TOO MUCH OR NOT ENOUGH? COMPETITION LAW AND TELEVISION BROADCASTING REGULATION IN THE UNITED KINGDOM

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Using the United Kingdom as a case study, this article examines the application of competition regulation to the contemporary television industry. The article begins with a brief overview of the nature of competition law. It then moves on to consider the growing importance attached to competition regulation within the UK television industry. Using a range of recent examples, the main part of the article analyses the application of competition regulation to UK television broadcasting in four main areas, namely: (1) mergers and acquisitions; (2) monopoly/market dominance; (3) cartels; and (4) state aid and public service broadcasting. The article highlights two key points: first, the difficulty of applying competition law principles to the television industry, most notably in relation to key concepts, such as 'market definition' and the 'abuse' of market dominance; and, second, the inherently political nature of competition law.

KEYWORDS

competition law, competition regulation, market impact assessment, marketization, media plurality, Ofcom

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Albeit to varying degrees and from different starting points, the last couple of decades or so have witnessed the marketization of television broadcasting throughout much of the world (Hesmondhalgh, 2007; Murdock, 2000). Alongside privatization (the sale of public assets to private investors), liberalization (opening previously monopoly or restricted markets to new entrants) and corporatization (urging or obliging publicly financed organizations to seek additional sources of income), one of the defining features of the 'the age of marketization' has been the 're-orienting of regulation' away from the defence of the public interest, however defined, to the promotion of 'fair' competition (Murdock and Wasko, 2007). The main object of this article is to examine in more detail the application of competition regulation to the contemporary television industry.

To this end, the regulation of television broadcasting in the United Kingdom (UK) is adopted as a case study, but, given the increased importance attached to competition regulation by television policy makers and regulators across the world, the issues raised here are relevant well beyond the UK. In fact, a number of recent studies have highlighted the growing emphasis placed on competition regulation in most, if not all, countries. For example, Jonathan Hardy identifies one of the key trends in communications policy within 'Western Media Systems' as a shift from 'sectoral (i.e. specific media policies, such as media ownership rules) to general competition regulation, and from broader public policy considerations towards limited regulatory intervention on economic and consumer welfare grounds' (2008: 141). In a similar vein, Petros Iosifidis describes an 'increased reliance on competition regulation' as one of the defining features of contemporary 'global media and communication policy' (2011: 81).

While there is little dispute over the existence of a general trend towards competition regulation within the global television industry, there is less consensus over the implications of this trend. Broadly speaking, on the one hand, media/communication studies researchers tend to be concerned about the possibility of too much competition regulation. From this perspective, a reliance on competition regulation for the television industry, and/or media industry more generally, is neither workable nor desirable, largely because of the special characteristics of media markets in economic terms and the wider public policy aims of media policy (see Baker, 2007; Doyle, 2002; Feintuck and Varney, 2006). By contrast, particularly against the backdrop of new developments in digital communications technology, the case has been made for a more extensive application of competition law to the television industry. For example, a number of leading media economists contend that, with the exception of 'taste and decency' content regulation, media-specific regulations, most notably ownership regulations, could be replaced by general competition law 'without undue loss of

regulatory impact' (Hope, 2007: 312; see also Compaine and Gomery, 2000). Perhaps unsurprisingly, this perspective has been echoed by major commercial media interests, such as BSkyB and News International in the UK, who have long argued for the lifting of media ownership restrictions and a greater role for competition law (BSkyB, 2002; News International, 2002). Furthermore, an underlying preference for competition regulation can also be found in the pronouncements of some policy makers and regulators, perhaps most notably within the European Commission, which openly declared its intention to 'roll back' sector-specific regulation and place a greater emphasis on general EU competition law as part of its landmark reform of European Union (EU) 'electronic communications services' regulation (European Commission, 2000).

This article attempts to advance a more nuanced position on the role of competition regulation within the contemporary television industry, namely that in some areas, most notably in relation to the pay-TV sector, there is a need for the vigorous application of competition law, but in others, such as the safeguarding of media plurality, as well as the role of public service broadcasters, competition regulation is of only limited value. To begin with, this article provides a brief overview of the nature of competition law. The second part of the article moves on to highlight the key political, economic and technological changes that have led to the growing importance of competition regulation within UK broadcasting. Using a number of recent examples, the main part of the article then analyses the application of competition regulation to the contemporary UK television industry. This section highlights two key points: first, the difficulty of applying key concepts from competition law, such as 'market definition' and the 'abuse' of market dominance to the television industry; and, second, the inherently political nature of competition law, particularly when applied to areas where wider public interest concerns have traditionally been regarded as paramount, such as media mergers and the role of public service broadcasting.

Competition Law

Competition law concerns intervention in the marketplace when there is some problem with the competitive process, or when there is what economists refer to as 'market failure' (Rodger and MacCulloch, 2009: 1). To be more precise, underpinned by the principles of neoclassical economic theory, competition law is usually (but not always exclusively) designed to promote a competitive marketplace characterized by a high number of buyers and sellers. From this perspective, the antithesis of a competitive market is a monopoly, a market controlled by a single supplier. In a monopoly, a single company or business has the market power to provide goods or services on a 'take it or leave it' basis and can therefore reduce

supply and force prices up so as to maximize its own profitability. Furthermore, a monopolist will also tend to be an inefficient provider, due to the lack of any competitive pressure to keep down costs and/or improve the product on offer.

On this basis, modern competition law was first introduced towards the end of the 19th century in the US (known as anti-trust law) with the passing of the Sherman Act of 1890. During the post-war period forms of competition law were also introduced throughout much of Western Europe, particularly following the establishment and growth of the European Community. By the early 2000s, a form of competition law had been established in more than 100 countries across the world (Papadopoulos, 2010: 15–17). Albeit subject to national variation, competition law has largely focused on four main areas:

- **Monopoly**: in practice, pure monopolies are rare so competition law tends to be focused on markets that, while not controlled by a single supplier, are dominated by companies or businesses with smaller, but still significant market shares, which may enable such companies or businesses to have power and influence over the market akin to that of a monopolist. Thus, under European Community law Article 82 prohibits the 'abuse' of a 'dominant position' by an 'undertaking' (i.e. a business or company). The significance of this aspect of competition law is that a monopoly, or near monopoly, position is not in itself illegal, but rather it is the attempt to act anti-competitively that is problematic. For example, during the 2000s, Microsoft was subject to anti-trust proceedings in the US, and fined €497m by the European Commission, not because its Windows operating system was by far the most popular in the PC market, but rather because it was found to be attempting to create barriers to competition by not providing vital interoperability information to its competitors in the wider computer software market (e.g. internet browsing software) (European Commission, 2007a).
- **Cartels**: 'Cartel' is the term used to describe forms of cooperation between firms who conspire, or agree to act together, so as to reduce competition. In effect, therefore, cartels carry the same threat to a competitive market as a monopoly. As a result, under European Community law Article 81(1) prohibits 'decisions of associations and concerted practices that may affect trade between Member States and which have as their object the prevention, restriction or distortion of competition'. Major financial penalties are imposed on firms found to be involved in cartels, but such agreements are often difficult to prove, as almost by definition firms involved in these practices are unlikely to keep records of their illegal activities!
- **Mergers**: Here, competition law is principally concerned with the possibility that two or more companies may achieve a position of monopoly, or dominance, in

a market by merging their companies. EU competition law is therefore designed to prevent mergers that 'would significantly impede effective competition in the common market or in a substantial part of it' (European Council, 2004). Typically, horizontal mergers, between two parties at the same level of the market are the greatest concern for competition law. However, the competitive consequences of vertical mergers between parties at different stages of the production process may also raise concerns, particularly if the newly merged company could act to restrict competition at any level of the market.

- **State aid**: This area of competition law is exclusively related to the EU. The underlying concern here is to prevent distortion of the market for a product or service by Member States providing unfair assistance to favoured companies (e.g. national airlines). Under EU law, Article 87(1) prohibits state aid that 'distorts or threatens to distort' trade between Member States, including financial investment, exemption from taxation or loan guarantees. At the same time, however, EU law also allows for 'exemptions' to state aid rules when such measures are seen as in the wider interests of the European Community. At least partly as a result, the application of state aid rules is a particularly controversial aspect of EU law, with the European Commission and/or commercial interests often seeking to challenge the activities of Member States.

The main part of this article considers how competition law has been applied to UK television broadcasting in each of these different areas. Before examining the case of UK television, however, it is worth emphasizing the extent to which the establishment and application of any system of competition law is as much about political objectives as economic theory. In fact, at the very heart of competition law is a fundamental debate over the role of the state, sometimes referred to as the free market/government intervention dichotomy (Helm, 1999). In relation to competition law, this debate is generally characterized as one between two rival groups of economists – the Harvard and Chicago schools (Rodger and MacCulloch, 2009: 22). On the one hand, the Harvard school tends to focus on the role of market structure as the principal cause of 'market failure'. From this perspective, government intervention can be justified in order to tackle concentrations of market power and may underpin decisions to prevent mergers (horizontal or vertical), as well as sector-specific measures to ensure reduced barriers to entry. On the other hand, the Chicago school contends that, in most circumstances, the market remains the most efficient means to allocate resources and that there is only limited scope for government intervention, most notably to prevent anti-competitive behaviour by dominant companies. Generally speaking, over the last couple of decades the approach of the Chicago school has been in sync with the generally neoliberal

thrust of US and European politics. As a result, there has been a discernible shift away from structural (ex ante) competition regulation and toward less interventionist behavioural (ex post) competition regulation. While, in reality, a combination of both schools of thought tends to shape the application of competition law, a preference for the non-interventionist/behavioural approach favoured by the Chicago school is certainly evident in the case of the UK television industry.

UK Television Broadcasting and the Rise of Competition Regulation

Over the last couple of decades, competition regulation has become an increasingly prominent feature of the UK television industry. This point is perhaps best illustrated by briefly surveying some recent changes to the institutional landscape of UK television regulation. First, established in 2003 (replacing five separate broadcasting and telecommunications regulators), the UK's new single communication regulator, Ofcom, was explicitly introduced to 're-base broadcasting regulation upon modern competition [law] principles' (DCMS and DTI, 2000, para. 8.9; Smith, 2006). While Ofcom's statutory duties require it to further the interests of both 'consumers' and 'citizens', in practice, it has tended to prioritize the former set of interests, particularly during its (first) review of public service broadcasting (Lunt and Livingstone, 2012: 39–40).

Second, the early 2000s also witnessed the reform of the governance of the BBC, with the replacement of the Board of Governors by the BBC Trust, which is more independent from BBC management. Under the new structure, the BBC Executive Board was made accountable to the Trust for the delivery of BBC services via individual Service Licences and a 'public value test' for new services. Furthermore, arguably the most significant feature of the reforms was the parallel introduction of a 'market impact assessment' to be carried out by Ofcom for any proposed new BBC service (Smith, 2008). Since these changes, a number of the BBC's plans for new services have been subject to the combined scrutiny of the Trust and Ofcom, including: BBC Local, a local broadband news and information service designed to supplement existing BBC Local services; and, the BBC i-player, an on-demand 'catch-up' TV service (Ofcom, 2006a, 2008; BBC Trust, 2007, 2009). These cases are discussed more below but, in general, it is difficult to disagree with the conclusion of one critic, who described the changes to the governance of the BBC as amounting to the 'disciplining of public service broadcasting' and treating the BBC, not as an autonomous proponent of public service values, but rather as an institution that, 'is part of an increasingly competitive, marketized environment and needs regulating according to that logic' (Freedman, 2008: 147).

Third, over the last decade or so, the UK's general competition authorities – the Office of Fair Trading (OFT) and the Competition Commission – have investigated

and acted as de facto decision makers in a host of major merger and acquisition cases, including: the merger of the two leading terrestrial commercial broadcasters (Carlton and Granada) to form ITV plc (Competition Commission, 2003); the merger of the two largest cable broadcasters (NTL and Telewest), and their subsequent acquisition of the mobile telephony service Virgin Media, to form Virgin Media (OFT, 2005, 2006); the attempted merger of the leading pay-TV broadcaster, BSkyB, with the most valuable Premier League football club, Manchester United plc (MMC, 1999); and the acquisition of 17.9 per cent of ITV by BSkyB (Competition Commission, 2007). Over the same period, the OFT and the Competition Commission have also each conducted separate investigations into BSkyB's position in the UK pay-TV market (Competition Commission, 2012; OFT, 2002a, 2002b). And finally, two major joint ventures proposed by UK broadcasters have also been subject to rulings from either the Competition Commission or the OFT, namely Project Kangaroo, a plan from the BBC, ITV and Channel 4 to establish a 'one-stop shop' for online television, and Project Canvas, a proposal from the BBC, ITV, Channel 4 and Channel 5, as well as British Telecom, Talk Talk and Arqiva, to develop a common interface for Internet Protocol Television (IPTV) in the UK (Competition Commission, 2009; OFT, 2010).

The final change to have shaped the institutional landscape of UK television regulation has been the growing influence of EU-level institutions, including the Competition Directorate of the European Commission. To some extent at least, the single market agenda advanced by the European Community (and then EU) has meant that EU television policy has almost inevitably been constituted predominantly, if not exclusively, in terms of competition regulation. For example, the first major piece of European Community-level television regulation, in 1989, the Television Without Frontiers Directive (TVWF), was based on the notion of broadcasting as an economic activity and was chiefly designed to facilitate the establishment of single market in European Community television broadcasting through the 'harmonization' of key areas of regulation across all Member States. Since then, the Competition Directorate has been responsible, or at least influential, in a number of important decisions related specifically to the UK television industry, including changes to the arrangements for the sale of television rights to English Premier League football (Smith, 2010); plans for new BBC services, such the BBC Digital Curriculum (Michalis, 2012); and the assessment of competition issues raised by the proposed merger between News Corporation and BSkyB (European Commission, 2012a).

The institutional landscape sketched out above is largely the product of a combination of ideological and technological changes. First, the last couple of decades or so have witnessed a general shift in political thinking toward free market and neoliberal principles. Initiated by the Conservative governments of the 1980s

and continued, in at least some ways, by New Labour during the 2000s, this shift has resulted in the application of market forces to areas of public policy traditionally (at least during the post-war period) not subject to market logic, including the provision of public utilities, public transport, health care and education. In this sense, the marketization of British broadcasting can be seen as part of much wider process. In terms of broadcasting, the paradigm shift occurred during the mid 1980s with the publication of the Peacock report, which, for the first time, offered a market (rather than public service) based analysis of British broadcasting (Collins, 2009). While many of the policy proposals put forward by Peacock were never implemented, the report set a neoliberal policy agenda that was then, albeit mixed with a degree of political pragmatism, advanced by successive governments (Goodwin, 1998; Kuhn, 2007). In fact, such was the change in thinking on broadcasting initiated by the Peacock report, that some of the most ardent supporters of public service broadcasting began to employ key economic concepts, such as public goods, merit goods and network externalities, to justify the existence of the BBC (Graham and Davies, 1997).

The view of broadcasting as an economic product has been given credence by technological changes within the television industry. Most significantly, the last couple of decades have witnessed the development of a whole host of new broadcast delivery technologies, such as satellite and digital television, as well as more recently the internet. Partly as a result, a defining feature of the contemporary television industry is the existence of a whole host of potential 'bottlenecks' or 'gateways', including conditional access services for pay-TV and electronic programme guide services. To reach viewers, channel owners require access to the 'gateway' services controlled by the leading delivery platform owners, such as BSkyB (Sky Digital) or Virgin Media (cable network). This has increased the salience of competition regulation to the television industry. For example, the introduction of digital television during the late 1990s was accompanied by regulatory initiatives, at both the EU and UK level, designed to remove the possibility of any abuse of control of 'gateway' technologies by delivery platforms (i.e. sector-specific ex ante regulation) (Smith, 2007). Currently, Ofcom's *Provision of Technical Platform Services* guidelines aim to ensure that channel owners are offered access to Sky's digital satellite platform on 'fair, reasonable and non-discriminatory terms' (Ofcom, 2006b). Just as significantly, delivery platform owners may also seek access to premium channels (e.g. sports) to ensure the popularity of their platform. However, if the owner of the rights to premium content also owns a delivery platform (i.e. BSkyB), such content may not be made available to rival delivery platforms, or may only be made available on less than favourable terms. From around the mid 1990s, this issue has been at the heart of repeated disputes between BSkyB and rival broadcasters (see below).

The Application of Competition Law to UK Television Broadcasting

Mergers and Acquisitions

Under competition law, the assessment of whether a proposed merger or acquisition should be allowed to proceed depends largely on decisions over the market(s) affected, commonly referred to as the relevant market(s). This is determined by identifying all goods and services which are close substitutes to those provided by the firms involved in a merger. The firms that are in competition with one another can then be identified and an assessment made as to whether the merger is, under the terms of the 2002 Enterprise Act, likely to lead to a 'substantial lessening of competition'. In reality, however, the identification of the relevant market can be far from straightforward and the OFT and/or the Competition Commission have considered a range of different markets in cases related to the UK television industry. This is important because a merger within a narrowly defined market is more likely to be seen to raise competition problems. For example, in 2003, the Competition Commission's investigation into the proposed merger of Carlton and Granada concluded that the 'relevant economic market' was 'the sale of television advertising airtime' and that the proposed merger would have 'an adverse affect on future competition' within this market (Competition Commission, 2003: 4–5). On this basis, the Competition Commission recommended that the merger only be allowed to proceed with certain safeguards in place (i.e. behavioural remedies) to prevent any abuse of the new firm's market power, preferably a Contract Rights Renewal (CRR) scheme, which would allow buyers of advertising airtime to 'fall back' to the terms of their existing contract in future negotiations (Competition Commission, 2003: 4–5). By contrast, if the relevant market is defined more broadly, intervention to prevent (or impose conditions) on a proposed merger is much less likely. For example, in the case of the proposed merger between NTL and Telewest, the OFT decided against considering cable television as a distinct (narrow) market and, instead, adopted pay-TV in general as the relevant market (OFT, 2005: 2, 7–8). Given BSkyB's leading position in the pay-TV market, the OFT concluded that the merger was unlikely to result in a substantial reduction of competition and should be allowed to proceed.

In some cases, the application of competition law to mergers involving UK broadcasters may well help to protect media pluralism, which, in brief, can be defined as encompassing both diversity of ownership and diversity of output (Doyle, 2002). For example, BSkyB's purchase of a 17.9 per cent stake in ITV was effectively vetoed by the Competition Commission, which ruled that, despite the fact that BSkyB's purchase did not breach the UK's so-called 20/20 rule on cross-media ownership,[1] it would enable BSkyB to 'influence ITV strategy so as to substantially lessen competition' in the UK television market (Competition Commission, 2007: 6). However, this should not obscure the fact that the pursuit of

competition and the promotion of media plurality are distinct policy objectives. The regulatory response to News Corporation's attempt to purchase the 60.9 per cent share of BSkyB that it did not already own highlighted this exact point. In 2010, the European Commission's Competition Directorate published its assessment of the competition issues raised by News Corporation's bid (European Commission, 2010a). The investigation considered a whole host of relevant markets related to the television industry, including: the licensing and acquisition of broadcasting rights; the wholesale supply of TV channels; the retail supply of audiovisual content to end users; and the provision of pay-TV technical services (European Commission, 2010a: 11). In each market, the European Commission claimed that no major competition concerns would be raised by the merger and, on this basis, concluded that the merger 'would not significantly impede effective competition in the European Economic Area, or any significant part of it' (European Commission, 2010b). By contrast, at around the same time in the UK, under the terms of the 'media plurality' test hastily inserted into the 2003 Communications Act despite initial government opposition (Freedman, 2008: 199), Ofcom undertook an analysis of the bid's impact on the wider 'public interest'. Initially, Ofcom advised the Department of Culture Media and Sport (DCMS) that the merger was likely to 'operate against the public interest', largely as a result of reduced plurality in the media's provision of news and current affairs (Ofcom, 2010a: 15). It was only after negotiations between the DCMS and News Corporation led to the agreement of measures to guarantee the independence of BSkyB's 24-hour news channel that Ofcom conceded that its 'public interest' concerns had been met (Ofcom, 2011). In all likelihood, if News Corporation had not been engulfed by the parallel events of the 'phone hacking scandal', the merger would have been allowed to proceed (Lance Keeble and Mair, 2012). In this sense, it could well be argued that, in addition to highlighting how competition law does not necessarily address concerns about media plurality, the News Corporation/BSkyB case also demonstrated the limitations of the UK's existing legal safeguards for preserving media pluralism.

Given the much heralded trend toward media convergence, a possible means to reconcile the difference between the pursuit of market competition and media plurality could be to adopt a definition of the media market as a whole, including both traditional and new media. In reality, however, there a number of major difficulties with this approach. First, reporting on its recent public consultation on *Measuring Media Plurality*, Ofcom stressed the difficulty of measuring market share across different media platforms and concluded that 'there is no single accepted measure for plurality' (Ofcom, 2012: 2). Second, Ofcom (2012: 2) also pointed out that 'no consensus exists' over the level at which any limit on market share (for news) should be set. Within general competition law, the threshold of market share

above which concerns are raised in relation to market dominance is typically within the range of 40–60 per cent (Hope, 2007: 317). In all likelihood, advocates of media pluralism would (rightly) be concerned about a single company exercising control over a much smaller share of the media market. With these two difficulties in mind, Ofcom recommended that, rather than a setting an absolute limit on market share, periodic (every 4–5 years) reviews of media plurality should be undertaken, using a range of criteria that assess media use, namely consumption, reach and impact (Ofcom, 2012: 21–2). This may well be a sensible approach, but it should not divert attention from the fact that any decision over the acceptable level of media plurality is ultimately a political one about the balance between the free market and government intervention, rather than an economic or technical one. Put another way, to safeguard media pluralism, rather than just market competition, there remains a need for a sector-specific approach that goes beyond general competition law, and the scale and scope of any safeguards to protect plurality should be the subject of public debate in much the same way as any other area of public policy, such as health or education – a point that is particularly salient given the extent of News Corporation's 'insider access' to the DCMS during the consideration of the News Corporation/BSkyB merger (Gaber, 2012: 638).

Monopoly and Market Dominance

Over the last decade or so, BSkyB's position in the UK pay-TV industry has been subject to near constant investigation by competition regulators. Two major investigations have been undertaken by the OFT, as well as a lengthy review of the pay-TV market by Ofcom. Broadly speaking, these investigations have examined, first, whether BSkyB can be said to have a dominant position in the 'relevant market' and, second, whether there is evidence that BSkyB has abused a dominant position so as to lessen competition in the market(s). Given the phenomenal commercial success of BSkyB since around the mid 1990s, on the issue of market dominance there has been little to dispute. The OFT's (1996) review of the wholesale pay-TV market and its (2002) Competition Act investigation both pointed out the dominant position of BSkyB within the UK pay-TV market. In particular, the OFT's investigations highlighted the significance of BSkyB's dominant position in the market for the wholesale supply of certain premium sports and film channels, which, in turn acted as a significant 'barriers to entry' for any potential competitors (OFT, 2002a: 5).

The issue of whether BSkyB has abused its dominant position within the UK pay-TV market has proved much more controversial. The OFT's investigations into the wholesale pay-TV market considered a number of complaints from cable broadcasters over their treatment by BSkyB. Perhaps most seriously, the cable broadcasters alleged that BSkyB exercised a 'margin squeeze' on the distribution

of its premium channels (OFT, 2002a: 2). Following its 1996 review, the OFT concluded that BSkyB had not acted anti-competitively and agreed some 'informal undertakings' with the broadcaster regarding its future relationship with cable operators (OFT, 1996: 17). By 2002, the OFT's position was less clear cut. While the regulator concluded that there were 'insufficient grounds for finding that BSkyB had abused a dominant position' (OFT, 2002a: 10), the OFT's Director General, John Vickers, described BSkyB's conduct as 'around the borderline of anti-competitive behaviour' (OFT, 2002b). A few years later, Ofcom reached a less generous conclusion. Following an exhaustive (2007–10) review of the UK pay-TV market, Ofcom concluded that BSkyB had 'market power in the wholesale provision of premium channels' and 'exploits this market power by restricting the distribution of its premium channels to rival pay-TV providers' (Ofcom, 2010b). To remedy the situation, Ofcom announced the establishment of a 'wholesale-must-offer' system, which compelled BSkyB to offer its premium sports channels (Sky Sports 1 and Sky Sports 2) to other outlets on a wholesale basis at prices regulated by Ofcom (2010b). However, around two years later, in response to a legal challenge against the decision from BSkyB, the Competition Appeals Tribunal (CAT) declared Ofcom's 'core competition concern' to be 'unfounded' (CAT, 2012: 15). More specifically, the CAT shared Ofcom's assessment that BSkyB held a dominant position within the UK pay-TV market, but not the regulator's view that there was enough (or any) evidence to show that BSkyB had abused this dominant position (CAT, 2012: 15–18).

These examples highlight a fundamental problem with the application of (ex post) competition law, namely the difficulty of establishing abuse of a dominant position. Moreover, a related difficulty is the need for lengthy and complex investigations, by which time the market under investigation may well have evolved beyond recognition. For instance, the conclusions of the Competition Commission's recent investigation into the supply and acquisition of UK pay-TV movie rights were almost completely reversed during the period of its investigation (Competition Commission, 2012). Even worse, a regulatory response may prove too late for the alleged victims of anti-competitive behaviour. Taken together, these problems suggest the need for the extension of the existing (ex ante) regulation of key bottlenecks within the television industry to also include, at the very least, the wholesale distribution of premium channels.

Cartels

The application of competition law to UK broadcasting in this area has focused mostly on the collective selling of the rights to English Premier League football. This issue was first raised by the OFT during the late 1990s and culminated in a high-profile case at the Restrictive Practices Court (RPC) between the OFT and the Premier League (Smith,

2010). The OFT argued that by selling rights collectively and exclusively to the highest bidder the Premier League was acting as a cartel, inflating prices and the restricting supply. In response, the Premier League claimed that chaos would ensue if individual clubs were allowed to sell the rights to their own matches. BSkyB, who owned the live rights, also defended the collective selling of broadcast rights on the grounds that the practice was not intrinsically anti-competitive as long as rights were made available on a regular basis and sold in a fair and open manner. In the event, the RPC ruled in favour of the Premier League (and BSkyB). In particular, the RPC noted that the distribution of funds between the different teams within the league could be facilitated much more easily through the collective selling of television rights.

Throughout much of the next decade, the arguments for and against the collective selling of Premier League football television rights were repeated, but this time in response to an investigation into the selling of Premier League rights launched by the Competition Directorate of the European Commission. Like the OFT, the European Commission claimed that the collective selling of Premier League rights restricted the number of matches broadcast live, limited the rights available for new media technologies, such as mobile phones and, most importantly, meant that only big media groups could afford to purchase the rights. However, the European Commission also acknowledged that the collective selling of rights offered some advantages, such as the potential for the redistribution of television revenue within sport. Consequently, the European Commission's focus was on how to best negate the possible anti-competitive effects of the collective selling of Premier League rights (European Commission, 2002). After much wrangling between the European Commission and the Premier League, it was finally agreed that the rights for the next three seasons (2007–10) would be sold in 'six balanced packages with no one bidder being able to buy all six packages' (European Commission, 2005). As a result, BSkyB's monopoly hold over live Premier League football was finally ended when the Irish-based pay-TV broadcaster Setanta purchased two of the packages of rights, with BSkyB purchasing the other four.

In these cases the application of competition law to the selling of television sports rights was tempered by an appreciation of more general public interest concerns. However, the European Commission's attempt to tackle the competition problems linked to the collective selling of rights has been only a partial success. While BSkyB's monopoly over live Premier League rights was successfully curtailed, the potentially positive impact of this development on competition within the UK pay-TV market has, at least to date, been largely negated by the failure to tackle BSkyB's dominant position in the wholesale supply of premium content channels (see above). Consequently, there has been little discernible benefit for UK viewers from the changed arrangements for the selling of Premier League rights, who now have to take out two pay-TV subscriptions, rather than one, to follow live Premier League football.

State Aid and Public Service Broadcasting
As described above, competition law related to state aid is a particular feature of EU law. However, the last few years have witnessed the adoption of a state aid type approach to the assessment of any plans for major new services by UK public service broadcasters at the national level too. Following the last BBC Charter review, this has largely been in the shape of Ofcom's market impact assessment of new services planned by the BBC. Although, in a similar vein, the Competition Commission has also investigated the plans of the UK's other public service broadcasters, ITV and Channel 4, when proposed as joint ventures together with the BBC (i.e. a possible cartel). More specifically, the market impact assessment carried out by Ofcom is intended to identify both the potential positive (creation) and negative (substitution) impacts of BBC plans on other services in the market (Ofcom, 2007: 2). In reality, however, as Ofcom has itself pointed out, the main focus of a market impact assessment is to consider the costs of any proposals, whereas it is the responsibility of the BBC Trust to highlight the main benefits of any proposal (Ofcom, 2006a: 18–19). Furthermore, while the final decision over whether the benefits of any proposal are likely to outweigh the costs rests with the BBC Trust, at least in the current political climate, it is difficult to envisage circumstances in which a negative market impact assessment would not be headed by the Trust.

As a result, Ofcom and/or the UK competition authorities have effectively been given the power to veto BBC plans for major new services. For example, in 2008, Ofcom was highly critical of the BBC's proposal for a new BBC Local Video service. Ofcom noted that local newspaper groups had expressed 'grave concern' about the BBC's plan on the grounds that it would 'undermine the commercial viability of their own online offerings' (Ofcom, 2008: 12). On this basis, Ofcom concluded that BBC Local would have 'a significant negative market impact on commercial providers' (2008: 1). This verdict was then reiterated by the BBC Trust as part of its decision to block the proposal (2009: 5). The BBC's plans for new on-demand services received a more positive response from Ofcom, but even in this case some significant amendments were recommended to protect the interests of commercial providers. Most notably, it was suggested (and later agreed by the BBC Trust) that the proposal to offer 'series staking' be watered down so as not to endanger the DVD sales market (BBC Trust, 2007; Ofcom, 2006a: 5). And finally, in 2009, the Competition Commission blocked a joint venture between the BBC, ITV and Channel 4 to offer a 'one-stop shop' for a video on-demand service – Project Kangaroo – on the grounds that it would lead to a 'substantial lessening of competition in the supply of UK VOD at the wholesale and the retail levels' (Competition Commission, 2009: 7).

There are at least two significant issues raised by the application of competition law to public service broadcasters in these cases. First, on a practical level,

supporting the findings of (Michalis, 2012), it should be pointed out that the negative impacts that have been identified in these cases have proved, at best, highly questionable. For example, in the case of BBC Local, the abandonment of the BBC plans has not, to date at least, been greeted by a significant expansion of the online video services offered by local newspapers. On the contrary, for the most part, the trend within the local newspaper industry has been toward cutbacks and job losses, rather than investment in new services, perhaps most notably in the case of one of the biggest local newspaper owners, Johnston Press, which, in 2012 reduced its workforce by almost a quarter (Sweney, 2013). Similarly, the blocking of Project Kangaroo has, for the most part, merely cleared the way for major international media corporations, such as Netflix, to enter the UK VOD market. Here, the Competition Commission's ruling hinged on its identification of the 'relevant market' as UK-produced content. It is certainly the case that, in general, UK audiences prefer UK-produced content, but international media corporations are equally aware of this and are likely to use UK material as way to increase their share of the UK market. Indeed, Netflix recently announced that it plans to significantly increase the amount it invests in the provision of UK programming (*Broadcast*, 2013). In this light, the benefits for UK viewers from preventing Project Kangaroo are far from clear. Second, as in the case of media plurality, the issue of the scale and scope of public service broadcasting/media that operates in a society is ultimately a political one. Supporters of public service media are therefore justifiably critical of a process that defines public service media principally as a threat to the market, rather than as a potential means to serve the public interest and enhance cultural citizenship.

Conclusion

Taking the UK as a case study, this article has examined the application of competition regulation to the contemporary television industry. The article began with a brief overview of the nature of competition law. It then highlighted how, over the last couple of decades, competition regulation has played an increasingly prominent role within the UK television industry. Using a number of different examples, the main part of the article analysed the application of competition law to UK television broadcasting in four key areas: (1) mergers and acquisitions; (2) monopoly and market dominance; (3) cartels; and (4) state aid and public service broadcasting. This analysis has highlighted two key points. First, key concepts used in the application of competition law, most notably 'market definition' and the 'abuse' of market dominance, are far from scientific and can be subject to much debate. In relation to the 'abuse' of market dominance, the difficulties experienced by the UK's competition authorities and Ofcom in the case of BSkyB suggest the need for more

(ex ante) competition regulation in order to tackle the likely anti-competitive impact of market dominance. In other areas, such as the safeguarding of media plurality and assessing the role of public service broadcasters, concepts, such as 'market definition' and 'market impact assessment' have proved of even less value. In fact, to a greater or lesser degree, in both of these two areas the reliance on such concepts reveals an implicit political preference for neoliberal free market principles. All of which highlights the salience of the second key point to have been made here, namely the fact that the application of competition law is an inherently political process. Key issues, such as media plurality and the role of public service media, are political questions about the balance between the free market and government intervention in the economy and the type of society we want to live in. The extensive use of economic and/or legal concepts in the reports and investigations of competition regulators should not be allowed to obscure this important fact.

1.
Under the terms of the 2003 Communications Act, the 20:20 rule prevents the purchase of 20 per cent or more of an ITV licence by a media company that controls more than 20 per cent of national newspaper circulations or vice versa.

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