

Fordham International Law Journal

Volume 21, Issue 3

1997

Article 6

Media Under French Competition Law

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Abstract

This Article discusses the Conseil de la Concurrence ("Conseil"), established by the December 1986 Ordinance on the Freedom of Prices and Competition. It provides an examination of the case law on media competition issues in France and suggests that such issues raise complex questions and that great caution must be exercised when applying competition law in this sector.

ARTICLES

MEDIA UNDER FRENCH COMPETITION LAW

*Frédéric Jenny**

INTRODUCTION

During the nearly eleven years since its creation, the Conseil de la Concurrence ("Conseil") has delivered more than fifty decisions or opinions dealing with competition issues in the media sector. This sector has thus been the object of close scrutiny by the French competition authority. The Conseil, established by the December 1986 Ordinance on the Freedom of Prices and Competition¹ ("Ordinance"), is entrusted with the task of investigating and adjudicating cases dealing with practices having the goal or the effect of restraining competition. Such cases include anticompetitive cartels and concerted actions prohibited by Article 7 of the Ordinance, anticompetitive abuses of dominant positions prohibited by the first paragraph of Article 8 of the Ordinance, and anticompetitive abuses of negotiating power prohibited by the second paragraph of Article 8 of the Ordinance. Article 10 of the Ordinance, however, provides for two types of exemptions for anticompetitive practices: a legal exemption when a law prescribes the anticompetitive practice, and an economic exemption when the authors of the anticompetitive practices can show that these practices led to economic progress that could not have been obtained otherwise and that this benefit was passed on to consumers.

In the merger control area, the Conseil merely has an advisory function. Mergers are controllable if the merging firms meet either a market share threshold of twenty-five percent of a relevant domestic market or a size threshold of seven billion

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1. Ordonnance No. 86-1243 du 1er décembre 1986 relative à la liberté des prix et de la concurrence, 1986 J.O. 14773 (modifié par Loi No. 87-499 du juillet 1987) [Ordonnance No. 89-1243 of December 1, 1986, Relating to Freedom of Prices and Competition] (Fr.), *reprinted in* J. WILLIAM ROWLEY & DONALD I. BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 333 (1991).

Francs aggregate turnover for the merging firms, provided that two of the merging parties have an individual turnover of at least two billion Francs. The Minister of Economic Affairs and the minister in charge of the relevant economic sector can decide to block a merger or to impose conditions on controllable mergers after the merger has been referred for appraisal to the Conseil. Although the ministers are not bound by the opinion of the Conseil, they must publish this opinion together with their joint decision. The role of the Conseil in merger analysis is to assess whether the potential anticompetitive effect of the merger is counterbalanced by a sufficient contribution to economic progress.

The Ordinance applies to all activities of production, distribution, or services, and thus includes the media sector. Various media sub-sectors are regulated, particularly, television, cable television, radio, and, to a lesser extent, films. In certain cases, this regulation limits the scope of action of the Conseil or implies some sort of shared responsibility between the Conseil and one of the sectoral regulators. Over the last ten years, the Conseil has examined two mergers in the movie industry,² one merger between weekly news magazines,³ one merger between publishers,⁴ and one merger between radio stations.⁵ Besides these merger cases, the Conseil has also investigated and adjudicated numerous cases of alleged violations of competition law in the movie industry,⁶ the press,⁷ television,⁸ cable industries,⁹ elec-

2. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 510, Avis No.93-A-12 relatif à l'acquisition par la Société U.G.C. des salles de cinéma des complexes George V, Forum Horizon, et Forum Orient-Express; Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 488, Avis No. 93-A-01 relatif à la cession réciproque de salles de cinéma entre les Sociétés Gaumont et Pathé Cinéma ou certaines de leurs filiales.

3. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 520, Avis No. 93-A-13 relatif à la prise de participation de la Société Générale Occidentale dans le capital de la société d'exploitation de l'hebdomadaire Le Point.

4. Conseil de la concurrence, D. 1994, Rapport annuel pour l'année 1994 at 684, Avis No. 94-A-22 relatif à l'acquisition de la Société des Codes Rousseau par la Société Média Communication.

5. Conseil de la concurrence, D. 1994, Rapport annuel pour l'année 1994 at 707, Avis No. 94-A-26 relatif à la prise de contrôle par la Compagnie Luxembourgeoise de Télédiffusion des stations Fun Radio et M40.

6. Conseil de la concurrence, D. 1988, Rapport annuel pour l'année 1988 at 116, Décision No. 88-MC-04 relative aux demandes présentées par les Sociétés Félicité Films, Karl Films, Felix Films, et Utopia Latin; Conseil de la concurrence, D. 1988, Rapport annuel pour l'année 1988 at 125, Décision No. 88-MC-14 relative à une demande de

mesures conservatoires émanant de l'Union des producteurs de films; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 138, Décision No. 89-D-40 relative à une saisine émanant de Monsieur Lucien Adira; Conseil de la concurrence, D. 1990, Rapport annuel pour l'année 1990 at 157, Décision No. 90-MC-09 relative à une demande de mesures conservatoires présentée par Monsieur Michel Champetier; Conseil de la concurrence, D. 1990, Rapport annuel pour l'année 1990 at 137, Décision No. 90-D-47 concernant l'exécution de la décision No 90-MC-09 du 4 juillet 1990 relative à des mesures conservatoires prises à l'encontre du Syndicat des producteurs de films publicitaires; Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991 at 109, Décision No. 91-D-45 relative à la situation de la concurrence sur le marché de l'exploitation de films dans les salles de cinéma; Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992 at 229, Décision No. 92-D-21 concernant l'exécution de la décision No 90-MC-09 du 4 juillet 1990 relative à des mesures conservatoires prises à l'encontre du Syndicat des producteurs de films publicitaires; Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992 at 282, Décision No. 92-D-32 relative à des pratiques mises en oeuvre par le Syndicat des producteurs de films publicitaires (S.P.F.P.).

7. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 25, Décision No. 89-D-05 relative à des pratiques mises en oeuvre par le journal Nice-Matin; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 131, Décision No. 89-D-37 relative à une saisine émanant de la S.A.R.L. Publi-Cazal contre la S.A. Société de Presse de la Réunion et la S.A.R.L. Editions et Presse de la Réunion; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 207, Avis No. 89-A-08 relatif à une question posée par l'Association pour la promotion de la presse magazine et concernant les taux de taxe sur la valeur ajoutée applicable aux quotidiens, à leurs suppléments, et aux publications périodiques; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 177, Décision No. 89-MC-06 relative à une demande de mesures conservatoires présentée par la S.A. La Dépêche du Midi et Le Petit Toulousain et par le Syndicat de la presse quotidienne régionale; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 178, Décision No. 89-MC-07 relative à une demande de mesures conservatoires présentée par la Chambre syndicale des diffuseurs de presse et de l'édition de Haute-Garonne; Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991 at 59, Décision No. 91-D-21 relative au secteur de la presse à Toulouse; Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 270, Décision No. 93-D-37 relative à une saisine de la Société pour la promotion de la presse régionale; Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 273, Décision No. 93-D-38 relative à une saisine d'office portant sur la clause du protocole d'accord liant la Société pour la promotion de la presse régionale à ses distributeurs.

8. Conseil de la concurrence, D. 1988, Rapport annuel pour l'année 1988 at 96, Décision No. 88-D-41 relative à une saisine émanant de la Société La Cinq S.A.; Conseil de la concurrence, D. 1988, Rapport annuel pour l'année 1988 at 96, Décision No. 88-D-42 relative à une saisine émanant de la Société Métropole Télévision M6; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 188, Décision No. 89-MC-13 relative à une demande de mesures conservatoires présentée par la Société La Cinq S.A.; Conseil de la concurrence, D. 1990, Rapport annuel pour l'année 1990 at 73, Décision No. 90-D-21 relative aux accords conclus entre les syndicats d'artistes-interprètes, des organismes de communication audiovisuelle, et certains producteurs d'émissions de télévision; Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991 at 166, Décision No. 91-MC-05 relative à une demande de mesures conservatoires présentée par la Société La Cinq S.A.; Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991 at 42, Décision No. 91-D-11 concernant les Organ-

tronic communications,¹⁰ news agencies,¹¹ and telephone directory publishing.¹² Prior to the creation of the Conseil in 1986, the Commission de la Concurrence, a purely advisory body charged with giving opinions on competition issues to the Minister of Economic Affairs, dealt with allegations of anticompetitive practices in the media sector and particularly by newspapers¹³ and television.¹⁴ In the course of this Article we will review some selected issues raised by the case law.

I. *RELEVANT MARKET DEFINITION AND THE MEDIA*

The definition of relevant markets is an important and complex issue in most competition cases involving the media sector. As early as 1986, in a decision concerning newspapers, the Commission de la Concurrence concluded that some media may offer two types of services. One type of service is directed at the general public, where the media entity provides either general

ismes français de radiodiffusion et télévision (O.F.R.T.); Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992 at 422, Décision No. 92-D-58 relative à une saisine de la Société La Cinq S.A.

9. Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991 at 130, Décision No. 91-D-51 relative au marché des programmes de télévision réservés à la diffusion sur les réseaux câblés; Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992 at 449, Décision No. 92-D-65 relative à une saisine de la Société Citécable.

10. Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992 at 294, Décision No. 92-D-35 relative à une saisine de la Société du Journal Téléphoné à l'encontre de la direction de la Météorologie Nationale; Conseil de la concurrence, D. 1995, Rapport annuel pour l'année 1995 at 472, Décision No. 95-D-58 concernant l'exécution de la décision No. 92-D-35 relative à une saisine de la Société du Journal Téléphoné à l'encontre de la direction de la Météorologie Nationale.

11. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989 at 133, Décision No. 89-D-38 relative à une saisine de la Société Plurimédia.

12. Conseil de la concurrence, D. 1996, Rapport annuel pour l'année 1996 at 217, Décision No. 96-D-10 relative à des pratiques mises en oeuvre par France Télécom et par l'Office d'annonces (ODA).

13. Commission de la concurrence, D. 1986, Rapport de la Commission de la concurrence pour l'année 1986, Annexe 1 at 12, Avis sur les conditions d'application du dernier alinéa de l'article 50 de l'ordonnance No. 45-1483 du 30 juin 1945 à des pratiques d'abaissement sélectif de prix dans le secteur de la presse quotidienne d'information locale; Commission de la concurrence, D. 1986, Rapport de la commission de la concurrence pour l'année 1986, Annexe 7 at 51, Avis relatif à la situation de la concurrence dans le secteur de la presse gratuite en région Provence-Alpes-Côte d'Azur.

14. Commission de la concurrence, D. 1983, Rapport de la commission de la concurrence pour l'année 1983, Annexe 14 at 269, Avis relatif à la situation de la concurrence sur le marché des productions destinées à la télévision.

or specialized information, such as news. The other type of service is selling advertising space or time to advertisers. Depending on the competition problem at hand, the relevant market in media cases may have to be defined from the point of view of service to the public or from the point of view of service to advertisers. In some cases, both approaches may be simultaneously warranted.

It is particularly difficult to define relevant markets in this sector, not only because of the high level of differentiation of the content communicated by the various media, but also because of the fact that the way the communication takes place and when it takes place are also elements of differentiation of the services offered. In addition, for certain medias, such as newspapers, magazines or movie houses, the geographical dimension of relevant markets must also be explored. As will become clear when we review the case law on film exhibition in movie houses, a time dimension may also contribute to the differentiation of media markets. Finally, the regulatory environment of the particular medium examined must also be considered to assess relevant markets. In many cases, the definition of relevant markets in the media sector depends more on qualitative judgment than on scientific evidence, thereby making the definition itself a subject of contention. Excessively broad or excessively narrow market definition can render competition law irrelevant. Although market power tends to disappear as the definition of the relevant market becomes broader, the narrower the definition of the relevant market, the less scope there is for possible competition between media service providers.

To a certain extent, going to the movies or watching television are alternative ways of spending leisure time, just as listening to a newscast or reading a newspaper are alternate ways of keeping up to date with current events. The fact that, in the long term, some media become more popular and others fall out of favor, combined with the existence of economies of scope or scale in the provision of different media services, means that from a long term strategic standpoint the media operate on a global market. This partly explains the prevalence of groups simultaneously engaged in providing services via several or all types of media. As a result, the claim that there is a global market for film, news, or audiovisual entertainment is more than just a legal argument designed to avoid the rigors of competition

law. The long term substitutability of media does not necessarily mean that a short term substitutability also exists, however. Therefore, the definition of the contours of relevant markets by competition authorities necessarily entails an implicit choice on the part of such authorities regarding the time frame in which they carry out their analysis.

Competition authorities traditionally focus more on short term competition than on long term perspectives. The Conseil clearly has followed that approach and, therefore, has tended to define markets rather narrowly. A choice of this type is not neutral in the sense that, from a competitive point of view, depending on the definition of the market, one can interpret the same acts differently. For example, because the Conseil believed that movie viewing was not substitutable for other forms of entertainment, such as watching television, reading books, or going to the theater or the opera, even though the development of television broadcasting has, over the long term, coincided with a significant decrease in movie house attendance, the Conseil objected to mergers tending to increase concentration in the exhibition of films in Paris. Additionally, the Conseil did not regard different media as substitutable one for another for advertising purposes. Although they may indeed be so in the long term, as it is clear that newspaper advertising revenues decreased when television advertising was introduced, the Conseil found that rebates given for the joint purchase of advertising time on three radio stations or for space in two news magazines impaired competition. We will return to the question of whether such a short term approach is justified at the conclusion of this Article.

A. Relevant Wholesale and Retail Markets for News

In a 1989 decision concerning a news agency,¹⁵ the Conseil defined several newsmarkets. In this case, the central question was whether Agence France Presse ("AFP"), the largest French news agency, had abused its dominant position when it discontinued a subscription to its general news service by Verimedia. Verimedia was the would-be publisher of a magazine that in fact never existed because Verimedia, rather than using the information provided by AFP's general news service to publish a newspa-

15. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 45 at 133, Décision No. 89-D-38 relative à une saisine de la Société Plurimédia.

per, had instead used it to create a videotext news service on the Minitel, a low speed videotext system with proprietary software specific to France. In the course of its discussion of this issue, the Conseil first examined whether to distinguish between rough, uncut news dispatches provided by a news agency to such media as newspapers, radio, or television stations and the news as presented to the public by the media. It held that, even if the news produced by the media was based on news dispatches provided by a news agency, the role of the media was to select, edit, and present the news according to an editorial policy. The transformed news thereby produced was not substitutable for the rough, uncut news distributed by news agencies. In other words, the Conseil distinguished between wholesale markets and retail news markets. AFP was operating on two different markets because AFP was providing both unedited news to the media and edited news to the public on its own videotext service.

Additionally, the Conseil held that a news item presented on the radio was not substitutable for a commented image relating the same event on television, for a written account of that event published in a newspaper, or for an online videotext service providing edited news to the general public. It thus held that, although AFP's Minitel on-line videotext news service could be in the same market as other online videotext services providing edited news, it was not in the same market as newspapers, television, or radio broadcast news programs. Finally, the Conseil decided that although AFP was not the only provider of rough, uncut news, it nevertheless had a dominant position in this market in France because it provided more extensive coverage than any other news agency of news relevant to the French audience and because all French media had to subscribe to its general information service.

The Conseil developed a similar type of analysis in a 1992 decision involving the provision of weather bulletins to the general public.¹⁶ At the time, the French weather bureau, *Météorologie Nationale*, was a division of the ministry responsible for transportation. Among its public services were the general sur-

16. Conseil de la concurrence, D. 1992, Rapport annuel pour l'année 1992, Annexe 42 at 294, *Décision No. 92-D-35* en date du 13 mai 1995 relative à une saisine de la Société du Journal Téléphoné à l'encontre de la direction de la *Météorologie Nationale*.

veillance of national weather conditions and the provision of weather data to aircraft pilots. In the late 1980s, the *Métérologie Nationale* had developed a weather bulletin service accessible to the general public via Minitel, the French videotext system. In addition to this service, the *Métérologie Nationale* had also developed and made available on the Minitel, a specialized service of weather bulletins for aircraft pilots providing the specific data that the pilots were required to consult before embarking on any flight. Although at the time this service was accessible to any person having access to a phone line and to a Minitel monitor, the information provided was coded and understandable only by licensed pilots. The *Métérologie Nationale* also had a weather bulletin service accessible to the general public by telephone.

The *Société du Journal Téléphoné*, a private company using technology allowing it to transform electronic weather data automatically into voice messages, wanted to produce a weather bulletin accessible to the general public by telephone that would compete with the service offered by the *Métérologie Nationale*. In order to produce this service and presumably differentiate it from telephonic weather bulletins offered to the general public by the *Métérologie Nationale*, the *Société du Journal Téléphoné* asked the *Métérologie Nationale* to sell it the weather data that the latter was using to produce its videotext weather service for aircraft pilots because this data was available electronically and also contained very precise weather data for a number of localities with airports. After some hesitation, the *Métérologie Nationale* refused to make this data available to the *Société du Journal Téléphoné*. The *Société du Journal Téléphoné* then argued that this refusal to sell was an anticompetitive abuse of the dominant position held by the *Métérologie Nationale* in the weather bulletin market.

In assessing whether the *Métérologie Nationale* held a dominant position, the Conseil decided that the *Métérologie Nationale* was operating both in the wholesale weather data market and in two separate retail markets: the weather bulletin market for the general public and the weather bulletin market for aircraft pilots. The Conseil held that, even if rough uncut weather data for aircraft pilots could be edited and used to provide weather bulletins for the general public, the weather bulletin service aimed at the general public and the specialized Minitel weather bulletin service for aircraft pilots provided by the *Métérologie*

Nationale were not substitutes for each other because they contained partially different information and because the data provided to aircraft pilots was given in a form that was not easily understood by non-pilots.¹⁷

B. *Relevant Markets for Film*

In 1993, the Conseil was called upon to give its opinion on two mergers in the movie industry involving the transfer of ownership of movie theaters.¹⁸ In both cases the Conseil first had to assess whether the market shares of the parties to the agreement reached the threshold of twenty-five percent of a relevant market because this condition was required for merger control to apply. The parties involved in the first case argued that the relevant market was the market for films that included films shown in movie theaters, on television, and through video cassette recorders because all three were alternative ways of exhibiting films. To buttress this argument the parties suggested that the general decline in movie theater attendance was a direct consequence of the increase in the number of films shown on television and of the development of videocassettes. They argued that this histori-

17. On the substance of the issue, the Conseil decided that the Météorologie Nationale held a dominant position on both markets, but had not abused its dominant position for two reasons. First, it had offered to make available in electronic form other meteorological data which could be used by the Société du Journal Téléphoné to create a weather bulletin service available to the general public. Second, the Conseil was impressed by the argument that making available, directly or indirectly, specialized data for aircraft pilots so that the data could then be edited and simplified for the general public might create a security risk if private pilots decided to use this information in its simplified form rather than getting the complete meteorological data for aeronautics that they needed before embarking on a flight. The Paris Court of Appeals overturned the Conseil's decision and decided that neither the offer by the Météorologie Nationale to provide other data nor the alleged security risk could be used to justify what was an attempt by a dominant firm to prevent a potential competitor from entering the field. The French Supreme Court subsequently overturned the decision of the Paris Court of Appeals on the ground that French antitrust law did not apply to the Météorologie Nationale. Eventually the Météorologie Nationale and the Société du Journal Téléphoné settled out of court. The requested information is currently made available to the Société du Journal Téléphoné.

18. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 75 at 488, Avis No. 93-A-01 en date du 12 janvier 1993 relatif à la cession réciproque de salles de cinéma entre les Sociétés Gaumont et Pathé Cinéma ou certaines de leur filiales; Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 79 at 510, Avis No. 93-A-12 en date du 29 juin 1993 relatif à l'acquisition par la Société U.G.C. des salles de cinéma des complexes George V, Forum Horizon, et Forum Orient-Express.

cal evolution of film viewing established that there was a sole market for exhibiting films. The Conseil disagreed with this analysis, basing its argument on two main considerations. It argued that film viewing was only one aspect of the services rendered by movie theaters. Movie theaters also provided viewing comfort, including screen size and comfortable seating, and various other forms of entertainment, such as being part of an audience, watching previews of coming attractions, and buying refreshments. The Conseil thus held that services rendered by movie theaters were different from services rendered by the rental or purchase of videocassettes or by watching films on television. The Conseil also considered the fact that, in France, films shown in movie theaters often differ from those shown on television due to specific regulations applying to film exhibition in that country. In France, films shown in movie theaters cannot be shown on television for one year after their initial release and videocassettes of such films cannot be sold for two years after their initial movie theater release.

Another issue in these cases was the geographical dimension of the relevant market for film exhibitions. More specifically, the Conseil had to decide whether movie theaters located in central Paris constituted a different market from movie theaters located in the suburbs of Paris. Due to the specificity of film release in France, where it is acknowledged that the ultimate commercial success of a film depends heavily on the success or failure of its first week's showing in the major first run movie theaters of central Paris, the Conseil decided that Parisian movie theaters, whose clientele account for twenty-five percent of all movie tickets sold in France, constituted a substantial part of a relevant market.

In a merger case involving the acquisition by Canal +, the only pay-television station in France, of a majority of the capital of UGC DA, the owner of the broadcast rights of 5,000 French films, the Minister indicated how he viewed television program markets.¹⁹ The Minister indicated that for television programs, one should distinguish between programs considered to be of

19. Bulletin Officiel de la concurrence de la consommation et de la Répression des Fraudes, le 5 décembre 1996 at 608, Lettre du ministre délégué aux finances et au commerce extérieur en date du 7 octobre 1996 relative à une concentration dans le secteur des droits audiovisuels.

lasting value, such as films, series, documentaries, and cartoons, on the one hand and programs considered to be of temporary value, such as news magazines, interviews, major sports events, and generally any kind of live broadcast show. This distinction is similar to the distinction made at the European level. The Minister noted that the financing methods for these two categories of programs differ, the programs of lasting value being in many cases produced by independent producers who then sell the rights to television stations and programs of temporary value usually being directly produced by broadcasters. In addition, the commercial prospects of these programs differ because films or series can be broadcast in several countries, whereas the second type of programs is usually of limited interest abroad. Finally, and most importantly, regulatory constraints apply in the case of lasting value programs, whereas no such constraints apply to the broadcasting of temporary value programs. The Minister argued that, within the lasting value program category, a distinction should be made between fiction and documentaries. Furthermore, within the fiction category, a distinction should be made between television series and feature films because multi-episode series serve a different purpose than that of one-time broadcasts of feature films. The Minister's decision suggested that another distinction should be made between made-for-television telefilms and feature films due to differences in quality and financing methods and the fact that feature films usually attract much larger television audiences than do telefilms. Therefore, feature film broadcasting is an absolute necessity for general purpose channels.

According to the Minister, the fact that the regulatory environment, on the one hand, imposed a maximum 192 film per year limit on the number of films which could be shown on television and, on the other hand, made it an obligation for forty percent of the films or series broadcast on television to be French-made, implied two things: that French and foreign-made films were not substitutable for each other and, also that there were two separate markets for television film broadcast rights: one for foreign films and one for French films. Although one may question the relevance of some of the criteria used by the Minister in his analysis, one could nevertheless agree that the regulatory constraints faced by television broadcasters in France for French-made fiction programming imply that there are sepa-

rate markets for television broadcasting rights to French films and to foreign films.

Following the approval of the merger involved in this case, a pay-per-view television operator complained to the Conseil that Canal +, which had a dominant position in the market for French-made feature film broadcast rights due to its ownership of the rights to 5,000 French-made films and because it bought the broadcast rights of the majority of newly-made French films, abused its dominant position. It did so, on the one hand, by refusing to sell the rights for pay-per-view broadcasting to this pay-per-view television operator and on the other hand, by maintaining exclusivity over the rights for both pay-television broadcasting and pay-per-view television broadcasting of newly-made French films. This case, which remains pending, raises the question of whether pay-television operators and pay-per-view television operators compete in the same market.

C. Relevant Markets for Books

Although book publishing may be somewhat outside the scope of this Article, it is worth mentioning a case dealt with by the Conseil in 1989, both because this case raised questions about market definition that might be relevant to the issue of market definition in the media sector, and particularly, to the issue of whether pay-per-view television services are different from pay-television services, and because it raised questions about exclusivity clauses in the purchase of copyrights.²⁰ From the point of view of relevant market definition, the issue was whether book clubs were in the same market as bookstores. Basing its decision on a number of factors, the Conseil decided that there was a separate market for book clubs. First, the Conseil decided that the type of contract signed by book club members was different from the contract they entered into with regular bookstores. In particular, the Conseil based its decision on the fact that book club members agreed to acquire a certain number of the books selected by the club during a set period of time, while no such agreement existed between consumers and bookstores. It therefore decided that consideration of the contracts

20. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 48 at 139, Décision No. 89-D-41 relative à la situation de la concurrence dans le secteur de la vente de livre par clubs.

between bookbuyers and booksellers was relevant to market definition. The Conseil also decided that the way in which books were physically delivered, by mail in the case of book clubs and by sale in a shop in the case of bookstores, as well as the possibility of preselection available to book club members, but not to bookstore customers, was significant when deciding whether the services offered by the two entities were competitive. Finally, the Conseil took into consideration the regulatory environment that allows book clubs to offer books at a discount, but prevents them from selling books within nine months of their initial bookstore release. Therefore, the time dimension of the release of a creative work through different commercial channels was deemed a relevant consideration in market definition. Because of the separate market for book clubs, the Conseil thus decided that France-Loisirs, the largest French book club and a joint subsidiary of a French publishing company and the Bertelsmann Group, had a dominant position in this market.

The Conseil's underlying reasoning in the book club case may indicate the reasoning it would follow for television services, particularly with regard to film broadcasting by pay-television and pay-per-view television services. To the extent that the contractual arrangements between service providers and consumers in the case of pay-television or in the case of pay-per-view are different, pricing of the respective services is established on different bases. The minimum time periods from initial release in movie theaters that these two types of television services must respect before they can broadcast a film are different and regulated in a way not dissimilar to the way books are regulated.

The book club case is also interesting because it gives an indication that the French Supreme Court may have difficulty in accepting such criteria when defining relevant markets. The Conseil book club case decision was appealed to the Paris Court of Appeals which affirmed the Conseil's analysis. The case was then appealed to the Cour de Cassation, the French supreme civil court, which overturned the decision of the Court of Appeals based upon the fact that the Conseil had not sufficiently justified the existence of a separate market for book clubs. Implicit in the Cour de Cassation decision was the notion that a book is a book and that, because the books that were distributed through book clubs were usually still available in bookstores, both channels competed in the market for the same books. The

Cour de Cassation had a difficult time distinguishing between the content of what was being sold and the service being offered by the retailers. When an Appeals Court decision is overturned by the Cour de Cassation, the case usually goes back for retrial to a Court of Appeals different from the one which handed down the first judgment. In competition cases, however, because the Paris Court of Appeals has national jurisdiction, the case goes back to the same Court of Appeals, but with a different panel of judges. When the book club case went back to the Paris Court of Appeals, the court confirmed its initial appraisal of the relevant markets, thereby "rebell[ing]" against the Cour de Cassation. It eliminated the fines that had been imposed on France-Loisirs for having abused its dominant position, thereby undercutting France-Loisirs' incentive to take the case back to the Cour de Cassation.²¹

D. *Relevant Markets for the Press*

The Conseil, like its predecessor, the Commission de la Concurrence, has tended to define newspaper markets narrowly by exploring the various dimensions of the specific information service provided to readers. These dimensions include the nature of the information, its packaging, the medium by which it is provided, the editorial policy of the provider, and the geographical dimension of the information. It has also defined markets for advertising space.

1. Readership Markets

In a 1986 opinion concerning potential abuses of dominant position by daily newspapers, the Commission de la Concurrence had to assess under what conditions the fact that a daily regional or national newspaper sold its local editions at different prices would be a violation of the competition statutes. The reasoning given by the Commission in its opinion was that price differentiation between local editions of a regional or national newspaper was not per se prohibited, but would be subjected to a rule of reason analysis. The Commission added that, if the newspaper was found to have a dominant position and if the

21. Had France-Loisirs taken its case again to the Supreme Court, after the "rebellion" of the Court of Appeals, and had the Supreme Court confirmed its position, that position would have been binding on the Court of Appeals.

price differentiation strategy had an exclusionary object or effect locally, it could indeed constitute a violation of the competition law.

In its opinion, the Commission stated that radio news bulletins or television newscasts could not be considered to be substitutable for printed news. Although the Commission did not exclude the possibility that in the future these services might become more substitutable, it based its opinion on the situation prevailing at the time it was delivering its opinion. Two considerations helped shape the opinion of the Commission: the fact that conditions governing the public use of newspapers were more flexible than conditions required for using news bulletins or newscasts and the fact that marketing studies showed that seventy percent of French newspaper readers felt the need to read a newspaper after having learned about a news item through another medium because they judged the information provided by newspapers to be more detailed than that provided by other media. The Commission also stated that the regional or local press were not in the same market as the national press because local newspapers dealt primarily with different issues and events than those reported in national newspapers. Finally, the Commission stated that each local edition of a regional or national newspaper was in a different geographical market than the other local editions of the same newspaper.

In 1993, the Conseil had to define the relevant markets when it examined the acquisition of S.E.B.D.O., the publisher of a national weekly news magazine called *Le Point*, by the group General Occidentale, publisher of a number of magazines, including a national weekly news magazine called *l'Express*.²² One of the central questions in the case was whether this merger met the merger control market share threshold of twenty-five percent of a relevant market. The parties to the merger alleged that the relevant market encompassed all the daily, weekly, or monthly publications dealing with general and national news. The Conseil disagreed. Regarding the readership market, the Conseil decided that general news publications could be differ-

22. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 80 at 520, Avis No. 93-A-13 en date du 6 juillet 1993 relatif à la prise de participation de la Société Générale Occidentale dans le capital de la société d'exploitation de l'hebdomadaire *Le Point*.

entiated according to the type of editorial policy they follow, their periodicity, their commercial strategy, and their pricing strategy. Thus, for the Conseil, general weekly news magazines were a differentiated set and no general news magazine was strictly substitutable for another. The Conseil also decided, however, that within this differentiated set, general weekly news magazines that have similar editorial policies and a similar type of readership could be deemed direct competitors and should be included in the same market. Using these criteria, the Conseil then established that the relevant market was defined by a set of six weekly magazines.²³

2. Relevant Markets for Advertising Space

In an opinion delivered in 1986, the Commission de la Concurrence had to analyze whether the pricing policy for advertising space followed by O.I.P., the publisher of a free paper comprised exclusively of commercial and personal ads and distributed in a number of small towns in the south of France, qualified as an abuse of its dominant position.²⁴ It was alleged that, whenever a free publication was launched in a local area where O.I.P. was not present, O.I.P. would launch its own local free paper in the same area and slash the prices it charged for personal or commercial ads compared to the price it charged in areas in which it had no competitors, thereby driving its competitors out of business. The available data showed that the prices charged for advertising in areas in which a competitor existed were four to fifteen times cheaper than the prices charged in areas where O.I.P. had no competitors. In defining the relevant markets, the Commission de la Concurrence stated that advertising in free papers was, for the advertisers, neither substitutable for advertising in regular newspapers in the same area nor substitutable for advertising in free papers in other areas. The Commission held that most advertising in free papers was for local goods or services providers, such as local butchers or plumbers. The fact that these papers were distributed free-of-charge in local shops or public places meant that their readership was largely local and

23. The six weekly magazines were *L'Express*, *Le Point*, *Le Nouvel Observateur*, *L'Événement du jeudi*, *Télérama*, and *Le Figaro*.

24. Commission de la concurrence, D. 1986, Rapport de la Commission de la concurrence pour l'année 1986, Annexe 7 at 51, Avis relatif à la situation de la concurrence dans le secteur de la presse gratuite en région Provence-Alpes-Côte D'Azur.

altogether different from the readership of regular newspapers. Several marketing studies indicated that, for advertisers, advertising in free papers was, if anything, complementary to, rather than substitutable for, advertising in newspapers. Having thus defined the relevant markets, the Commission de la Concurrence then decided that O.I.P., which held a dominant position in a number of local markets for free advertising publications,²⁵ had abused its dominant position by deliberately trying to exclude competitors in other local areas through selective price slashing for commercial and personal advertisements in those areas and then increasing its prices once the competitor had been eliminated.

In the previously mentioned case of the acquisition of S.E.B.D.O., the publisher of a national weekly news magazine called *Le Point*, by the group Occidentale, publisher of a number of magazines including a national weekly news magazine called *l'Express*,²⁶ the Conseil noted that, for any medium, the boundaries of the relevant readership market are not necessarily the same as the boundaries of the relevant advertising space market. The Conseil decided that, from the standpoint of the advertising space market, newspapers were not substitutable for news magazines for several reasons, including technical differences such as paper quality and the use of color. To determine whether two news magazines were substitutable for advertisers, the Conseil decided that a useful indicator would be the frequency with which the same brands were advertised in both news magazines. It should be noted, however, that the use of such a criterion can be ambiguous to the extent that it does not properly distinguish between complementary and substitutable publications for advertisers. In any case, the Conseil set a threshold level of twenty-five percent of common advertisers to distinguish between substitutable and non-substitutable news magazines for advertisers. Observing, for example, that 325 of the 792 brands that advertised in *L'Express* also advertised in *Le*

25. The Commission de la Concurrence noted among other things that O.I.P. had a leadership position in the southern region of Alpes Provence Côte d'Azur by publishing 19 free local advertising papers with a total of 1.1 million copies weekly.

26. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 80 at 520, Avis No. 93-A-13 en date du 6 juillet 1993 relatif à la prise de participation de la Société Générale Occidentale dans le capital de la société d'exploitation de l'hebdomadaire *Le Point*.

Point and that forty-one percent were common advertisers, the Conseil declared that the two news magazines belonged to the same advertising space market. Using this criterion, the Conseil eventually declared that, from the point of view of the relevant advertising space market, seven news magazines belonged to the same market. It is interesting to note that, from an advertising point of view, *l'Expansion*, a primarily economic bimonthly magazine, was considered to be substitutable for weekly news magazines when defining the relevant market from an advertising point of view, but it was not considered to be substitutable for these news magazines from a readership point of view.

II. *COMPETITION ISSUES AND BROADCASTING RIGHTS*

A number of cases brought before the Conseil raised issues related to the acquisition, sale, or sublicensing of broadcasting rights for films or sports events. The ability to broadcast sports events, particularly soccer, or films is crucial to the success of general purpose commercial television stations due to the large audiences they guarantee and, as a result, the advertising revenues they allow television operators to receive. In addition, as was mentioned earlier in the case of film broadcasting, television stations face regulatory constraints making it compulsory for them to broadcast a minimum quota of French-made fictional programs, including films, in their global film programming. Thus, the allocation of broadcasting rights for films and sports events is crucial in a country where the television sector was opened to competition only as recently as the 1980s. Three characteristics concerning the broadcasting rights of films and sports events are worth noting because they may lead to competition problems: most of the rights are sold on an exclusive basis, some of the rights are jointly sold, for example by a sports federation for a given number of games, and some of the rights are jointly bought, for example, by a broadcasting rights purchasing pool of television stations. The competition issues linked to television broadcasting rights transactions are all the more complicated because, in the case of international sports events which frequently draw the largest audiences, the negotiations over such rights may involve international organizations, including international sports federations or international television station

pools, over which a national competition agency may not have jurisdiction.

In the cases dealt with by the Conseil, it was not the exclusivity of the rights that was challenged. Challenges to grants of exclusive broadcasting rights for specific films or sports events based upon the fact that exclusivity restrains competition would probably not be easily successful in France because the Conseil and the Paris Court of Appeals generally tend to take a more lenient attitude towards vertical restrictions than does the European Commission. The way the Conseil dealt with such a case concerning the acquisition of book publishing rights suggests that it may be possible to challenge the scope of an exclusivity clause used in the acquisition of television broadcast rights, particularly if the clause applies to several distinct media markets.²⁷ In this decision, although the Conseil fell short of deciding that exclusivity clauses in the sale of copyrights to a publishing firm having a dominant position are per se prohibited by Article 7 of the ordinance, it expressed concern that, if too broadly designed, such clauses could be used by the purchasers of the rights to restrict competition in adjacent markets.

We have already seen that the Conseil has determined that a specific market exists for book clubs and that in this market one of the three book clubs active on the French market, France-Loisirs, had a dominant position. It should also be mentioned that a specific regulation allows resale price maintenance for the distribution of books.²⁸ For a period of two years bookstores must abide by the resale price indicated by the publisher at the time of publication. Book clubs buying the publication rights for a book to be sold to their subscribers are granted more flexibility, however. For a period of nine months following initial publication, book clubs cannot sell the book at a price lower than the bookstore resale price set by the publisher. During this nine month period book clubs may offer bonuses or free gifts to their subscribers for the purchase of the book, however. The life of a published book has three phases. The first phase covers the nine month period during which there are no more than two

27. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 48 at 139, Décision No. 89-D-41 relative à la situation de la concurrence dans le secteur de la vente de livres par clubs.

28. Loi No. 81-766 du 10 août 1981 relative au prix du livre.

editions of the book on the market: the original edition sold in bookstores at the price set by the publisher and the edition for which the book club acquired publication rights during the first phase. This book club edition is also sold at the price set by the publisher, with the possibility of a bonus for club members. The second phase covers the time between the ninth month and the twenty-fourth month after initial release of the book during which three editions of the book may be simultaneously offered: the original edition sold through bookstores at the price originally set by the publisher, the remaining copies of the edition distributed by the book club that purchased rights for the first phase, sold at a discount, and the edition sold at any price put on sale by another book club that purchased the rights for the second phase. The third phase concerns the time after the twenty-fourth month when four editions of the same book can be sold simultaneously: the original edition sold through bookstores and possibly discounted, the remaining copies of the two editions distributed by two different book club publishers, and possibly a cheap paperback edition of the book.

France-Loisirs, for example, generally operates during the second phase, securing the publishing rights to books for the period beginning nine months after the original publisher's edition comes out and selling the books at discounted prices. Its main competitor, *Le Grand Livre du Mois*, operates during the first phase, securing the publication rights to books for the first nine months after their initial release and selling the books to club members at the price set by the publisher while granting club members bonuses for book purchases. In this context, France-Loisirs, while purchasing the exclusive publishing rights to a book for the second phase, used its dominant position to impose clauses prohibiting publishers from allowing sales of the book through any other outlet at prices inferior to the original price of the book during the exclusivity period. This meant, among other things, that the publisher could not permit a first phase book club to offer a discount on its remaining stock of books and that it could not sell the publishing rights for a paperback edition during France-Loisirs' exclusivity period.

The Conseil decided that the exclusivity clauses that France-Loisirs was able to impose as result of its dominant position in the book club market, were designed to shelter France-Loisirs from price competition both by direct competitors, such as other

book clubs and by competitors in adjacent markets, such as paperback publishers. The Conseil, deciding that France-Loisirs' exclusivity clauses had the purpose and effect of hampering the development of competition, fined France-Loisirs and required that the exclusivity clauses in its contracts be restricted to book publication by book clubs. In so doing, the Conseil strictly limited exclusivity clauses for publishing rights. When the scope of such clauses was such that they actually interfered with the possibility of publishing a book, either at a different period than the one covered by the exclusivity period or at the same period but in a different form, the clauses reduced competition and were in violation of Article 7 of the Ordinance. It remains to be seen, whether the Conseil will take the same approach when confronted by situations in which exclusivity clauses cover broadcast rights for several adjacent television markets, such as pay-television and pay-per-view television.

An issue not yet dealt with by the Conseil is whether the acquisition by a media firm of exclusive rights for a large number of films or sports events, or the refusal to sublicense such a catalogue to competitors would in itself fall within the ambit of the Ordinance. The available evidence suggests that, in at least one case, the Minister of Economic Affairs and the Minister of Culture who make the final determination on media mergers have allowed the purchase by the only pay-television operator of a firm owning the broadcast rights to the vast majority of French films. The subsequent alleged refusal of this pay-television operator to sublicense its broadcast rights to a pay-per-view television operator is, however, presently being challenged in front of the Conseil as an abuse of its dominant position.

The question of whether joint sales of broadcasting rights by a set of sports clubs constitutes a violation of French competition law remains an open question. In some European jurisdictions such joint sales agreements are considered to be contrary to competition law. While one may agree that the joint sale of rights may restrict competition among sports teams in the broadcasting rights market, the question is whether, in a country like France where anticompetitive practices having efficiency-enhancing properties can benefit from an exemption, joint sales of broadcasting rights could qualify for such an exemption. It is likely that joint sales of rights would allow a smaller team to raise more money than it could raise if it had to sell its rights solely by

its own efforts. Some have argued that this is a distributional effect which should not be taken into consideration by competition authorities. Some others, including the author of this paper, believe that the fact that smaller teams may raise more money through joint sales of their rights than without such joint sales agreements cannot be reduced to a distributional issue. Indeed, money is necessary to allow teams to perform better, for example, by hiring better players. Thus a practice allowing smaller teams better access to more resources than they would otherwise have makes such teams better able to compete with other teams and results in more interesting games because teams thus become more balanced. In other words, the joint sale of rights to a sports event by a federation of nine sports teams, to the extent that it allows smaller teams to increase the quality of their teams, changes the quality of the competition among the teams concerned and increases benefits to spectators, thus resulting in efficiency value.

The debate over broadcasting rights transactions in France has focused on the collective behavior of members of pools acquiring such rights or on the collective behavior of the owners of such rights. The main issue in most of the cases has been whether the more-established television stations with the largest audiences, including the three television stations created when the French public broadcasting monopoly was abolished at the beginning of the 1980s, engaged in concerted actions with rights owners or organizations representing them and used their collective market power to prevent newly-established commercial television stations from gaining access on fair and non-discriminatory terms to broadcast rights for films or sports events that would allow them to effectively compete with more-established television stations. The Conseil examined the operation of purchasing pools of television broadcast rights in three decisions.²⁹ These three decisions resulted from complaints by a tel-

29. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 64 at 188, Décision No. 89-MC-13 relative à une demande de mesures conservatoires présentée par la Société La Cinq S.A.; Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991, Annexe 18 at 42, Décision No. 91-D-11 en date du 19 mars 1991 concernant les Organismes français de radiodiffusion et télévision (O.F.R.T.); Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991, Annexe 72 at 166, Décision No. 91-MC-05 en date du 19 novembre 1991 relative à une demande de mesures conservatoires présentée par la Société La Cinq S.A.

evision station, La Cinq S.A.,³⁰ that it had experienced difficulties in obtaining broadcast rights for major sports or entertainment events due to anticompetitive practices by the French Soccer Federation ("FFF") and by an association of formerly public television and radio stations, the Office de radiodiffusion et de Télévision Française.

Concerning the sale of broadcast rights to international soccer games, La Cinq alleged that the FFF systematically refused to grant it sub-licenses for the broadcast rights to soccer games organized by the U.E.F.A., an association of European national soccer federations based in Switzerland of which the FFF was a member. The U.E.F.A. organizes international soccer competitions. According to Article 14 of the U.E.F.A. bylaws, the U.E.F.A., its national federation members, and participating European clubs own the radio and television broadcast rights for the international soccer games it organizes. Article 14 of the U.E.F.A. bylaws also provides that the broadcast rights to a game owned either by a home team or by that team's national soccer federation can be sold to a television station from another country only if the national federation of the country in which the television station is located allows the broadcast in that country.

The rationale for such a provision is easy to understand from the point of view of national soccer federations. In several European countries, the national soccer federation owns the game broadcasting rights for the competitions it organizes. These rights are often sold on an exclusive basis to a national television station or to a consortium of national television stations. If international competitions are also broadcast in a given country outside of any control by the national soccer federation, there is a risk that spectators will be less willing to attend local games organized by the national federation or to watch such games on television. As a result, international games may compete for television audiences with national games. Allowing the broadcasting of international games may decrease the value of broadcast rights for domestic games organized by national federations. The FFF's desire to protect the value of the broadcast

30. La Cinq S.A. was the first privately-owned free terrestrial television station to obtain a license when the state television broadcasting monopoly was abolished at the beginning of the 1980s. La Cinq, created in 1985, had obtained authorization to broadcast nationally in France but, at the time of its referral to the Conseil in 1991, La Cinq's broadcasts were not yet received everywhere in the country.

rights of the soccer games it organizes explains, but does not necessarily justify, the restrictive policy the FFF adopted towards the demands of television stations like La Cinq. This restrictive policy was overt, as emphasized by the President of the FFF in 1991 in an interview in which he explained that, in the future, broadcasting rights would not be granted to La Cinq for U.E.F.A.-sponsored games. As La Cinq did not have a contract with the FFF for domestic soccer game broadcast rights, the FFF's systematic refusal to allow La Cinq to broadcast international games organized by the U.E.F.A. pretty much eliminated La Cinq from soccer broadcasting, despite the fact that soccer is an immensely popular sport throughout France, drawing large television audiences, and therefore allowing soccer-broadcasting television stations to attract significant advertising revenues.

In 1991, La Cinq filed a complaint with the European Commission arguing that Article 14 of the U.E.F.A. statute constituted a violation of Articles 85 and 86 of the European Union treaty. Simultaneously, La Cinq referred the case to the Conseil, arguing that FFF's behavior also constituted a violation of Articles 7 and 8 of the Ordinance. La Cinq asked the Conseil to grant a temporary injunction forcing the FFF to stop its discriminatory practices and requiring the FFF to grant La Cinq access under clear rules to U.E.F.A. soccer game broadcasting rights. The Conseil decided that it would undertake a full-fledged investigation of the case because the preliminary evidence presented by La Cinq was sufficient to suggest that the FFF's attitude could constitute a violation of French competition law. The Conseil decided, however, that the restrictive legal conditions under which it could grant a temporary injunction were not satisfied because La Cinq had not established that it had suffered irreparable harm.

Although the Conseil never completed its substantive investigation due to the fact that, for unrelated reasons, La Cinq went out of business before the end of the legal proceedings, one may wonder, given subsequent legal developments concerning the applicability of French competition law to sports bodies, if the Conseil, in spite of its initial ruling, or the Paris Court of Appeals would have had to declare that the behavior of the FFF was outside the scope of the Ordinance. The FFF argued that, like other similar sports bodies, it was entrusted by law with public service obligations related to soccer promotion in France and

that in this capacity it had to make sure that enough resources would be available to maintain local teams and to attract soccer game spectators. It contended that the management of television broadcast rights for soccer games, whether in the context of competitions organized by the FFF or in the context of international competitions for which the FFF had the right to authorize or refuse broadcast rights, was an integral part of the FFF's public service obligations and thus exempt from competition law.

Although both the Conseil and the Paris Court of Appeals have resisted this extensive interpretation of the role of sports bodies, it should be noted that a special court, the Tribunal des Conflits, composed of Supreme Civil Court and Supreme Administrative Court judges having the final determination in such issues, has adhered to a broad interpretation of the public service obligations of sports federations. The Tribunal des Conflits has decided that decisions on their part regarding the negotiation of collective sponsoring agreements or the choice of computer systems to be used for ticketing at all stadium gates, for example, fall within the ambit of sports federations' public service obligations. It is possible that this court would also consider the management of radio and television broadcast rights by such organizations to be part of their public service obligations. On this point there is thus the possibility of a conflict between French national law and European law.

In 1989, two years before it referred the U.E.F.A. broadcast rights case to the Conseil, La Cinq lodged another complaint concerning access to major international sports event broadcasting rights for worldwide events such as the Olympic Games or World Cups. Organizers negotiate the broadcast rights for such events through the European Broadcasting Union ("EBU"), a pool of the major television stations in Europe and the Mediterranean area. As of 1990, thirty-nine members from thirty-two countries were part of the EBU. The active members of the EBU are national television station pools that are themselves members of the EBU. In the case of France, for example, OFRT, an association of the major French television stations, is an active member of the EBU. When it was created in 1983, the OFRT originally regrouped only TF 1, A2, and FR3, the three television stations that were created as a result of the dismantling of the former French state television monopoly. Its membership was subsequently enlarged to include three newly-authorized private

channels, Canal + in 1984 and La Cinq and M6 in 1987. Among French television stations, TF I, A2, FR3, and Canal + were members of the EBU via the OFRT, but although La Cinq and M6 were OFRT members, neither one was accepted as a member by the EBU.

The negotiations of the broadcasting rights for an international sports event were conducted globally by the EBU with the organizers of the event after each national pool had indicated under what financial conditions its members would be willing to bid for the broadcasting rights to the event. If the negotiations were successful, all the television stations that were EBU members of the national pools that had participated in the bidding process collectively owned the exclusive right to broadcast the event in Europe. La Cinq and M6 could not bid for rights through the EBU pool because La Cinq and M6 were not members of the EBU, in spite of the fact that they were members of OFRT. Unlike EBU members, they were at liberty to join another international pool competing with the EBU for acquisition of the rights of an event. The chances of another pool getting the exclusive rights to broadcast a major sports event in Europe were slim, however, due to the large size of the EBU pool and because its members consisted of the longest-established and the most important national television stations. In addition, the fact that La Cinq and M6 were newly established in 1985, and were not yet broadcasting everywhere in France made them relatively unattractive prospects for major sports events organizers because organizers of such events tend to try to maximize their total revenues by means of a combination of the sale of broadcasting rights and of sponsoring contracts. Organizers of major events tend to prefer contracting with the more-established television stations that are EBU members because the value of a sponsoring contract is dependent on the television coverage of the event and the television coverage of the event depends on the ability of the television stations to broadcast throughout a country. This situation did not create a major problem for M6, which was primarily a music channel, but it did hamper the development prospects of La Cinq, which was a general purpose channel. While acting at the European level to challenge its non-admission to the EBU as a breach of Articles 85 and 86, La Cinq tried to negotiate with OFRT regarding the possibility of purchasing from OFRT members broadcasting rights they had themselves

purchased or were likely to purchase through the EBU process. Such a possibility did not exist before 1987 because EBU members were until then prohibited from reselling the rights they had purchased to non-EBU members. This became possible in 1987 after the negotiation of a contract between OFRT and EBU that set the conditions under which OFRT or its EBU members could resell their rights to an OFRT member who was not a member of EBU.

At the beginning of the 1990s, sports event broadcasting represented between 2.5% and 10% of the total programming time of each channel. In 1989, the rights for half of the sports events broadcast on French television had been purchased through the EBU. These events represented 72.5% of sports broadcast by A2, 64% of sports broadcast by T.F.I. and 31.5% of sports broadcast by FR3, but only 1.6% of sports broadcast by La Cinq. The latter figure demonstrates the difficulty experienced by La Cinq in obtaining rights from EBU members. In 1989 La Cinq filed a complaint with the Conseil concerning three clauses of the operating rules adopted in 1987 by OFRT. La Cinq considered these clauses discriminatory, anticompetitive, and designed to keep La Cinq from gaining access to sports events broadcasting. The first of these clauses stated that OFRT members agreed that television stations that had been OFRT and EBU members before the date when new members were accepted by these two organizations would be given priority for broadcasting sports events whose rights had been purchased through the EBU prior to the admission date for the new members. The clause also stated that the same principle would apply for five years following the admission of new members to OFRT and EBU for a number of important international sports events, including World Cup Soccer. The second clause stated that OFRT members admitted before June 22, 1987 would be given priority for broadcasting national soccer competitions for a period of five years until June 1992. The third clause made it mandatory for OFRT and EBU members to negotiate an agreement among themselves to share the rights of international events obtained through the EBU.

The Conseil's decision noted that the first clause was designed to discriminate against La Cinq if it gained admission to the EBU and reflected the worries of other OFRT members concerning the La Cinq legal challenge of EBU admission rules

at the European Commission level. Indeed, if that challenge were successful and if La Cinq were recognized as an EBU member, the OFRT operating rules clause would ensure that La Cinq could not claim that it had a right, on an equal footing with other members of OFRT and EBU, to broadcast the events for which the EBU had secured the broadcast rights previous to La Cinq's admission. It also ensured that for five years following La Cinq's admission, the other OFRT and EBU members would not have to negotiate shared rights for new events with La Cinq, but would be able to negotiate among themselves and leave to La Cinq only those events or parts of events that they did not want to broadcast. Along the same lines, the second clause ensured that for a period of five years the most established channels, which were the older members of OFRT, would get preferential access to broadcast rights for French soccer matches not negotiated through the EBU. In practice, this meant that during this five year period, La Cinq, because it was a member of OFRT and therefore had to abide by its operating rules, was forbidden from bidding competitively against any of the older members of OFRT to secure the exclusive broadcast rights to French soccer matches. As far as the third clause was concerned, La Cinq argued that either it was an illegal market sharing agreement that the Conseil should prohibit or that, if the clause was considered legal, La Cinq should be permitted to participate on an equal footing with EBU members in negotiations on shared rights secured through the EBU because it could, at least in principle, purchase such rights from its competitors.

In its decision, the Conseil decided that the first two clauses were obviously designed to discriminate anticompetitively against newly-established channels and had the effect of preventing them from gaining access to broadcast rights for important national and international sports events. The Conseil did not agree with the OFRT's view that this anticompetitive clause should be exempt under Article 10 of the Ordinance because it contributed to economic progress by ensuring that principal sports events would be broadcast by television channels throughout the country. The OFRT was fined 100,000 Francs. The Conseil did not, however, rule on the last clause.

III. PERFORMANCE RIGHTS AND COMPETITION

The negotiation of performance rights is often conducted collectively. In certain circumstances, labor unions representing actors negotiate those actors' performance rights. Predominantly monopolistic performance societies usually set performance rights for musicians or composers.

Two sets of issues have been raised concerning the management of performance rights. In 1990, the Conseil decided a collective boycott case arising from a labor dispute between performing artists' trade unions, the major television stations, and the producers of films made for television.³¹ One of the issues in this case was whether a labor settlement arrived at through collective bargaining could fall within the ambit of competition law provisions prohibiting anticompetitive agreements even though such agreements were admissible from the standpoint of labor law. The Conseil, supported by the Paris Court of Appeals, decided that, if labor law allowed unions to engage with employers in collective bargaining of labor agreements, it did not allow them to negotiate agreements which had the purpose or could have the effect of restraining competition in a product or service market. While the Conseil did not challenge the fact that the actors had collectively negotiated their rights with television producers and broadcasters through their unions, it examined whether the resultant agreement restricted competition in the television market.

A second set of cases concerning performance rights societies collecting royalties and distributing them to their members arose from a conflict between SACEM, the French performance rights society for composers, music performers, and discotheques.³² Two questions were discussed in this second set of cases: whether SACEM had abused its dominant position by charging

31. Conseil de la concurrence, D. 1990, Rapport annuel pour l'année 1990, Annexe 28 at 73, Décision No. 90-D-21 relative aux accords conclus entre des syndicats d'artistes-interprètes, des organismes de communication audiovisuelle, et certains producteurs d'émissions de télévision.

32. Conseil de la concurrence, D. 1994, Rapport annuel pour l'année 1994, Annexe 87 at 591, Avis No. 94-A-07 relatif à des questions posées par M. Maureille, juge d'instruction près le tribunal de grande instance de Dijon dans le cadre de plaintes avec constitution de partie civile déposée par la Société Sogédis, la Société Kiss et la S.A.R.L. White Horse Club; Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 31 at 81, Décision No. 89-D-24 relative à des pratiques de la S.D.R.M. en matière de fixation du taux de la redevance phonographique. A number of similar

excessively high prices and whether it had engaged in unlawful discrimination. What was not discussed was whether SACEM, a collective organization that sets and collects royalties on behalf of musical authors and composers, in itself constituted an anticompetitive cartel. In all likelihood, had this question been raised, the Conseil would have decided that the collective setting of royalties by authors and composers did indeed constitute an agreement restraining competition among authors and composers of music, but it probably would also have decided that, due to the transaction costs that individual authors or composers would have to face if they tried to collect their rights individually, this collective agreement could benefit from the economic exemption provided for anticompetitive agreements that contribute to economic progress.

The particulars of the first case are complex, requiring some explanation of various aspects of the regulatory environment for television in France and of French labor law. Television operators must be licensed to operate in France. Licenses are granted by the Conseil Supérieur de l'Audiovisuel ("CSA"), a regulatory body analogous to the Federal Communications Commission in the United States. The CSA can impose specific obligations on each licensed television operator. All television operators, however, are subject to a common obligation to allot a certain proportion of their overall programming to French-made fiction program broadcasting. To meet this obligation, television operators may choose among three solutions: to contribute financially to the production of new French-made fiction programs whose broadcast rights they will own, to purchase the rights of newly-made French fictional programs, or to re-broadcast older French-made fiction programs. Smaller television operators tend to rely heavily on purchasing from larger television operators the re-broadcast rights for old French-made television programs that they then rebroadcast a second or third time to meet their quotas because the production of new fiction programs and the purchase of rights to newly-made fiction programs are expensive propositions. Thus, a larger proportion of reruns of older French-made fiction television programs will typically be shown by smaller television operators than by the major

opinions were also delivered on this subject in 1993 by the Conseil at the request of other judges. These opinions have not been published, however.

television stations. At the time the Conseil rendered its decision, three channels were the major operators on the French television scene and four private channels were the newly-established challengers. Regarding the labor dispute involved in the case, it should be noted that, except in certain cases, labor agreements apply only to the signatories of such agreements and that separate negotiations are conducted between national labor unions and each firm.

In 1988, a labor conflict arose between the actors' unions on the one hand, and the producers of films and television operators on the other hand, regarding the question of the basis to be used for computing the residuals that actors were entitled to receive for the sale of rebroadcast rights of television fiction films. While the actors insisted that the residuals to which they were entitled in such cases should be proportionate to the acting fees that they had originally received for acting in a film or fictional series, the producers and television operators insisted that the residuals should be proportionate to the price for which the rebroadcast rights of a film or series had been sold to the rebroadcaster, the latter position being disadvantageous for the actors. In February 1988, after a protracted strike, the conflict was settled between the actors' unions and all of the television operators except La Cinq and M6 who refused to sign the agreement. The agreement stated that in the case of fictional program rebroadcasting, the signatory television operators would compute the actors' residual rights on the basis of their initial acting fees and that they would only co-produce with or purchase re-broadcasting rights from producers who accepted the settlement, whether or not such producers were parties to the settlement.

La Cinq and M6 refused to sign the agreement because they had a much higher proportion of reruns of old French-made fictional programs in their programming libraries due to the fact that they did not have the financial means to produce or co-produce a large number of fiction films or series to meet their quotas for French-made fictional programs. Therefore, the agreement proposed by the actors' unions had much greater financial implications for them than it had for television operators using few reruns in their programming. Although to meet their future quotas of French made fictional programs, La Cinq and M6 would have to purchase the broadcast rights for some feature

films or fictional series produced either by other television operators or by producers abiding by the settlement agreement, they still could produce their own films with non-union actors or purchase the rights to old or new films from producers not party to the agreement. This partial means of escape did not satisfy the actors' unions who wanted to force La Cinq and M6 to sign the agreement. They feared that, due to widespread unemployment in the acting profession and a lack of union membership on the part of a certain number of actors, some actors would indeed be willing to play in non-union films produced by one of these two television operators. Having settled their own labor dispute with the actors, the main competitors of these two television operators were only too glad to help the actors' unions force La Cinq and M6 to sign a similar agreement because this would increase the costs of La Cinq and M6 proportionately more than their own costs were likely to be increased by the settlement. Therefore, while the actors' unions had their own interest in forcing the two remaining non-signatory television operators to sign the agreement, other television operators were interested in weakening the competitive position of La Cinq and M6 also. To achieve that goal, the television operators who had settled with the actors' union agreed to sign an addendum to the labor agreement whereby they would refuse to sell any rebroadcast rights for French-made feature films or fictional series to La Cinq and M6 as long as these two operators did not settle with the actors' unions. By establishing a collective boycott on the part of the actors' unions and the major television operators against La Cinq and M6, this addendum deprived the two television operators of any flexibility because it was clear that they did not have the means to independently produce enough feature films or fictional series to fulfill their programming quotas for French-made works. The signing of this addendum to the labor settlement by the major television operators and the actors' unions forced La Cinq and M6 to capitulate and promptly settle with the actors' unions.

The Conseil held that the collective boycott agreement against La Cinq and M6 violated the prohibition against anticompetitive cartels and fined the three major television operators as well as the other signatories, the producers' union, and three actor's unions. In so doing, the Conseil decided that labor unions could not, in the context of exercising their legitimate,

constitutionally protected rights, conspire with third parties to enter into anticompetitive agreements prohibited by competition law. This decision led to a passionate debate in French legal journals regarding the respective limits of competition law and labor law, in addition to debates as to whether competition law could apply to collective actions initiated by labor unions in the context of labor disputes. The Paris Court of Appeals upheld the decision of the Conseil although it decided that no pecuniary sanction should be imposed on the labor unions.

The second set of cases referred to above arose from a long-lasting conflict between SACEM, the monopolistic performance rights organization for authors and composers of music, and discotheques. The discotheques argued that the royalty imposed on them for performing music of 8.5% of their receipts, including tips, was abusively high, that SACEM discriminated unfairly among different categories of discotheques, and that SACEM refused, without objective justification, licenses for the only category of music in which they were interested. Since the end of the 1970s, a number of discotheques refused to take out SACEM licenses and to pay SACEM royalties, arguing that SACEM was acting in violation of Article 86 of the European Treaty and Article 8 of the Ordinance. When SACEM took the recalcitrant discotheques to court, a number of national courts referred the case under Article 177 of the European Treaty to the European Court of Justice.³³ Simultaneously, a number of discotheques took their cases to the European Commission which refused for political reasons to make a decision, arguing that the cases did not present a sufficient Community interest. The European Court of Justice, acting on the Article 177 referrals from the national courts, ruled that SACEM's refusal to grant the discotheques licenses for the foreign repertory they requested was not a restriction of competition unless it was established that such partial licenses could be granted while safeguarding the interests of composers and without increasing the cost of collection of these rights.³⁴ The Court also ruled, however, that if an organization

33. *Ministère Public v. Tournier*, Case 395/87, [1989] E.C.R. 2521, [1991] 4 C.M.L.R. 248; *Sacem v. Lucazeau*, Case 110/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248; *Sacem v. Debelle*, Case 241/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248; *Sacem v. Soumagnac*, Case 242/88, [1989] E.C.R. 2811, [1991] 4 C.M.L.R. 248.

34. See D.G. GOYDER, *EC COMPETITION LAW 372-77* (Oxford European Community Law Series ed., 1992) (commenting on European Court of Justice rulings on this issue).

such as SACEM imposed special fees for its services that were appreciably higher than those imposed by similar organizations in other European Member States, that difference might itself be indicative of an abuse of its dominant position, unless the undertaking could provide a satisfactory justification for the difference between its fees and the fees charged by similar organizations. This ruling left the national courts with the task of establishing whether or not SACEM fees were higher than those charged in other countries. Unable to undertake this task, the national courts then referred the case to the Conseil under Article 26 of the Ordinance which allows the courts to ask the opinion of the Conseil on practices which may fall within the ambit of Articles 7 and 8 of the Ordinance.

Although the ruling of the European Court of Justice provides us with a relatively clear standard on the applicability of Article 86 of the Treaty to the pricing behavior of performance rights organizations, this ruling suffers from two major drawbacks: it does not make much sense from an economic standpoint and it is exceedingly difficult for national courts or national competition authorities to gather data on the fees imposed in other countries because their powers of investigation are territorially limited. A comparison between two monopolistically-set fees does not provide us with a benchmark as to what a competitively-determined fee would be and therefore is of little use in assessing the presence or the absence of an abuse of dominant position. Furthermore, fees are computed in different countries on very different bases. Depending on the country, fees can be based upon a proportion of a discotheque's total receipts, upon the surface area of a particular discotheque, or upon the number of tables in a discotheque. As a result, assuming that data were available, meaningful comparisons would be of limited value. Nevertheless, the Conseil had no choice but to apply the methodology suggested by the European Court of Justice on the basis of data transmitted by the Commission in contradiction with the rule established by the Court of Justice in the Spanish Bank case. It found that the fees charged by SACEM were significantly higher than the fees charged by similar organizations in other Member States. Furthermore, the Conseil established that the share of the fees distributed to the rights holders was approximately the same in all other countries, around thirty percent. As a result, it was established that the cost charged for

the collection of the fees in France was roughly 2.5 times the cost charged for collection of fees in other Member States. The Conseil held that none of the explanations offered by SACEM to justify the high cost of fee collection in France was valid.

The Conseil also had to give its opinion as to whether SACEM had abused its dominant position by discriminating among discotheques. SACEM had entered several agreements with professional discotheque organizations representing seventy-five percent of all French discotheques providing that the members of these organizations could pay reduced fees if they produced their accounting books spontaneously or if the organizations helped in the collection process. The Conseil held that, because the help provided by these discotheque trade organizations clearly reduced the collection costs incurred by SACEM and because SACEM had never refused to sign similar agreements with other discotheque trade organizations, the grant of a reduced fee in exchange for these services did not in itself constitute an illegitimate discriminatory practice. The Conseil also noted that while the fee reductions granted by SACEM to the organizations with which it had entered into agreements of the kind described above had increased from ten to fifteen percent in 1990 without any justification because the obligations of these organizations had not changed and it was neither alleged nor established that the collection cost reduction obtained by SACEM had itself increased in the same proportion, the post-1990 reduction in fees to these organizations thus appeared unjustified and discriminatory.

IV. *VERTICAL INTEGRATION IN TELEVISION AND FILMS*

The issue of the impact on competition of upward vertical integration in the media sector, particularly with regard to the film and television sectors, has been the subject of intense controversy in France. This controversy has centered upon the question of whether firms present at the exhibition level, either as television operators or cinema owners, should be allowed to integrate into the production and distribution of film or television programs. The debate has been fueled in particular by the claims of a small but vocal number of independent producers and distributors claiming that the difficulties they experienced in gaining access to television or movie screens weakened

France's creative potential. In a country traditionally concerned with the survival of its national culture, these claims have had a powerful echo. Simultaneously, some of the major integrated groups in the audiovisual sector have argued that the survival of the national film industry was crucially dependent on their ability to produce or distribute French films that they could show on their screens. They argued that their upward integration guaranteed that box office receipts would flow back into film industry financing. They have suggested that it was precisely the lack of vertical integration between the exhibition level and the production and distributions levels that explained the poor performances of film industries in several other European countries. Although the fact that the French film industry is relatively healthy is not in dispute, a number of independent film producers have argued that the films produced by integrated groups were films with little cultural quality, designed to appeal to the lowest common denominator. They further argue that such a result would not occur if these groups were prevented from integrating upward, an argument for which there is no empirical basis, or if regulatory constraints forced integrated groups to exhibit more culturally ambitious independent films. This debate, which originally focused on the film industry, has recently also concerned the television industry because some television operators, particularly cable television network operators, have extended their activities to television program production.

While the government has not considered prohibiting vertical integration or horizontal concentration in these industries, it has tried to placate the criticisms of independent producers and filmmakers by imposing regulatory constraints on both television station programming and major film exhibitors to ensure that independent film or television fiction producers would find an outlet for their work. In spite of these constraints, which are more burdensome than effective, the controversy has not abated.

The issues under debate have less to do with competition and more to do with ensuring the pluralism of cultural expression or taking a normative approach to the quality of creative work, despite the fact that practices of vertically-integrated audiovisual groups are often described as anticompetitive violations of the Ordinance. From the standpoint of competition, the fundamental issue is whether vertical integration at the dis-

tribution and the production level of firms controlling movie theater or television screens is likely to result in decreased consumer welfare. It is commonly argued that such an outcome could result from the fact that, once integrated upward, large groups operating television stations or controlling the programming of a number of movie theaters have an incentive to discriminate in favor of showing the films or programs they have produced or for which they have secured the distribution rights because they have expended money in such films or programs. Thus independently-produced films or programs would not get the chance they deserve to be exhibited or broadcast.

This argument is, at best, a short term argument, however. In the long run, there are no expended costs. An integrated profit-maximizing audiovisual group would have an incentive to leave the production or distribution business if it were not able to produce or distribute films having as much public appeal, and therefore as many commercial prospects, as films it could obtain from independent producers or distributors. For the same reason, such an integrated group would have no incentive to refuse to exhibit its films in independent movie theaters if these theaters attracted larger audiences than its own theaters. The counterargument frequently offered to refute this position is that, in the long term, independent producers or distributors, as well as independent cinemas, will disappear and presumably will not be in a position to reenter the industry. Therefore, the long term elastic supply of independently-produced films is nil or very low. Unfortunately there is relatively little evidence available on the technical question raised by this debate, although some would argue that the disappearance of national film industries in some European countries testifies to the fact that the long term elastic supply of independently-produced films is indeed low.

It is in the context of this debate, that the Conseil has dealt with several cases in which it was alleged that vertical integration in a media industry, combined with a high level of horizontal concentration, fostered the adoption of exclusionary anticompetitive practices. In a 1991 decision concerning the movie industry, the Conseil described the structural features of this industry in France.³⁵ Two major French film groups, Gaumont and UGC, are simultaneously involved in film production, distribution, and

35. Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991, An-

exhibition. The third largest French film group, Pathé, does not directly produce films, but is present at the film distribution and exhibition levels. Pathé owns shares in several French production companies and is thus, at least indirectly, present at all stages. Together these three groups control, directly or indirectly, the programming of 52% of the movie theaters in Paris and the movie theaters to which they distribute take in 71.5% of the total box office revenues of Parisian movie theaters. They also have substantial interests outside Paris and control 20% of all French movie theaters at the national level. The movie theaters they control account for more than 50% of total film box office revenues in France. The difference between the proportion of movie theaters these groups control and the proportion of box office revenues they receive from these movie theaters clearly indicates that they control the most successful movie theaters. Besides Gaumont and UGC, three middle size firms, AAA, AMLF, and MK2, specialize in the distribution and co-production of French films. MK2 also owns eighteen movie theaters in Paris. AMLF belongs to Chargeurs, a financial group that owns Pathé, one of the three vertically-integrated French groups. In 1990, the global market share of these smaller distributors was about 20%. Finally, the five American majors, Columbia, United International Pictures, Walt Disney, Twentieth Century Fox, and Warner Bros., also distribute foreign films in France. Their global market share at the distribution level was about 50% in 1990.

The commercial success of films in movie theaters is a significant source of revenues for film distributors because France is a country of moviegoers. The release of a film follows a precise pattern. Release in the best movie theaters in Paris and in major provincial cities is crucial to the commercial success of a film. Attendance during the first week of a film's release is usually a good indicator of a film's earning potential. Depending upon a film's first week's box office receipts, a film will continue to be shown in the best movie theaters, be moved to less important movie theaters, or be shown in smaller cities. The planning of its release is of paramount importance to the distributor who holds the film's rights because the commercial success of a film

depends in part on the movie theaters in which it is released. There are only three movie theater networks through which a film can be released nationwide, however: Gaumont, UGC, or Pathé. In addition, these networks are controlled by groups that are directly or indirectly involved in film production and distribution.

Concentration of movie theaters is partly the result of the regulatory environment that was established to promote the French movie industry by a July 1982 law on the audiovisual sector.³⁶ It was decided that the presence of a large number of commercially successful movie theaters was necessary for the harmonious and pluralistic development of the industry and that the commercial success of a movie theater was partly dependent on its ability to consistently provide movies that appealed to its customers. It was also felt that a number of theater owners were either unable to get access to films that would ensure the economic viability of their movie theaters, due to the vertical integration of the three major French distributors, or showed poor judgment in their choice of films and could be tempted to close down their movie theaters and sell them to real estate developers because movie theaters are often situated in prime central city locations. Because the existence of a large number of screens was perceived to be necessary to provide sufficient outlets for French-produced films, the prospect that small movie theaters would be turned into parking lots or apartment buildings was considered to be a threat to the French film industry.

To accommodate these various constraints, but without considering the possibility of prohibiting vertical integration between exhibition and distribution or ordering deconcentration measures at the exhibition level, a regulatory framework was designed in 1982 to allow independent movie theater owners to enter agreements with one or the other of the main film distributors so that these distributors would, on a regular basis, select the films to be shown in these movie theaters.³⁷ The Director General of the National Cinematography Center must authorize

36. Loi No. 82-652 du 29 juillet 1982 sur la communication audiovisuelle; Décret No. 83-13 du 10 janvier 1983 portant application des dispositions de l'article 90 de ladite loi et relatif aux groupements et entente de programmation modifié par le décret No. 91-1130 du 25 octobre 1991.

37. Loi No. 82-652 du 29 juillet 1982 sur la communication audiovisuelle, articles 90 à 92; Décret No. 83-13 du 10 janvier 1983.

these agreements after consultation with an administrative commission composed of magistrates, civil servants, and film professionals and, in particular, representatives of the three major distributors as well as of independent producers, distributors, and exhibitors. Once authorized, these agreements are exempt from competition law. The Director General of the National Cinematography Center tries to maintain a modicum of balance in each major city between the three movie theater networks controlled by the major distributors and the independent movie theater owners not party to any agreement. This scheme obviously allows each of the three major distributors to control a larger number of movie theaters than it owns outright and therefore fosters horizontal concentration at the exhibition level.

In order to meet the concerns of the independent movie theater owners competing with the three cinema networks controlled by the major distributors, local agreements are authorized only on the condition that each distributor controlling a network of movie theaters in that area will make available to competing independent movie theaters a certain number of potentially successful films throughout the year. This does not prevent conflicts from erupting because the box office appeal of a film at the time of its release is not always easy to predict and because the potential of an independent movie theater to attract moviegoers can also be subject to debate. For these reasons, a mediator's office was created. A mediator must first examine any conflict between a theater owner and a distributor before a case can be referred to the Conseil. This means that the agreements the mediator negotiates do not necessarily meet competition law standards because the mediator's role is to try to decrease tensions rather than to promote competition.

A 1991 case examined by the Conseil originated with a complaint by an independent exhibitor, Mr. Adira, who owned movie theaters in southeastern France and complained that independent French distributors as well as the three vertically integrated distributors refused to release films in his movie theaters and therefore prevented him from competing with the movie theaters belonging to the three major cinema networks. He contended, for example, that from September 1986 to June 1987, a period during which a total of ninety-four films were released by AAA and AMLF, the two largest independent film distributors, and by Gaumont and UGC, the two largest vertically integrated

film distributors, he had secured access to only seven of these films in Lyon, six in Grenoble, and twenty in Chalon sur Saone.

The Conseil established that the reason that Mr. Adira had difficulty obtaining first run films did not lie with a lack of competitiveness on the part of his movie theaters because independent distributors acknowledged that his movie theaters had good commercial potential. The defense presented by the independent French film distributors was that, in order to release their films with the best chance of success, they had to release them through one of the three main cinema networks because these networks owned or controlled the best movie theaters in Paris. In return, these networks agreed to release independent films nationally only under the condition that they not be simultaneously released in independent movie theaters competing with their own movie theaters.

A related issue was the difficulty that another independent film exhibitor, Mr. Malacarnet, who owned movie theaters in Avignon and Valence, had experienced difficulty in getting access to first release films distributed by UGC. In this case, the mediating session records established that UGC's refusal to do business with Mr. Malacarnet was due to the fact that Mr. Malacarnet had embarked on a policy of discounting tickets and had widely-advertised his pricing policy in the press. Eventually the mediator negotiated an agreement securing access for Mr. Malacarnet to films distributed by UGC on the condition that he bring his ticket prices back in line with the prices charged by UGC-controlled movie theaters. The Conseil found that the major distributors' condition requiring that films they released in movie theaters under their control in Paris not be shown in independent movie theaters competing with their network in other cities constituted a violation of competition law. Similarly, the Conseil found that the agreement under which an independent theater would be offered first run films by one of the cinema networks if the independent theater owner increased his ticket prices also violated competition law violations. As a result, the Conseil fined the networks.

A related case handled by the Paris Court of Appeals concerned the release of the film *Indiana Jones*. In this case, the network that had agreed to release this potentially very successful film controlled the Grand Rex, the largest movie theater in Paris, located on the Grands Boulevards, a high density area of

movie theaters similar to that of Broadway in New York City. The network involved had agreed with the distributor to release *Indiana Jones* in this theater, as well as in a number of movie theaters it controlled elsewhere in the Paris area, in its French-dubbed version. A well-known independent theater, the Max Linder, located in the same neighborhood, was denied the possibility of releasing the film in its original language version due to pressure exerted on the U.S. distributor of *Indiana Jones* by the French distributor heading the theater network to which the Grand Rex belonged. The French distributor, who had agreed to release the film via its network, argued that the independent Max Linder theater would compete with the Grand Rex theater and the U.S. distributor of *Indiana Jones* did not want to risk antagonizing the network which was going to release the film nationally. In a highly-publicized judgment, which led to a heated controversy regarding the respective limits of intellectual and artistic property rights law and competition law, the Paris Court of Appeals decided that the U.S. distributor of *Indiana Jones* and the French distributor who planned on releasing this film had entered into a conspiracy with the intent to restrict competition and that this conspiracy constituted a violation of competition law, despite a last minute plea by Steven Spielberg explaining to the Court that the commercial success of *Indiana Jones* would be compromised if the film was released simultaneously at the Grand Rex and the Max Linder. The Court therefore ordered the U.S. distributor of *Indiana Jones* to allow the release of the film in its original version in the independent cinema.

Competition problems created by a combination of high horizontal concentration and vertical integration are not unique to the movie industry. They also exist in other media markets such as the still poorly-developed French cable industry, as a 1991 decision of the Conseil suggests.³⁸ The regulatory regime of the French cable industry was first defined in 1984 and modified in 1986.³⁹ Any local government ("commune") or set of local governments can decide to establish a cable network and freely choose both the provider of the infrastructure and the op-

38. Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991, Annexe 58 at 130, Décision No. 91-D-51 en date du 19 novembre 1991 relative au marché des programmes de télévision réservés à la diffusion sur les réseaux cablés.

39. Loi No. 86-1607 du 30 septembre 1986 relative à la liberté de communication, modifiée, notamment par la loi No. 90-1170 du 29 décembre 1990.

erator of the cable network. Cable television network operators must obtain a license from the Conseil Supérieur de l'Audiovisuel ("CSA"), the regulatory body for the audiovisual sector, defining the type of service they are going to offer, the number and nature of the channels they will operate as jointly determined by the operator and the local government, and their responsibilities. The operator is then free to fulfill its service obligations in any appropriate way it sees fit.

A small number of large firms, often originally water distribution system operators, have diversified their activities to cover most of the public service needs of local governments because there is a long tradition in France of local government delegating public service management, such as water distribution, funeral services, garbage collection, and public lighting, to private operators. At the beginning of the 1980s they added the cable television network management to their already long list of activities. Thus, the largest cable television network operator in France is the Compagnie Générale de Videocommunication ("CGV"), a subsidiary of the Compagnie Générale des Eaux. At the beginning of the 1990s, subscribers to cable television networks operated by the Compagnie Générale des Eaux represented roughly forty percent of all French cable television subscribers. Concurrently, the second largest operator of cable television networks was Lyonnaise Communications ("LC"), a member of Lyonnaise des Eaux-Dumez, the group that operates the Paris cable television network, among others. A third major cable television operator is Communication Développement ("CD"), a subsidiary of a state-owned financial institution, the Caisse des Dépôts et Consignations.

To fulfill their obligations, cable television network operators needed programs and various independent producers set out to design thematic programs to be sold to cable television operators. Contracts signed between the cable television operator of a particular area and the producer of a thematic program often included a clause giving exclusivity on the theme for the relevant site to the producer of the thematic program. TV Mondes, an independent thematic program producer, was established at the end of 1985. Its programming was devoted to presenting foreign cultures, a theme no one else had covered previously. It approached the three major cable television operators and in 1988 it entered a preliminary agreement with the

CGV group by which, in order to test audience reaction, the cable operator would broadcast its program for three months, experimentally and free of charge, on three sites, Montpellier, Massy Palaiseau, and Villeurbanne. Subsequently, in 1988 and 1989, the three cable television operators integrated vertically and began producing thematic programs. The CGV group established a subsidiary, *Compagnie Générale d'Images* ("CGI") that started working on a program called *Planète* having a theme similar to one proposed by TV Mondes. *Planète* was ready for broadcast by the end of 1988.

At the end of the TV Mondes audience reaction test, negotiations with the CGV group were prolonged and it was only at the end of 1990 that the CGV group offered to broadcast the TV Mondes program on some of its sites at a price of 1.5 Francs per subscriber per month. Concurrently, on some of its other sites, CGV had contracted for the *Planète* program, produced by its subsidiary CGI, as well as for two other programs, *TV Sport* and *Canal 3*, coproduced by CGI and the two other major cable television operators, at a price of six Francs per subscriber per month. TV Mondes refused the CGV proposal, arguing that it could not cover its costs at that price because relatively few French households subscribed to cable television at that time. During that same period, TV Mondes had also entered into negotiations with LC, the second major cable television operator. In March 1989, LC offered to broadcast the TV Mondes program free of charge on several of its sites, including central Paris and several suburban sites. Unable to face the cost necessary to produce three months of programs without compensation, TV Mondes declined this proposal. Finally, in April 1989, the third cable operator, CD, offered TV Mondes a three-year contract at a price of six Francs per subscriber per month, but the contract was for only one site, a small town called Saint Avold. Given the very small number of potential subscribers and the fact that this contract was the only one it had been able to negotiate, TV Mondes had to decline the offer. TV Mondes went bankrupt shortly after the end of 1989.

While these difficult negotiations were taking place with TV Mondes, starting in February 1989 CGV decided to broadcast its subsidiary's program, *Planète*, at a price of six Francs per subscriber per month on all of its sites, representing forty percent of all cable television subscribers. It entered an agreement in July

1989 with CD, the third largest cable television operator, under which CD would show the Planète program on all of its present and future sites. Finally, in the second half of 1990, it entered into a co-production agreement for the Planète program with, among others, LC, the second largest cable television operator. As a result of these developments, Planète is now shown on most sites in France, regardless of the cable television operator involved.

It should be added that the contracts signed between Planète's producer and the cable television operators not only had the aforementioned exclusivity clause, but also allowed Planète's producer to refuse to permit similar programs to be shown on the sites on which its own program had been shown for a period of six months after the termination of its contract with the cable operators. The circumstances already described in the TV Mondes case could be viewed as either consistent with a situation in which the TV Mondes program turned out to be distinctly inferior to the Planète program and lost in a fair competition or consistent with a situation in which an independent producer was prevented from entering a market through discriminatory tactics used by vertically-integrated cable operators who were both potential distributors of this program and competitors of TV Mondes.

The Conseil decided that the cable operators, and in particular CGV, did not offer evidence that the commercial tests of the TV Mondes program showed that the this program's public appeal was significantly inferior to the commercial appeal of other programs, such as TV Sport, that were broadcasted by CGV on its sites. It decided that CGV had violated Article 8-2 of the Ordinance by abusing the commercial dependency in which it held TV Mondes through discriminatory pricing policies. The Conseil sanctioned CGV by imposing a fine of one million Francs. Furthermore, the Conseil decided that exclusivity clauses in contracts between program producers and cable operators could have the effect of restraining competition and were not justified by any legitimate consideration. Subsequently, the Paris Court of Appeals viewed the facts of the TV Mondes case differently. It noted that, although substitutable to the Planète program, the TV Mondes program was not strictly identical. In particular, the TV Mondes program was to be presented in the original language version with subtitles whereas the Planète program was to

be dubbed in French. Given these differences, it was not clear that CGV had misused its bargaining power with TV Mondes when it offered to broadcast its program for 1.5 Francs per month per subscriber. As a result, the Paris Court of Appeals overturned the sanctions imposed by the Conseil on CGV for discriminatory anticompetitive abuse of commercial dependency. It did, however, sustain the condemnation of the exclusivity clauses.

Considering these cases, one could legitimately ask whether the Conseil is too receptive to complaints alleging that dominant firms try to keep competitors out of their markets. The two cases reviewed above are similar in the sense that they both concern the audiovisual industry and that in both the operators of the infrastructures supplying access to final consumers, movie theaters in one case and cable networks in the other, have integrated vertically into the production and the distribution of programs. There are dissimilarities between the two cases, however. In the movie theater case, it was clear that the dominant firms had deliberately tried to use their economic power to eliminate competition by either conditioning the release in their theaters of films from other distributors on the fact that the other distributors would not simultaneously release these films in theaters competing with their own or by conditioning the release in independent theaters of films for which they owned the rights on the fact that these independent theaters would follow pricing policies similar to their own. In the cable television case the competition issue was not as clear. The Conseil did not establish that CGV had a dominant position. It merely decided that it had abused its bargaining power vis-à-vis TV Mondes. The source of TV Mondes' problem was that CGV had integrated into program production through its subsidiary CGI and was involved in producing a program similar to the TV Mondes program.

In these circumstances it is obvious that CGV had a short term interest in showing the CGI program on its cable television network as long as the price it would have had to pay for the TV Mondes program was superior to the variable costs of producing the CGI program. Thus only a price for the TV Mondes program inferior to the variable cost of production of the CGI program would have justified CGV choosing the TV Mondes program, assuming the programs were of equal quality. This may well explain why CGV indicated to TV Mondes that it would be

willing to show the TV Mondes program on its network at a price of 1.5 Francs per month per subscriber, a price considerably lower than the six Francs per month per subscriber that it paid for the CGI program. In fact, if CGV had wanted to eliminate its competitor altogether it would probably have refused to make any offer to TV Mondes. Thus, in the cable television case one may say that CGV was simply acting in its own interest. Because CGV did not have a dominant position, TV Mondes had the option of selling its programs to other cable television operators and, strictly speaking, did not need to have its programs shown on the CGV cable network.

Under these circumstances, one may wonder why CGV should have been held to the same standards as those usually applied to firms having a dominant position or operating an essential facility. Furthermore, economic theory suggests that even if CGV had a dominant position or a monopoly, neither a price discrimination in favor of its own programs nor a straight refusal to deal with an independent producer would have led to a loss in consumer welfare as long as there was a positive supply in the production of programs, a condition which the Conseil did not examine. This is because CGV could have an interest in refusing to deal with an independent producer in the long term only if it were able to produce a similar type of program of at least equal consumer appeal, in which case no loss in consumer welfare would result from a refusal to deal with an independent producer. Considering all aspects of this case, the Conseil's analysis seems incomplete, assuming one adheres to the idea that the goal of competition law is to promote efficiency and that, as a result, only anticompetitive practices which are likely to lead to welfare losses should be prohibited.

V. *RELATIONSHIPS BETWEEN THE MEDIA AND ADVERTISING SECTORS*

When analyzing media sector competition issues in France, one should also keep in mind the close relationship in this country between the media sector and the advertising sector. A number of media sell their advertising space through specialized firms that are often subsidiaries of the media or of advertising agencies. Advertising agencies are often also shareholders of media. A 1987 opinion of the Conseil on the advertising sector

provides a good example of this phenomenon and of the subsequent competition problems it creates.⁴⁰ In this opinion the Conseil explained that the Havas Group was, at the time, the largest group of advertising agencies in France, the largest seller of billboard advertising space, the largest seller of advertising time for radio commercials, the largest seller of advertising spots in movie theaters, the exclusive publisher and seller of advertising space in the official telephone directory yellow pages, the largest French publisher, through its control of CEP-Communication, of books, professional journals, and news magazines, the main shareholder of Canal +, the only French commercial pay-television station, an important shareholder of Audiofina, the majority owner of the Compagnie Luxembourgeoise de Télévision which controls Radio Television Luxembourgeoise, the fifty percent owner of M6, another important French commercial television station, and the fifty percent owner of two national radio stations, Fun Radio and M 40. Additionally, Havas also controlled part of the sale of advertising space of FR3, one of the two public television stations partially financed by advertising.

This example is not unique. Publicis, a very large advertising agency, is also integrated and occupies important positions in the sale of billboard advertising space, the sale of movie theater advertising space, and the sale of radio and television advertising time. One should also note that starting in the 1970s, France saw the rapid development of block-buying agencies for advertising space. The original idea behind the concept of an advertising space block-buying agency originated with Gilbert Gross, the founder of Société Gilbert Gross Michel Doliner in 1969, which changed its name to Carat in 1993. Gross' idea was based on the notion that such a firm could profit by buying blocks of advertising space in all kinds of media and then reselling the space to advertisers or to advertising agencies, despite the entrepreneurial risk involved in possibly being unable to resell the space.

The media were willing to grant Carat large discounts because Carat reduced the media's own risk by buying large blocks of space or time for commercial advertising early and by paying

40. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 66 at 394, Décision en date du 15 décembre 1993 relative à des pratiques relevées dans le secteur de la publicité.

promptly for the advertising space or time, regardless of whether or not it had found someone to whom it could resell the advertising space or time. During the 1980s, when the liberalization of television and radio was rapidly increasing competition for advertising revenues, the media were glad to trade off some their revenues in exchange for some security. This formula was also particularly appealing to newcomers, particularly newly-created radio stations, who were often in need of cash. In addition, advertising agencies found it interesting to buy from Carat because they obtained better prices than they would have obtained by buying directly from the media.

As time passed, advertising agencies found it more interesting to join forces and create their own advertising space block-buying agencies. In 1986, for example, Lintas created Publimedia Service ("PMS") in a joint venture with McCann Erickson. Similarly, five U.S. advertising agencies, J. Walter Thomson, Ogilvy & Mather, Grey, DDB-Needham, and CLM-BBDO, and two French advertising agencies, RSCG and BDDP, created a joint venture called TMPF for the same purpose. Finally, three advertising time and space block-buying agencies were created within the group Havas-Eurocom. At the end of the 1980s, Carat, PMS, TMPF, and Havas-Eurocom bought 19%, 16%, 16%, and 13%, respectively, of all the available French media advertising space. Needless to say, this combination of vertical upward integration of advertising agencies into the media, both through outright ownership and through partial control of advertising space-selling agencies, a horizontal concentration of advertising groups, and a concentration of advertising space and time block-buying agencies has not facilitated smooth and transparent competition either among the media or among advertising agencies themselves.

For the Conseil, which examined competition problems raised by the relationship between the media group and the advertising groups in 1987⁴¹ and again in 1993,⁴² one of the troubling aspects of the situation lay in the complete lack of transparency of the cost of advertising space in competing media.

41. Conseil de la concurrence, D. 1987, Rapport annuel pour l'année 87, Annexe 85 at 111, Avis relatif au secteur de la publicité.

42. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 66 at 394, Décision en date du 15 décembre 1993 relative à des pratiques relevées dans le secteur de la publicité.

The official tariffs for advertising space published by the media were largely meaningless because the media made a regular practice of giving huge confidential rebates to block-buying agencies. This confidentiality suited the media because they were able to make advertisers who bought space directly from them pay their inflated published tariffs without losing the clientele of the block-buying agencies. Furthermore, the media hoped that the large confidential discounts given to block-buying agencies linked to advertising groups and to media planners would give the latter an incentive to place a lot of orders with them. To ensure the confidentiality of the rebates that they granted to advertising time and space block-buying agencies, the media entered into bilateral agreements with these agencies. These agreements stipulated that the only price that would appear on invoices would be the gross list price of the space or time bought and that the rebate would appear on separate documents that were not made available to advertisers. In addition, competing media, such as *Le Monde* and *Liberation*, two major daily newspapers, would occasionally collude on their published tariffs or the rate of rebates to be given to block-buying agencies. The advertising space block-buying agencies did not want advertisers to know at which price they had bought the space because either they wanted to keep a proportion of the rebates for themselves or because they wanted to ensure the possibility of directing advertisers toward those media that they owned directly or indirectly. Finally, advertising agencies that either owned their own advertising space block-buying agencies or bought advertising space from independent advertising space or time block-buying agencies felt that the usual margin they were able to charge for their services was insufficient. Therefore, they were eager to secure a complimentary profit source by keeping part of the difference between the price actually paid for the advertising space or time that they bought on behalf of their advertising clients and the price they actually charged these clients for the space. All this took place despite the fact that contracts between the advertisers and their advertising agencies generally contained a clause granting the advertising agencies a mandate to buy advertising time or space on behalf of advertisers and providing that advertising agencies would pass any rebate they might get from the media on to their client advertisers.

In its 1993 decision, the Conseil decided that, through a

complex web of parallel bilateral vertical agreements, a number of media had conspired with advertising groups to make transactions for the purchase of advertising space or time non-transparent in order to restrain price competition among both advertising agencies and competing media by allowing the media to charge inflated tariffs to advertisers buying directly from them. The Conseil also found that Eurocom and Carat had entered a non-aggression pact to the effect that each would refuse to accept as its advertising clientele former clients of the other group and had exchanged information about the rebates they received from specific media. It determined that these practices were violations of Article 7 of the Ordinance and fined twelve media entities and twelve advertising agencies a total of sixty million Francs (US\$10 million). The Conseil's decision was partially nullified by the Paris Court of Appeals on procedural grounds. The same practices were subsequently reexamined by the Conseil which again found them in violation of the Ordinance. This second decision was not appealed. As the first case was progressing in front of the Conseil, Parliament passed a law regulating and making more transparent the relationship between the media, advertisers, and advertising agencies.⁴³ As a result, the media must now charge advertisers directly for the advertising space or time they buy.

VI. ECONOMIC EXTERNALITIES, COMPETITION AND THE MEDIA

In the previously discussed decision concerning the purchase of broadcast rights of major international sports events by television stations through the EBU,⁴⁴ the Conseil did not address one of the issues raised by La Cinq. La Cinq had argued that the fact that the French members of the OFRT, before bidding for the exclusive collective rights to broadcast an international sports event in France, had entered a market-sharing agreement regarding which one of them would broadcast each section of the event constituted an illicit market-sharing agreement. One can only speculate as to what position the Conseil

43. Loi No. 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, modifiée.

44. Conseil de la concurrence, D. 1991, Rapport annuel pour l'année 1991, Annexe 18 at 42, Décision No. 91-D-11 en date du 19 mars 1991 concernant les Organismes français de radiodiffusion et télévision (O.F.R.T.).

might have taken on this issue. In the author's opinion such an agreement should not be considered to be a violation of the competition law for at least two reasons. In the EBU system, each member of a national pool having participated in a bid is granted the exclusive broadcast rights to the event if the EBU bid is successful. Therefore, these exclusive broadcast rights are a resource collectively owned by potential competitors. In most circumstances, competition leads to a better allocation of resources among the activities of independent firms that bid against each other for the use of the resources. This competition model assumes that resources controlled by one firm cannot be employed by another competing firm. The case at hand does not fulfill this hypothesis because the resource in question, the broadcast rights to an international sports event, is collectively owned by the competitors. In this context, which could be described as an ownership externality, preventing the sharing of collective rights among owners would lead to an obviously inefficient allocation of programs among competing television stations. It is clear that without a market-sharing agreement, the competing television broadcasters collectively owning the exclusive right to an important international sports event might decide to broadcast simultaneously the same part of that event if they acted independently of one another. For example, if two competing television broadcasters collectively own the rights to the Summer Olympic Games and if seventy percent of television viewers prefer to watch a track event while the other thirty percent prefer to watch a swimming competition, then assuming that the two competitions occur simultaneously, both broadcasters would show the track event because each would have a potential seventy percent share of the television audience if the other decided to broadcast the swimming event. On the other hand, both broadcasters would have a potential thirty-five percent share of the television audience if the other decided to also show the same track event and the audience for the track event was split between the two broadcasters. Neither one would have much incentive to show the swimming competition because its maximum potential audience would be only thirty percent or much less than the normally expected audience for a track event broadcast. Such an outcome would be inefficient because television broadcasting is a public good, in the economic sense of this term. The duplication of resources implied by the double

broadcasting of the same competition would reduce unnecessarily the choice offered to television viewers and therefore would diminish their overall satisfaction. In fact, all the track enthusiasts could have watched this competition on one broadcaster's channel while all the swimming enthusiasts could have watched the swimming competition on the other broadcaster's channel. There would be no need for simultaneous broadcasting of the same competition on two different channels. Indeed, it would unnecessarily increase the broadcast costs for the competition and prevent some viewers from being able to watch another competition that they might prefer. Permitting a priori market sharing between the two broadcasters would improve things by allowing them to negotiate their respective financial contributions to the acquisition of the broadcast rights, eliminating uncertainty as to what the competitors want to broadcast, and allowing for better coverage of major sports events in most cases.

The double externality in this case, due to the fact of collective ownership of a resource by competitors and the fact that television broadcasting is to a large extent a public good, means that competition among broadcasters serving the same audience does not lead to efficient solutions. If the goal of competition law is to promote efficiency and if there is a divorce between the two in certain circumstances, the efficient solution should be preferred. In this case, the market-sharing agreement between competing television broadcasters negotiating the purchase of collective exclusive broadcast rights should have been exempted from the general prohibition against anticompetitive agreements by the use of Article 10 of the Ordinance exempting anticompetitive agreements that contribute to economic progress when such economic progress could not have been obtained without the anticompetitive agreement and when the benefits are passed on to consumers.

In another case discussed earlier concerning the AFP news agency,⁴⁵ the Conseil also considered that a public good was involved. In that case, a would-be newspaper publisher, Verimedia, had subscribed to AFP's general news service for newspapers, but had never launched its newspaper project. Instead, it had created a telematic newsletter on the Minitel, a low-speed

45. Conseil de la concurrence, D. 1989, Rapport annuel pour l'année 1989, Annexe 45 at 133; Décision No. 89-D-38 relative à une saisine de la Société Plurimédia.

videotext system with proprietary software specific to France. In the case, it was also established that Verimedia's telematic news bulletin had used some of the uncut, unedited news releases it had obtained through its subscription to the general news service of AFP. AFP contended that Verimedia had breached its contract by using the news items it had obtained from its AFP subscription on the Minitel. It was standard procedure for AFP to include a clause that specified the conditions under which the subscriber could use the service and the information contained in its news releases in the contracts AFP signed with subscribers to its general news service. Subscription contracts to the general news service also prohibited the use of the service or the information it provided for any purpose other than the one specified in contract.

The price paid for a news service subscription may vary from one subscriber to the next depending on what each subscriber is going to use the subscription for. In Verimedia's case, the subscription contract specified that the general news service and the information it provided were going to be used exclusively for the publishing of a printed monthly magazine and that Verimedia was prohibited from using this information for any other purpose, from communicating this information to a third party, and from duplicating or distributing it. When AFP discovered that the magazine had never been launched and that instead Verimedia was publishing a telematic news bulletin and was using the news releases it obtained from its subscription to the AFP general news service, AFP terminated its contract with Verimedia and subsequently refused to do business with it. Verimedia then complained to the Conseil that, on the one hand, AFP's refusal to do business with Verimedia constituted an abuse of its dominant position prohibited by Article 8 of the Ordinance and that, on the other hand, the clauses in AFP's general news service subscription contracts limiting the use one could make of the information provided were also abusive, anticompetitive, and designed to protect AFP's dominant position.

Limitations imposed by a dominant firm on the use of an industrial product that it sells or a professional service that it provides to a client firm, particularly a limitation on the client firm's ability to resell the product or the service, can arouse suspicion, especially when no question of patent or trademark infringement exists. Such limitations can, in some circumstances,

be viewed as both an infringement on the client's commercial freedom and a practice by the dominant supplier aimed at limiting competition. In the case of the AFP news service, however, the Conseil based its finding of non-violation with respect to the limitations imposed by the dominant supplier on the nature of news as a public good. A public good can be defined, from an economic analysis point of view, as a product or service that does not get destroyed while it is being consumed or, to put it differently, a product or service unit that can be simultaneously consumed by many users. For example, while several consumers cannot simultaneously wear the same pair of shoes, several television viewers can simultaneously watch the same television program. Due to the nature of news as a public good, a subscriber to AFP's general news service could, for example, use the news for its own publication and simultaneously resell it for a modest fee to potential clients by putting it on a videotext system such as the Minitel or on the Internet. The cost of doing so would be the cost of one subscription to AFP's general news service plus the very limited cost required to put the news on the Minitel or the Internet. None of AFP's potential clients would find it in their interest to subscribe directly to the AFP general news service and bear the full cost of a subscription to this service alone because this cost could be divided among all the potential clients of AFP. Allowing subscribers to the AFP news service or to any other news service to resell that news would eventually result in the news agency having only one subscriber, causing the news agency to go out of business. Competition at the retail level would lead to a market failure and the disappearance of the service itself, which would be inefficient. That is the main reason that news agencies may want to control the use of the news they provide and prevent their subscribers from reselling that news among themselves. On the basis of this analysis and in recognition of the potential conflict between competition and efficiency in the case of public goods, the Conseil decided that the contested clauses of the AFP contracts did not violate the Ordinance and that AFP's refusal to deal with Verimedia did not constitute an abuse of its dominant position.

VII. MERGER CONTROL

A distinction should be made regarding merger control be-

tween the printed press and the audiovisual sector, including radio, television, and cable television. In both sectors, specific legislation aimed at guaranteeing the pluralism of information sets limits on ownership concentration and media control. The existence of these specific regulations does not necessarily mean that the merger provisions of the competition law do not apply to mergers in these sectors, however. While there is no specific limitation on ownership concentration for news magazine ownership, Article 11 of the November 27, 1986 law on the legal regime of the press does set a limit on the ownership concentration or control of certain daily newspapers. Under Article 11, no individual or firm can own, directly or indirectly, daily general or political newspapers having a combined readership of more than thirty percent of the total national daily readership of newspapers. Violations of this Article are criminal offenses that can result in fines or imprisonment. Therefore, from a legal standpoint, newspaper mergers are subject to two sets of constraints: those arising from the merger provisions of the competition law, as enforced by the Minister of Economic Affairs and the Conseil, and those arising from the 1986 law on the press, as enforced by the criminal courts. The enforcement of Article 11 of the November 1986 law has been lax, however.

The basis of audiovisual sector regulation is the law of September 30, 1986, as amended by a January 1989 law and by a February 1994 law.⁴⁶ An important aspect of the 1986 law concerns limitations set on the level of ownership concentration in the audiovisual sector. Three kinds of rules apply in this area. First, an individual or entity cannot own more than 49% of a national terrestrial television station, more than 50% of a regional terrestrial television station, or more than 50% of a satellite television station. Second, rules exist to limit multiple ownership of the same type of media entity. An individual or entity owning between 15-25% of a terrestrial television station cannot own more than 15% of another terrestrial television station. Similarly, if a person owns more than 5% of the shares or the voting rights of two terrestrial television stations, that person's ownership of a third terrestrial television station cannot be more than 5%. Regarding radio or satellite television stations, if a per-

46. Loi No. 86-1607 du 30 septembre 1986 relative à la liberté de communication, modifiée.

son owns more than a third of the capital or of the voting rights of such an undertaking, that person cannot own more than a third of the capital or the voting rights of another radio or satellite television station. If a person owns more than 5% of two radio or satellite television stations, that person cannot own more than 5% of a third radio or satellite television station. A person can own an unlimited number of participations in radio or television stations if each participation is equal or less than 5% of the capital of each station and if the satellite television stations are regional, broadcasting to less than a total of six million people. Third, there are rules limiting multimedia concentration. At the national level, a person or an entity must respect at least two of the following thresholds: having less than 20% of daily newspaper circulation, a potential terrestrial television audience of fewer than four million people, a potential radio station audience of fewer than thirty million people, or a potential cable television audience of fewer than six million people. At the regional level, a person or an entity must meet two of the following conditions: owning one national or regional terrestrial television station, one radio station having an audience of more than 10% of the potential audience of the broadcast area, one cable television network, or one or more daily newspapers.⁴⁷

Finally, it should be mentioned that Article 41-4 of the 1986 law established shared responsibilities in the area of competition between the audiovisual regulator, the CSA, and the Conseil. Article 41-4 allows the Conseil to apply Title III of the Ordinance, prohibiting anticompetitive agreements, abuses of dominant position, and abuses of dependency to the audiovisual sector, but not Title V regarding merger control. Therefore, in principle, the merger control provisions included in the Ordinance do not apply to the audiovisual sector. The CSA is responsible for controlling mergers in this sector based upon the 1986 audiovisual sector law. Media mergers in the audiovisual sector often imply a concentration in the sale of advertising space or time available for these media and therefore affect the relevant advertising markets. The Conseil has jurisdiction to control media mergers in the audiovisual sector to the extent that they affect the adver-

47. The 1986 law has been criticized in various quarters following an increase in concentration, particularly of radio stations. The chairman of the C.S.A., the commission in charge of regulating the audiovisual sector, has called for stricter measures to control concentration in the audiovisual sector.

tising sector because the CSA cannot control mergers in the advertising sector and the merger control provided by the Ordinance applies to all activities of production, distribution, or services not explicitly excluded from the scope of the Ordinance, including advertising.

The Conseil analyzed the takeover by the Compagnie Luxembourgeoise de Telecommunication ("CLT"), a radio and television operator controlling nine television stations and thirteen radio stations in Europe, of two radio stations, Fun Radio and M 40.⁴⁸ The Conseil pointed out that the sale of advertising time slots on French radio and television stations controlled by the CLT group took place through joint ventures between the CLT group and the Havas group. The sale of radio advertising space on RT, Fun Radio, and M 40 was carried out through one of these joint ventures, IP-RTV. In line with its traditional analysis of advertising space markets, the Conseil decided that there was a specific market for radio advertising time and that the combined market share of CLT and Fun Radio in this market was 34.3% while the combined market share of the CLT group and M 40 was 32.8%, both thus being larger than the threshold share of 25% percent below which merger control is not applicable.

The Conseil took into account the fact that in 1993, just before the proposed merger, IP-RTV changed its rates for the sale of advertising space on RTL, Fun Radio, and M40 by creating a special additional discount of 26% for the joint purchase of advertising time on the three radio stations, plus a fourth regional radio station, Sud Radio, based in the southwest of France. The Conseil observed that the effect of this additional discount for the joint purchase of advertising time was quite important because, for example, an advertiser buying 1.52 million Francs worth of advertising time on RTL could, for only 50,000 Francs more, secure additional advertising time worth 526,000 Francs on the other three radio stations if the advertiser decided to buy the advertising space on these other stations jointly with its purchase of advertising time on RTL.

The Conseil decided that such a practice was all the more

48. Conseil de la concurrence, D. 1994, Rapport annuel pour l'année 1994, Annexe 101 at 707, Avis No 94-A-26 en date du 15 novembre 1994 relatif à la prise de contrôle par la Compagnie Luxembourgeoise de Télécommunication des stations Fun Radio et M 40.

likely to have a significant detrimental effect to the competitors of radio stations concerned in the merger because RTL had the highest audience rating of all French radio stations and because buying advertising time on RTL was a quasi-necessity for any advertiser wishing to reach certain major segments of the population, such as housewives under fifty years of age. Indeed, the record showed that during the first six months of 1994, following the adoption of this rebate for joint purchases of advertising time, the purchase of advertising time on Fun Radio and Sud Radio increased by 113% and 375%, respectively, whereas it had increased by only 30% on RFM and 22% on Europe 2, the two main FM competitors of the radio stations that were parties to the concentration. The Conseil decided that this rebate scheme for joint purchases of advertising space on RTL, Fun Radio, M 40, and Sud Radio was an anticompetitive agreement, artificially designed to discourage advertisers needing space on RTL and other radio stations from patronizing competitors of Fun Radio, M 40, and Sud Radio. It reasoned that RTL's takeover of Fun Radio and M 40 would not only facilitate the continuation of this practice, but would also make it more difficult to prohibit because the agreement which, up to that point, was an agreement among independent potential competitors, and as such was covered by Article 7 of the Ordinance, would become an agreement among firms belonging to the same group. Articles 7 and 8 of the Ordinance would not cover the latter agreement because it was not obvious that this group could be considered to have a dominant position in the market for radio advertising time. As a result of these considerations, the Conseil recommended that the merger be allowed only under the condition that the parties involved abolish all rebates for the joint purchase of advertising time on RTL, Fun Radio, and M 40.

Subsequently, the Minister of Economic Affairs and the Minister of Trade, who made the final determination on this merger and were not bound by the opinion of the Conseil, did not follow the opinion of the Conseil and allowed the merger. First, they argued that the Conseil had not found that the merging parties would hold a dominant position and second, that imposing a behavioral measure such as that suggested by the Conseil as a condition for allowing a merger would defeat the spirit of merger control which is to avoid meddling in the behavior of firms. In view of French case law on merger control, the second

rationale seems to have been little more than an ad hoc argument, although it was in line with European Community doctrine on merger control. The Minister warned the merging firms, however, that if they grew to have a dominant position, their discount scheme for the joint purchase of advertising space would probably be challenged as an anticompetitive abuse prohibited by Article 8 of the Ordinance.

The Conseil had previously voiced a similar concern with respect to discounts for the joint purchase of advertising space in 1993 when it examined the merger between two major news magazines, a case previously referred to in the section on relevant market definition.⁴⁹ It will be recalled that the Conseil had determined that seven news magazines were in the same market for advertising space and that the merger in question concerned the publishers of two of these news magazines because La Generale Occidentale, owner of various magazines including a news magazine called L'Express, intended to take a forty percent participation in the capital of S.E.B.D.O., publisher of Le Point, another news magazine belonging to the same market as L'Express. The goal of the merger was to reorganize the advertising space sales activities of the two news magazines. The combined market share of the parties to this merger was 29% of the relevant market for readership and 30.5% of the relevant market for advertising space in news magazines, thus exceeding the 25% threshold for merger control. The Conseil did not see any particular competition problem in the readership market. It voiced concern, however, regarding the advertising space market in news magazines. Indeed, as in the previously mentioned case, a discount was offered to advertisers jointly purchasing advertising space simultaneously in L'Express and in Le Point. The Conseil noted that advertisers who choose to advertise in news magazines usually do so in two news magazines and that the joint rebate was likely to artificially discourage advertisers in L'Express from choosing a competitor of Le Point as a second news magazine in which to advertise. Nevertheless, the Conseil proposed that the merger be approved in view of the efficiency gains due to reduced paper and printing costs that were likely to result from

49. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993 at 520, Avis No. 93-A-13 relatif à la prise de participation de la Société Générale Occidentale dans le capital de la société d'exploitation de l'hebdomadaire Le Point.

this merger and which were estimated to represent about 2.6% of the total operating costs of the two news magazines.

In 1993, the Conseil was also called upon to review two mergers in the movie industry.⁵⁰ In both cases, one of the vertically integrated film groups was acquiring new movie theaters in central Paris. The first merger concerned an exchange of ownership of movie theaters between Gaumont and Pathé, the second and third largest film distribution groups. The effect of this exchange was to consolidate the position of Gaumont in central Paris and to reinforce the position of Pathé in major provincial cities. Gaumont was acquiring thirty-two movie theaters in Paris, including twenty-four from Pathé, thus raising the total number of movie theaters it owned in the city to seventy-six and its market share from 20% to 31.5% of total Paris box office revenues. Conversely, besides the twenty-four movie theaters it was selling to Gaumont, Pathé also stopped programming thirty-one other theaters in Paris so that the number of movie theaters it controlled in central Paris dropped from ninety to thirty-five and its share of box office revenues decreased from 24.57% to 8%. In exchange for the twenty-four movie theaters acquired from Pathé in Paris, Gaumont was selling to Pathé twenty-nine movie theaters in five major provincial cities, Caen, Grenoble, Toulon, Aix en Provence, and Nice. UGC, the largest of the three major film distribution groups at the exhibition level, who was not a party to this first merger, owned ninety-one movie theaters in Paris and programmed eleven others. Its share of Paris box office revenues was 36%. MK2, also not a party to the merger, owned eighteen movie theaters and had a market share of 5.7%. Finally, there were seventy-five other movie theaters in Paris of a lesser reputation that often specialized in the exhibition of X-rated movies, representing a total market share of nineteen percent.

To arrive at its opinion regarding the potential effect of this concentration on competition, the Conseil conducted a detailed

50. Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 75 at 488, Avis No. 93-A-01 en date du 12 janvier 1993 relatif à la cession réciproque de salles de cinéma entre les Sociétés Gaumont et Pathé Cinéma ou certaines de leurs filiales; Conseil de la concurrence, D. 1993, Rapport annuel pour l'année 1993, Annexe 79 at 510, Avis No. 93-A-12 en date du 29 juin 1993 relatif à l'acquisition par la Société U.G.C. des salles de cinéma George V, Forum Horizon, et Forum Orient-Express.

analysis of the release plans for first run films. Taken into consideration was the fact that, in a period of declining movie theater attendance, the practice was to release films for an initial week simultaneously in a large number of prestigious movie theaters in Paris and in major provincial cities in order to maximize the short term return of the advertising campaigns undertaken at the time of release. Then a film was moved to lesser or smaller movie theaters as soon as it did not attract large enough audiences to fill the movie theaters in which it was first released. Some films considered to have large box office potential were released simultaneously in up to fifty movie theaters in Paris. The Conseil's analysis also considered the geographical distribution of movie theaters in Paris to be relevant. There are four neighborhoods where movie theaters are highly concentrated: the Champs Elysées, the Grands Boulevards, Montparnasse, and the Quartier Latin. Attendance at movie theaters in the first three of these four neighborhoods represented half of the total Paris movie theater box office. Moviegoers would often go to these areas without knowing in advance what film they wanted to see and make their choice upon arrival. It was thus particularly important for the success of a film that it be exhibited in a sufficient number of movie theaters in these neighborhoods. After the merger, UGC, who was not a party to the merger, and Gaumont, whose position was reinforced by the merger, would have owned 90% of the movie theaters in the Champs Elysées and Montparnasse areas and 65% of the movie theaters in the Grands Boulevards area, with Gaumont owning outright 56% of the movie theaters on the Champs Elysées.

For the Conseil, this situation created a competition risk from two standpoints. First, it meant that to successfully release a film with great potential for popular appeal one had to do so via either Gaumont or UGC because a Paris release was necessary and Pathé was no longer sufficiently active in the Parisian market. The merger thus reduced the possibilities for film release from three to two movie theater networks.

Secondly, the Conseil considered the fact that the two movie theater groups present in the Parisian market that had a dominant position in two of the most important movie-going neighborhoods in Paris were also integrated at the distribution and production levels. This fact, combined with the fact that movie theater box office receipts were split among the exhibi-

tors, the distributors, and the producers, meant that Gaumont could be tempted to release films it had produced or for which it had secured the distribution rights in its own movie theaters rather than films produced or distributed by independent distributors, even if the latter films might be more attractive to the public, because Gaumont could compensate for the potentially lower box office receipts of its own films by obtaining a larger share of those receipts. It should be noted, however, that for the reasons already indicated in the previous discussion regarding vertical integration in the cable television industry, this argument is questionable in the long term, assuming that a positive flexibility of film exists. The Conseil also feared that a recent agreement between Gaumont and Walt Disney by which Gaumont would release Walt Disney films in France might lead to a considerable reduction in the opportunities offered to other distributors to release their films in Gaumont theaters.

The Conseil decided to allow the exchange of movie theaters between Gaumont and Pathé, provided that Gaumont divest itself within a year of movie theaters accounting for 2.5% of the total film box office in Paris in the Champs Elysées and Montparnasse neighborhoods and that these movie theaters not be sold to UGC. It also recommended that Pathé sell the movie theaters it had acquired in Caen, a city where its market share of the total movie theater box office receipts would have risen within a year after the merger to eighty percent. The Minister of Economic Affairs and the Minister of Culture followed the Conseil's recommendations with only some minor adjustments. The second movie industry merger investigated that same year by the Conseil involved the purchase by UGC of twenty-three Paris movie theaters accounting for six percent of the total movie box office receipts in Paris, including some located in the Champs Elysées area. Using the same kind of analysis as in the previous case, the Conseil recommended that the purchase be allowed, provided that UGC divest itself of movie theaters in the Champs Elysées area representing two percent of total Paris movie theater box office receipts and that these movie theaters not be sold to Gaumont.

A final comment is in order about the acquisition by Canal +, the only pay-television operator in France, of UGC-DA, a company owning the audiovisual rights for a large number of French films; to which I alluded in the earlier discussion of the defini-

tion of relevant markets. As was mentioned previously, the Minister for Economic Affairs decided not to challenge this merger⁵¹ and therefore did not send it for review to the Conseil prior to giving his approval. In his decision, the Minister decided that there was a separate market for television broadcast rights for French films and that the merging firms had a significant share of this market because their share of this market was well above the twenty-five percent threshold required for merger control. In particular, it should be noted that UGC-DA held the rights to 5,000 French films, whereas the five other rights holders active in the French market collectively held the rights to about 1,700 French films. The issue raised was whether a merger between a television operator having a monopoly on pay-television and a dominant firm in the market for the broadcast rights to French-made films should be allowed due to the fact that television channels, such as general purpose channels, pay-television channels, and pay-per-view television channels, are subject to the constraint that 40% of the films they show must be French films and they cannot broadcast more than a total of 192 films per year.

Somewhat surprisingly, given that it is widely recognized that the ability to program films, particularly French-made films, is a necessity for commercial viability of most television stations, the Minister decided to allow the merger. His reasoning was based upon the fact that the five other free general purpose television channels could fulfill their legal obligation to show French-made films by securing the rights of films owned by one of the five other holders of broadcast rights for French-made films, even though the Minister acknowledged in his decision that only a relatively small number of the 1,700 films for which these firms owned the rights had sufficient commercial appeal to be shown on television. The Minister noted that 60% of the combined total sales of the broadcast rights made by Canal + and UGC-DA were to free access terrestrial television stations, the majority of these sales being to three channels that had a significant buying power. The Minister also argued that concentrations in the audiovisual sector would give pay-television channels significant purchasing power in the future. Finally, the Minister

51. Bulletin Officiel de la concurrence de la consommation et de la Répression des Fraudes, le 5 décembre 1996 at 608, Lettre du ministre délégué aux finances et au commerce extérieur en date du 7 octobre 1996 relative à une concentration dans le secteur des droits audiovisuels.

contended that the fact that UGC-DA would henceforth be part of Canal +, an international television operator, would increase the competitiveness of this group on the international level and contribute to economic progress.

The Minister's decision in this instance is highly questionable. It overlooked the fact that technological developments in television meant that new operators would appear in the near future and that they would be subject to the same regulatory constraints as existing channels in terms of local programming content. Therefore, the demand for French-made films would expand dramatically even in the short term and new operators would be largely dependent upon the willingness of Canal + to sell them the rights to French-made films. This is all the more true because Canal +'s license provides that it must reinvest a large share of its revenues in the production of French-made films. As a result, besides the rights that it acquired to 5,000 old French-made films, Canal + also owns the rights to approximately eighty percent of all recently made French films. By focusing only on the acquisition of the rights for old French films and the state of the television scene at the time of the merger, the Minister voluntarily overlooked some of the most significant and dynamic aspects of competition in this regulatorily constrained environment. The Minister noted that foreign firms, such as Warner, Turner, MCA Universal, and Columbia Sony, that are active in the French market for television broadcast rights also own the rights for large numbers of foreign-made films having greater commercial appeal than French films. This comment was irrelevant because the Minister rightly established that French films are not a substitute for foreign-made films for television programming due to the regulatory environment of television in France. The behavior of Canal + in the market for broadcast rights to French-made films is now being challenged under the provisions prohibiting anticompetitive abuses of dominant position.

CONCLUSION

An examination of the case law on media competition issues in France suggests that such issues raise complex questions and that great caution must be exercised when applying competition law in this sector. The time aspect of competition analysis is es-

pecially crucial, particularly in certain subsectors such as the audiovisual sector, not only because the assessment of the impact on competition of a particular practice may be different depending on whether one considers the short term or the long term, but also because the definition of relevant markets is often not the same in the short and the long terms due to rapidly evolving technology creating new opportunities in the provision of audiovisual services and the convergence of certain media markets. Another difficulty lies in the distinction which should be made between two goals which may not always be consistent: the goal of protecting competitors and preventing foreclosure of new market entrants and the goal of protecting competition. As seen in the earlier discussion concerning the vertical upward integration of television operators or movie theater owners into the production of programs or films, upward integration may mean more difficult entries for independent producers or distributors of films or programs, but it does not necessarily lead to a reduction in aggregate welfare in the long term. This type of vertical integration may, at least in the long term, have very different implications than does the downward integration of operators of essential facilities in the telecommunication sector. Depending upon the goal assigned to competition law (protection of competition or maximization of global welfare through the competitive process) competition enforcement authorities may assess the same set of facts quite differently. The potential conflict between the desire to prevent foreclosure of competitors and the desire to promote competition is very obvious in France where a number of regulations concerning books, the release of first-run films in movie theaters, and local content requirements for television service providers are designed to ensure that French filmmakers or authors are not prevented from gaining market access and to ensure pluralism, have restricted competition between service providers.

Another source of difficulty is the assessment, from the point of view of competition law, of the contractual relationships between content providers and service providers in the media industry. The intellectual property rights attached to the creation of original works allow the creators of programs or the producers of events to negotiate with service providers for the broadcast rights, performance rights, and publishing of such works. The rights granted to service providers are often exclu-

sive rights because in most cases exclusivity makes the rights more valuable to service providers and therefore increases the price such providers are willing to pay to secure the rights. The refusal by a service provider to sublicense the exclusive rights it has acquired or the scope of the exclusivity granted can, in certain circumstances, reduce competition in the service provider's market or in adjacent markets. It is thus tempting for competition authorities to criticize exclusivity clauses or to impose compulsory sublicensing. This temptation will be all the greater when competition authorities take a narrow short term approach to market definition, as well as when they take a limiting stand on vertical restrictions in general. By doing so, competition authorities may disregard several factors. In general, the acquisition on an exclusive basis of an intellectual property right by a service provider only shifts the monopoly power which the owner of the intellectual property right had over the content considered to the service provider. Such a shift does not in itself create monopoly power, although the simultaneous acquisition of a large number of intellectual property rights by one service provider may have the effect of foreclosing its competitors from the market and of restricting competition at the service level. In addition, the inherent weakness of compulsory licensing measures in alleviating the aforementioned problem is that such measures might reduce the value of the intellectual property rights likely to be acquired. If one believes that intellectual property rights are designed to foster creation and that fostering creation increases global welfare, there is a serious risk that increasing competition at the downward level of service providers through compulsory licensing will have an ambiguous effect on or may even reduce global welfare. Therefore, compulsory sublicensing measures should be used only in exceptional cases where it is likely that the overall impact of such measures will be to enhance efficiency. In cases where the overall impact of such measures is not clear, more appropriate means of preventing the concentration of rights in the hands of a single service provider should be sought, if possible. Finally, the presence of economic externalities or of public goods needs to be taken into consideration when assessing some competition cases involving the media, such as news services or broadcasting rights.