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M e d i a i n E u r o p e :
M e d i a a n d E U C o m p e t i t i o n L a w
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**Conference on Media in Poland by the Polish Confederation of
Private Employers**

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I) INTRODUCTION

I am particularly grateful that I can make a few comments on EU policies in this sector at this conference that will take a look at media in Poland—the largest of the future accession countries and therefore, of course, of central interest to the EU.

Let me focus on five areas:

- A few remarks on media developments in the EU, setting the scene;
- A short look at the general legal environment at EU level that any approach to media in Europe should now take into account;
- Some more remarks on the key role that EU competition law—and more generally anti-trust law at EU and national levels—have come to play since the mid-nineties in the sector;
- The complementary role that EU policy and national media regulation are bound to play in the media sector;

and

- I would like, as time allows, adding a few comments on where trends in regulation in the EU point.

II) THE DUAL STRUCTURE OF BROADCASTING IS NOW FIRMLY ESTABLISHED

We have seen the initial structure of the eighties—national public broadcasters based on licence fee income—evolve into the dual structure of the nineties, adding private broadcasters based on advertisement revenues. By the end nineties, pay-TV and pay-per-view revenues have emerged as a third main revenue stream.

Digitisation is amplifying further multiplication of channels and supply. The resulting new opportunities of packaging of offerings, in fields like special interest channels, video-on-

demand, and interactive is leading to repositioning and alliances across sectors—and that includes radio, Internet, and print.

Let me summarise the current picture in a few figures.

By the end of the nineties, the total media sector in the EU represented some 145 billion €, out of which roughly a third for television and radio broadcasting, and another third for magazines and newspapers—even if figures in the sector are notoriously unreliable, given the often different statistical base.

In television / broadcasting, some 45% of revenues now come from advertisement, the rest in nearly equal parts from public broadcasting fees and from pay-TV subscriptions.

The diversification of revenue streams is reflected by a diversification of platforms and products:

- Free TV;
- Pay-TV / pay-per-view;

Soon,

- Interactive;

And, perhaps earlier than we assume,

- Broadband Internet as a mass-market.

The dynamics of the sector are also shown by looking at the forecasts for digital TV homes in the EU.

Some sources predict by 2004 near 40 million digital TV homes in the EU—satellite, cable, terrestrial, up from 15 million at the start of this decade.

The entry of digitisation into the television sector is leading to substantial re-arrangements of the sector in Europe, and this shows up in the sector's agenda for this decade—and the resulting trends in regulation.

III) PLURALISM, CULTURAL IDENTITY AND CITIZEN'S CHOICE ARE KEY GOALS

Let me here take a step back and come to my next point.

The dominating themes in the media discussion in the EU are clearly—and this is true for *all* Member States, and I believe not different from the debate in this country:

- Pluralism, the basic public goal in the media sector;
- Cultural diversity, standing for the preservation of national identities;
- Enhancing citizen's choice, where we have to tackle the task to give citizens access to the new opportunities that innovation and markets open up.

And it is on this last item that regulatory development is likely to concentrate. A major issue in recent debate has been how to ensure best choice in times of convergence of different markets—particularly in the underlying electronic communications infrastructures.

IV) MAIN ELEMENTS OF THE FRAMEWORK OF MEDIA REGULATION IN THE EU

There is no time to go into any detail on the EU legal framework in the media sector, as it currently exists. The essentials are:

- The basic freedoms enshrined in the Treaty, and particularly the freedom to provide services;
- EC Competition Law;

- The Maastricht & Amsterdam Treaties: the provisions relating to culture and the protocol on public broadcasting;
- Post Nice: the Charter of Fundamental Rights, and particularly the freedom of expression and information (Article 11)

And, closely connected,

- The European Convention of Human Rights (Article 10).

In concrete terms, main elements / developments were:

- The Television without Frontiers (TWF) Directive of 1989 and the Copyright Directive for Satellite Broadcasting and Cable Retransmission and the subsequent line of Directives, well known to all involved in media in Europe;
- The debate on media concentration: the Green Paper on pluralism and the debate of the mid-nineties;
- A growing series of Decisions under the EU's Merger Regulation and anti-trust provisions;

And

- Liberalisation of the EU's telecommunications market, the underlying infrastructures of the media sector, leading to a further development of regulatory concepts.

The Television without Frontiers Directive remains the centrepiece of the EU's legal framework in the sector:

- It is focused on a trans-frontier perspective;
- Is harmonising provisions concerning advertisement, sponsoring, protection of minors;

- Contains, in its article 4, the famous European content provisions ("European Works")
- And it has added in its 1997 Amendment, access rights to events of general public interests ("the events of major importance for society"), and created for that purpose the instrument of the "list of designated events" (article 3a)

A Review of the Television without Frontiers Directive is foreseen for this year—and this is bound to set major guidelines for the future audio-visual regulatory framework at EU level.

Another major line was the debate on media concentration. Let me be clear:

- The basic Treaty provisions state that ownership issues fall with Member States;
- The Commission addressed the issue in the Green Paper on pluralism and media concentration in the early nineties. The subsequent proposals of the mid-nineties remained, to a large extent, inconclusive.

The overall result was that Member States retain the right to issue national media laws relating to limits on media ownership, both within sectors and on cross-ownership. Plurality of the media is regarded as a legitimate interest of a Member State under EU law and falls under its authority.¹

But, the European Parliament has, in the context of that debate, in a number of resolutions also warned that divergence in national legislation could jeopardise the functioning of the Internal Market.

A number of Member States have put in place controls concerning intra-media and cross media ownership, choosing different approaches and/or mixes of limitations on audience

¹ Article 21(3) of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings ("Merger Regulation", as amended by Council Regulation 1310/97 of 30 June 1997): "...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 ...

shares, share capital, and number of licences held. We will have at this panel a presentation from one of the major Member States that will show how this works in practice.

V) COMPETITION LAW IS PLAYING A GROWING ROLE

Let me concentrate then on one major EU instrument in checking media power that has emerged from this clarifying debate—EC Competition Law.

The major EU controls fall with the Merger Regulation, the control of public enterprises under Article 86 and the State Aid Provisions, and the anti-trust provisions under Articles 81 and 82 (anti-competitive agreements, abuse of dominant positions).

All lines of EC Competition Law are concerned:

- The Merger Regulation, the control of concentrations;
- Anti-trust (Articles 81 & 82), checking agreements and abuse of dominant positions. With the planned decentralisation of enforcement under the reform of Regulation 17 governing the application of these rules, the national anti-trust authorities are bound to play a much larger role in that respect in the future;
- Article 86, the EC Treaty public service provisions, as exemplified and explained by the Commission's communications on services of general interest;
- And,
- State Aid control under EC Competition Law.

VI) CASES

The restructuring of the media markets in Europe has led to the creation of large media groups of European dimension. "European dimension" (that triggers EC merger control) is defined under the EC Merger Regulation by:

- Certain thresholds: 5 billion € world-wide, 250 million € each (of at least two parties) in the EU; and unless the so-called "two thirds rule" applies;
- Lower thresholds in certain multi Member States cases where more than two Member States are concerned.

Below that level, in most cases national merger control will be triggered.

As a consequence, we have seen major Decisions under the EC Merger Regulation since the mid-nineties. The focus has been on: pay-TV markets, new platforms, and horizontal and vertical foreclosure effects.

Let me quote a few major Decisions²:

- *Kirch / Bertelsmann / Première*:
prohibited in order to check market power in the German pay-TV market;
- *BskyB / Kirch*:
green light after concessions concerning access to Kirch's pay-TV platform (in particular the technical platform);
- *Vivendi / Canal+ / Seagram*
green light, subject to conditions. At stake was, inter alia, Vivendi / Canal+ dominant position in certain European pay-TV markets ;
- Early cases:
Nordic Satellite Distribution concerning TV satellite transponder markets, certain national cable-TV markets, and distribution of satellite TV markets: *prohibited*;
Endemol & Veronica, with at stake the strengthening of a dominant position in TV and advertisement in a national TV and advertisement market, and the TV production market: *originally prohibited*, allowed after a change of the original project, taking account of the competition concerns.

² Available at DGCOMP website http://www.europa.eu.int/comm/competition/index_en.html

Without going into further detail on market definition and measurement of market power in these cases, let me draw one overall conclusion on the Commission's position:

- The Commission demonstrated that it was positive on restructuring and build up of new platforms,
- But
- It made also clear that it would not allow monopolisation either horizontally, nor vertically.

VI) ISSUES OF DEFINING MARKETS AND ENSURING ACCESS ON THE AGENDA

Drawing some further conclusions from these cases, a main issue concerns market definitions. Market definitions in the media sector are in full evolution, even if major distinctions have been established. One major distinction differentiates free-TV from pay-TV. In free TV the position of parties in the advertisement market was in many cases decisive. This also meant that audience shares were a decisive criterion for assessing market power in television and the advertisement markets.

A number of neighbouring markets have been identified—acquisition of rights, production, technical services for pay-TV, transponder markets and others, many of them outside the traditional media arena proper, but now of decisive importance for media deployment and control.

These new concerns are even more emphasised by those cases that are carried forward by the Commission under the second line of Competition Law: checking agreements and abuse of monopoly positions under Articles 81 and 82.

Those current cases mainly concern:

- Joint buying of content;

- Joint selling of rights to content, especially for football matches and other premium sports events;
- Link up of upstream content and downstream distribution platforms.

At stake is:

- Access to premium content has become decisive for the new TV and video platforms;
- Access to sports rights tops the agenda;
- Availability of rights for distribution of content via broadband Internet and UMTS is becoming critical for rapid deployment of these new media that are at the centre of the EU post-Lisbon growth strategies.

This demonstrates the importance of the new content bottlenecks for anybody launching into the new markets. Thirty-five percent of the public say that they are interested in football. Attention for motor sports (and particularly Formula One) has dramatically risen throughout the nineties from 15% in the early nineties up to current 40%. Interest in tennis has fallen from 35% in the early nineties but is still at 15%.

The anti-trust cases dealt with by DGCOMP's media unit show the new importance of sports rights for the whole of the media sector—and they also demonstrate that the agenda of an effective and modern media policy and anti-trust action is now largely dominated by rights to content issues. Nearly a third of all current media competition cases, dealt with under anti-trust (i.e. agreements or abuse of dominant positions) concern now sport rights, and selling and buying of those rights.

Commissioner Monti has made it very clear, on a number of occasions: *exclusivity of a long duration and for a wide range of content rights is unacceptable* because it is likely to lead to market foreclosure.

VII) THE ROLE OF PUBLIC BROADCASTING HAS BEEN CLARIFIED

Finally, a few words on Competition Law and public broadcasting. This concerns the application of EC article 86 (surveillance of public enterprises and enterprises with special or exclusive rights), and state aid scrutiny (article 87 ff).

The Commission has clarified its position in its Communication on the application of EC State Aid rules to public service broadcasting of last autumn.³ The Commission's position is based on the Protocol on Public Broadcasting annexed to the EU Treaty since its Amsterdam revision.

I believe it is worthwhile to quote from that protocol in full because it best defines the relationship of the European Union and public broadcasting.

The protocol says:

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.

This is reflected in the State Aid Communication:

- Member States have the authority to define public service goals in broadcasting, but;
- Public broadcasting is subject to substantial transparency requirements;
- Fair competition must be ensured when competing with the private sector,

Or, in more precise terms:

³ 2001/C 320/04 (OJC 320, 15.11.2001)

- There must be a clear specification of the public service mandate, and an independent regulator to survey it;
- Markets must be allowed to develop freely, as far as the performance of that function is not endangered. This is particularly true in times of converging markets.

VIII) CONVERGENCE WILL SHAPE FUTURE CONCEPTS

During the last four years, Europe has lived through a major debate on the issue of convergence of markets in the telecoms / media / Internet fields. As a result of this a new electronic communications framework is currently being introduced for the telecommunications networks underlying most of the media sector. The very essence of this new framework is that regulation must not separate markets but must allow for their convergence; and, that markets should only be regulated to the extent that standard competition principles are insufficient to cope with market power and the abuses that can result.

Inevitably, these convictions—resulting from a very broad debate—will spill over into future regulatory trends in the audio-visual sectors, and they are visible in the communication published by the Commission on audio-visual policy in a digital age⁴.

Main elements of the future regulatory debate in the media sector are likely to be:

- An overriding requirement for a regulator with true independence, both from government and the operator(s);
- Proportionality of regulation: regulate only where indispensable for achieving the public objectives concerned;

⁴ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age", COM(1999)657, 14.12.1999.

- And as a main result from the convergence debate: regulation should *not separate sectors and technologies in a rigid manner* but will have to depend more and more on a *dynamic assessment of actual audience and market power*.

This leads me to my concluding point: the complementary role that the EU framework and national media and competition regulation are bound to play.

Let me summarise those conclusions in some statements:

- Taking account of the European framework will be important, particularly also for the accession countries;
- Media specific concentration controls will remain national responsibility but will have to take account of the development of the general European framework;
- EU and national Competition Law will play a growing role, as markets diversify away from traditional core media market delimitations, and markets converge. Developments in the media markets will depend more and more on keeping upstream content markets open where competition law is the natural instrument to address foreclosure effects resulting from market concentration.
- Close interaction of competition and media authorities will be therefore a must, particularly as definition of markets and audience power will have to become more dynamic. Telecom regulatory authorities will be a third natural partner.
- Concentrate media regulation on areas where anti-trust and merger control cannot by themselves ensure pluralism and citizens' choice. Intensify competition law scrutiny in the related content and advertisement markets that will determine more and more the underlying power structures of the media sector.