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Digital TV Regulation and Competition Law Conference

Keynote Address: **Access to Content and Platform Competition**

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Introduction

Thank you for inviting me to make some remarks at the opening of this conference that will cover a wide range of issues—at the very time when the European media sector seems to go through a paradigm shift that will define its operations throughout this decade:

- The growth model of the media sector throughout the nineties seems to stagger—the media sector is squeezed between a slackening advertisement market and high content costs; and pay-TV models have not reached profitability in a number of Member States;
- As a result, the development of the new platforms seems to be in crisis in a number of cases—as the sometimes dramatic events in the European media sector during the last weeks and months seem to confirm;
- In all Member States, regulators and operators will have to reconsider their current regulatory and business models;
- As sometimes dramatic restructuring will proceed, competition rules will play a major role in creating a new healthier base for the future growth of the sector.

I will, of course, go into more detail on this last point. Before I do so, I believe it is useful to have a look at where we come from, and what the major goals in the European media sector are—seen in a European context.

Paradigm shift

Let me recall: We have seen the initial structure of the eighties— a structure of national public broadcasters based on licence fee income—evolve into the dual structure of the nineties, with the market entry on a broad scale of private broadcasters based on advertisement revenues. By the end of the nineties, we have seen the emergence of subscription based TV, with pay-TV and pay-per-view revenues as a third main revenue stream.

Digitisation has multiplied channels and supply. The resulting new opportunities of packaging of offerings, in fields like thematic channels, video-on-demand and interactive is leading to repositioning and alliances across the sector—and that includes radio, Internet, and soon UMTS.

It is useful to have some figures in mind when looking at the dramatic change and the growth bonanza that the European media sector has experienced—particularly during the second half of the nineties. TV channels in the EU have grown from some fifty at the end of the eighties to some 1500 now—even if some fifty broadcasters continue today to capture three quarters of the audience. At the beginning of the year 2000, 580 channels with potential national coverage were broadcast in the EU via terrestrial and satellite means (up 170% from 1996).

According to figures published by the European Audio-visual Observatory (used as a reference by the Commission) advertising revenues have grown by some 8% annually during the 1997 - 2000 period. Advertisement has delivered the bulk of revenue growth—even if pay-TV revenue has grown in a number of cases more spectacularly but from a substantially lower base and entailing substantial market entry cost. Licence fee income of public broadcasters grew during the same period by no more than 3%.

Let me add a few more global 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 from magazines and newspaper— even if figures in that sector are notoriously unreliable, given the different statistical base.

In television / broadcasting some 45% of revenues come from advertising, the rest in nearly equal terms from public broadcasting fees and from pay-TV subscriptions, both for the access network and the pay TV providers.

As we all know, the diversification of revenue streams was reflected in the diversification of platforms and products: free TV, Pay-TV, pay-per-view, the introduction of the various bouquets; and the first arrivals of interactive television and broadband Internet that still have to materialise on a mass basis.

The expectations for the sector are also shown by looking at the forecasts for digital TV homes in the EU. Some sources predict by 2004 near 40 million digital TV homes in the EU—up from below 15 million at the start of this decade. These opportunities are, of course, topic of this conference.

But expansion had its price.

Content prices have skyrocketed—particularly in the field of premium content, sports and premium films. For major events such as the football world cup prices in major markets went up by a factor of 4 to 6, within a period of four years.

We have seen unhealthy market concentration in those areas and resulting unhealthy cumulation of market risks, and speculation. According to the European Audio-Visual Observatory, the EU television sector went into overall deficit as early as 1999, largely unnoticed—and therefore was ill-prepared for the levelling off of market growth and particularly, its main support, the advertisement market.

The development of the new platforms is now at risk in a number of Member States, as we all know.

This defines the agenda:

- How to re-launch and further grow the new digital platforms;
- How to cope with media concentration in a way that still allows the development of the sector;
- How to ensure access to content and to dismantle unhealthy structures in that area that have shown their risks during these very days.

Media policy framework

I believe that we should take a step back and keep in mind the basic policy goals of Member States and the EU in the media field, which set the framework for a response.

The dominating themes in media discussions in the EU have been—and this is true for *all* Member States:

- Pluralism—the basic public goal in the media sector;
- Cultural diversity—that stands for preservation of cultural identities;
- Choice—giving access to the new media that innovation and markets open.

There is no time to go into any detail on the EU legal framework in the media sector, as it currently exists. This will be done elsewhere during this conference.

Let me just recall the essentials:

- The basic freedoms enshrined in the Treaty, and in particular, 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—the freedom of expression and information (Article 11); and the European Convention of Human Rights (Article 10).

And the Convention that has now started its work may further add to this general constitutional framework.

In concrete terms, the main developments have been:

- The Television Without Frontiers (TWF) Directive and the Copyright Directive for Satellite Broadcasting and Cable Retransmission, and the subsequent line of Directives—well known to all involved in the European media sector, and a major topic of this conference tomorrow;
- The debate on media concentration—the 1992 Green Paper and the related initiatives of the mid-nineties;
- A growing series of decisions under the EU's Merger Regulation and the EU's anti-trust provisions;
- And, the liberalisation of the EU's telecommunications market, the underlying infrastructure of much of the media sector.

Much of this is under review and will be subject of papers and intense debate at this conference. I refer to those interventions.

Let me here just add a few remarks on specific media concentration control, and then focus on the application of general EU Competition Law provisions.

With regard to the first:

- The basic Treaty provisions foresee that ownership issues fall with Member States;
- The debate on the Green Paper on pluralism and media concentration of the mid-nineties was inclusive.

The result was that 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, in this context, as a legitimate interest of a Member State under EU law and falls under its authority.

A number of Member States have set up differing schemes of ownership and cross ownership control— based on a mix of limitations of audience shares, limitation of share control and limitations on the licences that can be held, and on programmes that can be distributed.

One should also note that the European Parliament has warned on a number of occasions that divergence in national legislation in this area could jeopardise the functioning of the Internal Market.

But let me concentrate here on the major EU instrument in checking media power that has merged from this clarifying debate—EU Competition Law.

Competition law framework

All four lines of EU Competition Law are concerned:

- Merger Regulation—control of concentrations;
- Anti-trust (Articles 81 and 82)—checking agreements and abuse of dominant positions.

With the planned decentralisation of enforcement the national Anti-trust authorities will have a much larger role in this in the future,

- Article 86—the EC Treaty's Public Service Provisions, as interpreted by the Commission's Communications on Services of general interest,
- And, State Aid control under EC Competition Law.

The restructuring of the media markets in Europe have led to the formation of large media groups that have a European dimension as defined by the Merger Regulation:

- Thresholds of 5 bio € world-wide, 250 million € each in EU, two thirds rule;
- Lower thresholds in certain multi-MS cases where more than two Member States are concerned.

Below that level, in most cases national Merger Control will be triggered. And on top of this, the media specific national concentration controls put a check on media power, as I have mentioned.

We have seen since the mid-nineties major decisions under the EU Competition Rules, with a focus on pay-TV markets, new platforms, horizontal and vertical foreclosure effects.

Let me cite a few major examples:

- Kirch / Bertelsmann / Premiere—prohibition in order to check market power in the German digital pay-TV market;
- BskyB / Kirch—green light after concessions by Kirch concerning access to Premiere's pay-TV technical platform;
- Vivendi / Canal+ / Seagram—green light, subject to conditions. At stake Vivendi / Canal+'s dominant position in certain European pay-TV markets, and privileged access to content;

Cases have covered a broad range of markets: from TV satellite transponder markets, distribution of satellite-TV markets, and national cable-TV markets, to TV advertisement markets and TV production.

Market definitions are still in full development, with a major distinction generally drawn between free TV and pay-TV. In free TV, the position of parties in the advertisement markets has been generally decisive.

As a consequence, audience shares have often been the major criteria for assessment of market power—as they are in more and more Member States for checking media power under the media specific national concentration controls.

A number of "neighbouring markets" have been identified: transponder services, technical services for pay-TV, programme production, and, *more and more*, acquisition of content rights.

Without going into further detail on market definition and market power, let me draw *one general conclusion* on the Commission's approach.

The basic Commission position has been consistently that it is positive on restructuring and the build up of new platforms. But it will not allow monopolisation either horizontally or vertically.

This concerns all of the different levels involved—content rights, programmes, channels, and distribution platforms.

New focus under antitrust

Access to premium content is decisive for the new TV and video platforms, and access to sport rights tops the current agenda. And availability of rights for distribution of content via broadband Internet and UMTS is likely to become a critical factor for the development of these "*New Media*", all of them in a critical introduction stage.

The anti-trust cases carried forward at the Commission's Competition Directorate General in the media field reflect these developments. Nearly a third of all media competition cases currently processed under the anti-trust provisions concern sport rights, and selling and acquisition of those rights.

Many of you will know that the Commission has opened a proceeding concerning the selling of the UEFA Champions League rights that is bound to set a major reference for what *is acceptable in joint selling in this area, and what is not*.

The Press Release published on the occasion of the opening of the procedure set out the basic concerns:

"Joint selling on an exclusive basis has a number of effects that threaten affordable access to football on TV... One effect is that only bigger media groups will be able to afford the acquisition and exploitation of the rights ... This lack of competition may also slow down the use of new technologies.... But the press release went on to state: "The Commission will examine carefully any constructive proposal".

While it would be inappropriate to comment on an on-going procedure, let me make a more general statement. As Commissioner Monti has made abundantly clear, the Commission fully recognises the requirements for promoting sports, solidarity between clubs and brand recognition for sporting events. However, it cannot admit the foreclosure effects resulting from certain current arrangements that impede market development and result in unhealthy concentrative market structures—the risk of which has been shown by recent events.

Let me quote Commissioner Monti (at the Madrid European Competition Day):

"The combination of restrictive collective selling and long exclusivity can sometimes severely affect the normal functioning of the markets. Rights can be so highly priced that buyers hesitate to invest. Since the value of the rights is not defined under normal competitive conditions, companies that decide to secure the valuable unique set of rights are led to unjustifiably expose themselves to important financial risks. This may result in a highly fragile market situation detrimental to all the parties concerned, consumers, media industry and sport associations. ... The media industry may suffer as it is evidenced in the recent press reports on Germany and the Kirch group."

I believe that we will see during the coming months a growing focus on concentration in content, and related vertical effects. An intensification of anti-trust scrutiny in the media sector, and major anti-trust decisions are ahead.

State aid and public broadcasting

Let me then turn to the application of state aid rules that may gain prominence as the sector goes through its current difficult period, and the competition between platforms for a more limited cake will intensify.

Concerned are EC Article 86 (public enterprises, and enterprises with special or exclusive rights) and state aid scrutiny (Article 87 and subsequent articles).

The Commission's position is based on the Protocol on public broadcasting annexed to the EU Treaty since its Amsterdam revision. Under that perspective, the Commission has clarified its position in its Communication on the application of EC State Aid rules to public broadcasting as published in autumn of last year.

Let me quote from the Amsterdam Protocol:

"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 States, 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 by the State Aid Communication:

- Member States have the authority to define public service goals in broadcasting;

But,

- The action must be transparent;

And

- Fair competition must be ensured when competing with the private sector.

Or, in more general terms, there must be a clear specification of the public service mandate, and an independent regulator to survey it, and markets must be allowed to develop freely, as far as the performance of that function is not endangered.

This is particularly true in times of a difficult market transition.

Outlook

Having set forth these principles of our action let me draw some conclusions and try an outlook.

We will see a closer interaction of EU and national competition and media regulators—and the panels of this conference testify to this. Media-specific concentration controls will remain a national responsibility but EU and national Competition Law will play a growing role.

This conference also demonstrates an additional element that will have to be taken into account: the current reform of EU telecommunications—the new electronic communications framework.

The reform will mean that the regulation of the underlying networks and cable will be based on the determination of dominant positions. And that means that market definitions based on competition law principles will play a key role.

In practice, the new electronic communications rules will have substantial influence on the future regulation of access to the technical services underlying the new platforms. They imply a periodic review of market definitions and therefore regulation of the telecom and cable sector. Much will therefore depend on the orientation given to these reviews—if they lead *to more competition, or to more regulation*.

Competition must remain the driver as the sector restructures. And this should be kept in mind also in the current difficult market situation. Telecom stocks have experienced the second largest loss of all listed companies during the first quarter of this year—still bypassed by the media stocks that have fared even worse. The telecom and media sectors will have to rise together—and for this less regulation is needed, and more opportunities for competitive development.

Member States will have to review how under current conditions their main objectives in the media sector can best be reached—plurality, cultural diversity *and* growth. We will need a close interaction between media, telecoms and competition regulators—at EU level and national.

Under Competition Rules, we will have to seek a careful balance how best to contribute to the achievement of those goals. Competitive entry possibilities will always be a "must", as we review restructuring of platforms—but we must also take account of requirements for efficiencies and synergies, particularly during the difficult start-up periods.

The current reform of EC Anti-trust (Regulation 17) will facilitate a new orientation and a better sharing of work with national authorities. There is a new focus on core restrictions. And we will also have a new focus on sector-wide investigations—*Sector Inquiries* have been successfully used in telecoms, and may also become a core instrument in the media sector.

As current issues develop, attention under European Competition Law is likely to concentrate on four areas:

- Access to premium sports and film contents;
- Rights management systems;
- Digital gate keepers;
- New Media—Internet and UMTS.

At least two of these areas:

- Access to premium content

And

- Digital gatekeepers

will be of major importance for the new platforms and therefore of special interest to this conference.

Access to premium content is of key strategic importance for the development of all media markets, and particularly the new platforms. I hope I have made this priority clear.

Digital gatekeepers can result from the trend towards vertical integration, as digital platforms develop. Issues are access to set-top boxes, APIs, and EPGs.

We will address under competition law any anti-competitive structures that may stand in the way of creating more openness in those areas or may hold back new developments—such as those addressed during this conference. We will focus on anti-competitive structures and abusive behaviour that could turn into bottlenecks for future development. We believe that this is the best contribution that we can make for new growth of the sector, and the development of the new platforms.

As you see, we have a rich agenda in front of us.