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Session Three: Broadcasting, Telecoms and New Media: The Challenge of
Convergence – Competition Issues

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Let me add in my contribution three points from a European perspective to the opening of this session:

- The basic change of the fundamentals over the next 5 - 10 years: we will move from talking about broadband in media towards seeing its massive market introduction;
- Convergence does not mean more simplicity. It will mean more different markets, not less; more competitive relationships , not less—and this means also more potential for abuse of market power and a growing role of competition law as a basic regulatory framework;
- The open question how to handle in this context the traditionally heavy state intervention in favour of public broadcasting in Europe.

Let me come to the point:

Broadband as the basis for convergence

Let me submit one single (and simplified) proposition:

Broadband will be for media markets and media regulation what mobile was for the liberalisation of telecoms in Europe.

In telecommunication, the introduction of mobile in the nineties prepared the ground for the fundamental reform of telecoms, and ultimately led to liberalisation and the new Electronic Communications Framework. The new regulatory framework was to a large extent grandfathered by the regulatory

principles that were developed in Europe during the nineties for the introduction of the new mobile competitors. Mobile brought an entirely new frame of mind for the regulation of telecommunications in Europe. It brought new actors. And it brought entirely new market perspectives.

It is highly likely that the introduction of broadband will do the same for the media regulatory framework during this decade, and the next.

Broadband Internet is clearly on its way:

- there are now 40 million broadband lines in the EU.
- On a per inhabitant basis, 8% penetration, rapidly growing. Nine Member States higher than 10%, with the Netherlands at 19% and Denmark 18% leading.
- 80% of this is DSL based, 20% cable, averaged across Member States. The first promises rapid universal penetration but will require technological upgrade for much of current DSL, in order to become fully media capable. The latter reflects a cable penetration that remains substantially lower than telephone network penetration in most Member States, but also the need to catch up on modern marketing strategies for cable.

Whichever the ultimate technological basis will be, we will reach 50% or so of penetration by the end of the decade in the European Union—also one of the essential goals of the Lisbon strategy, as re-emphasised by the Kok report. It will mean a profound change of

- Regulation

- Players
- Redistribution of cards between stakeholders and new arrivals.

Which regulation when scarcity goes away ?

Regulation of television and radio has been based on the scarcity of frequencies and therefore channel capacity.

This basic principle is underlying the whole current radio and television order in Europe—since its inception in the twenties of the last century. Once broadband decouples availability of channel capacity nearly entirely from the availability of frequencies, the basic question will be: Which regulation?

This takes right to the current reform of the regulatory framework for television in Europe: the reform of the Television Without Frontiers Directive, the TVWF Directive.

A few points to be kept in mind: The starting point for the TVWF Directive in 1989 was the introduction of satellite television in Europe. Its main approach was based on the country of origin principle. Or in other words: which regulation is needed to allow transfrontier television.

The basic principle therefore has been a principle of minimal regulation—even if the Directive has ended up with quite complex provisions for example on advertisement. Throughout its further development during the reviews of the nineties the TVWF framework has developed a basic focus on four issues:

- Regulation of advertisement;
- Provisions on European content;
- Later, access to "events of social importance", the so-called listed events;
- Throughout: Protection of fundamental principles, such as the protection of minors.

The main incentive for the reform now under way is the coming of age of the New Media/ Broadband Internet. The direction of the debate has been indicated by a series of successive Commission communications. "Focus groups" for debate have been established on three core issues:

- Reach of regulation
- Advertisement
- Access

From a competition point of view the vital issue at stake is avoiding an increase of regulation on the New Media—at the very time, when we need the growth potential of those New Media for economic and social progress. An extension of reach will inevitably have to include a review of the overall intensity of regulation, in order to avoid exporting unduly heavy regulation into the new markets.

At the current stage of the debate, there are inevitably open questions: Is a principle of "graduated regulation" possible, such as retaining a special "regulatory intensity" in areas nearest to traditional television. Or in other

words: can in this respect the electronic communications framework approach be mirrored in content regulation in a meaningful manner?

As is well known to everybody in this conference, under the new Electronic Communications framework regulation is "graduated" according to market power, largely under Member States determination and control, with Commission review and coordination.

It will remain to be seen if equivalent principles are needed and can be developed in the field of Media—in order to avoid an overregulation of the whole sector by extending current provisions beyond the reach for which they were originally intended. Three caveats though:

- The Electronic Communications Framework was not based on a country of origin principle in the first place but on far reaching agreement on an open market environment between all Member States, underpinned by the application of common regulation and of competition law;
- In the media field, the issue is not only market power, but more fundamentally audience power—though in many instances the two are closely related;
- Media regulation has evolved in the Member States, within their specific media frameworks.

From a competition perspective our task is to contribute to the process, by promoting an open pro-competitive framework.

Let me then move on to my second point.

**Convergence does not mean that different markets will disappear,
neither at the same nor at different levels of trade**

At most it means that differentiation of markets according to transmission modes will disappear at some point in the future—but other market differentiation will come.

Media is Content. This means that intellectual property rights are the name of the game.

Let me make here one basic point on intellectual property rights:

- EU competition law recognizes the rights of the owner

However

- The exercise of the rights is circumscribed.

There can be no market foreclosure resulting from the exercise of the rights. The exercise of rights can have anti-competitive effects, particularly where combined with bundling of different levels of trade.

In clear terms: tying up critical upstream content with downstream platforms to the detriment of the newcomers will be, in many instances, beyond the red line.

The issue has been a main focus under EU competition law application in the media sector over the last three years.

Main principles are:

- There should be sufficient unbundling of content offers: the obvious example is the sale of critical sports rights;
- Markets must remain contestable;

And,

- Special diligence is required with regard to the New Media. The acceleration of the arrival of broadband is making this even more urgent.

We face two counter-veiling trends in the sector—and I suspect that they will largely dominate the future convergent environment, once it becomes market reality:

- transmission modes are converging—even if the splitting along other lines there creates new markets, such as wholesale and retail market differentiation, and differentiation along new demand patterns. Just remember that we have gone from a single monopoly market in telecoms in the eighties to eighteen markets under the new Electronic Communications Framework—and more may come.
- But, more profoundly, rights owners will want to "window" and split their rights along new lines—and this will lead to new, even more differentiated, markets in the future converged media world, and give rise to new access issues.

All this means that market power issues and conflict are ahead.

And this takes me to a further main issue in Europe which makes the situation even more complex.

Public Service Broadcasting— PSB

Public Service Broadcasters, and the regime they are working under, differentiates the European television scene substantially from US television, and the regulatory issues discussed there. In Europe:

- more than a fourth of revenues in the TV sector are raised under the form of mandatory license fees for PSBs paid by any TV user. This sums up to a more than 15 billion € levy contribution across the EU;
- PSB broadcasters account for 30 - 80% of audience share across EU Member States, with substantial national variations;
- A main issue therefore is how to maintain fair competition between public and private broadcasters, as Europe transits towards broadband.

The basic framework for PSBs in the European Union is the text resulting from the Amsterdam Protocol. The Protocol is annexed to the EU Treaty and reads as follows:

"...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..."

But it also says

"...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..."

It is against this background that current national PSB reforms in Europe and European Commission initiatives must be seen, such as the current scrutiny under EU state aid provisions of German ARD/ZDF procedures, as well as the investigations under antitrust provisions into the collective purchasing practices of public broadcasters in Europe. We must see to a level playing field in the sector, if even balanced entry into the new markets for both public and private broadcasters is to remain open.

This last consideration concerning the future lets me end on a more general point.

Broadcasting or Broadbanding? Will broad-banding be allowed to develop?

What will be the future of the sector? Is our current focus on traditional *linear programming* still up to date? Will the *non-linear programming* world of full scale "broad-banding" be allowed to develop?

Or in other words, will the focus on traditional programming still be prevalent in setting regulatory objectives for some time to come? Will the new non-linear world of on-demand be made subject to regulation that was designed for the world of traditional broadcasting? And an additional consideration: is on-demand different from e-commerce and e-print? Can it be dealt with differently in a sustainable manner?

I am conscious that I have raised a number of open questions at the beginning of this session. But this is a process in the making. The core issue is, in my view, where we are moving: Can the current *broad-casting* order be maintained in a sustainable manner in its essentials, and be reformed on

the margin? Or: Are we moving towards a new world, and when: *broad-banding*?