EUROPEAN COMMISSION
Competition DG
Information, communication and multimedia
Media
The Head of Division

Brussels, 10th December 2003
COMP/C2/HU/rdu

Impact of Competition Law on Media—some comments on current developments

4th ECTA Regulatory Conference

Brussels, 10th December 2003

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Introduction

With the reform of the telecommunications regulatory framework—the New Electronic Communications Framework—the impact of competition law on communications and media has dramatically increased.

Let me use my short contribution to this panel to stress the impact of competition law on media—well known of course to everyone here since the screening under the EU merger regulation of the big media ventures of the Internet boom, Vivendi/Universal and AOL/Time Warner being the most prominent examples. I would like to focus my remarks on the application of general competition law principles to a main issue of future development—access to key premium content, and our recent approach in developing those principles. Let me make a few points on:

(1) The general context

(2) The main principles that we apply

(3) The delicate line that we have to tread between the property right of the owner of the content, and the requirement of generating broad access, for allowing new entrants and markets to develop.

The issue is well known under a different disguise from telecom liberalisation where we had to make similar choices when subjecting incumbents' networks to stringent access requirements and unbundling, in order to ensure competitive development and entrance in the downstream service markets. This is, of course, now worked out to substantial detail under the SMP- and access regulation of the Communications Framework, and will, without doubt, be a matter of intense debate today.

Context

Briefly, a few remarks on the general context. The development of media in the European Union must be seen against the background of three main regulatory developments:

(1) The implementation of the Electronic Communications Directives, a topic of most of this conference;

(2) The Reform of the Television without Frontiers framework, where the emergence of the New Media will prompt the review of a number of principles;

(3) The intensified application of Competition Law principles, both under the Electronic Communications framework, and under their orthodox form.

A major criterion, against which all three lines of regulation will have to be measured in this sector, will be how far application of the new principles will allow new networks, services, and media to take off. Broadband take-off will be the decisive measure. Broadband, under its new Internet-based form, is now at 5%, somehow where mobile was 10 years ago when we fully started the Telecommunications Liberalisation. If we can get conditions right, we may see during the second part of this decade a broadband boom that could replicate the mobile boom of the second part of the nineties—with the same knock-on effects that we have seen then.

But for that we need: Access to premium content—decisive for TV and video markets, and even more so for new entrants and New Media, both Internet broadband and 3G.

Out of premium content it will be premium films and sports that will be decisive.

Principles

Under competition law in its orthodox form, we mainly analyse two aspects in the media field:

(1) Exclusivity in premium content rights;

(2) Effects of the exercise of such rights on downstream markets, i.e. the broadcasting and the New Media markets.

The basic measure is how far exercise of rights leads to market foreclosure and how we can avoid that outcome.

We are faced with a complex web of effects—and often restrictions:

- Horizontal effects;
- Vertical effects;
- A combination of horizontal and vertical effects.

Let me be more specific, and look at one of the most contested case areas that we have been dealing with recently: football associations / sport content.

We find:

Horizontal effects, where sports associations pool the rights of the participating clubs, and thereby restrict price competition, competition on features and often limit output in an attempt to maximise revenues, for fear of cannibalisation of their core TV income by the New Media.

Vertical effects, whereby the pooling upstream, or the simple excessive exercise of exclusive rights in case of a single owner, leads to a single buyer on the downstream television markets creating or reinforcing dominant positions in those markets, and closing these markets to competitors by withholding from them a vital input.

Combination of horizontal and vertical effects, the worst kind of situation, where we are facing the combination of dominant positions in the upstream *and* downstream markets leading to very strong market foreclosure effects, particularly in the area of TV live rights—as we are now facing in some national football TV rights markets.

The anti-trust provisions involved are mainly:

Article 81: Anti-competitive agreements—prohibition of price cartels, output restriction and market partitioning.

Article 82: Abuse of dominant positions—prohibition of unfair pricing, discrimination, and unfair foreclosure of competitors by actors dominant in their markets,

And, of course,

there is the extensive and well-known EU merger scrutiny in the field that I have mentioned. And in a field of strong state intervention, through Public Service Broadcasting, state aid rules also have a major role to play.

The common denominator of issues across all applications of these instruments is ensuring a level playing field, and the avoidance of market foreclosure.

In more detail, in the antitrust field the main issues are:

Horizontal restraints: excessive pooling in upstream markets.

- *Joint selling*, of particular relevance in the top leagues such as in the Champions League, and the big national leagues such as the Premier League in the UK and the Bundesliga in Germany.

- *Joint purchasing*, present, for example, in the original joint purchasing consortium of Sogecable and Via Digital—Audio-visual Sports—in Spain that has been overtaken by the merger of the two main parties. The conditions imposed by the Spanish Competition Authorities on the occasion of this merger allowed us to close the case.

  But the issue is also present at the European level, such as with the joint purchasing by the European Broadcasting Union, the EBU, of the Olympic Games' rights, currently again under intense scrutiny with regard to its potential anti-competitive effects—after the Court's ruling against the original Eurovision Decision of the year 2000.

Vertical restraints (jointly or single): exclusive selling to downstream TV operators. At stake:

- The duration of the agreements.

And

- The scope of the exclusivity.

All of these effects are of key importance as regards market foreclosure and concentration in the downstream media markets.

And finally, the major problem looming behind current issues in the live TV markets:

- Restrictions affecting *neighbouring markets*,

And particularly:

- *Embargoes and holdbacks* of content for New Media markets, especially for new entrants.

Let me add here a few remarks on the recent UEFA Champions' League Decision that has set the framework and the criteria that we apply to those situations. The Decision, which has set up a refined scheme of limitations on the scope of exclusivity, requirements for the unbundling of the offer, and limitations of duration—all of which with the principal aim of keeping markets open for new entrants.

The Decision has for the first time forced the release of top football content for New Media, both Internet and 3G, with near zero embargo time for 3G and a 90 minutes embargo for Internet content—subject though to review after the current contractual period.

The checklist that results from that decision can be read as follows:

- Open tender;

- Unbundling of offer

- No excessive exclusivity,

And,

- No excessive concentration in downstream markets.

The application of these principles, as now developed, are also at the heart of the current cases that aim at keeping high profile content open for market participants—such as the Premier League case.

Overall caveats are:

(1) No unused rights;

(2) No hold back of premium content, particularly not for the New Media (broadband, Internet) which has become a main focus of our action on content;

(3) No foreclosure of operators on a permanent basis.

What is ahead?

Let me then come to the future. What is ahead?

The application of competition principles under the new Electronic Communications Framework is a major test for the versatility of competition law principles and for the ability of our regulatory systems to use these principles to good purpose. As the Implementation Report on European Electronic Communications Regulation and Markets published last month has shown, the sector seem to be on the verge of new growth. Broadband lines have doubled over the last year, even if the uneven growth of lines between incumbents and New Entrants has led to new competition problems that the Commission is trying to tackle both under the Framework and the new Article 7 procedure, and by application of orthodox competition procedures, with a series of spectacular Art. 82 Decisions brought forward recently. Much of that future growth will depend on finding the right balance between the interests of the network investor, and of access regulation, in order to avoid market foreclosure in the emerging new service markets—the situation in the xDSL markets being one major example.

As regards the content that is necessary to fill the new pipes, we are facing a similar dilemma. *On the one hand* we have to ensure the respect for Intellectual Property Rights

to guarantee the incentive to create content. The Commission—via its line of Copyright Directives—has demonstrated that it is firmly committed to doing this. *On the other hand,* the Court has very clearly stated that the exercise of those rights must not lead to foreclosing development of markets, particularly when we are faced with cumulative effects either explicitly—like in joint selling or purchasing agreements—or implicitly by parallel agreements having a similar effect.

It is this delicate borderline that we are trying to tread in current cases—to the advantage of the consumer, the advantage of market developments and therefore, we believe, also to the advantage of all investors, the New Entrants and the Incumbents alike.

Content for the New Media will be key for the developments ahead. We are planning a series of investigations into key New Media sectors where we have indications that valuable content is held back by anti-competitive practices—using the instrument of Sector Inquiries under antitrust provisions that have been successfully used in the telecommunications field and that is further emphasised by the current Reform of our antitrust regulations.

Let me then conclude.

IP Rights reign the world of content. A main future regulatory issue in the world of broadband will be the exercise of those rights.