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Application of Competition Law to Media

- Some recent issues

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Introduction

Thank you for the invitation to make a few comments at this conference on our current practice in the application of competition law to the media.

Let me take you a few steps back from the thoughtful reflections about the beneficial effects of scale and scope that we have heard, to the more profane problems that we are facing in the media sector in our day-to-day work, where exclusion and exclusionary effects are the words of the day far more often than we would like.

Let me focus my remarks on three themes:

- The main competition issue that we are facing in the media sector: the race for essential inputs and access to distribution,

- The delicate balance that we have to strike between claimed efficiencies and anti-competitive effects that we find in the real media markets of today,

- Some recent cases to demonstrate principles—which also indicate where we are going.

Access to inputs and distribution

Let me start off with the market scenario which we are currently facing. We are faced with a diversification of platforms and products:

- free TV, where we have seen the emergence of the dual system in all Member States during the nineties, heavily dependent on advertising on the one hand, and licence fees on the other;

- pay TV / pay per view, a relative newcomer, another quarter of revenues today;

- Interactive TV;

And most recently:

- Broadband Internet, with 5% penetration now but rising.

We have to apply competition law, not in an abstract space, but within a given institutional framework incorporating:

- The EU television framework—the TWF Directive and related Directives, now under review;

- National Public Service Broadcasting and national media control regimes that are a firm factor of the media fabric in Europe;

- Decentralisation of our own antitrust powers since 1st May 2004, which will, as we hope, intensify the application of antitrust rules, but which also forces the clarification of our own approach and rules and the economic and regulatory concepts that we apply.

And we have to keep in mind the dominating policy themes in media in the EU, namely:

- Plurality;

- Cultural diversity;

- Choice.

It is under this latter objective that the application of competition law can make its main contribution and find its general justification in the public interest agenda.

We are faced with a concrete agenda for this decade, resulting from the general policy environment of:

- How to grow the new digital platforms;

- How to avoid further media concentration;

And:

- How to ensure fair access to content, without trespassing on the property rights of the content owners.

This also determines the main competition issues to which we have to give priority:

- Access to essential inputs—content;

And

- Access to distribution—the new developing platforms.

We have to follow up on these priorities in a dynamic market situation, with sometimes bitter conflict between the actors due to the recent years of crisis and revenue losses in the sector.

Principles

Having set the scene, let me turn now to the second point: the principles.

In the media sector we have the privilege of being at the forefront of debate on competition issues. In many instances, the basic questions are:

- Which efficiencies to acknowledge;

And:

- How to check anti-competitive effects.

In a sector that is dominated by content rights—where the principle of protecting investment and creation by exclusive rights is generally acknowledged—we inevitably have to strike a delicate balance between on the one hand:

- Exclusive rights;

And on the other:

- Requirements for access—that are often the very key for further market development.

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

This takes us to the very heart of recent clarification of competition law principles: balancing efficiencies against anti-competitive effects—and I refer here to the package of notices that have been published as part of the

May 1st 2004 reform of antitrust[1] and the reform of the Merger Regulation earlier this year,[2] and particularly the Guidelines on the application of Article 81(3) of the Treaty published on that occasion.[3]

Let me recall some basic principles that these guidelines emphasise over and over again—as you will find similarly in the Notice on horizontal mergers of last February[4]:

- Efficiencies must be verifiable;

- The nature of claimed efficiencies must be clearly set out;

- A causal link between the agreements in question and claimed efficiencies must be established;

- They must occur with reasonable likelihood;

And:

- They must be achieved within a calculable time perspective.

Likelihood and timing are decisive in rapidly moving markets like media, characterised often by a high degree of uncertainty.

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[1] Council Regulation (EC) No 1/2003 of 16 December 2002 OJ L 1, 4.1.2003, p. 1 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty replaced Regulation 17/62 when it came into application on 1.5.2004. Available at http://europa.eu.int/comm/dgs/competition/

[2] OJ L 395, 30.12.1989, p.1, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180,9.7.1997, p. 1 and Council Regulation (EC) No 139/2004 of 20 January 2004 OJ L 24, 29.1.2004, p 1.

[3] Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, pages 97-118

[4] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, pages 5-18

The balancing process, as set forth under Article 81(3)—slightly reshaped in sequence according to the new approach of the notice – is as follows:

- Parties must demonstrate efficiencies;

- prove indispensability of restrictions;

- ensure a fair share for consumers;

- No elimination of competition.

And, of course, as is well known, these conditions must be fulfilled cumulatively.

And this takes me then to my third point:

Cases

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

- Horizontal effects;

- Vertical effects;

- And a combination of horizontal and vertical effects, forming a sometimes highly explosive cocktail.

Let me briefly discuss three examples, all of last year's decisions:

- The Telenor/Canal+ Nordic Decision, under Article 81(3);

- Telepiu/Stream (SkyItalia), a Decision taken under the Merger Regulation;

- The UEFA Champions League Decision, again under Article 81(3).

I have selected those three Decisions because:

- these are the major decisions in the media sector of the last 12 months and they represent the application of the different instruments of EU competition law: antitrust and merger—not mentioning state aid and public broadcasting which are a topic of itself;

- they represent main trends in the current media scene:

  . Refocusing on core markets—often associated with the establishment of long-term complex arrangements for securing inputs and access to the different levels of the value chain

  . Consolidation of platforms

  . Exclusive selling and purchasing of critical content;

  all resulting from a harder competitive situation.

- All three cases have led to setting substantial principles in the application of competition law to the sector.

First case, Telenor/Canal+ Nordic[5].

This case concerned the de-structuring of an originally fully vertically integrated pay-TV platform—one of the two large pay-TV platforms in the Scandinavian region—and a provider of channels and content, Canal+ Nordic.

Let me simplify: As part of Vivendi's general refocusing on core sectors (as the owner of Canal+), the vertical relationship was separated but replaced with long-term contractual relationships:

- Telenor, now sole owner and operator of the platform, was ensured exclusivity downstream, of content and channels;

- Canal+ was ensured non-compete upstream - a preferred supplier status of content for the new platform.

We had to review:

- claimed efficiencies;

And:

- required safeguards, in order to exempt the resulting restrictions under Article 81(3).

[5] Commission Decision of 29/12/2003 relating to a proceeding under to Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/C.2-38.287 - Telenor / Canal+ / Canal Digital). Available at Available at http://europa.eu.int/comm/dgs/competition/ . See also press release IP/04/2, 5 January 2004, "Commission clears deal between Telenor and Canal+"

In this case, we recognised the efficiencies and the advantage for consumers which resulted from maintaining a strong second pay-TV platform in the Nordic countries. However, we had to insist on safeguards by shortening the exclusivity and non-compete arrangements substantially in time, in order to limit possible foreclosure effects.

This demonstrates a first general line: shortening restrictions substantially in time, particularly given the high innovation dynamics in the sector.

Second, Telepiu / Stream,[6]

the horizontal merger of the two Italian satellite pay-TV platforms that led to the creation of Sky-Italia—a case with parallels to the merger of the two 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, relying on a series of measures to allow future market entry and to lower correspondingly the barriers to entry.

For both:

- Access to critical inputs, sport content and film content; and

- Access to the distribution platform;

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[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"

were key requirements.

In this case, again, exclusivity was shortened very substantially in time, but also the scope of exclusivity for content was reduced severely. The scope of exclusivity was limited to the DTH core platform. A mandatory wholesale sublicensing scheme had to be agreed to by the parties. Additionally, a number of access conditions were applied to the platform and to the related conditional access system.

Thus, again, shortening of duration of exclusivity was key, combined with reducing the scope for content exclusivity quite dramatically.

Thirdly, the UEFA Champions League Decision[7]

I do not think I have to explain the background of this case. Football content is key to any television operation in Europe and this is known to everybody at this conference.

In this case, and similar national top league cases such as the English Premier League and the German Bundesliga, we are faced with the pooling of clubs' rights in the upstream content rights market and the subsequent joint selling of exclusive rights.

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[7] Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 —Joint selling of the commercial rights of the UEFA Champions League) (notified under document number C(2003) 2627). See also press release IP/03/1105, 24 July 2003, "Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League"

The joint selling cases in sports are the most explicit manifestation of the complex web of horizontal and vertical relationships in the media field that I mentioned previously.

The horizontal pooling restraint creates severe vertical restraints—exclusive licensing to downstream TV operators. The main issues are again:

- the duration of the agreements; and

- the scope of the exclusivity;

And, in addition:

- severe effects on neighbouring emerging markets, in particular the hold-back of New Media rights.

In the light of the Lisbon strategy goals, this latter aspect moves more and more to the centre of our attention.

In this case, the balancing of efficiencies and consumer benefits versus the indispensability of restrictions was done very explicitly. Clear benefits were:

- The availability of a single point of sale and cost savings in transaction costs resulting from the existence of a one-stop-shopping facility;

- The creation of packaged league media products—that otherwise would not be available for the consumer; and

- The possibility for developing branding.

The measures that were taken by the parties for avoiding market foreclosure and allowing future entry were threefold:

- Substantial unbundling of the offer—selling in packages to allow potentially more bidders;

- Open tenders and substantial shortening of contractual periods;

- Reduction of scope—taking New Media at least partially out of the pooling arrangement, by also allowing clubs to sell individually in these new market, to a certain extent.

We have, however, been left with a major issue for the future: how to avoid excessive concentration in the downstream market, still possible by the fact that a single buyer may snatch up all the packages—as happened in the Premier League with BSkyB.

Without going here into any further detail, avoiding excessive concentration in the downstream market remains a difficult issue, with which we—or the Courts, if we fail—will have to deal in the future.

This then takes me back to the basic line that we are taking: whichever efficiencies are claimed during the current restructuring:

- Market entry must remain possible and indispensability of restrictions must be demonstrated; and

- A focus of special concern will be the new broadband media.

We will not admit that under any pretext the emergence of nascent new markets in the Union will be blocked by locking up existing markets and

content rights. This is particularly true for the New Media markets, Internet and 3G. As many here will know, we are carrying forward a first sector inquiry into content for 3G and others will follow.

But let me end on a more general note.

Conclusion

We fully recognise the importance of economies of scale and scope, be they in a vertical relationship or a horizontal one. Our case treatment demonstrates this. The Commission is emphasising sound economic principles in its decisions. This is also shown by the establishment of the Chief Economist in DG Competition.

But let us also keep in mind. The more innovative a market is, the more quickly it moves, the more likely new ideas can come up, thus the less trust can we have in claims of consumer benefits through economies of scale and scope, and the more we will depend on safeguards for keeping market entry open.

Let us never forget. The company that still does not exist but that may enter the market with new benefits for the consumer, cannot raise its voice in any current proceeding. This is why competition policy, in its basic vocation, must protect competition and not any competitor. And this is exactly what we are doing and will continue to do in the media sector.