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COMMENTS OF GRIMALDI E ASSOCIATI

ON THE

PRELIMINARY FINDINGS OF THE

COMMISSION SECTOR ENQUIRY INTO

NEW MEDIA (3G)

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I. Introduction

1. This paper provides some considerations on the 3G sector inquiry preliminary findings presented by the European Commission, according to Article 17 of Regulation n. 1/2003¹, on 27 May 2005.
2. Following general remarks on the characteristics and potentiality of 3G technology, this paper intends to stress the importance for the new media, of the access to contents, in particular to premium contents, and the consequences that a restricted access to contents may have on the structure of markets. On the basis of the decisions concerning mergers and agreements on media market, this paper tries to understand the concerns of the Competition Authorities when assessing co-operations which may distort competition and the measures required to overcome such concerns. Finally, a proposal for the future treatment of competition cases concerning the new platform of 3G technology is drawn.

II. The new mobile generation

3. As the Commission noted², the mobile communications sector has a profound economic and social impact in Europe and beyond. While penetration levels are

¹ Council Regulation (EC) No 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 April 2003, p. 1.

likely to continue to increase, the most significant future development will be the growth of mobile broadband services, as the potential provided by third generation mobile phones, as well by other wireless technologies, is great.

4. 3G is a collective term for the new communication procedures, standards and devices that will improve the speed and quality of services available on the move. 3G takes the form of handsets that can combine the functionality of a mobile phone with that of a personal computer and a personal organiser/PDA. 3G devices generally have greater transmission abilities, both in terms of speed and capacity, than their predecessors³.
5. The new mobile generation is the last step of a continuous evolution process of the telecommunications sector. This evolution is due to broadband technologies which increase the possibility to carry different contents on different platforms, thanks to the digitalisation process of the information. This new mobile generation is very attractive as it is easier for users to access a big variety of contents. Competition between different existing platforms is thus increased.
6. With a view to permitting this evolution, it is of a fundamental importance for companies operating in the communication sector to have access to the new wireless and broadband infrastructures - and to contents as well. These accesses are the bottlenecks of communication sector.

III. Access to contents

7. The new media platforms connect content providers to final consumers. The possibility to offer different contents could increase the competitiveness of a TV broadcasting, of an internet portal, a 3G mobile service or a satellite platform.
8. On the one hand, consumers demand new contents for the communications device; on the other hand, the offer of such new contents is linked to the possibility to buy them.
9. Access to contents and infrastructures represent potential bottlenecks of the electronic communications sector: availability of contents, in particular the premium contents, is an important incentive to the development of networks and competition between operators. However, the risk is that incumbents, thanks to

² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Mobile Broadband service, COM (2004)447.

³ In this regard, the International Telecommunications Union (ITU) defines 3G as any device that can transmit and receive data at 144 Kbps or better. In practice, 3G devices can transfer data at up to 384 Kbps, which is faster than many home broadband connections. As a comparison, GSM is up to 14.4 Kbps and GPRS is around 53.6 Kbps with theoretical maximum speeds of up to 171.2 Kbps.

their economic power, can acquire contents, often accompanied by strong exclusive rights, thus limiting the possibility of other operators of investing in their own infrastructures and producing a market foreclosure.

10. This situation has been clear with the PAY-TV. The growth of this platform was due to the exclusive offer of blockbusters and sport events, which have contributed to determine the success of the satellite platform and have decided the fortune of the operators present on the market. Over the last years, the market for TV rights regarding sport events and premium movies has enormously developed: this has increased the contractual power of the owners of such rights vis-à-vis TV operators, determining the increase of the revenues related to the transmission. In this regard, an important part of the revenues of football clubs are due to the sale of sport rights: e.g. two thirds of the revenues of AS Milan have origins in such activity. Football represents 65% of the broadcasters' total rights expenditure⁴.
11. The new generation of PAY-TV is video-on-demand (VOD): these technologies permit to request films on demand and to pay for them without being bound to PAY-TV offer and to modulate the use and costs of the platform. On the one hand, the possibility of modulating the contents according to the offer allows creating a new dynamic between users and platforms. On the other hand, the possibility for market players to offer a variety of contents depends on the access to them.
12. The same can be said for the internet, where operators are investing a lot to substitute the infrastructures in order to increase the capacity to transfer data. By doing this, operators intend to make available to users more content such as film, sport, music, and information. The fees for the exploitation of such content will be directly charge to the users' telephone bill. The continuous evolution of internet technology makes obsolete the assessment carried out by Antitrust Authorities over mergers concerning companies active on the internet. As an example, in the assessment of the merger *Newscorp/Telepiù*⁵, the Commission concluded that the ADSL technology did not allow in Italy the offer of premium contents on telephone cables. Notwithstanding this, few months later, important internet portals are able to offer premium movies, sport events and music.
13. Access to contents has become relevant over the last years also for the third generation of mobile phones. Companies which manage to obtain premium contents are making the difference in a sector which is still at its beginnings, as compared to any previous mobile phone technology.

⁴ A. Pezzoli, *Il calcio visto dal divano*, in "Mercato concorrenza e regole", 2000, pag. 539.

⁵ Commission Decision n. 2004/311/EC of 2 April 2003, case COMP/M.2876, *Newscorp/Telepiù*, OJ L 110 of 16 April 2004, p.73.

IV. The availability of premium content

14. Premium content availability is crucial to the development of new platforms. However, access to valuable content seems to be one of the main obstacles to the development of competitive offers from new media platforms.
15. The following principal entry barriers can be identified:
- content providers set the price and keep the largest part of revenues;
 - sale of contents is generally accompanied by exclusivity clauses, exclusion mechanisms and high costs which prevent new media providers from accessing high quality content needed to boost their business;
 - as far as premium films are concerned, it is general practice that the providers of such rights ask for minimum guarantee prices, with the consequence that new platforms or new operators cannot manage to purchase such rights;
 - competition between platforms is made difficult also because of the windows of exhibition. According to such windows, movies can be performed in new platforms also after a long period has passed after the performance in traditional platforms such as cinema, video rental and television;
 - high prices paid for premium events.
16. In particular, the minimum guarantee clause bases the payment of the right upon the number of subscribers and does not reflect the real growth potential of the operator. Thus, it can discourage new operators from entering the market. In other occasions, the content provider fixes a revenue sharing, with very high percentages in his favour. Finally, the content owner might also fix prices to end consumers.
17. High profits are accompanied by great amount of expenditure for the acquisition of the premium contents. The high costs of these contents are due to exclusivity rights which impede selling the same contents to other platforms, such as the Internet and UMTS, which are only partially explained by the characteristics of such events (lack of substitutability, not possibility of being duplicable and, therefore, high revenues for the platforms transmitting them).
18. Moreover, the current situation is of a substantial limitation to the offer of quality content. There is in general a scarce offer of blockbusters, access to live sport events is difficult, retransmission of TV programming is often not allowed.
19. Movie offers are scarce if compared to the operators' network capacity. This is also due to the selling practices adopted by content owners. The necessity to have a wide access to contents consolidates a move in the media industry towards vertical agreements between content providers and delivery companies

with the target of realizing economies of scale and offer new products and services to consumers.

20. As far as sport events are concerned, content providers claim that low definition of images transmitted over new platforms would prejudice content, so they are not willing to allow live transmission of sport events on such platforms, allowing only near live transmission. The uniqueness of sport events makes their delayed transmission less valuable. Therefore, the unavailability of sport events makes less attractive new media services and may undermine the development of new platforms.
21. Finally, the transmission of music over the internet and 3G technology, once limited by copyright issues, is now the future opportunity for further development of the new platforms. Negotiation of transmission rights over these platforms would, on one side allow new artists to access the market and, on the other side, would allow a higher level of distribution of music. Even in this case, difficulties due to national legal frameworks for the protection of on line music should be overcome and the vertical agreement between music producers and main and traditional distributing operators should be limited in their scope.
22. On the contrary, in open network model, customers can choose independently the best network and the best content; separation between bit-carrying content production allows TLC and Media to focus on their respective core skills; reduced barriers to entry allow for more pluralism in television and content offer. Finally, an open network model collides against established oligopolistic interests: broadcasters may perceive a dilution risk on their audiences and block the distribution of their content on new technological platforms; incumbents may use exclusive agreements with important content providers as new barriers to entry against new TLC competitors.

V. Assessment according to competition rules

23. The activity of the Competition Authorities in the media sector aims at avoiding market foreclosure and allowing small operators to bring competitive pressure to dominant firms and to encourage competition between platforms.

A - The cases of mergers

24. In particular, the Commission cleared mergers between companies having dominant positions in different platforms and high profile content providers, under the conditions that also competitors of the parties could have access to such contents. Cable or internet operators, which were parties of the mergers, were limited in their possibility of purchasing exclusive transmission rights over the contents produced by the other parties. Finally, the mergers were cleared

under the conditions that contents would be available also through other platforms (*Vodafone/Vivendi/Canal +*⁶; *Vivendi/Canal +/Seagram*⁷; *AOL/Time Warner*⁸).

25. In the merger *Newscorp/Telepiù*⁹, leading to the creation of a nearly monopoly in the pay TV market in Italy, the Commission assessed the best ways to grant the market contestability by eliminating bottlenecks on the satellite platform and between different platforms. Therefore, the Commission limited the period of contracts to purchase contents to two years for football clubs and three years for movies producers. Moreover, in order to allow the entry of other satellite operators, the contents owners were given the possibility to terminate the contracts without prior notice. For other platforms Newscorp renounced to all exclusive rights and all protection from transmission of contents by competitors.

B - The cases of agreement for joint selling of transmission rights

26. As far as it concerns the application of competition rules to agreements between competitors - football clubs -, concluded within their Association, to jointly sell the rights to transmit football matches, the Commission and the Italian Competition Authority intervened several times to reduce the scope of application of such agreements. In particular, both institutions promoted single football clubs to negotiate individually and favoured sale of transmission rights also to new platform.
27. In this sense, the Commission exempted the new joint selling arrangements of European football organisation *UEFA* for the media rights to the Champions League, following the amendments of such agreements¹⁰. The rights, even if marketed centrally through *UEFA*, would be sold separately; even if, under certain conditions, rights would be sold individually by football teams. The new joint selling system also affords opportunities to new media operators. The contracts will have a limited duration.
28. The Commission authorised, following commitments, the system adopted by the *German Football League* regarding the central marketing of the media rights of

⁶ Commission Decision of 20 July 2000, case n. IV/M.0048, *1*3* VODAFONE / VIVENDI / CANAL PLUS*, OJ 118 , 20 May 2003, p. 25.

⁷ Commission Decision of 13 October 2000, case n. IV/M.2050, *3* VIVENDI/CANAL+/SEAGRAM*, OJ C 311 31 October 2000, p.3.

⁸ Commission Decision n. 2001/718/EC of 11 October 2000, case n. COMP/M.1845, *AOL/Time Warner*, OJ L 268 f 9 October 2001, p. 28.

⁹ Commission Decision n. 2004/311/EC of 2 April 2003, *Newscorp/Telepiù*.

¹⁰ Commission Decision n. 2003/778/EC of 23 July 2003, case n. COMP/C.2-37.398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ L 291 of 8 November 2003, p. 25.

German football matches¹¹. The Commission had been concerned that the exclusive selling of commercial broadcasting rights could violate article 81 of EC Treaty. The German Football League modified the agreements so to continue to market broadcasting rights in a manner which allows football clubs to operate jointly, but ensures that the procedures used are open, transparent and non-discriminatory. In particular, under the commitments decision, the German football league has undertaken to offer unbundled packages of rights for a limited duration. In addition, the clubs can sell their own branded services to their fans, in particular in the field of new media.

29. Finally, at national level, the Italian Competition Authority examined the centralised negotiation of football television broadcasting rights by *Lega Nazionale Professionisti*¹². The Authority considered that the centralised sale of encrypted television broadcasting rights for the championship matches and the *Coppa Italia* matches had restricted competition. However, it did not consider the centralised negotiation of match *highlights* to restrict competition, because the features of this product were such that it would be extremely complicated to sell them individually and it could even change their characteristics altogether. But following the changes to its Rules that the *Lega* has introduced, the Authority considered that *Coppa Italia* broadcasting rights, restricted to matches played in the direct elimination rounds, could be granted an exemption.

VI. Conclusion

30. In conclusion, it is our opinion that the future activity of the Commission in the field of the application of competition rules to the sale of transmission rights over premium contents to platforms should ensure, as it has been up to now, equal opportunities to traditional and new platforms. Access to content has become an asset which could contribute to the determination of the constitution of a dominant position of operators of a platform. Premium contents could incentivate consumers to subscribe for the services of a TV operator, or a internet service provider or a GSM operator.
31. Constitution or strengthening of dominant positions, together with exclusive mechanism in the negotiation of transmission rights, often cause the diminishing of competition on a market. Competition within a platform or between platforms may result lessened. Incumbents, thanks to financial resources and exclusive access to contents could rise high entry barriers, following leverage practices or foreclosure practices. In this sense, the activity of the Commission should

¹¹ Commission Decision n. 2005/396/EC of 19 January 2005, case n. COMP/C.2/37.214, *Joint selling of the media rights to the German Bundesliga*, OJ L134 of 27 May 2005, p. 46.

¹² Decision of the Italian Competition Authority n. 7340 of 1 July 1999, case I/362, *joint sale of TV rights*, in *Bullettin* n. 26/1999.

continue to aim at granting access to both infrastructures and contents in order to grand contestable markets.

32. Technological progress is favouring the development of new markets in which contents represent the element of bigger attractiveness of demand. In this perspective, the acquisition of large quantity of TV premium rights, their exclusivity with respect to the different form of distribution and the long duration of contracts are often decisive elements for a foreclosure of the downstream markets. These aspects are even more underlined in the case of vertical integration between platforms' operators and content suppliers. In both cases foreclosure risks are not negligible.
33. Therefore, it is important to grant access to premium contents through a robust regulation of the demand: a larger distribution of resources among operators so that competition is protected.
34. In order to introduce competition in the downstream market joint sale of contents for different platforms must be avoided. Joint selling should only be allowed when it can be explained in terms both of high transaction costs and uncertainty which the broadcasting companies have to accept in order to purchase rights without knowing from whom until immediately after the event and the need to facilitate the transition away from a mutuality system hinging entirely around the collective sale of rights towards a system in which most of the rights will be negotiated individually, with the mutuality principle mainly being pursued by redistributing part of the revenues¹³.

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¹³ See, Decision of the Italian Competition Authority, case I/362 – joint sale of TV rights.