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Freedom or intervention: What is the role of the regulator in achieving competitive pay-TV markets?

A case study on the UK and Singapore experiences

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ABSTRACT

The concept of competition has taken on greater importance in media and communications policy as governments aim to capitalise on the economic opportunities in the digital media age. It has often been said that new technologies would enable dynamic, competitive markets which would deliver wider choice and better quality services for consumers and citizens. Yet, while the benefits are obvious, there is much uncertainty over how competitive markets can be achieved in broadcasting. Although governments have typically favoured a deregulatory approach with minimal intrusion into commercial markets, critics have argued that the unique features of the media industry and new monopolisation strategies by market players would hamper the development of competition.

This goal of this dissertation is to understand the role of regulation in achieving effective competition in pay-TV markets. The research design is based on case studies of the UK and Singapore markets. Through documentary analysis of the key regulatory developments, and interviews with key role-holders, the study seeks to examine: (a) the approaches adopted by regulators; (b) the rationale and objectives behind them; and (c) the external factors that have influenced the regulatory process.

The findings reveal that market imperfections arising from content scarcity issues have hampered the development of effective competition in the two pay-TV markets. Neither the free market nor general competition law has been able to adequately address these problems. In the latest developments, regulators, acting in the interests of consumer welfare and industry development objectives, have resorted to greater intervention through sector-specific regulation in their pursuit of competitive pay-TV markets.

INTRODUCTION

In the post-industrial "information society" of the 21st century, the economic significance of media and communications industries has taken centre stage. The key features of the digital economy – technological convergence, market liberalisation, cultural commodification, and globalisation – are well-documented (Barnett, 2004; van Cuilenburg and McQuail, 2003; Melody, 2003; McQuail, 2005; McMillan, 2005). Epitomising these characteristics is the pay-TV industry, which has experienced phenomenal growth over the past two decades.

In line with the growing convergence between communications and media markets, the emergence of new technologies, such as digital terrestrial television and high-speed broadband, has highlighted the potential for greater competition in pay-TV markets. On the whole, governments have tended to favour marketisation policies, such as liberalisation, deregulation and privatisation, in anticipation that these would help kick-start an era of dynamic, competitive markets (Syvertsen, 2003; Freedman, 2008; Murdock and Golding, 1999: 118). The belief was that, compared to a monopoly, greater competition in the marketplace would serve the public interest by inducing suppliers to become more efficient and to offer a greater choice of products and services at lower prices (Intven, 2000: 5-1).

However, while the benefits that competition can offer are clear, the way through which competitive markets are achieved in broadcasting and the role of regulation in the process are more uncertain. The shift towards competition has led to fundamental changes to both market structure and regulatory policy-making (Marsden, 2000: 356). One of the key issues in media policy is the challenges facing the implementation of competition in media markets (Marsden and Tambini, 2005). A fundamental question is whether intervention or freedom produces efficient, competitive markets (Harrison and Woods, 2007: 47). This has been reflected in the discussion on the role of regulation in the competition paradigm. Although less regulation is generally regarded by governments as desirable, what this actually means in practice is questionable (ibid: 49). Critics have pointed out that convergence and liberalisation do not necessarily lead to market entry, innovation and experimentation in communications and media industries (Melody, 1997; Mansell and Steinmueller, 2000). Instead of greater competition, liberalization and deregulation can often have the opposite effect, leading to consolidation, monopolies or oligopolies (McQuail, 2005: 228).

The move towards more competitive media markets has proved problematic with vertical concentration, platform consolidation, exclusive content rights, intellectual property law and the behaviour of dominant players posing huge challenges for regulators (Galperin and Bar, 1999; Marsden and Tambini, 2005). Attempts to address these issues through general competition law have had mixed results (Cave, 2005; van Rompuy, 2009). Yet, others have cautioned against sector-specific regulation, arguing that excessive intervention in nascent markets could be counterproductive and result in adverse effects on innovation, investment incentives and economic efficiency (Cowie and Marsden, 1999; Alleman and Rappoport, 2005).

This dissertation aims to examine the role of regulation in achieving effective competition in pay-TV markets. An empirical case study is conducted to survey the market and regulatory developments in the UK and Singapore pay-TV markets, and to analyse the rationale, objectives and factors behind them. The goal is not to provide a conclusive answer but to contribute to a better understanding of the role of regulation in the competition paradigm of the new media environment.

This paper is organised as follows. Section 2 reviews the relevant literature, setting out: (a) the context and key themes associated with the current media policy paradigm; (b) the different theoretical approaches towards regulation in the competition paradigm; and (c) the key aspects of the pay-TV industry. Section 3 outlines the conceptual framework and the research objectives. Section 4 explains the research design and methodologies employed. Sections 5 reports the findings, and Section 6 discusses them with reference to the conceptual framework and research questions. Section 7 concludes with an overview of the study and suggestions for future research.

LITERATURE REVIEW

The new communications and media environment

The communications and media landscape has undergone significant transformations over the past two decades as new digital technologies have generated new opportunities for businesses, governments, consumers and society in general. A major theme that has emerged is the growing economic importance of media and communications industries. The key features of the "digital economy" are well documented. Firstly, convergence and the digital technologies have made possible the delivery of information and content over various transmission media (DTI-DCMS, 1998; DTI-DCMS, 2000; Vick, 2006; Foster and Kiedrowski, 2006). Secondly, privatisation and market liberalisation have produced a new media environment that is increasingly being organised around commercial logic and profit-driven motivations (McQuail, 1998, 2005; Freedman, 2008).

Thirdly, the commodification of creative and cultural content through copyright has led to the emphasis on economic value of media, rather than its non-economic qualities such as social capital and cultural identity (McMillan, 2005: 41). Fourthly, globalisation, facilitated by fast and low-cost transmission technology across large distances, has led to the creation of a global market for media products. This has been accompanied by expansion of transnational media corporations through mergers and acquisitions, and increasing horizontal and vertical integration of media companies (Barnett, 2004; Hart, 2004; Feintuck and Varney, 2006).

The rise of pay-TV

Until the 1980s, the television industry consisted mainly of free-to-air broadcasters – licence fee-funded public broadcasters and advertising-funded commercial operators. The development of cable and satellite technologies, coupled with encryption and conditional access systems, created a distinctive subscription-based business model for TV programming. For audiences able and prepared to pay, pay-TV provided the option to access to an extensive choice of content, at an unprecedented high quality of image and sound, and with a greater degree of control (Ofcom, 2010).

The development of the pay-TV industry exemplifies the key features of the new media environment discussed above. Technological convergence and market liberalisation have lowered the technical and regulatory barriers to market entry (Cowie and Marsden, 1999).

The commodification of TV content by transnational media corporations has contributed to the spectacular commercial success of the industry (Harrison and Woods, 2007: 5). Global pay-TV revenues for 2010 are expected to exceed $300billion (Friedman, 2010). In the UK, subscription revenue accounted for 39% of the total TV industry revenue of £11.2 billion in 2008, dwarfing those of advertising (31%) and public funds (24%) (Ofcom, 2009).

Shift in policy and regulatory focus

The main rationales for media regulation have traditionally been: (a) effective communications; (b) diversity, both political and cultural; (c) economic justifications; and (d) public service (Feintuck and Varney, 2006: 58-59). The new media environment has posed considerable regulatory challenges for governments. While each of these aspects remain relevant in the contemporary digital media landscape, the economic opportunities offered by new communications technologies has led to a shift in policy priorities from traditional political and socio-cultural objectives to economic goals, such as encouraging growth, investment and jobs (Curran and Seaton, 1997; van Cuilenburg and McQuail, 2003; Reding, 2006a). Consequently, the economic regulation of media markets has taken on greater importance.

In the traditional broadcasting era, the economic justifications for regulation are based on market failure arguments[1] related to scarcity and public goods. However, the emergence of digital compression technologies meant the hertzian constraint was no longer a justifiable rationale for regulation (Kleinsteuber, 1998; Ungerer, 2005; Vick, 2006). Furthermore, encryption technologies and conditional access systems have enabled broadcasters to exclude non-payers and to charge those who are willing to pay a fee for access to TV programmes. This meant that broadcasting services are no longer just a public good but increasingly a private good as well (Hart, 2004; Solberg, 2007). Thus, the traditional scarcity and public good rationales for regulation do not apply to multi-channel pay-TV services, and the pay-TV operators are not subject the stringent entry and content restrictions of free-to-air TV (OECD, 1999: 8)

[1] Market failure occurs when the allocation of resources become distorted and inefficient, or when the market generates a socially undesirable impact (Ewen, 2006: 86). See Breyer (1998) and Baldwin and Cave (1999) for a description of the market failure justifications for regulation.

The competition paradigm

The growing economic and industrial significance of media and communications has highlighted the need for greater attention to economic analysis and new models of economic regulation (van Cuilenburg and McQuail, 2003; McQuail, 2005; Foster and Kiedrowski, 2006). With the weakening of the spectrum scarcity rationale for regulation, the emphasis of economic regulation in the new media environment has shifted towards maintaining competitive markets – a concept based on rational-choice theories in neo-classical economics (Hart, 2004: 15). The assumption is that a fully competitive marketplace is more likely to foster innovation and maximise social welfare in the long run, in the form of lower prices, enhanced quality, and greater economic efficiency (Galperin and Bar, 1999: 11; Intven, 2000: 5-1). This is best summed up by the expression "competition is the best regulator" (Baldwin and Cave, 1999: 210).

With digital technologies offering a bigger role for competition in broadcasting, competition policy has moved from a peripheral issue to a core concern in media policy (Vickers, 2002; Iosifidis, 2002; Syvertsen, 2003). In the academic literature on competition policy in new media, there are two main threads: (a) the challenges facing competition policy in the new media environment; and (b) whether competition is an appropriate strategy to address citizen interests related to democratic pluralism and cultural heritage[2] (Marsden and Tambini, 2005). The discussion in this dissertation focuses on the former, in particular on the role of the regulation in achieving competitive pay-TV markets. The research is motivated by the fundamental question of whether competition is achieved through intervention or freedom. The following sections describe three general theoretical approaches, in ascending degree of regulatory intervention.

Free-market approach

The free-market or laissez-faire approach stems from the neo-classical conception of the market as an "automatic, impersonal, self-equilibrating, all-powerful, all-knowing mechanism of stability, optimality, efficiency and justice – with which one interferes only sparingly, circumspectly and reluctantly" (Babe, 1993: 16). The "invisible hand" of the free market is assumed to produce welfare-maximising outcomes that are in the interests of all (Curran and Seaton, 1997: 336). This is closely associated with the key tenets of neo-liberal political ideology which emphasises individual sanctity in free markets and regards state

[2] See for example, Gibbons (2005), Feintuck and Varney (2006).

intervention as an impediment to the market mechanism (Vick, 2006; Freedman, 2008). Free-market advocates argue that the imperfect nature of the state results in government failures such as regulatory capture, rent-seeking and corruption (Chang, 2002).

Since the 1990s, the free-market approach has gained currency among governments as digital convergence and the end of spectrum scarcity were used to justify marketisation policies, such as deregulation, removal of ownership restrictions and privatisation (Curran and Seaton, 1997; Sampson and Lugo, 2003). These measures were designed to minimise government intervention and increase the freedom of action of private corporations (Murdock and Golding, 1999). The belief was that as technological abundance lowering entry barriers to media markets, a laissez-faire approach would provide the best environment to unleash the dynamics of competitive markets, foster investment and deliver greater choice, diversity, high quality services to citizens and consumers (DTI-DCMS, 2000).

Criticisms and weaknesses

Critics, however, highlight that competitive markets do not arise naturally when government has gotten out of the way (Landy and Levin, 2007). In communications and media markets, liberalisation alone does not necessarily lead to a higher level of competition, and the desired outcomes of consumer and citizen benefits, innovation and experimentation (OECD, 1999; Mansell and Steinmueller, 2000). On the contrary, they are especially prone to market failure and free competition has often produced the opposition effect, leading to consolidation and monopolies or oligopolies (Marsden, 1997; Mansell, 1999; Alleman and Rappoport, 2005; McQuail, 2005).

Although popular discourse presupposes a negative relationship between regulation and competition, it is actually is more positive than what is portrayed by the neoliberal camp (Vogel, 2007: 28). It is argued that liberalisation requires not just the removal of regulations that impede competition such as ownership restrictions, but also increasing rules that enhance it, such as competition law (ibid). Thus, for competition in broadcasting to benefit consumers and produce desirable public policy outcomes[3], a clear competition policy framework is required (Vickers, 2002).

[3] These include stimulating investment in new communication infrastructures, promoting service innovation and ensuring that the potential of emerging markets is fully exploited (Monti, 2004; Reding, 2006b; Stelzer, 2006).

General competition law approach

General competition law is part of the fundamental ground rules of the market economy (Vickers, 2005: F244). Designed to promote efficient competition by prohibiting conduct that reduces competition and economic welfare in a market, it is widely adopted across many industries and is concerned with: (a) anti-competitive agreements between competitors such as price fixing, output restriction and market sharing; (b) abusive behaviour, such as predatory pricing, by a monopolist or a dominant firm with market power; (c) mergers and acquisitions involving large corporations which could result in harmful effects to the competition process; and (d) public restrictions of competition, such as legislative measures, regulations, licensing rules or provision of subsidies (Whish, 2009: 2-3).

Even if liberalisation results in the entry of more firms in the new media environment, this does not indicate the achievement of a competitive market for substantial market power may persist which could lead to adverse social and economic outcomes (Mansell and Steinmueller, 2000: 32). This is due to incumbent firms and insurgent newcomers seeking new, innovative and often subtle monopolisation strategies in the era of technological abundance to constrain supply and create a situation of scarcity in order to secure revenues and profits (Mansell, 1999: 157). Thus, competition law is pertinent in addressing such conduct and ensuring the development of competition.

Competition law enforcement is typically ex-post or retroactive in nature[4], and hence considered less intrusive for firms, allowing greater flexibility in the industry (Baldwin and Cave, 1999: 45). The scope and powers of intervention is narrowly defined and the competition authority's role is analogous to a referee whose duty is to enforce the rules of the market and stop specific instances of anti-competitive conduct or market abuse (InfoDev-ITU, 2010).

Criticisms and weaknesses

Although widely adopted, there are drawbacks of an overreliance on competition law. Firstly, as it is based on general economic principles, competition law may not be able to address problems arising relating to operational, technical or commercial issues (Baldwin and Cave, 1999: 45), which may be better resolved by sector regulators with relevant knowledge and expertise. Secondly, it is widely acknowledged that competition in its infancy stages is subject to severe limitations (Dassler, 2006: 31). Thus, the application of competition rules may come too slow and too late to deal with abuse of dominant market power (Michalis, 2001: 772). Hence, even as governments seek to facilitate market entry in the new media environment by relaxing traditional sector-specific rules, such as ownership control, content regulation and licensing conditions, industry-specific rules could still play a role in enhancing competition and efficiency in new media markets (Ungerer, 2000; Nikolinakos, 2000).

Sector-specific approach

Unlike competition law, sector-specific regulation is broader in scope and typically ex ante or anticipatory in nature. Sector-specific rules are usually highly prescriptive and involve some form of command-and-control regulation. They are imposed on market players in advance and operate in general manner as opposed to a case-by-case basis in competition law (Harrison and Woods, 2007: 130). While competition law focuses exclusively on economic efficiency, sector-specific rules are utilised to attain a variety of economic, social and technical goals (Hope, 2007: 320; Broumas, 2009: 183) and to "direct market activity towards socially desirable ends" (InfoDev-ITU, 2010). In other words, a competition law approach involves the enforcement of general rules of the marketplace whereas a sector-specific approach attempts to set the rules and conditions of the market itself.

It is argued that the creation of competitive markets is not just about deregulation but also a process of market design (Landy and Levin, 2007: 21). Sector-specific regulation is typically concerned with issues of market structure[5], and thus particularly relevant to communications and media industries where competition issues relate to structure as well as conduct (Helm, 2005: 12). Despite the potential of new technologies to alter media cost structures, the distinctive features of media economics – high fixed costs, low marginal costs, economies of scale and scope, the hybrid nature of media, the high uncertainty of media business associated with its creativity aspect – means that entry barriers remain high (McQuail, 2005: 233; Freedman, 2008: 8). These are exacerbated by the tendency for communications industries to develop "bottlenecks" – situations where "a company establishes monopolistic control over a scarce resource or facility" (Vick, 2006: 32). Hence, it is claimed that more, rather than less, regulation would be required to generate competition (Vogel, 2007: 28).

[4] The exception is the regulation of mergers and acquisitions is ex ante (prospective) with certain criteria such as market definition and threshold market share defined in advance by competition authorities (Hope, 2007: 315).

[5] These include factors such as the number of firms and level of market concentration, entry conditions, and the degree of product differentiation (InfoDev-ITU, 2010).

An example is the telecoms industry where sector-specific regulation has focused on promoting competition to monopolies or replicating the effects of competition through regulatory pressure on costs and prices (Foster and Kiedrowski, 2006: 29). This is crucial because dominant incumbents often control essential facilities, such as public rights-of-ways, local loops, telephone numbers and frequency spectrum, which are required by competitors to compete, and difficult to substitute both technically and economically (Intven, 2000: 5-14; Melody, 1997: 25). Thus, rather than relying on general competition law, competition had to be "created" through sector-specific asymmetric regulations on incumbent operators such as structural or operational separation, regulation of interconnection rates and local loop unbundling (Michalis, 2001; Geradin and Kerf, 2003; Vogel, 2007: 34).

Criticisms and weaknesses

The main disadvantage of sector-specific rules is that they may be unnecessarily interventionist and thus risk creating distortions in market processes (InfoDev-ITU, 2010). Government intervention should not be viewed as a panacea for addressing market failure and in some cases may even exacerbate the extent of the problem (Ewen, 2006: 90; Booth, 2006: 278). Critics from the neo-liberal school see the state as being run by self-seeking politicians and bureaucrats who are not only limited in their ability in collecting information and executing policies, but also open to capture by the industry (Baldwin and Cave, 1999; Chang, 2002). Thus, a sector-specific approach can result in regulatory failures where rules or laws fail to rectify market imperfection, and produce detrimental effects on resource allocation, investment incentives and social welfare (Ewen, 2006: 94; Alleman and Rappoport, 2005). The costs of regulatory failure, argue neo-liberalists, is often greater than that of market failure and hence it is "better to live with failing markets than to attempt state intervention" (Chang, 2002: 545).

Pay-TV competition issues

With the emergence of new high-capacity platforms such as digital terrestrial television (DTT), Internet Protocol TV (IPTV) and wireless broadband, there is clear potential for greater competition in pay-TV markets, which in theory should stimulate innovation and produce to greater economic efficiency and improved consumer welfare. Yet, even technological abundance has opened the door for new entrants, especially telecommunications firms, into pay-TV markets, this transition has also raised significant competition issues and challenges for governments and regulators (Cave, 1997; Cowie and Marsden, 1999; Marsden, 2000; Geradin, 2005).

Market structure

In economic regulation, the first step is to define the relevant market and understand the market structure in order to determine whether a market is monopolistic, or somewhere in between, and the reasons why that is the case (Hart, 2004: 15). Market definition provides the framework for competition analysis by identifying the competitive constraints faced by individual firms, taking into account demand-side and supply-side substitutability (OFT, 2004; Ofcom, 2007a). In broadcasting, pay-TV is typically considered a separate market from free-to-air TV due to differences in content, prices and business models[6] (Ofcom, 2007a: 4-5).

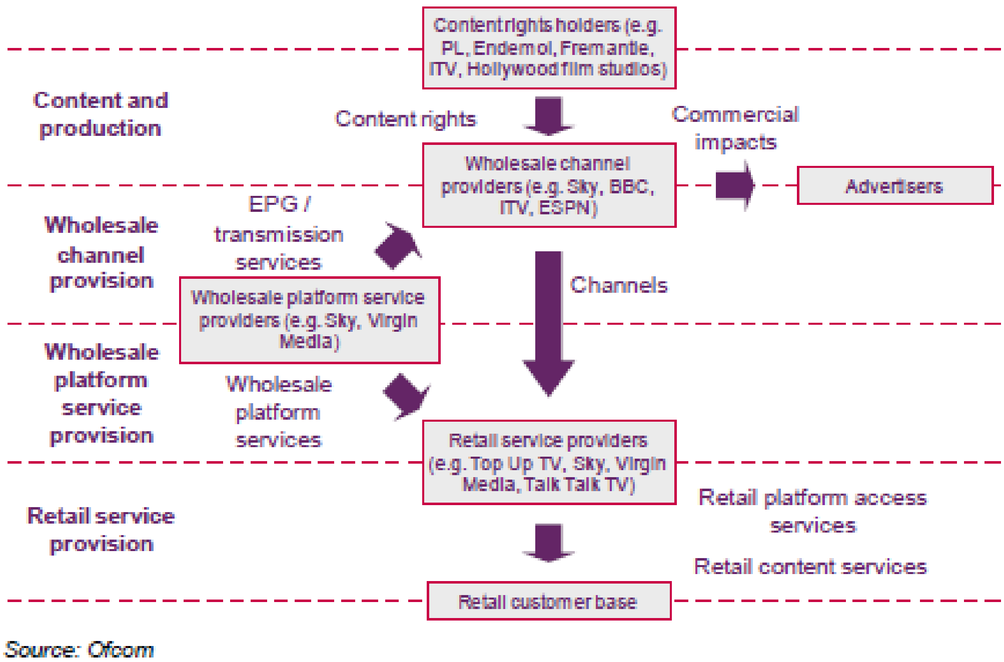

Figure 1: Pay-TV value chain.

There are four main levels in the typical pay-TV value chain – content production, wholesale channel provision, retail service provision and audiences (Figure 1) – which reflect the different groups of stakeholders. Within the pay-TV market, further sub-markets can be identified according to the key processes and relationships between stakeholders. These are: (a) the upstream market for production of content by producers (e.g. Hollywood studios) and rights holders (e.g. sports bodies); (b) the wholesale market where content is packaged into channels or bundles by wholesale channel providers (e.g. ESPN, Sky, BBC); and (c) the retail

[6] Free-to-air TV is driven by advertising and public funds with no direct commercial transaction between broadcasters and viewers. On the other hand, pay-TV depends primarily on direct subscription revenue from viewers (EC, 2002).

market where channels or content are delivered to consumers through a technological platform (Armstrong, 1999; Geradin, 2005; Nicita and Ramello, 2005).

Challenges of competition regulation

Competition issues in the pay-TV industry can arise can at any level of the value chain in the form of “bottlenecks”, which are associated with market power. A bottleneck facility is defined as a key asset or technology without which it would be difficult for a third party to provide a service to consumers (Cowie and Marsden, 1999: 55; Marsden, 2000: 341). To complicate matters, market power at one level of the value chain may have far-reaching effects on other levels (Vickers, 2002: 4) – a situation compounded and complicated by vertical concentration (Ungerer, 2005).

These competition concerns reflect the concept of abundance-scarcity dynamics of the marketplace (Mansell, 1999). In communications and media industries, the condition of scarcity is crucial for network and information service providers to secure revenues and profits (Mansell, 1999; Garnham, 2000). Thus, while digitisation has, to a large extent, eliminated the transmission bottleneck, new ones, such as conditional access systems, electronic programme guides and content rights, are emerging at different levels of the market (Nolan, 1997; Cowie and Marsden, 1999; Marsden, 2000).

In the pay-TV industry, the control of scarce, premium content[7] rather than distribution channels has become increasingly key to commercial dominance (Seabright and Weeds, 2007; Huigen and Cave, 2008; Hutchins and Rowe, 2009). Thus, there is a greater responsibility on regulators to ensure that the potential benefits of competition are not squandered through abuses of market power in other points of the value chains (Cave, 2005: 27). At the same time, others called for regulatory forbearance, cautioning that the extension of ex ante regulation could inadvertently dampen innovation (Cowie and Marsden, 1999). Furthermore, the uncertain nature of competition and shifting market dynamics attenuate the risks of regulatory failure, posing additional dilemmas for regulators (Helm, 2005: 12; Reding, 2006b).

[7] Live sports and movies are widely recognised to be premium content as they play a critical role in attracting viewers, and there are few, if any substitutes, for such programmes. Rupert Murdoch famously described sports as the “battering ram” for the expansion of BSkyB’s pay-TV business (Milliken, 1996).

CONCEPTUAL FRAMEWORK & RESEARCH OBJECTIVES

Conceptual framework

In discussing the role of regulation in achieving competitive pay-TV markets, the analysis will be guided by three theoretical approaches outlined above – free market, general competition law and sector-specific regulation. These approaches can also be considered in terms of the two schools of thoughts in communications studies, namely the market-driven, neo-liberal perspective and the non-market-driven, institutionalist perspective (Trebing, 1987; Babe, 1993; Chang, 2002). The former is concerned with economic objectives of achieving Pareto-efficient outcomes[8], while the latter focuses on the production, distribution and consumption of resources, market inequalities, and wider public interest issues[9] (Dassler, 2006; Mosco, 2008). It is important to recognise that these concepts are not mutually exclusive and, in practice, the distinctions described may be blurred as regulators may pursue a mix of objectives in regulation (Baldwin and Cave, 1999; Cave and Crowther, 2005).

A fundamental concept in competition analysis is effective or "workable" competition, which lies somewhere between monopoly[10] and the neo-classical ideal of perfect competition[11]. It produces a reasonable level of economic efficiency with genuine alternatives for consumers and without overcapacity for producers (Rodger and MacCulloch, 2004: 304). Given that perfect competition is unattainable in practice, a workable competitive structure is worth striving for and maintaining as it is expected to have a beneficial effect on conduct and performance (Whish, 2009: 16).

Another key concept is market power, defined as "the ability of a firm to raise prices above competitive levels without promptly losing a substantial portion of its business to existing rivals or firms that become rivals as a result of the price increase" (Pitofsky, 1990: 1806). Market power is associated with bottlenecks and the abundance-scarcity dynamics of the marketplace. In competition regulation, market power is a major concern as the exercise of

[8] This refers to a situation where resources are allocated in such a way that no-one can be made better off without others becoming worse off (Vickers, 1995: 1)

[9] Public interest, in the media context, is commonly associated with the informational, cultural and social benefits to the wider society which go beyond immediate, particular and individual interests (McQuail, 1992: 3)

[10] A monopolistic market, in which one producer controls 100% of the production or supply of services, is usually associated with excessively high prices, reduced supply levels or other behaviour that reduces consumer welfare (Intven, 2000: 5-1).

[11] The conditions of a perfect market are: (a) all firms must be producing homogeneous products; (b) there must be an infinite number of buyers and sellers; (c) all firms are price-takers; (d) there must be free entry to and exit from the market; (e) there must be full information available to consumers, allowing them to make rational decisions (Rodger and MacCulloch, 2004: 302).

market power could have a damaging effect on economic welfare and lead to a transfer of wealth away from consumers to the firms with market power (Feintuck and Varney, 2006: 89).

The discussion in this dissertation will be on the empirical, rather than the normative, aspect of regulation. The primary goal is to explore the regulatory developments in competition paradigm, and their origin, intentions and operation, as well as factors behind the decision-making process. As regulation is "no more than a means of distribution of costs and benefits between market participants" (Hills and Michalis, 1997: 236), it should be viewed not just as analytical, problem-solving, but also as a political process (Majone, 1997; Gordon et al., 1997). Thus, in understanding the role of regulation, it is important to examine both internal factors, such as the motivations and beliefs of the regulators, and external factors such as social, economic and political influences (Jenkins, 1997).

Research objectives and questions

As an exploratory research, the aim is to understand the role of regulation in achieving competitive markets in pay-TV. Through case studies of two pay-TV markets, the UK and Singapore, the research seeks to answer the following questions:

RQ1 What approaches have regulators adopted towards achieving competitive markets in pay-TV?
RQ2 What are the rationale and objectives behind these approaches?
RQ3 What are the external factors that have influenced the regulatory process?

Through the analysis of the actual experiences of regulators in the two countries, this dissertation seeks to make a contribution to the discussion on competition policy in the new media environment. The aim is not to come up with a definitive answer, but to seek insights the role of regulation in the competition paradigm by drawing insights from the two cases, and to provide a foundation for further research.

RESEARCH DESIGN AND METHODOLOGY

Research design – case study

In designing the research, the first decision was to employ the case study method. A case study is “an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident” (Yin, 1994: 13). It enables the researcher to study “the particularity and complexity of a single case, coming to understand its activity within important circumstances” (Stake, 1995: xi). Hence, a case study is appropriate for this particular research because: (a) competition issues are context- and market-specific; and (b) policy studies typically involve a “pattern of action extending over time and involving many decisions” (Anderson, 1975: 10).

The second decision involved the selection of the appropriate cases. It is important to highlight that case study research is not sampling research (Stake, 1995: 4). As the goal is to maximise learning, the strategy was to select cases rich in information on a given problem or phenomenon, rather than a typical case (Flyvbjerg, 2006: 229). In this dissertation, a collective case study with two instrumental cases – UK and Singapore – was conducted. The unique contexts and market features of the two cases can help enhance the potential of the overall study (Shkedi, 2005: 21). The reasons for selecting the UK are: (a) it is a key pay-TV market in Europe; (b) a major market investigation by Ofcom[12] was recently concluded; (c) the UK is widely recognised around the world as a main reference point for communications regulation; and (d) documentation on current and previous regulatory decisions is widely accessible. Singapore was chosen because, like the UK, a key regulatory decision was recently announced following an investigation into the pay-TV competition issues by the Singapore regulator, the Media Development Authority (MDA). Although the inclusion of more cases would be ideal, this research is confined to two cases due to time constraint.

Research method I – documentary analysis

The primary research method is documentary analysis. For research on policy processes, records and documents are an important source of data and part of the reality being studied (Hakim, 2000: 49). They are crucial in providing an overview of the policy and regulatory developments in the two cases over time. For this research, the main documents are official

[12] The Office of Communications (Ofcom), established in 2003, is the UK’s communications regulator. It regulates the television and radio sectors, fixed line telecoms and mobiles, and radio spectrum.

records of various investigations, decisions and public consultations by authorities responsible for competition policy and regulatory issues in the media sector. For the UK, these include past investigations by the European Commission[13] (EC), the Office of Fair Trading[14] (OFT) and Ofcom. For Singapore, the key documents are records of past investigations by MDA. (See Appendix A for list of documents analysed). In both cases, the official documents are supplemented by other relevant documents from industry key stakeholders, such as speeches, newspapers, trade publications or annual company reports. Given that the concept of competition is a relatively new aspect of communications and media policy in light of the digital age, the analysis will be restricted to developments over the last decade.

The quality of documentary evidence depends on four criteria of authenticity, credibility, representativeness and meaning (Scott, 1990: 6). Firstly, there is no issue with the authenticity of the documents as they were all obtained through official sources[15]. For the same reason, the documents can be considered to be credible. However, it is important to recognise that there is likely to be an element of bias or prejudice, depending on the political interest in presenting one view rather than the other (Scott, 1990: 23). This reflects the argumentative function of the policy analysis (Majone, 1989: 7) and will be taken into account in the analysis.

As governments and regulators are required to publish their key consultations and decisions for accountability and record-keeping purposes, it is assumed that the relevant documents available from the official websites are representative of the key regulatory decisions undertaken. However, it is should be noted that only publicly available documents were examined. The existence of private documents, which may shed more light on the decision-making processes behind regulatory developments, cannot be verified and are thus not considered. Lastly, in terms of meaning, the literal understanding of the documents is not an issue. However, more problematic is the interpretative understanding of the texts, which involves understanding of individual concepts, appreciation of social and cultural context and a judgement of the meaning and significance of the text as a whole (Scott, 1990: 31). Due to the different frames of reference of the author and the researcher, it is not possible to claim that the full intentions of the authors are detected. To minimise discrepancies, a secondary method is employed.

[13] The EC's Directorate General for Competition enforces the competition rules of the Community Treaties.

[14] The OFT, established in 1973, is the UK's consumer and competition authority. Its key duty is the enforcement of competition law.

[15] These included official websites of government and regulators, individual companies and newspapers.

Research method II – interviews

Individual interviews with role-holders were conducted to supplement and triangulate the findings from the documentary analysis. The interviews would also enable clarification of any doubts or missing information in the documents. More importantly, interviews with key role-holders would be able to provide "a fine-textured understanding of beliefs, attitudes, values and motivations" in relation to behaviour in particular contexts (Gaskell, 2000: 39; Shkedi, 2005; Berger, 1998). This dimension is especially relevant in this research because public policy is determined by internal objectives and perceptions as well as by external, environmental factors (Gordon et al., 1997: 6). As official documents typically adopt a formal style and tone, these aspects may not be fully captured. Hence, by including a second source of evidence, the case study would be able to present a more rounded and complete account of the policy process (Hakim, 2000: 61).

Given the specific nature of the issues being studied, the selection of interviewees was crucial. In this study, there were two categories of interviewees: (a) regulatory bodies, and (b) key industry stakeholders at various levels of the pay-TV value chain. For the former, the key criterion was that the interviewee had to be a key role-holder with direct involvement or insight into the regulatory developments in the respective cases. For the latter, the key decision-makers of the respective organisations were considered the most suitable candidates given their experience and knowledge on public policy and competition-related issues which are likely to involve key commercial and business strategies.

In setting up the interviews, substantial difficulties were faced. A number of the shortlisted candidates declined to be interviewed despite repeated attempts to convince them of the value of their participation to the research. Crucially however, the Ofcom and MDA candidates, whose inputs are central to the research, agreed to be interviewed. Among the industry stakeholders identified, only the FA Premier League, Virgin Media and the Cable and Satellite Broadcasting Association of Asia[16] (CASBAA) agreed to be interviewed. (See Appendix B for list of interviewees) While these three interviews are unlikely to be representative of the whole range of stakeholder views, they provide an alternative perspective to the regulators' version of the developments and help in identifying the external factors behind the regulatory process. The interviews were carried out between May and June 2010 and ranged from 20 to 45 minutes each.

[16] CASBAA is an industry group representing the interests of the pay-TV industry in the Asia-Pacific region. Its members consist mainly of cable and satellite system operators, multinational networks and programmers.

Analysis of data

The analysis of the data is divided into two sections. In the first, the relevant information pertaining to the regulatory developments in each of the two cases are outlined. This includes the background, market features, regulatory framework, and the major investigations and outcomes. The second section seeks to develop a general understanding of the individual cases through the method of analytical generalisation (Yin, 1994: 31). This involves the discussion of the three research questions with reference to the theoretical framework and the key concepts outlined. The goal of this exploratory study is to gain a better understanding of the role of regulation in achieving competitive pay-TV markets. The findings from this research would be a useful platform for explanation-building and to develop ideas for further study (ibid: 110). Some of these ideas are discussed in the concluding section.

CASE STUDY FINDINGS

The UK

The main pay-TV providers in the UK market today are BSkyB[17] (Sky) and Virgin Media[18] which operate on satellite and cable platforms, respectively. Since the migration from analogue to digital services in the late 1990s, Sky has been the dominant player after experiencing rapid growth (Ofcom, 2007b: 4). At the end of 2009, Sky had 9.7 million subscribers, Virgin Media had 3.7 million, with recently-launched IPTV operators BT Vision and Tiscali/TalkTalk TV lagging behind on 500,000 and 50,000 subscribers, respectively (Ofcom, 2010: 43). A fifth provider, Top Up TV[19], operates on the digital terrestrial television (DTT) platform.

The driving force behind Sky's growth has been well-documented, namely its stranglehold on key premium content, such as exclusive rights to live Premier League football[20] and first-run Hollywood movies[21]. Thus, Sky's market power is not just at the retail and distribution level,

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[17] Sky Television was launched in 1989 and merged with British Satellite Broadcasting in 1990 to form British Sky Broadcasting (Ofcom, 2007b: 18).

[18] Virgin Media was created as a result of a consolidation over 13 years of the cable franchise areas set up in 1984, culminating in the merger of NTL and Telewest in 2006, and the subsequent rebranding to Virgin Media in 2007 (Ofcom, 2007b: 3).

[19] Subscriber figures for Top Up TV were not available.

[20] In 1992, Sky signed exclusive live television rights with the FA Premier League, triggering a phase of significant growth (Ofcom, 2007b: 28). It has managed to retain a major proportion of the live rights at subsequent auctions.

[21] Sky has exclusive contracts with six major Hollywood studios – NBC Universal, Viacom, Fox Filmed Entertainment, The Walt Disney Company, Sony, Time Warner (Ofcom, 2010: 233).

but also extends vertically to wholesale channel provision of premium channels, such as Sky Sports and Sky Movies (See Figure 2).

New regulatory framework – CA03 (1998-2003)

The digital pay-TV era took off with the launch of Sky Digital in 1998, and cable TV operators Telewest and NTL following suit over the next two years (Ofcom, 2007b: 19-20). The prevailing mood during this period was one of optimism that the switch from analogue to digital technologies would open up new opportunities and usher in a new competitive era. This was captured in the 1998 Green Paper, *Regulating Communications*, in which the UK government stressed that "it would be wrong to seek to mould this market, which is developing rapidly but unpredictably" (DTI-DCMS, 1998: 10) and that "the presumption that broadcasting and communications should be regulated should therefore in general be reversed" (ibid: 23).

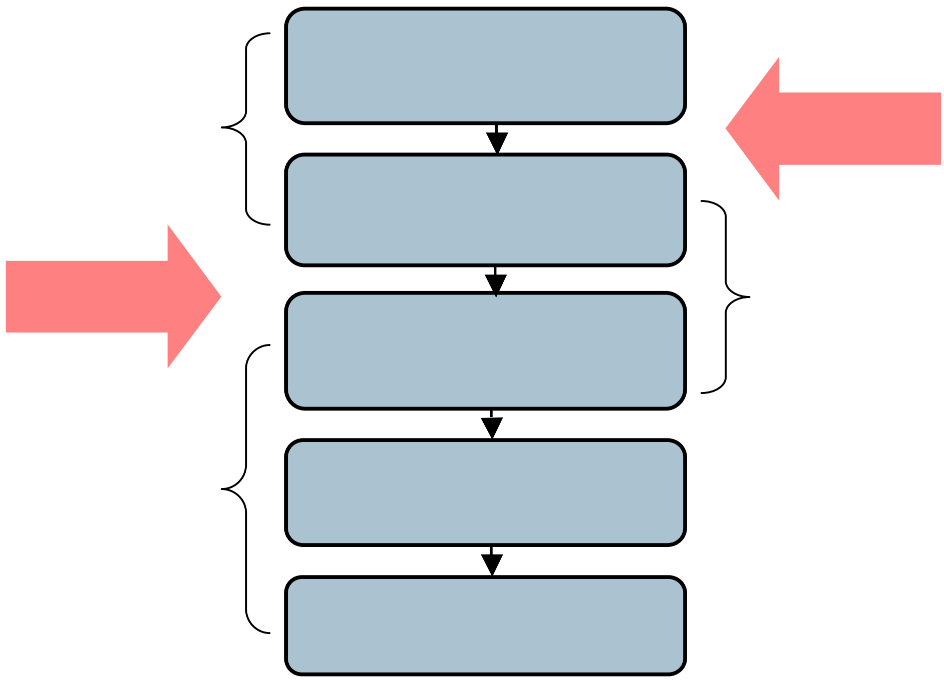

Figure 2. Simplified structure of UK pay-TV market.

In the subsequent *Communications White Paper* (DTI-DCMS, 2000), a new regulatory framework with general competition law as a central element was proposed. This was in line with the government's objective to make the UK the most dynamic and competitive communications and media market in the world was outlined (ibid: 10). The duty to protect and promote competition would be given to a new communications regulatory body (Ofcom) which would have concurrent powers with the OFT to administer the Competition Act 1998 (CA98). On top of this, Ofcom would also have certain sector-specific powers to promote competition[22]. These changes were incorporated into the Communications Act 2003 (CA03).

OFT investigation into Sky (2000-2002)

Despite the advent of digital technologies, a long-standing issue in the UK pay-TV industry, pre-dating Ofcom's existence, is the market position of Sky and the potential negative consequences on competition. Sky's vertical integration – in wholesale channel provision and retail service provision, in the context of sports and movies content – was a main concern on its conduct (OFT, 2002a: 3). In December 2000, following a review into Sky's activities in the pay-TV market, the Director-General of Fair Trading launched an investigation into whether Sky had infringed the Chapter II prohibition of CA98 (OFT, 2002b: 4).

The investigation concerned whether Sky had abused its dominant market position by: (a) exerting an anti-competitive "margin squeeze" on rival distributors of pay-TV; (b) pricing its channels in the form of anti-competitive "mixed bundling"; and (c) giving anti-competitive discounts to distributors (OFT, 2002a: 2). Following extensive economic and financial analysis, the OFT concluded in December 2002 that, while Sky was dominant in the markets for the wholesale supply of premium sports and film channels, there was insufficient evidence to find that it had abused that position with respect to the three allegations (OFT, 2002a: 10). Thus, no regulatory action was taken.

EC investigation into FAPL (2001-06)

In 2001, the European Commission (EC) launched a competition investigation into the UK pay-TV market on the joint-selling of media rights to the English Premier League. Unlike the OFT investigation, the EC's focus was on the "upstream market" where broadcasters acquire rights from content rights holders. The allegation was that the FA Premier League's practice of joint-selling of broadcast rights was tantamount to price-fixing and would thus breach competition law under Article 81(1) of the EC Treaty[23] (EC, 2002: 1). The EC's concern was that joint-selling, coupled with exclusivity, would lead to a situation in which only the big

[22] These powers are restricted mainly to essential issues such as consumer protection, access and interconnection although stronger rules may be applicable to firms with significant market power (DTI-DCMS, 2000: 15).

[23] Article 81(1) of the EC Treaty prohibits agreements and concerted practices which prevent, restrict or distort competition, insofar as they may affect trade between Member States, unless justified by improvements in production or distribution in accordance with Article 81(3) (EC, 2003).

media groups (Sky, in the UK case) could afford the acquisition and exploitation of the bundle of rights (ibid).

Although the FAPL argued that the joint-selling arrangement improved efficiency and distribution of broadcast revenue among the football clubs, this was rejected by the EC which held that the joint and exclusive sale of large packages of rights created barriers to entry, limited the development of products and markets, and led to foreclosure on downstream markets (EC, 2004: 1). The EC's justification was that in order to stimulate growth of media markets, access to key inputs in the markets for delivery of content was not unjustifiably restricted (Monti, 2004: 4). To the EC, premium sports content was considered crucial to the development of services on broadband Internet and 3G mobile platforms, in the same way it spurred the development of satellite and cable pay-TV. Despite maintaining that it had not breached competition law, the FAPL eventually undertook a number of commitments, which included the splitting of live TV rights into six packages with no single buyer allowed to purchase all six packages; limiting the duration of agreements to three years; and increased Internet, mobile and radio rights (EC, 2006: 8-9).

Ofcom market investigation (2007-2010)

In March 2007, Ofcom launched a pay-TV market investigation following a submission by British Telecommunications (BT), Setanta Sports[24], Top Up TV and Virgin Media alleging that that competition in the industry was not working effectively (Ofcom, 2007c: 3). The complaint was that the existing market structure and market conditions[25] gave Sky the incentives and ability to leverage and exploit its dominant market position by withholding premium content from its competitors (BT-Setanta-TUTV-Virgin, 2007: 4). According to the complainants, these adverse effects on competition led to consumer harm in terms of "higher prices, restricted choice and reduced innovation" (ibid: 8).

Following a lengthy investigation which included three public consultations, Ofcom's assessment in March 2010 was that Sky, in limiting the wholesale distribution of its premium channels[26], was exploiting its market power with the effect of restricting competition from

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[24] Setanta Sports was a vertically integrated wholesale channel provider and retailer service provider in the UK from 2007 until June 2009 when it went into administration due to spiralling debts (BBC, 2009).

[25] These include: (a) a finite pool of key content; (b) the limited duration of certain contracts for key content; (c) staggered ability of key content; (d) exclusive licensing and selected distribution of key content; (e) economies of scale in distribution of content; and (f) feedback effects along vertical supply chain (BT-Setanta-TUTV-Virgin, 2007: 5-6).

[26] Ofcom's assessment was that the prices that Sky was charging other pay-TV retailers for its premium channels did not allow them to compete effectively (Ofcom, 2010: 318).

retailers on other platforms (Ofcom, 2010: 2). This was considered to be "prejudicial to fair and effective competition, reducing consumer choice and holding back innovation by companies other than Sky" (ibid: 2). Thus, Ofcom's key decision[27] was to impose a requirement on Sky to offer its premium sports channels, Sky Sports 1 and 2, to retailers on other platforms, at prices set by Ofcom. This "wholesale must-offer obligation" would deliver immediate benefits to consumers in terms of access to attractive sports content on other pay-TV platforms, wide range of packages due to competition between Sky and other retailers; and longer term benefits in terms of improved choice, variety of services and investment in new distribution platforms (ibid: 3).

Despite similarities with the OFT investigation, the departure was in Ofcom's reference to CA03[28] instead of CA98, meaning it was adopting a sector-specific approach rather than a competition law approach. In using its powers under CA03, Ofcom was able to implement a forward-looking requirement on Sky based on to ensure fair and effective competition without the need to establish that Sky had breached competition law (Ofcom, 2010: 39).

Singapore

In Singapore, the pay-TV industry began as a cable monopoly in 1995 with the launch of Singapore Cable Vision (SCV)[29]. In recognition of its nationwide cabling investment, SCV was granted exclusivity in the provision of pay-TV services in Singapore until 2002 (MDA, 2003a). It was only until 2007 that a second operator, SingTel, launched its IPTV services. As of end 2009, SCV had 539,000 subscribers compared to 155,000 for SingTel (StarHub, 2010; SingTel, 2010). Both pay-TV operators in Singapore are predominantly retail providers. They acquire content from wholesale channel providers or directly from content providers. Hence, unlike Sky in the UK market, SCV and SingTel are not vertically integrated with the wholesale channel provision level (See Figure 3).

[27] The other decisions were to allow Sky to launch a pay-TV service on DTT and to refer the issue of premium movies to the Competition Commission (Ofcom, 2010: 1).

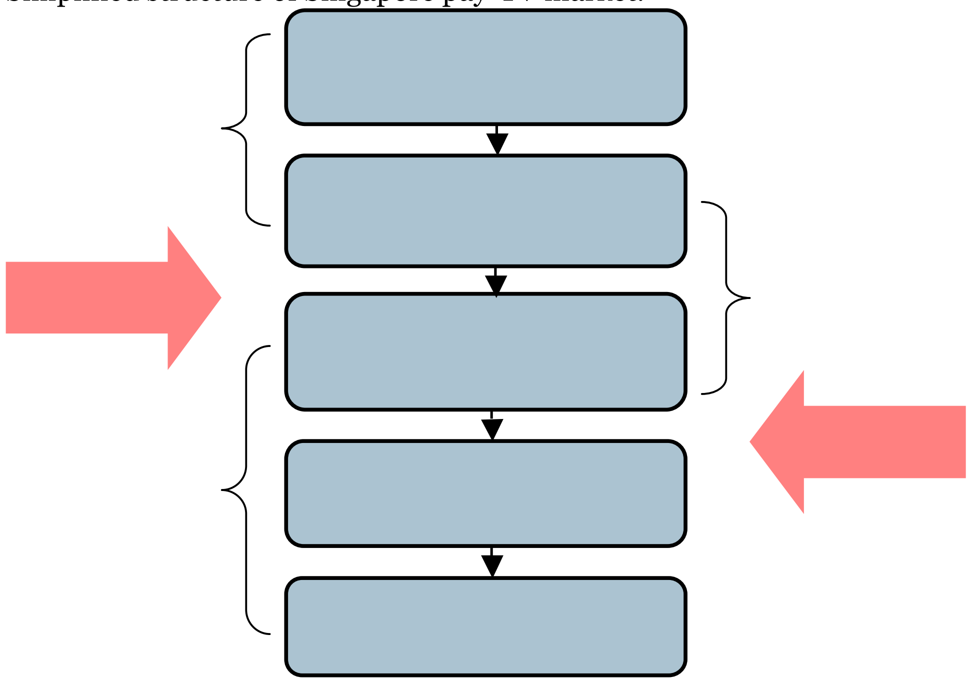
[28] Section 316 of the CA03 gave Ofcom the power to include conditions considered appropriate for ensuring fair and effective competition as part of the regulatory regime for licensed services.

[29] It was later renamed StarHub Cable Vision following its merger with telecommunications company StarHub in 2002.

New regulatory framework – MMCC (2003)

The print and free-to-air TV markets in Singapore were partially liberalised in 2000, reflecting the global trend in media markets around the world. This led to the creation of a new regulatory framework – the Media Market Conduct Code (MMCC) in 2003. The objective of the MMCC is to "promote fair market conduct and effective competition by laying out the ground rules for fair competition in the broadcasting and print sectors" (MDA, 2003c). The MMCC, which sets out the legal rights and obligations of licensees and market participants, is essentially a hybrid of competition law to maintain and enable effective competition, and sector-specific rules designed to safeguard public interest and protect consumers.

Figure 3. Simplified structure of Singapore pay-TV market.



MDA investigation into SCV (2003-2006)

With the expiry of SCV's exclusive pay-TV licence in 2002, MDA sought to liberalise the market by calling a tender for a second pay-TV licence. However, despite interest being expressed by a number of parties, no bids were received. One of key reasons for the lack of bidders for second pay-TV licence was the concern by potential entrants over the SCV's monopoly position and its exclusive carriage agreements with channel providers. These agreements involve a pay-TV retailer paying a sufficient premium to a channel provider such that the latter agrees to a particular channel being carried exclusively by a single retailer (MDA, 2003a: 5). Such practices are common in broadcasting markets as they allow operators to differentiate themselves from competitors while maximising the value of content. However, competition concerns would arise if a pay retailer enters into a sufficiently large number of exclusive carriage agreements to “substantially foreclose a necessary content market to other pay-TV operators and thereby prevent, restrict or distort competition in the pay-TV market” (MDA, 2003a: 2).

Thus, MDA launched an investigation to ascertain if SCV’s exclusive carriage agreements were breached the competition law provisions of the MMCC. In determining whether these agreements substantially foreclose access to an input, or a channel of distribution, the factors considered were: (a) the percentage of the market foreclosed; (b) the duration of the agreement; (c) whether the agreement has a legitimate business purpose or whether its principal effect is to foreclose access to competitors; and (d) the competitors’ ability to obtain comparable inputs from other providers (MDA, 2003b: 47).

In June 2006, MDA determined that, while certain content, such as sports and educational programming, could be considered critical for the success of a pay-TV service, there was no substantial foreclosure of potential entrants’ access to key content for the pay-TV market in Singapore, and thus no need for regulatory action (MDA, 2006). In its final statement on the investigation, MDA also underlined its preference for a free-market approach, noting it was important to afford industry players “maximum room to freely negotiate carriage agreements on mutually agreed terms as this will allow the creation of more compelling content for consumers” (ibid).

MDA market investigation (2008-2010)

SingTel’s entry into the market in 2007 ended SCV’s monopoly and was widely expected to bring greater choice, higher quality content, competitive prices and more flexibility for consumers (MDA, 2008). However, a new competition issue related to exclusive carriage agreements surfaced. With SCV and SingTel battling to secure content from channel providers on an exclusive basis, competition instead led to an escalation in prices of premium content[30] and inconvenience to consumers who had to subscribe to both services to access popular programming – a situation worsened by the lack of interoperability between the two platforms.

In late 2008, MDA launched another investigation into competition issues in the Singapore pay-TV market. Among the key findings was that competition between SingTel and SCV had resulted in the doubling of exclusive carriage agreements from 64 in December 2005 to 131 in March 2010 (Singapore Parliament, 2010: 18). Furthermore, there was a high degree of content fragmentation compared to other markets with just seven of the total of 179 combined channels available on both pay-TV retailers[31] (ibid). This resulted in negative consequences, in terms of higher costs for pay-TV retailers[32], and increased subscription fees and inconvenience for consumers.

MDA's assessment was that "so long as the retailers continue to pursue a content exclusivity-centric strategy, the pay-TV market is unlikely to correct its inefficiencies and consumer welfare will continue to be affected" (MDA, 2010a: 3). To address this problem, MDA introduced a new provision into the MMCC to requiring cross-carriage of exclusive content by pay-TV operators (MDA, 2010b: 1). The aim was to: (a) reduce content fragmentation and its associated problems; (b) enable consumers to access exclusive content from different retailers via one set-top box; and (c) shift competition towards other aspects such as service differentiation and competitive packaging (ibid: 2).

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[30] For example, between 2004 and 2007, the price of SCV's sports channels increased more than threefold from S$8 to S$25 (Wang, 2008a).

[31] This implies that the services offered by the two retailers are not substitutable, and hence competition is not effective as it has not offered genuine alternatives for consumers.

[32] SCV's content costs to revenue ratio rose from 40% prior to 2007 to 70% in 2010 (Singapore Parliament, 2010: 18).

INTERPRETATION AND DISCUSSION

Regulatory approaches (RQ1)

Despite differences in market characteristics, there are a number of similarities in the regulatory developments in both cases. Firstly, in seeking to facilitate competition in media markets, new competition regulatory frameworks have been implemented. Both the CA03 and the MMCC provide significant powers for Ofcom and MDA, respectively, in their duties promote competition. These include general competition law, as well as sector-specific rules. Despite having these regulatory tools at hand, the initial emphasis was on a free-market approach, as spelt out in their respective regulatory principles, namely Ofcom's "bias against intervention" (Ofcom, 2004: 9) and MDA's "primary reliance on private negotiations and industry self-regulation" (MDA, 2003b: 3).

However, in the two pay-TV markets, the laissez-faire approach appears to have limited success in producing the dynamic, competitive markets envisioned by policy-makers. In the UK, Sky's dominance and its vertical integration along wholesale and retail levels appeared to restrict the development of competition. In Singapore, concerns about the barriers to entry were linked to the exclusive carriage agreements of SCV, the incumbent retailer. To address these concerns, regulators in both markets turned to competition law as reflected in the subsequent competition investigations[33] – abuse of dominant market power by Sky (OFT), anti-competitive joint-selling arrangements by FAPL (EC), and market foreclosure by SCV's exclusive carriage agreements (MDA).

Interestingly, in all three investigations, no anti-competitive conduct was established despite the alleged misdemeanours. Although Sky was found to be dominant at the wholesale level in the OFT investigation, its conduct was not deemed abusive. Similarly in the Singapore case, no regulatory action was taken as MDA determined that SCV's exclusive carriage agreements with third-party channel providers did not substantially foreclose potential entrants' access to key content for the pay-TV market. Even in the EC's investigation into FAPL's joint-selling arrangements, a breach of competition law was not established[34] (EC, 2008: 1).

[33] The fact that the concerns occur at different levels of the pay-TV value chain indicates the extent of competition-related problems posed by access to content. (See Figures 2 and 3)

[34] It is likely that the FAPL's willingness to commit to the undertakings was motivated by commercial interests. Following the new arrangements, the UK live rights fees for the 2007-10 seasons increased to £1.706 billion from £1.024 billion for the previous 2004-07 seasons (Gratton and Solberg, 2007: 187; Shah and Fildes, 2006).

However, significant market distortions continued to hamper the development of competition in both markets. The latest regulatory developments in the two cases indicate a shift towards a sector-specific approach. The departure from the general competition law approach suggests that: (a) greater intervention in the form of command-and-control sector-specific rules is necessary for the development of competitive pay-TV markets; and (b) there are wider regulatory objectives beyond merely maximising economic efficiency in the market.

Rationale and objectives (RQ2)

The absence of anti-competitive conduct suggests that the two markets are functioning well, at least from an economic efficiency perspective. Yet, the expected level of competitiveness and associated consumer benefits did not materialise. As MDA's deputy chief executive Michael Yap explained: "There is a difference between anti-competitive behaviour and a competitive market. In terms of behaviour, none of the players may be engaging in anti-competitive conduct but the market itself may not be competitive at all." (Yap, personal interview, 17 June 2010) This was echoed in Ofcom's assessment that a competition problem in the market would still exist "even absent a finding of anti-competitive behaviour" (Ofcom, 2008: 180). Thus, achievement of competitive pay-TV markets required an unprecedented level of regulatory intervention in both markets.

Content scarcity issues

In both cases, the market imperfections were related to the control over the access and distribution of content, albeit manifested in different forms. In the UK, Sky's market power in the wholesale and retail levels gave it distinct advantages over its competitors in gaining access to premium content rights, which in turn reinforced its dominance (Myers, personal interview, 7 June 2010). Ofcom's assessment was that Sky, in restricting the distribution of its premium channels to potential new retailers such as BT Vision and Top Up TV Sky, was acting on "strategic incentives to protect its retail business, and to reduce the risk of stronger competition for content rights" (Ofcom, 2010: 7).

In Singapore, the problem stemmed from the strategies by SCV and SingTel to protect and gain market share through exclusive carriage agreements. Such deals, though not strictly anti-competitive, create a "competition for the market" environment whereby only one retailer has privileged access to subscribers and potential newcomers have to compete by gaining access to the residual content (Nicita and Rossi, 2008: 87). This leads to undesirable consequences at the retail level, in terms of (a) restricted distribution of content across platforms which means reduces consumer choice; (b) aggressive or destructive competition which leads to escalating content costs; and (c) higher barriers to market entry.

These monopolisation strategies employed by the market players in the two cases reflect the "inescapable dynamics of the tension between abundance and scarcity in the marketplace" (Mansell, 1999: 157), and highlight the increasingly complex problems arising from content scarcity. The creation of artificial scarcity through such monopolisation strategies has increased the economic rents[35] to content producers and channel providers at the expense of consumer welfare. The outcome is an extraordinary growth of programming costs, benefiting content producers, rights owners and dominant market players[36], while resulting in market imperfections at the retail level.

Consumer welfare

The main objective for intervention in the two cases is to ensure that competition deliver positive outcomes for consumers (Ofcom, 2010: 390; MDA, 2010b). As Ofcom's director of competition economics Geoffrey Myers explained, "we decided to intervene despite the bias against intervention, because there is an opportunity for consumers to do better if there is healthier competition in the market" (Myers, personal interview, 7 June 2010). In the UK, Ofcom assessment revealed that the restricted access to key content had a negative impact on choice, innovation and pricing in the retail market (Ofcom, 2010: 391).

In Singapore, the move from monopoly to competition has ironically worsened consumer welfare with consumers having to subscribe to a second service in order to access the same set of programming due to the prevalence of exclusive carriage agreements. This resulted in higher costs and greater inconvenience for consumers, which was worsened by the lack of interoperability between the two rival networks. In a competitive environment, according to Yap (personal interview, 17 June 2010), "a consumer should be able to reasonably access – in terms of convenience and cost – the entire range of content…in the Singapore situation, it is uniquely inconvenient and painful for the consumer because almost 100% of the content is

[35] Economic rent is a measure of market power and refers to the difference between what a content producer or channel provider is paid and how much it would need to be paid to remain in its current use (Bishop, 2009: 272)

[36] Ofcom's analysis of the UK pay-TV market showed that most of the revenue generated in the industry flowed to the content rights owners and the channel providers (Ofcom, 2007b: 16). Likewise, in Singapore, the exclusivity-centric competition has led to increasing costs for retailers and consumers (Singapore Parliament, 2010: 18).

exclusively held." Thus, intervention was considered necessary to address the imbalance and shape competition towards more desirable outcomes for consumers.

Industry development

Although consumer welfare was a key consideration, the documentary evidence and interviews also reveal that the regulators were also motivated by industry development objectives. This reflects the wider objectives of governments to capitalise on economic opportunities offered by new communications technologies in the digital age (van Cuilenburg and McQuail, 2003). In pay-TV, it appears that stronger sector-specific regulation, as opposed to deregulated, laissez-faire approach, is required to achieve this. In the UK case, Ofcom judged that Sky's control of key sports and movies rights gave it the ability to "set the pace of future developments in the sector" (Ofcom, 2010: 390). A key factor behind Ofcom's decision to intervene is timing. As Myers (personal interview, 7 June 2010) explained: "We are in a particular phase of development when a number of new platforms and competitors have come along … one of our key concerns was that they were not getting access to premium content which is very critical to these platforms being credible competitors in the downstream market".

The latest Ofcom and MDA decisions can be viewed in the context of the current priorities by the respective governments in developing high-speed national broadband networks. In opening up access to premium content, Ofcom's remedy provides greater incentives for the likes of BT to invest in the development of superfast broadband infrastructure (Ofcom, 2010: 3), thus advancing the UK government's objective to deliver a nationwide fibre-optic broadband network (BIS-DCMS, 2009). In Singapore context, with the next-generation broadband network due to be in place by 2012, MDA expects the cross-carriage provision to facilitate the entrants and produce a vibrant, competitive pay-TV market (Yap, personal interview, 17 June 2010). Another goal of MDA is to encourage pay-TV operators to invest in the production of original programming, instead of depending on the carriage of foreign content (ibid). This is in line with MDA's other role of promoting the growth of the local media industry.

External factors (RQ3)

In examining the factors behind the regulatory developments, it is important to understand public policy as a political system operating in its environment (Jenkins, 1997: 30). The internal perceptions and objectives of the regulators in the two cases have been discussed above. This section briefly discusses two external environmental factors which are likely to have influenced the regulatory process.

One such factor is the lobbying efforts by industry players seeking to influence the regulator in order to benefit from a "regulatory rent" (Baldwin and Cave, 1999: 22). There is evidence of this, especially in the UK case. For instance, Virgin Media chief executive Neil Berkett revealed that when the whole complaint process was started by BT, Virgin, Setanta and Top Up TV in 2007, it was decided that "a consumer-oriented campaign" would be mounted, instead of accusing Sky of anti-competitive conduct (Berkett, personal interview, 17 June 2010). Thus, even if the claims made are valid, the motives of the complainants are likely to be based on self-interests. Not surprisingly, Sky and FAPL have argued that the complainants were engaging in "regulatory gaming" to secure more favourable terms to access premium content and further their own business interests (Sky, 2008: 10; Lines, personal interview, 21 May 2010).

Another external factor is pressure from consumers which was evident in the Singapore case. The steep increase in prices of premium sports content following SingTel's entry, coupled with the increasing fragmentation of content between the two pay-TV retailers, triggered led to a huge outcry among consumers, especially sports fans (Wang, 2008b), which culminated in the issue being raised in parliament (Singapore Parliament, 2009, 2010). Thus, it is possible that there was political pressure on MDA to intervene to assuage the masses of unhappy pay-TV subscribers.

As these two external factors indicate, the latest developments should also be considered from the perspective of regulation as a political process in which group, sector and individual interests often seek further their own agenda. Thus, in adopting a more interventionist approach towards achieving competitive pay-TV markets, regulators face not only the challenge of prescribing the appropriate remedy to address the complex market imperfections, but also that of balancing the host of divergent interests from consumers to service providers to content producers. To minimise the risks of regulatory failure and avoid the pitfalls of regulatory capture, greater accountability would be necessary.

CONCLUSION

One of the main regulatory challenges in the digital age is the question of how effective competition is achieved in media markets. While new technologies have lowered the technical barriers to entry, content scarcity issues arising from the monopolisation strategies of market players, coupled with structural characteristics of the market, have hampered the development of healthy, effective competition in pay-TV markets. The findings from the UK and Singapore cases suggest that neither a free-market approach nor a general competition law approach is sufficient in overcoming such market imperfections. Despite their predominantly non-interventionist stance, both Ofcom and MDA have adopted an unprecedented and highly interventionist, sector-specific approach as reflected in their latest regulatory decisions.

In the two cases, the rationale for intervention was to ensure effective competition in order to improve consumer benefits and stimulate industry development. Although this appears to give credence to a proactive sector-specific regulatory approach, it is remains to be seen at this point in time if the particular rules imposed by Ofcom and MDA will indeed prove more successful in achieving effective and sustainable competition in the pay-TV market. While well substantiated by the two regulators, they are not immune to the risks of regulatory failure – something which Sky, FAPL and CASBAA have been vocal in highlighting[37].

Nonetheless, there is likely to be a bigger role for sector-specific regulation due to the market imperfections arising from content access issues – which are likely to become more pronounced in the digital age – and the limitations of the free market and general competition law approaches in resolving them. However, in moving towards a sector-specific approach, regulators are likely to face difficult challenges in prescribing the appropriate regulation and balancing the host of divergent interests in the new media environment.

Future research

There are several limitations in this study which could be further developed in future research. Firstly, the analysis of the cases is based primarily on the public interest perspective which posits that regulation is driven by public interest-related objectives rather than group

[37] Sky and FAPL have argued that Ofcom's intervention would reduce incentives to invest in content and to innovate, thus produce negative consequences for competition and consumers (Sky, 2009: 5; FAPL, 2009: 3). CASBAA has also raised similar criticisms of MDA's regulation, claiming that it would deprive content owners of their freedom to negotiate contracts, undermine investment in content and ultimately harm consumers in the long run (Twiston-Davis, personal interview, 3 June 2010).

or individual interests (Baldwin and Cave, 1999: 19). However, given that inherent political aspect of regulation, an analysis of the two cases using private interest theories of regulation can provide a fuller understanding of the developments.

Secondly, this study has only provided an empirical account of the regulatory developments in the two cases. Another aspect is the normative question of what the role of regulation in the competition paradigm should be. The findings of this study can provide a good starting point for such research.

Thirdly, further study is required to evaluate the outcomes of the regulations implemented in the two cases. Given the limited success of the free market and competition law approaches in achieving competitive pay-TV markets, it would be interesting to see if the sector-specific regulations adopted will pay off as Ofcom and MDA have argued, or backfire as its detractors have warned. This would provide valuable lessons for regulators and policy makers in their quest to achieve effective competition in pay-TV markets.

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APPENDIX A – LIST OF KEY DOCUMENTS ANALYSED

1. UK

Regulatory framework (1998-2003)

DTI-DCMS (1998) Regulation communications: approaching convergence in the information age. *Green Paper*, July 1998. URL: http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/converg/ [Accessed 17 August 2010]

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2. Singapore

Regulatory framework (2002-2003)

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APPENDIX B – LIST OF INTERVIEWEES

1. Regulators

Name: Dr Geoffrey Myers
Designation: Director of Competition Economics
Organisation: Ofcom
Date of interview: 7 June 2010
Interview mode: Face-to-face

Name: Mr Michael Yap
Designation: Deputy Chief Executive Officer
Organisation: Media Development Authority of Singapore
Date of interview: 17 June 2010
Interview mode: Telephone

2. Industry stakeholders

Name: Mr Neil Berkett
Designation: Chief Executive Officer
Organisation: Virgin Media
Date of interview: 17 June 2010
Interview mode: Telephone

Name: Mr Phil Lines
Designation: Director of Media Operations and International Broadcasting
Organisation: FA Premier League
Date of interview: 21 May 2010
Interview mode: Telephone

Name: Mr Simon Twiston-Davies
Designation: Chief Executive Officer
Organisation: Cable and Satellite Broadcasting Association of Asia
Date of interview: 3 June 2010
Interview mode: Telephone