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Convergence between media and telecommunications: competition law and regulatory perspectives

Miguel Mendes Pereira*

GSM Europe

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OUTLINE

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* Administrator, European Commission/DG Competition/Dir. Information, Communication and Multimedia. Lecturer at the Law School of the University of Lisbon.
The opinions expressed are purely personal and only engage the author.

Ladies and Gentlemen,

I wish first of all to thank the GSM Europe association, and in particular Mr. Mario Girasole, for inviting me to speak here today.

I intend to give you a brief overview of how the European Commission has so far dealt with the phenomenon of convergence between media and telecommunications from the point of view of competition regulation. I will also highlight the current approach taken in respect of convergence issues such as access to contents for distribution through platforms like the Internet or UMTS networks. And finally, I would like to exploit with you the possible impact of the recent "EU Regulatory Framework for Electronic Communications" on the "new media".

I. CONVERGENCE

Convergence has become all too familiar to most of us as one of the main driving forces behind the recent changes occurred in the media and telecom industries. Logically, EU competition law could not stay immune to the effects of convergence on these two industries.

However, as it so frequently happens with notions that turn into "buzzwords", the many meanings attributed to the term "convergence" are often ambiguous and, as such, unhelpful in order to describe the evolution of the media and telecom industries.

Let me therefore turn, first of all, to the three meanings of the term convergence that I consider to be most relevant in this context.

1. Technical convergence

Technical convergence mainly concerns the possibilities offered by digital technology.

Those possibilities are reflected, for example, in the infra-structures required to deliver contents like movies or music. With the current digital technology, huge amounts of data may be transmitted to a high number of users through different networks (mobile networks, Internet, B2B sites). This allows for the dematerialization of media products traditionally sold as physical products (newspapers, films, CD's) by transforming them into packages of bytes.

At the same time, digital technology allows for the convergence of traditionally separate media into a single product, putting together text, sound, video and voice in what has become known as *multimedia*. Access to TV broadcasting, or rather webcastig, on the Internet is already nowadays a reality and listening to an MP3 music file on a cellular phone is nothing new.

2. Economic convergence

Audio-visual products were never cheap but the growing competition induced by the proliferation of TV channels has inflated production costs. In order to have an idea of the recent increase in the price for audio-visual contents it is sufficient to compare, for example, the price paid for broadcasting rights of the Football World Cups of 1990, 1994 and 1998 – 241 million ECU – with the price paid for the same rights in respect of the World Cups of 2002 and 2006 – 1,7 billion Euro. Only large companies seem to be able to afford such astronomical costs.

In face of economic barriers of such dimension, media companies have shown a trend towards concentration. „**C**reate **O**nce, **P**lace **E**verywhere!“ seems to be the current motto for the media industry, illustrating the need for media producers to place their products in the largest possible number of different platforms.

This was the underlying reason for alliances and mergers between companies which are active in sectors of the economy that used to be separate like television and telecommunications. Operations like AOL/Time Warner, Vivendi/Universal, Vivendi/Vodafone for the setting up of portal Vizzavi or the acquisition of Dutch entertainment producer Endemol by the Spanish telecom company Telefonica clearly illustrate this trend.

3. Regulatory convergence

Regulatory convergence concerns the way the legislator and/or the regulator intervene in the domain of media and telecommunications.

Competition authorities must increasingly analyse transactions which involve both the media and the telecom industries. They must accordingly take into account the integrated impact of such operations, without it being possible anymore to isolate the effects felt on the media markets, on the one hand, and the effects felt on the telecom markets, on the other.

This is the case, for example, of the ongoing scrutiny by the Spanish Competition Authority of the merger between the pay-TV platforms CanalSatelite and Via Digital in which the incumbent Telefonica also has a stake or the pending merger recently notified to the European Commission between the Italian pay-TV platforms Stream and Telepiú where the incumbent Telecom Italia also has a stake.

As regards legislation, in most European countries the media and the telecom industries are still subject to different sets of rules, based on the principle that media concerns contents and telecom concerns delivery. The same basic approach has been taken at European level, as it results for example from the scope of the “Television without Frontiers Directive” which only concerns content. However, as it is apparent from the recent “EU Regulatory Framework on Electronic Communications”, convergence between the two sectors is impossible to ignore.

In the “Framework Directive”[1], Recital 5 starts by saying:

“*The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework*”.

It then goes on to say:

“*It is necessary to separate the regulation of transmission from the regulation of content (...)*”, although “*this framework (...) is without prejudice to measures taken at Community or national level (...) in order to promote cultural and linguistic diversity and the defence of media pluralism.*”

The difficulty in keeping these two worlds apart becomes clear with the last sentence of Recital 5 which reads:

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[1] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108/33, 24.4.2002.

"*The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.*"

II. CONVERGENCE MERGERS AND JOINT-VENTURES

Let me now briefly refer to some cases of "convergence mergers and joint-ventures" analysed by the Commission in the past 2 years.

Most "convergence issues" from a competition law point of view have been dealt with by the European Commission under the Merger Regulation, i.e. in respect of concentrations notified under the EC Merger Regulation[2]. The test applied by the Commission when assessing these operations was therefore a market dominance test. As you know, pursuant to Article 2 (3) of the Merger Regulation, "a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared incompatible with the common market."

I will mention here three paradigmatic cases: the Vizzavi joint-venture between Vodafone, Vivendi and Canal+, the AOL/Time Warner merger and the Vivendi/Canal+/Seagram merger.

The analysis carried out by the Commission in these operations was directed at assessing how an economic convergence between two or more previously separate media companies leading to vertical integration would eventually translate into market power of the new entity such as to, due to technical convergence, significantly impede competition in the relevant markets.

I would argue that convergence from the point of view of competition law gives rise to three issues:

a) "gate-keeper" issue;

b) "source issue";

c) "path issue".

1. The gate-keeper

A gate-keeper role is played by a company possessing a certain technology, know-how or technical standard allowing it to exert a significant degree of control in respect of the access to a given market. This degree of control is relevant from a competition point of view only where the market power of the gate-keeper is significant and where the technology at stake is an essential input for any potential new entrant to be able to enter the market. A gate-keeper will be able to engage in exclusionary practices vis-à-vis its competitors and/or excessive pricing vis-à-vis its customers.

A clear gate-keeper issue arose in the AOL/Time Warner merger[3]. AOL is the leading Internet access provider in the US and the only provider with a presence in most EU Member States. Time

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2 Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395/1, 30.12.1989, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 40/17, 13.2.1998.

3 Case COMP/M. 1845 *AOL/Time Warner*, decision of 11.10.2000, OJ L 268/28, 9.10.2001.

Warner, on the other hand, is one of the world's largest media and entertainment companies with interests in TV networks, magazines, book publishing, music, filmed entertainment and cable networks.

The Commission found that the new entity resulting from the merger would have been able to play a gate-keeper role and to dictate the technical standards for on-line music delivery, i.e. streaming and downloading of music from the Internet. Consequently, AOL/TW could end up holding a dominant position on the emerging market for on-line music delivery.

2. The "source issue"

The second issue is the source issue.

A given company may hold a significant degree control over the source of the different businesses at stake in the relevant markets, i.e. of the primary input at the top of the value chain of the product. In the media industries, this will generally refer to the company producing the audio-visual product (films, music, TV-programmes) and/or holding the corresponding copyrights.

The control exerted at the source will become relevant from a competition law point of view where the amount or breadth of products and/or copyrights is such as to allow the company to gain a competitive advantage by means of exclusionary or discriminatory practices vis-à-vis its competitors.

In AOL/Time Warner, for example, the combined entity would not only possess one of the largest music libraries in the world (Warner Music is one of the 5 music majors) but would also, due to contractual links, have preferential access to the library of Bertelsmann Music Group, also part to the group of the 5 music majors. This would result in the combined entity controlling the leading source of music publishing rights in Europe.

The problem was aggravated due to the simultaneous notification of the projected merger between EMI and Time Warner[4]. The preferential access by AOL/Time Warner to the music copyrights of EMI, Warner and Bertelsmann would have put in the hands of the new entity half of all the music content available in Europe for on-line delivery.

A similar "source" problem arose in the Vivendi/Seagram merger in respect of both music and films. Vivendi was a leading company in the telecommunications and media sector, with interests in mobile telephony networks, cinema production and distribution, and pay-TV services. Seagram was a Canadian company which, among other interests, controlled the Universal music and filmed entertainment businesses.

In terms of content, the merged entity would have the world's second largest film library and the second largest library of TV programming in the EEA. It would also be number one in recorded music combined with an important position in terms of publishing rights in the EEA.

The position of Vivendi/Universal concerning music rights became particularly relevant in respect of the Vizzavi portal, a portal run by a joint-venture between Vivendi and Vodafone. The Vizzavi

4 Case COMP/M. 1852 *Time Warner/EMI*, see Press Release IP/00/617 of 14.06.2000.

joint-venture had itself been notified to the Commission just some months before the Vivendi/Universal merger.

3. The "path issue"

Let me now turn to the third issue.

There may be "path" issue where a company exerts a significant degree of control over the path to the customer, i.e. the distribution channel. Traditional distribution channels for media products are the physical distribution networks through which physical goods such as books, CDs, video-tapes or DVDs are distributed to the retailer. I guess that also free-to-air (analogue) terrestrial television broadcasting has to be regarded nowadays as a traditional distribution channel. More recent distribution channels are satellite broadcasting, cable networks, fixed or mobile telephony networks and, naturally, the Internet.

A "path issue" will arise from a competition law perspective where the degree of control exerted by the path-owner allows it to engage in exclusionary or discriminatory practices vis-à-vis its competitors, excluding them from the path to the customer or forcing them to seek less efficient paths.

The Vodafone/Vivendi/Canal+ joint-venture[5] for the development of the Internet portal Vizzavi presented a clear "path issue" in respect of Internet access. As regards Internet access via mobile phone handsets, the issue arose in respect of the significant market position of Vodafone in the market for mobile telephony in a number of European countries. Vodafone already had a very significant customer basis in these countries and therefore a solid path to the future customers of the JV was already established. As regards Internet access via TV set-top boxes, a similarly solid distribution channel was also owned by Canal+ in respect of its customer basis for pay-TV services. The concern therefore arose in respect of the ability of both Vodafone and Canal+ to migrate their customer basis from the mobile telephony and pay-TV markets to the Internet access markets by using the already existing distribution channels or paths.

The same path issue arose during the Vivendi/Seagram merger[6], which was notified some months after the Vizzavi joint-venture. The issue here concerned the addition of the Universal music library to the distribution channels of Vodafone and Canal+ and its possible impact on two emerging markets: the market for on-line music delivery and the market for horizontal Internet portals.

III. "NEW MEDIA" AND THE ISSUE OF ACCESS

One of the concerns continuously expressed by the European Commission in respect of both telecom and media markets is **access**.

As regards media markets, the main concern has been to ensure access to contents or to the underlying copyrights. As regards telecom markets, the main concern has been to ensure access to the infra-structure.

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5 Case COMP/JV.48 *Vodafone/Vivendi/Canal Plus*, see Press Release IP/00/821 of 24.07.2000.

6 Case COMP/M. 2050 *Vivendi/Canal Plus/Seagram*, decision of 13.10.2000, OJ C 311/3, 31.10.2000.

This approach has sufficed as long as media were offering content and telecoms were offering transmission. It just so happens that technological development, particularly as regards wireless technology, has blurred the distinction. So which approach should be taken when telecoms are directly offering contents?

GSM technology already allows for the transmission of ring tones, logos, financial information, sports or news updates. In fact, SMS has proved to be a pleasant surprise for mobile operators in terms of revenue increase. And this is a revenue increase based on content, much of it branded content: Disney logos, EMI tunes, Reuters news flashes, Dilbert's calendar, Scott Adams' motto of the day, etc.

GPRS promises to raise the stakes but I am sure that the minds of all of you are set at the prospects offered by UMTS.

The penetration rates of mobile telephony are pretty much exhausted in some European countries. Therefore, the only way to increase revenues is by way of offering new technology or new services, such as to increase the ARPU[7]. This is where the possibilities offered by UMTS in terms of paid-for content delivery appear to be crucial. I think that it is not exaggerated to say that as regards mobile telephony, it's contents that will shape the future business model.

In this framework, the Commission has been paying a particular attention in respect of the so called "new media" rights, i.e. Internet and UMTS. The basic approach has consisted in imposing on right-holders a segmentation of rights such as to avoid that they are sold in a bundle together with the rights for exploitation on all other possible platforms such as free-to-air TV or pay-TV.

Until recently, rights used to be sold in a large package to a single operator in each country in the EU. Typically, rights on valuable contents such as sport events (football) would be sold to a single pay-TV operator in each Member State on an exclusive basis lasting for a long period. The package would include not only the rights for all possible ways of exploitation on TV platforms but also rights for other platforms such as Internet or UMTS. Often, rights for new media would not be exploited at all, either because the broadcaster did not operate the appropriate platform or just out of fear of cannibalising traditional TV exploitation.

This situation would lead either to:

a) non- or under-exploitation of new media rights, causing a serious hindrance to the development of new markets; or

b) market players in these new markets being confronted with powerful licensees holding rights for exploitation on all platforms, access to rights being made particularly difficult.

So, in the UEFA Champions League case[8], the Commission accepted the "unbundling" of rights in smaller packages according to the exploitation platform. UMTS was clearly singled out as a separate category, next to Internet rights. The approach by the Commission in this particular case has envisaged 4 objectives:

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7 Average Revenue Per User.

8 Case COMP/C2/37.398 *UEFA Champions' League*, Notice published pursuant to Article 19(3) of Regulation 17, OJ C 196/3, 17.8.2002. See also Press Release IP/02/806 of 3.6.2002.

a) that UMTS rights do NOT remain unexploited and that, on the contrary, they are available on the market;

b) that UMTS rights are licensed to operators holding a 3G license, such as to ensure that the rights are not acquired with the mere purpose of being held back or re-sold at over price;

c) that UMTS rights are available on a stand alone basis and not bundled to larger packages of rights intended for other platforms, such as to allow the price for UMTS rights to correspond to their genuine commercial value;

d) that UMTS rights are not licensed for longer 3 years as a rule, allowing such rights to be placed on the market on a regular basis.

The same idea of "unbundling" or segmentation of rights was present in the decision by the Italian Competition Authority[9] of May this year concerning the merger between the two Italian pay-TV platforms Telepiú and Stream. One of the conditions imposed on Telepiú was the waiver of all exclusivity in respect of UMTS rights for the most important football events in Italy (Series A and B of the national Championship, Champion's League, UEFA Cup, Coppa Italia, etc.).

As you might know, the parties ended up not implementing the merger. The inverted transaction (i.e. the acquisition of Telepiú by Stream/Newscorp) has been recently notified to the Commission[10] and the Commission has actually announced just today that it would open a Phase II investigation into the operation further to the conclusion that the commitments offered by the parties did not appear to solve all competition concerns raised by the merger[11]. The Commission will therefore soon be called to express itself again on the status of UMTS rights.

IV. The new "Regulatory Framework"

To finish, let me say a few words on the new Regulatory Framework on Electronic Communications and on how it might somehow be related to the convergence trend. This new framework is actually a fine example of legal convergence as defined at the beginning of my presentation.

Article 8 of the Framework Directive lays down the policy objectives of the new regulatory package, namely the principles to which National Regulatory Authorities will be subject to. As you may know, NRAs have been granted extensive powers for the implementation of the Regulatory Framework, ranging from price controls and account review to the monitoring of access and inter-connection.

Although the new set of directives is clearly not aimed at regulating content, Article 8(1) of the Framework Directive nevertheless reads:

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9 Case C5109 *Groupe Canal+/Stream*, decision of 13.5.2002, available at http://www.agcm.it.

10 Case COMP/M. 2876 *Newscorp/Telepiú*, OJ C 255/20, 23.10.2002.

11 Press Release IP/02/1782 of 29.11.2002.

"*National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism."* These are elements which explicitly concern content regulation.

Let me give you another example of the ever closer relationship between transmission and content in the new Regulatory Framework.

Article 12(2) of the Access Directive[12] provides for certain elements to be taken into account by NRAs when imposing access or inter-connection obligations to telecom operators. One of these elements are "*any relevant intellectual property rights*"[13].

It is not yet absolutely clear how IP rights will be taken in consideration in this context. The fact is that any ring tone SMS transmission or, in the future, the UMTS transmission of football highlights, are legally based on an underlying IP transaction. And this transaction purely concerns content, not transmission. It is therefore forceful to conclude that the Framework now provides for certain content issues being taken in consideration when imposing access or inter-connection obligations.

It is apparent from the previous examples that there is a clear tension between the wish of maintaining the traditional separation content and transmission regulation, on the one hand, and the impossibility of doing so due to the phenomenon of convergence. This means that regulatory authorities are now being engaged in a totally new exercise: in certain circumstances, they might have to regulate content and transmission issues in one go.

What the exact outcome of this tension will be, is uncertain for the moment, as much as the very business models of UMTS operators are themselves far from clear for the moment. It will certainly depend on how the European Commission and the NRAs will enact the provisions. But it will ultimately depend on the creativity of the people who have developed the technological wonders which gather us here today. These are the people who created convergence, and these people are you!

Thank you very much for your attention.

Miguel.Mendes-Pereira@cec.eu.int

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12 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108/7, 24.4.2002.

13 Sub-paragraph e).