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Media Concentration & Convergence: Competition in Communications

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Throughout the world, the regulations governing communications and media sectors have been undergoing fundamental reforms. This is not very surprising. In the first place, governments have recognized that by opening up previously regulated markets to competition, competing service providers deliver better products and services to consumers. The service providers also become more efficient and profitable. And their employees become better off. So the emphasis of regulation has shifted away from protection of some broadly defined ‘public interest’ and from public utility management towards opening up markets, ensuring free and fair competition between producers and promoting the interests of consumers.

Secondly, thanks to new technologies and innovation, new products and markets are constantly appearing and the boundaries between new and traditional markets are being redefined.

Thirdly, together with the push towards more open and competitive markets across national frontiers, the development of satellite, internet and digital technology have made it impractical if not impossible to regulate only at a national level. Even international agreements between governments can no longer simply be negotiated on the basis of some pre-planned ‘fair’ allocation. They have to reflect how markets and technologies are developing.

Within the EU, these trends are reflected in changes in the regulatory framework both at national and European level. One common feature across the Union is that every EU Member state now has an active competition authority. And each of those authorities now applies rules which are largely competition-based. The focus of their attention is on agreements which restrict competition, on abuse of market power (abuse of a dominant position in the traditional European language), and on merger control.

At EU level, the Commission has in addition the unique responsibility to control the use of public subsidies which can distort competition and trade within the EU.

From 1st May this year, changes in EC legislation will result in even further convergence and cooperation between the enlarged EU's 25 competition authorities and between them and the Commission.

EC rules on restrictive agreements and on abuse of market power will from then on be applied in their entirety by national competition authorities and courts as well as the Commission if the agreements or conduct affects trade between the Member states (which tends more and more to be the case). As EC law will be applied in parallel to national law, this may favour further convergence in competition policy and, arguably, competition law enforcement across the EU.

In the field of merger control, there is a different allocation of responsibilities between the Commission and national authorities but a parallel move towards greater convergence.

The 'one-stop shop' system which has been in operation now for nearly fourteen years means that mergers above some relatively high turnover thresholds are dealt with exclusively by the Commission on the basis of EC merger law, and those below the thresholds are examined under national merger laws. Some exceptions are made to this when the focus of a concentration is primarily in one Member state. At the

same time, Member states are empowered to take any action to protect media plurality.

The recast EC Merger Regulation which come into effect on 1st May introduces a new substantive competition test ('significant impediment to effective competition'-SIEC) which aims to cover all the anti-competitive effects of a concentration, including those resulting not only from creating or strengthening a dominant position but also from so-called 'non-coordinated' effects on markets where there are only a few players. This test is aimed at the same targets of competition concern as tests under national laws such as SLC ('substantial lessening of competition') or market power as defined in other jurisdictions, such as Germany. Those national authorities who had previously incorporated the previous dominance test into their own merger laws are likely to align these laws with the new test.

The procedures for referring cases between competition authorities are also being made easier so that the authority or authorities best placed to deal with a merger get the responsibility for it. So here again, the EU's 26 competition authorities (the Commission and the 25 national authorities) are developing a framework in which law and enforcement practice are converging.

So competition rules at EU and national level are getting to look more like each other and are likely to be enforced more efficiently including in the media and communications area.

Are competition rules enough to ensure free and fair competition and consumer interests in sectors which have been recently liberalized? The EU's Member States have so far replied to this question with a resounding 'No'. The fact that markets post-liberalization have been dominated by incumbents who are the inheritors of previous public monopoly has led them, as in here in the UK, to put laws in place which give a complementary, and sometimes concurrent role to sectoral regulatory authorities in the supervision and control of corporate behaviour. The telecoms,

energy and financial services sectors are the prime examples. Some EU countries have merged, or are thinking of merging their competition and regulatory authorities. Others have sought to combine the regulators of related sectors. As with OFCOM, these authorities have been assigned other supervisory functions which relate to public interest objectives such as media plurality, control of content and regulated use of common facilities. However there is a growing consensus that there should be no sector excluded from the competition rules.

At the same time, there is still a judgement to be made as to whether the best way to help competition and the consumer is through ex-ante regulation, the action of a regulator or the application of the competition rules. Regulators tend to focus on conduct, in particular on pricing and non-discriminatory access to common facilities. Competition authorities tend to look for structural solutions, if they are available, and fall back on behavioural remedies when they are not. Both groups of authorities would like to open the way to new market entrants if they are out there.

At the European level, the choice has been made for a number of liberalized sectors, to develop a framework in which national supervisory authorities, alongside the department of the Commission responsible for the specific regulation concerned, implement European-wide directives which are transposed into national law. EC competition law applies in parallel and in the new network of European competition authorities which I referred to earlier. It follows that the development of a competition policy towards the development of a sector requires a good degree of consensus between regulators and competition authorities, both at national and European level. And if we do not achieve that consensus by active policy-making, it will ultimately be brought about by decisions in national and European courts!

As far as the media and communications sectors are concerned, there are specific challenges in three areas where new developments have required a response at the European level:

First, the new EU regulatory framework for electronic communication services and networks aims to achieve some degree of integration of competition law principles into *ex ante* regulation. A range of competition tools, such as the new definition of significant market power (“SMP”), will therefore govern both *ex ante* regulation and (*ex post*) application of EU antitrust rules. Similarly to the new UK Communications Act, the new framework will tend to reduce *ex ante* regulation to the minimum in cases where healthy competition can be adequately maintained through the *ex post* application of competition rules;

Secondly, the merger and antitrust controls are being applied where problems have arisen as a result of high market concentration, increased vertical integration and greater media convergence;

Thirdly, the application of the EU State aid rules to the communications and media sector, in particular to the financing of public service broadcasting, have raised important policy issues which need to be addressed.

I shall deal briefly with these three components of current Commission action.

I. The new electronic communications framework

The New Year marks the beginning of an important step in that process for the European communications industry, with the full implementation of the new electronic communications regulatory framework across Europe. Although a number of countries are still in the process of implementing the new regulatory framework into their national legislation, it is now in force. This new framework achieves, in my view, two important objectives.

First, it responds to the challenges put forward by the process of convergence. A framework based on a set of fragmented rules centred on administratively pre-defined markets cannot face the increasing and ever more complex issues arising from the use of digital technology for the treatment of information. Second, the new

framework is grounded on competition principles. Intervention on the market is necessary and beneficial only when it offers the solution to certain negative effects of market power, and in particular to market failures which derive from formerly monopolistic market structures. This means that intervention must be based on sound market definitions and a rigorous analysis of actual and potential competitive forces on the market.

A number of factors were instrumental in devising this new framework. Key elements have been economic analysis, as well as empirical evidence, on what is the best regulatory strategy. The successful experience of the most advanced regulators in the world has been invaluable. Among these regulators, Oftel's experience and approach has been very influential at European level and I am sure that OFCOM will continue this role.

The general principles which I have discussed so far have started working in practice, and the first results have already been achieved. Regulators have started carrying out in-depth market analyses for all markets listed in the Commission Recommendation, as mandated by the new framework. They have also have started consulting on their preliminary conclusions, under a "national" and a "Community" consultation procedure.

As with merger control, the Commission has to respond within tight deadlines. My staff, jointly with the relevant services in the Commission's Information Society Directorate-General, have already received, and to a large extent dealt with, 40 notifications from national regulators. Overall it should result in more appropriate and arguably less regulation at national level.

Obviously the success of the new framework depends on the manner in which national regulators and the Commission's departments commit themselves to the

task. I congratulate the UK authorities for having been the first to notify measures, thus proving that they continue to be ahead of the pack.

II. Media concentration and the application of EU competition rules

Let me now turn to the application of competition rules to communications and media in their more orthodox form. The EU rules governing the control of concentrations between undertakings apply to the communications and media sectors in the same way as to any other field of economic activity, notwithstanding the explicit powers reserved for Member states under the EC Merger Regulation to take action to protect media plurality. The Commission now has more than ten years' experience in dealing with media mergers, beginning by the way with its prohibition of a concentration (*Bertelsmann/Kirch*).

More recent decisions include for instance, the authorization with conditions, of the *Newscorp/Telepiù* merger which related to the Italian pay-TV market, and gave rise to the creation of Sky Italia.

Last week, the Commission also cleared the *Lagardère/Natexis/Vivendi Universal Publishing* merger, relating to the French book publishing and distribution sectors, subject to significant divestments in both sectors.

The marked trend towards concentration in the European communications and media sectors during recent years in our view entails two dangers. The first danger is the creation of significant market power of undertakings – or even monopoly – that significantly impedes competition, ultimately to the detriment of consumer welfare. This very often coincides with the second danger, which by the way – as competition authorities – we have no remit to control, namely the possibility for a limited number of media companies to curtail media pluralism, diversity and freedom of information.

The distinction between these two different facets of media concentration is obviously important. The first is purely economic and market-related, the second pertains to the fundamental democratic values. More importantly, the control mechanisms regarding media pluralism continue to rest primarily with national regulators, such as OFCOM, on the basis of the various national media concentration laws.

The Commission, by means of its merger control activity, is primarily called upon to prevent distortions of competition resulting from the creation or strengthening of dominant positions in the media markets. In the current climate of technological convergence, digitalisation and rapid emergence of new media markets the trend towards vertical integration can be damaging to competition. There is always the risk that new media markets are either rapidly monopolised by strong players already active in traditional media or that the new markets cannot even develop because key inputs, such as premium content, particularly rights on recent films or on major sports events, are inaccessible for potential entrants and remain bundled in the hands of a few, often vertically integrated, companies.

The Commission seeks to ensure that media companies do not engage in anti-competitive agreements with other companies or abuse their market power to the detriment of competitors and consumers. Practices which give rise to concerns are for example leveraging market power from traditional onto new media markets or foreclosing these markets by barring access to premium content needed by potential entrants. The granting of long-term exclusive licences for premium content to a single dominant operator can produce these anti-competitive effects.

Notwithstanding the strict limitation of the Commission's competition law enforcement activity to the economic side of communications and media, it is fairly obvious that curtailing market power, keeping markets open and enhancing competition in these areas also promotes media diversity and plurality.

Moreover freedom of opinion and information as well as diversity and pluralism in the media, are enshrined in Article 11 of the EU Charter on fundamental rights and Article 10 of the European Convention on Human Rights. Needless to say, the Commission has to take these fundamental principles into account in all areas of its activities. In addition part and parcel of the European media landscape is the coexistence of private and public broadcasting which is governed by the so-called Amsterdam Protocol. I will revert to this aspect when addressing the application of the EU State aid rules to the public broadcasting sector.

III. Applying competition policy: the marketing of premium content, notably sports media rights

With the general objective of keeping media markets open, this Commission aims in particular to ensure that access by media operators to key inputs is not unduly restricted. Sports rights and notably football media rights are powerful drivers for the sale of pay-TV subscriptions, TV advertising slots and the roll-out of new media markets, such as enhanced Internet and UMTS services. The restricted access to premium content contributes to media concentration, limits output and opens the risk of higher prices and less choice for consumers as well as less innovation in the sector.

On the other hand, there are undoubtedly efficiencies to be gained for firms and their customers by some degree of restriction of competition which gives market operators sufficient financial certainty and stability to be able to develop new and reliable media services. The problems arise, on the one hand, when operators aggregate exclusive rights of long duration and large scope, and on the other, when sports organizations pool and bundle exclusive rights in joint selling arrangements.

The Commission has looked at both levels by using different competition tools. Given the complexity of the issues involved, the picture is certainly not black and white. We consequently aim to follow a balanced approach.

Firstly, I want to mention how the Commission treated the aspect of media operators' access to premium content including sports rights in the recent **merger decision *NewsCorp/Telepiù***. The Commission allowed the creation of a very strong market position in the Italian pay-TV market, held by the new Sky Italia, on condition that market entry was kept open, by imposing strict structural and behavioural conditions.

The solution took due account of the circumstances of the case and was pragmatic because neither Telepiù nor Stream, the pay-TV operators present so far, had ever been profitable. There was accordingly a strong risk that one of them would exit the market in any event, with all negative consequences for Italian pay-TV subscribers that this would have entailed.

On the other hand, strict conditions were imposed in order to keep the relevant media markets open for potential entrants and competition. These include, in particular, Sky Italia's commitment to waive its exclusive access to premium content for non-satellite retransmission (i.e. cable, digital terrestrial transmission, Internet), to reduce substantially the duration of its exclusive exploitation rights for premium content, such as blockbuster movies and football matches (three years for film producers and two years for football clubs), and to sublicense this content to competitors at competitive prices. Moreover, Sky Italia agreed to grant access to its satellite TV platform to competing satellite broadcasters and all related services including the grant of licences for its proprietary conditional-access technology under fair and reasonable terms.

These conditions, which will incidentally be monitored by the Italian Communications Regulator, aim at keeping the relevant media markets open and in parallel support the roll-out of new media by making available to operators important content, which has proven to be the key driver in developing these markets. The Commission's intervention should in principle contribute to the

creation of new services and products in the new media environment ultimately beneficial to consumers. But of course competition rules only open the door to competition. They cannot manufacture new competitors. That is up to the market!

Let me now turn to some of the **antitrust issues** raised by the sports' associations **joint selling of football rights**. The Commission has looked at a number of football leagues in Europe, notably the UEFA Champions League, where we adopted a formal exemption decision last July, and the German Bundesliga and English Premier League, where we reached preliminary settlements recently. The Commission identified three recurrent patterns and competition concerns.

First, the pooling of rights – the joint selling – makes the rights only accessible to few and big media operators. The terms and conditions – including the price – are jointly determined in the invitation to bid. This behaviour often leads to fewer matches being made available live on TV and gives rise to price increases. However, the overall assessment of joint selling is more balanced. In some areas, it provides a one-stop-shop for the sale of rights of a packaged league product with reduced transaction costs. Additionally, it fosters the branding of a uniform and high-quality league product that the consumer easily recognises and appreciates.

Against this background, joint selling and individual selling may exist side by side. The clubs should arguably market at least some rights individually, which will allow them to develop their club brand while a league may market other rights jointly.

Secondly, sports rights are particularly ephemeral products. Exclusive marketing deals cannot be considered as a restriction per se. But the duration and scope of the exclusivity are problematic if they lead to market foreclosure, i.e. by preventing other free- or pay-TV operators from competing effectively.

The extent to which scope and duration should be limited is dependent upon a careful assessment in each case. Generally speaking, a regular and open tender of the

jointly sold rights and smaller packages allowing for the acquisition of live rights by both free- and pay-TV operators help alleviate competition concerns.

Thirdly, conventional media operators tend to fear a “cannibalisation” of their core business by new media, such as the Internet or mobile services, and to protect it against competition emanating from innovative services. Consequently, they often try to acquire all of the media rights to prevent new media markets from emerging.

The Commission seeks to ensure that the new media rights are made available to media operators willing to enter and invest in these markets so as to allow innovation and the roll-out of new media technologies. To that end, the new media rights need, in general, to be unbundled from the traditional media rights and in principle be marketed separately.

To sum it up, our making premium content more accessible aims to create an effective framework for competition while taking full account of the various interests at stake. But the results depend ultimately on the media operators - whether they make effectively use of the business opportunities offered and thus contribute to innovation to the benefit of enhanced consumer choice – we continue to be educated by market developments!

Let me now turn to the final topic of my speech.

IV. Public Service Broadcasting and EU State aid rules

After the opening up of most EU Member States’ broadcasting sectors to private operators and commercial TV, Member States have remained in general heavily involved in the media markets through public service broadcasting. Since public broadcasters are, at least partially, publicly funded, the European Commission’s duty is to ensure that the EU State aid rules are complied with.

The aim is of course to create free and fair competition between service providers while giving clear recognition and compensation for public service obligations. The Commission's approach so far in this respect has been twofold: on the one hand it has worked on examining ad-hoc measures granted to public service broadcasters (e.g. tax exemptions, capital increases, or debt re-scheduling); on the other hand, it is cooperating with Member States with a view to amending national legislation to ensure that ongoing State funding to broadcasters is compatible with the EU State aid rules. Such funding generally takes the form of a licence fee charged to owners of radio and television sets or annual compensation directly from the State budget.

The Commission has recently closed a number of cases relating to public broadcasters in Italy (RAI), Portugal (RTP), and France (France 2 and France 3).

I do not want to enter into too much detail, but the two main objectives pursued in these cases were to ensure (i) that State compensation does not exceed the costs linked to public service obligations (in application of Article 86(2) of the Treaty) and (ii) that the public broadcasters do not undercut their private competitors' prices in non-public service / commercial activities, i.e. essentially TV advertising.

I should emphasise in this context that the so-called Amsterdam Protocol on Public Service Broadcasting annexed to the EU Treaty allows the Member States substantial latitude in defining the scope of public service broadcasting. Nonetheless the costs for running that public service need to be clearly identified. Once this is done, the Commission's practice consists in deducting the net profit generated by the commercial activities of the public broadcasters. In all of the above-mentioned cases, the Commission found that there was neither over-compensation of public service costs nor undercutting practices in the TV advertising market.

As to ongoing State funding, the Commission is currently working with the Italian, Portuguese, French and Spanish authorities on implementing safeguards into their national legislations so as to guarantee the compatibility of the funding with the EU

State aid rules. In a nutshell, the main features of these safeguards cover (i) the separation of accounts in accordance with the Transparency Directive, (ii) the prohibition of over-compensation of public service costs, (iii) commercial terms for the commercial activities of public service broadcasters, and (iv) the arm's length relationship between the public service broadcaster and their commercial subsidiaries.

Let me conclude by mentioning that the technological developments in the context of convergence have recently given rise to new State aid issues in the broadcasting area. This essentially applies to the Internet activities of public broadcasters which raise State aid issues to the extent that they are financed by public funds. These cases raise novel questions, such as whether these Internet activities fall within the definition of "broadcasting" (and thus under the same rules as TV broadcasting activities) and whether they are to be considered as belonging to the public service or as purely commercial activities.

Given these complex issues, you will understand that we are looking forward very much to the BBC Charter Review. We believe that the review can make a substantial contribution to the development of concepts also at the European level – as we also hope that due account will be taken in the review of the European context.

V. Conclusions

Media and communications will remain on the top of the agenda for the application of European competition policy. Across Europe we will monitor very carefully market developments and screen concentrations and restructuring of the big international media groups. We will act wherever we detect foreclosure of markets. Premium content – both sports and film rights – will continue to be kept under close scrutiny.

We will continue in particular to pay special attention to the joint selling and purchasing arrangements for high premium content that always entail substantial risks of distortion of competitive conditions. We have set signposts with the exemption decision of last of year on the selling by UEFA of the TV rights for the Champions League, and I believe we will be able to apply these principles to the other League cases.

The new work sharing spirit with the OFT resulting from our general antitrust reforms, and the new electronic communications framework where OFCOM is bound to play an important role, demonstrate the close interrelationship of developments in the communications and media sectors in this country and European developments – as do the recent competition cases. The UK has played a leading role in the development of concepts in a number of communications and media areas – such as in the field of spectrum licensing where we are now initiating an important EU study on the tricky issue of spectrum trading. Both in the UK and at the European level, we are struggling with common problems – such as respecting on the one hand the key role of intellectual property rights while on the other hand ensuring that the exercise of those rights does not lead to foreclosure of markets and the strangling of the take-off of the New Media. Outside the field of EU competition law enforcement in the strict sense, I may add important other areas in the communications sector in which other department of the Commission is currently active, such as the fight against “e-mail spams” and electronic piracy and counterfeiting, to name but a few. In many areas, implementation of the requisite EU law requirements and reflections in the UK are more advanced than elsewhere – while in others international developments and consensus at the European level will be helpful.

I believe the sector needs competition and regulatory principles that are firmly applied. But I also believe that the sector needs a period of regulatory pragmatism, not abstract dogmatism, and even less unreflected traditionalism. We will need good

reason and circumspection when applying principles and we must give time to existing structures to adjust. Let me leave you with this reflection.

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