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INTRODUCTION

Europe is currently going through a major telecom reform that will integrate competition law elements into Europe's framework substantially more than in the past.

This is an important change of framework for the sector as a whole and I will refer to it. But my main emphasis will be on a broader phenomenon of which current telecom reform is one element : The current re-positioning of companies in the new value chain telecom–Internet - media – content and the major role the application of competition rules will play for companies as they undertake that search for new markets and revenues.

A CRITICAL PHASE

A main growth motor for the current development continues to be, without doubt, market liberalisation—even if heavy pressure on the telecom markets seems to continue during this year resulting from the set back on the stock markets and from the shock of the high UMTS licence fees that—though uneven across EU Member States—have withdrawn some 110 billion € from Europe's telecom markets, resulting in substantial debt and heavy repercussions in telecom and mobile markets across Europe.

The substantially tighter financial situation in the major telecom growth markets (Internet, mobile) combine, in many European countries, with unresolved issues in launching the new digital cable, satellite and terrestrial platforms, with digital satellite, digital cable, and digital audio all at decisive stages of introduction. Europe's telecom and media sectors are therefore at a critical cross road : There is a requirement to open new business opportunities and revenues. A main element there is further regulatory reform and a still more open market environment.

The new policy mix rests, beyond many more detailed issues, on two main requirements to relaunch the Telecom – Internet – Media chain :

– Access to the local loop

and

– Access to content.

TELECOMS: FINDING THE RIGHT BALANCE

Access to the local loop is a main element in the current telecom reform—and it best demonstrates the closely complementary role between:

– Sector specific regulation

and

– Application of EC Competition Rules.

The general goal of the current EU Telecom Reform package, the first major overhaul of the EU's telecom regulatory framework since full liberalisation of telecoms in the EU in 1998, is to make the framework sufficiently flexible to allow the development towards the new multi-media markets—with a progressive transition of market regulation towards the rules of general competition law, while at the same time strengthening specific regulation where strong ex-ante regulation is needed to allow the new markets to develop.

A main point in focus is access to the local loop. The reform package of July of last year contained the proposal to mandate the opening of the local loop EU-wide by the beginning of this year. The EU regulation on the unbundling of the local loop was passed in record time by the Council of Ministers and the European Parliament and entered into force on 1st January of this year.[1] Even if the implementation record and its impact on the market place is still not satisfactory, the Commission is determined to ensure, in close co-operation with the National Regulators, that the new regulation will progress effective opening of the local telecom access markets.

At the same time, the general reform package has made substantial progress, with agreement in principle at the EU Telecom Council in April and the opening of the co-

[1] http://europa.eu.int/comm/competition/liberalization/legislation/#telecom_regulations

decision phase between the Council and Parliament before the final adoption, hopefully before the end of this year.

Future regulation will concentrate on checking the market power of the incumbents—with the promise that sector specific regulation will phase out, as effective competition provides a sufficient check on that market power.

Analysis of market power will now be based on proven market definition principles developed under Competition Law practice. In the context of the current reform process the Commission has published in March "Draft Guidelines on Market Analysis and the Calculation of Significant Market Power" for the sector.[2]

CONTENT BECOMES KEY

Let me then turn from the issue of local access, to the issue of access to content—or the wider issues of the transition to the new multi-media distribution networks. The current market re-structuring in the context of that transition and the introduction of the new systems—be they digital TV or digital audio-broadcasting, or the first precursors of a future Mega-bit Internet with full interactivity—has given rise to a number of complex cases under Competition Law. They have made the application of Competition Rules a major factor of influence in the restructuring of the sector, both at the European and the national levels.

In this context, one cannot overstate the importance of the complementary role of :

– National Competition Authorities and the national sector specific telecom regulators

and

[2] available at http://europa.eu.int/comm/competition/liberalization/legislation/#telecom_guidelines.

– The application of EC Competition Rules at the European level by the European Commission.

This complementary role will be further strengthened through the current telecom reform, and the reform of basic Regulation 17 governing European Competition Law application, as it is under way.

Before turning to some details of the application of EU Competition Rules to the new Telecom - Internet - Media - Content paradigm, let me re-call to this business audience some basic principles: The European Commission, in its application of EC Competition Rules, has been consistently positive on market restructuring that is required to exploit market integration and face globalisation,

but,

competition cannot be sacrificed in the process.

Or in other terms : market operators must be allowed to adjust to the new converging markets in the Telecoms - Internet - Media - Content environment, but there must be no market foreclosure by powerful market actors—that by itself would jeopardise this very adjustment process.

The tools are well known : strict screening under EC Competition Rules. This means:

– Article 81 : anti-competitive agreements ;

– Article 82 : abuse of dominant positions

and

– Vetting mergers and acquisitions under the EC Merger Regulation.

where the trigger is aggregate world-wide turnover of more than 5 billion € and EU-wide turnover of at least two of the participating companies of more than 250 million €, unless each of the undertakings concerned achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. A more complex test

applies for a world-wide aggregate turnover of over 2.5 billion € only where a merger concerns at least three Member States.

What counts for the application of the Regulation is impact on the market place in the European Union—and not the location of companies.

CASE CATEGORIES

Let me then turn to the main case categories in the Telecom - Internet - Media - Content field :

– Local access ;

– Horizontal restructuring ;

– Vertical issues.

The local bottleneck.

I have mentioned the Unbundling Regulation that entered into force by 1st January 2001 in the context of the current telecom reform. In fact, both instruments—sector specific regulation and application of general competition rules—play their (complementary) role in this area. Take the Telia / Telenor case as an example, the first case of a major merger of two telephone incumbents in Europe (in this case in the EEA). Screened under the Merger Regulation, the Commission required, as a condition for approving the merger, the unbundling of the local loops of the parties and the divestiture of the parties cable networks, i.e. the complete opening of the local access market. Even if the merger was subsequently disbanded by the parties, the Commission made it clear in the press release published on the occasion that it may apply similar conditions in similar circumstances in other future cases.

Horizontal

Out of a number of cases of horizontal restructuring—amongst them all of the global telecom alliances of the mid- to late-nineties—let me just mention two cases that have written case-law for the analysis of market power in the Internet : the review, under the

EC Merger Regulation, of WorldCom / MCI in 1998 (approved) and of the subsequent WorldCom / MCI / Sprint in 2000 (prohibited). In both cases the Commission identified network effects as a new critical determinant in assessing mergers in the new Internet environment, in this case the Internet backbone market. In WorldCom / MCI the parties offered sufficient remedies, i.e. the divestiture of MCI's Internet operation. In the subsequent WorldCom / MCI / Sprint case the remedies offered were insufficient.

Vertical

As market operators move towards content-based strategies, this third line of cases is likely to become most important —as they have been in the deployment of the new television platforms for some time.

In this line of cases the main concern is that by linking up market positions in upstream content markets and downstream distribution markets actors can exclude existing or potential competitors to an extent that establishes them as effective gatekeepers for the new markets, with the threat of a lasting dominant position. Companies could become able to foreclose markets, by refusing to licence access to content to competitors, or by denying transmission of content via their infrastructures or platforms to other content owners.

In AOL / Time Warner, the link between AOL and Bertelsmann existing at the time would have created such a risk in the online music delivery market. The commitment to cut the link AOL / Bertelsmann allowed to give green light to the merger. In Vivendi / Seagram there was the concern that Seagram's (parent of Universal) control over content could be leveraged into Vivendi's position in the downstream pay-television and Internet services markets in Europe. In this case, a main condition was non-discriminatory access to Universal's music catalogue. Both cases show that access to content becomes crucial, as the converging Telecoms – Internet – Media markets move towards content-based strategies.

Access to premium content is therefore decisive for the new TV and video markets and, within that content, access to sports rights tops more and more the agenda. At the same time the availability of rights for distribution of content via the Internet is becoming critical for new revenue models for that medium.

Be it sports or music or film rights, access to premium content—and the control of it — becomes crucial for future strategies—but makes it also a centre of competition concerns.

In focus is exclusivity in premium content rights and potential exclusionary effects that result from that exclusivity for competitors.

Let us be clear. It is established practice under EC Competition Rules—as in general EU policy—not to question the rights of parties to content they created or lawfully acquired. But it is also established case law that the exercise of those rights must not lead to a situation where the development of competition would be substantially and in a permanent manner impeded.

Competition Commissioner Monti has stated this clearly. I quote : "*Exclusivity of a long duration and for a wide range of rights is unacceptable because it is likely to lead to market foreclosure*".

This will be the guideline for a number of critical decisions under EC Competition Rules ahead, be they on football rights or other areas of premium content.

As Commissioner Monti has stated on a number of occasions, the Commission respects the specificities of sport, as it has shown in the media sector just a month ago with the approval of the UEFA Broadcasting Regulations, after requesting a number of modifications.[3]

However, control of content must not lead to build up of market power and exclusionary effects of such a degree that consumer choice and interests are put in jeopardy.

Offering access to content to competitors can ease competition concerns as it has in the Audio-visual Sports case in this country whereby Telefónica and Sogecable jointly acquired and exploited broadcasting rights to the Spanish First League football matches. After the granting by the parties of access to the relevant football rights to the new cable and digital terrestrial television networks in Spain, Commissioner Monti, last Autumn, expressed his satisfaction that "*Spanish viewers now benefit of very interesting pay TV*

[3] http://europa.eu.int/comm/competition/antitrust/cases/2001/

subscription companies as a result of strong competition between digital cable, satellite and terrestrial TV". He emphasised in that context the close co-operation with the Spanish Competition Authorities. We hope to conclude the final examination of all competition aspects of this case during this year.

CONCLUSION

Under EC Competition Rules the red light is likely to go on when :

– Under-exploitation of exclusive rights leads to under-provision of services—or in other terms where rights are harboured by market actors without the intention of using them to the benefit of consumers ;

– When consumer choice is severely curtailed by this and other anti-competitive effects

and

– Particularly where this hinders severely the deployment of new technologies at a time when the market actors need access to content at fair conditions to develop new strategies in the converging Telecom - Internet - Media - Content markets. This is particularly true at a time when Europe is in a critical stage in the deployment of digital TV, digital audio-broadcasting, and development of high-speed broad band Internet.

Particular vigilance by Competition Authorities will be required where under-exploitation or bundling of rights would artificially hinder market development and interbrand competition between different media, for example in order to favour deployed infrastructures such as proprietary set-top boxes.

The market will need both flexibility to use the new opportunities, and vigilance to avoid the build-up of gatekeeper positions to exclude competitors on a lasting basis. In a number of instances the offering reasonable access commitments and licensing of content may offer a way forward. In other cases, structural measures will be required, and in some cases prohibitions will be unavoidable. We hope that a number of forthcoming case decisions will allow clarifying principles during this year further.