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Legal framework to secure open Media Markets and the Independence of the Press

- The Role of EU Competition Law

Conference on Democracy and Human Rights in the EU

Opole, Poland

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Introduction

Thank you for this invitation. I believe that it is a special opportunity to share some thoughts on the European framework and the role of competition law in securing media pluralism, only one month after this country has become a full Member of the European Union.

Let me cover in my remarks four main issues:

- The basic framework for the EU's approach to media and the press
- The topic that I would like to expand more on—the role of competition law in securing open market structures that must underlie any sustainable multi-plural media and press environment
- The danger of concentration that is also visible in certain parts of the media and press sector in the Accession countries, and other countries of Central and Eastern Europe
- An outlook—what the evolving trends in the EU media framework are

Firstly,

The Basic Framework

TV/radio

In the European Union, we have seen the initial structure of the eighties—Public Service Broadcasters mainly based on licence fee incomes—evolve

into the dual structure of the nineties, adding private broadcasters based on advertisement revenues.

Digitisation is amplifying further the multiplication of channels and supply, with new packaging, special interest channels, and video-on- demand.

Press/print

We have seen the formation of powerful press groups, often acting on a multi-national basis and with a multi-national strategy.

New Media

Most recently, we are seeing the emergence of New Media: Internet - narrowband and broad-band, 3G and other forms of interactive media—obviously starting on a relatively small base, but growing.

Looking at global figures, at the start of this decade television / radio and newspapers / press accounted by far for the largest part of the media sector in the European Union, with nearly equal weight—56 billion € (39%) for newspapers/magazines, some 50 billion € (33%) for TV/radio—not including the New Member States.

The developments over the nineties—the entry of advertisement-based television sitting beside licence-fee financed Public Service Broadcasters, and now also the New Media—have inevitably led to hard-cutting competition for the advertisement market—and this has been further aggravated by the overall slump in advertisements that we have seen over the last three years and from which the market is only now recovering.

This has been of major consequence also for newspapers and has put substantial pressure on them in many instances—and we have to keep those fundamental market facts in mind, when we talk about maintaining and developing the plurality and freedom of the press.

This then leads to the basic EU objectives for the sector.

Objectives

The essentials at EU level are:

- The Charter of Fundamental Rights: Freedom of expression and information (Article 11)

And the:

- European Convention of Human Rights (Article 10)/Council of Europe

both discussed at length at this conference. This basic emphasis on human rights and freedom of information is now reinforced by the integration of the Charter into the future European Constitution, more precisely in Title II / Article 11.

Let me quote from the fundamental Articles of the Constitution that will set the overarching framework for the Union. Article 2 reads: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination".

Just to recall:

Article 11 corresponds to Article 10 of the European Convention on Human Rights. It reads as follows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....The freedom and pluralism of the media shall be respected."

This then sets the agreed European objectives for the media sector:

- Pluralism / plurality of opinion
- Cultural diversity
- Choice

Pluralism is the uncontested primary public goal in the media sector. However, in a Union of now 25 Member States, cultural diversity stands beside it, as a goal of equal importance—the preservation of national identities.

Plurality requires the availability of choice. Choice between different opinions and offers within the same media but also between different types of media: access to TV, Print and New Media.

Within the framework of these general objectives, and pending the entering in force of the Union's new Constitution, current EU action in the media sector is based on three main legal foundations:

- The basic freedoms: the freedom to provide services

- The Maastricht & Amsterdam Treaties: the provisions relating to culture and the protocol on public broadcasting

and the

- The EU competition order

In practice, following up these mandates has resulted in three strands of policies:

- The Television without Frontiers (TWF) Directive, and the associated Directives
- Application of the EU merger regulation and antitrust controls, and State Aid review

And one should add

- The liberalisation of the EU's telecommunications market.

In addition to

- The special schemes in nearly all Member States regarding the operation of Public Service Broadcasters, and in nearly half of them, specific media concentration controls.

As far as television/ broadcasting is concerned, the basic framework at EU level is provided by the Television without Frontiers Directive and related Directives, such as the Satellite Broadcasting and Cable Retransmission Directive.

The Television without Frontiers Directive:

- harmonises the definition of broadcasting, and determines the national law to apply
- sets provisions concerning advertisements, sponsoring, protection of minors
- includes the European content provisions
- provides access rights to events of major importance for the general public, according to the choice of Member States.

Indirectly, it also sets framework conditions for the press sector, particularly by regulating television advertisements and by setting basic goals for the protection of minors.

The TWF Directive is currently under review, inter alia with regard to adjusting its advertisement provisions to the new digital environment.

As far as the print/newspaper sector is concerned, Member States have traditionally relied more on self-regulatory mechanisms, with regard to issues such as ethical standards, rules concerning advertisement, and rules concerning protection of minors.

A larger use of self-regulation is now also discussed in the television and New Media fields. In fact, the more extended use of self regulation in the print sector may set some examples for a future loosening of regulation in the television sector in certain aspects.

Media concentration controls

The basic Treaty provisions clearly state that ownership issues fall to the Member States (Article 295 of the EU Treaty). There has been a clarifying debate in the EU subsequent to the EU Green Paper on pluralism and media concentration of the mid-nineties on this issue.

The outcome is that:

- Member States retain the right to issue national media laws relating to limits on media ownership
- Plurality of the media is regarded as a legitimate interest of a Member State under EU law

Member States have introduced a variety of ownership and cross ownership controls in a number of instances including caps on cross-ownership between newspapers and radio/television, both at national and regional levels.

Article 21(3) of Council Regulation 4046/89 of 21 December 1989 (latest amendment on 20.1.2004) on the control of concentrations between undertakings reads: "...Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law...plurality of the media...shall be regarded as legitimate interests...". The Television without Frontiers Directive contains a similar provision in its recitals.

Controls put in place by Member States concern intra-media and cross media ownership, choosing different approaches and /or mixes of limitations on audience share, share capital and number of licences held.

It should be noted that the European Parliament has requested effective measures to ensure media pluralism in a series of resolutions, the most recent report dated 5 April of this year (Report by the European Parliament on the risks of violation, in the EU and especially in Italy, of freedom of expression and information, by the Committee on Citizen's Freedom and Rights, Justice and Home Affairs¹).

Let me then move to my focal point.

The role of Competition Law

Major EU controls in the media sector fall within the ambit of EU competition law. All areas of EU Competition law are concerned:

- The Merger Regulation
- Antitrust (Articles 81 & 82 EU Treaty)
- Article 86: the EU Treaty's public service (services of general interest) provisions, and State Aid review (Article 87)

As regards the Merger Regulation—the control of concentrations—relatively high thresholds of combined and individual turnover must be reached to trigger the Union's intervention. Otherwise review falls to the Member State's Competition Authorities, according to their national competition laws.

As regards antitrust—the checking of agreements and the abuse of dominant positions—under the decentralisation of EU antitrust enforcement as

¹ European Parliament, PE 339.618/DEF, 5 April 2004, available at www.europarl.eu.int

effective of 1st of May 2004, the national anti-trust authorities are bound to play a much larger role in this respect in the future. The European Commission will concentrate on lead-cases and cases of European dimension and/or interest.

As regards Article 86, the White Paper on services of general interest issued in May of this year² has set a new framework within which to conduct the survey of the activities of public enterprises, including public broadcasting.

And,

As regards the application of the Union's State Aid rules in the sector, particularly to licence-fee financed public service broadcasters, the Altmark ruling³ of the European Court of Justice of last year has detailed principles and sets a clear and strict framework.

The Commission has in fact dealt with a number of major transnational and global concentrations in the TV / broadcasting sector, and concentrations in premium content rights, such as football rights and Olympic Games.

Kirch/Bertelsman/Premiere, Vivendi/Seagram and AOL / Time Warner may stand as examples of the screening of the giant global concentrations in the media field during the boom years of the late nineties / early 2000. The UEFA Champions League Decision of last year was a major milestone to prevent concentration in the sports rights market. And of course one must mention the recent scrutiny of the consolidation of pay TV platforms, such as Telepiu /Stream in Italy under the EU's merger regulation.

² White Paper on services of general interest, COM(2004) 374, 30.4.2004; available at www.europa.eu.int/Comm

³ ECJ, case C-280/00 Altmark Trans, 24 July 2003

Press sector

In the press sector, Commission intervention under competition law has been more limited to date, even though a number of cases have been dealt with at European level and by national authorities under national antitrust law.

The major competition issues that we encounter in the print sector are:

- Horizontal concentrations, becoming a more and more important feature in current strategies of major publishing concerns, often still under the trigger level of EU merger control
- Vertical foreclosure / vertical distribution agreements, a long standing feature of newspaper / magazine distribution and one of the most effective ways to exert market power and to obtain a gatekeeper position, limiting ultimately the plurality of the press,

Linked to this:

- Problems in access to dominant distribution systems, very often the very power base of dominant newspaper publishing houses.

Issues at stake are exclusivity practices in distribution systems, vertical price fixing and other vertical restrictions, and, often, territorial restrictions: all of these issues that have to be reviewed in the light of the basic principles of EU competition law. Let us not forget that EU competition law is very strict in banning hard core violations, such as price fixing, market partitioning and output restrictions.

The record of the EU to date in breaking up these market barriers has been limited. However, this does not mean that these issues will not have to be addressed more intensely in the future.

The Binon case⁴ of the eighties has set some clear guidelines for the sector about what can be tolerated under competition scrutiny and what clearly cannot: in particular there can be no quantitative restrictions and no trans-frontier vertical price fixing in selective distribution systems.

Before turning more specifically to the challenges ahead, let me have a short look at another strand of EU competition law, of crucial importance for the sector, State Aid control.

State Aid control

Licence-fee financing for public broadcasting is subject to scrutiny under EU Article 86 and State Aid scrutiny (Article 87), within the limits now set by the Altmark ruling. The Commission's communication on the application of EC State Aid rules to public broadcasting of 2001⁵ and a number of case decisions since that time have set forth the Commission's approach, even if the communication must now be read and interpreted in the light of Altmark and the principles set in that ruling.

In short, Member States have:

- The authority to define public service goals in broadcasting

⁴ ECJ, C-243/83, Binon / AMP, 1985

⁵ Communication from the Commission on the application of State aid rules to public service broadcasting, OJC 320, 15.11.2001, p.5; available at http://www.europa.eu.int/comm/competition/index_en.html

But:

- Transparency must be ensured, and clear accounting principles followed
- Fair competition principles must be upheld when competing with the private sector

and the Altmark ruling has added an efficiency test as a new basic requirement.

The general principle is that the dual nature of the market must not be tilted by public intervention in an unfair manner. This is also true when public broadcasters compete with private broadcasters and publishers for advertising revenues.

Let me then come to the main area of concern:

Concerns about growing concentration / special concerns regarding the new Member States

The European Parliaments Committee on Citizen's Freedom and Rights has put this issue very bluntly in its April report⁶.

It welcomes "the contribution of commercial media to innovation, economic growth and pluralism, but notes that the increase in the concentration of the media, including multi-media multinationals and cross border ownership threatens media pluralism."

⁶ see above

We are facing three fundamental challenges:

- A squeeze in the advertising markets and a consequential intensification of competition for that major revenue resource
- Emergence of large multinational groups, particularly also in the press sector
- Consolidation after the media bubble as regards a number of pay TV platforms but also as regards the New Media

We are facing a special situation in New Member States, particularly in the print sector.

- We have seen after 1989 the successful development of the private sector and reforms of public service broadcasting, both making a major contribution to plurality in these countries
- Since the mid-nineties there is a growing presence of large media groups from Western Europe
- This seems to lead to concentration trends in a number of countries, particularly—and often unnoticed—in regional newspapers

Let me recall the general EU position.

We are positive on restructuring,

But:

Not at the price of market foreclosure and permanent damage to plurality.

Antitrust review both at national and at EU-level will become more important, as will national plurality controls.

This leads me to the outlook.

Outlook

We are seeing a wave of consolidation that raises new concentration concerns. There are indications that these are particularly acute in certain of the New Member States.

As regards the latter, the report of the European Federation of Journalists on Ownership, Policies and Strategies in Central and Eastern European Media of June⁷ of last year makes interesting, and sometimes alarming, reading.

At the same time, there is:

- A growing sensitivity in the European Parliament with regard to media plurality, as shown in its most recent reports and resolutions
- At EU-level the reform of the Television Without Frontiers framework will influence substantially the future development of the media sector as a whole, as shown in the Commission's Communication on the future of European Audiovisual Regulatory Policy of last December⁸

⁷ European Media Ownership: Threats on the Landscape, European Federation of Journalists IFJ, September 2002; available at www.ifj.org

⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy (COM(2003) 784, 15.12.2003); available at http://www.europa.eu.int/comm/avpolicy/index_en.htm

- There is a need for an intensification of antitrust supervision in national markets, due also to the decentralisation of EU antitrust powers that has become effective since the 1st of May.

As regards the latter, let me again quote here the European Federation of Journalists' report referred to above: "limiting concentration of ownership / cross ownership and developing antitrust legislation a European level is a precondition for democratic and independent media in Europe"

This leads me to a more general remark.

Only a competitive market structure is a sound basis for sustainable plurality.

The underlying market power structures in the media sector are determining the development of the sector—and ultimately the efficiency and sustainability of media specific pluralism controls. Abuse of market power and market foreclosure must be corrected at the root—and these roots are largely outside the reach of any media specific regulation. However, they will, in many cases, be well within the reach of horizontal competition law instruments. Without efficient anti-trust application across the board, media specific pluralism controls risk being bypassed rapidly by actual development of market power—as the development of the media sector in a number of European countries over the last years has demonstrated where we have seen substantial concentration in spite of elaborate pluralism controls in place.

In other words, applying strict competition controls to the sector and the related upstream and downstream markets is a necessary pre-condition for achieving effective and sustainable pluralism. This does not mean that competition controls of market development can replace in all cases media

specific controls. In many cases specific controls will still be needed to secure media plurality. We will have to keep the balance of competition controls and media specific regulatory controls in mind.

Vigilance will be needed at national and European levels, in order to keep our media markets open, guarantee plurality, freedom of information and an effectively free media and press.