Pierre Larouche*

Throughout the 1990s, convergence was the buzzword in telecommunications and media circles. A number of studies were devoted to the phenomenon;¹ a good description thereof can be found in the Commission’s 1997 Convergence Green Paper, from which the following explanations are drawn.² “Convergence” refers to the coming together of what were previously thought of as separate sectors, namely telecommunications, information technology (IT) and media, as a result of technological developments³ that enabled pent-up customer demands to be satisfied. The first two were already converging since the 1980s (albeit mostly at the level of larger customers). Convergence is taking place at various levels. First of all, convergence can already be seen at the level of terminal equipment and networks. Nowadays, computers can be used not just for computing, but also for telecommunication and the reception of audiovisual media, telephones now have limited computing abilities and TV sets are following the trend. Similarly, networks originally conceived for telecommunications or broadcasting of audiovisual media (cable TV networks) can now be used for the other purpose, as well as for computing purposes (access to the Internet, etc.). Secondly, convergence is taking place at the service level, with the introduction — albeit later than foreseen — of new services which combine elements of telecommunications and media, for instance pay-per-view or video-on-demand. Thirdly, the industry itself is converging through cross-sectoral mergers (the epitome being the TimeWarner/AOL merger), the most significant of which give rise to major competition law decisions, which will be discussed further below.

Most of the literature concerning convergence was based upon a vision of the evolution of the various sectors which did not materialize, or at least did not materialize quite according to plan. That vision foresaw major players in the telecommunications and media sectors upgrading their networks and equipment to bring the requisite amount of bandwidth and computing power down to customers, after which these players would begin to offer converged services upon these networks. Reality did not unfold as predicted. The costs turned out to be much higher than originally forecast, and the first trials showed that customer demand was not as high as it was


³ Including digitalization and compression techniques, the introduction of optical fibre and the advent of packet switching.

thought. Accordingly, that vision is not yet realized, and it may never be.

At the same time, convergence did occur on a smaller, more incremental scale and in a way that was not foreseen at all: the Internet. The Internet is a converged network within the meaning of that vision, using the most converged terminal equipment — the computer — to deliver services that closely resemble the “converged services” which were forecast. Yet the Internet was originally narrowband, and it was not the result of single-handed competing efforts by a few large vertically-integrated firm along proprietary lines, but rather of the collective and co-operative work of small startups in an open standard environment. Those startups (to the extent they have survived the recent downturn in the sector) have now become large firms in their own right, or have been integrated into larger firms. It could be that future developments will come closer to the vision expounded in the 1990s, albeit with actors that grew out of or with the Internet wave. In any event, one cannot help thinking that the rise of the Internet might have had a very positive impact, among others, in providing a welcome “reality check” on the forecasts of industry gurus and avoiding that the existing industry structure be perpetuated. One can only wish that the future keep similar surprises in store, so as to foster dynamism and innovation.

The present article discusses first how convergence has been dealt with so far under EC law (I), before going on to examine what consequences this might have for public service broadcasting (II).

I. CONVERGENCE IN EC LAW

In addition to the debate which has been taking place since 1997 in relation to telecommunications and media law (A), EC competition law was forced to take an early lead in a number of decisions on cases where firms were acting to position themselves for the converged world (B). Some conclusions can be drawn from a joint examination of both realms (C).

A. Telecommunications and media law

The convergence phenomenon sketched above could not but have significant implications for law and regulation. Put crisply, the respective regulatory realms of telecommunications and media, as well as the absence of regulation of the computer industry, rest on a number of technical assumptions, which have been translated in the fundamental definitions applicable to each regulatory realm:

- Telecommunications is seen as a network-based activity, conducted in real time on the basis of two-way, point-to-point networks. Hence the current EC regulatory framework defines telecommunications as “the conveyance of signals between defined termination...
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points by wire, by radio, by optical or by other electromagnetic means”.5

- Media is seen also as a network-based activity conducted in real time, but functioning according to different parameters. Here the network is one-way (only from the emitter to the receiver, with no feedback) and point-to-multipoint. For instance, in Directive 89/552 (Television Without Frontiers), TV broadcasting — a type of media activity which will be the main focus of this article — is defined as “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public”.6

- Information technology (IT) and computing were not originally seen as network-based activities, but rather as localized activities, conducted in one place.

These models, and the legal definitions which were based upon them, were not hermetically separated from one another: indeed those definitions usually comprised additional clauses excluding each other.7 Nevertheless, they represent conceptually different activities, which give rise to different public policy concerns (if any). While a complete explanation lies beyond the scope of the present article, it can briefly be recalled firstly that in the absence of communicative elements and since the sector developed without monopoly rights or any lasting dominant position, information technology and computing were seen as essentially individual activities, where no specific policy concerns arise. In contrast, the point-to-point, two-way nature of telecommunications has meant that they were seen more as a private activity (much like a conversation), and that the main policy concerns were accordingly privacy, access to telecommunications, etc. Finally, the point-to-multipoint, one-way nature of broadcasting and media made them look more like a speech, with the policy concerns then being freedom of expression (including the possibility to speak and to listen), “false” and injurious speeches, etc. With respect to broadcasting in particular, two rationales traditionally compete for the justification of regulation; each of them provide a better foundation for one or the other part of regulation, but it has never been necessary to isolate them further, since they were both valid. The first one is more technical and based on the scarcity of electromagnetic spectrum used for broadcasting.8 The second one is more social: amongst all media, broadcasting is likely to have


7 The definition of “telecommunications services” at Directive 90/387, supra, note 5, Art. 2(3) is “with the exception of radio and television broadcasting”. While it was apparently clear that broadcasting, as defined in Directive 89/552, ibid., did not include telecommunications, it was nevertheless added that “[i]t does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services”.

8 I.e. given that not everyone can obtain spectrum, some regulation can be justified in order to ensure that the limited spectrum is allocated and used according to stated public policy goals.
a strong impact on society at large, with few means of correcting such impact if it contradicts stated public policy goals (taking into account competing values such as freedom of expression, however). All in all, the law and regulation surrounding each of the three converging sectors was thus thrust in different directions.

Given that the law was built upon these technical models, any change in the latter requires a reassessment and rethinking of the law, all the more when the change takes the form of a breakdown in their hermetism, coupled with the apparition of new mixed models. To take the case of broadcasting, the scarcity rationale is more or less swept away through convergence, which brings with it a massive increase in available broadcasting capacity or other capacity to spread content to recipients (e.g. Internet). The impact rationale is affected as well through the fragmentation of the audience (due to the increase in available content) and the breakdown of the point-to-multipoint model (with an increase in interactivity), both of which contribute to reduce the impact of broadcasting.

At the EC level, the Commission decided to address the regulatory implications of convergence in the mid-1990s. The first round of reflection and consultation resulted in the Convergence Green Paper of 1997. One of its central elements was a request for comments on three options for the evolution of regulation in the light of convergence, namely:

- Option 1: Build on current structures;
- Option 2: Develop a separate regulatory model for new activities, to co-exist with telecommunications and broadcasting regulation;
- Option 3: Progressively introduce a new regulatory model to cover the whole range of existing and new services.

These three options can be described as “vertical”, inasmuch as they are premised on bodies of regulations which concern a field of activity — telecommunications or broadcasting — in its entirety, through all the steps of the production chain. The new models provided for under Options 2 and 3 would be equally concerned with the entire chain of the new activities (Option 2) or of the whole range of services (Option 3).

The response to the call for comments proved somewhat disappointing for the Commission. Most commentators preferred the wait-and-see approach of Option 1, which did not imply major regulatory reform (while at the same time leaving open the possibility that the regulatory framework would become inadequate). Yet at the same time the Commission noted that:

“[t]here was a large measure of agreement on the need to ensure a consistent approach on the way in

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9 Supra, note 2.
10 Ibid. at 33-35.
12 Ibid. at 5-6.
which networks and transmission services were treated, leading many to support a move away from current vertical regulatory divisions to a more horizontal approach to them. This would ensure a consistent approach to infrastructure, and at the same time allow rules governing content provision to continue to reflect the specific nature of the services concerned.”

This led the Commission to support that more “horizontal” approach, whereby content and infrastructure (networks) would be separated. The Commission sought further comments on the main issues arising from such an approach.

The results of that further round of comments showed support for that horizontal approach. The Commission accordingly proposed:  

“Separation of transport and content regulation, with recognition of the links between them for possible competition problems. This implies a more horizontal approach to regulation with:
- homogenous treatment of all transport network infrastructure and associated services, irrespective of the types of services carried;
- a need to ensure that content regulation is in accordance with the specific characteristics of given content services, and with the public policy objectives associated with those services;
- a need to ensure that content regulation addresses the specificity of the audiovisual sector, in particular through a vertical approach where necessary, building on current structures;
- application of an appropriate regulatory regime to new services, recognising the uncertainties of the marketplace and the need for the large initial investments involved in their launch while at the same time maintaining adequate consumer safeguard.”

The resulting picture would thus be of a large, across-the-board regulatory framework concerning all sorts of networks, with a number of more specific regulations concerning certain aspects of content. In terms of “mass”, network regulation would be the main component and presumably the main focus of attention as well. Content regulation will be fragmented and more of a matter for specialists. Some room is left for a vertical approach to the audiovisual sector, but it can be asked how that can be reconciled with the general principle of separation of content and network regulation.

Since then, the Commission has put in practice the conclusions reached during that consultation process. The new regulatory framework applicable to all networks was set forth in a series of directive proposals making up the revised “electronic communications” framework. As for the regulation of content, however, no further action has been taken; the next major event will probably be the review of Directive 89/552 at the end of 2002.

### Notes


14. These proposals were tabled following a consultation process on the so-called “1999 Review”: Towards a new framework for Electronic Communications infrastructure and associated services — The 1999 Communications Review, COM(1999)539 (10 November 1999). On the issue of convergence, however, the 1999 Review essentially followed the conclusions of the debates on the Convergence Green Paper.

15. See the most recent policy document, Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM(1999)657 (14 December 1999), which does not contain any substantial proposal.
Looking in greater detail at the proposals for the regulation of “electronic communications”, it becomes apparent that they are very largely inspired from the current telecommunications regulatory framework.\(^{16}\) In the key piece of legislation, the proposed Directive on a common regulatory framework for electronic communications networks and services (Framework directive), the creation of an horizontal, across-the-board regulation for networks is effected in great part by replacing the definitions of “telecommunications networks” and “telecommunications services” with the following:\(^{17}\)

> ‘electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, networks used for radio and television broadcasting, and cable TV networks, irrespective of the type of information conveyed;

> ‘electronic communications service’ means services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services;

It will be noted that, in comparison with the definition of telecommunications quoted before, the reference to “network termination points” has been removed, so as to cover both point-to-point and point-to-multipoint networks.

The separation of networks and content is done, but not entirely consistently. On the one hand, services involving content are excluded from the definition of “electronic communications services” set out above, which would imply that they are entirely left out of the new regulatory framework. On the other hand, services involving content (including e.g. TV broadcasting) qualify as “services delivered using electronic communications networks and services” within the meaning of Article 1(2) of the proposed directive,\(^{18}\) where it is stated more broadly that the proposed directive would be “without prejudice to obligations imposed by national law in accordance with Community law or by Community law in respect of services delivered using electronic communications networks and services.” On that account, services involving content could thus potentially be affected by the new regulatory framework, but not so as to supersede other laws and regulations (including Directive 89/552). It seems that this latter approach, which does not seek to isolate content and networks hermetically, would be more advantageous, leaving the regulatory framework to apply to services building upon electronic communications when suitable and adequate, while letting rules that are specific to those services prevail.

For the rest, the Commission proposals are silent on content. The Commission simply mentioned in a recital that “[t]he separation between the regulation of transmission and the regulation of

\(^{16}\) The 1999 Review, \textit{supra}, note 14 at e.g. 17, already indicates that the new proposals will be based on existing telecommunications legislation.


\(^{18}\) As stated in Recital 7 of the proposal.
content does not prejudice the taking into account of the links existing between them”, but included very few specific provisions to that end. As mentioned in the proposed Directive on a common regulatory framework, Directive 89/552 remains outside the scope of the new framework. A few content-related provision come through the inclusion within the new proposals of Directive 95/47 on the use of standards for the transmission of television signals. For instance, the proposed Directive on access and interconnection provides for broadcasters to be granted fair, reasonable and non-discriminatory access to the conditional access services of pay TV or other operators. In addition, the proposed Directive on universal service contains a provision on ‘must-carry’ rules, whose aim is not to impose such rules at the EC level, but rather to establish an EC-level framework to assess the validity of Member State rules; this provision does not put content providers in a privileged position vis-à-vis network operators. The overall scheme of the Commission proposals therefore leads to a clear distinction between networks and content, the new regulatory framework being (self-)focussed on the former and leaving the latter almost entirely out of consideration. Content providers are thus put in the same position as any other user of electronic communications networks and services. In their relationship with operators of such networks and services, they are left to rely generally on EC competition law.

In the course of its first reading of the above proposals, the European Parliament took greater account of the link between content and networks. In particular, the EP was concerned that the new regulatory framework could end up interfering with measures dealing with content, with a view to ensuring cultural and linguistic diversity as well as media pluralism. It made a number of amendments to the proposals, in order to emphasize that measures related to content could not be affected by the new regulatory framework concerning networks. In some respects, it even went further, proposing for instance to give “[a]ll providers of audiovisual content... the right of access to electronic communications networks and associated facilities on fair, appropriate and non-discriminatory terms to enable them to convey their content unhindered, irrespective of the

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19 Ibid.
20 Ibid.
22 Proposal for a Directive on access to, and interconnection of, electronic communications networks and services COM(2000)384 (12 July 2000), published at [2000] OJ C 365E/215, Art. 6(1) and Annex I(1). The scope of these access rights can be extended to application programme interfaces (APIs) and electronic programme guides (EPGs), pursuant to Art. 6(2) and Annex I(2).
25 See the amendments to the proposed Framework directive, supra, note 17, adopted on 1 March 2001 (available at <http://www.europarl.eu.int> pending publication in the Official Journal), in particular amendments 1, 6 and 15.
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method of transmission”.26 This would give broadcasters access rights going far beyond those of any other user of electronic communications networks and services, who can receive access rights only if they are operating electronic communications networks and services27 or if the party from whom access is sought has Significant Market Power (SMP).28 Here it could be argued that the EP introduced an element that is inconsistent with the rest of the proposed regulatory framework, which does not seek to regulate access more than is necessary and relies on commercial negotiations first and foremost.29

In any event, the EP’s amendments in first reading do not modify the fundamental articulation between content and networks in the proposed new framework. That framework will govern all communications networks and services, to the exclusion of content services, which may fall under specific regulation, if at all. By the same token, a “regulatory interface” between content providers and network operators will be created: each will be subject to its regulatory regime, and presumably content providers will rank amongst the customers/users of electronic communications networks and services. The Commission does not envisage putting them in a different position under than other customers/users, while the EP in its 1st reading amendments would give them a somewhat privileged position.

B. EC competition law

When it comes to the regulation of relationships between the various actors in a converged sector, sector-specific regulation and competition law largely overlap.30 Difficulties which may arise in relation to access, non-discrimination, pricing, etc. can be framed either as regulatory or competition law problems. Furthermore, given the rapid pace of the sector, those difficulties will tend to be dealt with first under competition law — whether in the course of infringement31 or

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27 Proposed Directive on access and interconnection, supra, note 22, Art. 4(1). Here there is no guarantee of access, since the operators only benefit from a right to negotiate interconnection. The same provision is found in the current regulation in Directive 97/33 of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L 199/32, Art. 4(1).


29 Proposed Directive on access and interconnection, ibid., Rec. 4 and 9. The same principles underpin the current framework.


31 Either for a violation of Article 81 or 82 EC.
Either for an exemption under Article 81 EC (while still available) or, in the greatest number of relevant cases, for clearance under the Merger Control Regulation (MCR), where decisions must be taken within strict deadlines, it often finds itself in a regulatory vacuum, and it must therefore seek to fill that vacuum to the extent necessary through and with its decision, for instance by attaching conditions to that decision.

While Community institutions are still discussing how to fashion the regulatory framework in view of convergence, five years after preparatory work on the 1997 Green Paper begun, the Commission has already had to decide upon a number of “converged” transactions (i.e. transactions involving e.g. telecommunications and media firms, carried out because of or with a view to convergence), where the regulatory issues associated with convergence arose. Through its decision practice under EC competition law, the Commission therefore ended up setting some milestones on the way to convergence.

In an earlier article, I had examined the first few decisions in that area, concluding that EC competition law did not appear ready for convergence yet. In particular, the major cases until then had resulted in prohibition decisions under the MCR, which could be seen as a sign that the Commission was very, if not overly, cautious in its approach or that it had not yet been able to find appropriate safeguards to contain the negative effects of “converged” transactions.

Since then, a number of new important cases have been decided, which will be briefly reviewed below. In these cases, the Commission has refined its analysis. For the first time, it exempted (under Article 81 EC) or cleared (under the MCR) some “converged” transactions. Accordingly, it developed its reasoning on remedial measures much further than before, with some cases containing impressive sets of conditions and obligations, just as had been seen earlier in the cases concerning telecommunications alliances, where the Commission imposed a large number of detailed conditions which strengthened its regulatory efforts. Here as well, it will be interesting to examine if and how the conditions attached to those decisions relate to the developments in

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32 Either for an exemption under Article 81 EC (while still available) or, in the greatest number of relevant cases, for clearance under the Merger Control Regulation (MCR), i.e. Regulation 4064/89 of 21 December 1989 [1989] OJ L 385/1.

33 Ibid.


the regulatory area.

Amongst the more recent decisions, the first notable one was in the *Premiere*\(^{37}\) and *BetaResearch*\(^{38}\) case, which bore an uncanny resemblance to the MSG transaction which the Commission prohibited in 1994.\(^{39}\) The same parties were involved, namely Bertelsmann, Kirch and Deutsche Telekom (DT). The operation was very similar: Bertelsmann and Kirch would become the sole owners of the only German pay-TV channel, Premiere, and they, together with DT, would control a company called BetaResearch, which licenses proprietary decoder technology to be used in technical platforms for digital pay TV. The Commission found that the same relevant markets as in MSG were involved, namely pay TV,\(^{40}\) technical services for pay-TV providers\(^{41}\) and cable TV networks.\(^{42}\) Accordingly, it will come as no surprise that the Commission found, as it did in 1994, that the operation would strengthen Bertelsmann and Kirch’s dominant position in the pay-TV sector,\(^{43}\) that it would place the parties in a dominant position for technical services\(^{44}\) and that it would strengthen DT’s dominance on cable TV networks.\(^{45}\) The only way for the parties to avoid a second prohibition decision would have been to succeed in fashioning a set of undertakings acceptable to the Commission, which they tried hard but failed to do. The salient features of the proposed undertakings for the purposes of this article were that (i) Bertelsmann and Kirch would open up 25% of their content rights to third parties, and (ii) the parties would open up 25% of BetaResearch to third parties (while leaving Kirch to lead the company), set up an open advisory council on decoder technology, license


\(^{39}\) See supra, note 35.

\(^{40}\) Dealt with in the *Premiere* decision, supra, note 37.

\(^{41}\) Dealt with in both *Premiere*, ibid. and *BetaResearch*, supra, note 38.

\(^{42}\) Dealt with in the *BetaResearch* decision, ibid.

\(^{43}\) *Premiere*, supra, note 37 at para. 29-101. In short, the Commission found that Premiere would be the only pay-TV channel, with extensive TV rights and no competitive constraints from public broadcasters. Furthermore, given the rights portfolio of the parties and their control of decoder infrastructure, there would be no realistic hope of competitive entry.

\(^{44}\) *Premiere*, ibid. at para. 102-18 and *BetaResearch*, supra, note 38 at para 25-44. Here as well, the Commission noted that the parties will control the only provider of technical services. Their proprietary solution will become the *de facto* standard on the market, and no competition will arise for technical services, given that the parties also control the sole existing pay-TV programme and that any competitors will be dependent on licensing of the parties’ proprietary technology (otherwise customers have to install multiple decoders in their home).

\(^{45}\) *BetaResearch*, ibid. at para. 45-54. DT is in a dominant position for cable TV networks in Germany, especially in the higher levels of the cable TV network. In connection with the transaction, it chose to become a mere transport channel for Premiere’s pay TV programme, so that its network would not be structured to market pay TV programmes but only to relay them. Actual or potential competitors of DT which would want to expand their activities would then be hard-pressed to obtain a different status from BetaResearch and Premiere, which are owned and closely linked to DT, respectively.
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BetaResearch’s technology to third parties, disclose the API\(^{46}\) to third parties, add a standardized API to its technology and license third-party manufacturers of decoder equipment.\(^{47}\) The Commission found these undertakings insufficient, however, arguing that (i) a competitor could not launch a pay-TV programme on the basis of access to a mere 25% of the content rights held by the parties and (ii) the parties would still retain control over what would then remain in essence proprietary technology.\(^{48}\)

Subsequently, the Commission was able to obtain the opening of Germany’s pay-TV infrastructure when Kirch (in the meantime sole owner of Premiere) found itself in a dire financial situation and had to seek a capital injection from BSkyB.\(^{49}\) The reasoning of the Commission in *BSkyB/KirchPayTV* is far from convincing,\(^{50}\) but it leads to the conclusion that clearance under the MCR can only occur if Kirch commits to a set of undertakings going beyond what was discussed in the previous cases.\(^{51}\) First of all, third parties must be able to use Kirch’s pay-TV platform to distribute their own programmes at non-discriminatory rates (Kirch having to separate the accounting of its technical platform business for that purpose). Secondly, third parties receive access to the API for that platform, with an objective and independent procedure to certify their applications for use on that platform. Thirdly, Kirch is to implement a standardized API on its platform. Fourthly, Kirch will work to ensure interoperability with competing platforms. Fifthly, it will make its pay TV services available on these competing platforms. Finally, Kirch must licence its proprietary technology to competing platforms as well as to competing equipment manufacturers.

A similar approach was followed in two earlier cases dealing with the introduction of digital TV in other countries, namely *British Interactive Broadcasting (BiB)/Open*\(^{52}\) (concerning the UK) and *TPS*\(^{53}\) (concerning France). In *Open*, British Telecom (BT), pay-TV operator BSkyB and others set up a joint venture to launch Open, the first UK provider of so-called “digital interactive

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\(^{46}\) Application Programme Interface, i.e. the means by which third parties can develop application programmes to run over the decoder platform.

\(^{47}\) See the presentation given in *Premiere, supra*, note 37 at para. 123-32 and 142-7 and *BetaResearch, supra*, note 38 at para. 55-60 and 66-71.


\(^{50}\) For instance, the Commission finds a separate relevant market for as yet non-existing “digital interactive television services” (thus distinct from both high-street retailing and Internet services) at para. 30-40, and then proceeds to hold that BSkyB’s capital injection would enable Kirch to enter this market (as the first firm to do so in Germany) and thereby gain a dominant position (at para. 73-80).

\(^{51}\) These commitments are listed in Annex to the decision, ibid.


television services”, i.e. services using the conditional access infrastructure of digital pay TV (decoders, etc.) to enable the customer, among others, to conduct financial transactions, to shop, etc. The relevant market definition was broadly similar to that described above, and accordingly the Commission came to the conclusion that the transaction raised competitive concerns, which were addressed in a series of commitments made by the parties. For instance, a central element of the transaction was that the price of set-top boxes (i.e. the equipment on customer premises used to decode the signal and administer services) would be subsidized through the subscription fee. The Commission required the parties to set up two separate companies — each with its own accounting — for the administration of set-top boxes and the subsidy (network company), on the one hand, and for the interactive services (content company), on the other hand. In order to avoid that the subsidy would create a barrier to entry, a transfer mechanism had to be put in place for the network company to recover the subsidy from the content company and to enable subscribers to change to another content provider from which the remainder of the subsidy would then be recovered. Furthermore, the parties were not allowed to tie the acquisition of a set-top box with a subscription to BSkyB’s digital TV services. BSkyB also agreed to provide, on demand, a “clean feed” of its TV services, where any links to BiB’s digital interactive services would have been removed, so that distributors of BSkyB’s digital TV services could superimpose their own interactive services upon it. Furthermore, BSkyB agreed to create a standardized interface (Simulcrypt) and enter into interoperability agreements with other operators of conditional access services, in order to ensure that users of those other services can access customers with BiB set-top boxes. Furthermore, the technical features of BiB set-top boxes were to be made available to third parties to allow them to develop applications that are compatible with such boxes. In TPS, the Commission was far less suspicious of the transaction, whereby a second digital pay-TV operator was created in France. The only major change made to the transaction was that TF1, France Télévision and M6 — the main general-interest broadcasters of France, all parties to TPS — reduced from ten to three years the period during which their channels would only be available on TPS.

Despite differences in the undertakings from the parties, these three cases rest on a similar set of assumptions. First of all, networks are separated from content as much as possible, as is shown for instance in the legal/accounting separation requirements of Open and BSkyB/Kirch Pay TV.

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54 Open, supra, note 52 at para. 10-50 (relevant market) as well as 51-91 and 123 (assessment).
55 Ibid. at para. 126.
56 Ibid. at para. 126-8 and Art. 2, Condition 7.
57 Ibid., Art. 2, Condition 2.
58 Ibid., Art. 2, Condition 3.
59 Ibid., Art. 2, Condition 6.
60 Ibid., Art. 2, Condition 9.
61 TPS, supra, note 53 at para. 134.
Secondly, networks are kept as open as possible to content providers besides the parties to the transaction, as is done in BSkyB/Kirch Pay TV. Thirdly, the content held by the parties to the transaction is made available to competing network operators, in all three cases. Finally, to the extent that the case concerns the first network to be established for the provision of digital TV and/or interactive TV services (as in BSkyB/Kirch Pay TV), measures are taken to foster the emergence of parallel distribution channels, whether based on a separate network or on the use of network elements belonging to the parties (including the opening up of APIs, licensing of technology, interoperability agreements, standardised interfaces, etc.). While the content/network boundary is not always clear, these cases therefore rest on the assumption — and through the attached conditions contribute to realizing that assumption — that the market will be structured along the lines of a series of content providers and a number of network operators.

The same assumptions underpinned the two major decisions taken at the end of 2000, AOL/Time Warner and Vivendi/Canal+/Seagram. These two transactions involved full-scale mergers between large firms active in different areas of the converging telecommunications/media sector. In AOL/Time Warner, the former firm was the world leader for Internet access and the provision of proprietary content services over the Internet, while the latter was one of the largest “old media” empires, with interests in TV channels (CNN, etc.), movies (Warner Brothers), music (Warner Music), publishing (Time, etc.) and cable TV networks. In Europe, AOL was already linked in a joint venture with Bertelsmann, owner of, among others, BMG Music. Furthermore, at around the same time as the TimeWarner/AOL merger, Warner Music was envisaging a merger with another music major, EMI. Two relevant markets gave rise to competitive concerns according to the Commission, namely the market for online music distribution and that for music players, i.e. the software used to play online music. That relevant market definition is questionable, but that point will be left aside. The Commission came to the conclusion that the

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62 In particular, the conditions imposed in Open appear to envisage that competing content providers would also be operating their own conditional access platform. Given that Open is primarily about digital interactive TV services and not digital pay TV as such, it may be correct to assume that competing providers of such services will require their own access platform. Nevertheless, in the light of the other cases, which also involved interactive services in addition to basic TV broadcasting, it is surprising that the Commission did not seize the opportunity to obtain commitments on the access of third-party content providers (broadcasters) to BSkyB’s and Open’s networks. It could be that such access was already guaranteed by the national regulatory framework (see Open, supra, note 52 at para. 131-4), but that did not prevent the Commission from seeking explicit commitments in other cases.


65 These markets were defined in AOL/Time Warner, supra, note 63 at para. 17-32.

66 In isolating a market for online music, the Commission ignores that in reality such distribution channel has not yet been proven to work commercially. Furthermore, downloading online music or listening to streaming audio files online — at the moment generally for free — is very attractive in great part because of the perceived excessive price of established retail mediums, first and foremost the CD sold in a record store. Online music retailing (if and when it works) and traditional channels are thus in a very clear substitutability relationship.
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merged entity would have a dominant position on both these markets, due to the fact that it would control access to a significant part (somewhere between 30% and 40%) of available music rights. Accordingly, it would be in a position to restrict access to that music to its own distribution channel (through AOL) and to make the music files compatible only with its own music player (Winamp), thereby gaining a dominant position in online music retailing and music player software respectively. As even though the parties protested that such a strategy would not be efficient and that they would not have the power to carry it through, the Commission required TimeWarner/AOL first to abandon its deal with EMI and then to sever its links with Bertelsmann. From that moment on, the risk that a dominant position would arise on either the content or network side was reduced to the point where the Commission could allow the transaction.

A similar situation, this time involving movies in addition to music, occurred in Vivendi/Canal+/Seagram, a case which must be seen in conjunction with the joint venture between Vivendi and Vodafone to establish the Internet portal Vizzavi. The case involved a full merger between Vivendi (telecommunications, Internet, as well as a participation in BSkyB) and its subsidiary Canal+ (leading European pay-TV operator, movie production, acquisition of movie rights), on the one hand, and Seagram (among others the Universal movie studios and PolyGram music major), on the other hand. In keeping with its tendency to define narrow markets, the Commission identified a flurry of relevant markets, from which the following raised competitive concerns: the acquisition of rights to premium films for pay-TV purposes, the pan-


68 In AOL/Time Warner, ibid. at para. 45, the abandonment of the Warner Music/EMI merger is mentioned in passim. However, it was clear at the time that the parties terminated their dealings in view of the Commission’s objections to the addition of EMI to a merged TimeWarner/AOL entity: see “Commission opens full investigation into TimeWarner/EMI merger” Press Release IP/00/617 (14 June 2000) and “EMI and Time Warner withdraw their notification to the Commission” Press Release IP/00/1122 (5 October 2000).

69 Ibid. at para. 95 and Annex.


71 Vivendi/Canal+/Seagram, supra, note 64 at para. 18-21.
European market for Internet portals and the market for online music distribution. On all three of them, the concerns of the Commission were linked to the position of the merging parties as regards content, which could be leveraged at the network level. As regards movie rights, Canal+, whose portfolio of “output deals” was already considerable, would become more closely linked to Universal (itself linked with Paramount and MGM through UIP, their European distribution joint venture) and Fox (through BSkyB), so that any competing pay-TV operator would be deprived of access to the movie rights for a large fraction of the US movie output. Similarly, with respect to Internet portals and online music distribution, the Commission feared that, once the PolyGram music catalogue is added to the resources of Vivendi (Vizzavi portal, with a very large number of potential subscribers, i.e. the customers of Vodafone and Vivendi), the merged entity would benefit from a significant competitive advantage. It would have the ability to deny competing distributors access to its music catalogue, and to be able to require exclusivity from competing content providers for access to its distribution channels. If it succeeds in being the first on the market, network effects would compound its first-mover advantage. In order to obtain clearance for the merger, the parties had to enter into significant commitments. As regards movies, they agreed to limit Canal+’s output deals with Universal to at most 50% of Universal’s output (for a 5-year period) and to sever Vivendi’s links with BSkyB. As for music, the parties agreed that, during a 5-year period, PolyGram would make its music available to all distribution channels (i.e. its affiliate Vizzavi and competitors) on non-discriminatory terms.

C. Conclusion

In the course of applying competition law over the past years, the Commission has thus based its assessment on the same assumption about the evolution of the market as underlies its current proposals for the new regulatory framework: a clear separation between content and networks, with a number of content providers on one side and a number of network operators on the other,
where firms on each side seek to build relationships with the firms on the other side. In a certain way, the basic articulation of the regulatory framework around such a distinction is reminiscent of the then-cardinal distinction between services and infrastructure which ran through earlier telecommunications regulation in the run-up to full liberalization and was eventually abandoned both for practical (it was difficult to uphold) and policy (both services and infrastructure were liberalized) reasons.

The competition law cases show that the distinction between networks and content is not so airtight as the regulatory proposals would make it to be. Rather than a clear separation, one finds a subtle gradation from one end of the chain to the other. For instance, in the pay-TV cases, there were at least four vertical layers, from the acquisition of rights through their packaging into pay-TV channels (broadcasting, more or less) and the use of technical services (conditional access) to the final delivery to the customer. The first one belongs to the realm of content while the last one pertains to networks, but the two intermediate layers partake to both. Content packaging and broadcasting deal with content, but they are done with an eye to a certain mode of delivery to customers and to certain groups of customers which may be reached through the networks. Similarly, the technical services surrounding pay TV (and interactive services such as those in *Open*) are imbedded in the distribution networks, yet their operation depends on the content which is passing through them; access will be allowed or denied under certain conditions according to the content in question. Similarly, in the *AOL/Time Warner* and *Vivendi/Canal+*/*Seagram* cases, besides the markets for movie or music rights, one finds markets such as that for music player software (in the former case) or portals (in the latter case), which concern both content and networks. Portals, for one, are meant to direct users to specific content items, yet at the same time the Commission finds that they can give rise to network effects. In the light of the experience in competition law so far, therefore, the clean separation envisaged by the regulatory framework may not be so easy to work out. Competition law is thus more sophisticated than the current regulatory proposals in its treatment of the content/network distinction, but nevertheless the cases surveyed above reveal that the competitive assessment relies on that distinction.

As mentioned above, save for the amendments put forward by the European Parliament, the proposed regulatory framework leaves the relationship between the network and content realms to be administered essentially by competition law. The cases reviewed above show that the Commission is still fairly cautious in its approach to “converged” transactions under EC competition law. It fears the consequences of vertical integration and assumes readily that, if the parties to a transaction hold some market power at one level, they will be able to “leverage” it to gain dominance at other levels or, as in *Vivendi/Canal+*/*Seagram*, they will increase existing

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80 As reflected for instance in the original version of Directive 90/388, *supra*, note 5.

81 It is interesting to note *in passim* that the distinction still endures in the legislative texts, even though it is without significant consequence. See for instance the proposed Framework directive, *supra*, note 17, which still contains separate definitions of “electronic communications networks” and “electronic communications services”, even though the two are usually dealt with jointly.

82 See *supra*, note 77.
market power by gaining a foothold at another level. The Commission also considers that the acquisition of content rights or the rollout of network infrastructure constitute significant barriers to entry. Accordingly, it seeks commitments that would diminish market power and/or annul the outside effects of vertical integration by ensuring that third parties have access to the content or the networks of the parties or to both. Under EC competition law as it now stands, the relationship between content and networks thus tends to be circumscribed narrowly: in the presence of market power at either level, commitments will be sought to minimize the effect of vertical integration and keep both content and networks open to third parties, as required under the circumstances of the case. Here as well, the network/content distinction lies at the very root of the Commission’s approach. It follows that the effect of the Commission decisions, where commitments often make up the only applicable regulatory framework in a given area, is to strengthen the content/network distinction which underlies the current regulatory proposals.

II. CONSEQUENCES FOR PUBLIC SERVICE BROADCASTING

In the second part of this article, I now turn to the consequences of the approach outlined above for public service broadcasting (PSB).

A. Threats

As seen in the first part of this article, both the regulatory and the competition law response to convergence are based on a separation between content and networks. When applied to PSB, such an approach is likely to have disadvantageous consequences in at least two respects.

First of all, the most obvious consequence will be that the operations of most public service broadcasters will end up falling under two different regulatory regimes. Indeed, most such broadcasters not only operate in the broadcast programming sector, but also control terrestrial wireless transmission networks over which their programmes are conveyed to the recipients. While the former activities are and will remain subject to Directive 89/552 (Television Without Frontiers), as it may evolve in the future, the latter will now be covered by the proposed new regulatory framework for electronic communications. Beyond the inconveniences flowing from having to make a single organization comply with two regulatory frameworks that were not necessarily designed to work together, the application of the proposed electronic communications framework to the network operations of public service broadcasters will have a number of significant consequences, including:

- Should the broadcaster operate the only nationwide terrestrial television network or the largest one by some margin, it might be subject to a series of obligations either under the regulatory framework because of Significant Market Power (SMP) or under competition law because of a dominant position. In both cases, market definition will play a crucial

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83 The proposed electronic communications framework contains a new definition of Significant Market Power (SMP) which is by and large aligned with that of dominance under competition law (see the proposed Framework directive, supra, note 17, Art. 13), including a market definition exercise which however appears difficult to equate with market definition under competition law despite the intent of the Commission: ibid., Art. 14.
role, since the risk of SMP or dominance is far smaller if all the transmission means (terrestrial wireless, cable TV, satellite) are considered to fall within one and the same market. However, the practice of the Commission under competition law so far has been to consider each means as a separate market. If accordingly the public service broadcaster is found to have SMP or a dominant position as regards its network operations, the following obligations could kick in, third-party access to the transmission network, transparency of tariffs, non-discrimination among third parties and between third parties and the public broadcaster’s own programmes and even accounting separation between the network operations and the rest of the broadcaster’s obligations. This would turn the terrestrial network into some kind of shared facility between the various broadcasters.

The network operations of the public service broadcaster would also be subject to the new regulatory framework for electronic communications as regards the use of scarce resources, the most relevant one here being the frequency spectrum. As envisaged in the current proposals, the allocation of frequency spectrum would be co-ordinated at Community level, and Member States would have to assign spectrum according to transparent, objective and non-discriminatory procedures, which can be either an auction or a so-called “beauty contest”. Irrespective of the allocation method, the days of preferential frequency allocation for public service broadcasters are probably numbered.

Ultimately, given that public service broadcasters would have to open up their terrestrial...
networks and compete for spectrum, it might make more sense for them to put their network operations in a separate subsidiary, and perhaps even to let go of it and turn it into an autonomous legal entity. The scope of public service broadcasting would thus be brought back to broadcasting as such, without distribution over terrestrial wireless networks.

Secondly and perhaps more importantly, the broadcasting operations themselves are also put into question. Convergence as such shatters the concept of broadcasting. It fragments the audience, given the diversity of content now available to the customer and the ease of access to it through the various technical means. In a converged environment, programming — one of the core functions of broadcasters — could end up being done by the viewer himself or herself, with the help of tools such as Electronic Programme Guides (EPGs) or portals (in the Internet world) which take over the selection function (and discharge it in a different fashion, enabling the viewer to make individual programming choices). As a consequence, the role of the broadcaster, as a packager of content into a balanced programme which has a certain identity and feel to it, could become obsolete.

The separation between content and networks, as foreseen in the proposed new regulatory framework and undertaken in the application of competition law, echoes and strengthens this trend. Indeed, the term “content”, as it is used in the proposed regulatory framework for electronic communications, covers a relatively large set of items, including “broadcasting content, financial services and certain information society services”. The latter two categories are transaction-based, i.e. they are provided at the request of the customer for a specific purpose. From the competition law decisions discussed above, it appears that pay TV is also seen as some form of transaction-based service, i.e. the distribution of premium content (films, sport events, etc.) to subscribers. Like other content categories, audiovisual content would therefore be conceived of mostly as a collection of discrete items, i.e. films, sport events, news, dramas, game shows, etc. This leaves broadcasting in an odd position, caught as it is between content provision as it is conceived in a converged world (i.e. the provision of individual items, with no attempt at programming) and network operation (where in theory content is not processed). Little consideration is given to the core of broadcasting, namely the creation of a programme, i.e.

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90 Throughout this article, “programme” and “programming” refer to the continuous broadcasting stream filling a channel, and not to an individual item on the programming grim (e.g. a movie, a show, etc.), as is sometimes done casually.

91 The European Parliament proposed to amend this to “audiovisual content”: see supra, note 25, Amendment 1.


93 See for instance the description of the pay-TV market given in Vivendi/Canal+/Seagram, supra, note 64 at para. 18-21.
selecting, scheduling and putting together content items, with some kind of underlying idea.

Furthermore, in the longer term, it is likely that problems or debates will arise with respect to those parts of the regulatory framework which rely on the concept of “programme” or “channel”, such as the European content requirements and the advertising restrictions found in Directive 89/552 (Television Without Frontiers). These provisions are almost meaningless in a context of direct provision of individual content items to the customer: how can a minimum European content requirement or a restriction as to the amount of advertising in a given hour be applied to pay-per-view services or audiovisual databases on the Internet? The effectiveness of such provisions will be diminished, and it cannot be excluded that they would one day be perceived as unfair provisions which hamper certain categories of market players while not affecting their competitors, perhaps leading to their repeal. Whatever happens, the limited protection which these provisions offer (given their numerous gaps and loopholes) to established broadcasters — most of which are public service broadcasters — will be diminished or lost.

In all of this, chances are that private broadcasters will find a way to maintain their position, re-inventing themselves as needs be. If the broadcasting activity becomes unattractive because of the evolution of the market and the regulatory environment, then private broadcasters will turn into something else, either content providers or distributors of content or a mix of both.

The outlook is not so rosy for PSB, since it cannot recast itself at will. It is bound by a public service mission, which justifies its existence and which furthermore might provide grounds for a specific regulatory treatment, for instance as regards EC competition law or EC State aid law.

In general, there are three main elements which can be found in a public service mission in the broadcasting sector, all of which are affected by convergence and regulatory developments:

1. The public service mission often comprises a classical universal service element, whereby the public service broadcaster is bound to make its broadcasting services available across a given territory. That part of the public service mission was usually discharged with the setup and upkeep of a terrestrial wireless network. Now it is of lesser importance, and as mentioned before it is quite possible that the new regulatory framework and the application of competition law will contribute to push this network away from the public service broadcaster.

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94 Directive 89/552, supra, note 6, Art. 4-6 (content requirements) and 11, 18-20 (advertising restrictions).

95 It should be added that, despite the thrust of the Protocol on the system of public broadcasting in the Member States, added to the EC Treaty by the Treaty of Amsterdam [1997] OJ C 340/1, recent trends point towards greater emphasis on the precise boundaries of the public service mission in the course of applying both EC competition law for firms (see the most recent twist in the Eurovision saga with the CFI judgment of 21 March 2001, Case T-206/99, Métropole Télévision SA v. Commission, not yet reported) and EC State aid law in conjunction with Art. 86(2) EC (see CFI, 10 May 2000, Case T-46/97, SIC v. Commission [2000] ECR II-2125). See also Directive 2000/52 of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings [2000] OJ L 193/75, which forces public service broadcasters to introduce detailed analytical accounting, separating their public-service activities from their other activities.
2. In addition, part of the public service mission usually relates to the production and
distribution of certain content, usually content which is not otherwise produced or made
available, for instance “quality” news programmes and documentaries, minority cultural
programmes, less mainstream sport events, etc. Obviously, such a mission would remain
valid in a converged world, but perhaps not necessarily as it is now perceived. As regards
the production of content, for one, the Commission has already indicated in its
Communication of December 1999\textsuperscript{96} that an increase in direct support (both from the
Community and the Member States) for content production would be envisaged. The
question then arises whether the production of public-mission content will necessarily be
entrusted to a single public service broadcaster or rather spread over the various
broadcasters on a case-by-case basis. Furthermore, as for the distribution of public-
mission content in a converged world, the question might arise whether it cannot be
adequately ensured through specific must-carry obligations imposed on network
operators,\textsuperscript{97} instead of charging a public-service broadcaster with putting together a
programme wherein public-mission content is featured. Seen against the background of
the regulatory framework and of competition law, the end-result might be that public
service broadcasters would be pushed into the “content provider” category, where they
would occupy a certain niche, i.e. public-mission content production, not unlike what
PBS does on the US market. It goes without saying that this would imply a major change
in the structure and operation of European public-service broadcasters.

3. Finally, a third element of many public service mission statements is to seek a wide
audience. At this point in time, this is certainly the most controversial element; it lies at
the heart of the debate surrounding State aid to public service broadcasters.\textsuperscript{98} Irrespective
of the outcome of current discussions, the “wide audience” mission will be affected by
convergence and the new regulatory framework. Audiences will tend to become more
fragmented, so that the very idea of seeking a wide audience will lose its strength.
Furthermore, where a strong legal distinction is made between content providers and
network operators, the task of seeking an audience is likely to be associated more with
the latter, whereas public service broadcasters, as mentioned before, are likely to be
pushed into the former category. It could then seem odd to make legal exceptions to
allow content providers to take the requisite measures to reach a wide audience, whereas
their prime consideration should presumably be to maximize their return on investment
and sell distribution rights to the highest bidder.

In sum, convergence and its legal consequences (new regulatory framework, evolution of
competition law) outlined above could break down the current structure and operation of public
service broadcasters and force them to abandon a number of current activities (or operate them
on a market basis), so as to become niche content providers.

\textsuperscript{96} Supra, note 15 at pp.18 and ff.

\textsuperscript{97} Within the framework set in the proposed Directive on universal service, supra, note 23, Art. 26.

\textsuperscript{98} See the contribution of R. Crauford-Smith elsewhere in this book.
B. Opportunities

Despite the foregoing, the future might not be so gloomy for public service broadcasters. For one, the convergence phenomenon has so far always been hyped, and it may not unfold as now foreseen. However, the direction taken in recent competition law cases can be modified only slowly, and once the proposed new regulatory framework is in place, the content/network separation will be fostered through regulation and competition law alike, irrespective of the evolution of the sector.

For public service broadcasters, some adaptation and creativeness might therefore be required to make the best out of the new economic and regulatory environment.

A number of public service broadcasters, for instance, have already branched into new markets that are by and large consistent with their public mission as regards content (which as mentioned before is bound to remain valid). Among others, the German ARD and ZDF public broadcasters created a specialized programme for children, and the UK’s BBC created a 24-hour news channel. Both of these were found by the Commission not to clash with EC State aid rules, since they fell within the public mission of ARD/ZDF and BBC respectively and the funding provided to them was not in excess of their actual costs. Beyond that, public service broadcasters can probably also use their public funding to venture into other forms of content packaging than broadcasting, for instance Internet sites, or into alternatives to programming, such as EPG services.

Nevertheless, if it is to maintain its position in the longer-term, public service broadcasting must be rethought so as to give it a justification which fits in with the new economic realities and the regulatory environment. In particular, the wide audience element of the traditional public service mission must be revisited, or otherwise public service broadcasting risks shrinking to a niche content provision market, as mentioned above.

In the following paragraphs, I want to see if a tentative line of argument could not be put forward to sustain a broader public service mission in a converged environment.

Firstly, in line with what was said before, it is not impossible that free-to-air broadcasting as it is now known would be replaced by new mixed forms of distribution which are more focussed on the individual content items, e.g. where some payment is extracted from the viewer directly (through a pay-TV subscription or on a pay-per-view basis) with a modicum of very targeted advertising. Indeed, given the lifting of technological constraints, better means should be found of maximising the return on content distribution than free-to-air broadcasting (even with some advertising). In this context, free-to-air broadcasting, especially as it is now practised by leading public service broadcasters with relatively little advertising, could become anomalous.

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Secondly, some items of audiovisual content have a distinctive collective dimension, in the sense that they feed the collective mind of a society. It is not so much a matter of integrating society — a goal put forward previously, which now appears beyond the reach of audiovisual media in our pluralistic and multicultural societies — but more broadly of fuelling public discussion and debate in a modern society. This can occur not only with news and public affairs items, but also with dramas, movies, live broadcasts of certain events, etc., which will be on everyone’s mind and will thus contribute to the evolution of a given society. For the sake of argument, it will be assumed that this collective dimension is desirable and valuable, i.e. that there is a collective value to audiovisual content, or at least to some of it.\textsuperscript{100}

In economic terms, it could then be said that this collective dimension is subject to network effects. These arise when the value of a given product or service increases with the number of users or consumers of that product or service, without any change in the intrinsic nature of the product or service and irrespective of any economies of scale in its supply.\textsuperscript{101} In this sense, the collective value of an item of audiovisual content — as described in the previous paragraph — definitely increases with the number of viewers or recipients.

Thirdly, these network effects could conceivably become network externalities and thereby give rise to a form of “market failure” which would justify regulatory intervention. As mentioned at the outset of this argument, it cannot be excluded that free-to-air broadcasting would become the exception rather than the rule. Distribution against payment (pay TV, pay-per-view, etc.) might become the norm, in which case part of the viewers might not receive audiovisual content because they are unable to afford it or for some other reason. Accordingly, the collective value of the audiovisual content would not be maximized, since such value increases with the number of viewers and not everyone can view the content. Private firms have no incentive to maximize this collective value unless they can collect for it, so they will not seek to ensure that everyone receives the content in question, thus giving rise to a network externality (the collective value created through network effects cannot entirely be internalized by the distributor of the content).

It would therefore follow that, in order to avoid such externalities arising, there would be room for an entity whose main aim is to maximize the collective value of certain audiovisual content items, and which accordingly receives a measure of public support (through regulation or direct financial aid) to enable it to overcome the costs linked with making these items available freely to everyone at the same time. That could then be a public-service broadcaster, with a well-balanced and refined public mission, including for instance non-profit orientation, a focus on public affairs and collective interests, etc. By implication, that broadcaster would be able to aim for a wide audience. Its public mission would thus not be restricted to the provision of niche content items. Moreover, it would include not just the production of content, but also its selection.

\textsuperscript{100} A “reality” show of the “Big Brother” type could well attract a large audience, but it does not mean that it has a valuable collective dimension.

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and packaging as well as its distribution, thus avoiding the trap of the strict network/content separation. In comparison with today, public service broadcasters might find more freedom to experiment with such a mission, subject of course to appropriate levels of funding. For some public service broadcasters, such a mission would also mean a perhaps painful reassessment of their current performance.

It can be noted in closing that the argument outlined in the previous paragraphs already finds some application in existing legislation: it could be used for instance to justify the introduction of a provision dealing with the broadcasting of major events in Directive 89/552.102

III. CONCLUSION

Throughout the present piece, it was argued that, in response to convergence between the media, telecommunications and IT sectors, EC law (both sector-specific regulation and competition law) is evolving in a way which rests upon a definite conception of the converged world. In return, once that conception becomes well-established in EC law, chances are that the law will then to a certain extent condition the evolution of the market.

The approach underlying both the proposed new regulatory framework for electronic communications and recent EC competition law decisions involves a horizontal separation between the provision of content, on the one hand, and the operation of networks, on the other hand. Presumably, a number of firms would be present on each side and would seek relationships with firms on the other side to ensure their commercial success as content providers or network operators. The proposed new regulatory framework for electronic communications is surprisingly silent on the relationship between content and networks, but recent competition law decisions leave no doubt that the Commission will enforce third-party access to content rights and/or networks — thereby underlining the conceptual separation between the two — whenever there is a risk that a strong market position on either side would spill over to the other side as a consequence of vertical integration.

Even though the approach described above is certainly advantageous from a number of perspectives (maintaining or strengthening competition, fostering innovation, among others), it does place broadcasters, and public service broadcasters in particular, in a difficult position. First of all, the separation between networks and content could spell the end of the terrestrial network operations of broadcasters, or at least put them under a completely different regulatory regime (the proposed new regime for electronic communications) which would lead to accounting and probably legal separation. Secondly, the Commission’s approach tend to force firms to place themselves in the “content provider” or “network operator” pigeonhole, leaving broadcasting, i.e. the selection and programming of audiovisual content, sitting uncomfortably in the middle.

For public service broadcasters, this could mean that the admissible scope of their public mission (or in other words, the part of their public mission which justifies exceptions from the general

regulatory framework) could shrink to the provision of certain items of audiovisual content which are not produced by private firms. The “wide audience” element of the public mission, in particular, could be more difficult to sustain than it already is.

Nevertheless, it is not impossible for public service broadcasting to evolve in a way that could not only avoid regulatory difficulties, but even take advantage of the new environment to have a strong (albeit redefined) regulatory position. Public service broadcasting would then be the response to a “market failure” in the maximization of the collective value of certain items of audiovisual content, in light of network effects related to that collective value.

The convergence phenomenon and the evolution of EC regulatory and competition law, while they may appear threatening, might in the end contribute to a better and more refined understanding of public service broadcasting, which could be used to relaunch that service after years of neglect in a number of EU Member States.