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Scope and duration of media rights agreements: balancing contractual rights and competition law concerns

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The opinions expressed are purely personal and only engage the author.

Ladies and Gentlemen,

I wish first of all to thank IBC for inviting me to speak here today.

I intend to give you an overview of the main EC competition law issues raised by the scope and duration of contracts concerning the licensing of rights for the transmission of contents through different media. "Contents" in this context should be understood mostly as information or entertainment products such as, for example, thematic TV channels, films or sports events.

The questions to be answered in this respect are the following:

a) can media rights contracts restrict competition?

b) if so, why and how does the restriction appear?

c) and, thirdly, in face of a restriction, how can effective competition be restored?

Over these past few years, the majority of the questions concerning the scope and duration of media rights contracts has been raised in relation to television. However, technological evolution has made place for the appearance of new media such as the Internet or UMTS, and these new media have also been taken in consideration by the European Commission in its most recent decisions.

I will start by placing exclusivity concerning media rights contracts in the light of the principles laid down by the Court of Justice. I will then analyse the two main pathological manifestations to which excessive scope or duration may give rise: the "single seller" issue and the "single buyer" issue. I will conclude by highlighting the way the Commission has dealt with the issue of excessive duration and/or scope by means of remedies imposed or accepted in different situations.

In so doing, I will refer to a number of cases where scope and duration of rights contract were at the heart of the competition assessment carried out by the Commission such as *Film purchases by German television stations*[1], *Vivendi/Seagram/Canal Plus*[2], *Newscorp/Telepiù*[3], *Sogecable/Canal Satelite Digital/Via Digital*[4] and *UEFA Champion's League*[5].

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1 Case IV/31.743, *Film purchases by German television stations,* decision of 15.09.1989, OJ L 284, 03.10.1989.

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

3 Case COMP/M.2876 *Newscorp/Telepiù*, decision of 02.04.2003, available at http://europa.eu.int/comm/competition/mergers/cases/index/by_dec_type_art_8_2_with_conditions.html. See also Press Release IP 03/478 of 02.04.2003 at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/478|0|RAPID&lg=EN

4 Case COMP/M. 2845 *Sogecable/Canalsatélite/Vía Digital*, referral decision by the Commission to the Spanish authorities of 14.08.2002, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2845_es.pdf. See also press release IP/02/1216 of 16.08.2002. As to the final decisions in the case taken by the Spanish authorities, Decisión del Consejo de Ministros de 29 de noviembre de 2002, see http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N-280_1_ACM.htm and http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N-280_2_ACM.htm.

5 Case COMP/C2/37.398 *UEFA Champions' League*, decision of 23.07.2003, available at http://europa.eu.int/comm/competition/antitrust/cases/decisions/37398/en.pdf. See also Press Release IP/03/1105 of 24.07.2003 at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1105|0|RAPID&lg=EN

I. Restriction of competition

Let me start with the first question highlighted before: can media rights contracts restrict competition?

1. Exclusivity

The starting point in the competition assessment is given to us by the judgement of the Court of Justice in *Coditel II*[6]. It's important to bear in mind that the competition issue only arises where exclusivity is attached to the agreements. Non-exclusive agreements do not seem to raise competition concerns[7].

Coditel II concerned an exclusive licensing/distribution agreement of films for television broadcasting. The Court was confronted with the direct question of whether such an exclusive agreement infringed Article 81(1), and the answer was quite straightforward.

Based on the classic distinction between the *existence* and the *exercise* of copyright, the Court made it clear that a licensing/distribution agreement containing an exclusivity clause for a given territory "during a specified period" did not, as such, infringe Article 81(1). Nonetheless, the Court went on to detail the way in which the subsequent assessment must be carried out.

2. Principles

From the Court's judgement we can distil some principles:

a) an agreement concerning the licensing of IP rights on works which can made available to the public only by means of performance (be it television or cinema), concerns the exercise and not the existence of the underlying right. This means that, for example, a condition imposed on the parties to reduce the scope and/or duration of the exclusivity attached to an agreement is in line with Article 295 of the Treaty because such reduction does not affect the property of the right and could not therefore be considered as some sort of an expropriation;

b) duration of the exclusivity is specifically identified as a possible restriction of competition where it exceeds the proportionate needs of the industry at stake, namely a fair return on investment;

c) the creation or reinforcement of entry barriers in the relevant markets ("artificial barriers") may also constitute a restriction of competition where the purposes of the exclusivity are exceeded.

In the light of the foregoing, the answer to the first question is: YES, media rights' contracts can indeed restrict competition.

3. Antitrust and merger control

It should be noted that competition problems in rights contracts may arise not only under Article 81.

Excessive duration or scope of the exclusivity attached to content licensing agreements may lead to market foreclosure, and may therefore give rise to negative structural effects in a given market. As such, these structural elements may also be relevant under the Merger Regulation where excessive scope and/or duration of rights contracts leads, or contributes, to the creation or reinforcement of the dominant position of the merging entity.

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6 Judgment of the Court of 06.10.1982, Coditel SA-Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, ECR [1982] 3381.

7 This statement must be understood in the exclusive context of assessing scope and duration of exclusive agreements. In other contexts, non-exclusive agreements may naturally give rise to other types of competition concerns.

II. Pathology

Let me now turn to the second question: why and how can a restriction of competition appear in this context?

I would argue that the two main pathological manifestations in terms of competition that may materialise in respect of media rights agreements are:

a) the "single seller" issue; and

b) the "single buyer" issue.

1. The "single seller" issue

The "single seller" issue results from a horizontal restriction of competition. It may arise where a group of right-holders decides to pool their rights in a joint-selling scheme such as to create a "single seller" for their products. The pooling materialises by means of an exclusive license given by the each of the individual right-holders to the "single seller". The question therefore arises as to the scope (and eventually duration) of such license.

A clear (and recent) example of a "single seller issue" is given by the UEFA joint-selling arrangement for the sale of the Champion's League media rights.

UEFA was empowered to exploit the commercial rights to the Champions' League on an exclusive basis, thereby preventing the football clubs from individually marketing their rights. This prevented competition between the football clubs, and also between UEFA and the football clubs in supplying in parallel media rights to interested buyers.

This means that third parties had one single source of supply. Third party commercial operators were therefore forced to purchase the relevant rights under the conditions jointly determined on behalf of all individual football clubs. The reduction in competition caused by the joint selling arrangement therefore prevented the football clubs from taking independent commercial action and led to uniform prices, as opposed to what would normally happen in a situation with individual selling.

The UEFA joint-selling arrangement imposed moreover a number of restrictions on the clubs in respect of some rights not licensed to UEFA, i.e. rights to be exploited directly by the clubs themselves. Such restrictions were e.g. obligation to sell rights to pay-TV only and not to free-TV, or embargoes on the exploitation of deferred media rights, both for TV and the Internet.

The dimension of the competition problem in these cases will naturally depend on the scope of the exclusivity granted by the right-holders to the joint-selling body, the "single seller".

2. The "single buyer" issue

The "single buyer" issue is rather of a vertical nature, and it concerns the situation where one single buyer acquires all the rights at stake, i.e. a "one takes all" situation.

The possible restriction of competition in this situation results from the impossibility of access to the licensed rights by competitors of the exclusive licensee. This becomes relevant where such access is rendered impossible by a disproportionately long period of protection, or where the licensee's competitors are prevented from accessing the licensed rights in ways that would not undermine the licensee's position.

Examples of the latter situation would occur where the available amount of rights is such that the access to some of them cannot be regarded as harmful, or where alternative ways of exploitation cannot be regarded as directly competing with the licensee's own exploitation (or where the barriers to alternative ways of exploitation would amount to unjustified output limitations or would prevent the emergence of new markets).

The *UEFA Champion's League* case also provides a good example of the "single buyer" issue where both scope and duration assume a particular importance.

The statement of objections sent to UEFA found that the possible efficiencies that the joint selling arrangement could provide for the TV broadcasting market were negated by the commercial policy pursued by UEFA. The reason was that UEFA sold the free-TV and pay-TV rights on an exclusive basis in a single bundle to a single TV broadcaster per territory for several years in a row. Since the broadcasting rights agreements covered all TV rights to the UEFA Champions League, it made it possible for a single large broadcaster per territory to acquire all TV rights to the UEFA Champions League to the exclusion of all other broadcasters. It also left a number of rights effectively unexploited (Internet and UMTS).

The case *Film purchases by German television stations* provides another example.

The case concerned agreements on TV rights to American films entered into by the American studio MGM/UA[8] and the ARD German broadcasting stations group. In this case, the restrictions of competition were found to lie at both the duration and the scope of the exclusivity attached to the agreement.

ARD acquired exclusive TV rights on 1.350 existing feature films for a period ranging between 15 and 16 years, in addition to a 15 year exclusivity on all new films to be released by MGM/UA. The agreement also covered all existing cartoon movies, as well as a significant amount of existing TV series. Furthermore, the agreement covered a package of 14 existing James Bond films, as well as all new James Bond movies to be released during a period of 15 years. Two additional clauses reinforced even further ARD's exclusivity. The first granted ARD a 2 year exclusivity period at the beginning of the contract in respect of the complete MGM/UA library in order to select the desired films, during which no third party could be granted rights in respect of the any one of the products included in the library. The second clause granted ARD a right of first negotiation at the end of the contract in respect of a possible renewal.

Worth noting is the fact that the previous commercial practice of ARD consisted in concluding licensing agreements for 200-300 films for periods not exceeding 5 years. In this context, the Commission considered that there was a clear problem concerning both scope and duration of the licensing agreement entered into with MGM/UA, and concluded that the agreement therefore infringed Article 81.

A more recent example is provided by the pay-TV platforms mergers in Spain and Italy, the *Newscorp/Telepiù* and *Sogecable/Canalsatélite/Vía Digital* cases, concerning pay-TV rights for premium contents, essentially successful films and football. The Commission concluded in both cases that the notified merger operations would lead to the creation or strengthening of a dominant position in the markets for the acquisition of pay-TV broadcasting rights on: a) premium films; b) regular football events where national teams participate; and c) other sports.

The competition concern was related to the possible foreclosure effects as a result of which access by actual or potential competitors to crucial input markets would be barred. The foreclosure effects could result from two main factors.

First, access to premium contents was already difficult pre-merger due to the exclusivity attached to the licensing agreements entered into by the platforms with content providers.

8 The agreements were formally concluded with Nefico, a subsidiary of UA, and with TEC, the acquirer of MGM/UA. For convenience purposes, reference will made to MGM/UA only.

The long duration of such exclusivity, in addition to numerous hold-back and pre-emption rights provided for in the agreements, not only rendered actual competition bleak but, more importantly, virtually eliminated potential competition.

The same should be said in respect of the scope of the exclusivity because in some cases it not only covered satellite transmission but also applied to other technical platforms such as cable.

Secondly, the dominant (in some circumstances even monopsonistic) position gained by the merged entities would naturally increase their bargaining power vis-à-vis the content providers. This would allow each of the new entities to tailor its contractual conditions with content providers to its precise needs, including the prevention of potential competition by new entrants in the pay-TV market.

Another example arising from a merger operation is provided by the *Vivendi/Seagram/Canal Plus* case as regards both music and film rights. Vivendi was a leading company in the telecommunications and media sector, with interests in 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. The issue here concerned mostly the scope of the exclusivity to be enjoyed by the new entity in respect of an impressive amount of content.

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 competition issue at stake was market foreclosure, materialised in the creation or reinforcement of a dominant position resulting from, *inter alia*, the breadth of exclusive rights to be held by the merged entity.

III. Remedies

The third question to be answered today is: how to restore effective competition?

The starting point in the assessment by the Commission is the acknowledgement that exclusivity in rights contracts, as such, is not anti-competitive but that its exercise must be kept within limits such as to allow for competition to subsist. It follows that, when assessing the scope and duration of exclusivity, the task of the Commission is to achieve the appropriate balance between the legitimate needs and concerns of the parties, on the one hand, and the requirements of a competitive market, on the other.

The striking of this balance implies that, although some clear principles can certainly be derived from this approach, there are no automatic rules engraved in stone in this respect. The concrete outcome of this exercise depends, among other things, from the specific characteristics of the relevant market and from the market power of the parties involved.

1. Remedies for the "single seller" issue

As said before, the "single seller" issue concerns a horizontal restriction and basically corresponds to the setting up of a joint-selling scheme characterised by exclusivity, i.e. excluding the individual right-holders from selling in parallel with the joint-selling body. Where the scope of the exclusivity is excessive, i.e. where individual selling is totally excluded as regards of all types of rights, a competition problem may arise.

In the *UEFA* case the parties solved the problem by allowing the individual football clubs to sell on a non-exclusive basis in parallel with UEFA certain media rights on the Champion's League. This means that the

scope of the exclusivity granted by the football clubs to UEFA was reduced.

UEFA will have the exclusive right to sell the two main packages of live TV rights (so called Gold and Silver Packages). There are, however, other rights (s.c. Bronze Package). UEFA will keep the exclusive right to also sell these rights but if after one week UEFA has not managed to sell them, then the clubs are free to sell them individually in parallel. The fact that UEFA has now got a clear cut-off date means that not only the scope of the exclusivity granted to UEFA was reduced, but also its duration, which is reduced in respect of the Bronze Package to one week. Clubs will also be able to exploit in parallel with UEFA the rights to deferred matches, and the same rule will apply as regards Internet and UMTS rights.

Therefore, in the *UEFA case*, the "single seller" issue was solved by means of a reduction in both the scope and the duration of the exclusivity granted to UEFA by the football clubs.

2. Remedies for the "single buyer" issue

In *UEFA Champion's League*, after its initial objections, the Commission held discussions with UEFA. These discussions led the Commission to accept a number of limitations to the exclusivity attached to the licensing agreements to be concluded between UEFA and the broadcasters.

As regards duration, the Commission accepted a maximum duration of three years for licensing agreements, which will be concluded further to a public tender procedure allowing all interested broadcasters to bid.

As regards scope, you might remember that the Commission's objections arose from the fact that the sale of the entire rights package on an exclusive basis and for a long period of time had the effect of reinforcing the position of the incumbent television companies as the only ones with the financial strength to win the bids. This, in turn, lead to unsatisfied demand from other broadcasters and a lesser ability to make an attractive offer to customers. One has to bear in mind that sports and films are two key ingredients for television and for pay-TV channels in particular. Furthermore, they are also proving increasingly critical for the development of new technologies.

Accordingly, the Commission accepted a solution providing for the "unbundling" of football rights in smaller packages, allowing different (and financially weaker) broadcasters to access different packages.

It is worth underlining that the reduction in scope does not only occur in respect of TV broadcasting rights, that is to say, within one single transmission platform. The segmentation of rights also takes place in respect of different transmission platforms, given that Internet and UMTS rights were singled out as separate categories within the rights segmentation and constitute autonomous packages. The new system therefore affords opportunities to new media operators as both UEFA and the football clubs will be able to offer Champions League content to Internet and UMTS operators.

In *Film purchases by German television stations* a significant reduction in the duration of the agreements was accepted by the parties by means of the introduction of several "windows" ranging from 2 to 6 years during which the exclusivity of ARD is lifted, thereby allowing the films to be licensed to third parties, which concomitantly implied a reduction in the scope and duration of the exclusivity. As regards made-for-TV products, ARD committed to waive its exclusivity in respect of products it did not select for own broadcasting, thereby liberating immediately after the selection period such products for the benefit of third parties.

In *Newscorp/Telepiù* and *Sogecable/Canalsatélite/Vía Digital*, for example, the remedies concerning access to

content were devised through limitations to the scope and duration of exclusivity agreements with premium content providers, as well as through the establishment of sub-licensing schemes.

The duration of the exclusivity attached to future agreements entered into by the pay-TV platforms with premium content providers (film producers and football clubs) was limited in both cases. In the Spanish case, such limit was set by the Spanish authorities at 3 years while in the Italian case the limit was defined by the Commission also at 3 years for films and 2 years for football, a difference justified by the greater complexity of the licensing agreements for films. Additionally, as regards **ongoing** exclusive contracts, a unilateral termination right was granted by the parties in the *Newscorp/Telepiù* case to film producers and football clubs.

The exclusivity attached to premium content was also limited in its scope, restricting the range of technical platforms on which the new merged entities will be able to enjoy exclusivity. In *Newscorp/Telepiù*, the new entity waived exclusive rights, as well as any other protection rights, with respect to all platforms other than DTH (terrestrial, cable, UMTS, Internet etc.). In the Spanish case, the new entity will not acquire or exploit exclusive UMTS and Internet rights on the Spanish League and Cup events and, as regards films, it shall not acquire exclusive pay-per-view rights for platforms not operated by the merging parties at the time of the merger.

With respect to sub-licensing schemes, the merged entity in *Newscorp/Telepiù* shall offer third parties, on an unbundled and non-exclusive basis, the right to distribute on platforms other than DTH its premium contents. The price for this "wholesale offer" will be determined on the basis of the "retail minus" principle and its implementation will imply an account separation and cost allocation between wholesale and retail operations of the platform. On its turn, the merged entity in the Spanish case shall provide third parties with at least one channel including premium films, as well as its own in-house produced thematic channels. Additionally, it will be obliged to maintain the sublicensing scheme for football events that existed at the time of the merger[9].

Finally, in *Vivendi/Seagram/Canal Plus*, the parties undertook to grant access to Universal's music content to any third party on a non-discriminatory basis, therefore reducing the concerns in respect of the Internet portals market and the on-line music market. The parties also undertook not to offer more than 50% of the Universal's film production to Canal+, thereby reducing the concerns in respect of the foreclosure by Canal+ of the pay-TV markets.

Conclusion

Exclusivity is nowadays commonly perceived as an important feature of many media rights contracts. The need for differentiation between competitors and a fair return on investment are acknowledged by the Commission as legitimate concerns on the part of media operators. This cannot mean, however, that the scope and duration of exclusivity may be extended without limits. Essentiality, proportionality and a fair share of the benefit for the consumer are well-known principles of EC competition law, and they have a privileged field of application in the framework of media rights agreements. In the context of exclusivity, the end justifies some, but certainly not all, means.

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9 This condition refers to the sublicensing scheme existing already pre-merger through the joint-venture Audiovisual Sport. See Press Release **IP/03/655** of 08.05.2003 at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/655|0|RAPID&lg=EN.