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- P a n e l C o n t r i b u t i o n

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Introduction

I am particularly grateful for being given the opportunity to contribute to this conference at a time when Europe is on its way to a larger Community, and this country is on its way into the European Union. The new draft Constitution that has been submitted by the EU Convention to the Intergovernmental Conference—starting its work in two weeks time—has emphasised Citizen's rights and the role of pluralism and freedom of information, both values central to public broadcasting. With the Constitution Europe sets a new framework, confirms basic principles and establishes a Community discipline to ensure fundamental rights.

Let me use my time to make comments on four points:

- Some remarks on the general development of broadcasting over the last decade and the development of the dual model of broadcasting, now the rule in all Union Member States
- The legal framework for broadcasting at the EU level, including the shift to a growing role of the application of antitrust rules to ensure the basic goals of freedom of markets and information in the sector
- The special discipline established for public broadcasting under the State Aid rules and Article 86 of the EU Treaty
- An outlook.

Firstly, the dual structure of Broadcasting

Across Europe, we have seen the initial structure of the eighties—national public broadcasters based on licence fee income—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 revenues have emerged as a third main revenue stream.

Let me summarise the current picture in a few figures.

By the end of the nineties, the total media sector in the EU represented some 145 billion €, out of which roughly a third for television and radio broadcasting, and another third for magazines and newspapers.

In television / broadcasting, some 45% of revenues 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 antitrust 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;

Later than we thought but certainly coming:

- Interactive;

And, perhaps earlier than we assume,

- Broadband Internet as a mass-market.

And market delineations are becoming a moving target.

Secondly, the legal Framework

Let me here take a step back and come to my next point.

The dominating political themes in the media discussion in the EU have been clearly—and this is true for *all* Member States, and I believe not different from the debate in this country:

- Pluralism, the basic public goal in the media sector;
- Cultural diversity, standing for the preservation of national identities;
- Enhancing citizen's choice, where we have to tackle the task to give citizens access to the new opportunities that innovation and markets open up—and that last point will take a large weight in future debates.

There is no time to go into any detail on the EU legal framework in the media sector, as it currently exists. The essentials are:

- The basic freedoms enshrined in the Treaty, and particularly the freedom to provide services;
- EC Competition Law;
- The Maastricht & Amsterdam Treaties: the provisions relating to culture and the protocol on public broadcasting;
- Post Nice: the Charter of Fundamental Rights, and particularly the freedom of expression and information—Article 11, and, closely connected, the European Convention of Human Rights—Article 10;
- And now, of course, the integration of the Charter into the future European Constitution—Title II / Article 11.

The Television without Frontiers Directive remains the centrepiece of the EU's legal framework in the sector:

- It harmonises the definition of broadcasting;
- Is making detailed provisions concerning advertisement, sponsoring, protection of minors;

- Contains, in its article 4, the famous European content provisions ("European Works")
- And it has added in its 1997 Amendment, access rights to events of general public interests ("the events of major importance for society").

Innovation and particularly the New Media services make a re-consideration of a number of concepts underlying the Directive necessary, on issues such as the definitions and the provisions for advertisement. A Review of the Directive is going on this year. Working papers have been published for comment—and this is bound to set major guidelines for the future audio-visual regulatory framework at EU level.

Another major line is the debate on media concentration. The basic Treaty provisions state that ownership issues fall with Member States. Member States retain the right to issue national media laws relating to limits on media ownership, both within sectors and on cross-ownership. Plurality of the media is regarded as a legitimate interest of a Member State under EU law and falls under its authority.

But, the European Parliament has, in the context of that debate, in a number of resolutions also warned about divergence of national, and it has requested effective measures for ensuring pluralism.

A number of Member States have put in place controls concerning intra-media and cross media ownership, choosing different approaches and/or mixes of limitations on audience shares, share capital, and number of licences held—and, of course, media concentration controls are now at the centre of debate in the US.

Let me concentrate then on the one major EU instrument in checking media power that has emerged in practice over the last years—EC Competition Law.

All lines of EC Competition Law are concerned:

- The Merger Regulation, the control of concentrations;

- Anti-trust (Articles 81 & 82 EC Treaty), checking agreements and abuse of dominant positions, of critical importance now with the bitter competition for sports rights. With the decentralisation of enforcement under the reform of EC Regulation 17 governing the application of these rules as of 1st May of next year, the national anti-trust authorities are bound to play a much larger role in that respect in the future;
- Article 86, the EC Treaty public service provisions, as exemplified and explained by the Commission's communications—and now a Green Paper— on services of general interest;
- And,
- State Aid control under EC Competition Law, crucial by the fact that in Europe public broadcasters are heavily financed by licence fees.

Thirdly, the rules for Public Broadcasting clarified

Let me just make some more comments here on the way public broadcasting falls into this general EU framework. We value highly public service broadcasting as a main guardian of freedom of information, pluralism and cultural diversity, as IPI's Vienna declaration has also emphasised. The EBU represents at European level the best of the values that public broadcasting contributes to the democratic life of our societies—and we have heard this in more detail from Mr. Rumphorst and others. However, let us be clear: also public broadcasting must respect the basic ground rules of a market economy that ensure a healthy development of the dual system. Under EU antitrust these rules are spelt out mainly under EC article 86 that concerns the surveillance of public enterprises and enterprises with special or exclusive rights, and state aid scrutiny (Article 87 ff).

As regards the rules set by State aids and Article 86 EU Treaty, the Commission has clarified its position in its Communication on the application of EC State Aid rules to public service

broadcasting.¹ The Commission's position is based on the Protocol on Public Broadcasting annexed to the EU Treaty since its Amsterdam revision.

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.

This is reflected in the State Aid Communication. The recent Altmark ruling² by the Court will allow to refine that position further. But the essentials stand:

- Member States have the authority to define public service goals in broadcasting, but;
- Public broadcasting is subject to substantial transparency requirements;
- Fair competition must be ensured when competing with the private sector, particularly at a time when there is intense competition for sports rights and advertisement income.

Or, in more precise terms:

- There must be a clearer specification of the public service mandate, and an independent regulator to survey it; and rules of fair competition must be complied with.

¹ 2001/C 320/04 (OJC 320, 15.11.2001)

² *Altmark Trans GmbH et al. vs Regierungspräsidium Magdeburg*, case C-280/00, European Court of Justice, 24 July 2003

- Markets must be allowed to develop freely, as far as the performance of that function is not endangered. The dual nature of the market must not be tilted by public intervention to the favour of any market participant.
- And, innovation the emergence of New Media must not be strangled. We believe that the sector will look very different before the end of the decade, to the benefit of all—if we let consumer and audience choice develop.

Fourthly, Outlook

During the last five years, Europe has lived through a major debate on the issue of convergence of markets in the telecoms / media / Internet fields. As a result of this a new electronic communications framework is in force in the EU since July for the telecommunications networks underlying most of the media sector. The very essence of this new framework is that regulation must not separate markets but must allow for their convergence; and, that markets should only be regulated to the extent that standard competition principles are insufficient to cope with market power and the abuses that can result.

Inevitably, these convictions—resulting from a very broad debate—will spill over into future regulation in the audio-visual sectors, and they are visible in the communication published by the Commission on audio-visual policy in a digital age³ that has written ground rules for broadcasting regulation, to be developed further within the debate on the reform of the Television without frontiers Directive.

Main elements are:

- An overriding requirement for a regulator with true independence, both from government and the operator(s);

³ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age", COM (1999) 657, 14.12.1999.

- Proportionality of regulation: regulate only where indispensable for achieving the public objectives concerned;
- And as a main result from the debate: regulation should *not separate sectors and technologies in a rigid manner* but will have to depend more and more on a *dynamic assessment of actual audience and market power*.

This leads me to my concluding point: the complementary role that the EU framework and national media and competition regulation are bound to play.

Let me summarise those conclusions in some statements:

- Taking account of the European framework will be important, particularly also for the countries acceding to the European Union.
- Antitrust Law will play a growing role, as markets diversify away from traditional core media market delineations, and markets converge. Developments in the media markets will depend more and more on keeping upstream content markets open—such as premium sports coverage and premium films where competition law is the natural instrument to address foreclosure effects resulting from market concentration. The main motivation of antitrust law is the promotion of consumer choice and innovation. And we will particularly not admit that the New Media are strangled by anti-competitive constraints.
- Strong antitrust institutions will be essential, in this sector as in others. The current reform and decentralisation of enforcement of antitrust rules at EU level that will fully enter into force on 1st May of next year is to foster institution building and networking in antitrust application— and this will be a focus of attention in the countries seeking accession to the Union.
- Specific media regulation will remain indispensable, and strong independent media regulators will be needed, in areas where anti-trust and merger control cannot by themselves ensure pluralism and citizens' choice. It will have to be applied in a manner that respects the dual nature of modern broadcasting in Europe, both

public and private, and that allows the development of the New Media—Internet and broadband.

- Public broadcasting will remain a backbone of the European media scene. But it must adjust to the requirements of competition, both when broadcasters act individually, and even more so when they deal collectively. In its Eurovision ruling⁴ of last Autumn the Court has set signposts for the joint purchasing by public broadcasters that must be respected in the future. We will discuss the latter intensely with the EBU during the coming weeks and months.

⁴ Metropole Television SA (M6) et al. vs Commission, joined cases T-185/00,T-216/00,T-299/00 and T-300/00, Court of First Instance, 8 October 2002 ECR 2002, II-03805