



EUROPEAN COMMISSION

Competition DG

Information, communication and multimedia

Media

The Head of Division

Madrid, 15 February 2005

COMP / C / 2/ HU / rdu

**IESE Business School & School of Communication of the University of
Navarra**

Centre for Media Studies, Madrid 15/2/2005

Impact of European Competition Policy on Media

Herbert UNGERER

Let me start with congratulating IESE Business School and the School of Communication of the University of Navarra on the creation of their new Centre for Media Studies. This strengthening of work on media comes at a most appropriate time, when Europe, as this country, is facing up to a major paradigm shift in the way media will operate, communicate and be consumed.

Spain has been at the forefront of media and communications development in Europe, both by virtue of its vigorous media and telecommunications scene, as well as by pioneering, together with others, the introduction of digital television. And, of course, the whole of Europe is looking during these very days at Spain, when this country will be the first to vote on the new European Constitution.

Two weeks ago, the new European Commission has launched a new comprehensive approach for Growth and Jobs, aiming at revitalising the Lisbon process. Many aspects of this new comprehensive framework for moving Europe forward will also impact on the media sector—particularly through its emphasis on innovation and new technology but even more

through its broad underlying theme of mobilising the dynamism of our societies.

Competition and competition policy will play an important role in all of this, as a basic driver of creativity of our societies. I have therefore followed with pleasure the invitation to say a few words at this opening event about the impact of competition policy on the media.

Let me first of all recall the broad basic consensus that we have in Europe on policies in the media field. There is consensus across Europe on basic goals:

- *The Guaranteeing of Pluralism of Opinions*, as the basic public goal in the media sector.
- *The Maintenance of Cultural diversity*, standing for the preservation of national identities.
- *The Widening of Choice*, where we have to open access to the new media that innovation and markets provide. And that last point will take much weight in the debates ahead.

The EU Treaty allows Member States to put into place their media regulatory framework largely to their choice. I do not think that I should go in these brief remarks into any detail of the legal framework for the media

sector as it has evolved in the EU. Just let me mention the fundamentals on which EU policy in this area is built:

- The basic framework for the media at EU level is set by the Television without Frontiers (TWF) Directive, and the associated Directives. The TWF Directive is now under review, particularly with regard to adjusting its provisions to the new digital environment.

And

- One should add the new rules set by the Electronic Communications Framework across the EU.

In the medium term, an overarching framework at EU level will be set by the new Constitution. The Constitution includes under Title II the Charter of Fundamental Rights. Title II / Article 11 stipulates "... The freedom and pluralism of the media shall be respected".

However, beyond this general framework, Competition Law is vital for the development of open market structures.

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.

Major EU controls in the media sector fall therefore within the ambit of EU competition law. All areas of EU Competition law are concerned:

- The Merger Control Regulation
- Antitrust (Articles 81 & 82 EU Treaty)
- Article 86: the EU Treaty's public service (services of general interest) provisions, and State Aid review (Article 87)

As regards the Merger Regulation—the control of concentrations—relatively high thresholds of combined and individual turnover must be reached to trigger the Union's intervention. Otherwise review falls to the Member State's Competition Authorities, according to their national competition laws—and the Spanish Competition Authorities are of course playing a key role in this area in this country.

As regards antitrust—the checking of agreements and the abuse of dominant positions—under the decentralisation of EU antitrust enforcement as effective of 1st May of last year, the national anti-trust authorities are bound to expand their role in the future. The European Commission will concentrate on lead-cases and cases of European dimension and/or interest. A major part of enforcement of EU antitrust rules will fall from now on to the national competition regulatory. This just emphasises the key role that the National Competition Authorities are bound to play in the sector.

As regards Article 86, the EU Treaty's provision on public service, the EU White Paper on services of general interest issued in May of last year has set a new framework within which to conduct the survey of the activities of public enterprises, including public broadcasting.

And,

As regards the application of the Union's State Aid rules in the sector, the Altmark ruling of the European Court of Justice of 2003 has detailed principles and sets a clear and strict framework.

The transition from analogue to digital is the major media issue for this decade, as I believe we all agree. It sets an entirely new basis for the whole of the media sector of the future.

Across the EU we have now some 20% of TV households gone digital. This country is playing a major role in this transition.

The European Commission has identified a number of key elements of the transition in its communication of 2003 on Digital Switchover, complemented last year by a communication on the issue of the standards to be used for ensuring the interoperability of the new digital interactive television services, addressing issues such as MHP (the Multimedia Home Platform standard), APIs (Application Programme Interfaces), and EPGs (the Electronic Programme Guides), all thorny issues in the transition. I do

not propose to go into these issues in any detail, even if some of them will clearly pose competition issues. Suffice it to say that in both communications the European Commission at this stage of development relies in essence on the Member States to push the development, and on the method of coordination between them. Neither does the Commission for the time being propose an EU wide time-line for the switch-over, nor has the home platform standard made at this stage mandatory.

Let me concentrate here, within the time slot I have, on the core problem of the transition in competition terms, as it currently seems to come up on the agenda.

As digitisation multiplies the number of available channel capacity by a figure of 5 - 10, the main concern under a competition perspective must be to transform this new multi-channel environment into a truly larger choice for the users. This implies as the major goal of competition policy in the

area the maintenance, or creation, of a level playing field during the transition.

In short, digitisation must lead to *more* market actors and *not to less*. It must not lead to the traditional actors, in many instances already very powerful, to use the new channels to entrench their positions further, to the detriment of market entrants and the New Media that are developing—such as the new Internet based media providers. Neither must it lead powerful actors in neighbouring market to leverage their dominant position unduly into the newly developing media markets. During the transition we must strengthen pluralism and a pro-competitive market structure.

Therefore, across Europe, we are faced with a very concrete competition agenda for the sector:

- How to grow competition at the different market layers during the digital transition;
- How to avoid excessive and permanent media concentration in the course of the transition;

And:

- How to allow new market entrance

The latter depends on two essentials:

- Access to critical inputs—content;

And

- Access to distribution—allowing new content providers to deliver content and channels via the new developing platforms.

Where exclusivity is a key economic concept, as in media markets, the danger of market foreclosure by dominant buyers or sellers is omnipresent.

This is what happens in the real media markets of today all too often.

We are often faced in the media sector with a complex web of:

- Horizontal restrictions;
- Vertical restrictions;

or a combination of horizontal and vertical effects that can lead to foreclosing competitors.

The key decisions taken during the last two years in Europe on digital platforms under competition law—in this country under the authority of the Spanish Competition Authorities concerning the merger Sogecable / Via Digital of 2003, at EU level under the European Commission's merger control powers concerning the merger Telepiu / Stream into Sky Italia at about the same time—stand as major examples of the problems that we are

facing during the transition to digital, but also for the safeguards that can be developed. The two cases have been major milestones in developing parallel principles at the EU and the national level for the transition to the digital age.

In both cases, mergers leading to very important market positions were allowed to proceed, given the very difficult economic situation for the platforms at hand, the interest to grow a digital platform and to provide continued digital services to the consumers. Both relied on a series of commitments by the parties to lower barriers to entry and to allow future market competition. Both decisions depend as to their validity and effect on faithful and goodwill implementation by the parties.

Though both cases must be seen in their proper context and against the specific framework of national markets and effects on competitors, the basic thrust of the commitments requested from the parties was common:

- Safeguards for ensuring access to critical inputs, sport content and film content, for competitors, in order to ensure future *inter-platform* competition, and
- Safeguards for accessing the digital distribution platform itself—securing opportunities for competitors to provide channels via the merged digital platform as a basis for *intra-platform* competition

Securing future inter-platform competition in the digital environment is fundamental for sustainable open markets. Securing intra-platform competition is a necessary launch pad, in many cases, for competitors for gaining a sound subscriber basis before launching into the full-scale build-up of a competing platform. Both elements are therefore, in many cases, vital pieces for a consistent application of competition rules to the sector.

We are applying similar principles—shortening exclusivities, unbundling, and safeguards against vertical foreclosure—in dealing with the cartel-type behaviour and the resulting vertical concentration effects in the top sport rights markets both at the selling and the purchasing end, such as in the cases relating to top football leagues TV and New Media rights at both European and national level, and rights to top events such as the Olympic Games. Similar attention is needed for premium film content, and for developments in the music sector and the related rights management markets. Recent case decisions and announcement of opening of procedures by the European Commission testify to this.

Without going into further detail, let me insist here on the general point. The paradigm shift over the next five to ten years in Europe's media sector, the transition from analogue to digital, creates huge opportunities—but it also creates substantial risks for strengthening dominant market positions and locking out competitors. The European Commission and the National

Competition Authorities case practice demonstrate abundantly that Europe is positive, under both merger control and antitrust, on restructuring. But safeguards are needed for avoiding market foreclosure and ensuring opportunities for new entrants.

Under antitrust and regulation, authorities will have to have a watchful eye on bottlenecks, as the transition proceeds:

- Bottlenecks in access to critical content;
- Bottlenecks in access to distribution networks;
- Future gateway power generated through network effects
- And the leveraging of market power from neighbouring markets where this can lead to foreclosure of competitors.

The new emerging markets—Internet and 3G, the New Media—will need special attention.

As we move towards full scale digitisation, we are seeing a paradigm shift in European media—towards new platforms, new business models, and the New Media, broadband Internet and 3G.

In the now enlarged European Union, 180 million households are equipped with TV sets. As I have mentioned, Europe has now more than 30 million digital households, 20% 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.

Fully interactive Broadband Internet has now 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%—very similar to the growth rates we saw in mobile in Europe 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.

If this development continues, we may reach a broadband Internet (fixed DSL and cable, and mobile) penetration at fifty percent of households well before 2010. The media landscape will then look very different. New Media would rapidly gain in importance, and new markets and additional revenue streams would develop.

We must keep the development towards those new markets open. This gives special priority to action for the New Media—broadband Internet and third generation mobile.

The EU's new Antitrust Regulation 1/2003 emphasises market orientation and analysis, and the instrument of sector-wide investigations. We believe both will play a major role in securing open markets for New Media. We have launched a first Europe-wide Sector Inquiry into the field of New Media via 3G mobile, and we are currently analysing the results of the investigation. Results and our conclusions from a competition point of view are due to be presented in Brussels in May. Other broad investigations into critical content for the New Media via the Internet will follow.

Let me conclude. The market must not be tilted during the transition from analogue to digital in favour of any actor. Competitive market structures are a necessary condition for plurality—even if they may not be sufficient by themselves, and efficient specific national media plurality controls may be required in addition in many cases. Turning the digital transition into more choice and plurality in the media sector will be the key task for our institutions in this field, both for national media and antitrust regulators, as well as for those acting at the European level.