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# COMPETITION POLICY AND THE ISSUE OF ACCESS IN BROADCASTING MARKETS : THE COMMISSION PERSPECTIVE

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## Introduction

Thank you for the opportunity to make a few remarks at the beginning of this conference, which will cover a number of areas to substantial detail.

I would like to use this opportunity to say a few words on three issues :

- The paradigm shift in the development of the media sector that forces us, as others, to rethink and to sharpen our competition analysis in a number of aspects—of course in the more general context of the review of EU Competition Law application that has been prompted both by our own on-going reform efforts, and by the recent Court Rulings.

- This shift is giving even more weight than in the past to focus on the bottlenecks that could block the rapid emergence of the new markets we need to turn current stagnation into new growth. Competition Law and regulation together will play a major role in this.

- And, finally, I would like to go into some more detail with regard to the two bottlenecks that are currently at the centre of attention—access to downstream distribution platforms and access to upstream premium content.

## Paradigm shift

Let me then first turn to the paradigm shift in media development that we are living. The sector is currently in a transition phase on its way towards new business models.

During the last two years the sector has faced a difficult situation. The new subscription based services have run into substantial financial problems in a number of European countries. The main driver of the rapid expansion of the sector during the 90s—the booming advertisement market of the time, accounting for 45% of the total revenues of the sector—has turned into stagnation, and even contraction.

According to the latest report on the performance of the sector published last week by the Commission[1]—The Fourth Report on the Application of the Television without Frontiers Directive, the basic regulatory framework for the TV sector at the EU level—for 2001 alone the contraction of advertising revenues can be estimated at more than 6%, and higher in certain parts of the sector. The sector is far from having recovered from the dramatic decline in share values that resulted from the Internet slump 2000/2001. And, the sector is facing a difficult transition to new technologies and platforms, very much at the centre of current attention.

For the application of Competition Law to the sector, this has meant that the market tests our principles against new types of issues.

## Consolidation

A main phenomenon resulting from the current stagnation of the sector have been major cases of digital platform consolidation in a number of Member States—the announced merger cases in Italy and in Spain being on everybody's mind. Consolidation has put Competition Authorities at EU level and at national level before novel problems and the requirement for establishing new doctrines.

In all of these cases, European Competition Law must break new ground in a number of aspects :

- We must understand under which conditions efficiency arguments can be accepted and consolidation can be allowed to go forward—without jeopardising future development.

- We must ensure that new markets will be able to develop under those circumstances—in order to avoid that we confort the position of current stakeholders at the expense of new market entrants.
  At a time where we see the beginning of a shift from traditional media to new

[1] Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers" (COM(2002) 778 final), 06.01.2003. Available at http://www.europa.eu.int/comm/avpolicy/whatsnew_en.htm

platforms, and the search for new business models, the main task for anti-trust regulators both at EU and national levels must be to keep markets open.

- A main instrument for keeping markets open, is ensuring access for new actors to the inputs that they need for successful market entry. This is true for both *access to distribution platforms, and access to content*.

And this leads to the central role of those two potential bottlenecks, and to the role sector specific media&communications regulation, and competition law play in addressing these bottleneck situations.

## Competition concerns

From a competition law point of view, the main competition concerns have been laid out in a number of recent cases, and will be more so during this conference :

- Horizontal effects ;
- Vertical effects ;
- and the combination of those effects.

In most cases, we are faced with a complex web of horizontal effects, e.g. in the upstream premium content markets, and vertical effects, e.g. contracts that tend to create very strong market positions by a combination of upstream and downstream positions, and the formidable effects that combination of both can generate—as we are seeing for example in the markets of European top league football rights.

In more general terms, we are faced with basically three situations, all of them well known to the media professionals :

- Bottlenecks in distribution networks, where a distribution platform may control a gateway, essential for upstream producers to be able to supply their content in downstream markets.

- Gateway control resulting from network effects that may be created by direct and indirect network externalities, or "the winner takes all" syndrome. These effects will grow in importance, as the New Media expand—Internet broadband and mobile, and interactive services.

- Gateway control resulting from control of critical content where we have to tread the narrow path between justified exclusivities as conferred to the creator or owner by the established Intellectual Property Rights doctrines, and the abusive exercise of those rights aiming mainly at the exclusion of market competitors and market foreclosure—and this is a main focus of our attention now.

## Instruments

The instruments with which we address these situation under EU Competition Law are well known to the practitioners here in this conference room :

- Article 81 : anti-competitive agreements ;

- Article 82 : abuse of dominant positions, including unfair pricing.

- EU Merger control : vetting mergers and acquisitions; triggered by an aggregate world-wide turnover of more than 5 billion €, and EU-wide turnover of more than 250 million €, subject to the "Two Thirds rule".

And, in a sector, where a third of the total revenue stream continues to be accounted for by public broadcasting fees, of course, the rules for state aids must be mentioned, where the Commission has set forth its doctrine in its communication on public broadcasting and state aids a year ago[2].

The Commission has set forth basic general principles for the application of these instruments in a series of communications, and these principles apply mutatis mutandis

[2] Communication from the Commission on the application of State aid rules to public service broadcasting, OJC 320/5, 15.11 2001. Available at http://europa.eu.int/comm/competition/index_en.html

to their application in the media sector. As regards the application of Art. 81 and 82, the "horizontal guidelines" and the "vertical guidelines" are of special relevance[3].

But, additionally, in the media sector, there is a strong interaction between competition law and sector specific regulation:

- The EU telecom framework has evolved into the electronic communications framework, and the related package of Directives, as adopted in March of last year, due for implementation in all Member States by July 2003[4];

- The Television without Frontiers framework that is due for reform[5];

and, of key importance,

- The national audio-visual frameworks that are to enforce the public interest goals of Member States in the sector, particularly concerning pluralism and media concentration control.

The new electronic communications framework takes right to the discussion of the first of the two main access issues that will frame the development of the sector in Europe over the next few years: *access to downstream distribution platforms*.

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[3] Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements OJC 3/2, 06.01.2001; and, Commission Notice - Guidelines on Vertical Restraints, OJC 291/1, 13.10.2000. Available at http://europa.eu.int/comm/competition/antitrust/legislation.

[4] The package comprises five Directives and one Regulation concerning a common regulatory framework for electronic communications in the European Union, access and interconnection, authorisation, universal service, data protection, and the unbundling of the local loop. In the context of access, Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (the Framework Directive), OJL 108/33, 24.4.2002, and Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive), OJL 108/7, 24.4.2002, are of special relevance. Available at http://www.europa.eu.int/eur-lex

[5] See Fourth Report on the Television without Frontiers Directive of 6.12003, supra.

**Access to downstream distribution platforms**

The expansion of the 1998 Framework—that liberalised the European telecommunications market—into the 2002 Electronic Communications Framework has resulted from comprehensive and broadly based Europe-wide analysis and debate on the consequences of the convergence of telecom and media markets. It has led to an integration of sector regulation and anti trust principles, by establishing the proven principles of market definition developed under competition law—and the analysis of actual market power in that framework—as the basis for future regulation of electronic communications networks and services in the European Union.

The 2002 electronic communications reform package now represents a comprehensive framework that also addresses the issues of access to the TV distribution platforms.

As a basic rule, access obligations under the sectoral regulation continue to depend on the determination of Significant Market Power (SMP), as was the case in the 1998 Framework, but:

- Significant Market Positions are now determined according to the dominant position principles of anti-trust, and

- Relevant markets are no longer fixed in the Directive but determined according to EU competition law principles, and subject to periodic review.

The Commission has initiated a comprehensive debate on market definitions to be used as basis for future regulation, and has issued, in accordance with the new Framework Directive, guidelines in that respect.

It is currently in the final phase of issuing a Recommendation on market definitions that will designate relevant markets for SMP determination by the National Regulatory Authorities, both at the wholesale and retail level, and therefore define those markets that will be regulated.

While it is therefore too early to comment in detail, perhaps some more general remarks.

The new framework allows :

- More flexibility

But

- Carries also a certain risk of extension of sector regulation to new markets

One question in that context is the future regulation of broadband and mobile.

Much will depend on the National Regulatory Authorities using the new flexibility of withdrawing regulation once markets are competitive, such as foreseen under Article 16 of the new framework regulation. The essential condition for the success of the new framework will be to concentrate regulation on the decisive bottlenecks.

As regards access to digital television platforms where the spread of propriety systems and the link up of upstream and downstream market positions have favoured the formation of bottlenecks, the framework essentially integrates and maintains in its Access Directive the provisions of the previous Television Standards Directive.

In a recent Working Paper published by the Commission's services on access to new services through open platforms in digital television and third generation mobile communications[6], the Commission makes it clear that it intends to fully use the policy tools established in the framework in relation to breaking down the current bottlenecks in access to digital television platforms. The paper recalls that under the provisions of Article 18 of the new Framework Directive "Member States must encourage the use of an open API (Application Programme Interface) by all providers of digital television interactive services and all providers of enhanced digital TV equipment".

The Paper also states that the Commission intends to include the MHP—the DVB and ETSI Multimedia Home Platform technical specification—in the lists of recommended standards.

The Paper goes on to state that the Commission may make such a standard compulsory under Article 17 of the Directive *if* inter-operability and freedom of choice for users have not been adequately achieved by July 2004.

From a competition law point of view, we will rely as far as possible on the sector specific framework to remedy issues of open access to the distribution platforms—as far as technical barriers and interoperability are concerned. However, as in the past, we will have to address barriers to access where they are established with anti-competitive intent, or where action is necessary to allow a pro-competitive market development.

Major issues, where problems may arise in the field of technical services for digital television services are :

- Making available of the set top boxes, the digital decoders ;
- The provision of conditional access services and subscriber management services ;
- The provision of the API, the Application Programming Interface
- The provision of software for and the writing of applications compatible with the API.

As is well known, a number of these issues have been raised in past cases dealt with under anti-trust or the Merger Regulation[7]. Let me just mention the BiB case (green light, with conditions, under Regulation 17), the MSG and Kirch / Bertelsmann case (prohibition under the Merger Regulation) and the BskyB / Kirch case (green light with conditions under the Merger Regulation), all of which have helped to develop principles in this area.

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[6] Commission staff working document on barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications, Public Consultation, Closing Date 15.2.2003.
http://www.europa.eu.int/information_society/topics/citizens/consultations/doc/open_platforms/en.pdf

[7] A compendium of competition cases and references to the full text of the decisions and press releases in the Media sector has been published by the EU Competition Directorate General, Media unit. Available at http://www.europa.eu.int/comm/competition/publications/studies/ecompilation.pdf

We will see if the market place and sector specific regulation will eliminate access bottlenecks in this area. *If not*, we will not hesitate to go into wider investigations under competition rules.

Let me then turn to the other main potential bottleneck: *access to upstream content*.

## Access to upstream content

Access to premium content is decisive for the new TV and video markets, as nobody in this room will contest. As regards current cases, access to sport rights tops the agenda—even if investigation of access to premium film rights, and anti competitive provisions in that context, will gain very much in importance and become a major focus of our work during this year.

Given last year's events in the sector and the failures of major companies we have seen, it is difficult to contest that the combination of horizontal effects (e.g. joint selling of football rights by top leagues) and vertical effects (buying by a single bidder of a single comprehensive package) has led to the build up of high risk market structures and, as we find, unacceptable foreclosure effects.

The issues at stake are :

- Exclusivity ;
- Non compete provisions ;
- The relationship of intellectual property rights and competition law objectives.

I may be more explicit :

- Exclusivity: The selling or licensing by the content owner to only one buyer in a relevant market.
- Non compete: any direct or indirect obligation causing the buyer not to manufacture, purchase, sell, or resell goods or services, which compete with the seller's.

—both having as their effect or object the linking up of upstream and downstream market power, and resulting in severe market foreclosure in the markets concerned.

Principles at stake are the relationship of intellectual property rights and competition law objectives. Let me be clear : the Court has fully recognised the exclusivity that IPRs confer on the owner, and the protection of the innovator and the creator that those rights guarantee.

But it has also said that the exercise of those rights cannot be a pretext for exclusive conduct and must not be allowed to monopolise markets. Abusive exercise of rights can limit production, markets, and technological development. And it can prevent the development of new products and services, to the detriment of the consumer.

At stake are the duration of exclusive contracts between top premium content providers and broadcasters, the bundling of those rights, and the resulting foreclosure effects.

The effects are most obvious where dominant positions in upstream content and downstream distribution platforms are combined.

The Commission has dealt with these issues in a number of past cases. Just recall AOL / Time Warner and Vivendi / Seagram where these arguments played an important role and where the commitments for clearance under the Merger Regulation addressed, amongst others, these issues.

While these mergers may seem to some as having been overtaken by the market developments of last year, the principles set at the time stay and will also apply to the current cases, notwithstanding the fact that we are continuously reviewing and refining the validity of our analysis, and that each case gets its specific treatment.

As is well known, the Commission is carrying forward a number of lead cases, and it has published an Article 19(3) Communication under Regulation 17 on the joint selling of top premium sport rights by the UEFA's Champions League. This will be subject of a separate presentation at this Conference.

We have also opened in late December the proceeding against the selling of the football rights of the English Premier League in its current form. In the Press Release published on that occasion[8] basic concerns were set out. Let me quote : "*one effect of joint selling, especially when coupled with exclusivity, is that only big media groups can afford the acquisition and exploitation of the bundle of rights. This leads to higher prices and shuts out competitors from key content. Football fans are also potentially harmed since they are offered less football on TV, or no coverage at all in those cases where they do not subscribe to pay-TV as there are no live matches on free TV.*

*The lack of competition may also limit the packages of rights available for new media and new technologies, in particular the third-generation of mobile phones, which could see their introduction slowed down as a result."*

However, it continues

"*All these anti-competitive effects do not mean, however, that joint selling is to be banned outright. Article 81(3) requires the Commission to assess whether agreements, which at prima facie are anti-competitive could bring benefits, including to the consumer, in which case they could be exempted".*

And

"*The Commission fully accepts that sport is not be treated like any other sector and respects the declaration of the European Council in Nice in December 2000, which encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels as beneficial to the principle of solidarity between all levels and areas of sport".*

This then sets out the basic considerations that we have to apply to these cases under competition law. We have to balance

- efficiencies and consumer benefits gained,

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[8] Commission opens proceedings into joint selling of media rights to the English Premier League, IP/02/1951, 20.12.2002.

against

- the indispensability of restrictions and the risk of elimination of competition,

and to ensure

- that markets are kept open for future competition, to the consumer's benefit, and particularly for the development of new products and services.

The Eurovision Court Ruling[9] of last October—though concerning a case of joint purchasing—has recalled to all of us these basic principles.

And, as you will be aware, these considerations go in parallel with the wider reflections that are going on, across the EC competition instruments, with regard to the consideration to be given in the future to efficiency arguments.[10]

## Outlook

This takes me back to the paradigm shift I was referring to at the start of this talk. We are seeing a shift towards new business models, new platforms and the New Media, while the traditional actors and platforms are consolidating, in order to gain new economic strength. The latter development must not exclude the first, to the detriment of the European consumer.

At this stage, nearly all of the EU's 155 million households are equipped with TV sets. Fifty-three percent of all TV households are connected to cable, with sixty percent of those actually subscribing, i.e. about 50 million households. Sixteen percent of all households had, by the end of 2001, subscribed to digital broadcasting, most of them (18 million) via satellite.

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[9] T-185/00, M6 vs Commission, Judgement of the Court of First Instance, 8.10.2002. Available at http://www.europa.eu.int/comm/competition/court

[10] See EC Merger Reform, draft "Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings", 11.12.2002. http://www.europa.eu.int/comm/competition/mergers/review/final_draft_en.pdf

Compared to these figures broadband Internet penetration is still limited, in the one digit range in all Community countries.

But penetration could progress rapidly. Some forecasts put penetration by broadband Internet (fixed DSL and cable, and mobile) into the two digit range before the year 2005 in most major European markets, and at fifty percent well before the end of the second half of the decade. The media landscape would 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. That will give special emphasis in our action to the New Media—broadband Internet and new generation mobile, and interactive.

This takes me back to some more general comments:

- The environment of television in Europe is subject to change, both in market terms but also in terms of the regulatory framework within which it evolves. One change of framework is the new electronic communications legislation to which I have pointed. Another one is the discussion on the future revision of the Television without Frontiers Directive, announced in the Commission's Communication of last week. One of the issues at stake is the access of the public to top premium content events of major importance to society, such as top sports events, under the so-called "listed events" approach.

- As regards the anti-trust framework applied to the sector, with the reform of Regulation 17 that will become effective on 1st May of next year, we will see substantial change and more work sharing between the Commission and the National Anti-trust Authorities. Even now, the major consolidation cases of the digital platforms, as in Spain and, initially, in the planned merger's first version, in Italy have been carried forward by the National Anti-trust Authorities[11]—as have been

[11] Spain: Sogecable/Via Digital, "Autorizada la Fusión de televisiones digitales al cumplimiento de 34 condiciones de competencia", Spanish Council of Minister, 29.11.2002. Available at http://www.la-moncloa.es .
Italy: Telepiu/Stream (where Telepiu's parent Vivendi would have acquired Stream), "Tutela della Concorrenza/Intese, abusi, concentrazioni/Istruttorie/art.6 Concentrazione/2002/C5109 Groupe

other trend setting cases in other Member States. Colleagues from these authorities will present this at this Conference.

In that way, ground rules for the sector are set in a decentralised but co-ordinated manner. We have launched studies to support this new network of Competition Authorities, and we have just published on our web site a first series of studies on market definitions in the media sector[12].

- 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 access to the downstream distribution platforms.

- Finally, we will give strong emphasis to the New Media and the Internet both as regards rights management and the territoriality issues involved, and the abusive holding back of New Media rights.

  The new Regulation 17 emphasises market orientation and analysis, and the instrument of sector-wide investigations. I believe both will play a major role in securing open markets for New Media and this will become a major future orientation.

Let me then conclude. The current phase of consolidation of the economic structures of the media sector in Europe requires that we give renewed and thorough consideration to

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Canal+¦Stream/Provvedimento 10716", Autorita Garante della Concorrenza e del Mercato, 13.05.2002. Available at www.agcm.it .
Conditions for access to the distribution platform and to content, and for sublicensing, played a major role for clearance under both decisions.
The Telepiu/Stream merger was abandoned by the parties after the decision. The merger was resubmitted in a different set up later (a "mirror" deal where Stream's parent Newscorp would acquire Telepiu), now falling under the EC Merger Regulation. The case is currently being examined. See Press Release "Commission opens in-depth probe into the acquisition of Telepiu by Newscorp", IP/02/1782, 29.11.2002.

[12] 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.

efficiency arguments that are made. But as platform operators test the markets and try to achieve the right scale for economically sustainable operation, we will have to make sure that competition is not eliminated during the 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.