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Convergence in Regulatory and Competition Law paradigms

Communications and EC Competition Law

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I. INTRODUCTION

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Let me use my time slot at this conference for covering three main points :

- Some remarks on the current development in the media and telecom sectors, against which the evolution of principles must be seen ;
- The convergence of principles in regulation and in competition law that are very much at the heart of the issues discussed at this conference ;
- The new role of content and an outlook at the application of principles in this area where competition rules currently are a major instrument for ensuring open markets.

II TRENDS

Telecom liberalisation continues to set the scene—even if the dominating topic of this new decade seems to become the deployment of the new media and Internet platforms: cable, satellite, terrestrial digital, UMTS, all in a critical stage of introduction.

But both, telecom and media, are now suffering from tight financial situations:

- The general fall of the stock markets—particularly of high-tech stocks have pulled down in a dramatic manner telecom stocks—some of them now at 10 to 20% of their value just a year ago ;
- Additionally, the UMTS licence fees have withdrawn up to 130 billion € from the sector in Europe during this very period, resulting in substantial debt for main actors and drying up capital markets for both telecom and media entrepreneurs.

At this critical stage, any reform will have to be measured by the contribution it makes to resolve this situation. We need to:

- Open new markets and keep existing markets open ;
- New markets mean new revenue streams ;
- New revenue streams can bring recovery of stock performance and debt relief.

This is what we will have to keep very much in mind as principles of application of regulation and competition law are developed further—in both the telecom and media sectors.

III CONVERGENCE OF PRINCIPLES

The convergence of principles for regulation and application of competition law has farthest developed in the field of telecommunications regulation. Let me therefore first turn to the electronic communications sector and the current reform package.

The main themes for the reform have been spelled out clearly by the Commission.

I refer to the topics of this conference. Let me here focus on one major development that is at the very heart of the reform: the development of a new relationship between sector-specific regulation and general competition law for the sector.

What we are seeing is the convergence of principles in regulation and competition law as applied to the sector—or let me better say, a new common base for the application of the respective principles.

In fact, the new catchword seems to be more "convergence of principles" instead of "convergence of markets". The latter will still take some time in many cases.

In fact, notwithstanding technological convergence and the resulting convergence debate, markets remain substantially separate at this stage in many cases, both between telecoms and media, as well as within these sectors. This does not mean that these markets can develop separately—in fact, the telecoms and media markets can only grow together. Or say it in other words: the electronic communications platforms need access to the content platforms to thrive, and content needs access to the platforms.

But under a rigorous competition analysis of markets, relevant markets depend on the existence of competitive checks on the behaviour of the economic agents concerned. Or

to quote from the Commission's market guidelines as published in spring[1], the definition of these markets depends on "the existence of competitive constraints on the price-setting behaviour of the producers or service providers concerned". The associated application of the principles of demand and supply side substitution and of potential competition have led the Commission over the past years to identify, in a range of anti-trust and merger procedures, a wide array of separate markets in both, the media and the telecom fields.

As a consequence, we are faced, at this stage, more with a convergence of principles that prepare an ultimate convergence of markets, than the inverse.

IV THE FUTURE RELATIONSHIP OF COMPETITION LAW AND REGULATION

The convergence of principles has been set forth by the Commission very explicitly during the convergence debate.

Let me here quote Commissioner Liikanen on the objectives of the EU electronic communications reform package that is currently in the process of adoption:

- "Simplify and clarify regulation ;
- Adapt the 1998 framework in light of technology and market development."

And Commissioner Monti on the convergence of competition and regulation:

- "In favour of the maximum application of competition law…"

but

- Possible "need for regulation to extend to other areas where the competition rules are not yet effective".

The future balance will be delicate. Let me just mention two examples.

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[1] Draft guidelines on market analysis and Significant Market Power, available at

One example is the regulation on the unbundling of local loop.

In this case, the Commission decided that an application of competition rules, i.e. an essential facility-type approach within the context of general competition law as originally envisaged, was not sufficient to resolve this specific access problem and that a regulatory solution was required. As a consequence, the Commission proposed the Unbundling Regulation, subsequently adopted by the European Parliament and the Council.[2]

But the general emphasis of the reform is on a growing weight of competition law for the sector. This is best demonstrated by the evolution of the definition of the SMP concept.

SMP has been, since the liberalisation of the EU's telecoms sector of the nineties, very much at the heart of the European Regulatory Framework of telecommunications.

Basing the definition of markets for the determination of SMP more explicitly on proven competition law principles, as now foreseen in the Reform package, is a reform necessary to allow convergence, but, inevitably,

- Difficult issues of market definition will result—as they do in competition cases elsewhere ;

and

- Undoubtedly, market definitions will become key in regulation.

This is, of course, dealt with in depth in the Guidelines on Market Analysis that will be discussed at length during this conference.

Let me just add those few short comments:

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http://europa.eu.int/comm/competition/antitrust/others/com_2001_175/en.pdf

2 http://europa.eu.int/comm/competition/liberalization/legislation/#telecom_regulations

As market definition becomes the basis of regulation in the electronic communications sector—as it is traditionally in the application of competition law—there will be a number of challenges for sector regulators:

- Stability of market definitions ;
- Coherence between regulators ;
- Leveraging of market power into neighbouring markets and how it is dealt with.

Regulation will become a substantially more complex process—but at the same time there is the opportunity for a substantial convergence of principles between sector specific regulation and application of competition law, by having a unified base for both.

Let us not forget: Regulation is heavy weaponry. And I believe a main guideline for the process ahead should be that at the base line there must be *less* regulation and not *more*. This is the very central objective of the reform as spelled out by Commissioners Liikaanen and Monti. It is a "must" at a time where the sectors need clear investment incentives—and certainly not disincentives.

EU Competition Law has played a substantial role in the liberalisation process and afterwards in checking mergers and alliances. Its integration into the regulatory process can now soften that process and make it more easily react to market developments.

V THE NEW ROLE OF CONTENT

A major condition for the take-off of the sector is access to content.

As is well known content is expressly excluded from the new electronic communications Regulatory Framework, but it becomes central for its new take-off that we so urgently need.

Access to content regulation at EU level has been mainly harmonised by the provision of the Television without Frontiers Directive of 1989, as amended in 1997, on top of the sometimes elaborate national media regulatory regimes in place, as well as by the

Copyright Directives. Both the approach at EU level and at the national level aim at broader objectives, as recognised by the Commission and the Member States for the media sector, and address common values, such as freedom of opinion, pluralism, promotion of cultural and linguistic diversity, the protection of authors and their works, and the protection of minors, and, more generally, human dignity.[3]

The convergence of principles between regulation and competition rules will still have to be developed further in this area, and the review of the TWF Directives is ahead in 2002. Let me expand here only on the current application of competition law to the sector that may foreshadow some of the future issues.

At the centre of current competition concerns is:

- Access to premium content that is decisive for the new TV and video platforms ;
- Access to sports rights that top the agenda ;

and

- Availability of rights for distribution of content via broadband Internet and UMTS that become critical for the rapid deployment of these new media.

Let us have a short look at current markets directly related to audio-visual content: roughly 40% TV advertising ; 25% public broadcasting fees ; 20% pay TV ; and the rest video and cinemas.

This represents a "total cake" of some 60 billion €. This market is half only of the respective market in the U.S. This just demonstrates the European potential. And this market will pull the whole electronic communications market in a much broader context.

Apart from the highly visible merger cases that have been dealt with in this area—recall AOL/Time Warner or Vivendi/Seagram as major examples—content issues have now become a central topic for the application of antitrust rules in general, mainly for the following reasons:

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3 Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age COM(1999)657, available at http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/av_en.pdf

- Premium content rights markets are highly concentrated, particularly in highly visible sport events such as in football and Formula 1 ;
- A number of sports and movie rights contracts are up for renewal, and the future organisation of the marketing of these rights is being reshaped now ;

Whole markets are being organised at the global level, such as the on-line music market, with Pressplay and Music net as major examples.

According to a general conviction in the sector, access to premium content is essential for successful introduction of the new platforms. This is confirmed by the market introduction strategies chosen by the major market operators.

VI COMPETITION CONCERNS: HORIZONTAL AND VERTICAL EFFECTS, EXCLUSIVITY OF LONG DURATION, GATEKEEPER POSITIONS

Reviewing the competition cases in this area, three main competition concerns currently stand out:

- Joint buying ;
- Joint selling ;
- Link up of upstream content and downstream distribution platforms, and vice versa—i.e. vertical integration issues,

besides the general issues of concentration of market power at any of these different levels that can create gatekeeper positions.

Let me make a few comments:

- Joint buying can eliminate competition between participants in joint negotiations, and therefore is a major concern ;
- Joint selling can amount to price fixing, can limit the availability of rights for key sport events and tends to strengthen the market positions of major

broadcasters and channel providers further. It has therefore become a focus in current cases, particularly in the football arena ;

- The link-up of upstream content and downstream distribution platforms through exclusive arrangements of long duration can lead to effectively excluding competitors from the markets concerned.

We are therefore faced with a combination of horizontal and vertical effects that, depending on given case situations, tend to reinforce each other.

Let me add a few words to the latter.

As regards vertical effects, the main concern is that by linking up market positions in upstream content markets and downstream distribution markets operators 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 dominating position. Companies would 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 giving 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.

In more general terms, a centre of concerns is exclusivity in premium content rights where potential market foreclosure results 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 lasting manner impeded.

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.

The Commission has acknowledged on a number of occasions that a balanced approach is required that takes account of specific situations. Arguments such as efficiencies and consumer benefits in specific cases and solidarity between large and small clubs and sports activities will be carefully analysed and taken into account.

EU Anti-Trust law, as expressed under Article 81, gives that flexibility. But, we cannot accept the build up of gatekeeper positions to exclude competitors on a lasting basis.

This can only lead to substantial risks for the consumer: short time risks such as high prices, limitation of output such as a limit number of television packages available, delay in deployment of new technologies; long term risks such as lasting damage to consumers by locking up markets, formation of monopolistic structures and lasting restrictions on consumer choice.

VI I RECENT CASES

Competition case law gives guidance how to approach these situations. Let me just summarise*: the more horizontal competition the less concerns about vertical effects; and vice-versa*. Article 81 (3) allows making a fine trade-off between advantages and disadvantages for the consumer, even where we find restrictions of competition. But in no case can we accept the elimination of competition altogether, or long term exclusionary effects.

Current and forthcoming cases will set examples and give guidance on the principles applied to the sector. Let me quote:

- The UEFA Broadcasting Regulations ;
- The UEFA Champions' League ;
- Audio-visual Sports.

The negative clearance decision of last April concerning the UEFA Broadcasting Regulations[4] that allowed restrictions on broadcasting football matches for 2 1/2 hours on Saturdays and Sundays for protecting stadium attendance demonstrated the Commission's intention to take a balanced approach.

The Press Release issued on the occasion of the Statement of Objections against the joint selling of broadcasting rights for the top UEFA Champions' League matches[5] made it clear where we have to draw a line to secure openness of markets.

In the Press Release issued last Autumn in the context of the procedure regarding the Audio-visual Sports agreement between Telefonica and Sogecable[6] in Spain, the Commission indicated that sub-licensing commitments can under certain circumstances mitigate competition concerns—even if, in this case, it was also stated that the procedure would have to be carried on concerning a number of serious remaining competition concerns.

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4 available at http://europa.eu.int/comm/competition/antitrust/cases/2001/

5 Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League IP/01/1043 Date: 2001-07-20, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh

6 Commission withdraws threat of fines against Telefonica and Sogecable, but pursues examination of their joint football rights, IP/00/1352 Date: 2000-11-23, available idem

VIII OUTLOOK

Under EU Competition Law, preference will always be given to the more pro-competitive solution: *Competing platforms are better solutions than a single platform with access regulation*—or, in the case of content, a sub-licensing regime. But efficiencies and benefits for the consumer will be taken duly into account where they can be convincingly argued. In no case the lasting elimination of competition can be accepted.

The Commission has fully recognised the public objectives and the rights of Member States in media and broadcasting, as spelt out in the Amsterdam Treaty. This is reflected in the current consultation on state aids and public broadcasting. It will also have to be kept firmly in mind as principles in the sector are developed further.

But we will also have to keep in mind that the future openness of markets in the content fields will be fundamental, as we approach the market introduction, on a wide scale, of the new digital platforms.

Cases will have to be dealt with with this objective in mind, while developing complementarity also in this sector between general interest regulation and the application of general competition principles. In order to allow electronic communications markets to take off again—often on the basis of content-based strategies—we will have to be very careful to keep access to the new digital platforms and content open in the key areas:

- Cable ;
- Satellite ;
- terrestrial ;

and, particularly, in the new areas in the media arena:

- Broadband Internet ;

and

- UMTS, the third generation mobile system, that could develop into a new conduit for media content in the European Union.

I believe that these areas will be at the focus of much attention during forthcoming months.