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Competition and Web 2.0

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Introduction¹

Web 2.0 is an open-ended concept. It will evolve through a series of Web x.0 development stages. In policy terms its ingredients will be: an open market environment; a ubiquitous broadband infrastructure; and a receptive regulatory framework. Taking all together, we are facing the second wave of the Internet revolution. The net will absorb current telecommunications, media and software applications. On its way, it will radically change existing telecoms, media and e-commerce policies.

Change is inevitable. 90% of youth (age 14 – 19) in Germany now use YouTube, but only 1% of age above 60 % do so. As European society develops and our young generation grows into the decision makers of tomorrow, so the debate on regulation and media will shift.

For the European Union, the new developments have led to a new wave of policy reviews and a growing role of competition policy concepts. The current debate on access to Next Generation Networks is one of them; the future relative weight of ex-ante regulation and application of competition rules is another; the future role of Public Service Broadcasting and equal opportunity of entry into the future media a third.

Crucial issues high on the agenda

While we have proposals and debate on a broad range of issues, reaching from consumer protection to the telecoms and TV reforms, let me single out from an EU competition point of view three key issues in current development:

- 1) *Next generation networks*, where from a competition perspective the task is to make the transition without creating new fibre optic monopolies;
- 2) *Next generation services*, where the new freedoms gained could be rapidly undermined by restrictive practises and abuse of market power;
- 3) *Next generation values*: which role for the values created in the media sector by our public broadcasters—what is the right balance in a changed media environment?

1) Next generation networks

Next generation broadband networks will be the cornerstone of the future development. Nearly 40% of households in the EU now have broadband access—though with substantial variations between Member States. However only 1 million local lines are currently fibre-based. This shows the magnitude of the task ahead.

The European Commission in 2008 submitted recommendations on the rules to apply to Next Generation Networks.² Let me therefore limit myself to emphasise the points important from a competition perspective.

The basic approach of the EU Electronic Communications Framework continues to apply, based on the interaction between competition law and regulation: regulation not on a technology basis but on a competition based market analysis and the concept of Significant Market Power (SMP). The three criterion test of ex-ante regulation remains key. This implies regulation only in case of:

¹ The opinions put forward in this article are the personal views of the author.

² European Commission, press release IP/08/1370, 18.9.2008, "Broadband: Commission consults on regulatory strategy to promote high-speed Next Generation Access networks in Europe".

- high and non-transitory entry barriers
- no trend towards effective competition within relevant time horizon
- competition law offering no effective remedy
- otherwise: sun-setting of regulation.

This means that the discipline of ex-ante regulation is to be maintained. In other terms:

- No regulation holiday

But

- Regulation can go away when there is competition

And

- Investment in infrastructure by competitive forces will be encouraged and remunerated with risk-based returns.

This also means that the draft recommendation emphasises access at the lowest possible level, as far as possible directly at the level of the ducts—but it will not allow that this will be taken as a pretext to refuse bit-stream access where otherwise there would be no competitive alternative.

The approach is consistent with the general approach taken in the reform of the Electronic communications framework now underway³:

- focusing regulation on wholesale markets (regulation reduced from 18 to 7 markets, adopted by the Commission in Spring 2008⁴)— reducing regulation;
- functional separation of network and services as a possible remedy— opening for more local competition;
- establishment of more European coordination of the remaining regulations— a more coordinated approach; and
- more rational use of radio communications frequencies for the wireless component of the future infrastructure.

Alongside ex-ante regulation, EU antitrust law continues to apply, with:

- screening for abuse of dominant positions;
- The DT decision⁵ stands as an example as well as other more recent cases, where the Commission has punished margin squeeze leading to the exclusion of competitors, as has been seen last in the 2007 Telefonica case⁶;

³ European Commission, press release IP/07/1677, 13.11.2007, "Commission proposes a single European Telecoms Market for 500 million consumers" and IP/08/1661, 7.11.2008, "Telecoms Reform: Commission presents new legislative texts to pave the way for compromise between Parliament and Council"

⁴ OJL 344/65, 28.12.2007, Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC)

⁵ European Commission, press release IP/03/717, 21.5.2003, "Commission fines Deutsche Telekom for charging anti-competitive tariffs for access to its local networks" and Decision OJL 263/9, 14.10.2003.

- Antitrust law applies wherever specific regulation cannot control abuse.

The draft Next Generation Access recommendation which has been submitted under the joint umbrella of telecom regulation and competition law demonstrates the soundness of the basic principles of regulation in place in Europe and the extension of the framework to next generation networks:

- The virtues of technology neutrality and an antitrust based approach: Technology neutrality is key, in order to keep future developments open;
- Focus on avoiding the build-up of new monopolies in the future broadband networks.

We need the right balance between service competition and infrastructure competition, in an area where the networks largely must still be built up.

We also have to be careful about the Digital Divide. For the European Commission, this also implies that we need a balanced application of the EU state aid rules in broadband deployment.

During the last five years the European Commission has assessed nearly 40 aid measures for the deployment of broadband, many of which were in the UK. It has approved all but one. The Commission has developed a strict, competition based assessment approach which weighs, in line with the general approach under EU State Aid assessment, the objective of deployment of broadband against possible crowding out of private investment.

Our starting point is assessment according to the so-called "white, grey, black area" approach:

- White (no competing network): this normally leads to a positive decision for rural areas;
- Black (competing broadband networks in the area): the Commission will often only be able to give agreement if the public investor acts like a private market operator would act. In the negative decision concerning a Dutch urban network this was not the case;
- Grey (some competition): this needs further analysis and will have to be decided on the facts of the case.

The Commission has generally also requested further conditions to be fulfilled for approving a public subsidy approach. In particular:

- technology neutrality, in line with the general approach;
- non-discriminatory access for all competitors to the networks built.

In short:

⁶ European Commission, press release IP/07/1011, "Antitrust: Commission fines Telefonica over Euro 151 million for over five years of unfair prices in the Spanish broadband market" and Decision at http://ec.europa.eu/competition/index_en.html

- The European Commission is favourable to public support of broadband deployment, particularly in rural areas

But

- It will not admit that under the disguise of broadband deployment competitors are pushed out of markets and competition is reduced.

The Commission is currently assessing the first Next Generation Networks—and these will give the opportunity to further develop the Commission's approach to subsidies for building these networks.

II) Next generation services

Web 2.0 services and subsequent Web x.0 service generations are a moving target. Let us therefore look at some aspects of current e-services—e-commerce. For the EU, a major current issue is the continuing effective separation of Internet markets along national borders:

- 56% of EU consumers with Internet access buy domestically on the Internet
- But only 13 % buy internationally

This means that the value of the Internet for EU market integration is far from realised. European Competition Commissioner Kroes has raised the issue at a high level meeting in September 2008 in Brussels with industry leaders from both the online music and the e-commerce world⁷. The issue is how far current distribution agreements and strategies lead to this market fragmentation that undermines in Europe the very freedom of the Internet. At stake are exclusive and selective distribution agreements which may impede on-line sales—be it by banning Internet sales altogether or by onerous conditions like bundling internet sales with brick and mortar distribution. At stake is also the working in practice of the Community guidelines on vertical restraints which are applicable to these agreements under EU competition law and which are up for review in 2009. At stake is further the issue of Community-wide licensing for copy righted services and music and video and the operation of the rights management companies in Europe.

As is well known, EU competition law has been applied to a series of high profile cases:

- Microsoft⁸, which does not need more explanation and where one of the main issues was to keep the software development open.
- iTunes⁹, where the issue was precisely the separation of markets in the EU by national borders for music sales. The case was settled by elimination of the price differences for the buyers of music resulting from that market fragmentation.

⁷ European Commission, press release IP/08/1338, 17.9.2008, "Competition: Commissioner Kroes hosts consumer and industry Roundtable on opportunities and barriers to online retailing and the European Single Market"

⁸ European Commission, press release IP/04/382, 24.3.2004, "Commission concludes on Microsoft investigation, imposes conduct remedies and a fine" and Summary Decision, OJL 32/23, 6.2.2007

⁹ European Commission, press release IP/08/22, 9.1.2008, "Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe"

- CISAC¹⁰, the prohibition decision concerning certain clauses in the framework agreements of the European rights management companies which led to the effective partitioning of markets by the rights management companies and the resulting lack of EU-wide licenses for online services.
- Google/DoubleClick¹¹ where the Commission found that the merger would not worsen the competitive situation in the on-line advertising markets concerned and therefore cleared the transaction, in line with the finding of the US antitrust authorities.

Google /DoubleClick shows the global dimension and complexity that next generation cases will have. In this case the European and US antitrust authorities worked in tandem, and demonstrated that in the competition field the world-wide cooperation of antitrust agencies has the required capability of scrutiny—even if the privacy aspects of the case could not be dealt with under the EU merger control procedures. Close world-wide cooperation will be needed to match the emergence of the new Internet giants of today.

This raises also the issue whether the new participative nature of Web 2.0 services will weaken or strengthen the position of the large global platforms which have evolved recently. Will the emergence of many to many services mean less market dominance by the underlying platform companies, or more? Only the analysis of future conduct will show.

III) Next generation values

We need a thorough debate on how to carry forward traditional values into the new environment.

Let me here briefly comment on one aspect only, the future public role in the new media landscape. What is the future public role in the sector, and more particularly the future role of public broadcasting in a Web x.0 type environment. At issue is the public value created by traditional licence fee funded public broadcasting vs. the effects of subsidised entry into the new Internet fields.

In spring 2008, the European Commission launched a review of its broadcasting communication on publicly funded broadcasting—one of the major public subsidies in the EU. The basic orientation was to give also Public Broadcasters their full role in the new web environment, in order to maintain the balance in Europe between public and private presence in the media field; however subject to proportionality and market impact tests, in line with the so-called Amsterdam Protocol.

Some of the key issues at stake are:

- the future definition of the PSB remit, to be based on real market impact analysis;
- the consistency and integration of Public Broadcasting into the overall Internet and media approach;
- the transparency of the future operation of subsidised services in the new environment.

¹⁰ European Commission, press release IP/08/1165, 16.7.2008, "Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users" and Decision at http://ec.europa.eu/competition/index_en.html

¹¹ European Commission, press release IP/08/426, 11.3.2008, "Mergers: Commission clears proposed acquisition of DoubleClick by Google" and Decision at http://ec.europa.eu/competition/index_en.html

The Commission has initiated a broad consultation exercise and substantial discussions since January 2008 on a new draft of the EU's broadcasting communication which was published for consultation in November 2008¹².

Some final comments

Looking at the issues today on the agenda for the new telecommunications, media and Web x.0 environment, it seems that the common theme across the issues is equal opportunity:

- For the new entrants or the incumbents when wanting to enter the new markets. The issue of access to networks and net neutrality is one specific facet in this more general context.
- For the consumer who must be empowered to use the new competitive opportunities.
- For the creators of the next generation Web x.0 platforms and services that will have to evolve within the framework we are now developing, both at European and national level.

We need adjustments and clarification on a broad front reaching from consumer protection legislation, privacy and security to the frameworks for electronic communications and audiovisual services.

The European Union has brought much of this on its way and national debate will carry this forward into national legislation. The basic concepts of the EU response to the fundamental changes in our networks will hold. Technology neutrality is a common denominator of the:

- EU's Electronic Communications Framework;
- reformed EU Audiovisual Media Services Directive; and
- the application of EU competition law in all of its forms, be it merger, antitrust or state aid control.

However for the EU the challenge is broader. The challenge is to use this unique opportunity of major change for bringing Europe more closely together.

Overcoming the centrifugal forces in the EU Electronic Communications Framework is proposed in the Reform Package which is now on the table of the European Parliament and the EU Council of Ministers; identifying and lifting obstacles to e-commerce that currently continue to partition the markets in the EU; empowering consumers to use the new services; designing policies for the Europe-wide deployment of broadband and avoiding the digital divide, both in our urban communities and in our rural areas; and keeping abuses of existing or newly emerging dominant market positions in check which would otherwise undermine Europe's network futures and jeopardize the new freedoms gained. Those are the tasks likely to dominate the European web agenda.

However let me make three caveats for the regulation needed:

¹² European Commission, press release IP/08/1626, 4.11.2008, "State aid: Commission consults on revised rules for state funding of public service broadcasting"

1. We have to fill loopholes to protect market fairness and the consumer. But at the same time, we must reduce regulation, in order not to stand in the way of Web x.0 and to maintain the basic Internet freedoms. The leitmotiv must be: less but better. This should be kept in mind also in times of economic crisis when many are longing for more regulation.
2. Given the uncertainties on future market developments, technology neutrality must be maintained as the overriding principle. Technology specific regulation must be reduced to the minimum. Otherwise we will run the risk to regulate the future with the concepts of the past.
3. In a global network, the national dimension is insufficient. National focus means loss of scale and sub-critical concepts.

In Europe, the EU dimension is offering a common platform for discussion and policy development. At the global level we will have to rely on the gradual evolution of international Treaties, Codes and standards. However we will have to be careful that these Codes and standards will not be captured by powerful market interests based on very strong market positions on a global scale. International anti-trust cooperation is a must to keep markets open and freedoms alive.