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**Panel 1 :
Why can't the market decide.**

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Introduction

Let me make a few remarks on the topic of this panel from a European perspective.

After the shocks that the sector has experienced across Europe over the last three years—in the UK as elsewhere—, we need a thorough re-thinking of the basic principles applied to the sector. The new Communications Act, the creation of OFCOM and the forthcoming BBC Charter Review are by themselves major opportunities for this country to take a lead in that Europe-wide debate.

Let me briefly comment on three issues:

- (1) The consensus on basic goals for the sector across Europe, as it has emerged over the last decade. We will have to keep that international consensus in mind in any regulatory reflection ;
- (2) The market structure that has evolved – more or less in parallel in all European countries. This means that we are facing quite similar agendas across Europe;
- (3) The safeguards for the public interest in the sector that we still need. Can we rely on the instrument of general market regulation that antitrust controls offer, or do we continue to need the specific controls and public interest tests that the sector has become used to – or can we do without both?

Let me also make a brief comment on the New Media that will have to be kept in mind when checking the adequacy of our regulatory structures.

And I refer, of course, for the general policy consideration and the application of EU competition principles to the keynote that we will hear from Mr Lowe.

Firstly, the Consensus on the basic goals

The debate at European level over the last decade has led to a broad consensus on basic goals that I believe, is shared also widely in this country :

- *Plurality*, as the basic public interest test for the media sector.
- *Cultural diversity*, standing for the preservation of national identities.
- *Choice*, where we have to tackle the task to give access to the new media that innovation and markets open up. And that last point will take much weight in the debates ahead.

I do not think that I should go in these brief remarks into any detail of the EU legal framework for the media sector as it has evolved. Just let me mention the fundamentals on which EU policy in this area is built:

- The basic freedoms enshrined in the Treaty, and particularly the freedom to provide services across the continent.
- Of course, the EU competition order.
- The Treaty provisions relating to culture, and the Amsterdam protocol on Public Service Broadcasting.
- The European Convention of Human Rights—Article 10 incorporates the continent-wide consensus on freedom of expression and information; now also integrated into the Charter of Fundamental Rights, Article 11.
- Broad consensus on Public Service Broadcasting as a main guardian of plurality and cultural diversity, and high quality programming.

And perhaps one should quote here the Amsterdam protocol on Public Service Broadcasting, as annexed to the EU Treaty. The protocol says :

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common

interest, while the realisation of the remit of that public service shall be taken into account.

Secondly, Market Structures

Across Europe, we have seen the initial structure of the eighties—national public service broadcasters based on licence fee—evolve into the dual structure of the nineties adding private broadcasters based on advertisement revenues. By the end nineties, pay-TV and pay-per-view had emerged as a third major group of actors—as they have in this country.

Across the EU, some 45% of revenues of television / broadcasting come from advertisement, the rest in nearly equal parts from public broadcasting fees and from pay-TV subscriptions—and competition for those revenue streams delineates the main battlefields in the media sector of today, and the cases that we are facing.

The diversification of revenue streams is reflected by a diversification of platforms and products :

- Free TV ;
- Pay-TV / pay-per-view ;

Progressively:

- Interactive ;

And soon to come:

- Broadband Internet as a new comprehensive multi-channel digital infrastructure.

Market delineations are becoming a moving target. Though competition has developed, all of the main media markets have remained highly oligopolistic. This is a main challenge for the regulators.

Thirdly, which instruments do we need?

The EU Treaty allows Member States to put into place their media regulatory framework, largely to their choice, as has this country done in a very elaborate manner—now fundamentally reviewed with the introduction of the new Communications Act and the creation of OFCOM.

About half of EU Member States have put in place intra-media and cross-media ownership controls, choosing different approaches and/or mixes of limitations on audience shares, share capital, and number of licences held—as has this country. In a number of countries these controls are now at the centre of debate—as they are in the US.

At the EU level, general market regulation under the form of competition rules emerged as the main prominent instrument for checking market power and foreclosure in the media markets that remain highly oligopolistic. Existing market power structures make the option of no regulation—but reliance on market mechanisms only—at this stage of development in most markets still unworkable. This has meant that both the Commission, in its role as guarantor of the EU competition order, as well as national competition and fair trading authorities have emerged as major actors in the media arena. With the decentralisation of EU anti-trust powers under the reform of the EU's antitrust regulations as from 1st May of this year, national competition authorities and regulators – OFT, OFCOM and their counterparts on the continent—will further increase their role in this area.

All lines of EU Competition Law are concerned;

- The Merger Regulation, the control of concentrations ;
- Anti-trust (Articles 81 & 82 of the Treaty), checking agreements and abuse of dominant positions, of critical importance now with the fierce competition for premium sport rights. The Premier League / Sky case stands as a recent example.

- Article 86, the EU Treaty public service provision , as exemplified and explained by the Commission’s communications—and now a Green Paper—on services of general interest; and
- State Aid control under EU Competition Law, crucial by the fact that in Europe the PSBs are heavily financed by licence fees.

Let me here add another comment.

Convergence means as a general rule that sector-specific controls will tend to be reduced and general market regulation will gain in importance. Across Europe, the new EU Electronic Communications Framework stands as an example for this. The whole debate behind current media reforms is another signal of that development.

Nowadays, the developments in the media sector are determined to a large extent by the position of companies in the upstream rights markets, both premium sports and films, and in the downstream platform markets. The recent high profile cases testify to that. The underlying market power structures in the media sector are determining the development of the sector—and ultimately the efficiency and sustainability of media specific plurality controls. Abuse of market power and market foreclosure must be corrected at the root—and these roots are largely outside the reach of any media specific regulation. However, they will, in many cases, be well within the reach of horizontal competition law instruments.

In other words, applying strict competition controls to the sector and the related upstream and downstream markets is a necessary condition for achieving effective and sustainable plurality—though in many cases it will not be a sufficient condition, and specific plurality controls will still be needed. However, without efficient anti-trust application across the board, media specific plurality controls risk to be bypassed rapidly by actual development of market power—as the development of the media sector in a number of European countries over the last years has demonstrated where we have seen substantial concentration in spite of elaborate plurality controls in place.

In Conclusion,

Sector specific controls should be limited to what is needed for achieving the public goals for which they are set up in the first place. They therefore will need continuous review. Competition controls will have to ensure that basic underlying market power structures are in check.

A basic issue over the next years will be to get this balance right. The acid test for many markets will be how far the regulatory framework will allow wider choice. That makes the emergence of the new media—Internet Broadband and mobile Broadband—decisive. We expect by the end of the decade a penetration of 50% of households by Internet Broadband across Europe—up from the current 5%. It may mean that we may see over the next five years more change in the media sector than we have seen in the sector for the last fifty years. All of our current concepts in the media sector—still based on the original scarcity of transmission means – will have to be tested against this new environment: the rights agreements as to their exclusionary effects; the still prevailing hold-back of premium content from the new media with the sole object to secure positions for traditional stakeholders in their traditional pay-TV and free TV markets that cannot be allowed to continue if we want to secure wider choice; the reform of the regulations under which the PSBs operate, where one of the major issues will be the conditions under which they will be allowed to operate in the New Media environment.

Only continuous review based on practice will be able to determine at which point sector specific media controls can be taken further back, and the general market regulation through competition rules will suffice. The New Media will be an ultimate test for the new converged regulator, and its ability to allow convergence—even if it means discarding regulation to which we have all become accustomed but that dates back to another time.

Thank you.