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Application of EU Competition Rules to Broadcasting

- The Transition from Analogue to Digital

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Introduction

The transition from analogue to digital is a decisive transformation of the media sector, in this country as across the European Union. It can redistribute the cards and create new growth, more pluralism and new services, or it can leave the cards in the same hands and even strengthen existing sometimes very strong market positions further. Given the growing importance of the media and communications sector in our economies and our societies, whichever way the transformation takes, it will be a major influence on the European Union's future competitive environment, and on its ability to reach the Lisbon objectives.

Let me make remarks on four components of this development:

- The basic media framework at EU level within which this transformation takes place across Europe
- The role of competition law
- The need for a level-playing field during the transition as the major criterion

And

- The special attention which should be paid to the emergence of the New Media, Internet and 3G, in that context.

Pluralism control falls under the Member States' remit...

Media is an area of shared responsibility between the European Union and the Member States. While EU legislation in many areas, such as in internal market and competition issues, sets certain framework conditions, the thorny issue of media concentration controls falls under the responsibility of the Member State.

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 nineties on this issue.

The overall outcome at the time was 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

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.

Indeed, about half the Member States have introduced a variety of ownership and cross ownership controls in a number of instances, including limitations on shares of audience, percentage of share capital held and on the number of licences, and sometimes a complex mix of all of these measures. Others are maintaining caps on cross-ownership between newspapers and radio/television, both at national and regional levels. In all cases the actual determination of which audience and media are counted in or not, is decisive for the actual effect.

This is often a difficult and complex process, as the well known history of concentration controls in this country demonstrates. But let me also underline. The rights of Member States to exercise their chosen controls in this area also carry the responsibility to establish effective controls and to implement them in practice—particularly as we transit into the digital age. 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).

The basic framework for the media at EU level is set by the Television without Frontiers (TWF) Directive, and the associated Directives. The TWF Directive is now under review, particularly with regard to adjusting its provisions, such as on advertisement, to the new digital environment.

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

And one should add the new rules set by the Electronic Communications Framework across the EU, here in Italy implemented by AGCOM, the Autorita per le Garanzie nelle Comunicazioni, and home in this city.

In the medium term, an overarching framework at EU level will be set by the new Constitution, once adopted. As is well known, it includes in Title II the Charter of Fundamental Rights. Title II / Article 11 stipulates "... The freedom and pluralism of the media shall be respected".

However Competition Law is vital for the development of open market structures...

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.

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

- The Merger Control 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 - and the Italian Competition Authority (the Autorita

Garante della Concorrenza) is of course playing a key role in this area. As regards antitrust—the checking of agreements and the abuse of dominant positions—under the decentralisation of EU antitrust enforcement as effective of 1st of May 2004, the national anti-trust authorities are bound to expand their role in the future. The European Commission will concentrate on lead-cases and cases of European dimension and/or interest. A major part of enforcement of EU antitrust rules will fall from now on to the national competition regulatory. This just emphasises the key role that the Autorita Garante is bound to play in the transition.

As regards Article 86, the EU Treaty's provision on public service, the EU 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. State aid control is bound to play a wider role during the transition, in making sure that well intended schemes for accelerating the transition, such as subsidised deployment of equipment, do not turn into distortion of the market, with the negative effects that this inevitably would bring.

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

The Commission has 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, not least here in Italy, where the merger of Telepiu /Stream, screened first under national antitrust and then under the EU's merger regulation, has led to the formation of Sky Italia, for the time being the major digital platform in this country.

Let me turn after these remarks on the general role of competition law, to my third point,

The transition must not strengthen entrenched market positions further...

The transition from analogue to digital is the major media issue for this decade, as I believe we all agree. It sets an entirely new basis for the whole of the media sector of the future.

Across the EU we have now some 20% of TV households gone digital, with satellite across the board the major platform for the time being, accounting for 66% of this, cable in a number of countries important but substantially behind, with some 25% averaged across the Union, and Digital Terrestrial still at only some 10%, after a well known very difficult start in a number of countries, but now rising and moving from pay TV services into free TV.

This country is playing a major role with some 15% of TV households having digital access, still nearly all of them via the satellite platform based on pay TV. But with the plans for digital terrestrial television—DTT—now in place by both groups of the free TV sector, and with new vibrant entrants based on fibre optics and DSL, Italy has the potential to become soon a forerunner in the overall development towards digital in the EU.

The European Commission has identified a number of key elements of the transition in its communication of last year on Digital Switchover,⁴ complemented two months ago by a communication on the issue of the standards to be used for ensuring the interoperability of the new digital interactive television services⁵, addressing issues such as MHP (the Multimedia Home Platform standard), APIs (Application Programme Interfaces), and EPGs (the Electronic Programme Guides), all thorny issues in the transition, well known to the specialists. I do not propose to go into these issues in any detail, even if some of them will clearly pose competition issues. Suffice it to say that in both communications the European Commission at this stage of development relies in essence on the Member States to push the development, and on the method of open coordination between them. Neither does the Commission for the time being propose an EU wide time-line for the switch-over, nor does it intend to make at this stage the home platform standard mandatory.

⁴ Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'), COM(2003)541, 17 September 2003

⁵ Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions on interoperability of digital interactive television services, COM(2004)541, 30 July 2004

Let me concentrate here, within the time slot I have, on the core problem of the transition in competition terms, as it currently seems to come up on the agenda.

As digitisation multiplies the number of available channel capacity by a figure of 5 - 8, the main concern under a competition perspective must be to transform this new multitude of channels into a truly larger choice for the users. This implies as the major goal of competition policy in the area the maintenance, or creation, of a level playing field during the transition.

Digitisation must lead to more market actors and not to less. It must not lead to the traditional actors, in many instances already immensely powerful, to use the new channels to entrench their positions further, to the detriment of market entrants and the New Media that are developing - such as the new Internet based media providers.

Or, as last year's communication describes a regulatory level playing field: 'Each individual network should not necessarily enjoy the same position in the digital landscape as in the analogue landscape. The objective should be to achieve a fast and efficient switchover.'

During the transition we must strengthen pluralism and a pro-competitive market structure.

Across Europe, we are therefore faced with a very concrete competition agenda for the sector:

- How to grow competition at the different market layers during the digital switch-over;
- How to avoid further media concentration;

And:

- How to allow new market entrance

The latter depends on two essentials:

- Access to critical inputs—content;

And

- Access to distribution—allowing new content providers to deliver content and channels via the new developing platforms.

Where exclusivity is a key economic concept, as in media markets, the danger of market foreclosure by dominant buyers or sellers is omnipresent. This is what happens in the real media markets of today all too often.

We are often faced in the media sector with a complex web of:

- Horizontal restrictions;
- Vertical restrictions;
- And a combination of the two, forming an often highly explosive cocktail.

The decision on Telepiu / Stream⁶ taken under the EU merger regulation stands as a major example of the problems that we are facing during the transition to digital, but also for the safeguards that can be developed.

This horizontal merger of the two Italian satellite pay-TV platforms of last year led to the creation of Sky-Italia, currently the major digital provider in Italy—a case with parallels to the merger of the two digital Spanish pay-TV satellite operators, reviewed under Spanish competition law after referral, and leading to a very parallel outcome.

In this case, substantial new principles were set. The Commission allowed for the first time a merger to near monopoly given the very difficult economic situation for the two platforms at hand and the interest to grow a digital platform and to provide continued digital services to the users. It relied on a series of commitments by the parties as sufficient safeguards to lower correspondingly the barriers to entry and to allow future market entry.

Commitment in two areas were considered essential:

- Safeguards for ensuring access to critical inputs, sport content and film content, for competitors, and
- Safeguards for accessing the digital distribution platform itself—securing opportunities for Third Party providers to provide channels via the new platform.

In order to achieve this,

⁶ Commission Decision of 02.04.2003 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M. 2876 - Newscorp / Telepiù), OJ L 110, p. 73. See also press release IP/03/478, 2 April 2003, "Commission clears merger between Stream and Telepiu subject to conditions"

- exclusivity for key content contracts for the new entity, SkyItalia, was shortened very substantially in time—for top football league contracts (A series) to two years, for premium film content (Hollywood majors) to three years;
- The scope of exclusivity for content that the new entity was allowed to buy was reduced severely. The scope of exclusivities was limited to the DTH (Direct to Home) core platform of new entity;
- the new entity had to commit to a mandatory wholesale sublicensing offer—with prices set at a 'retail minus' level;
- a number of access conditions were applied to the platform and to the related conditional access system—in particular measures to dampen the adverse effect of the proprietary nature of the system, such as commitments to licensing of the technology and to simulcrypt;

And

- Third Parties were allowed to provide channels via the new digital DTH platform.⁷

We are applying similar principles—shortening exclusivities, unbundling, and safeguards against vertical foreclosure—in dealing with the sales practices of the top football leagues, the UEFA Champions League Decision of last year standing as an example.

⁷ Newscorp, the controlling owner of the new entity, undertook also to divest Telepiu's digital and analogue terrestrial broadcasting activities and committed not to enter into any further DTT activities. The Commitments are to be implemented under an arbitration procedure, with a major role for AGCOM, the Italian Communications Authority. Commitments will be in force until 31 December 2011 “unless, upon application of Newscorp, the Commission decided to shorten their duration on grounds that the conditions of competition would no longer justify their continuation.” IP/03/478, *supra*.

Let me insist here on a general point. The transition to digital creates huge opportunities—but it also creates substantial risks for strengthening dominant market positions and locking out competitors. The European Commission's case practice demonstrates abundantly that it is positive, under both merger control and antitrust, on restructuring. But safeguards are needed for avoiding market foreclosure and ensuring opportunities for new entrants.

Under antitrust, we will have to have a watchful eye on bottlenecks, as the transition proceeds:

- Bottlenecks in the allocation of radio frequencies and multiplexes;
- Bottlenecks in access to distribution networks;
- Bottlenecks in access to critical content;
- And, future gateway power generated through network effects.

The new emerging markets—Internet and 3G, the New Media—will need special attention.

This takes me to my forth, and last, point.

The New Media must lead to enlarged choice...

As we move towards digital switchover we are seeing a paradigm shift in European media. We are seeing a shift towards new platforms, new business models, and the New Media, broadband Internet and 3G.

In the European Union, 155 million households are equipped with TV sets. More than 30 million have by now subscribed, or can receive, digital TV services.

Compared to these figures broadband Internet penetration is still in its infancy, in the one digit range in most EU countries.

But penetration could progress rapidly. Some forecasts put penetration by broadband Internet (fixed DSL and cable, and mobile) at fifty percent well before the end of the second half of the decade. The media landscape will then look very different. New Media would rapidly gain in importance, and new markets and additional revenue streams would develop.

We must keep the development towards those new markets open. This gives special priority to our action for the New Media—broadband Internet and new generation mobile.

The EU's new Antitrust Regulation 1/2003 emphasises market orientation and analysis, and the instrument of sector-wide investigations. We believe both will play a major role in securing open markets for New Media and this will become a major future orientation. We have launched a first Europe-wide sector inquiry into the field of New Media via 3G, and we are currently analysing the results of the first investigation phase. Other broad investigations into critical content for the New Media via the Internet will follow.

Conclusion

Let me then conclude. The current phase of transition of the media sector in Europe requires increased vigilance. As operators test the markets and try to achieve the right scale for economically sustainable operation, we will have

to make sure that dominant positions are not carried forward into the new environment and competition is not eliminated during this very process. The issue of access is key to resolving this dilemma, and it is bound to play a crucial role in the approach that is evolving.

With the reform of the EUs antitrust framework that has become effective on 1st May of this year, we will see substantial change and more work sharing between the Commission and the National Anti-trust Authorities, and in this country with the Autorita Garante.

In that way, ground rules for the sector will be set in a decentralised but co-ordinated manner. We have launched studies to support the new network of National Competition Authorities created for that purpose, and we have published on our web site a series of studies on market definitions in the media sector used across the EU⁸.

We will focus in our own work on priority cases in the upstream content market, and work for a complementary role between public interest regulation and application of competition law principles as regards development of access to the new digital downstream distribution platforms—be they satellite, cable, digital terrestrial or Internet broadband.

The market must not be tilted during the transition in favour of any actor. Competitive market structures are a necessary condition for plurality—even if they may not be sufficient by themselves, and efficient specific plurality controls may be required in addition in many cases. Turning the digital transition into more choice and plurality in the media sector will be the key

⁸ Market Definitions in the Media Sector, Comparative Legal Analysis, December 2002 (Bird&Bird)
Market Definitions in the Media Sector, Economic Issues, November 2002 (Europe Economics). Available at <http://www.europa.eu.int/comm/competition/publications/publications/#media>.

task for our institutions in this field, both for national media and antitrust regulators, as well as those acting at the European level.