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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Romania

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Romania --

1. The state of competition in the television broadcasting sector in Romania

1.1 Overview

- 1. The analysis of certain criteria (number of competitors in the markets, variety of the technological platforms, the constant increase in the quality of services, the number of channels included in packages of programmes, the level of prices) indicates that in Romania the television broadcasting markets are competitive environments.
- 2. In this respect, regarding the distribution of TV programmes (TV retransmission services), consumers have real choice among providers of platforms¹ and alternative services which is a sign of a good level of competition in the market. Nevertheless, RCC received reports regarding the existence of tailored offers for TV services made by large cable operators in particular geographic areas. Subsequently, it received complaints from competitors related to alleged predation practices.
- 3. The number of broadcasters and the content that they provide also ensures a good level of competition in the market (especially from the perspective of consumer's choice). However, there are competition problems related to the access of broadcasters to the networks in order to distribute their TV services. These competition concerns were addressed by RCC, as it will be described in the dedicated section bellow.
- 4. It is worth mentioning that the only regulated² market is the market of retransmission services for TV programmes in analogue terrestrial system. This situation is due to the fact that state owned broadcaster is a separate entity from the state owned distributor. However, this service will disappear in July 2015 when the analogue to TV digital switchover process³ will be over.

1.2 Some considerations regarding barriers to entry and expansion

- 5. Broadcasting is mainly characterised by two key characteristics:
 - 1. Low/zero marginal costs of an additional viewer (which leads to very high economies of scale), created by high fixed costs and
 - 2. The co-existence of different forms of finance (advertising, subscription and pay-tv).

There is a choice for viewers among at least two of the three main platforms for terrestrial (only in analogue system), cable and satellite television broadcasting. Also, television broadcasting over IP platform is available (IP TV - transmission technologies are TV over DSL and TV over fiber-to-the-home).

² By the national telecom sector regulator (ANCOM).

When digital terrestrial television will entirely replace the analogue terrestrial television.

- 6. In this respect, the main barriers to entry and expansion in broadcasting are structural (especially regarding distribution services which require network infrastructures). In fact, the following similarities between broadcasting and telecom services determine some commonalities regarding barriers to entry and expansion:
 - 1. Both transport signals using wired and wireless technologies;
 - 2. Technical common ground (ITU, CEPT, ETSI);
 - 3. Many telecoms operate broadcast transmission;
 - 4. Some operators venture into content;
 - 5. Broadcasting services are combined in "multi-play" offers (bundle of services).
- 7. Taking into consideration that broadcasting is the *simultaneous* distribution of rich content to a scattered audience, unlike telecom, broadcasting is not characterized by a strong network effect. Moreover, there are differences between broadcasting and telecom especially regarding the type of externalities. Unlike telecom services (especially voice services), broadcasting may be characterized by negative externalities due to the business model. In this respect, unlike telecom services which are paid by users, the traditional broadcasting services are mainly paid by third parties (i.e. private radio or television stations often interrupt their programmes to broadcast advertisement).

1.3 The regulatory regime in broadcasting sector

- 8. Even though there are some (but not critical) differences in points of view between the RCC and the national regulator in broadcasting sector regarding the regulatory regime (as it was showed above), the existing legal and regulatory framework in Romania is effective in supporting a robust competition policy for the broadcasting sector.
- 9. In fact, the convergence between telecommunications and the IT industry on the one hand, and the broadcasting industry with radio and television on the other hand, was recognised in the new regulatory framework for electronic communications. The framework was extended to include the transmission of broadcasting content because it was expected that increasingly all networks would be capable of carrying any type of traffic. Regulating all networks through the same regulatory framework should ensure a fair and consistent framework for all.
- 10. In order to avoid the overlap between two regulatory regimes (broadcasting regulation and the regime for electronic communications), a delineation of competences was drawn: the national broadcasting regulations are focused on the content (including must-carry regulations) and policy aspects of broadcasting, while the conveyance aspects of television and radio signals (access to networks and associated facilities defined as conditional access systems, application programme interfaces and electronic programme guides and rights of use for spectrum for providers of radio and television broadcast content) are covered by the framework for electronic communications. In this respect, there are two separate authorisations, one relating to operation of the network infrastructure and the transmission of broadcast signals (provided by the national regulator in telecom sector), and the other concerned with the content of broadcast transmissions (provided by the national regulator in broadcasting sector).

2. Current and future challenges for competition policy in television broadcasting

2.1 Barriers to entry

- 11. There are a number of barriers to entry and expansion in television broadcasting:
 - 1. Because broadcasting produces nonphysical, public goods, generally economies of scale are not a significant entry barrier in radio and television. However, large established broadcasting firms can achieve economies of scale in the cost of purchasing supplies and programming, technical operations, and administration that provide them competitive advantages not available to competitors. This is especially true in the operation of multiple channels under single ownership. Also it must be mentioned that the economies of scope are achieved by supplying bundle of services (multi-play services that include TV services) along with economies of density.
 - 2. Limited access to distribution channels creates barriers that keep undertakings from distributing their product or service. This type of barrier occurs when channel capacity is not high enough to make space available for additional channels or when a vertical integrated undertaking (a company that own distribution facilities) chooses not to make space available to a company that offers competing channels to its own;
 - 3. Access to content Access to and reasonable prices for desirable programming are necessary for successful entry. These critical resources can be controlled by competitors through various rights and licensing arrangements, contracts, or capacity utilization of scarce facilities.
 - 4. The advantage of the first entrant in the market the better known will be likely to have more success because it already has recognition. But this barrier is more significant when the existing undertaking is dominant. For example, dominant broadcasters usually have significant experience in the market and established relationships with audiences and advertisers that must be challenged by entrants and are difficult to overcome.
- 12. However there are a number of aspects on the demand side that can be also considered as barriers to entry and expansion. Loyalties create barriers to entry that are difficult for a new firm to overcome. Switching costs make it more difficult for another operator to compete or for providers of new communication technologies that offer substantially the same benefits as existing technologies to enter markets. Switching costs can also be psychological barriers as well as financial because there is some psychological discomfort when changing products with which one is familiar, and many consumers tend to show inertia when new products become available.

2.2 New technologies and future challenges

13. The constant increase of bandwidth supported by telecommunication networks (due to the fibre networks roll-out and spectrum made available for commercial applications including mobile TV) creates huge capacity that may be used for various services (content distribution) including broadcasting. The development of IP technology and the Internet, with its many different forms of content, allows any enduser to access specific content whenever it is needed. The traditional broadcasting is increasingly meeting competition from other types of media and video content. It is expected that changes brought by the new technologies will raise some challenges regarding market definition (i.e. novel wholesale input markets) and assessment of market power (i.e. possibly network specific access input markets⁴, applicability of

The problem is whether access to one network is or not substitutable for access to another network.

two/multi-sided market concepts). In this respect, the issues regarding net neutrality will became more relevant.

2.3 Efficient spectrum allocation

- 14. Romania has a transparent procedure for granting spectrum licenses which generally follows the EU legal framework. As a part of national procedure, RCC was extensively involved in the spectrum allocation procedure, by issuing a number of opinions and recommendations. For example, at the end of 2012 RCC issued a recommendation to the Ministry of Communication in order to ensure that the legal framework for digital switchover will not create any advantage to the state owned company which provides retransmission (distribution) services to broadcasters but will ensure a level playing field for all undertakings which will acquire spectrum for digital terrestrial television.
- 15. On the other hand, due to reorganisation of spectrum and the transition from analogue terrestrial television to digital terrestrial television, a considerable amount of spectrum was (and will be) made available in Romania. In this respect, RCC is aware that this situation may diminish the impact of legal procedures for spectrum allocation on competition. In fact, after the auction held in 2012 for the allocation of most important spectrum frequencies⁵ the conditions for mobile television were created. In conclusion it is foreseeable that new technologies will undermine rapidly the traditional television broadcasting business model.
- 16. Nevertheless, RCC is aware that the absence of tradable spectrum rights can raise barriers to entry, contributes to inefficient use of spectrum and therefore can lead to a reduction in competition. In this respect, RCC stressed in all its interventions that the spectrum must be allocated in a manner that, on one hand avoids anticompetitive accumulation of frequencies, and on the other hand satisfies operators' need for bandwidth. It is true that the national regulator has the possibility to redraw licenses for spectrum which is proved to be in excess. However this administrative intervention is not as efficient as a market mechanism would be. As it was already stressed in the previous OECD discussions⁶, the lack of a market value for spectrum may lead to spectrum being used inefficiently (e.g., in extending coverage of terrestrial broadcasters) rather than allowing new entrants into the market.

3. Experience in competition law enforcement relating to television and broadcasting

3.1 Overview of significant competition law enforcement matters

17. RCC identified some constraints on competition in the value chain of television broadcasting especially regarding: (i) the distribution services to consumers (viewers) and (ii) the access of broadcasters to the distribution services.

18. Regarding the first type of competition problems, currently there is no evidence of excessive prices in the television broadcasting markets. But in the past (2006), RCC has found that a cable operator abused its dominant position by practicing unfair prices for distribution of TV signals (TV content) to its subscribers (for more detail, please see following sections). Also RCC investigated and sanctioned the collusion between two cable operators that harmed consumers by artificially eliminating any possibility of choice between the services provided by the operators in question (for details of the case, please see the following sections).

⁵ 790-862 MHz, 880-915 MHz/925-960 MHz, 1710-1785 MHz/1805-1880 MHz and 2500-2690 MHz.

Regulation and Competition Issues in Broadcasting in the light of Convergence , OECD, Edition 1998, page 11.

- 19. Regarding merger assessments, until now there was no major merger operation that required an extensive analysis of the cases brought to RCC's attention or raised particular competitive concerns. Therefore this aspect will not be addressed in this written contribution.
- 20. Except cartel cases, in all other types of cases a key issue has been and still is the market definition. Over time, RCC changed the market definition for the audiovisual services (TV programmes) due to the degree of substitution between services provided by various technological platforms (cable, DTH, mobile and IP platforms) and market conditions. Another issue is possibility to include all types of offers in the same market ("mono-play", "double play", "basic offers of triple–play" "triple-play"). The traditional approach is to define separate markets. However, it must be taken into account that the level of development of multiple-pay services increased constantly over time. Therefore the possibility to define a retail market for multiple play offers must be analysed. In this respect, the following must be assessed:
 - The possibility to include all types of offers in the same market due to the substitution chain, taking into account also the cost of entry and exit for the end-user;
 - From the supply side, the high investment costs regarding the audiovisual services (particular fibre roll-out and rights).
- 3.1.1 Abuse of dominant position in Bucharest on the market of CATV services
- 21. The investigation started as a result of the consumers' complaints regarding very high tariff of UPC for CATV services.
- 22. The relevant product market was assessed for two periods:
 - 1. 2002-2004 and
 - 2. 2005 (a new technology was developing DTH).
- 23. Seven elements have been taken into account when assessing the potential substitution between the two technologies (CATV and DTH):
 - 1. Number of subscribers for CATV services that number increased continuously;
 - 2. Tariffs' assessment There was a substantial difference between the prices for services that used CATV and DTH. Nevertheless, the tariffs for the CATV services have increased during the examined period, but this fact did not affect in a negative manner the number of subscribers for the CATV services.
 - 3. Differences /similarities between the provisions of two services in relation with the number of TV sets in a household cost assessment from consumers perspective. There were certain differences favoring CATV technology:
 - a. The consumer paid one fee and received the service on all the TV sets in the household (CATV);
 - b. The consumer paid as many fees as the number of TV sets if the consumer wanted to receive the service for all the TV's in the household (DTH);
 - 4. Integrated services CATV technology provided, on demand, supplementary services fixed telephony and internet access; this feature was not present in the case of DTH technology;

- 5. Penetration rate for DTH At the level of the year 2005 DTH represented nearly 4% of the number of CATV subscribers; this penetration has been mostly realized in the areas where no CATV services were provided, where the CATV services were of low quality (rural areas) or in the areas where the costs of adding a new customer to CATV network were too high;
- 6. Switching costs These costs were important taking into account the relatively long period of time needed in order to recuperate them;
- 7. The competitive advantage of the first comer CATV operators benefit from this advantage (we also include here consumers' inertia regarding the switch between technologies but mostly between suppliers).
- 24. This 7 steps analysis concluded that the two services were not substitutes from the consumer point of view. So the relevant product market was defined as the market of retransmission of TV channels through cable TV technology (2002-2005).
- 25. Relevant geographical market was defined as:
 - 1. Areas covered by the network of a single operator and where the consumers were not in the position to make a choice and
 - 2. Areas covered by the network of a single operator and where the consumers were not in the position to make a choice.
- 26. In most areas of Bucharest the operators have been identified as being in a de facto monopoly position the subscribers were not in a position to choose between competitors.
- The contractual clauses stipulated that prices would increase only if the costs of the operators increased. However, the analysis of monthly subscription fees and the costs analysis over a 4 years period revealed that the contractual clauses were not respected by UPC (CATV services supplier in Bucharest). UPC increased tariffs that were not justified by a costs' increase. Actually, in many months, the tariffs have increased while the costs decreased. So the analysis revealed that UPC had a discretionary behaviour regarding its subscribers by imposing unfair prices. In this respect, RCC sanctioned UPC for abuse of dominant position by imposing unfair prices.

3.1.2 Cartels and horizontal agreements

- 28. The investigation started as a result of consumers' complaints regarding CATV services. Two companies were involved (UPC and HIFI). It is very important to bear in mind that before August 2001 those two competitors' networks overlapped in some areas, but after August 2001 there was no overlapping of the respective networks.
- 29. In 2001 UPC and HIFI concluded a contract UPC was supposed to buy some of the networks belonging to HIFI. Those companies claimed that the contract was not enforced. However, the declarations provided by the involved parties' representatives, declarations of the subscribers and the maps provided by one of the operators proved that both companies withdrew from some areas, leaving the other company in a monopoly situation. Here are some examples of statements: "HIFI cancelled the contracts with the subscribers located in the areas that were object of the transaction with UPC" (HIFI) and "if the subscribers had already paid the fees, the payments were considered to be valid by the new provider" (UPC)".
- 30. UPC claimed that its activity produced losses in those areas the business strategy required an intensive development, concentrating the service on a more restricted area in order to modernize the

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networks. Naturally, the competition authority recognizes companies' individual right to choose their own business development plan, however not under the form of a market sharing agreement.

- 31. The effect of the agreement was that subscribers didn't have the possibility to choose if they were not satisfied with the services provided they could only renounce those services.
- 32. In conclusion, in 2006 both companies have been fined by RCC for sharing the market ().

3.1.3 Vertical issues

- 33. Regarding the vertical relations between broadcasters and distributors, it is worth mentioning that recently, certain complaints were submitted to RCC regarding the access to the network for distribution services. Also, as a result of the changes in the implementation of the must-carry obligations complaints were submitted to RCC regarding the rights of distribution of TV programmes over the DTH platforms. As a consequence, RCC opened investigations in both cases.
- 34. Even though the investigations are on-going, some highlights of the cases can be stressed.
- 35. In the first case, it is necessary to assess the vertical relation between the plaintiff (a content supplier) and the defendant (a network operator). A major point of investigation is the fact that the defendant is vertical integrated, being also a channel provider. In this stage of the investigation it cannot be excluded that both the defendant and the plaintiff compete in the same segment of the market.
- 36. In the second case, the investigation was opened against the national regulator⁷ (National Audiovisual Council of Romania) as a result of its intervention in the market. The market affected by the National Audiovisual Council of Romania's decision is the market for services specific to audiovisual programmes retransmission regardless of the technology used (through electronic communication networks that use the digital platform Direct-to-Home and through the electronic communication networks that use coaxial cable/HFC). The other markets affected are the upstream markets of pay TV channels, of free TV channels and the market of advertising through television. In fact, the national regulator excluded the DTH platforms from must-carry obligations.
- 37. As a result, the distributors that use DTH platforms must pay to TV broadcasters the rights of distribution of the TV programmes, even though there are declared to be free-to-air and benefit from the must-carry obligation on wired (cable) platforms. So this intervention affected the vertical relations between TV broadcasters and network operators and might also affect consumers. The starting points of RCC's investigation are: (i) the basis of all must-carry regulation should rest in the Universal Service Directive and (ii) the must-carry obligation must respect the principle of technological neutrality. RCC will take into consideration the limitations of this principle. In this respect the limitation must be justified on objective grounds (i.e. capacity restriction).

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RCC currently carries on an investigation having as object the possible infringement of art. 9 of the Romanian Competition Law by the National Audiovisual Council of Romania by issuing a decisionthat contains provisions which limit the commercial freedom of the undertakings and establish discriminatory conditions for their activities. These discriminatory conditions have as object the obligation to apply the must-carry principle for all the administrators of electronic communication networks, except those which use in order to retransmit audiovisual programmes electronic communications networks with satellite access (DTH).

3.1.4 Access to content

- 38. In 2009 RCC started an investigation concerning joint selling of the commercial rights regarding the broadcasting of the national league football matches.
- 39. The relevant market was defined as being the national market of selling commercial rights⁸ over the football matches played within the events that take place regularly on each year⁹.
- 40. The FRF members decided to cede their commercial rights to the Federation in order to be jointly sold¹⁰. Within the same joint selling complex plan, the FRF members that belong to the 1st League competition level decided to jointly sell the radio-television rights, respectively the rights of direct broadcasting, of recording and retransmission, on full or highlights basis, by radio-television or by any audio-visual means of the football events organized within the professional football league (LPF).
- 41. The analysis of the regulations concerning the football activity in Romania enacted by the Romanian Federation of Football (FRF) revealed the existence of some provisions that could fall under the Competition Law. RCC considered that the collective selling threatened to limit the coverage area for the football matches broadcasting to the detriment of the consumers. The joint selling of commercial rights had a complex, unique and continuous character that may have as unique economic aim to prevent price competition amongst football clubs and may have as effect the foreclosure of the affected market.
- 42. Due to the changes¹¹ in the national competition law and following the initiatives of LPF and FRF to formulate commitments, RCC initiated the commitments procedure. The case was closed in 2011 because RCC accepted the commitments¹² proposed by the parties.

3.2 Issues regarding parallel application of competition law and the sector regulations

- 43. In fact, RCC and ANCOM (national regulator) supported each other actions in the markets.
- 44. In order to alleviate potential conflicts between the competition and the regulatory authority, regulation should be interpreted in light of competition policy principles.

Broadcasting rights including all of the transmission mediums: television, radio, internet and mobile phone; and the publicity and advertising rights: outdoor, image rights.

The joint selling of the commercial rights over the football matches played within events that take place regularly in each year has begun in 1997 (the year when the Competition Law came into force) and continues in the present.

The national competition law was amended by the "Emergency Government Ordinance no. 75 of 30 June, 2010 on subsequent amendments of the Competition Law no. 21/1996" and RCC was enabled to accept commitments from the parties in cases of anti-competitive practice. The amendments came into force on August 5, 2010.

The commitments were assumed in order to restore competition on the market, potentially affected as a result of the way in which the commercial rights on football matches were sold, within the competitions organized by FRF and LPF (national cups, championships, super cup). Succinctly, FRF and LPF committed themselves on the following: (i) to sell the commercial rights separately from the broadcasting rights, (ii) the broadcasting rights will be sold only by public tender, in separate packages and also for separate media platforms - internet, mobile, radio and TV, (iii) the tender will be open, transparent and on non-discriminatory conditions, (iv) the broadcasting rights will be awarded for maximum 3 years without the possibility to extend their availability, (v) limitation of the number of packages that can be granted to the same buyer (vi) no 'first option' clause regarding the broadcasting rights over next editions.

The Romanian national championships, Romanian Cup, Romanian Supercup, UEFA Champions League and Europe League.

- 45. Regulations/other actions of administrative bodies, at local or central level, which generate significant competitive distortions, are prohibited by competition law; therefore the competition authority may open an investigation and order the cessation of the unlawful conduct. These attributions have been enforced according to recent amendments to the competition law. Now RCC may impose heavy fines on any administrative body that does not cooperate during the procedures.
- 46. The protection and strengthening of the competition is mentioned as a primary goal by all laws regulating specific industries, including telecommunications.
- 47. Apart from the above-mentioned legal framework governing the interaction between competition authority and sector regulators or other administrative bodies which enact regulatory measures according to their attributions, cooperation mechanisms have been set by MoUs signed between the Romanian Competition Council and the main regulators, covering mainly the exchange of information between parties and the delineation of attributions and coordination of market interventions.
- 48. For example, the MoU concluded with the national regulatory authority in telecom sector (ANCOM) stipulates that RCC and ANCOM should cooperate whenever undertakings commit certain deeds or acts that may constitute, simultaneously, both an infringement of Competition Law and an infringement of the primary or secondary legislation in the field of electronic communications or postal services. The two parties should also cooperate in cases where either RCC or ANCOM already issued a decision, in order to avoid *contradictory measures or decisions, or the imposition of disproportionate sanctions or obligations as compared to the objectives of the two institutions*.
- 49. Therefore, under the cooperation protocol, where one of the parties finds that it has no competence provided by law to investigate or settle a certain dispute in the field of electronic communications or postal services, but considers that the respective dispute may fall under the other party's competence, the former shall transmit to the other party the relevant information on the respective case under investigation, and shall notify, as the case may be, the interested persons. Whenever a negative conflict of competences occurs, the parties should meet in order to clarify the issue and to agree on the measures that must be taken in that particular situation.
- 50. On the other hand, where one of the parties finds that it has the competence, according to the law, to investigate or solve a certain case in the field of electronic communications or postal services, but considers that the respective case could also involve the competence of the other party, the former shall inform the other party, for the purpose of identifying a potential positive conflict of competences.
- 51. In both types of cases, the party receiving the information shall make its stand on the case, whereas both parties shall inform each other regarding other aspects they may deem relevant.
- 52. If, during the parties' correspondence or meetings, it is revealed that one of the parties is not competent to investigate or to solve the respective case, the former shall decline competence.
- 53. If both parties decide to continue the investigations or the case settlement, they shall consult each other in order to ensure consistency of the decisions and proportionality of the sanctions and obligations imposed on the providers of electronic communications networks and services or on the postal service providers, taking into account the seriousness and the duration of the infringements, as well as their consequences on the competition. In those situations when either RCC or ANCOM has already issued a decision or imposed obligations in the same or similar case, the party that investigates must request an opinion from the other party, opinion which is non-binding. Also, during the procedures, the parties should meet and analyse the circumstances of the investigated deeds and the consistency of the decisions adopted by each party.