

## **MEDIA OWNERSHIP CONTROL: TO WHAT EXTENT IS COMPETITION LAW AND POLICY SUFFICIENT TO PROVIDE FOR DIVERSITY AND PLURALITY IN THE MEDIA?**

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### **ABSTRACT**

In modern economies and societies, the availability of information is central to better decision making by citizens and consumers. In most countries, citizens and consumers receive the information they need through the media, including newspapers, television radio, internet and etc. After 1990s, technological and economic developments have evolved the media sector by converging it to telecommunications and IT sectors and by leading to new interactive broadcasting services transmitted by different technologies. These developments also increased mergers and joint ventures both at global level and national level. As well as these developments, the private benefits of media have increased concentration of ownership in these sectors. There are many people who argue that concentration in media markets has a negative effect on diversity and plurality. Because of increasing concentration in media markets in recent years all over the world, many concerns as to whether competition law and policy is sufficient to ensure the diversity and pluralism in media have arisen. Competition rules can address issues of concentration, efficiency and choice and will tend to encourage dispersed ownership and new entry. However, they cannot guarantee any of it. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice. Therefore, if competition law and policy is assessed as a whole in the context of media, it can be stated that it guarantees diversity to some extent. However, because of the objectives and criteria of competition law, it cannot adequately ensure diversity and plurality itself. Because, competition law takes in to account the economic criteria, which are partly different from diversity criteria, its sufficiency to ensure diversity remains limited. Therefore, it can be concluded that although competition law and policy is very important in media sector, it cannot completely provide for diversity and plurality. Thus, although competition law is an important part of regulation, it is not designed to deliver diversity and plurality in the media. Special media ownership rules exist across the world because the market alone, even regulated by competition law, is not thought to provide the best results for society and for democracy.

## 1. INTRODUCTION

In modern economies and societies, the availability of information is central to better decision making by citizens and consumers. In political markets, citizens require information about candidates to make intelligent voting choices. In economic markets, including financial markets, consumers and investors require information to select products and securities. The availability of information is a crucial determinant of the efficiency of political and economic markets.

In most countries, citizens and consumers receive the information they need through the media, including newspapers, television, and radio. The media serve as the intermediaries that collect information and make it available to citizens and consumers.

The recent explosion of media and communications technology was expected to deliver consumers a brave new world of competition across all telecommunications and media markets. There is no doubt that today, consumers have the option of receiving news, information, entertainment from a far greater variety of media – newspapers, radio, television, internet – than ever before.

Unfortunately, this growth in variety has not been accompanied by a comparable growth of independent, diversely owned competitive communications services and media voices (Kimmelmann, 2001). A crucial question, then, is how the media should be optimally organized. Should newspapers or television channels be state or privately owned? Should the media industry be organized as a monopoly or competitively? (Djankov, et al., 2001)

Therefore, the issue of ownership control and related effects should be explored. The tendency, has been towards increased concentration of ownership of the individual media in fewer and fewer hands, as well as the development of integrated ownership patterns across several media. What this means in practical terms is that a relatively small number of individuals decide what television programs will be broadcast, what issues will be investigated and reported.

Almost all modern democracies regulate the media sector in some detail. Regulation of media has been one of the sensitive fields for nation states because of its central importance for freedom of expression, democracy and national culture. The main aim of the media regulation is to ensure diversity that is considered as a guarantee for pluralism, working of democracy and national culture.

Diversity of the media, accurate and honest reporting of the news is considered to be vital for guaranteeing pluralism of opinion, adequate political representation and a citizen's participation in a democratic society.

A pluralistic media is seen to meet the demands of democracy by providing citizens with a broad range of information and opinions; to represent minorities giving them the opportunity to maintain their separate existence in a larger society; to reduce the event of social conflict by increasing understanding between conflicting groups or

interests; to contribute to overall cultural variety; to facilitate social and cultural change, particularly when it provides access to weak or marginal social groups.

In contrast, media concentration is widely considered to have a detrimental impact upon pluralism. In particular, concentration of the media market curtails the representation of a wide range of political and cultural societal groups (Harcourt ve Verhulst, 1998). The wide consensus on the view that media concentration is dangerous for democratic representation is reflected in many regional and national policy and legislative documents<sup>1</sup>. From a policy point of view, economic efficiency aspects of media concentration, such as price-cost margins on newspaper copies, are likely to be outweighed by concerns that increased media concentration may have adverse effects on the democratic process. This issue is reflected in special provisions in, or amendments to, competition laws, government subsidies and other policies designed to counter concentration tendencies or mitigate the effects of increasing concentration (Hackner and Nayberg, 2000).

Consequently, we can say that special media ownership rules exist across the world because the market alone, even regulated by competition law, is not thought to provide the best results for society and for democracy. Because of increasing concentration in media markets in recent years all over the world, many concerns as to whether competition law and policy is sufficient to ensure the diversity and pluralism in media have arisen.

In this context, this essay is intended to examine the extent of sufficiency of competition law and policy to provide for diversity and pluralism in media. But before discussing how competition law can be applied media sector, we can analyze that what is media and what are main features of it? Because they are very important to understand how and why we try to regulate it. So in second and third chapter of this essay, I try to describe the media and especially their economic features. In fourt chapter I mentioned shortly the terms of plurality and diversity. Then in chapter five and six, means of media concentration and regulations are explained. And finally, in the chapter seven, competition law applications in media sector and it's adequacy are discussed. Consequently, I can say that in this essay, i try to reach the reasons behind why we regulate the media sector concentration in addition to competition law.

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<sup>1</sup> Especially the opinions and resolutions of the Council of Europe on media concentration are important and interesting within that context. The 1982 Declaration on the freedom of expression and information states the importance of an "existence of a wide range of independent and autonomous media, permitting the reflection of diversity of ideas and opinions". Freedom of expression is guaranteed in the Article 10 of the European Convention on Human Rights states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..." (Harcourt ve Verhulst, 1998)

## 2. WHAT IS MEDIA ?

Actually media are the print (newspaper, magazines, etc.) and electronic communication devices (radio and television). Usually we use this term instead of mass communications in a daily life. But, in this essay, I use the terms as a form of communication by which messages are created by organizations and distributed to audiences. Typically, the audience of media message is large and members receive the message with near simultaneity<sup>2</sup>.

### 2.1. CHARACTERISTICS OF MEDIA

Demsetz (1989) hypothesize that the “amenity potential”, also known as “the private benefits of control”, arising from owning media outlets is extremely high. In other words, the non-financial benefits, such as fame and influence, obtained by controlling a newspaper or a television station must be considerably higher than those from controlling a firm of comparable size in, say, the bottling industry. Also economic theory predicts that private control of media firms should be highly concentrated.

According to Tyner (1997), media have seven key concepts:

1. All media are constructions.: The media do not present simple reflections of external reality; they present productions, which have specific purposes. The success of these productions lies in their apparent naturalness. However, although they appear to be natural, they are in fact carefully crafted constructions that have been subjected to a broad range of determinants and decisions. Media are manufactured constructs. Careful planning and execution has gone onto the process of constructing the media into a seemingly natural reality.
2. Media construct reality. Although media are not real, they are influential in shaping our attitudes, behavior and ideas about the world. The media provides us with information about people, places, and things which we may not know about. This media information is sometimes used as the basis for our decision making.
3. Audiences negotiate meaning. Audiences use their minds to make sense of the information. As individuals or as groups, we anticipate the codes and conventions in media as we "read" sense into the message. Basic to an understanding of media is an awareness of how we interact with media texts. When we look at any media text, each of us finds meaning through a wide variety of factors: personal

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<sup>2</sup> For more details see; <http://www.museum.tv/archives/etv/M/htmlM/masscommunic/masscommunic.htm>

needs and anxieties, the pleasures or trouble of the day, racial and sexual attitudes, family and cultural background. All of these have a bearing on how we process information.

4. Media have commercial implications. Billions of dollars are associated with media industries. Advertising drives media industries. The commodity that is bought and sold is the audience.
5. Media contain value messages. Media are not value free. All media has explicit or implicit values and ideology. All media products are advertising in some sense - for themselves, but also for values or ways of life. They usually affirm the existing social system. The ideological messages contained in.
6. Media have social and political implications. Media not only sells products but also ideas, messages, political candidates and has the power to shape audiences into political constituencies. Media technologies have the power to alter our culture and the way we use our leisure times.
7. Media have unique aesthetic forms that are closely related to content. There is an artistry and creative vision in the media that we are exposed to. Each medium has unique codes and conventions that influence its content.

## **2.2. MEDIA TYPES**

Different media serve different needs, have different content and differ widely in their impact and effect. People use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. As a result, competition between the media is muted in the marketplace and, in some respects, the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas (Cooper, 2001a).

The sectors of the media market divided by the Tabernero and Carjaval (2001) are:

- . General news daily press
- . Economic newspapers
- . Magazines
- . Publishing houses
- . Over-the-air radio
- . Open television
- . Pay television
- . Cinema film distribution
- . Music industry
- . Advertising agencies
- . Internet

At this point, we can shortly identify to four of all: TV, internet, radio and newspapers.

## **A. Television**

Clearly, television is a unique communications medium unlike any other. Television incorporates a significant nonverbal component, which not only serve to suppress the importance of content but also requires little deliberative message processing. TV networks still dominate the most valuable viewing time – prime time – and capture the lion's share of national advertising markets Network TV is primarily a nationally oriented medium. National advertising revenue accounts for the majority of its revenue. Television has been the primary source of news for over a decade.

Cable TV has become distribution mechanism for national programming to its subscribers. In contrast to network TV, which is funded entirely by advertising, cable is funded primarily by subscription revenues although national advertising revenues have been growing.

## **B. Internet**

The internet appears to occupy a new media space and is starting to look a lot more like cable than broadcast in its revenue model.

For the vast majority, it is a shopping mall at the fingertips of subscribers, enhancing daily activities. Internet traffic is made up of a couple of hours on online time per week spread over a dozen sessions with a minute or so at any given page. The leading advertisers on the internet are a completely different group than one sees on television.

## **C. Radio and Newspapers**

Newspapers provide a different type of information service with different impact. They also provide a different news function than video or radio, with much longer and in depth treatment of issues. In this they have adapted to a role that is distinct from television.

Radio, newspapers and magazines are substitutes from an advertiser's perspective. The stability of their market shares indicates that they are not likely to be greatly eroded by new media in the near term. There is some evidence that cable and newspapers are cross elastic, which reflects the fact that they are both local.

## **2.3. MEDIA EVALUATION**

Examining performance of media industries ought to be the ultimate step in media analysis. We need to select performance criteria that are as precise as possible: How well has a media industry functioned when compared to some ideal standard? If there is market failure, then is there a regulatory remedy to correct that failure?

Dennis McQuail's suggest six media performance norms that encompass most judgements and take them up in order of ease of use (Gomery, 2000).

1. **EFFICIENCY:** Media industries ought not waste resources; that is they should be as efficient as possible. This is the sole criterion of the free market approach. Monopolists waste resources in order to maintain their position of power. However, what about control by a few firms?
2. **MULTIPLE VOICES:** Media industries ought to facilitate free speech and political discussion. A democracy needs freedom of expression to make it work and the mass media ought to be open enough to promote debate of all points of view. The marketplace of ideas calls for criteria of accuracy and completeness. This surely much count in any definition of diversity.
3. **PUBLIC ORDER:** Media industries ought to facilitate public order. In times of war, violence, and crime, how should we regulate the media (if at all) to ensure differences? This is a growing area of concern as the media easily jump across national (and local) boundaries.
4. **CULTURAL QUALITY:** Media industries ought to protect and maintain cultural quality and offer some product diversity. Can advertising-generated-revenue companies develop quality programming, and not simply dish up more sensationalism? Here the issue of use of television in elections becomes paramount. This surely must count in any analysis of diversity and localism.
5. **TECHNICAL CHANGE:** Media industries ought to bring to the marketplace new technologies as quickly as possible. It has long been known that monopolies and collusive oligopolies resist the innovation of new technologies in order to protect their highly profitable status quo positions.
6. **EQUITY:** Media industries ought to equitable. Should members of groups in society be shut out of the mass media industries either as employees and managers, or as consumers? For consumers, access is becoming more and more restrictive as a larger share of the mass media go to direct payment.

### **3. MEDIA ECONOMICS**

The media products have two functions, on the one hand for the recipients and on the other hand for the advertisers. According to these two functions, media products can be traded on two markets. Thus, recipient demand is based upon content, in fact on its informative and/or entertainment function. To the advertisers on the other hand, it is the function of the content as “facilitator” in accessing the interest of the recipients which is of central importance.

Media markets tend to share usually these common features :

1. They are often highly concentrated<sup>3</sup>.
2. Media firms, such as newspapers, magazines and commercial television channels, operate simultaneously in two sub-markets: media firms that publish

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<sup>3</sup> This issue is covered in Section 5.

newspapers or magazines have to consider two markets, the markets for the medium itself (primary market) and the market for advertising (secondary market). Hackner and Nayberg (2000) say that, the interrelationship of the sub-markets is a salient characteristic of mass media. Even though this interrelationship is not an exclusive characteristic of media markets<sup>4</sup>, they are surely an important example for this phenomenon. The deciding feature of interrelated markets is the interdependency of the respective demands<sup>5</sup> (Dewenter, 2003). Not only do they sell their products to readers, viewers or listeners, they also sell advertising space to firms. These markets are generally interrelated on the demand side. For example, the value of placing an ad in a local newspaper increases in the paper's circulation, and the subscribers' valuation of the newspaper may well increase in say the amount of classified ads. It is sometimes argued that demand linkages of this type give rise to positive spirals that partly explain the strong concentration tendencies in media markets. Of course, the media consumer's valuation of advertising may depend on the type of advertising as well as the type of media. Needless to say, the fact that the production of media content often involves high fixed costs further increases the benefits conferred by size (Hackner and Nayberg, 2000). Therefore, interrelated markets can be described as a peculiar phenomenon, which is not comparable with typical product market relations (Dewenter, 2003).

3. Because of interrelation of sub markets, at least two or three different prices have to be considered by the publisher or broadcaster. For example, internet provider has to optimise access fees on the one hand and advertising rates for banners on the other hand. Also television and radio stations have to consider primary and secondary markets, the broadcasting and advertising market. The cinema operator is faced with the demand for three different products, therefore she has to optimise the respective prices. Apart from ticket prices and advertising rates, also a vector of concession rates has to be set.
4. Especially the (print) media exhibits large economies of scale. Moreover, the existence of these scale economies is frequently asserted as a main reason for the persistent concentration in media markets and therefore for market power.
5. Furthermore, intra-industry concentration and also cross-ownership of media products is a characteristic worth mentioning. There are several firms which operate in different media branches such as print media, radio broadcasting and television<sup>6</sup>.

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<sup>4</sup> Interrelated markets, also exist in other sectors (even though they are frequently associated with media markets). Sports events, for example, combine several markets, where the demand for advertising, concession, broadcasting and, last but not least, the event itself are characterised by interdependency. And also other events like music concerts or theatre performances and, additionally, institutions like amusement parks are all different types of interrelated markets if advertising plays any role for these events. Further features of media markets

<sup>5</sup> Markets are said to be interrelated if the demand for advertising and the demand for the media are interdependent (e.g., readers are interested in advertising and the advertising customers are interested in number of readers). In related markets there is only a one-way relationship (e.g., readers are not interested in advertising, but advertising customers are still interested in circulation).

<sup>6</sup> Some few examples of the largest worldwide acting cross-ownership firms are AOL Time Warner , Bertelsmann, Viacom, Rupert Murdoch 's News Corporation .



- 6. A further characteristic of media products is an effect that can be described in terms of habit formation or addictive behaviour. Newspaper habit and particularly internet addiction are phenomena subject to psychological and psychiatric research.
- 7. Mass media can be described as network goods. In this connection, the internet should be beyond dispute, because of its physical network properties, but also newspapers, magazines or television programmes can be considered as some kind of network products, namely in the sense of social networks.
- 8. Media products are also frequently characterized by price discrimination. Newsstand prices (i.e. of newspapers or magazines) and subscription rates are typically differentiated. The same is true for internet portals or for pay TV programmes.
- 9. Finally, regulation is also an important feature of mass media. Because of the existence of economic factors like scale economies, barriers to entry and relatively high fixed costs, but also for political reasons the media sector is usually (still) heavily regulated .

**4. DIVERSITY and PLURALISM**

In many sources, we can see that diversity and pluralism, which are stated amongst the aims of media regulation, are used interchangeably (for example Gibbons, 1999). On the other hand, pluralism and diversity can be used in different meanings. For example, in the Consultation Paper of the UK Government on Media Ownership Rules (2001), there is a clear distinction between diversity and pluralism.

Diversity and pluralism have been two of the central objectives of communications policymaking. According to Napoli (2000), diversity as a policy objective grows directly out of the marketplace of ideas metaphor’s advocacy of the "widest possible dissemination of information from diverse and antagonistic sources" in an effort to promote goals such as informed decision making, cultural pluralism, citizen welfare, and a well-functioning democracy.

Regardless of whether one takes a purely democratic theory approach or purely economic theory approach to the marketplace of ideas, the concept still emphasizes maximizing both the number of participants in the marketplace and the range of ideas, viewpoints, and cultural perspectives available to citizens/consumers.

**Table 1: Diversity Components, Subcomponents, and Assumed Relationships.**

Source Diversity	Content Diversity	Exposure Diversity
1. Ownership a. Programming b. Outlet 2. Workforce	1. Format/Program Type 2. Demographic 3. Idea/Viewpoint	1. Horizontal 2. Vertical

**Source: FCC**

This model builds upon and extends the source-outlet-viewpoint diversity framework traditionally employed by the FCC. The concept of source diversity here is defined in terms of both content and outlet ownership (“source” and “outlet” diversity under the Commission’s definitions). In addition, the concept of source diversity also encompasses workforce diversity, which is defined in terms of the ethnic and gender composition of a media outlet’s workforce.

Content diversity is defined not only in terms of diversity of viewpoints, but also in terms of diversity of program types and demographic diversity, which refers to the ethnic and gender composition of those represented in media content.

As the figure indicates, the traditional presumption that has guided policymaking is that source diversity promotes content diversity.

Exposure diversity refers to the diversity of content or sources consumed by audience members, which, of course, may be very different from the diversity of content or sources available. Assessing exposure diversity can focus on either horizontal exposure diversity or vertical exposure diversity. Horizontal exposure diversity refers to the distribution of audiences across all available content options, while vertical exposure diversity refers to the diversity of content consumption within individual audience members. (Napoli, 2000).

According to the UK Government Consultation Paper (2001), diversity and plurality are delivered by different means. Diversity refers to the variety of different programmes, publications and services that are available, whereas plurality is about the choice people can make between different providers of those services. Both are key to the quality of service and the range of news and opinion we as citizens receive from the media.

Since diversity is about the availability of a wide range of content, it has traditionally been maintained through content regulation, rather than ownership controls. Some media companies, however, argue that deregulation of the market is the best way to ensure true diversity (Jowell and Hewitt, 2002).

With plurality it is not content but the source of that content that matters, the company controlling it, the ‘voice’ behind it. We want a plurality of voices, giving the citizen access to a variety of views that, in a competitive market, maintain their own balance. We need regulation that is specifically directed to ensure such plurality. That is why government have imposed rules on media ownership.

In its 2001 consultation paper, UK Government set out at least four reasons for plurality importance:

1. Plurality ensures that no individual or corporation has excessive power in an industry which is central to the democratic process.
2. A plurality of owners should secure a plurality of sources of news and editorial opinion, which is vital given the position that newspapers and current affairs occupy at the heart of public debate. A healthy democracy depends on a

culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.

3. At the limit, even though a single source might produce impartial, high-quality content, they would be able to dictate exactly what constituted 'news' itself, and their inclusion or omission of stories could slant the whole news agenda in a particular direction.
4. Plurality maintains our cultural vitality. Different media companies produce different styles of programming and publishing, which each have a different look and feel to them. A plurality of approaches adds to the breadth and richness of our cultural experience.

## **5. MEDIA CONCENTRATION**

Media concentration can occur in a number of different ways and for different reasons. Media companies can integrate both vertically and horizontally and through product diversification and internationalisation (this occurs through mergers, acquisitions, take-overs, and cross-national market planning). Presently, "traditional media" (terrestrial television, publishing, radio) is being joined by forms of media resulting from new technologies coming from the telecommunications field (cable, satellite, telephony, internet, and consumer electronics companies).

A process of market convergence is underway as broadcasting, print media and communications media combine services through mergers, acquisitions and alliances. Newspapers, radio stations and cable TV stations have experienced substantial consolidation in the last fifteen years and have become highly concentrated. Network TV remains a concentrated market. The Internet has become more concentrated more quickly than anyone dreamed when measured either in terms of subscribership or usage.

Why media concentration is so important? Harcourt and Verhulst (1998) give five reasons:

1. Firstly, mergers often mean cost cutting, staff lay-offs, the closing down of media outlets and less investment in content through which editorial independence is jeopardized. Cost cutting usually leads to a standardization in media content, rather than diversification. This leads also to a reduction in the variation and amount of information sources.
2. A second concern about media concentration is the fact that large market players can close the market to new entrants, independent producers or drive out weaker competitors. A market monopoly or oligopoly could be the result. This situation is true for other markets but considered to be counter-competitive for the media market as well as having social costs. Competition law can be used to prevent market concentration.
3. Media concentration may thirdly allow media owners an unwieldy heightened influence on public opinion (politically, economically and etc.) The media gives

an owner potential power to influence public opinion in his favour and prevent counter views from reaching the general public. In principle, this could conform to the principles of freedom of speech. However, as concentration could lead to only this voice being heard, it could have negative consequences for external and internal pluralism.

4. Fourthly, the increased use of encryption technologies in the delivery of media content threatens to financially burden the public with high costs for popular viewing. A high cost for access could be established by gateway monopolies. The result could be the development of what has been termed as the "information rich" and the "information poor".
5. Fifthly, the new media broadcast channels (particularly cable and satellite television) seek to identify market niches to boost profitability. This often results in specialized channels which tend to be thematic and narrow-cast. Minority audiences could be overlooked by such thematic channels (it could be the case that minority interests could also be served by these channels).

## 5.1. MEASURING MARKET CONCENTRATION

To understand how market concentration is measured, we can use the U.S. Department of Justice (DOJ) Horizontal Merger Guidelines<sup>7</sup>. The DOJ defines market levels of concentration to determine the extent of review of mergers. DOJ is unlikely to challenge mergers between companies in markets that are in unconcentrated. To make this assessment, it calculates the index of concentration known as the Herfindahl-Hirschman index (HHI)<sup>8</sup>. A measure of concentration of the production in an industry that's calculated as the sum of the squares of market shares for each firm. This is an alternative method of summarizing the degree to which an industry is oligopolistic and the relative concentration of market power held by the largest firms in the industry. Another way to quantify market concentration is to calculate the market share of the largest 4 firms (4 firm concentration ratio or CR4).

The DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal sized competitors. In such a market, the 4-firm concentration ratio would be 40 percent. Any market with a concentration above this level was deemed to be a source of concern and increases in concentration through mergers would receive scrutiny.

The DOJ considers a market with an HHI of 1800 as the point where a market is considered highly concentrated. In terms of equal sized competitors, this level falls between five and six. A market with six equal sized competitors would have an HHI of 1667. In such a market, the four firm concentration ratio would be 67. A market with

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<sup>7</sup> Section 4 of these Guidelines, relating to Efficiencies, was issued in revised form by the Department of Justice and the Federal Trade Commission on April 8, 1997; and the footnotes in Section 5 of the Guidelines have been renumbered accordingly. The remaining portions of the Guidelines were unchanged in 1997, and they were issued on April 2, 1992.

<sup>8</sup> The Herfindahl index gives a better indication of the relative market control of the largest firms than can be found with the four-firm and eight-firm concentration ratios.

five equal sized competitors would have an HHI of 2000. The four firm concentration ratio would be 80 percent.

**Table 2: Describing market concentration for purposes of public policy**

DEPARTMENT OF JUSTICE MERGER SHARE GUIDELINES	EQUIVALENTS IN MERGER SIZED FIRMS	HHI TERMS OF EQUAL	4- EQUAL
↑ CR4=80	5 EQUAL SIZED FIRMS		HHI= 2000
	HIGHLY CONCENTRATED		HHI= 1800 OR MORE
CR4=67	6 EQUAL SIZED FIRMS		HHI= 1667
↓ CR4=40	UNCONCENTRATED 10 EQUAL SIZED FIRMS		HHI= 1000

**Sources: U.S. Department of Justice, Horizontal Merger Guidelines, revised April 8, 1997.**

Coopers (2001) stated that Shepherd describes these thresholds in terms of four-firm concentration ratios as follows:

1. Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.
2. Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.

Sellers with market power<sup>9</sup> also may lessen competition on dimensions other than price, such as product quality, service or innovation. Because of the critical importance of the media not only an economic marketplace, but as the cornerstone of the marketplace of ideas, we believe these industries should be held to close scrutiny. The critical level for scrutiny is the unconcentrated threshold (roughly the equivalent of 10 or more equal sized firms).

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<sup>9</sup> Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.

In this point, we can look at media market concentration level in USA.

**Table 3: Concentration on some media market**

MARKET AND PERIOD OF MOST RECENT DATA CONCENTRATION	LEVEL OF
Internet (2000)	
Subscribers	2500
Viewing Time	1200
Television (mid-1990s)	
Local Viewing - Advertising	
Largest Fifth	1600 - 700
2nd Fifth	2000 - 1600
3rd Fifth	2100 - 2300
4th Fifth	2700 - 2300
Smallest Fifth	2500
3100	
National	
Viewing	1100
Advertising	1700
Cable Subscribers (1999)	
FCC - MPVD	
w/o Attribution of AT&T Ownership	1000
w/ Attribution	1400
Cable only	
w/o Attribution of AT&T Ownership	1900
w/ Attribution	2500
Radio Local Share (1997)	1600 - 2100
Newspapers Circulation (1999)	6000

**Source: Cooper 2001**

Coopers (2001) analyze this table as follow: Market structure analysis must be grounded on the actual market shares, not merely the number of participants and the rapidly increasing concentration of the Internet underscored that point. The increasing concentration of the internet is stunning (table 3). AOL's dominance of subscribership in the U.S. is widely noted (30 million subscribers, putting its market share above 50 percent). Its market share makes it a leading firm in a highly concentrated market. Even more striking is the growth in the concentration of usage.

Because the number of potential online channels is infinite, some assume that market dominance is an impossibility on the Internet. This is faulty reasoning. Gauging consolidation online simply requires a different measuring stick than it does off-line. Analysis of Media Metrix data over the past three years shows an incontrovertible trend toward online media consolidatio. Between March 1999 and March 2001, the total number of companies controlling 50 percent of user minutes online decreased by nearly two-thirds, from 11 to four.<sup>58</sup>

Because AOL has such a dominant position (over 30 percent of user time) the HHI is about 1200, well above the moderately concentrated threshold. The four firm

concentration ratio also falls in the range where concerns about concentration and the abuse of market power begin.

Most local distribution markets for network TV are highly concentrated measured either in terms of viewers or advertising dollars. HHIs are well above 1800 and four firm concentration ratios are well above sixty percent in all but the very largest markets. The national market for viewers (HHI=1000) and advertising (HHI=1600) is moderately concentrated.

Although the FCC claims that the cable TV market falls just below the level of being moderately concentrated (HHI = 954), it arrives at this conclusion by ignoring AT&T’s substantial ownership interests in Cablevision and AOL Time Warner and by including satellite in the same product space, even though it could not find significant cross-price elasticity between cable and satellite. Defining the market correctly as cable only and taking AT&T’s ownership interests into account places the cable TV market into the highly concentrated category. The recent wave of mergers has moved local radio markets into the highly concentrated range, with HHIs averaging above 2000. Newspapers have long been highly concentrated, with HHIs above 6000.

**5.2. SOME OWNERSHIP DATA**

In this section, we can look at results of the studies of Djankov, McLeish, Nenova and Shleifer (2001) which is related to ownership structure of media in all over the world. Because of the aim of the our essay, we do not give place to such as construction of database, variable construction.

**Table 4: Some Ownership data of 97 Countries**

	State	Families	Employees	Widely Held	Other
Press Ownership, by Count (%)	29	57	4	4	6
Press Ownership, by Share (%)	29	59	4	3	5
TV Ownership, by Count (%)	34	60	0	5	1
TV Ownership, by Share (%)	29	64	1	5	1

**Source: Djankov, McLeish, Nenova and Shleifer (2001)**

Their first significant finding is that families and the state own the media throughout the world. In the sample of 97 countries, only 4% of media enterprises are widely held. Less than 2% have other ownership structures, and a mere 2% are employee owned. On average, family controlled newspapers account for 57% of the total, and family controlled television stations for 34% of the total.

State ownership is also vast. On average, the state controls approximately 29% of newspapers and 60% of television stations. The state owns a huge share – 72% - of the top radio stations. Based on these findings, for the remaining analysis we classify ownership into 3 categories: state, private (which is the sum of family, widely held and employee categories), and other.

This result is consistent with the Demsetz (1989) insight that the large amenity potential of ownership media outlets creates competitive pressures toward ownership concentration. In a sense, both the governments and the controlling private shareholders get the same benefit from controlling media outlets: the ability to influence public opinion and the political process.

They say that the state has a monopoly in a media market if the share of state controlled firms exceeds 75%. A total of 21 countries have government monopolies of daily newspapers, and 43 countries have state monopolies of television stations with local news. Television has significantly higher levels of state ownership than newspapers.

Alternatively, from the political perspective, privately owned newspapers are easier to censor than privately owned TV. Because television can be broadcast live, control of content is more likely to require ownership. In this case, governments that want to censor news would own television.

The simple statistics presented so far raise many questions. The evidence suggests that there are large private benefits of media ownership. Throughout the world, media are controlled by parties likely to value these private benefits: **the families and the state.**

## **6. MEDIA (OWNERSHIP) REGULATION**

As has mentioned in section 4, diversity and plurality will be used to refer both different content and services and different media owners. However, it is difficult to measure diversity and plurality, especially the diversity of content. According to the Council of Europe (CeO 2002:4), critical threshold is one-third of the market in terms of revenues, audiences or network capacity. This means that, for the diversity aim, there must be at least four owner in the market. In the same way, in the proposal of DG XV in 1996 for a 'Media Pluralism Directive', 30 percent upper limit for single medium and 10 percent upper limit in the overall media was adopted (Doyle,1997). However, these thresholds of media ownership are only related to the structure of market and they do not guarantee diversity of content (CoE 1999).

Because of that, media ownership rules are not sufficient to ensure the diversity, so, "measures over and above those that solely focus on restrictions to ownership may be needed" (CoE 1999). These measures can be imposing content obligations, ensuring access to "bottleneck" proponents and applying competition law.

Two broad areas of regulation are involved in controlling media ownership: more specific rules set out in sectoral law (especially at broadcasting) and competition law (Research, 2002).

- Sectoral law imposes additional controls on the scale of a company's media interests. These controls operate at a number of levels. Some persons are wholly prohibited from holding any broadcasting licences, or are prohibited from holding certain types of licence. Further, within individual media sectors there are limits



on the scale of interests that a person may have within that sector. Finally, there are controls which apply across different types of media (such as running a national newspaper and holding a broadcasting licence) which are designed to prevent a person accumulating too great a share of the media voice. These rules are detailed and complex.

- Competition law applies to all sectors of the economy, and addresses the creation of concentrations of business operations (through merger controls<sup>10</sup>), the abuse of monopoly power and anti-competitive cartels.

The terrestrial television and daily newspaper markets, which commonly enjoy a wide audience reach, are targeted as particularly salient for ensuring pluralistic (and democratic) representation. It is therefore necessary for the government to continue regulating – either through structural constraints like ownership caps, or behavioral requirements like “equal time,” “reasonable access,” or network/affiliate rules – to pursue the public interest goals of meeting local community needs and promoting diversity of views in media markets, even where competition exists<sup>11</sup> (Kimmelman, 2001).

According to Cooper (2001a), in media sector, public policy is most critically important now for two reasons.

- First, the new interactive, multi-media hold the potential to increase the power of the TV medium and expand its role in commerce and political expression.
- Second, it is critical to ensure public values are reflected in the underlying infrastructure of the media marketplace at the early stages, as the networks are being designed and deployed. Economic and contractual relations create barriers to access and give owners control, and, perhaps more importantly, architectural decisions in the design of networks place speakers and non-owners at a disadvantage.

There are many dimensions and rationales about regulation of media in literature<sup>12</sup>. Countries have developed a template identifying the *key policy instruments* used in regulating media sector (Harcourt ve Verhulst, 1998):

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<sup>10</sup> In UK, within the merger control regime, special procedures currently exist for mergers of larger-circulation newspapers. These create a presumption of detailed scrutiny for newspaper mergers which must be notified to the competition authorities before they are completed. In contrast, other mergers are only scrutinised if they are thought to raise specific competition concerns.

<sup>11</sup> Consumers Union in USA believes the FCC should leave the current national television broadcast ownership cap in place, while it initiates a much more detailed and extensive analysis of market structure than it has in the past. However, when the two largest sources of news and information – television and newspaper come under the same ownership roof, there is special cause for concern about business pressures that could undermine the free marketplace of ideas.

Moreover, Consumers Union also believes that, particularly where there is only one local newspaper, the public interest is best served by prohibiting that newspaper from owning a local television broadcast outlet. Dangers ranging from favorable newspaper reviews of a broadcaster’s programming, to positive editorials/opinion articles about business interests of a broadcaster or politicians who favor such business interests would be difficult to prevent if cross-ownership is broadly permitted:

<sup>12</sup> See for details Golderberg *at al* (1998).

- A. Basic constitutional rights relating to freedom of speech
- B. Legislation ensuring transparency of media holdings
  - 1. Requirements to name company owners/shareholders (nominative shares)
  - 2. Requirements to disclose company accounts
  - 3. Requirements to disclose sources of media revenue
  - 4. Requirements to notify regulatory authorities of significant changes in stock, capital or shareholdings
- C. Legislation concerning media ownership
  - 1. General ownership and management rules e.g. licensing requirements, representation of social groups at general board
  - 2. Cross Media Ownership regulations
  - 3. Foreign ownership/investment rules
- D. Legislation ensuring access (e.g. distribution platform, interconnection, essential facilities)
- E. Competition Law (and the way it is applicable to the media)
  - 1. Cartel, merger and acquisition regulation
  - 2. Measurements and methodology to determine dominance
- D. State support and subsidising of media companies
- E. Advertising rules/restriction
- F. Protection rules of editorial/journalistic independence and accountability
- G. Content related legislation/provisions
  - 1. Impartiality of news coverage
  - 2. Public Interest Provisions (regional programming, representation of societal groups, etc.)
  - 3. Programming rights and listed events
- H. Powers of regulatory bodies in the field of media ownership and concentration
- K. Future regulatory proposals and trends

As mentioned above, countries have developed a variety of policy instruments directly governing media sector. Media sector has been regulated by sector specific rules to achieve social and political aims like preserving cultural identity, maintaining diversity and pluralism, protecting minors, privacy and freedom of speech. However, the main concern is to prevent control of media by one or few person. Much regulation is aimed at limiting excessive concentration in media markets. The importance of controlling excessive cross-media ownership between these two markets has been also a source of regulation

In order to ensure diversity and pluralism in the media, there are special restrictions on the concentration. Ownership rules and restrictions, e.g. cross-ownership

restrictions, restrictions on number of licences, foreign ownership and share of individuals and legal persons in media companies<sup>13</sup> are one of the important tools for ensuring diversity and pluralism in most of the countries. We can summarize key policy instruments used to control media market concentration and those effecting ownership in media markets such as (Harcourt ve Verhulst, 1998):

1. general competition law and specific provisions under competition law directed towards the media.
2. Regulating media and telecommunications operators through licensing of national services
3. Requiring the promotion of media pluralism as a pre-requisite to licence-issuing.
4. lowering entry barriers to markets through legal decisions and economic incentives (tax relief, financial assistance)
5. promoting media which are seen to provide diversity of content or represent minority views
6. providing financial assistance to content providers providing a variety of content
7. guaranteeing the high quality and availability of public service broadcasting (by instituting "must carry" rules on cable, satellite and digital providers
8. adopting legal instruments to safeguard editorial independence and freedom of expression
9. requiring high transparency of company reports and activities
10. monitoring ownership patterns in media markets and making this information publicly available.
11. ensuring open networks and universal service for internet users
12. To prevent gateway monopolies of new services.

In recent years, with the economic and technological changes, necessity of media ownership rules has begun to be questioned. In this context, governments try to balance two objectives when deciding their media ownership rules: maintaining diversity and other public policy aims on the one hand, and ensuring dynamic and competitive media markets on the other hand (UK, 2001; Scheuer and Stroattmann 2002). In this context, there is a debate on whether competition law and policy itself is sufficient to ensure diversity and pluralism.

## **7. COMPETITION LAW AND MEDIA CONCENTRATION<sup>14</sup>**

As stated above, competition law and policy is one of the tool to regulation of media. With the increasing commercial activities and concentrations in recent years, adequacy of competition law and policy itself to provide for diversity and pluralism has been questioned. In that debate, while some argue that competition law is sufficient to ensure diversity and pluralism so there is no need for specific regulations, some argue that competition law and policy is an essential tool in regulating media but it cannot sufficiently deal with diversity concerns (Scheuer and Stroattmann 2002). In other words, some believe that specific regulation like

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<sup>13</sup> See CoE (2002) and UK (2001) for the media ownership rules of different countries.

<sup>14</sup> I would like to thank my colleague, Competition Expert Mr. Ali Demiröz who has contribution to this chapter by sharing his unprinted essay " *To what extent is european competition law and policy sufficient to provide for diversity in the broadcast media?* " which was submitted at Essex University.

ownership rules are essential to provide for diversity in media sector. It could be stated that this view is widely accepted<sup>15</sup>.

## **7.1. Competition Law and Media**

Competition or antitrust laws are enacted by states around the world in order to provide that market mechanism works properly. So, it could be stated that main objective of the competition law and policy is to achieve 'effective competition' in the market (Sufirin and Jones 2001). If there is effective competition in the markets, it is assumed that productive, allocative and innovative efficiency will be ensured.

It is not possible to examine every aspect of competition law and policy, so, some important points which are relevant to media will be examined below. Generally, competition law and policy has three main tools:

### **7.1.1. Agreements Between Undertakings**

Like Turkish Competition Law Article 4 and EC Treaty Article 81, generally all competition law prohibits agreements and concerted practices between undertakings, and decisions of associations of undertakings, which prevent or distort competition in the market. Agreements to fix prices, share markets and limit production are some of the examples prohibited by these articles<sup>16</sup>.

If there were no tool to deal with cartels and agreement, media company could easily coordinate their behaviours. Because of that, these articles serves to diversity and plurality aim directly by requiring undertakings to decide their commercial behaviours independently.

In *BİRYAY*<sup>17</sup> Case, Turkish Competition Authority took the decisions as follows:

When the information received from the parties during the stage of investigation is examined, whereas both BBD and YAYSAT abolished all current contracts concluded by the customer publishing houses as of 01.06.1996, and declared that they assigned these contracts to BIRYAY, the customer publishing houses concluded contracts with BIRYAY on 01.06.1996 which generally involved heavier conditions compared with the precedents such as higher rates for distribution commissions and compensation figures, some of the customer publishing houses resisted to sign these contracts, and BIRYAY requested from BBD and YAYSAT to cease the distribution of publications of publishing houses which had not signed a distribution contract with it, it is understood that BBD and YAYSAT eliminated competition in the market by means of transferring to BIRYAY the customer publications in hand, partitioning the distribution market for newspapers and journals and making BIRYAY the only addressee for the customer publishing houses.

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<sup>15</sup> See, among others, Gibbons (1999), CoE (2002), UK (2001).

<sup>16</sup> However, some agreements can be exempted from this prohibition if the agreement in question satisfies the conditions set out in related articles.

<sup>17</sup> BIRYAY is the joint venture of BBD and YAYSAT equally owns.

After commencing operation, BIRYAY apportioned between BBD and YAYSAT the distribution of publications belonging to the customer publishing houses which concluded a distribution contract with it. Therefore, besides the partitioning of market, customers are also partitioned via BIRYAY.

It is also evidenced in documents that BBD and YAYSAT made correspondences via BIRYAY and determined the fixed prices and commission rates to be received from the customer publishing houses.

When the above statements and the determinations and documents in the findings section of the decision are considered, the opinion reached is that BBD and YAYSAT infringed article 4 of the Act by both

- partitioning the distribution market for newspapers and journals and customer publications via BIRYAY jointly set up by them, and
- determining jointly the amount of fixed prices and the distribution commissions to be received from the customer publishing houses via the Main Contract of BIRYAY and correspondences through BIRYAY.

Subsidiary dealership contracts concluded by YAYSAT and BBD involve anti-competitive provisions as they grant an exclusive region for one of the parties and restrict the freedom of the subsidiary dealer for resale and to display and sell competing goods, and therefore they are contrary to article 4 of the Act.

In *BiB Case*<sup>18</sup>, a joint venture between BskyB, British Telecom (BT), Midland Bank and Matsushita Electric Europe was assessed under Article 81 of EC Treaty. The joint venture established to provide digital interactive television services. Although BT and BskyB were potential competitors in that market and there were restrictive clauses in the agreement, Commission granted exemption by imposing some conditions on parties (Nitsche 2001). This case is important that, on the one hand, it shows Commission's 'permissive approach' in the case of a new service (Nitsche 2001), on the other hand Commission intervenes the agreement by imposing conditions on parties to preserve competition. These conditions aim to prevent the foreclosure of market by parties.

In the context of Article 81, collective selling and purchasing of content rights especially broadcasting sports events can be anticompetitive. Monti (2002) states that collective selling of sports rights can distort competition, if they are sold for 'long duration' and 'exclusively'. He also stresses the Commission's will "to ensure that any withholding of rights does not hinder the emergence of new technologies". Similar approach also were accepted by Turkish Competition Authority (TCA). In other words, TCA stated that Turkish Football Federation was an undertaking so its agreement between broadcaster (Cine 5, Teleon and Digitürk) was also under scope of Competition Law of 4054.

It can be concluded that these article is directly or indirectly serving to the diversity and plurality by preventing anticompetitive agreements and by exempting pro-competitive agreements.

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<sup>18</sup> *Bib+4 Comp/36.539*, OJ L 312/1-37, 06.12.1999.

### 7.1.2. Abuse of Dominant Position

Like Turkish Competition Law Article 6 and EC Treaty Article 82, generally all competition law prohibits the abuse of dominant positions of one or more undertakings. Excessive or predatory pricing, discrimination, leveraging, and tying are the examples of these articles.

One of the claims about the inadequacy of competition law is related to concept of abuse of dominant position. According to this claim while competition law can prohibit the external growth of a company (like mergers), it cannot prohibit the internal growth by which a company can have a dominant position in the market (Gibbons 1999; Scheuer and Stroattmann 2002).

On the other hand, when deciding the dominant position of an undertaking (like a broadcaster), Competition Authorities takes into account different factors like market shares, barriers to entry, and number of competitors. In practice, 40-50 per cent market share is critical to decide dominant position and below 40 per cent level it is difficult to find a dominant position (Jones and Sufrin 2001). This means that 'special responsibilities' imposed to undertakings holding dominant position will apply above certain thresholds (at least 40 per cent) that these thresholds are above the diversity thresholds.

Because that competition law does not intervene undertakings holding dominant position in the market unless they abuse their positions, plurality aim will be at stake. For example, considering the plurality criteria (25 per cent upper limit for one medium in RTUK Law), there is a need for restriction of ownership when undertaking achieved more than 25 per cent market share even in the case of internal growth or success. In other words, the very rational rule of competition law and economics conflict with the aim of diversity and plurality in the broadcast media.

Another critic relates to abuse of dominant position is that it is not an adequate tool to remedy access issues (Scheuer and Stroattmann, 2002). Access issues are very important particularly in the convergent environment of media (Perreira, 2002). As mentioned above, access to technologies, standards and transmission channels are very important in the broadcasting sector. One who controls these 'bottlenecks' can lever this power in other markets. It is argued that judgement of European Court of Justice in *Bronner Case*<sup>19</sup> requires strict criteria for the application of 'essential facilities doctrine' that gives third parties to access to an essential facility (Scheuer and Stroattmann, 2002). Because of that, proponents of sector specific regulation claim that specific rules are essential to ensure access to bottlenecks especially access to transmission channels.

However, prohibition of abuse of dominant position has strengths that specific regulation cannot address. First of all, it can control oligopolies by applying Article 82 of EC Treaty to collective dominance of media company (Scheuer and Stroattmann, 2002). Because that media markets are "prone to oligopoly" (Doyle, 2002), this tool is

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<sup>19</sup> *Oscar Bronner GmbH & Co. KG v. Mediaprint*, Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112. See Jones and Sufrin (2001) for the comments about the case.

very important to prevent media company from behaving like a monopolist. Secondly, Commission tend to define narrow markets, thus it can address problems in all markets in the supply chain. So, competition law can prevent abuse of dominant position held in the every stage of media market<sup>20</sup>. It also prevents leverage of this dominant position to other markets.

Like Commission's applications, Turkish Competition Authority also investigated the media company's abusive behaviour. Such as in BIRYAY case, Competition Authority reached the determination of and grounds for the abuse of dominant position under article 6 of the Act:

During the conducts which are the subject of investigation, YAYSAT, BBD and BIRYAY's total market shares for the last five years reach 100 percent. Therefore, the relevant product market is of an oligopolistic and even a duopolistic nature when it is considered that BIRYAY is a joint venture of YAYSAT and BBD groups.

It is rather less likely that new companies enter into a market without much perspective for development and expansion such as the distribution market for newspapers and journals in Turkey, which is the subject of investigation, and therefore it is assumed that the companies in these markets shall maintain the market shares already hold by them. That the market shares on the date of signing the foundation agreement of BIRYAY (14.05.1996) and during the subsequent years did not change too much in terms of the joint venture and competing companies is indicative of the fact that balance of powers is somewhat maintained.

Competition in the market is considerably restricted due to the fact that the distribution market for newspapers and journals in Turkey was a quite busy market before the foundation of BIRYAY, there were only two firms which could actually distribute customer publications, and these two firms which were competitors set up a joint venture and made it compulsory to distribute customer publications via this joint venture.

That following the foundation of BIRYAY, price and commission rates for the firms (customer publishing houses) transferred to here by both distribution companies are determined by the agreement of both distribution companies, that in article 39 of the foundation contract of BIRYAY entitled "tariffs to be applied", tariffs to be applied for newspapers and journals are decided and prices are already set at the founding stage, that after the founding stage prices to be applied for new customer publishing houses are set by the agreement of both companies, that joint dealers exist, and that joint decision is taken not to make these dealers sell products from other distribution channels show that BBD, BIRYAY and YAYSAT act together in several matters.

It is rather less likely for a new undertaking to enter the market due to the fact that there is a very high rate of concentration in the said market and there are not any firms capable of competing with these two companies after concentration, that establishing a distribution company is costly, that it is not possible to enter the current networks of dealers, and that there is inability to reach enough number of publications to feed the new network of dealership to be set up. As customer

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<sup>20</sup> However, it is argued that a narrow relevant market defined by economic concerns may not address the diversity concerns (Scheuer and Stroattmann, 2002).

publishing houses do not have any alternatives other than distribution companies jointly set up by firms with which they compete in the upper market (publishing market for newspapers and journals), their bargaining power is very low. Therefore, the price elasticity of demand is very low.

When the above statements are considered together, it is understood that YAYSAT, BBD and BIRYAY are jointly in dominant position in the distribution market for newspapers and journals.

When the determinations in the findings section are examined;

It is seen that publishing houses resist to conclude contracts with BIRYAY, or try to erase, cross out compensation figures which take place in the contracts they signed and which are important for BIRYAY. On the other hand, in order to ensure that these publishing houses "prefer" itself, BIRYAY requests from BBD and YAYSAT "to cease the distribution of publications of publishing houses and not to make payment to these publishing houses".

It is understood that BBD and YAYSAT which have a joint dominant position in the distribution market for newspapers and journals set up BIRYAY so that they can distribute "customer publications" i.e. publications which may compete with those issued by their own group under different conditions than publications belonging to their own group and force customer publishing houses to conclude contracts with BIRYAY, that publishing houses which do not wish to sign contracts with BIRYAY are exposed to the risk of not having their publications distributed and not receiving their payment, and therefore the risk of the prevention of their activities in the publishing market for newspapers and journals, that their activities in the publishing market for newspapers and journals are made difficult due to new commission rates and they are placed at a competitive disadvantage because of the intra-group publications of BBD and YAYSAT, that certain publications are tried to be pushed out of the market, thereby distorting the conditions of competition in the publishing market for newspapers and journals.

It is observed that the distribution contract between Özgün Medya A.S. (Özgün Media Inc.) publishing the Newspaper Siyah Beyaz and BBD was abolished by the formation of BIRYAY and a new contract was tried to be signed which involved aggravated provisions in terms of new commission rates, that the publishing house which did not want to sign the said contract with BIRYAY wished to deliver its publications to BBD under the previous contract with BBD but BBD did not accept these publications, that eventually the publishing house had to sign a contract with BIRYAY, however BIRYAY did not renew the contract after its expiration without indicating any grounds and rendered difficult the activities of the newspaper in the publishing market for newspapers and journals, and that the newspaper was pushed out of the market.

It is understood that following the foundation of BIRYAY, the activities of Uluslararası Moda Yayıncılık A.S. (International Moda Publishing Inc.), Universal Yayıncılık ve Ticaret A.S. (Universal Publishing and Trade Inc.) and Novamedya Tanıtım ve Yayıncılık Ticaret A.S. (Novamedya Publicity and Publishing Trade Inc.) which did not want to conclude contracts with BIRYAY under more different conditions were



rendered difficult, and that the introduction of publications of these publishing houses which later accepted the contract terms of BIRYAY was delayed.

Notary minutes obtained are noteworthy, which concern the fact that the display and sale of the newspaper Akşam and other publications in the same group at newsdealers are prevented or made difficult by BBD, YAYSAT and BIRYAY, and that dealership is offered in return for not selling the Newspaper Akşam. That the said minutes show similarities although they have been kept recently by numerous dealers in a wide variety of settlements in Turkey gives the impression that the practices are not individual cases.

It is thought that the above practices fit in actions aiming at the distortion of competition in another market in the context of article 6 of the Act.

### **7.1.3.Mergers**

Competition Laws generally prohibits mergers, acquisitions and joint ventures with if they create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the market.

Like EC merger control regime, Turkish Competition Law Article 7 and Merger and Acquisitions Communique No. 1997/1 are important tools to address diversity issues because it considers directly the number of players in the market. Its importance has increased in recent years with the waves of mergers and joint ventures (JVs) between converging sectors. Both Turkish and Commission merger regime sets out so-called 'dominance test' to assess the concentrations (merger, acquisitions and JVs). According to this test, if a concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market", this merger will be prohibited. However, again, this criterion of merger control causes critics that it cannot adequately address diversity (Scheuer and Stroattmann, 2002).

As mentioned above, criteria of finding dominant position conflict with the diversity criteria. Both Turkish and Commission merger regime's main concern in merger cases is to prevent creation and accumulation of a dominant position. Furthermore, if there is a risk for collective dominance, Commission can intervene a merger causing oligopolistic dominance in the market.

As has stated before, concentrations particularly JVs between parties who are in the different stages of value chain in broadcasting sector have increased. In these cases, Commission's concerns are focused on foreclosure of markets and access to bottlenecks. For example, in *MSG Media Services*<sup>21</sup>, Commission prohibited the JV, which was established by Kirch group, Bertelsman and Deutsche Telecom to provide Pay-TV and related services in Germany, "because the joint strength of two major private broadcasters, together with telecom expertise, would make further market entry impossible and deprive consumers of the benefits of competition between different Pay-TV suppliers" (Nitchse, 2001). Because of the flexibility of competition law in defining market definition, Commission defined Pay-TV market separately and

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<sup>21</sup> *MSG Media Services* [1994] IV/M.469, OJ L 364/1.

prohibited merger. This shows strength of EC competition law that it can control strategic alliances in new markets, which can escape the national media regulation rules to ensure media diversity (Levy, 1999).

Commission's merger policy especially in the light of convergence is to balance two conflicting aims: encouraging investment in the new markets by permitting transactions on the one hand, ensuring competition by imposing strict conditions to access to bottlenecks on the other hand (Perreira, 2002).

Different from the Turkish merger control regime, Commission's Article 21(3) of merger regime sets out an exception to the so-called 'one-stop-shop rule' that "member states may take appropriate measures to protect legitimate interests". Plurality of media has been counted as one of the legitimate interests of member states in Article 21(3). It means that if approved merger has negative effects on plurality in media in one member state, this member may take appropriate measures in its territory. However, Article 21(3) does not require Commission to consider plurality of media in its analysis and so far no member states has invoked this rule (Nitsche, 2001). It is argued that this rule indicates the inadequacy of EC competition law to provide diversity (Scheuer and Stroattmann, 2002).

It can be concluded that although merger control aims to achieve economic goals and takes into account economic criteria, its contribution to the diversity especially by addressing problems of vertical integration and access issues in the new markets cannot be ignored.

## **7.2. Adequacy of competition Law**

The prevailing orthodoxy is that competitive forces, supplemented by competition law, are the most desirable way of ensuring that markets work well and efficiently for business and consumers. Under this view, the opposite pole of competition is regulation, which is seen as an alternative or supplementary force to control the workings of uncompetitive or immature markets so as to prevent undesirable outcomes. As those markets are opened up to competition, or mature, then the expectation is that regulatory controls will give way to ordinary competition controls.

There are those who argue that competition law would be sufficient in itself to control the newspaper and broadcasting sector, and that special controls on media ownership are unnecessary. However, many governments have rejected this policy, arguing that while competition controls have a role in delivering an efficient media which also reflects the expectations of democratic society, they cannot on their own guarantee core features of the media.

In order to achieve effective competition objective by using tools mentioned above, competition law and policy mainly takes into account economic concerns and competition. Because it focuses on economic aims other than those public policy aims like diversity in broadcast media, proponents of specific regulation in media claim that competition law itself is not sufficient to achieve diversity. For example, in

the UK Government's *Consultation Paper on Media Ownership Rules* (UK, 2001), this view is clearly expressed as:

“... although competition law is an important part of regulation, it is not designed to deliver diversity and plurality in the media. Competition rules can address issues of concentration, efficiency, and choice, and will tend to encourage dispersed ownership and new entry. ...Competition law cannot therefore provide the certainty we need that a significant number of different media voices, will continue to be heard, or that prospective new entrants to the market will be able to add their voice.”

Competition law as a general framework for all sectors of economy cannot normally address the all specific needs of the sectors like the diversity and pluralism in the media. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice.

Therefore, it can be stated that with its objectives, tools and criteria, competition law and policy itself is not *completely* sufficient to provide for diversity in the broadcast media. However, it has also strengths to address the aim of diversity.

## **8. CONCLUSION**

After 1990s, technological and economic developments have evolved the media sector by converging it to telecommunications and IT sectors and by leading to new interactive broadcasting services transmitted by different technologies. These developments also increased mergers and joint ventures both at global level and national level. Increasing concentrations in this process caused many concerns about diversity and plurality in the media.

There are many people which argue that concentration in media markets has a negative effect on diversity and plurality. Greater concentration results in less diversity, while diversity of ownership across geographic, ethnic and gender lines is associated with diversity of programming. The dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts that ability to deliver diverse, locally-oriented and public interest programming (Cooper, 2001a)

Although competition law is an important part of regulation, it is not designed to deliver diversity and plurality in the media. Competition rules can address issues of concentration, efficiency and choice, and will tend to encourage dispersed ownership

and new entry. However, they cannot guarantee any of it. Competition law cannot therefore provide the certainty we need that a significant number of different media voices will continue to be heard, or that prospective new entrants to the market will be able to add their voice. Moreover, it cannot directly address concerns over editorial freedom or community voice

Therefore, if competition law and policy is assessed as a whole in the context of media, it can be stated that it guarantees diversity to some extent. However, because of the objectives and criteria of competition law, it cannot adequately ensure diversity and plurality itself. As Monti (2001) accepted, in some cases, competition law is not sufficient to address diversity concerns if a concentration does not raise competition concerns. This problem stems from the conflict of economic rationale and diversity and plurality concerns in the media. Because, competition law takes in to account the economic criteria, which are partly different from diversity criteria, its sufficiency to ensure diversity remains limited. Therefore, it can be concluded that although competition law and policy is very important in media sector, it cannot *completely* provide for diversity and plurality.

The Government's task is to find a middle ground that safeguards both competition and democracy, realigning ownership rules to adapt to the new market that is emerging. In other words, we should act to encourage a dynamic market whilst at the same time guaranteeing plurality, diversity and quality for the consumer

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