EUROPEAN COMMISSION

Competition DG

Information, communication and multimedia

Media

The Head of Division

Brussels, 5 April 2005

COMP/C2/HU

Herbert Ungerer

Switchover or Catch-up?

Applying the modernised EC Competition Regime in the New Media Sectors

The Law Society's European Group, Brussels

Herbert Ungerer

Commission Européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: J70 1/74. Telephone: direct line (32-2) 2968623 / 68622. Fax: (32-2) 2969804 / 94217. E-mail: Herbert.Ungerer@cec.eu.int

I would like to use this evening discussion as an opportunity for an informal exchange of view on the special nature and the particularities of the application of competition rules to the media sector, as we transit toward a new world of broadband and New Media content based services.

Let me first make some caveats.

Media is a very special sector compared to other sectors in the communication and information field, as regards the application of EU competition rules:

- It is a sector very near to the heart of our constitutional environment. Media is the basis for exercising the fundamental rights of freedom of expression and information and therefore touch on the roots of our democracies. Media therefore inevitably is a sector of extreme political sensitivity.

- It is a sector where competition is existing both in television and print. The EU television sector is firmly grounded since the late eighties on a dual system of public and private broadcasters. However, markets have remained highly oligopolistic. Competition Authorities have found it traditionally difficult to tackle oligopolistic structures.

- It is a sector with heavy and deeply institutionalized public intervention. A third of total revenues of the sector are collected

under the form of Public Service Broadcasting license fees or other state contributions for financing PSB goals. The Amsterdam protocol of the Treaty has recognized the right of Member States to secure Public Service goals in the sector by this method but friction between Public Service Broadcasters and advertisement or pay TV financed private broadcasters on the issue is permanent since the introduction of the dual system in all Member States.

- media is a content based industry—and this means that it is a field dominated by Intellectual Property Rights, well known as one of the most difficult fields of application of competition policy.

In terms of competition law cases, particularly those concerning the new emerging media markets, this has meant that we are faced with an extremely complex environment—and this has limited undoubtedly in a number of instances possible action under competition law. Let me just recall that well known court decisions over the last few years have tended to substantially increase the burden of proof on the Commission when it wants to address market concentration in highly oligopolistic markets. In the Sony/BMG merger decision of last year, the Commission had to acknowledge that proof was not sufficient for not giving the green light to a merger that decreased the number of music majors from five to four. The Commission had to limit itself to the announcement that it would keep the sector under review under antitrust. In many instances the competition

argumentation in media is substantially more difficult than in sectors where regulators face more clearly delineated market positions—such as in telecoms where often competition regulators face dominant positions and therefore a clear base to apply Article 82, or Significant Market Power based regulation. In the media sector, the existence of more complex oligopolistic market structures has meant that we have to rely primarily on Article 81 to combat anticompetitive conduct. Often, we find ourselves at the forefront of the application of competition law principles. One example is the fact that the first Article 9 commitment decision under the modernized EC competition regime was issued in January in this sector—the Bundesliga Decision concerning the selling of the TV rights of the German top league.

After these caveats, a remark on the new market developments that we face.

The digital transition and the arrival of the New Media will bring dramatic change. Broadband will be for media, what mobile was for the liberalization of the European telecommunications sector a decade ago. It will inevitably lead to a profound reform of regulation, new players, and a fundamental redistribution of cards.

In the 25 Member States of the European Union, 180 million households are equipped with TV sets. Europe has now 41 million digital households, 27% household penetration.

At the same time, we are living a silent revolution that may overtake traditional concepts of digital TV more rapidly than we think: Rapid growing broadband Internet penetration.

By the end of last year, fully interactive Broadband Internet had reached 33 million households across the European Union—a penetration of some 18 percent of households, 7% of inhabitants, out of which 80% DSL telephone wire based, and 20 % cable, with wide variations between EU countries. Growth rates of broadband connection over the last year have been over 100%—significantly very similar to the growth rates we saw in mobile during the build up of the mobile networks that subsequently entirely transformed lifestyles, consumer behaviour and the revenue structures in the telecom sector within a period of less than five years.

Europe may reach a broadband Internet (fixed DSL and cable, and mobile) penetration at fifty percent of households well before 2010—and the Kok report has recommended this penetration goal as a target for the revigorated Lisbon strategy. The media landscape will then look very different. New Media will rapidly gain in importance, and new markets and additional revenue streams will develop.

In policy terms we are facing a new situation.

The basic framework for the media at EU level, the Television without Frontiers (TWF) Directive, is under review. The Review is particularly focusing on adjusting the provisions of the Directive to the New Media.

In competition terms, the basic challenge for the application of competition rules to the sector is now to keep the development towards the new markets open. The market must not be tilted during the transition from analogue to

digital, from traditional to New Media, in favour of any actor. An open dual structure must be maintained.

The main goal must be to avoid market foreclosure. Avoiding market foreclosure in this sector goes beyond traditional competition law concepts. Application of competition law cannot be seen in abstract. It must be seen inevitably against the basic goals of the Union in this sector—particularly the guarantee of plurality.

Plurality requires the availability of choice. Choice between different opinions and offers within the same media but also between different types of media: access to TV, Print and New Media. The development of open competitive market structures is therefore vital. This makes Competition Law application a vital component of policies in the media sector—and it gives its full meaning to the avoidance of market foreclosure as we move to the New Media.

Let me then move on to the major principles of our action.

While this is work in progress a number of principles have developed out of the case decisions of the last years, as far as application of competition law is concerned:

- opening access to critical content as the main driver of the development

- safeguarding contestability of markets at every level of trade, while admitting necessary consolidation and restructuring

- creating a level playing field between public and private broadcasters during the transition

- A categorical no to any blocking of the development toward the New Media. Wherever traditional actors are tempted to secure, by anticompetitive means, their existing market positions to the detriments of the emergence of the new markets, they clearly cross the red line

Access to critical content, particularly premium sports rights

I think nobody will disagree that top premium sports rights, and particularly football, is an indispensable launch-pad, in many cases, for the new platforms—particularly after the experience in a number of EU countries. 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 Germany the Deutsche Bundesliga, in the UK the English Premier League,.

In all these cases we were faced with the fact that the pooling of clubs rights in the upstream contents rights market, and the subsequent selling of exclusive rights led to strong foreclosure effects in the downstream television markets—and to the vertical blockage of any development towards the New Media. The horizontal pooling agreement creates severe vertical restraints—exclusive rights to downstream TV operators, a single one, or very few. It is the cumulative effect resulting from the horizontal pooling agreement that is at the centre of the concerns.

In the UEFA Champions League case, 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

And, in order to remedy a key concern

- 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 was reached and a formal positive decision was taken by the European Commission in January as mentioned. With the Premier League discussions are still ongoing, but the essentials of a planned settlement 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.

All of these cases have been based to date on Article 81, EC Treaty, and the antitrust provision against anti-competitive horizontal or vertical agreements.

Platform restructuring

The lead case here has been undertaken 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.

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 key issue was how to safeguard contestability at the different levels of trade, and therefore future market development.

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,

- 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.

Level playing field between public and private broadcasters

As many here will know, addressing this issue has been a main recent concern by the Commission. The entering of the Public Broadcasters, financed by public license fees, into the New Media and their extensive buying of exclusive sports rights are inevitably at the center of debate when

reviewing the conditions for a level playing field. While it would be inappropriate to talk about ongoing procedures, let me refer to the basics.

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 Amsterdam protocol has confirmed the right of Member States to choose their PSB-order. However the Altmark ruling by the European Court of Justice of two years ago has set 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"

Procedures in this area are very much work in progress, as are current investigations under antitrust addressing the joint purchasing by the European Broadcasting Union of top sport rights such as the Olympic

Games. One of the main tasks is to find a sustainable balance between public broadcasting and private broadcasting, as both enter the New Media.

No preservation of existing market positions to the detriments of the emergence of the new markets

As a general principle, there can be no preservation of existing market positions by anticompetitive means, the less so when it works to the detriment of the emergence of the new markets.

The traditional arrangements in collective rights management in Europe are a case in point—a field of vital importance for the rapid deployment of critical content, particularly music, via the Internet. Reciprocal agreements between the national collective rights management companies in this area are traditionally based on national customer allocation. For obtaining a Europe-wide license a new entrant can only turn to his national rights management company—and he will entirely depend on its efficiency

We now need a pro-active approach to Europe-wide administration and marketing of the rights of the national authors. We have to take out the restrictions that can hinder finding the most efficient solutions that allow an expansion of the European market. Recent decision practice under EU competition law in the field of simulcasting music via the Internet makes it clear that in the new technology fields, territorial restrictions in the management of those rights are generally an unnecessary restriction. That

restriction impedes the most efficient right administration in the online world, restricts the choice by the users of the rights and therefore hinders putting those rights in the most efficient manner on the new European music markets. It therefore works against the very purpose of European rights administration in the on-line world—the expansion of the presence of the national author and European culture on the European and global music markets.

The new principles have been proven in the meantime in implementation—and are now also applied quite generally for issuing global licenses for web casting of music by the members of IFPI, representing the recording industry worldwide, for the rights they hold.

Let me summarise the principles that seem to emerge from current case developments in this field:

- Territorial restrictions must not stand in the way of creating the new regional and global one-stop-shopping arrangements that are required for gaining efficiencies for regional and global rights licensing in the new music markets in the European Union.

- Under competition law, we will look favorably at one–stop-shopping agreements and the related reciprocal agreements between collective rights management systems,

But

- We cannot allow them to perpetuate the monopoly structures of the past where they are no longer indispensable.

And:

- Rights owners must be able to determine themselves the proper mix between individual rights management and collective management of their music rights.

- Arrangements must not bundle unnecessarily rights management offerings. Individual administration of rights must be allowed to develop. Rights owners must be able to use the new digital rights management techniques for individual rights management where they so choose.

Let me then conclude.

The very objective of the application of EU competition rules is to prevent powerful market participants from reserving the new markets for themselves—or, worse, to impede them developing at all. 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.

Switch-over or catch-up? I leave it to you to decide that question. But whatever the answer is application of competition rules will have to play a central role.

Let me sum up the essentials:

- We must unbundle critical content to allow market participants to put the pieces together into new attractive offerings

- We must not stand in the way of market restructuring but markets must remain contestable

- We must maintain a fair balance between the public and private sector during the transition

- And, we must recognize that for the new markets Intellectual Property Rights will be the word of the game. This also means that rights management structures must become more efficient and allow for new packaging, all best achieved through a more pro-competitive environment.

All of this gives a key role to the application of competition rules in the transition of the sector into the new environment. It does not mean that the Commission will play a larger role. The decentralization of antitrust under

the modernized EC competition regime means that much of competition scrutiny will fall to the Member States Authorities. A special network for media issues has been set up between European Competition Authorities, within the ECN, the new European Competition Network. The new set-up will have a busy agenda: market definitions, sector inquiries in the field of the New Media, problems resulting from the interaction between competition law and Intellectual Property Rights.

It will be a difficult agenda but it will be an agenda that will move Europe forward into the New Media age.