EUROPEAN COMMISSION

Competition DG

Information, communication and multimedia

Media

The Head of Division

Brussels, 19 January 2005

COMP/C2/HU

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Competition in the media sector

- how long can the future be delayed?

PCMLP 2005 Seminar Series

"What's Wrong with Competition Policy in the Media Sector?"

Programme in Comparative Media Law and Policy

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Coming from a competition agency[1], I was puzzled and intrigued by the title for this seminar series: What's wrong with competition policy in the media sector? I was the more honored to be invited to this first session. And I was thinking about a fitting title for my own intervention. I came to the conclusion that I should speak to the theme: Competition in the media sector: how long can the future be delayed? I will therefore make my remarks along this line. I hope these introductory remarks will lead to some debate afterwards.

Three initial statements:

- We are moving to a new media environment and a new organisation of the sector. The second phase OFCOM PSB report of last autumn[2] has made it abundantly clear that the issue is not if *but* how late

- Inevitably a larger role will fall to competition law and competition law considerations. The market is moving to substantial complexity and the basic law is that complex markets cannot be regulated by public regulation alone, sophisticated as the public regulator may be. Control of complex markets and maximising utility for consumers in those markets are best done, at the end of the day, under the influence of market forces and the controls that market actors and audience exert on each other in such an environment. This is of course the very essence of beliefs in free markets and in the working of competition forces.

- Current media regulation and competition law control can help to get from here to there—guiding through the transition. At the moment none can do without the

[1] The opinions put forward in this paper are the personal views of the author.

[2] OFCOM 2004, OFCOM Review of Public Service Television Broadcasting: Phase 2 - Meeting the Digital Challenge

other if we want to achieve the basic values in the sector: plurality, diversity and choice.

The regulatory transition strategy is of course OFCOM's main current theme, and will be the main theme of the lectures and conference tomorrow.

My task here is to explain how we contribute to the transition under EU competition law.

Let me add one further point. Even if the current debate in the UK on the transition to digital switchover is very much linked to essentials of the UK broadcasting market—leading in many aspects the European market—and to processes and issues unique to the UK broadcasting scene, such as the BBC Charter Review, the transition in the UK parallels the agenda on the continent. In fact, it is part of a world-wide phenomenon. The basic market facts will be set at a larger level—and I do not believe that any of the national reform debates and processes could be decoupled from this larger context in a sustainable manner.

Let me then move to expand on those points

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Point 1: The current system is unsustainable.

We will move across Europe—and indeed world-wide—to an environment that will be less subject to the sector specific rules built for the traditional broadcasting sector, and more to the general market regulation under competition rules.

I would like to refer here largely to the analysis given in OFCOM's PSB report that inevitably had to look at the wider change in the sector.

Just let me recall essentials:

- We are moving from analogue to digital at increasing cruising speed. In the EU's now 25 Member States, we have now 30 million digital TV households, out of near 180 million households that are equipped with TV sets—a penetration rate of around 17%, though spread very unevenly across the countries concerned. The UK, of course, is well ahead of this penetration rate, mainly thanks to the recent success of Freeview, and of course of Sky.

- In more profound terms this means that we have moved a substantial way from a hertzian to a broadband multi-channel environment—even if the current digital environment is still way off a full-scale environment of potentially limitless channel capacity as the Internet interactive broadband environment will offer. Current planning is still based on the increase by a factor of 10 or so of channels that classical digital brings, still far off the nearly limitless channel capacity that full interactive broadband Internet will provide. Analysis and regulatory policy making are still very much focused on existing platforms, and the enhancement digitisation brings to them—digital satellite, cable and terrestrial. However, Internet broadband penetration is now rapidly rising, and the liberalisation of telecoms of the nineties is now bearing its full fruits in generating that innovation rate. Broadband connection in the EU has reached by the end of the year 33 million lines—a penetration rate again of some 18% of households, 7% of inhabitants—but many of these connections are still not at speeds with full video capability, and 80% are based on DSL telephone lines.

- Much will depend on how rapidly capacity of the back-up networks increases, and how much intelligence and storage will be available through truly multi-media home systems, the PDR being just one specific element in this. Technology breakthroughs are possible and technology wildcards are out there, as the

impressive success of the use of P2P technologies in the field of VOIP telephony has shown over the last few months. Once intelligence and storage is deployed massively to the homes, and homes share that intelligence via legitimate sharing arrangements, we could see rapid upgrading of the capability of the new platforms. The age of limitless channel capacity may come more rapidly than we may think.

That takes me to my second point.

Point 2: Once we move away from a platform-tied limited channels world to a world of nearly limitless capacity, the basic rationale for the current regulation in economic terms goes away—and in public interest terms it must change.

The OFCOM PSB report has pointed this out in quite clear terms. At the EU level this is expressed by the current reform debate on the EU Television without Frontiers Directive, and, of course, the increased role that EU competition rules have come to play.

The traditional broadcasting regulation in all EU Member States has been based on the principle of scarcity—extreme scarcity of frequency first, scarcity of frequency mitigated by increased efficiency of frequency use through digitisation in the current transition. If scarcity of channel capacity goes nearly completely away, through a combination of transmission and intelligence in a fully video capable Internet, there will be a need to explain where the basic rationale is for the difference in regulation of the publishing sector, mainly based on general market regulation and self-regulatory mechanisms, and of broadcasting.

The OFCOM report has drawn somehow a consequence by proposing the Public Service Publisher—of course under its own specific perspective and its focus on redefining PSB for the transition.

However, the relationship between market change and regulatory change is no one way street. Technological innovation takes place and markets change if regulation so allows—and if the strategies of actors promote that change.

So why does the future not happen? Why is the limitless channel environment still far off?

We are facing the problem of the Gordian knot: Regulation is still based on the principles of the past, and reforms have just started, with this country without doubt in a driving seat; market power structures in the sector favor gatekeepers; and gatekeepers tend to favor business strategies that optimise the presence and still sacrifice, quite often, the future — the New media. It is with regard to the latter that competition policy in the media sector gains its full importance.

This leads me to my third, and main, point.

Point 3: The contribution EU competition law can make to the transition.

Let me make first a few basic remarks. Competition policy takes a very down-to-earth approach. It is formulated against a background of existing power relationships set by ownership, markets, and gatekeeper positions. It defines markets within which it deals with these power relationships.

In the media sectors we mainly structure these markets according to four levels: content, broadcasters/channels, distribution platforms, audience—and advertisers— even if of

course in practice these market definitions are substantially more refined according to the requirements of cases. But we also apply competition rules within a concrete regulatory setting given by law and public interest. This framework is shaped for the media sector by PSB and specific media regulation, by Intellectual Property Rights, by telecom regulation, and, of course, general market regulation where competition law figures prominently. And we are conscious that we move in the media sector within a framework of public goals, widely agreed across Europe: plurality, diversity and choice.

The basic vocation of the application of competition rules is control of market power. In a media world where gatekeepers tend to hold back the development towards the limitless channel environment that I have discussed, addressing the abuse of market power by gatekeepers becomes a task of fundamental importance. It means that we are concentrating in the application of competition law on what we consider as the most critical issues in the transition, as far as market power and its abuse is concerned:

- Access to premium content
- Vertical concentration: bundling of platforms and content
- Horizontal concentration: platform consolidation

We have to address the effects of horizontal concentration, vertical concentration, and the resulting market foreclosure for the new media entrants. The strategic challenge is the unblocking of the transition towards the New Broadband Medium. Innovation needs open markets and open structures.

One reminder: a growing role of competition rules for keeping media markets open does not mean an automatic growth of influence for EU-application of competition rules. The current decentralisation process of EU competition powers to the Member States,

initiated with the reform of EU antitrust application of 1 May of last year, means in many cases that national competition authorities will play a lead role—in this country OFT and OFCOM.

Under EU law we apply, as is well known to the practitioners in this room, mainly four competition instruments:

- Antitrust rules, the prohibition of anti-competitive horizontal and vertical agreements, Article 81 and 82 EC Treaty
- The EC merger regulation
- The EC Treaty public service provisions, Article 86
- And EC state aid control, Article 87

Let me then have a short look at how this has worked in the media sector in practice in key cases.

Football TV rights

I think nobody will disagree that football is an indispensable launch-pad, in many cases, for new platforms—particularly after the experience, both positive and negative, in this country. For us it is a test case for unblocking access to content that may be withheld from other market participants by anti-competitive agreements. The lead decision is the decision on the UEFA Champions League of two years ago, and similar proceedings with regard to top national football leagues, in this country the English Premier League, in Germany the Deutsche Bundesliga.

In all three cases we were faced with the pooling of clubs rights in the upstream contents rights market, and the subsequent selling of exclusive rights.

The horizontal pooling agreement creates severe vertical restraints—exclusive rights to downstream TV operators, a single one as in this country or very few.

Our main aim is keeping markets open and unbundling access to critical content, in order to move the sector forward, as I have said.

In the UEFA Champions League case[3], UEFA, the European Football League, made the necessary concessions:

- Unbundling of the offer into a number of packages comprising interesting matches, allowing a number of media actors to bid

- substantial shortening of contract periods, in order to ensure periodic market opening, and to avoid a permanent bundling of platforms and football content—in this case tender of rights every three years

- Separate packages for the New Media, in order to give the necessary launch-pad to the transition

On that basis, the joint selling by UEFA was agreed and a positive decision was taken.

Negotiations for settlement were undertaken with the German top league, the Bundesliga, and the English Premier League. With the Bundesliga agreement has now been reached and a formal positive decision was taken by the European Commission today[4]. With the Premier League discussions are still ongoing, but the essentials of a planned settlement

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[3] 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"

[4] See press release IP/05/62, 19 January 2005, "Competition: German Football League commitments to liberalise joint selling of Bundesliga media rights made legally binding by Commission decision"

were published 12 months ago. Inevitably the problem here is more complex, given the historic long-term bundling of Premier League content with one single downstream operator, the Sky platform— and the foreclosure effects that have resulted for others from this practice.

The League cases are dealt with under Article 81, EC Treaty, and the antitrust provision against anti-competitive horizontal or vertical agreements.

Platform consolidation

A quick look at a second case, this time under the merger regulation. The case concerned the merger of the two Italian digital pay-TV platforms of the time, Telepiu and Stream, into Sky Italia.[5]

This case therefore dealt with the problems under which conditions a merger of platforms leading to near monopoly in the respective market could be accepted.

The Commission relied on a series of measures similar to those discussed above, in order to allow the restructuring to go forward. The basic line was to secure future market entry, and to lower correspondingly the barriers to entry.

Again critical,

- Access to sports and also film content, for safeguarding *inter-platform* competition;

And,

[5] 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"

- allowing access for competitors to the merged distribution platform, in order to give them the possibility to attain critical size for their own operations, through initial *intra-platform* competition

In order to achieve these goals, again exclusivity was shortened very substantially (two years for top league football contracts, three years for film output deals). Scope of exclusivity was reduced to the DTH core platform. A mandatory wholesale offer for sublicensing had to be agreed by the parties. Additionally, a number of access conditions were applied to the platform and to the related conditional access system.

This takes back to the essentials for keeping future markets open: access to premium content; and, no exclusionary long-term bundling of content and platform. Both are fundamentals for open market development in media, and for fair competition.

Altmark

Let me finally say a few words about another essential condition for fair competition: the future role of publicly financed operators in the evolving market—very much at the center of the PSB debate in this country.

Under EU competition rules the issue of license-fee financed PSB's falls under state aid review, Article 87, and Article 86, as applicable.

The so-called Amsterdam protocol, an annex to the EU Treaty, has confirmed the right of Member States to choose their PSB-order. However the Altmark ruling[6] by the European Court of Justice sets certain strict criteria, in order to safeguard fair competition with the private sector.

There must be

- A clear remit / clearly defined public service tasks
- Compensation of PSB-tasks by a licence fee or other state resources must be calculated on an objective basis, and be established in advance
- No overcompensation in financing PSB tasks
- An effective efficiency control: to be achieved by public tender or by determination of costs on the basis of a "well run company"

All of this is of course very much related to the current UK discussion and OFCOM's current analysis and proposals.

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[6] European Court of Justice, ECJ case C-280/00 Altmark Trans, 24 July 2003

Let me then wrap up.

Recent cases in the application of competition rules in the media sector evolve around *three central themes*, all of them essential for moving the sector forward into the transition towards the new media world: Unbundling of content and platform, in order to allow for newcomers to enter; restructuring, subject to allowing for sufficient market opening; fair competition between the public and private sector, in order to prevent the strangling effects that public subsidies can have, while safeguarding public value in the sector.

The application of competition rules—merger control, antitrust, state aid control—tame market concentration, both horizontal and vertical, and the unbalancing of media structures through uncontrolled use of public subsidy. Competition rules therefore make a substantial contribution towards the maintenance of a fair level playing field in the media sector—the very basis for freedom of speech, diversity of opinion and choice—together with a fair play PSB concept.

Competition rules cannot replace public regulation intended to guarantee plurality entirely—not at this stage. However, without them, an open media structure cannot be sustained. As Member States move towards more liberalisation in the media market, as the natural consequence of the increasing multiplicity of channels brought by the new technologies, the basic task for competition law application is to prevent private structures and dominant stake holders impeding through anti-competitive practices that very market opening.

The very objective of the application of EU competition rules is that we must prevent dominant market participants reserving markets for themselves that have been opened by Member States. As I have tried to demonstrate, this is a core issue during the current

transition. It is also the reason why we are carrying out EU-wide sector investigations for identifying anti-competitive practices that stand in the way of rapid introduction of the new media—such as the current EU-wide investigation into sports content for 3G. The aim is to identify practices such as refusal of supply of content for the new entrants, anti-competitive bundling, and excessive embargoes and other onerous conditions. Broader investigations into the availability of premium content for provision via the broadband Internet are to follow.

So what is wrong about competition policy in the media sector? I leave that question to the debate.

The basic role of competition rules for the sector is to open markets, in order to allow for the transition into an era of nearly unlimited channel capacity—as far as "channel concepts" will still exist and be meaningful. Unbundling is fundamental to allow market participants to put together the pieces of the puzzle of future markets in new ways. Openness of markets is fundamental for any innovation, as it is for diversity. High quality of services is not in contradiction with competition, but one drives the other. Choice is, of course, the very essence of competition.

We do not believe that in the current state of development of the media sector competition rules alone can guarantee the achievement of the public goals for the sector. A sound PSB concept to guarantee inclusiveness will be indispensable for the transition. Regulation will be needed for some time to come.

But we do not believe either that market economics contradict the public values in the sector. On the contrary, we believe they promote them in a sustainable manner.

Let me end on this note.