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Vertical and horizontal integration in the media sector and EU competition law

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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 the SMIT Center and Telenor for inviting me to speak here today.

I intend to give you a brief overview of the competition issues raised by vertical and horizontal integration of companies in the media sector. I will start by referring to the convergence trend in the media and telecommunications sectors and its link to the concentration wave we have witnessed during these past three years. I will then highlight the main competition issues which this type of operations raise from a theoretical point of view. I will subsequently address the issues linked specifically to vertical as well as to horizontal integration, and conclude by illustrating how the European Commission has dealt with these problems by means of remedies accepted as a condition for the approval of this type of concentrations.

In so doing, I will refer to a number of cases recently assessed by the Commission such as *AOL/Time Warner*, *EMI/Time Warner*, *Vizzavi*, *Vivendi/Seagram/Canal Plus* and, decided just last week, *Newscorp/Telepiù*.

I. CONVERGENCE & INTEGRATION

Convergence has become all too familiar to most of us as one of the main driving forces behind the recent changes occurred in the media and telecom industries. However, as it so frequently happens with notions that turn into "buzzwords", the many meanings attributed to the term "convergence" are often ambiguous and, as such, unhelpful in order to describe the evolution of the media and telecom industries.

Let me therefore turn, first of all, to the two meanings of the term "convergence" that I consider to be most relevant from a competition law point of view.

1. Technical convergence

Technical convergence mainly concerns the possibilities offered by digital technology.

Those possibilities are reflected, for example, in the infra-structures required to deliver contents like movies or music. With the current digital technology, huge amounts of data may be transmitted to a high number of users through different networks (mobile networks, Internet, satellite). This allows for the dematerialization of media products traditionally sold as physical products (newspapers, films, CD's) by transforming them into packages of bytes.

At the same time, digital technology allows for the convergence of traditionally separate media into a single product, putting together text, sound, video and voice in what has become known as *multimedia*. Access to TV broadcasting, or rather webcastig, on the Internet is already nowadays a reality and listening to an MP3 music file on a cellular phone is nothing new.

2. Economic convergence

Audio-visual products were never cheap but the growing competition induced by the proliferation of TV channels has inflated production costs. For example, the by now famous saga "The Lord of the Rings" has had reported costs of € 278 million. In order to have an idea of the recent increase in the price for audio-visual contents it is sufficient to compare, for example, the price paid for broadcasting rights of the Football World Cups of 1990, 1994 and 1998 – 241 million ECU – with the price paid for the same rights in respect of the World Cups of 2002 and 2006 – 1,7 billion Euro. Only large companies seem to be able to afford such astronomical costs.

In face of economic barriers of such dimension, media companies have shown a trend towards concentration.

3. Efficiencies

What appeared to be particularly new about these alliances and mergers in the media industry was the search of not only the traditional economies of scale but, above all, the search of economies of scope. This translated into an attempt to use the same product in a number of different ways: pure entertainment and telecommunication, or entertainment and information, or information and telecommunication. From an economic point of view, economies of scope basically translate in lower Average Total Costs as a result of producing a wide range of products.

The main feature of this type of concentrations is the vertical integration of the different levels of production and distribution of media products that leads to companies which are able to, for example, produce films or music, register them in DVDs or CDs and distribute them not only to "brick and mortar" shops but also through the cable, satellite or mobile telephony networks they own. Vertically integrated companies are in a position to exploit their products at every single level of the value chain.

„Create Once, Place Everywhere!" seemed to be the motto for the media industry during the Internet bubble, illustrating the need for media producers to place their products in the largest possible number of different platforms. This was the underlying reason for alliances and mergers between companies which are active in sectors of the economy that used to be separate like television and telecommunications. Operations like AOL/Time Warner, Vivendi/Universal, Vivendi/Vodafone for the setting up of portal Vizzavi or the acquisition of Dutch entertainment producer Endemol by the Spanish telecom company Telefonica clearly illustrate this trend.

It should be said that, to a large extent, the ratio underlying some of these operations was a deep faith in the Internet potential and a strong belief in the synergies resulting from cross-supply between different technical platforms belonging to the same vertically integrated company. The burst of the "dotcom bubble" showed how some of these expectations were possibly premature.

We now start seeing some of the vertically integrated groups selling off some of their units (AOL/TW or Vivendi/Universal) and witness consolidation caused by heavy losses incurred during these past few years. Such is the case of the pay-TV industry, as illustrated by the merger in Spain of the platforms Canal Satelite and Via Digital and the merger in Italy between the platforms Stream and Telepiù, approved by the Commission just last week. After a period of extensive vertical integration, we now witness a reflux of horizontal integration dictated to some extent by financial reasons.

II. COMPETITION ISSUES

1. The competitive arena

Turning now to the competition issues raised by integration of companies, the first step required in order to understand the forces at play is to determine the perimeter of the competitive arena. What do media companies compete for, whom do they try to sell their products to and how do they intend to do it?

Media companies compete for – essentially – three things.

First, they compete for content, which is what they will ultimately sell to their customers. Access to content produced by third parties or the establishment of production facilities is a *sine qua non* condition for entering or staying in business.

Secondly, they compete for the best way to deliver such content to customers. Access to delivery channels owned by third parties or the possibility to establish their own paths to the customer is what allows media companies to distribute their output.

Finally, they compete for the obvious ultimate addressee of all this competition: the customer. But this is a contest which goes beyond the obvious competition for a one-time sale. Some of the businesses in the media & telecom sector (e.g; pay-TV, Internet access), like most IT-driven businesses, are based on a durable relationship with the customer. An established customer basis allows for the progressive development of new services and products and for the consequent increase in ARPU[1]. Access to potential clients managed by third parties or the build-up of their own client basis is the ultimate target of media companies.

2. Foreclosure

Foreclosure of the competitive arena is a central concern of EU competition policy in relation to vertical agreements and mergers. Restricted access to input markets (copyrights or contents) or to sales markets (customers, at retail level) may limit inter-brand competition. The extreme example is where a company, as a result of a vertical or horizontal integration, succeeds in simply barring the access to a given market to its competitors.

However, in real life foreclosure does not arise in such simplistic terms and mostly materialises by indirect means. For example, by raising rivals' costs, by raising barriers to entry or by engaging in tying/bundling. Tying is particularly relevant in the media and telecom sectors given that it is often present in explicit (and in most cases, legitimate) commercial offers: for example, a bundled offer of pay-TV and Internet access, or both plus fixed telephony (so called "triple play").

The ability to raise rivals' costs may easily arise where a dominant firm is in a position (or acquires such position as a result of a concentration) to control the access by competitors to a given infra-structure or input (a technology or a copyright) and where it has the possibility to charge supra-competitive prices for such access. In the media sector one could think about, for example, access to a satellite platform for TV distribution or to a proprietary standard for Conditional Access System. A company in these circumstances is commonly referred to as a "gate-keeper".

A central element in the assessment of market power of a company and its possibility of foreclosing a given market is the concept of barriers to entry. Where entry barriers do not exist, easy entry will quickly eliminate the problem, even where the incumbent holds large market shares. Entry barriers might be described as "the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry"[2]. Although in most cases barriers to entry will indeed have an economic nature, they may in some cases assume other forms. Regulation may function as an entry barrier when it provides for the establishment of special rights, for example when only a limited number of licenses is foreseen. This is the case of terrestrial TV and/or radio broadcasting due to spectrum scarcity.

3. The dominance test

Most competition law issues related to vertical and horizontal integration in the media sector have been dealt with by the European Commission under the Merger Regulation, i.e. in respect of concentrations notified under the EC Merger Regulation[3]. As

1 Average Revenue per User.

2 J. Bain, *Barriers to Competition*, H.U.P. 1965, p. 3.

3 Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations

you know, pursuant to Article 2 (3) of the Merger Regulation, "a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared incompatible with the common market."

The test applied by the Commission when assessing these operations was therefore a dominance test. The concept of dominance used under the Merger Regulation is equivalent to the one defined by the Court of Justice in Article 82 cases:

"The dominant position (…) relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[4].

"(…) such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in discard of it so long as such conduct does not operate to its detriment."[5]

III. Vertical integration

The reason why vertical integration is a particularly relevant competition issue in the media sector is because many media companies have during these past years actively sought to take vertical integration as far as possible. This has been a constant feature of the concentrations in the media sector assessed by the Commission.

The multiplication of the presence of a company throughout a number of markets along the value chain of the product concomitantly multiplies the possibilities for such a company to foreclose one or more of the corresponding markets where the company possesses market power. In these circumstances, vertical integration may in itself raise barriers to entry.

A number of recurrent competition issues has arisen in the cases dealt with by the Commission, and I propose to address the most significant ones.

1. The gate-keeper

A gate-keeper role is played by a company possessing a certain infra-structure, technology or know-how allowing it to exert a significant degree of control in respect of the access to a given market. This degree of control is relevant from a competition point of view only where the market power of the gate-keeper is significant and where the infra-structure is a crucial gateway to the market or where the technology at stake is an essential input for any potential new entrant. A gate-keeper will be able to engage in exclusionary practices vis-à-vis its competitors and/or excessive pricing vis-à-vis its customers.

A clear gate-keeper issue arose in the recent *Newscorp/Telepiù* case[6], concerning the merger of the two Italian pay-TV platforms Stream and Telepiù. As a result of the merger, the new entity would become the gate-keeper in respect of the access to the only satellite platform in Italy for the provision of pay-TV distribution services. Furthermore, it would become the gate-keeper in respect of a number of technical services associated to

between undertakings, OJ L 395/1, 30.12.1989, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 40/17, 13.2.1998.

4 ECJ, *United Brands*, case 2/76, ECR [1978] 207.

5 ECJ, *Hoffman-La Roche*, case 85/76, ECR [1979] 461.

6 Case COMP/M.2876 *Newscorp/Telepiù*. See prior notification notice in OJCE, C255, 23.10.2002, p. 20; press release IP/02/1782 of 29.11.2002; press release IP/03/478 of 02.04.2003.

pay-TV such as Conditional Access Systems, set-top boxes and Electronic Programme Guides.

A gate-keeper issue also arose in the *AOL/Time Warner* merger[7] approved in the year 2000. AOL was the leading Internet access provider in the US and the only provider with a presence in most EU Member States. Time Warner, on the other hand, was one of the world's largest media and entertainment companies with interests in TV networks, magazines, book publishing, music, filmed entertainment and cable networks.

The Commission found that the new entity resulting from the merger would have been able to play a gate-keeper role and to dictate the technical standards for on-line music delivery, i.e. streaming and downloading of music from the Internet. Consequently, AOL/TW could end up holding a dominant position on the emerging market for on-line music delivery. This could happen in two ways.

First, AOL/Time Warner would be in a position to develop a closed proprietary formatting technology for all the downloads and streaming of Time Warner and Bertelsmann tracks. The formatting language of AOL/Time Warner could become an industry standard and competing record companies wishing to distribute their music on-line would be required to format their music using the new entity's technology. Because of its control over the relevant technology, the new entity would be in a position to control downloadable music and streaming over the Internet and raise competitor's costs through excessive license fees.

Alternatively, AOL/Time Warner could format its music (and Bertelsmann's) to make it compatible with its own software Winamp only, ensuring at the same time that Winamp could support and play different formats used by other record companies. By formatting its music and the music from Bertelsmann to make them compatible with its own software Winamp only, the new entity would cause Winamp to become the only "player" in the world capable of playing virtually all the music available on the Internet. By refusing to license its technology, the new entity would impose Winamp as the dominant music player as no other player would be able to decode the proprietary format of TW and Bertelsmann music. As a result of the merger, the new entity would control the dominant player software and could charge supra-competitive prices for it.

2. Foreclosure of input markets

A given company may hold a significant degree control over the source of the different businesses at stake in the relevant markets, i.e. of the primary input at the top of the value chain of the product. In the media industries, this will generally refer to the company producing the audio-visual product (films, music, TV-programmes) and/or holding the corresponding copyrights.

The control exerted at the source will become relevant from a competition law point of view where the amount or breadth of products and/or copyrights is such as to allow the company to gain a competitive advantage by means of exclusionary or discriminatory practices vis-à-vis its competitors.

In *AOL/Time Warner*, for example, the combined entity would not only possess one of the largest music libraries in the world (Warner Music is one of the 5 music majors) but would also, due to contractual links, have preferential access to the library of Bertelsmann Music Group, also part to the group of the 5 music majors. This would result in the combined entity controlling the leading source of music publishing rights in Europe.

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7 Case COMP/M. 1845 *AOL/Time Warner*, decision of 11.10.2000, OJ L 268/28, 9.10.2001.

The problem was aggravated due to the simultaneous notification of the projected merger between EMI and Time Warner[8]. The preferential access by AOL/Time Warner to the music copyrights of EMI, Warner and Bertelsmann would have put in the hands of the new entity half of all the music content available in Europe for on-line delivery.

A similar problem arose in the *Vivendi/Seagram/Canal Plus*[9] merger in respect of both music and films. Vivendi was a leading company in the telecommunications and media sector, with interests in mobile telephony networks, 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.

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 position of Vivendi/Universal concerning music rights became particularly relevant in respect of the Vizzavi portal, a portal run by a joint-venture between Vivendi and Vodafone. The *Vizzavi* joint-venture[10] had itself been notified to the Commission just some months before the Vivendi/Universal merger.

3. Leveraging

A classic competition concern is the leveraging ability of the parties, i.e. their ability to transpose their market power in a given market into a neighbouring market, thereby creating or strengthening a dominant position. This problem may become particularly acute in cases where the parties extend their activities into different product or services markets, something that is explicitly sought for by media companies wishing to distribute their products across different platforms.

In the *Vizzavi* case, the creation of the joint-venture raised concerns in respect of the ability of the parties to leverage their market power in the market for mobile telephony into the market for mobile Internet access. The stated purpose of the Vizzavi portal was to create a "horizontal, multi-access Internet portal", providing customers with a range of web-based services across a variety of platforms (PCs, mobile phones, TV set-top boxes).

As regards Internet access via mobile phone handsets, the issue arose in respect of the significant market position of Vodafone in the market for mobile telephony in a number of European countries (and of Vivendi in France). Vodafone and Vivendi already had a very significant customer basis in these countries and therefore a solid path to the future customers of the JV was already established. On the basis of their client basis for mobile telephony services, the position of the JV-parties in the market for mobile Internet access would be strengthened by the Vizzavi branded and integrated approach to Internet across various platforms, which would allow for cross-selling and bundling of offers. This would allow the new entity to leverage a strong position in the mobile telephony market into a dominant position on the mobile Internet access market.

As regards Internet access via TV set-top boxes, a similarly solid distribution channel was also owned by Canal+ in respect of its customer basis for pay-TV services. A similar concern therefore arose in respect of the ability of Canal+ leveraging its strong market

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8 Case COMP/M. 1852 *Time Warner/EMI*, see Press Release IP/00/617 of 14.06.2000.

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

10 Case COMP/JV.48 *Vodafone/Vivendi/Canal Plus*, see Press Release IP/00/821 of 24.07.2000.

position in the pay-TV market into the market for Internet access via set-top boxes.

The overall concern therefore arose in respect of the ability of both Vodafone and Canal+ to migrate their customer basis from the mobile telephony and pay-TV markets to the Internet access markets by using the already existing distribution channels.

Another clear vertical leveraging issue arose in the *Vizzavi* case, as regards the buying power of the J-V parties. Already before the operation, Canal+ was an important buyer of content for pay-TV, such as TV-programming, sports and films. Furthermore, it had a large customer basis accustomed to pay for content. The Vizzavi portal would combine a powerful new Internet access mechanism with paid-for content. Given the dominant position that the parties would acquire on the Internet access markets which I mentioned before, the operation would allow the parties to leverage their market power in the markets for Internet access into the market for the acquisition of paid-for content for the Internet. Moreover, the structural link between Vivendi and Canal+ and AOL France (55%) made the concern in respect of the increase in the bargaining power of the parties even more serious.

The leverage allowed for by the operation would naturally work in detriment of the parties' competitors in the markets for mobile telephony and pay-TV.

The concerns identified in the Vizzavi operation were strengthened when Vivendi and Canal+ notified some months later their acquisition of Seagram, the Canadian company owning the music and film business of Universal. The Commission considered that Canal+ would further increase its dominant position on a number of European pay-TV markets at national level. Already before the operation Canal+ enjoyed an almost monopolistic position in respect of the acquisition of the exclusivity on Hollywood films produced by the major studios (in France, Spain and Italy). The acquisition of Universal Studios would further strengthen Canal+'s position as purchaser of Hollywood films, not only in respect of Universal itself but also in relation to other studios due to underlying financial links. Due to the vertical integration of Universal and Canal+, Canal+ would be able to leverage its position in order to secure the renewal of the exclusive agreements for pay-TV with all of the Hollywood studios and in fact also to enter into new deals.

The bargaining power of Canal+ vis-à-vis the film studios would therefore be increased, allowing Canal+ to further foreclose the pay-TV markets where it already was active.

4. Network effects

Let me now turn to another issue that often arises in media cases, most notably since convergence with the telecom industry became a reality: network effects. A network effect may, in simple terms, be described as the self-multiplying power of a network. In economic terms, a network effect occurs when the benefit of an individual who is linked to the network increases with the accession of other individuals.

In AOL/Time Warner, the Commission found that the distribution strength of AOL combined with the content of Time Warner and Bertelsmann would create network effects in respect of both content providers and consumers:

- for content providers, the AOL Internet community would become an essential outlet for the distribution of their products;

- on their side, consumers, would be deprived of any incentive abandon AOL.

The network effects would work both ways: more subscribers would bring more content and more content would bring more subscribers. Newcomers would also be attracted to AOL community because the larger the community, the more the possibilities to chat and communicate through AOL.

The reason for this lies at the critical mass of content owned by Time Warner and Bertelsmann (namely their huge music library) combined with the huge Internet community formed by AOL subscribers and the members to its Instant Messaging services. The critical mass of content owned by TW and Bertelsmann would attract further music from other record companies. Competing record companies would feel obliged to distribute their products through AOL's on-line outlet, which would end up having access to all the available music.

Furthermore, AOL would be able to bundle TW and Bertelsmann music content (or filmed entertainment content) with Internet access and other proprietary services and give its subscribers preferential access to that content, allowing for instance its subscribers to access new releases before they were made public through other distribution channels. Attractive content such as music or films could also be used as promotional tools or loss-leaders in order to subscribe to Internet-access services. Consequently, the more subscribers AOL would attract, the more important it would become as a carrier for content providers seeking to secure maximum distribution.

First mover advantages are particularly strong in network industries. It comes as no surprise that, for example, mobile telephony companies give away, or strongly subsidise, mobile handsets to their customers such as to quickly establish a significant customer basis leading to increasingly stronger network effects. This circumstance justifies a particular attention by the Commission when assessing concentrations in the media & telecom industries. The combination of network effects with a strong market position may significantly raise barriers to entry and consequently lead to market foreclosure.

IV. Horizontal integration

Competition problems which are specific to the media sector are more likely to be found in cases of vertical integration than in cases of horizontal integration. I would argue that in cases of horizontal integration, the competition issues arising in the media sector are equivalent to the ones to be found in any other sector. The issue basically concerns classic market power and the required exercise translates into measuring such market power with the help of the traditional analytical tools: market shares, barriers to entry, etc.

Furthermore, there haven't been that many examples of problematic cases of horizontal integration in the media sector dealt with by the Commission. The two most significant examples are probably *EMI/Time Warner* and the recent *Newscorp/Telepiù*.

1. The *Newscorp/Telepiù* case

This concentration was notified to the Commission on 16 October 2002 and was cleared on 2 April 2003, further to the submission by the parties of an extensive package of undertakings.

Newscorp, the acquiring firm, is a global media company, which is active in the film and TV industries, publishing (newspapers and books) and a number of other areas. It controlled the Italian (satellite) pay-TV platform Stream jointly with Telecom Italia. Telepiù, the acquired firm, was controlled by Vivendi Universal, itself a global media group. Telepiù is the dominant pay-TV operator in Italy. Its platform started operating via analogue-terrestrial means in 1991 and went on satellite in 1996.

The markets affected by the operation were:

a) the market for pay-TV services;

b) the markets for the acquisition of contents, namely:

- premium films;
- football events;
- other sports;
- TV channels.

It should be underlined that experience shows that some of this content, namely premium films and football, is crucial for the success of any pay-TV operation.

The notified operation would give rise to significant horizontal overlaps and would have a very strong impact on actual competition. In more concrete terms, the operation would lead to:

a) the creation of a near monopoly in the Italian market for pay-TV;

b) the creation of a near monopsony in the markets for the acquisition of rights

Furthermore, the characteristics of the markets at stake would cause entry barriers to rise significantly.

2. The *EMI/Time Warner* case

This concentration was notified to the Commission on 5 May 2000. It never materialised given that, further to a statement of objections issued by the Commission, the parties withdrew their notification.

Time Warner is a global media company, with interests extending from film production and distribution to TV production and broadcasting, cable systems operation, magazine publishing, book publishing, recorded music and music publishing. EMI is a company incorporated in the UK, its main activities being music recording and publishing world-wide. The notified concentration involved the combination of the parties' music recording and music publishing[11] businesses.

There were serious doubts as to the compatibility of the proposed operation with the common market due to the significant horizontal overlaps in the relevant markets. The assessment carried out by the Commission showed a very high likelihood of the operation resulting in a single dominance of the merged entity in the music publishing business and collective dominance, jointly with the other four remaining music "Majors", in the market for recorded music.

V. Remedies

Having gone through some of the competition problems raised by vertical and horizontal integration in the media industry, let me now conclude by explaining how the Commission has tried to solve these problems.

The Commission had to achieve a balance between two somehow conflicting elements:

- on the one hand, the Commission was aware of the reasons that lead companies to seek further integration, namely where these reasons were related to clear efficiencies;

- on the other, it became aware of the serious competition problems to which some of these concentrations gave rise, namely the risk of foreclosure of the affected markets.

The approach taken by the Commission was therefore not to prohibit most of these operations but rather approving them on the basis of strict undertakings proposed by the parties and accepted as a condition for the approval. However, the Commission can only accept commitments by the parties when the

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[11] Music publishing consists of the acquisition by publishers of rights to musical works and their subsequent exploitation upon remuneration, mostly in the form of a commission charged by the publisher to the author on the revenues generated by the commercial exploitation of musical works.

competition problems are effectively solved. In fact, the underlying objective of any remedy package should be to create the conditions for actual competition to subsist and/or for potential competition to emerge. This aim must be achieved by lowering barriers to entry in the affected markets and through the creation of competitive constraints which effectively operate as a disciplining and restraining factor of the dominant player.

The main concern of the Commission in media-related cases was to ensure access, access to the relevant markets or access to those crucial elements allowing for new entrants to establish themselves in those markets. In parallel, the Commission has often imposed divestitures or the severance of structural links that aggravated the foreclosure problems.

1. Remedies in the *Newscorp/Telepiù* case

In Newscorp/Telepiù, the undertakings accepted by the Commission can be divided in three major groups:

a) access to content, via namely a reduction in the duration of exclusivity agreements with premium content providers and the establishment of a sub-licensing scheme through a wholesale offer;

b) access to infra-structure, i.e. access to the satellite platform for pay-TV distribution as well as to the technical services associated with pay-TV;

c) withdrawal from terrestrial broadcasting activities.

As regards access to content, with respect to ongoing exclusive contracts, a unilateral termination right shall be granted to film producers and football clubs. Furthermore, the new entity will waive exclusive rights with respect to TV platforms other than DTH[12] (terrestrial, cable, UMTS, Internet etc.). The parties shall also waive any other protection rights as regards means of transmission other than DTH.

With respect to future exclusive contracts, the new entity shall not subscribe contracts exceeding two years with football clubs and three years with film producers. The exclusivity attached to these contracts will only cover DTH transmission and would not apply to other means of transmission (for example, terrestrial, cable, UMTS and Internet). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH.

Lastly, the merged entity shall offer third parties, on a unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform offers such premium contents to its retail customers. Such wholesale offer will be made on the basis of the retail minus principle and will imply an account separation and cost allocation between wholesale and retail operation of the platform. The beneficiaries of the wholesale offer shall be free to determine their own pricing policy.

As regards access to the infra-structure, the merged entity shall grant third parties access to its satellite platform and access to the application program interface (API) and conditional access system (CAS), according to a fair non-discriminatory pricing formula. The new entity will also have the obligation of entering into simulcrypt agreements in Italy as soon as reasonably possible and in any event within 9 months from the written request from an interested third party.

As regards the withdrawal from terrestrial activities, the merged entity shall divest of Telepiù's digital and analogue terrestrial

12 Direct To Home satellite.

broadcasting assets and commits not to enter into any further DTT activities, neither as network nor as retail operator. The frequencies will have to be acquired by a company willing to include pay-TV broadcasting of or more channels in its business plan for the operation of the divested business after the switchover from analogue to digital terrestrial television broadcasting in Italy.

2. Remedies in the *Vivendi/Seagram/Canal Plus*, *Vizzavi* and *AOL/Time Warner* cases

In *Vizzavi*, the project of the parties provided for the Vizzavi portal to be the default portal on Vodafone and SFR mobile phone customers, as well as on Canal+ set-top boxes. The Commission imposed the possibility of customers changing the default portal on their devices, as well as the possibility of competing telecom operators accessing the customers' devices. This commitment by the parties prevented them from bundling their offers on a fully exclusive basis and prevented them consequently from leveraging their market power in a way such as to gain dominant positions in the markets for Internet access and Internet portals.

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.

As regards the severance of structural links, Vivendi undertook to divest from BSkyB in which it held a 25% stake. The severance of this link to Fox, namely through their joint venture UIP for the distribution of films in Europe, significantly reduced the impact of the acquisition of Universal.

In AOL/TW, you may recall that the competition concerns started at the source, due to the breadth of music copyrights that the new entity would control. Warner Music, combined with Bertelsmann music due to crossed shareholdings, and in addition the EMI library (should the EMI/TW merger be approved), would put in the hands of the new entity a huge amount of content that rendered the gate-keeper role played by AOL in respect of music player software and the network effects resulting from the AOL community as serious competition concerns. The abortion of the EMI/Time Warner merger already reduced significantly the competition concerns. Therefore, the attention of the Commission was focussed on the structural link between AOL and Bertelsmann in AOL Europe and AOL France. In this respect, AOL undertook to put in place a mechanism pursuant to which Bertelsmann would exit from AOL Europe. Once solved the problem at the source, the other concerns were partially dissipated.

As regards online music delivery, AOL also undertook not to take any action that would result in Bertelsmann music being available online exclusively through AOL or being formatted in a proprietary format that was playable only on an AOL music player.

Conclusion

If I had to sum up the Commission's approach in three words as regards competition in the media markets, they would certainly be: access, access and access!

No matter how far media companies integrate, vertically or horizontally, access is crucial. Access to inputs, access to contents and access to infra-structure remains fundamental in order to ensure the freedom of choice by the ultimate addressee of competition policy: the consumer.

Thank you for your attention.

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