay a fee for the transmission of the signal, i.e. a *carriage fee*, to the distributor, or alternatively the platform will pay royalties (or license fees) to the content provider. "*Even when it is mutually agreed that the content provider*

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[152] See European Commission Case Decision COMP/M.3355, *Apollo/JPMorgan/Primacom*, of 15.06.2004, paragraph 10.

[153] See European Commission Case Decision COMP/M.4521 – *LGI/Telenet*, of 26.02.2007, paragraph 27.

pays a carriage fee and the platform pays royalties for the distribution of a given channel, the respective levels of both are closely linked."[154]

Therefore the European Commission confirmed the fact that whenever content is supplied by third parties to a platform, there is a wholesale market for television rights and it makes no difference whether the content is integrated or not integrated in the platform. Thus when the platform is a multi-sided one and the programme maker pays a carriage fee to the platform, this means that the content provider is the purchaser of the signal carriage service and so the content provider and the platform share the broadcasting spectrum[155].

Furthermore the relevant wholesale market encompasses all categories of transmission infrastructure (i.e. cable networks, satellite, DSL networks), despite some exceptions. In the Cinven-Warburg Pincus/Casema-Multikabel and Providence/Carlyle/UPC Sweden cases[156] for example, the European Commission concluded that the wholesale market for television services through cable networks constituted a separate product market compared to other transmission networks. This conclusion was based on the fact that in the countries concerned there was a very large penetration of cable (i.e. the majority of households were connected to a cable network) compared to other platforms and therefore other platforms were not substitutable from a TV content provider perspective; since cable penetration was so extensive, the platform was accessible from virtually all households[157].

Wholesale and retail markets are vertically connected, since activities in the upstream wholesale market have direct effects on the downstream retail market. Any anti-competitive behaviour in the wholesale market

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[154] See European Commission Case Decision COMP/M.4521 – *LGI/Telenet,* of 26.02.2007, paragraph 27.

[155] See Chapter 2, section 2.5., letter a) of this dissertation.

[156] See European Commission Case Decisions COMP/M.4338, *Cinven-Warburg Pincus/Casema-Multikabel* of 06.092006; COMP/M. 4217, *Providence/Carlyle//UPC Sweden* of 02.06.2006.

[157] See European Commission Case Decision COMP/M.4521 – *LGI/Telenet*, of 26.02.2007, paragraph 28.

has negative effects for the downstream market and so is subject to Articles 81 and 82 of the Treaty.

5.5. Inter-*platform competition and article 81 of the Treaty.*

Collusion among broadcasting platforms is forbidden under Article 81 of the Treaty. Before examining European Commission decisions regarding the television sector, we shall first review the general rules under Article 81 of the Treaty and their application since Regulation 1/2003 of December 16, 2002 came into force.

Article 81(1) of the Treaty 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, and in particular those which*" fix purchase prices or other trading conditions, limit production, apply dissimilar conditions for equivalent transactions and impose supplementary contractual obligations (tying). However, according to article 81(3), these provisions are inapplicable under certain conditions, which we will describe subsequently.

The European Commission gave up its monopoly on applying Article 81(3), which, under Regulation 1/2003 is now directly applicable.[158] In order to facilitate the application of Article 81(3) in accordance with a

[158] "Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required". See Council Regulation (EC) 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, paragraph 1.

"*more economics-based approach*", the Commission published a set of guidelines.[159]

Undertakings are now required to do a self-assessment of whether an agreement that restricts competition under Article 81(1) might benefit from an exemption under Article 81(3). Each case must be assessed on its own merits by applying the guidelines reasonably and flexibly with reference to the following conditions.[160]

According to the first condition of Article 81(3), any restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

According to the second condition of Article 81(3), consumers must receive a fair share of the efficiencies generated by the restrictive agreement. The concept of fair share implies that the passing-on of benefits must at least compensate consumers for any actual or likely negative impact. Within European competition policy, the only goal is to maximize "consumer" welfare. Therefore the distribution of the gains and pass-on issues are very important.

In the context of the third condition of Article 81(3), the decisive factor is whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the agreement or the restriction concerned.[161] Once it is found that the agreement in question does indeed produce such efficiencies, then the indispensability of each restriction of competition flowing from the agreement must be assessed separately. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement

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[159] European Commission, Communication of the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ (C) 101/97, 27.04.2004.

[160] European Commission, Guidelines on Article 81(3), paragraphs. 4 and 5.

[161] The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction.

or make it significantly less likely that they will materialise. In this context it must be assessed whether individual restrictions are reasonably necessary in order to produce the efficiencies.

According to the fourth condition of Article 81(3), the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. The application of the last condition of Article 81(3) requires an analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. In the assessment of the impact of the agreement on competition, it is also important to examine its influence on the various parameters of competition. Both actual and potential competition must be considered.[162]

Application of article 81(3) to the broadcasting sector includes for example case COMP/C.2-37.398 of the European Commission in which an exemption under article 81(3) of the Treaty was granted for the arrangements under a joint agreement for the sale of the commercial rights to the UEFA Champions League signed between the Union of European Football Associations (UEFA) and its members.[163] In its case decision the European Commission said "*The Regulations of the UEFA Champions League provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs. The joint selling arrangement restricts competition among the football clubs in the sense that it has the effect of coordinating the pricing policy and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. However, the Commission considers that such restrictive rules can be*

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[162] See European Commission, Guidelines on Article 81 (3), paragraphs. 107 and 108.

[163] See European Commission Case Decision COMP/C.2-37398 – *UEFA Champions League* of 23.07.2003.

exempted in the specific circumstances of this case."[164] The Commission granted the exception because UEFA's joint selling arrangement provided the consumer with the benefit of league-focused media products from this pan-European football club competition that were sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently. In the words of the Commission: "*The philosophy behind the Commission's insistence in giving the football clubs an opportunity for individual sale of such live TV rights is twofold. First, the efficiencies and benefits of joint selling can be argued where the joint selling body fails to find demand in the market for such rights. Secondly, maintaining competition between UEFA and the football clubs in bringing such rights to the market helps to avoid rights to the UEFA Champions League remaining unused, where there is demand for them. Football clubs should therefore also be able to meet demand from free-TV broadcasters"*.

In another case concerning the British Football Association Premier League (FAPL), the Commission considered the agreements per se not to be exempted since "*the joint and exclusive sale of large packages of media rights created barriers to entry, various restrictions on the output of the FAPL limited the development of products and markets, and generally the sales policy led to foreclosure on downstream markets. The restrictions therefore led to further media concentration and hampered competition between media operators*"[165]. In this case the FAPL made some undertakings to the Commission, which it accepted without applying any sanction.

The specific characteristics of the sport would appear to authorize agreements on rights distribution under a model of financial solidarity, as expressed for example in the declaration of the European Council in

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[164] Ibidem.

[165] See European Commission Case Decisions COMP/38.173 – Joint selling of the media rights to the *FA Premier League* on an exclusive basis of 30.04.2004; COMP/38.453 – *FAPL+Sky* –of 30.04.2004 .

Nice in December 2000[166]. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. The Commission said that the model "*encourage[s] recruitment of young players, which serves to promote competition in European football. As a result of the financial policies implemented by UEFA, competition between clubs in Europe is enhanced and the number of competitors on the market is increased*".[167]

5.6. Sport and television: from the Bosman case to the Treaty on the functioning of the European Union.

Sports and media are closely connected since sports broadcasting rights are fundamental for attracting viewers. Indeed, platforms seek to obtain the rights to the best sports events in order to increase their viewers together with their advertising revenues.

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[166] See Annex IV to the Charter of Fundamental Rights of the European Union 364/01 of 07.12.2000.

[167] On this point see ECJ judgements in Case 36/74, *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405, paragraph 4; Case 13/76, *Donà* v *Mantero* [1976] ECR 1333, paragraph 12; Case C-415/93, *URBSF* v *Bosman* [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97, *Christelle Deliège* v *Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo* (C-51/96) *and François Pacquée* (C-191/97) [2000] ECR 2549, paragraphs 41-42; Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL* v *Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR 2681 paragraphs 32-33.

But sport also has a social value and this has been underlined in the most recent European legislation and in the main competition policy decisions of the Antitrust Authorities, as described below.

According to Article 6 of the Treaty on the Functioning of the European Union, which came into force on December 1, 2009[168] after being amended by the Lisbon Treaty of 13 December 2007[169], the Union has "*competence to carry out actions to support, coordinate or supplement the actions of the Member States*", the areas of such action to include sport. Article 165 of the same Treaty says that Union action is aimed at "*developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*".

These provisions were introduced into the Treaty on the Functioning of the European Union by the Treaty of Lisbon some months after the release of the White Paper on Sport[170]. The White Paper defined sport as any form of physical activity which, through organized participation, aims at expressing or improving physical fitness, developing social relationships or obtaining results in competition all levels.

European Institutions encourage the practice of all sports activities, with special attention to combating negative phenomena such as doping. The European Court of Justice has pronounced on sport-related cases on a number of occasions. The first was in 1974 in the Walrave and Kock case, when it said that sport is an economic activity under Article 2 of the EC Treaty, and that it must respect the law, particularly the provisions on free movement of workers[171].

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[168] See the consolidated version in OJ C 115 of 09.05.2008.

[169] See OJ C 306 of 17.12.2007.

[170] See White Paper on Sport COM(2007) 391 of 11.07.2007.

[171] ECJ Judgment Case 36/74 – *Walrave* v *Union Cycliste Internationale* of 12.12.1974 [1974] ECR 1405.

Also imortant to the field of freedom of movement was the Bosman case[172], which for the first time called into question the system of transfer of players between football teams, totally altering the balance that had previously existed in relations between clubs. The Court essentially confirmed the principles of Walrave, with the difference that clubs were now forced to forego the training and promotion allowance (payable in the form of a "transfer fee" to the company at the time of football player's sale to another club), which was considered an obstacle to free movement of sports players, contrary to the provisions of the Treaty.

As a result of this ruling, many companies found themselves with huge budget problems, because the transfer fees had been highly lucrative. The Italian government tried to help football clubs in financial trouble by issuing the so-called "*Decreto salva calcio*"[173], which gave retroactive tax breaks to the clubs. Of course the European Commission took action, contesting the violation by Italy of Article 87 of the Treaty on State aid, and for this reason Italy repealed the *Decreto salva calcio* by Law No. 62 of April 18, 2005.

The ECJ also made a revolutionary ruling on the question of doping. Setting aside a judgment by the Court of First Instance in a case brought by athletes Meca-Medina and Majcen, the ECJ said that the rules of doping are subject to Articles 81 and 82 of the Treaty since, although they have no economic value in that they are based on fair-play and the spirit of sport (and if anything should be evaluated in the light of the Treaty's provisions on the free movement of workers and

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[172] ECJ Judgment of 15.12.1995, Case C-415/93 *Bosman*. See the comments of MERONE G. (2007) "Lo sport nel diritto dell'Unione Europea", in TORTORA M., IZZO C.G. and MERONE G., *Il diritto dello sport*, UTET, pp. 366 onwards; ORLANDI M. (1996) "Ostacoli alla libera, circolazione dei calciatori e numero massimo di «stranieri comunitari» in una squadra: osservazioni in margine alla sentenza Bosman", *Giur. Civ*., 3, p. 601.

[173] Decree Law No. 282 of 24.12.2002, converted into Law No. 27 of 21.02.2003.

services), the rules governing sports are written by companies that could restrict competition in the markets of the Member States[174].

On July 11, 2007 the Commission published its White Paper on Sport, which proposes a series of concrete measures to be implemented as part of the so-called "*De Coubertin Action Plan*"[175].

The White Paper is a document of particular significance since it clarifies the EU's position with reference to the world of sport, which involves states, organizations, international institutions of various kinds and individuals. In the Commission's opinion, both the rules of specific sports and more wide-ranging rules (such as those on doping) are subject to European Union control.

In the White Paper, the Commission also acknowledges the benefits of the collective sale of broadcasting rights, which sometimes creates problems of competition, although the gains outweigh the disadvantages. It says that *"Issues concerning the relationship between the sport sector and sport media (television in particular) have become crucial as television rights are the primary source of income for professional sport in Europe. Conversely, sport media rights are a decisive source of content for many media operators.*

Sport has been a driving force behind the emergence of new media and interactive television services. The Commission will continue to support the right to information and wide access for citizens to broadcasts of sport events, which are seen as being of high interest or major importance for society.

The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs

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[174] See Court of First Instance Case Judgment T-313/2002 - *David Meca-Medina and Igor Majcen* of 30.09.2004, [2004] ECR II-03291; ECJ Judgment Case Judgment C-519/04 - *David Meca-Medina and Igor Majcen* of 18.07.2006, [2006] ECR I-06991.

[175] See Commission Staff Working Document Action Plan "*Pierre de Coubertain*" SEC(2007) 934 of 11.07.2007.

marketing the rights individually). While joint selling of media rights raises competition concerns, the Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports.
The Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport."[176]

The concerns to which the Commission makes reference are the restriction of output arising from the joint sale of sports broadcasting rights and foreclosure in the downstream television markets[177]. This fear is based on the knowledge that the opportunity to broadcast football content plays a key role in competition among television operators, in the advertising, marketing and sale of pay TV. The ability of medium to small size platforms to gain access to football content is therefore considered an important element for achieving the goal of an open and competitive market[178].

On this point the Italian Parliament took a position, reversing its earlier policy of non-intervention[179] and passed Law no. 106 of 19 July 2007,

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[176] See White Paper on Sport COM(2007) 391 of 11.07.2007, Section 4.8, paragraph 17.

[177] See European Commission Cases Decisions COMP/38.173 of 22.03.2006, relating to proceedings under Article 81 of the EC Treaty, paragraphs 25 et seq; COMP/C.2-37398 – *UEFA Champions League* of 23.07.2003, relating to paragraph 116; COMP/C-2/37.214 – Joint selling of the media rights to the *German Bundesliga* of 19.01.2005 in proceedings under Article 81 and Article 53, paragraph 1, of the EEA, paragraph 23.

[178] See in this sense European Commission Case Decision COMP/C.2-37.398 – *UEFA Champions League* of 23.07.2003, which affirms that the sale of media rights to the UEFA Champions League in separate packages by public auction should increase the opportunities for television, enabling broadcasters and SMEs to acquire the content (paragraph 171).

[179] For a detailed description of the historical evolution of sporting rights distribution see GIANNACCARI A. (2006) "Calcio, diritti collettivi e ritorno all'antico. Storia a lieto fine?", *Merc. Conc. Reg.*, 3, p. 487-520.

which empowered the Italian Government to enact a reform of the sale of rights by football clubs to broadcasting platforms. One aim of the new law was to improve the situation of the smallest sports clubs, who had least to gain from the individual bargaining of rights[180]. Following the principles of the enabling law, the Government adopted Law 9 of January 9, 2008, which formalized the solidarity principle in the sale of football broadcasting rights by imposing collective bargaining.

5.7. Law 9 of January 9, 2008 and the collective sale of sport broadcasting rights.

Law 9 of January 9, 2008[181] introduced rules on the collective sale of broadcasting rights to sporting events including championships and other professional tournaments, providing that the organizer of each competition and the organizer of the related events are co-owners of

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[180] See the reason for this decision as described by the Ministry of Youth Policies and Sport in the preliminary report on bill no. 1496 of 2007 which led to the passing of Law 106 on 19.07.2007 available from http://legxv.camera.it/_dati/lavori/stampati/pdf/15PDL0010270.pdf. See also MASSEY P. (2007) "Are Sports Cartels Different? An Analysis of EU Commission Decisions Concerning Collective Selling Agreements for Football Broadcasting Rights", *World Competition*, 30(1), p. 87; VROOMAN J. (2007) "Theory of the beautiful game: the unification of European football", *Scottish Journal of Political Economy*, Vol. 54, No. 3.

[181] See PISCINI A. (2007) "L'evoluzione della disciplina sull'evoluzione dei diritti di immagine relativi agli eventi sportivi – in Italia e in Europa – tra affari, concorrenza e specificità", *Riv. Dir. Ec. Sport*, 3, p. 35-45; GIANNACCARI A., "Calcio, diritti collettivi e ritorno all'antico. Storia a lieto fine?", supra at footnote 179.

the broadcasting rights[182]. The organizer of the competition lays down the guidelines for the trading of the broadcasting rights (premium and basic, live and delayed broadcast), the criteria for creating the relevant packages and additional rules, in order to allow candidates to participate in competitive procedures on an equitable, transparent and non-discriminatory basis. The media rights relating to events in "Serie A" and "Serie B" (the football league's first and second division respectively) are sold separately on a collective, integrated basis (Article 6).

The organizer of the competition must provide a balanced package to ensure the presence of events of major interest to users. The organizer of the competition also sets a minimum price for each package, below which, upon notice to the competition authority and the market, they may decide not to sell (Article 8).

Participants in the procedure cannot compete for all packages. They must have a concession or a broadcasting licence and, if they are granted the rights, the contract can last no more than three years. The Italian Communications Authority and the Italian Antitrust Authority supervise the implementation of these rules, each according to its specific area of competence (Articles 6 and 7).

The ownership of the sports rights is held exclusively by the organizer of the event itself (Article 3).

The broadcasting rights for the individual events of the competition are traded by the organizer of the competition. The organizers of specific events can conduct autonomous commercial initiatives relating to the rights to broadcast highlights and repeats on the clubs' official channels.

The organizers of specific events are the owners of the pictures and the videos made during the event by themselves or others, in accordance with the competition organizers' guidelines on production and technical and quality standards, with which the organizer of the events must comply.

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[182] See PODDIGHE E. (2003) *Diritti televisivi e teoria dei beni*, CEDAM.

The person or company that produces images of the sporting events is required to make them available to all purchasers of broadcasting rights, on a transparent and non-discriminatory basis, and according to a tariff established by the organizer of the competition under the supervision of the Italian Communications Authority (Article 4).
In the case of football in Serie A and B, the competition organizer is the Lega Nazionale Professionisti (hereinafter the "**Lega Calcio**" or "**Football League**"). Consequently, Law 9/2008 gives the Football League a kind of collective mandate to trade exclusively for the sale to broadcasting platforms of national and international audiovisual rights relating to domestic football in Serie A and Serie B, the Italian Cup, Super Cup and Super Cup Primavera.
On the basis of the legal framework described above, it should be pointed out that the agreement between the competition organizer and the event organizer, which gives the former an exclusive mandate to negotiate the collective sale of right to sporting events, should fall as such within Article 81 of the Treaty since it is a horizontal collective trading agreement. Similarly, since as a result of the assignment procedure a vertical licence agreement is signed between the sporting rights owners on one hand (the Football League on behalf of the event organizer) and the platform to whom the rights are awarded on the other, Article 81 of the Treaty again applies. However, in both cases, since the collective agreements were introduced by law, they are exempted from Article 81, which does not apply to the state (or its laws) but only to undertakings[183].
Furthermore, regarding the platform to which the sporting rights are awarded, the Lega Calcio and the event organizer are the providers of the football content since, although the Lega Calcio is responsible for the procedure by which the rights are awarded, Article 3 of Law 9/2008

[183] See FIGUS DIAZ J. and FORTI V. (2008) "La disciplina antitrust della nuova legislazione sui diritti di trasmissione: quid novi sub sole?", *Riv. Dir. Ec. Sport*, 2, p. 31.

makes it clear that the sports rights belong to the Lega Calcio and the event organizer.
Since the existing platforms usually control their own networks, by acquiring exclusive rights to such content, they become vertically integrated. However, according to Article 14 of Law 9/2008, Lega Calcio cannot refuse to sell broadcasting rights to emerging platforms on the grounds that they have already ceded exclusive rights to some other platform. Emerging platforms, which typically do not control their own networks, are thus multi-sided rather than vertically integrated, since they do not have exclusive rights to the audiovisual content they broadcast[184]. Therefore such platforms, which by definition do not occupy a dominant position, should be under no obligation to grant access to rivals and no restraints should be placed on them, with the sole exception of their legal obligation under article 8 of Law 9/2008)[185] to make certain images, highlights, etcetera available to other platforms.

5.8. Criticism of Law 9/2008.

There has been intense criticism of Law 9/2008, especially the parts where it apparently seeks to impose state control over television rights,

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[184] On the question of whether the licence agreement makes it possible to vertically integrate content and technology within the platform, see European Commission Case Decision COMP/M.5121 – *Newscorp/Premiere* of 25.06.2008. We will return to this point in Chapter 6, sections 6.4 and 6.7.
[185] GERADIN D. (2004) *Access to Content by New Media Platforms: A Review of the Competition Law Problems*, GCLC Working Paper No. 01, pp. 68-94.

thus intervening in the football and television sectors[186]. For example, under articles 22 and 24 of the Law, the organiser of the competition is required to allocate specific percentages of its financial resources to certain areas:

a) at least 4% for the development of the clubs' youth sectors, the safety of the sports facilities (including infrastructure) and the financing of at least two projects a year in support of disciplines other than football. (article 22);
b) at least 6% for clubs in the lower divisions (article 24);
c) a non-specified percentage for a "general mutual fund for professional team sports";
d) the remainder to be shared as described below:
    i) at least 40% in equal parts among the participants in the competition;
    ii) 30% in relation to football results over the last 60 years;
    iii) the remaining 30% in relation to the population of the "catchment area" of each team.

We have already mentioned that one of the reasons for Law 9/2008 was to encourage a collective negotiation of sports rights that would provide a better deal for the smaller clubs[187].

However, the terms of the Law clearly go further than this, even regulating the distribution of the proceeds. The state thus appears to be balancing the interests of the parties (football clubs and broadcasters) by means of heavy-handed measures that preclude free bargaining and are excessively biased in favour of the clubs.

Indeed, it should be pointed out that the express abrogation under the terms of article 30 of the Law 9/2008 of article 2, comma 1 of Decree 15 of January 30 1999, as converted with modifications into Law 78 of March 29 1999, has also had repercussions on the investments of those

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[186] ZENO-ZENCOVICH (2008) "La statalizzazione dei diritti televisivi sportivi", *Dir. Inf. Inform.*, 6., p. 695.

[187] See paragraphs 5.6 and 5.7 of this chapter.

companies which had purchased football rights on the basis of the old legislation and consolidated their acquired rights.
In addition, the purported defence of the right to report matches mentioned in article 5 of Law 9/2008 has given public broadcasters and other national and local television companies a fully-fledged right of access to the highlights of sport events, for re-transmission during news programmes, which is barely compatible with the private interests of the PAY-TV broadcasters who have bought such content. This right of re-transmission is limited to a total of eight minutes a day, with a limit of three minutes per event, to be shown at least three hours (and up to 48 hours) after the end of the event. A right of this kind favours the competitors of the purchasers of the television rights to a greater extent than is envisaged in the EU's Audiovisual Media Services Directive. In fact Article 3-*duodecies* of the AVMSD establishes an obligation to apply fair, transparent and non-discriminatory conditions in terms of access to brief clips of "events of great public interest" for news purposes, but does not state that such access must be granted free of charge.
The legislation also establishes an excessive degree of regulation of sport television rights from the point of view of ownership, by deferring to Italian Law 633/41 on copyright (article 4, comma 6, of Law 9/2008). Thus footage of sports events is placed on the same level as intellectual property rights, with ownership residing not with the broadcaster who creates the footage but with the organiser of the event. The associated rights are managed by yet another entity, i.e. the organiser of the sporting competition. The consequence of all this is needless over-regulation. Many of Agcom's responsibilities, including approval of the Lega Calcio guidelines, identification of emerging platforms and the application of price caps under article 14 of Law 9/2008, could be replaced by the spontaneous recognition by the parties of the obligations and rights that the Law imposes.
Any attempt to provide an overall assessment of Law 9/2008 must take account of the clear strengthening of the position of the owners of the sporting rights in their negotiations with companies seeking a licence to broadcast the events, based on legislation that appears to go against the tendency to market liberalisation seen in the last few years. It is also true however that the current situation represents a concrete change

with respect to pre-existing legislation, and while the new regulation is not exactly impartial, it is a result of the failure of the market, which proved to be unable to guarantee the survival of the weakest clubs. Indeed, the new legislation is based on constitutional principles, specifically those set out in articles 2 and 32 of the Italian Constitution concerning the right to sport, which the state is required to promote. It is necessary therefore to assess whether the legislation is excessively favourable to one of the parties involved to the detriment of the other, and whether the new legal situation is likely to foster the concrete development of sport in general and the various subjects that keep it alive, including television broadcasters.

5.9. Inter- *and* intra-*platforms competition under article 82 of the Treaty.*

The abuse of a dominant position held by a broadcasting platform or an economic operator involved in a platform, such as a content provider, falls within Article 82 of the Treaty.
Recently the Italian Antitrust Authority initiated two infringement procedures under Article 82 of the Treaty against the content provider Lega Calcio and the broadcasting platform Sky, both of which were considered to be in a dominant position[188].

[188] See the ongoing procedures relating to Italian Antitrust Resolutions No. 18932 of 02.10.2008, and No. 20434 of 05.11.2009, Case A407 – *Conto TV/Sky Italia,* Agcm Bull. 37/08 on 29.10.2008 and Bull. 44/2009 on 23.11.2009, and Italian Antitrust Resolution No. 20116 of 22.07.2009, as extended by Resolution No. 20343 of 01.10.2009, Case A418 – *Procedure Selettive Lega Nazionale*

With reference to the alleged abuse by Lega Calcio of its dominant position, the Italian Antitrust Authority argued that the Football League was dominant in the relevant market of premium sports broadcasting rights[189], because, according to Article 6, paragraph 1, of Law 9 of January 9, 2008, it is the only entity entrusted with preparing the guidelines for the trading of such rights. The guidelines for the sale of collective media rights were approved by Agcom and published on March 18, 2009 as an annexe to its Resolution no. l20/09/CONS.

In the Antirust Authority's opinion, the abuse of dominance stems from the fact that, although Lega Calcio was supposed to make available multiple packages for the sale of sports rights and none of them were to be exclusive, on July 1, 2009 it made available only two packages for the 2010-11 and 2011-12 seasons to terrestrial Pay TV and only two to satellite Pay TV, both of which were offered on an exclusive basis. The FTA market was offered only the highlights[190].

On November 20, 2009 Lega Calcio responded to the Italian Antitrust Authority under Article 14-ter of Law 287 of October 10, 1990. It

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Professionisti Campionati 2010/11 E 2011/12, Agcm Bull. 29/09 on 10.08.2009 and Bull. 39/09 on 19.10.2009.

[189] TV broadcasting rights to football events played regularly throughout the year every year in the "*Serie A, Serie B, Coppa Italia*", UEFA Champions League and UEFA Cup competitions are a distinct market from events involving national teams. See European Commission Case Decisions COMP/C.2/37.214 – Joint selling of the media rights to the *German Bundesliga* of 19.01.2005 and COMP/C.2-37398 – *UEFA Champion League* of 23.07.2003; see also Agcom Resolution 7340 *Sale rights* (I/362) of 01.07.1999, Agcom Bull. 26/99.

[190] The Antitrust Authority uses the term "platform" to refer to different broadcasting techniques, e.g. satellite and DVB-T (see Antitrust Authority Resolution No. 20116 of 22.07.2009). In contrast we use the term to refer to any enterprise or infrastructure which supplies content to viewers, regardless of the transmission technique used. This is also confirmed by Article 2, paragraph 1, letter u) of Decree Law 9/2008 which defines the platform as the system used for the distribution of audiovisual products and technologies via the delivery and reception of images (both encrypted and unencrypted), including FTA-TV and Pay TV, by means of electronic communications networks.

proposed a possible unpacking of the existing packages and a fresh round of bargaining with the platforms to be completed by February 26, 2010. If the Antitrust Authority accepts the proposals then the proceedings against Lega Calcio will be dropped and, as Lega Calcio requested, the Antitrust Authority will issue an administrative act obliging the platforms that have already bought the broadcasting rights to renounce them and to compete for them again in the new competitive procedure together with other platforms.

A recent case brought by the Italian Antitrust Authority against Sky concerned *inter*-platform competition. Conto TV accused its competitor Sky of violating Article 82 of the Treaty. Sky is dominant in the Pay TV broadcasting market in Italy, with a market share of around 90%, and it was obliged to grant access to its content and television services to competitors by European Commission Decision COMP.M876 of April 2, 2003. Conto TV complained that the access price demanded by Sky for wholesale services (e.g. customer care, simulcrypt, inclusion of its channels in the Electronic Program Guide, hereinafter "**EPG**"[191]) was not cost-oriented, implying abuse by Sky of its dominant position[192].

In both the described cases the anti-competitive effects of the dominant firm's behaviour have negative consequences for consumers and competitors since they can determine their foreclosure.

The case brought before the Italian Antitrust Authority against Sky gives rise to some important considerations. The complaints by Conto TV actually recall the situation we have previously described of a programme maker (such as Conto TV) that uses the radio spectrum or the carriage services belonging to another platform (such as Sky)[193]. In

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[191] Simulcrypt is a service that broadcasts digital content encrypted using more than one encryption standard so that it can be viewed using more than one conditional access system.

[192] See Italian Antitrust Resolutions No. 18932 of 02.10.2008 and No. 20434 of 05.11.2009, Case A407 – *Conto TV/Sky Italia,* Agcm Bull. 37/08 on 29.10.2008 and Bull. 44/2009 on 23.11.2009.

[193] See Chapter 2, section 2.5., letter a) and section 5.4 of this Chapter in this dissertation.

this case Conto TV is a content provider that pays Sky TV to carry its channels and make them available to Sky subscribers, who can purchase PPV content directly from Conto TV, in addition to their regular subscription to Sky.
Hence with respect to Conto TV, Sky acts just like a multi-sided market platform, because it does not integrate Conto TV's content. The access price that Conto TV has to pay for the wholesale services provided by the platform should be cost-oriented and must be calculated in a transparent and fair way, taking account of the revenues (and externalities) coming from the platform subscribers[194].

5.10. Anti-competitive vertical effects: input and customer foreclosure.

Anti-competitive vertical effects may arise from cooperation between companies at different levels of the supply chain when an integrated platform limits or eliminates competitors' access to supplies (input foreclosure) or to markets (customer foreclosure)[195].
But the risk of input and customer foreclosures in the broadcasting sector can also arise when there are agreements between economic

[194] For a description of the access price rules see Regulation 360/04/CON of 28.10.2004 of the Italian Communications Authority.
[195] See the European Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on 28.11.2007, available from http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, at paragraphs 29-30.

operators (e.g. advertisers, content providers) and the platform in the downstream market.

Considering that the production and the distribution of content on a broadcasting platform can be integrated or non-integrated (multi-sided)[196] we shall verify the different consequences of the obligation to grant access to content in both cases.

In contrast to horizontal agreements which may, by eliminating competition between the parties, or by increasing the scope of collusion, give rise to a significant impediment of effective competition, vertical agreements are less likely to produce negative economic effects. Indeed, vertical agreements might even have some positive impacts on consumer welfare. For example, it is generally accepted in economic theory that a vertically integrated platform might eliminate the double marginalisation problem and opportunistic behaviour. Other positive results might be lower transaction costs, increasing efficiencies in input choices and other static and dynamic efficiencies. Under exceptional circumstances, vertical platforms may give rise to two types of foreclosure concerns: input foreclosure and customer foreclosure.

Input foreclosure depends on the following factors:

d) the ability of the vertical firms to foreclose;
e) the incentives to foreclose; and
f) the overall impact on effective competition[197].

As recognised by the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, adopted on November 28, 2007, in order to be able to foreclose competitors, the platform must have a significant degree of market power in one of the markets concerned. Specifically, the Guidelines stress that the platform would only have the ability to

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[196] See Chapter 2, section 2.4 of this dissertation.

[197] See the European Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra* at footnote 195, paragraphs 31 et seqq and 60 et seqq.

foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of input for the downstream market in terms of price or quality.[198]

There may be an incentive for input foreclosure if it enables the platform to foreclose its competitors in the downstream market. This might occur if the integrated firm can raise its rival's costs by increasing input prices while the downstream entity of the firm still has access to the input at marginal costs, thus gaining a competitive advantage. Input foreclosure also arises if the merged firm simply stops supplying rivals of its downstream entity, completely denying access to the input.

Conversely, downstream foreclosure or customer foreclosure by vertically integrated firms occurs when the downstream platform exclusively purchases content from its upstream division.

However, customer foreclosure is generally seen as less harmful than input foreclosure. Due to vertical integration, a non-integrated upstream firm may have a smaller market, which could make it difficult for them to cover their fixed costs. But the non-integrated firms' pricing is not likely to change and the integrated firms' prices might even be lower due to efficiencies. Only if the non-integrated rivals are forced to exit the market will the merged firm be able to raise prices above competitive levels. But these effects are felt in the long term only and are thus subject to some speculation. Moreover, rivals have enough time to discover alternative ways to reach their customers.

On the other hand, input foreclosure leads to immediate price effects. The non-integrated firms face higher costs and thus have to raise their prices. If the supply of input is denied, non-integrated firms must find alternative sources that will probably be more expensive. If they cannot find a substitute for the input they might even exit the market, which

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[198] See the European Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *supra* at footnote 195, par. 36.

will increase the market power of the remaining firms and probably lead to price increases.
Therefore, input foreclosure is more likely to be harmful than customer foreclosure.
Having said this, the vertical integration of a content provider in a platform rarely causes input or customer foreclosure, unless it seeks to offer content exclusively to one single platform. But usually content providers want to offer their content to a number of platforms even in the case of premium content, which is usually sold to Pay TV platforms.
As pointed out by the European Commission[199], content rights are generally managed by collecting societies on behalf of publishers and/or authors. Collecting societies generally sign agreements with programme makers, allowing them to grant a licence to all content, including back catalogues, on standard, non-discriminatory terms. Therefore, all end users should enjoy full and non-discriminatory access to programmes (this is true first of all for movies and entertainments, including sports events).
With reference to customer foreclosure, the same is true for a broadcasting platform which does not have a dominant presence in the downstream TV market. Since upstream rivals will continue to have access to a sufficient customer base post-integration, alternatives exist in the downstream market for the upstream rivals of a merger. A platform will usually seek to maintain access to a broad range of entertainment products as it competes for a share of audience and advertising revenues[200].

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[199] See European Commission Case Decision COMP/M.4404 of 22.05.2007, *Universal/BMG Music Publishing*, on the licensing to TV and radio broadcasters of performance and sound recordings rights.
[200] See European Commission Case Decision COMP/M.5533 – *Bertelsmann/ KKR/JV* of 08.09.2009.

5.11. Conclusions.

Even though multi-sided broadcasting platforms have been around for a long time, they have not yet been expressly considered as a specific entity under the definition of the relevant market either by the European Commission, or, to our knowledge, by the Italian Antitrust Authority, which does not deviate from the descriptions of the relevant broadcasting markets made by the Commission. Until now Antitrust Authorities have preferred to analyze competition in the broadcasting sector with reference to the different markets in which the various economic operators involved in the platform carry out their activities.

When the commercial relationships between multi-sided platforms, content providers, service providers, network providers and advertisers are founded on vertical agreements, they may fall within Article 81 of the Treaty. Indeed even if these agreements do not imply a concentration of firms in the market, they are still vertical agreements and as such have effects on both the downstream and the upstream markets.

Agreements that are anti-competitive or have actual (or potential) anti-competitive effects are forbidden under art 81(1) of the Treaty, unless they have pro-competitive benefits that outweigh the anti-competitive effects under article 81(3). The balancing of anti-competitive and pro-competitive effects is evaluated within the framework of Article 81(3) of the Treaty and therefore the "structured rule of reason", set by Regulation 1/2003 of European Council, applies.

Abuse by a multi-sided platform of its dominant position falls within Article 82 of the Treaty. In any case the assessment of anti-competitive behaviour by dominant multi-sided platforms has to take account of their distinctive structure, which is different from that of an integrated platform. This means for example that in fixing the best access price to the platform the cost orientation criterion is not by itself sufficient. Other criteria have to be considered, such as the revenues from the other platform users, taking into consideration the positive externalities arising from interaction with the other parties in the platform and the fact that the platform charges higher fees to the party that derives the greatest advantage from a large number of members on the other side.

Furthermore, considering that sports rights are fundamental for increasing platform revenues, under the influence of ECJ jurisprudence[201] the Italian parliament has passed laws to improve competition in the sports rights distribution market by establishing a legal framework aimed at introducing collective bargaining for sports rights between the football teams and the broadcasting platforms. The previous system (and also the present one if we consider that the procedure under Article 82 against the Lega Calcio for abuse of its dominant position is still pending before the Italian Antitrust Authority) had clear repercussions on the competitive ability of different football teams. Indeed, the sale by individual teams of television rights was useful only for the most important football clubs, who were able to support very high transitional costs, while the minor clubs, who could not rely on the same resources, saw their competitive position progressively diminish.
Sport has a social role because it improves the health of citizens and plays a role in culture and recreation. It is subject to the competition rules of Articles 81 and 82 insofar it is an economic activity and also with reference to more wide-ranging rules (on doping for example) that can restrict competition.

[201] See European Commission Case Decision COMP/C.2-37398 – *UEFA Champions League* of 23.07.2003.

Chapter 6

Access to content by alternative multi-sided platforms.

6.1. Introduction.

Platforms that vertically integrate content limit the spread of content in the market, since emerging platforms are not able to obtain premium content, the most attractive for viewers, because the existing platforms have exclusive rights to it (by virtue of property or licence). *Ex ante* regulation and *ex post* intervention by antitrust authorities both seek to improve the production and distribution of content in an equitable, transparent, non-discriminatory and unbundled manner. One remedy for example is the so called "*must offer*" provision, by which platforms have to grant competitors access to content on request. In contrast, the "must carry" remedy is applied in favour of those content providers that are not network operators or are not integrated into any platform; it thus favours emerging multi-sided platforms for example.

6.2. The access to content problem.

The digital broadcasting sector is currently affected by the phenomenon of technological convergence. At the same time it is

increasingly characterized by a plurality of transmission techniques and the arrival of new channels through which audiovisual content can be provided to viewers. Audiovisual products flow between old and new platforms, via terrestrial networks (viewed on mobile or fixed terminals from the classic television to the mobile phone), via cable (connected to both televisions and personal computers) and via satellite.

Each different broadcasting platform has its unique structural characteristics, but the intangible goods that it carries, i.e. audiovisual content, are common to all platforms. However there is significant differentiation among the various platforms with reference to content distribution.

In this regard, we have already discussed the characteristics of Pay TV and FTA markets and seen that they are considered to be separate by the European Commission[202].

Here we simply wish to point out that in any case the common aim of Pay TV and FTA TV platforms is to maximize revenues[203], firstly those coming from subscriptions and the licence fee and secondly from the sale of specific services to content providers or advertisers.

These two distinct forms of income depend on an identical and shared element: the ability to attract an audience (i.e. viewers) and to draw their attention to the services offered. The more users each operator is able to capture, the greater the platform's scope for generating direct income in the first case and indirect in the second.

The most effective way for a platform to achieve this aim is to collect the best content. The better the content on offer (including so-called "*premium content*") the more the platform will be able to attract the attention of viewers, and the higher, in consequence, its revenues will

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[202] See Chapter 2, section 2.5., letter a) and Chapter 5, section 5.4 of this dissertation.

[203] On this point see investigation of the broadcasting sector IC23, Italian Antitrust Authority Resolution No. 13770 of 16.11.2004, published in Agcm Bull. no. 47/2004 on 06.12.2004.

be. Premium content is usually broadcast by thematic channels, i.e. those channels that dedicate most of their programming to a specific topic in order to cater for a certain type of audience. The market strategy followed by the various platforms is to try to obtain the best content, the most attractive among what is available. Platforms try to purchase exclusive rights to broadcast certain types of content, or to negotiate privileged rights thereto. Overall, then, it is not difficult to imagine the interrelations between different broadcasting platforms, which are all seeking to obtain the best content.

This situation shifts the focus away from the retail market for the distribution of content to end users towards the upstream wholesale market for the acquisition of content. For this reason, competitiveness among platforms starts in the wholesale market, where the implementation of digital technology (by all players) increases the quantity and variety of contenders[204].

Of course, the main focus of competition in the upstream market is valuable content such as movies, sporting events of particular significance and social events of great interest. Transformed into objects for which broadcasting rights can be acquired, they become the subject par excellence of dispute, or rather, of competition. If platforms succeed in capturing large amounts, perhaps taking advantage of their strong positions, they are likely to enjoy tangible results in the downstream market for distribution of content to viewers. The result is a clear dominance of the platform with the best content, and as a consequence a shrinking number of platforms and a consequently lower level of pluralism.

To maintain equilibrium among platforms, intervention by competition authorities may be required in order to assist the negotiations concerning access to content by minor platforms. The legislation could, for example, impose an obligation on the content providers to give

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[204] See DIFELICEANTONIO L. (2005) "Competizione tra piattaforme nel mercato televisivo digitale", *Merc. Conc. Reg.*, 3, pp. 551-556.

specific types of content to different broadcasting platforms, negotiated on an equitable and non-discriminatory basis[205].

More recently the demand for access to content on the part of new content distributors has risen sharply, since they aspire to build their own platforms and develop their own networks[206].

In Italy in particular, new entrants to the digital TV market include cable television and mobile-TV network providers. These are multi-sided platforms since they are not structured like vertically integrated operators. Basically, their role is that of carriers of content: they have no in-house programme production that they can develop on the basis of corporate links, but can only hope to negotiate more or less direct, reliable synergy agreements with content providers.

Vertical integration, by contrast, is precisely the tendency of broadcasting platforms to vertically integrate content providers. Since the best content is in the hands of the main vertically integrated

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[205] Consider in this regard Article 5 of Decree Law 9/2008, which grants the state broadcaster RAI the right to show highlights of sporting events in accordance with a specific daily schedule. See also ZENO-ZENCOVICH V. (2004) "I rapporti tra gestori di reti e fornitori di contenuti", *Dir. Inf. Inform.*, 3, pp. 421-431, who suggests "compulsory licenses" for audiovisual content, as used for example in the music sector where all radio stations can broadcast hit songs on payment of a fair fee.

[206] See CREA G. and GIANNACCARI A. (2005) "Il binomio banda larga e industria dei contenuti tra innovazione, diritto antitrust e regolazione", *Merc. Conc. Reg.*, 1, pp. 77-118, who argue that the availability of content, including premium content, is an important driver of platform development, and, ultimately of competition among operators. The risk is that with their greater economic strength the incumbents can acquire the content with exclusive rights, thus discouraging other players from investing in their own infrastructure and ultimately producing a closed (or even monopolistic) market. The authors maintain that access to content and access to network infrastructures are among the main bottlenecks concerning which intervention is necessary in order to open up the market for new and converging operators.

platforms, emerging media platforms are disadvantaged in terms of the acquisition of valuable content[207].

Indeed, established platforms are offering resistance to other carriers that can deliver content[208] by refusing to grant competitors access to

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[207] See MONTI M. (2004) *Access to content and the development of competition in the New Media market – the Commission approach*, speech given at the Workshop on Access to quality audiovisual contents and development of New Media (Brussels, 8.7.2004), available at http://ec.europa.eu/comm/competition/speeches/index_theme_8.html. Monti considers access to content to be the key to the development of policies designed to favour media competition, especially new media: "*one concern of competition authorities should be to ensure that media content can be provided over new networks and not just the traditional ones. [These new networks include not only] the new 3G mobile networks [third generation mobile telephone networks] but also broadband DSL and cable connection to the Internet*". The crucial question is to ensure the development and competitiveness of new media, by providing them with access to the most attractive content (such as sports, movies, etc.). The author makes a distinction between new media (such as third generation mobile phones or the internet) and new technologies, such as DVB-T which is a new technology for a traditional medium.

[208] See CREA G. and GIANNACCARI A., "Il binomio banda larga e industria dei contenuti tra innovazione, diritto antitrust e regolazione", *supra* at footnote 206, p. 104; who argue that horizontal and vertical integration lead to the creation or strengthening of dominant positions and this, together with the mechanisms of exclusivity, often gives rise to a loss of competition. *Inter-* and *infra-*platform competition may decrease, and the incumbents, thanks to their superior financial resources and (exclusive) access to premium content, can erect high barriers to market entry for newcomers. The risks of anticompetitive behaviour mainly have two causes: the leverage effect and the closing of markets. The leverage effect is based upon the power to influence related markets in which established platforms can determine the foreclosure of competitors. The vertically integrated operator could, in fact, make only its own content available on its communications network. Alternatively, it could discriminate between content, potentially degrading its quality. That is why the creation and the development of alternative platforms is crucial.

their own content and that of other content providers by means of exclusive rights agreements.

To bypass these barriers and to guarantee the entry of newcomers into the market (and, through them, new technologies, opening up the market to more players), the most recent legislation has introduced *ex ante* regulation aimed at the vertical disintegration of broadcasters using DBV-T technology[209], and this was confirmed by the Italian Communications Authority in Annex A to Regulation 181/2009 of April 7, 2009. This structural separation has not yet been introduced for satellite and cable technologies. An extension of the structural separation principle to them as well would probably increase the number of multi-sided platforms using those technologies.

Regardless of the transmission technique, digital technology enhances the capacity to disseminate audiovisual content, and is suitable for all types of broadcasting network. As such, it may contribute to pluralism in the market and increase effective competition, as long as access to content by the various operators is guaranteed[210].

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[209] See Article 5, paragraph 1, letter g.2) of the Consolidated, which stipulates that corporate separation is required when the network operator of a national television company is also a content provider or service provider associated with interactive or conditional access services. This does not apply to television stations that broadcast only via cable or satellite, or to content providers and network operators on the local level.

[210] See PRETA A., BERNI G. (2006) "Dual or triple play?", *Beltel*, 5, pp. 15-17. The authors argue that in the converging communications market, for the new digital networks to spread, they must be fleshed out. The crux, then, is not so much possession of the most advanced technology, but of the most attractive content. Ultimately, what emerges is that television – like telecommunications – is evolving towards a new paradigm, in which competition is likely to cross national borders, abandoning the traditional, closed, vertically integrated, distribution model based on the maintenance of a secure income, in favour of a more open and dynamic model made possible by the new digital environment.

6.3. "Must-offer" and "must-carry".

A study of the role and nature of *ex ante* measures prescribed in the laws of various states yields interesting examples of the recognition and protection of the right of access to content. These include "*must offer obligations",* which are popular in the USA and the UK, and are also present in European countries like Holland, Belgium, and Italy. Their purpose is to regulate the television platform market by providing a certain degree of legal support for requests for access[211].
The starting point for the must-offer obligation is the fact that by using their leverage over certain content providers, some network operators (again, vertically integrated ones in particular), try to prevent access to content by rival platforms by obtaining exclusive licences. In the face of such exclusive rights agreements, in most cases competing platforms can only aspire to second-window broadcasting rights to those programmes that have great appeal for viewers, which often are also covered by an exclusivity agreement. In response to this situation, during the nineties, the United States of America intervened to curb the excessive power of vertically integrated operators in the market for the purchase of content. First it was established that vertically integrated cable platforms could not hold exclusive rights to content. This was followed by the imposition on established broadcasters of the must-offer obligation in the negotiation of re-transmission rights to their content[212].

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[211] See ROUKENS J. (2005) "What are We Carrying Across the EU these days?, To have or not to have Must-carry rules", *IRIS Special European Audiovisual Observatory*, Strasbourg, pp. 7-19. The author argues that "a "*must-offer*" already explicitly exists in the UK, Ireland and Belgium (Flanders) for the PBS [*Public Broadcasting Service*] (p. 18, footnote 61).

[212] See DIFELICIANTONIO L., *Competizione tra piattaforme nel mercato televisivo digitale*, *supra* at footnote 204. The Program Access and Carriage Rule (see section 628 of the Cable Television Consumer Protection and Competition Act of 1992) prohibits unfair or discriminatory practices in the sale of television channels by programme makers who are vertically integrated within a

The must-offer obligations in the UK are even more stringent than those of the USA. The UK Communications Act of 2003 requires that content providers have to negotiate broadcasting rights for FTA re-transmission in good faith with all digital platforms that request them, without discrimination, and negotiate the re-transmission of their channels with FTA platforms[213]. The programmes are thus made available to the various operators of platforms that have an interest in showing them to their viewers.

The rationale for the must-offer obligations can be described as follows:

a) firstly, by requiring content providers to negotiate the distribution of some of their channels, and by prohibiting discriminatory practices, the must-offer obligation establishes the principles of fairness and transparency. In addition, the various broadcasting platforms gain access to the distribution of channels. The must-offer obligation is a significant new development for distribution platforms that want to compete in the television market;
b) the must-offer obligation is closely connected to the principle of net-neutrality, by which regulators seek to guarantee equal treatment to viewers regarding access to FTA channels. Platforms are neutral in terms of the audience, who are able to watch the same audiovisual content on a variety of platforms;

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platform. Vertically integrated platforms are also prohibited from applying an exclusive distribution of channels. In 1999 Congress passed the Satellite Home Viewer Improvement Act, which further strengthened the regulatory framework by introducing "must-offer", i.e. the duty for FTA terrestrial broadcasters to negotiate re-transmission rights in good faith with all platforms and prohibiting the sale of rights to only one platform (p. 558).

[213] See Sections 272-274 of the Communications Act of 2003. In the UK OFCOM is entrusted with the task of regulating the obligation to provide content that is attributable to "*a) every licensed public service channel [...] and c) every licensed television service added [...] to the list of must-carry service*" (section 272, c. 1). In this way, both public service channels and channels that enjoy the status of "must-carriers" are obliged to offer their content to others.

c) the imposition of *ex lege* constraints on the sale of certain content also helps to make certain channels considered of general interest accessible to the broadest number of viewers. It is no coincidence that in the UK, the suppliers who are most burdened by must-offer constraints are the broadcasters who are entrusted with the mission of public service.

Therefore, ensuring the dissemination of certain channels via all the different broadcasting platforms and facilitating agreements between the publishers and platform operators for their re-distribution not only strengthens the multi-sided platform system, but also effectively supports the widest possible circulation of content.

By its very nature, content is an essential tool in giving substance to the right of information, which is a fundamental right of the individual. Thus while the rights and obligations concerning access to content described in this section encourage competition among broadcasting platforms, they also protect the public interest in terms of the pluralism of information.

More generally, however, the must-offer obligations are often considered a reflection of the must-carry rules, which require networks to grant access to content providers[214].

Under the must-carry rules, content providers have access to the platform networks; on the other hand, this means that the platforms that grant such access can also request content from the content provider.

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[214] On the specific nature of the must-carry duty in the new regulatory framework, see Article 31, paragraph 1, of Directive 2002/22/EC of 07.03.2002, which states: "*Member States may impose reasonable must carry obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review*".

For this reason must-carry constraints should be encouraged by regulation. Content providers who have the right of access to networks thanks to the must-carry obligation should, in turn, be obliged to offer their content to all platforms that request it, in a way that allows such platforms to compete effectively with others and at the same time to achieve the widest possible dissemination of certain content.

6.4. The right of access to content: from the Consolidated onwards.

Recognition of the right of access to content is contained in Article 5, paragraph 1, letter f) of the Consolidated, which, in order to safeguard pluralism of information and competition, establishes the general principle for content providers of non-discriminatory practices when selling to the various distribution platforms. Article 5 also regulates, according to market conditions, exclusive clauses, copyright rules and, negotiation between the parties for the transfer of content rights to platforms.
This provision, which reproduces almost exactly the wording of Article 5, paragraph 1, of Law 112/2004, in itself represents an indisputable novelty in the Italian context. For the first time national legislation refers to a principle that looks like the generic must-offer obligation. It imposes on all content providers the obligation to transfer content rights to all distribution platforms that request them, in accordance with the principles of network neutrality – which is now the focus of

renewed regulation of digital communications[215] – and non-discrimination.

The new regulation therefore appears to be particularly useful in breaking down those barriers associated with vertical integration that are an obstacle to the development of a system with multiple operators (or platforms) engaging in real competition among themselves.

However, it could be argued that Article 5, paragraph 1, letter f) of the Consolidated does not introduce a real must-offer obligation since the requirement to grant equal conditions arises only in the context of the sale of content rights. Thus, if the parties do not agree a sale, there is no must-offer duty for the content provider to grant equal treatment to another platform. The failure of Article 5 to fully implement the must-offer principle lies in its respect for the freedom of negotiation; in practice the fulfilment of the principle depends on the good faith of the contracting parties[216].

Although the Consolidated does not introduce a real *must offer* duty, it does however pave the way for Law 9/2008 which represents an important step towards the break-up of integrated platforms.

Law 9/2008 introduces the collective sale of sports broadcasting rights, by which a single negotiator (the competition organizer) sets the rules of the assignment procedure and trades the sports broadcasting rights of all teams on a fair, equal and non-discriminatory base.

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[215] See PACE A. and MANETTI M. (2006) *Commentario. Rapporti civili. Art. 21*, Bologna. The authors argue that although Article 5.1.f of Law No. 112/2004 prohibits discrimination between platforms in terms of content distribution (the principle of net neutrality), content providers may refuse requests for its content from platforms that use a lower level of technology (p. 678).

[216] See PACE A. and MANETTI M., *Commentario. Rapporti civili. Art. 21, supra* at footnote 215, who argue that given the duopoly of Rai and Mediset, the main purpose of Article 5.1.f of Law No. 112/2004 is to safeguard free negotiation between the parties. While it is legitimate for a content provider to take account of the technological quality of the platform that requests the content, this should not be understood as allowing the content provider ample freedom to withhold the transfer of rights, otherwise the law would have no purpose.

This new regulation was enacted to protect those minor content providers who are not able to bear the high costs of negotiating with broadcasting platforms. Thus although the rationale for this new procedure introduced by law was not to force content providers or platforms (as the teams may be considered when they are entitled to broadcast their own programmes as network providers) to grant access to the broadcasting platforms who ask for them, the effect of the assignment procedure was to improve access on a non-discriminatory basis.

Consequently there is a "sort of" must-offer obligation on the sporting rights owners. This also means that the platform's right of access to content is based on the obligation of the sporting rights owner to grant access as if there was a general must-offer obligation.

Furthermore, the possibility of abuse of dominant position on the part of the integrated platforms has been reduced by the following two general restraints operating on the platforms to which rights are awarded: (i) the duty to grant images of the event, on request, to all other platforms to which rights are awarded; and (ii) the prohibition on any platform acquiring all the sporting packages on offer (Articles 4 and 9 of Law 9/2008).

The must-offer duty is definitely introduced by Article 14 of Law 9/2008, which expressly states that the Communications Authority, periodically and at least every two years, can identify the emerging platforms who should be admitted to the sporting rights assignment procedure. Audiovisual rights for emerging platforms are offered on a ***non-exclusive basis***. The organizer of the competition, in order to support the development and growth of emerging platforms, ***has to grant a licence*** directly to these emerging platforms broadcasting audiovisual products, including a significant proportion of the share for the first airing, taking account of their technological characteristics, at prices proportional to the actual user base of each platform.

Thus this provision is a significant step towards the break-up of vertically integrated platforms and the free movement of sports broadcasting rights. Emerging platforms, which do not integrate content and do not hold exclusive rights, can still broadcast premium content. They have a right of access to content that derives from the

must-offer duty of the content provider. This duty is a legislative remedy against the foreclosure of emerging platforms by existing vertically integrated platforms.

6.5. Ruling 665/09/CONS by Agcom and the emerging platforms.

With reference to the above-described centralised sale of sport media rights, article 14 of Law 9/2008 stipulates the following:
"*The audiovisual rights allocated to emerging platforms must be offered on a non-exclusive basis*" (paragraph 3);
"*In order to support the development and growth of emerging platforms, the organiser of the competition is required to grant audiovisual rights under licence directly to such platforms. Those rights must include a significant share of the rights pertaining to first-window and live broadcasts, adapted to the platforms' technological characteristics, at prices commensurate with the actual number of users of each platform who consume such audiovisual products*" (paragraph 4);
"*The sale of audiovisual rights to emerging platforms must take place on a platform-by-platform basis, in order to avoid the formation of dominant positions*" (paragraph 5) [our translation].
In line with the provisions of Law 9/2008, the organiser of the competition should offer each emerging platform identified by Agcom one or more specific packages. In order to promote *intra*-platform competition, these packages must be assigned on a non-exclusive basis so that the events in question can be transmitted by a more than one operator.
It should be stressed that although article 2 of the Law defines a "platform" as "*a system for disseminating audiovisual products via technologies and means of transmission and reception of images, both*

unencrypted and by conditional access, free and for payment, on electronic communication networks" [our translation], nothing is specified in terms of what exactly is meant by "emerging platform".
Therefore Agcom, as requested by article 14, comma 1 of Law 9/2008, on November 29 2009 issued Resolution 665/09/CONS which defined the concept of an emerging platform and identified the emerging platforms to which article 14 of the Law should be applied.
First of all Agcom makes reference to the definition of emerging markets given in the European Commission Recommendation of December 17, 2007[217] on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council. Agcom argues that although the parameters specified therein referred to markets and not platforms, they could nonetheless be of help in the identification of platforms. Specifically, Agcom referred to the following criteria: "(*a) the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory*

[217] See OJ L 344 of 28.12.2007, p. 65, which states that "*Newly emerging markets should not be subject to inappropriate obligations, even if there is a first mover advantage, in accordance with Directive 2002/21/EC. Newly emerging markets are considered to comprise products or services, where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three criteria. The purpose of not subjecting newly emerging markets to inappropriate obligations is to promote innovation as required by Article 8 of the Directive 2002/21/EC; at the same time, foreclosure of such markets by the leading undertaking should be prevented, as also indicated in the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services (1). Incremental upgrades to existing network infrastructure rarely lead to a new or emerging market. The lack of substitutability of a product has to be established from both demand and supply-side perspectives before it can be concluded that it is not part of an already existing market. The emergence of new retail services may give rise to a new derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products.*"

nature; (b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry; (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned".

The logical and juridical reasoning followed by Agcom entailed verification of whether the individual platforms could be considered "emerging" from both a technological and economic point of view, in order to determine the appropriacy of tightening the rules in their favour in the economic and technological fields.

Agcom thus establishes the following technological parameters for the assessment:

a) the date of definition of the technological standard (open or proprietary) on which the platform is based;

b) the degree of maturity and evolution of the technology/standard; and

c) the evolution of the networks, infrastructures and reception devices;

On the basis of these indicators, each platform is classified as "Emerging", "In transition" or "Consolidated" from the technological point of view.

In terms of economic criteria Agcom chooses the following:

d) the year of the first product launch;

e) the characteristics of the products on offer;

f) the market penetration of the platform; and

g) the income of each platform (from products provided for payment and from advertising);

These criteria are used to classify the platforms' phases of economic development as "Launch", "Maturity" or "Decline".

Agcom thus concluded that a platform can be considered emerging if it is technologically "Emerging" and economically in its "Launch" phase.

On the basis of this analysis, Agcom ruled that platforms transmitting by terrestrial digital, by satellite and by internet are not emerging[218]. In contrast, the following platforms are held to be emerging:

a) IPTV, i.e. TV via internet, since there is no open standard and each broadcaster uses a proprietary standard. In addition, the technology expected to be deployed is VDSL using direct access via fibre-optic cables (the so-called NGAN, Next Generation Access Network);
b) Wireless platforms for mobile networks, which include both GSM/GPRS/EDGE and UMTS/HSDPA technologies, allowing the distribution of multimedia and information content of various kinds, such as video clips, sport, features, cinema, reality shows, etc. Like IPTV, this platform is usually based not on centralised broadcasting but on unicast-type communication (PtoP). This allows users to view on-demand content;
c) Mobile terrestrial digital platforms, or DVB-H (Digital Video Broadcasting – Handheld), the standard for which was defined only recently by the DVB project. DVB-H is a broadcast technology, which means that the content can be received simultaneously by a very high number of mobile users. This is due to the use of the IP protocol, which allows simultaneous transmission on the same channel of video packets (the DVB stream) and data packets that can be used by client applications on the receiving device (IP Datacast). Currently DVB-H is the most widely used standard for mobile television in the EU. In some European countries (Italy, Finland, Austria,

[218] Web Television (Web TV) allows audio and video content to be viewed by downloading the content (which may be for payment or free) via an open IP network, without the support of specific software or decoders other than normal player programs used to view multimedia content that have been available for some time and are technologically consolidated (e.g. *Windows Media Player*, *Quick Time*, *Real Player*, *etc.*).

France, Switzerland and Spain) the commercial launch has already happened and in the remaining European countries testing is under way. Looking forward, a key development is likely to be the evolution of the DVB-SH standard (Digital Video Broadcasting – Satellite services to Handhelds) in the S band for delivering content to handheld terminals based on a hybrid satellite/terrestrial downlink. In Italy, mobile networks with DVB-H technology have been operating since mid 2006, and there are currently 2 multiplexes (H3G and Elettronica Industriale) in operation.

Generally speaking, we agree with the technological and economic parameters applied in the study conducted by Agcom. However, we believe that the considerations which prompted the legislature to intervene in favour of emerging platforms in the first place are not fully taken into account in Agcom's analysis.

Indeed, although Agcom assesses the development of the technology employed and the income generated by the platforms, it completely neglects the question of whether or not they already own rights to content, particularly premium content. Ownership of such content – access to which is fundamental to the success of emerging platforms – is the key factor in determining whether a platform becomes dominant in the wholesale content market. Thus, although the regulations introduced by article 14 of Law 9/2008 were intended to boost emerging platforms by guaranteeing them access to premium content – i.e. by introducing the "must offer principle" – Agcom's implementation of this Law shifts the focus away from intangible goods towards technological and other factors. It may be supposed that Agcom's approach in this case stems from the assumption a priori that companies employing such avant-garde technologies are unlikely to possess content, something which in our view should not be taken for granted.

6.6. Network neutrality.

The restructuring of the market in the light of DVB-T and network convergence are only some of the expressions of media pluralism. Another aspect that is closely connected to access to content is network neutrality. In the opinion of the European Commission the "*underlying principle of media pluralism should be technologically neutral, but it should be applied in a proportionate manner to reflect the emergent nature of new media. Pluralism rules should not seek to enshrine the legacy structure of the media, but rather permit new structures to emerge.*"[219]

Network neutrality means that content is broadcast in a regime that does not distinguish between content or digital services in terms of price. In addition, the price of content does not change from one provider to another or one user to another[220].

Network neutrality was originally conceived as a basic principle of the internet, but it is also valid for television. Unfortunately, instead of transmitting data and content without discriminating between providers, some network operators have recently demanded additional compensation for carrying valuable digital services and have also reserved the right to charge differently, based on the identity of the provider, even for the same type of data.

The companies deploying these component technologies are of various kinds – from start-ups to established concerns, and from local monopolies to international competitors – and they face disparate regulatory constraints. The purpose of a platform is to transport information content from providers to users and the differences between them affect the offering of content to consumers. But these platforms are based on systems that have radically different architectures which influence the price. It is part of the nature of the

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[219] See Media pluralism in the Member States on the European Union, *supra* at footnote 80.

[220] ECONOMIDES N. and TAG J. (2007) *Net neutrality on the Internet: A Two-sided market analysis*, Working Papers No. 27, New York University.

transport service offered by digital networks that in some cases the provider is fully aware of the type of content being transported (e.g., movies, point-to-point video, music, etc.), and in others the content is completely opaque.[221]

The strategic competition between the internet, telephony and cable networks has been described in the economic literature in the following terms: "*Networks promote choice, choice enhances quality and quality favors morality. Television is culturally erosive because its small range of offerings requires a broad, lowest-common-denominator appeal. Linking to millions of cultural sources, global networks provide a cornucopia of choices, like a Library of Congress at your fingertips*"[222].

Television is not neutral in terms of the prices it charges for access to content. The economic reasons for the absence of net neutrality in the television sector are the following:

1) in the broadcasting market, multi-sided pricing ensures that a platform charges a fee to the content provider "on other side" of the network which typically does not have any contractual relationship with the viewer.

2) platforms prioritize content. Indeed, in the broadcasting market competitiveness depends first and foremost on the quality of the content and also of course on the network's dimensions and efficiency. Content prioritization may enhance the value of premium content, which is broadcast first on Pay TV, potentially degrading the quality of the content left over for the FTA platforms. Under the current system of access to platforms, Pay TV typically shows thematic channels, while FTA platforms usually have generalist channels. By buying better

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[221] See MACKIE-MASON J., SHENKER S. and VARIAN H.R. (1995), "Service Architecture and Content Provision: The Network Provider as Editor", *Telecommunication Policy*. The authors found that differences in architecture affect the content provided to consumers, and that differences in the network provider's awareness could affect the selection of existing content that is made available to consumers.

[222] GILDER G. (1995) "Angst and Awe on the Internet", *Forbes ASAP* of 4.12.1995, p. 132.

content, the Pay TV platforms generate a difference in the affordability of content between paying and non-paying platforms, demonstrating the absence of net neutrality.
3) considering that there are very few platforms given the huge amount of investment needed to build the network, there is not enough space for all the content providers and the platform must necessarily make a selection. In so doing, it determines which content providers will get priority and which will be excluded. Thus, the determination of the content provider is in the hands of the platforms.
4) new firms with small capitalization (or those innovative firms that have not yet achieved significant penetration and revenues) will probably will not be the winners of the prioritization auction. This is likely to reduce innovation.
5) platforms can favour their own content and applications rather than those of independent producers. Finally, since access to content between platforms implies interconnection among different networks, any of these networks, and not just the ones providing final consumer access, can, in principle, ask content and application providers for a fee. This can result in multiple fees charged on a single transmission and lead to a significant reduction in broadcasting trade.[223]

6.7. Unbundling and exclusive rights to content.

Exclusive rights and the aggregation of audiovisual content constitute the biggest restraints on access to platforms. Vertically integrated network operators in particular aim to prevent competing platforms

[223] See ECONOMIDES N. and TAG J., *Net Neutrality, supra* at footnote 220.

from gaining access by purchasing exclusive rights to the content they distribute.

The European Commission's assessment of the dominant position of a platform is also conducted with reference to the licence agreements it signs. In the merger case decision COMP.M2876 of April 2, 2003 *News Corp/Telepiù*[224], for example, the Commission accepted Sky's undertaking not to broadcast its contents via cable and terrestrial DTH until December 31, 2011. In application of the so-called "*no single buyer rule*", Sky also undertook to reduce the duration of the exclusive rights it had already obtained, and committed itself to buying new content with exclusive rights not exceeding two years' duration for sports rights and three years' duration for movie rights. In addition, until December 31, 2011, Sky has to grant access to all its premium content not covered by exclusive rights to emerging platforms who broadcast via DTH and cable, at their request, on a transparent, equitable, non-discriminatory and unbundled basis. The newcomer is to purchase the premium content wholesale[225].

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[224] See European Commission Case Decision COMP/M.2876 – *NewsCorp/Telepiù* of 02.04.2003.

[225] An example of the wholesale purchase of such content is provided by the experience of BSkyB, the satellite platform operating in the United Kingdom. In July 2004 the OFT launched an investigation of the national Pay-TV market as a result of concerns that the BSkyB platform (which appeared to hold monopoly power in the supply of premium sports and movies on Pay TV) enjoyed a position of dominance. In 1995 the OFT accepted the measures proposed by the platform to the extent that they provided adequate solutions to the distortions in the market that the investigation had recorded. In addition to a commitment to provide access to its technical platform, BSkyB proposed measures to free up the market for the provision of high quality content (in which it occupied a position of dominance). These included the obligation to offer premium channels and programmes (as well as basic ones, to some extent) to operators of alternative platforms (e.g., cable and terrestrial operators), on a non-discriminatory basis, together with the obligation to publish the Rate card (i.e. a list with the reference costs for wholesale purchases). Additional market research conducted by the OFT in subsequent years (see *The Director General's*

With reference to unbundling, the platform is required to separate the content on offer to emerging competitors into a number of packages or single channels, at their request. In this way the wholesaling of content is supposed to be more competitive since it involves more participants and is supposed to lead to a decrease in the sale price.
Unbundling is a valid instrument to help develop an effective competition policy. Breaking down a content package means making access more flexible and adaptable to the needs of individual buyers, who can choose (freely and at their discretion) between different content and segmentation options. In general terms the greater the degree of unbundling, the greater the possibility for the emerging platform to broadcast the content in a re-aggregated and original package that differs from that of the platform they purchase it from. The originality of the re-aggregation may confer a distinct identity on the content, which is crucial to the question of how it is marketed to viewers[226].
Exclusive rights to content (based on either ownership or licence) are a legitimate consequence in terms of the general corollary of the freedom of economic initiative granted by Article 41 of the Italian Constitution,

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Review of BSkyB's Position in the Wholesale Pay-TV Market for 1996 and subsequent amendments [online], available from http://www.oft.gov.uk/shared_oft/reports/media/oft179.pdf) demonstrated the easing of restrictions in the Pay-TV market (thanks to the emergence of significant alternative television platforms), and the OFT consequently reviewed the measures relating to the wholesale supply of content. In 2001-02, the OFT removed the requirement to publish the wholesale Rate Card (which meant the full deployment of contractual freedom in establishing prices for the content on offer) and the requirement to include basic channels. On this last point, see DIFELICIANTONIO L., "Competizione tra piattaforme", *supra at* footnote 204, pp. 558-559.

[226] For a description of the characteristics of unbundling in the broadcasting sector see Italian Communications Authority Resolution 360/04/CONS, *Definizione della controversia e.Bismedia S.p.A. / Sky Italia S.r.l. avente ad oggetto "offerta wholesale premium"*, of 27.10.2004, Bull. 5 of Sept.-Oct. 2004.

since exclusive rights are useful for the exploitation of the economic value of intangible content. However, exclusive rights are still subject to the antitrust rules since they are related to economic activity that can distort competition[227]

By means of exclusive rights platforms safeguard their investments and programme makers are remunerated for the inventive skill and/or the content packaging they perform. There has to be a time limit on exclusive rights however, otherwise a dominant position would arise[228]. Thus the obligations to forego exclusive rights and provide access to unbundled content are remedies imposed by *ex ante* regulation in order to improve competitiveness. Examples include Article 14 of Law 9/2008 regarding the must-offer duty imposed on sporting event organizers with respect to emerging platforms, and the *ex post* decisions of the Italian Antitrust Authority (e.g. its interpretation of Article 6 of Law 9/2008). This entails balancing the private economic interests of the platform with the public interest in competitiveness and pluralism of information, which are all values protected by legislation.

As we have already mentioned, the European Union protects pluralism of information by means of the Charter of Fundamental Rights of the European Union (C 364), signed in Nice on December 7, 2000[229]. Article 6 of the Treaty on the functioning of the European Union, which came into force on December 1, 2009[230], also protects sport, considering it to be of social value, although it is subject to competition rules insofar it is also an economic activity. Therefore the social value of sport, together with its economic value in terms of broadcast rights (held under licence

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[227] See ECJ Judgment in Case 262/81 – *Coditel II* of 10.06.1982 [1982] *ECR*3381; European Commission Cases Decisions IV/31.743 – *Film purchases by German television stations* of 15.09.1989, OJ L 284 of 03.10.1989; and *IV/31.851 – Magill TV Guide/ITP, BBC and RTE* of 21.12.1988, OJ L 78 of 21.03.1989.

[228] See European Commission Working Staff Paper "The EU and sport: background and context accompanying document to the White Paper on sport", Brussels, 11.07.2007, SEC 2007 95.

[229] See chapter 4, section 4.3 of this dissertation.

[230] See the consolidated version in OJ C 115 of 09.05.2008.

or by virtue of ownership) are both protected by European legislation, which also seeks to strike the right balance between the two.

6.8. Conclusions.

The recent technological, economic and social developments in the field of communications and information, including the progress of market liberalization, the rise of digital and the growth of convergence, have led to changes in the legislative approach. We have gone from vertical regulation, which kept broadcasting separate from telecommunications, to horizontal regulation, which does not differentiate between industries, but between networks and content, or rather between the transmission layer and the content layer. This trend affects legislation since technological convergence leads to regulatory convergence.

We have seen that the main players in the digital broadcasting market are (and will continue to be) the network operators on one hand and content providers on the other. Their mutual relations will depend on the broadcasting to end-users of television programmes in abundant quantities and variety.

The nature of the relations between network operators and content providers is of great importance to regulators, who recognize that these are contractual relationships. Obviously, the contractual relationships between structurally integrated content providers and network operators are different from the relationships between content providers and network operators who remain independent. In the first case in fact the prohibition of discriminatory practices or differential treatment among operators does not make sense, but in the second case it becomes necessary.

Intervention by regulators has sought to reduce discrimination and unequal treatment on the part of network operators in their contractual

relationships with content providers, and to enable independent content providers to make legally based requests for the provision of network services: these measures are steps towards the idea of must-carry.
Taking this as a starting point, Italian legislators introduced some remedies, for example the idea that network operators should reserve part of their transmission capacity for broadcasting the programmes of independent content providers.
The basis of the relationship between network operators and independent content providers remains content negotiation, and it is on this basis that the regulator must intervene to promote competition and accordingly pluralism. The ability of broadcasting platforms to obtain programmes of such quality and in such quantities as to make their offerings attractive and diversified (and hence to win the approval of large audiences) is closely dependent on their right of access to content, and this has to be protected.
The initiatives of the European Commission have been stimulating and incisive in this regard, and the activities of the Italian Antitrust Authority and the Italian Communications Authority in regulating the communications sector have been equally effective.
It is however desirable that the legislature should indicate without delay the criteria concerning procedures for exercising the right of access in various fields, especially sports events.
There are widespread complaints about the limited amount of high-quality content on the market, although the number of channels is increasing. Therefore what is needed is a strategy of supporting the production of content, and then eliminating the bottlenecks arising from its limited availability (associated with and aggravated by the practice of purchasing exclusive broadcasting rights). Such a strategy entails the adoption of regulatory measures governing access and curbing inflexible proprietary rights, in order to achieve the desired system of broadcasting platforms.
Clearly, access cannot be confined to the context of industrial competition and the provision of services, but it should be subject to systematic regulation which safeguards both the economic side and pluralism of information. Therefore freedom of enterprise and freedom

of expression and information must be coordinated by comprehensive regulation. At present a complete description of the right of access is still lacking in the relevant regulatory framework. It is desirable therefore that this gap be filled as soon as possible. It is also to be hoped that this right, given its undoubted constitutional significance, can be incorporated in the near future in the Italian Constitution, possibly via a redrafting of Article 21 in accordance with the times.

Chapter 7

Conclusions.

Regarding communication the contribution of liberalism is important, since the competitive circulation of opinion in the "ideas market" promotes the search for truth by means of reason.
According to Milton[231] and Mill[232], the truth emerges from the free comparison of all ideas, including wrong ideas, that should not be censored. In their view, the truth cannot be subject to any restriction by the public power. The need to observe this principle is even stronger with reference to certain means of communication such as television[233].
This is because of the considerable potential of the medium itself and the interests involved in it. Broadcasting is governed by two constitutional principles, i.e. the free expression of thought and the freedom of private enterprise, both of which are linked to the need to find the best solution in the allocation of the limited radio spectrum.
More than any other means of communication, even more the press, broadcasting is more important to the social value of information and viewers' education[234]. However, although the latter is expressly

[231] See MILTON J. (1987) *Areopagitica. Discorso per la libertà di stampa*, translation and introduction by BREGLIA S., Laterza.
[232] See MILL J. S. (1981), *Saggio sulla libertà,* Giuffrè.
[233] On broadcasting as a form of electronic communication see ZACCARIA R., *Diritto dell'informazione e della comunicazione*, *supra* at footnote 82.
[234] On this subject see CHIOLA C. (1973) *L'informazione nella Costituzione*, CEDAM, p. 28 onwards, and CARETTI P., *Diritto pubblico dell'informazione e della comunicazione*, *supra* at footnote 94, p. 31 onwards; on the differences

mentioned by the Italian Constitution, the question of access to television platforms is not.

This study has sought to analyze the issues of major interest regarding access to broadcasting platforms under a competition policy approach with particular reference to the new economic theory of multi-sided markets, taking into account the main recent innovations in broadcasting legislation and the associated issues that have been tackled by the Antitrust Authorities.

We discussed the basic separation between Pay TV and FTA TV and we analyzed the architectures of these relevant markets in terms of the interrelations among the economic operators that are involved with the platforms.

From an economic point of view, for a broadcasting platform to be genuinely multi-sided, the content providers, service providers and network providers must not be integrated within the same platform under the same corporation, neither legally nor *de facto*, otherwise the platform becomes vertically or horizontally integrated. In its relations with content and network providers, the platform may sign agreements for renting the infrastructure, carriage of the broadcasting signal, content distribution, etcetera, but in any case the parties must not transfer any exclusive rights to the platform, which must retain its third-party status with reference to both content and network providers.

This contrasts with vertical integration: network providers provide the platform with a network over which a broadcasting signal can reach viewers, and content providers provide the platform with the content to be broadcast. In both cases they transfer control of the channel and the network together with editorial responsibility to the platform. In this way the integrated platform can foreclose the other competitors

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between the press and broadcasting see PACE A. (1992) *Problematica delle libertà costituzionali. Lezioni. Parte Speciale,* CEDAM, p. 440 onwards; see also ZENO-ZENCOVICH V. (2004) *La libertà d'espressione. Media, mercato, potere nella società dell'informazione*, Il Mulino, p. 42.

through network and content discrimination. The viewers, on their side, pay to watch the channels on that platform even though they may not be aware that there is no separation between the platform, the network operator and the content providers. Perhaps they would be more likely to realise this if the packaging, the brand and the name of the channel were no different from the name of the network operator.
We discussed the openness of this market in terms of the entry of newcomers, who are mainly private and do not integrate audiovisual content[235]. In this context we took into account the technical evolution associated with the switch-off of the analogical signal and the new regulations concerning authorizations and concessions, the powers of the competent Authorities, and the constitutional principles involved, with reference to the right of private economic initiative.
Analyzing all these aspects of the problem becomes even more difficult if we consider that the issue of 'access to platforms' is affected by the tangled web of relations between law and technology, and the latter is continuously evolving[236].
In the broadcasting sector there is an independent administrative authority, in addition to the antitrust authority, which serves to

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[235] ZENO-ZENCOVICH V. (2004) *La libertà d'espressione, supra* at footnote 234, p. 47, explains the reasons why private companies are third parties in the application of the assumptions of a public service.

[236] For example, CAMPIONE F. (1961) "Sulla disciplina giuridica della televisione italiana", *Giust. Civ*., III, p. 16, says that "*to discuss, even briefly, the technical aspects of broadcasting is essential to an appropriate technical and juridical approach to the issue*" [our translation]; see also DE SANCTIS V. M. (1959) "La televisione dinanzi alla Corte Costituzionale", *Rass. Parl*., 12, p. 302. See also NAZZARO A.C. (2006) "Natura giuridica del bene, proprietà pubblica e monopolio", in DI RAIMO R. and RICCIUTO V., *Impresa pubblica e intervento dello Stato nell'economia. Il contributo della giurisprudenza costituzionale*, Edizioni Scientifiche Italiane, p. 98 onwards, who argues that technological progress is the main parameter to be taken into account in television-related rulings by the Italian Constitutional Court.

guarantee respect for fundamental rights concerning television and the duties arising from public service.

The multi-sided markets theory adds new elements to the issue of public regulation of broadcasting with reference to the mission of public service, respect for the principles of competition and consumer protection. The issue of pluralism of information, which was the priority for the Italian Constitutional Court, now obliges jurists to find new parameters for addressing the need for pluralism in the broadcasting sector through a new technological media framework[237], and through new economic rules.

This is a hot topic from the point of view of political and institutional opportunities (think of the choices made by legislators on the antitrust limits and mergers to avoid dominant positions and conflicts of interest), and also with reference to the new technical and juridical aspects of broadcast financing. Jurists have to consider the implications of this new situation, and some ideas in this sense come from the theory of multi-sided markets. The commercial relationships among the economic operators of the broadcasting sector should be taken into account in their approach to this issue and a new regulatory framework should emerge. Specifically, this regulatory framework should be founded on the need for antitrust limits in the sector, just like any other sector subject to regulation and may also require a reform of the Italian Constitution.

Currently, the legislation governing the sector is based on article 21 of the Italian Constitution, which does not mention the right of access.

The question of access to a broadcasting platform in multi-sided markets is closely connected to the emergence of alternative new platforms, to whom at present the right to access (at least to sporting rights) is granted by law.

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[237] CHELI E. (2003) "Note in tema di pluralismo e servizio pubblico radiotelevisivo nella trasmissione del digitale terrestre", ALLEGRETTI U. et al., *Diritti, nuove tecnologie, trasformazioni sociali. Scritti in memoria di Paolo Barile*, CEDAM, p. 217 onwards.

A platform has to grant access to its own infrastructure and products, including the network and the content, to third parties only when it is vertically integrated, i.e. it has editorial responsibility and exclusive rights to those goods.
Thus it should be no surprise if the European Commission and the other national competition authorities, took into account multi-sided theory with reference to emerging platforms, whose right of access on a non-discriminatory basis must be assured.
Indeed, the integration by the platform of the surplus arising from the positive externalities of the content providers and the viewers in its pricing strategy cannot be considered anti-competitive behaviour, especially if the platform is not in a dominant position. As with any other business practice, subsidizing one's own products in order to catch new customers by taking advantage of the indirect externalities cannot be prohibited, since it is part of normal entrepreneurial freedom. However, it is also true that the broadcasting sector is highly concentrated, and for this reason it is easy to be in a situation where a platform is dominant and is thus subject to article 82 of the European Treaty. When such platforms do not respect their must-offer and must-carry obligations, for example when they apply discriminatory criteria or refuse to enter into commercial agreements with rivals, they become liable to sanctions. On this point it should be stressed that in the broadcasting sector it is not just abuse which is forbidden but the dominant position *per se*, since operators are bound by the principle of pluralism of information. Thus competition policy and regulation impose limits on the operators' market power. In Italy, these limits are expressed as a percentage of the value of the entire communications sector (the ICS), including television, print media, and internet publishing. It should be borne in mind that an increasing proportion of the ICS is now accounted for by viewer subscriptions and Video-On-Demand rather than by advertising, which was traditionally the main source of revenue in the sector.
Furthermore the relations among content providers, service providers, network providers and advertisers that are not integrated into the platform usually involve vertical agreements that come under Article 81 of the Treaty. If their objective is anti-competitive or if they have

actual (or potential) anti-competitive effects they are forbidden under art 81(1) of the Treaty, unless they also have benefits that outweigh the anti-competitive effects.

As we know, the European Commission intervenes in the markets by regulating mergers, acquisitions and the creation of cartels, and by obliging dominant broadcasting platforms to deal with their competitors. On many occasions, authorization entails the adoption of remedies of some kind. For example, authorities may force the platform to carry out functional or structural separation. The European Commission has also imposed the obligation to grant access to at least one other competitor in accordance with a transparent procedure. The moral suasion applied by Member States to this effect tends to be accepted with more favour by the obliged company, partly because they it is considered helpful for improving innovation.

Since the broadcasting sector is affected by the issue of pluralism of information, control over the relationships between the platform and the content providers is entrusted by *ex ante* regulation to the national authorities, which guard against the constitution of dominant positions by platforms. However, the authorities should bear in mind that given their know-how and the other resources at their disposal, vertically integrated platforms are also a force for innovation.

Finally, it is possible that a grouping together of all the relevant markets identified by the antitrust authorities in their case decisions relating to the broadcasting sector would better reflect the tendency to convergence among networks envisaged in recent European legislation. If this happens then it would make more sense to speak of *inter*-platform and *intra*-platform competition. In the first case the authorities should consider the risk of foreclosure from the market for the other competitors, that is for the platform together with all its users and not just the individual participants, as is the case at present. Only in the second case does it make sense to consider the horizontal effects between firms of the same sector (e.g. content providers).

In conclusion, we note that although the broadcasting market is expanding by means of new technology and viewers are more aware of the content, *ex ante* regulation is still necessary. The "re-introduction" of must-offer obligations means that some failure has occurred in the

broadcasting sector, as most antitrust cases would seem to demonstrate. The right of access guaranteed by law, however, can only encourage content production, with the consequent improvement of pluralism of information. A constitutional guarantee of the right of access could facilitate this opportunity.

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