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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from the European Union

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- European Union * --

1. Introduction

1. The media sector (including, notably, television and broadcasting) is a significant contributor to the EU economy. Nonetheless, the Treaty on the Functioning of the European Union (TFEU) only refers to the media (audiovisual) policy in the context of artistic and literary creation, or cultural or linguistic diversity. The only binding EU act in the media sector (the Audiovisual Media Services Directive) was adopted to facilitate the freedom of establishment and operating across Europe. As opposed to, e.g. the telecoms sector, we have not seen the far-reaching harmonisation of rules applicable to television and broadcasting. Thus, today, the relevant policy, including media consolidation, ownership and plurality, remains largely a national matter¹.

2. That said, the EU competition rules have been applied to the media sector, as has been the case with all economic activities, from the outset of the European Communities. The European Commission and the European Courts have addressed a wide variety of competition issues regarding television and broadcasting and the following sections will provide an overview of the main issues and enforcement activities under the anti-trust, merger control and State aid rules.

2. Access to Premium Content

3. Premium sports and premium films are one of the key sales drivers for media operators, both due to their economic relevance and to their likely impact on development and innovation in the media/broadcasting sectors. The appeal of premium films and top international sports tournaments goes beyond the territory of any single Member State.

2.1 *Joint selling and right acquisition of sports content*

4. With respect to premium sports, in a large number of Member States football rights qualify as must have content for media operators (although in some countries other sports, such as ice hockey or basketball may be more important, depending on the national taste). While there are some differences between selling systems in various countries, generally the leagues prefer to sell media rights on an exclusive basis. As a consequence, exclusivity is one of the most important issues as regards joint selling and acquisition of media rights. In this field, the Commission adopted three decisions involving UEFA Champions League, the German football league and the English football league which have set policy in this area and ensured better access to premium sport rights content².

* Contribution submitted by the services of the European Commission, Directorate-General for Competition.

¹ The impact of the Charter of Fundamental rights, which now requires respecting the freedom and pluralism of the media is yet to be seen and assessed.

² Case 37398, *UEFA Champions League* of 23 July 2003, OJ 2003 L 291/25 - Case 37214, *Bundesliga* of 19 January 2005, OJ 2005 L 134/46 – Case 38173, *FA Premier League* of 22 March 2006, OJ 2008 C 7/18.

5. In these decisions, the Commission took the view that joint selling constitutes a horizontal restriction of competition contrary to Article 101(1) of the TFEU, since it prevents clubs from marketing their rights individually and may therefore hinder competition between clubs in terms of prices, innovation, services and products offered to fans. However, joint selling also creates efficiencies as it reduces transaction costs for media operators and clubs, responds to broadcasters' demands and may bring about marketing advantages, such as branding of uniform league products and services. Joint selling was consequently accepted by the Commission under Article 101(3) of the TFEU, with certain case-by-case remedies. In particular, the Commission required certain modifications and commitments involving e.g. a short duration and a limited scope for exclusive rights, a transparent bidding procedure, retention of sales of certain media rights by the clubs, and a return of unsold rights to the clubs. In addition to the above modifications, in the FA Premier League case, the "no single buyer" rule was introduced, whereby no single purchaser was allowed to acquire all the exclusive live rights packages.

6. The above Commission decisions served as a model for the National Competition Authorities, which have been adopting an increasing number of decisions in this area in recent years (approximately 30 between 2004 and 2010). For example, the German National Competition Authority adopted in January 2012 a decision accepting the German League's marketing plans. In line with the Commission's precedents, the commitments offered by the League ensured a fair, transparent and non-discriminatory awards procedure. The League also undertook to offer several unbundled packages for the live broadcasting of games (via various platforms) and to provide free-to-air highlights coverage.

2.2 Territorial exclusivity for premium content

7. While very often the technologies used by broadcasters are inherently meant for cross-border use (e.g. satellite, internet) throughout the EU, broadcasters (especially pay-TV retailers) restrict access to TV services to the country of a subscriber's residence. This is because, in the EU, premium content is licensed to broadcasters on a territorially exclusive basis and licensees are granted absolute territorial protection regarding the licensed rights. Absolute territorial protection means that the licensees are prohibited from not only selling actively into other licensees' territories but also passively, i.e. responding to unsolicited demands from customers located in other countries). In principle, under EU competition law, territorial restrictions fragmenting the EU internal market, such as absolute territorial protection, restrict competition by their very object (without the need to prove their effects). However, the jurisprudence and decisional practice concerning territorial exclusivity in the agreements between right holders (owners of premium content rights) and broadcasters has so far been limited and interpreted as allowing such absolute territorial protection.

8. In October 2011, the European Court of Justice in the Premier League/Murphy judgment³ stated that the mere granting of a territorially exclusive license is not in itself anti-competitive. However, Premier League/Murphy also clarified that an exclusive licensing agreement imposing absolute territorial protection is deemed to have as its object a restriction of competition and can be in breach of EU competition rules. In a situation involving provisions granting absolute territorial protection, the burden of proof to justify that such provisions are pro-competitive so that the licensing agreement could benefit from an individual exemption lies with the right holders (in Premier League/Murphy, the right holders were unable to meet this burden). Notably, the Premier League/Murphy judgment concerned distribution of premium sports content via satellite and left open the question whether it could be applied to the distribution of premium films, or to distribution of either type of content via the Internet.

³ Judgment of the Court of Justice of 4 October 2012, *Football Association Premier League Ltd v Karen Murphy*, joined Cases C-403/08 and C-429/08.

3. Access to spectrum and transmission facilities

9. The transition from analogue terrestrial broadcasting to digital broadcasting (DTT) by 2012 constitutes one of the EU's policy objectives⁴. This change creates the opportunity to ensure a more efficient use of radio frequencies and to re-arrange a significant proportion of the spectrum for new services ('the digital dividend').

10. EU Member States are bound by the principles set out in the Competition⁵, Authorisation⁶ and Framework⁷ Directives when assigning DTT spectrum. The rules relating to the assignment of spectrum set out in the three Directives ensure that the assignment process leads to the entry of new players capable of enlivening competition in the market and expanding viewer choice. These rules require among others that spectrum is allocated on the basis of open, transparent, objective, non-discriminatory and proportionate criteria, without prejudice to specific criteria and procedures aimed at pursuing general interest objectives. The Authorisation Directive moreover mandates the use of open procedures.

11. On the basis of these provisions, the Commission monitors in particular that the electronic communications infrastructure markets are open and competitive so as to facilitate entry of new players or the expansion of smaller players.

12. The Commission has received several complaints against Member States that decided to assign the 'digital dividend' to incumbent broadcasters, potentially in breach of the requirements of the Competition Directive, including non-discriminatory assignment procedures.

13. In 2006, the Commission opened infringement proceedings against Italy regarding the assignment of spectrum for DTT broadcasting. In particular, the Italian legislation allowed the incumbent analogue broadcasters to obtain the majority of DTT spectrum (multiplexes) otherwise than in an open, transparent and non-discriminatory manner. In order to address the competitive distortions, Italy launched a tender (beauty contest) for new multiplexes in 2011. While the beauty contest was cancelled in 2012, a new procedure (auction) is expected to take place in 2013.

14. In November 2010, the Commission launched infringement proceedings against France regarding the criteria used to award certain digital broadcasting spectrum to the incumbent commercial broadcasters. The latter were to be automatically assigned additional spectrum as a compensation for the quicker analogue switch-off. Following the Commission's intervention, in 2012 the French regulator assigned the digital broadcast spectrum concerned on the basis of an open procedure without favouring the former analogue TV channels.

15. In May 2011, the Commission launched infringement proceedings against Bulgaria regarding the assignment of DTT spectrum. The Commission considered that, in 2009, Bulgaria assigned spectrum via contest procedures which were disproportionately restrictive as they prevented from participating all applicants that had links with content providers (TV channels operators), including operators active only

⁴ Communication of 24 May 2005 on accelerating the transition from analogue to digital broadcasting COM(2005) 204 final.

⁵ Directive 2002/77/EC on competition in the markets for electronic communications networks, OJ L 249, 17.9.2002, p. 21.

⁶ Directive 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, OJ L 108, 24.4.2002, p. 21–32.

⁷ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33–50.

outside Bulgaria, or with broadcasting network operators. As the measures proposed by Bulgaria to address distortions resulting from the contests were unlikely to enable new entry, the Commission has recently referred Bulgaria to the European Court of Justice.

16. In parallel, national regulatory authorities (NRAs) continue to monitor, under the Framework Directive, competition on national markets for digital television broadcasting services delivering broadcast content to end users. In several Member States (e.g. France, Estonia) access to broadcasting towers which cannot be replicated is mandated. A consistent application of sector specific regulations and competition law is ensured through the notification procedure provided for in Article 7 of the Framework Directive. Under this provision, NRAs must notify the Commission of their market assessment and any envisaged remedies before their implementation.

4. Convergence of broadcasting and telecoms: Bundling and triple play

17. Over the last few years the telecommunications sector has experienced the development of bundled offers, notably triple-play offers (including internet access, fixed telephony and TV) and quadruple play offers (which tend to include fixed voice, fixed broadband, TV and mobile services). These bundled offers now coexist alongside the separate offers for each of these products. The development of these bundled offers varies significantly between Member States.

18. In its decisional practice the Commission has delineated separate national broadband retail markets and voice telephony markets. The Commission has also subdivided the latter into a market for mobile phone contracts and a market for fixed line contracts. However the Commission has left open the question of whether a separate market for "triple play" or "multiple play" products exists⁸.

19. Some National Competition Authorities (NCAs) have already examined this issue because of the strong development of these bundled offers within their jurisdictions. In France for instance the triple play offers were present as early as 1998 and the first quadruple play offer was launched in 2005. Bundled offers appear to have had an impact on fixed markets in France, where according to the French NCA the rate of France Telecom's broadband market share gains decreased dramatically in 2009 following the multiplication of these offers⁹. The French NCA has recognised the existence of a distinct retail market for multiple-play offers, in the context of *ex ante*¹⁰ as well as *ex post*¹¹ analyses. The French NCA has also stated that there is a trend in France towards a "universal operator model" (a single operator providing fixed telephony, Internet, TV and mobile services)¹².

20. In 2010 the Portuguese NCA had to address this issue as well, in the context of two antitrust cases. During its market investigation the NCA notably recognised the increasing number of households which preferred purchasing bundled offers as opposed to the separate products. The NCA carried out every version of the SSNIP test and came to the conclusion that there was a relevant market for triple play products. It should be noted that the development of these bundled offers could have a locking-in effect for entire households which would need to be assessed on a case by case basis. It seems that the development of bundled offers in the telecommunications sector is a growing trend in the EU and it is necessary for competition authorities to take account of the impact it may have on telecommunication markets.

⁸ See for instance Commission Decision in Case COMP/M.5900 - LGI / KBW, paragraph 186.

⁹ See Opinion 10-A-13.

¹⁰ In merger cases; see notably Letters of the minister in cases C2004-4 and C2007-181. This is also the case in *ex ante* regulation; see Opinions 05-A-03 and 11-A-05.

¹¹ See notably Decision 08-D-10.

¹² See Opinion 10-A-13.

5. EU merger control rules and media plurality

21. Article 21(1) and (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation")¹³ grants the Commission exclusive jurisdiction to review under the EU merger control rules transactions, which constitute concentrations within the meaning of Article 3 of the Merger Regulation, and which meet the turnover thresholds provided for in Article 1(2) or (3) of the Merger Regulation (and therefore have a Union dimension). As a corollary, Article 21(3) of the Merger Regulation provides that Member States are prevented from applying their national laws on competition to concentrations with a Union dimension.

22. Article 21(4) of the Merger Regulation allows, however, at certain conditions, Member States to review concentrations with a Union dimension based on their national legislation on grounds other than competition, provided such grounds constitute legitimate interests that are compatible with the general principles and other provisions of EU law. The same provision then goes on to identify media plurality (together with public security and prudential rules) as grounds that are to be considered as legitimate interests.

23. Based on the above provisions, whenever the Commission receives a notification of a proposed concentration with a Union dimension, which may have an impact on media plurality in one or more Member States, it is for the Commission, and only for the Commission, to review the proposed concentration on competition grounds under the EU merger control rules. However, and also due to the absence of a centralised system of media plurality review at the EU level, Member States retain the ability to review the same proposed concentration under the applicable national procedural and substantive rules on media plurality. This, in turn, means that, in this scenario, the same transaction could be subject to parallel regulatory reviews by the Commission on competition grounds and by the competent national authorities on media plurality grounds.

24. The purpose and procedure of the two regulatory reviews are very different, although there may be some convergence.

25. For example, it is likely that, if the Commission were to take the view that a proposed concentration is likely to have anti-competitive effects on one or more media markets, for example due to the reduction of the number of players, these findings would likely be equally relevant in the parallel media plurality review carried out by the competent national authorities.

26. Conversely, it is also possible that a proposed transaction, which does not raise concerns on competition grounds, may lead to a reduction in the plurality of media, which may be incompatible with applicable national laws. This may be the case, for example, where a proposed concentration increases the concentration across media (e.g., television and newspapers), which, from a competition viewpoint, constitute separate product markets.

27. Further, the Commission is also to ensure that the review carried out by the national authority is strictly confined to media plurality issues and does not constitute a disguised attempt by the Member State to review the transaction on competition grounds and/or to protect national interests other than media plurality, which may not be considered as legitimate grounds to intervene within the meaning of Article 21(4) of the Merger Regulation.

¹³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004.

28. The recent News Corp/BskyB case¹⁴ is the main example of such parallel review of a proposed concentration by the Commission and the competent national authorities¹⁵. The transaction consisted of the proposed acquisition of sole control by News Corporation ("News Corp") of pay-TV broadcaster BskyB in the United Kingdom. The proposed transaction constituted a concentration with an EU dimension. It was therefore notified to the Commission and unconditionally approved in phase I by the Commission under the Merger Regulation. In other words, the Commission concluded that the proposed transaction did not raise any concerns on competition grounds. In its decision approving the proposed transaction, the Commission, however, made it clear that its conclusions as to the lack of impact of the proposed transaction on competition were without prejudice to the separate media plurality assessment carried out by the UK authorities.

29. As explained by the Commission in the decision, the UK media plurality assessment had a different scope than its competition assessment and focussed on issues beyond a competition assessment. The media plurality covered issues such as (i) the need for there to be a sufficient plurality of persons with control of media enterprises in relation to every different audience in the United Kingdom or a particular area of the United Kingdom, (ii) the need for the availability throughout the UK of a wide range of broadcasting which is both of high quality and calculated to appeal to a wide variety of tastes and interests, and (iii) the need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment in relation to broadcasting to the attainment of standards such as due impartiality of news, taste and decency.

30. In the case at hand, the proposed transaction would have allowed News Corp, which already controlled a number of popular newspapers in the UK to also acquire control over BskyB's popular news channel in the UK. While the combination of these activities did not raise concerns from a competition perspective (mainly due to the fact that newspapers and TV channels belong to separate product markets and conglomerate issues were unlikely to arise), the same combination might have led to issues from a media plurality perspective, as it might have led to the elimination of an independent voice from the media landscape.

31. While the transaction was ultimately abandoned by News Corp and the UK authorities did not therefore need to conclude their media plurality review, the case constitutes a good illustration of how EU merger control rules and national media plurality laws interplay in practice. It should also be noted that, while the two different levels of review (the Commission at the EU level on competition grounds and national authorities at the national level on media plurality grounds) are a specificity of the EU legal system, a parallel review of the same transaction on competition and media plurality grounds by different authorities based on different procedural and substantive rules, may well happen also within a Member State. Indeed, it is well possible that, also at the national level, different authorities be in charge of the enforcement of each of competition and media plurality rules based on different procedural and substantive framework.

32. The experience in the News Corp/BskyB case may provide useful guidance to other competition authorities around the world faced with similar issues in the future.

¹⁴ Case No COMP/M.5932 - *News Corp/BskyB*, Decision of 21 December 2010.

¹⁵ Case COMP/M.423 - *Newspaper Publishing*, decision of 14 March 1994, constitutes another example of parallel review conducted by the Commission and national authorities (also the UK authorities in this case).

6. State aid control in broadcasting and digital switchover

6.1 Broadcasting

33. State aid to public service broadcasting is a sensitive topic in all Member States. The Amsterdam Protocol¹⁶ attributed special status to this sector due to its importance for the democratic debate, the social needs of society and the paramount goal of maintaining media pluralism. The Commission's rules on State aid to public broadcasting, set out in the Broadcasting Communication¹⁷, describe the conditions under which Member States may finance public service broadcasting. These rules were necessary to limit public financial intervention in a market which was traditionally State run and/or financed, but which has become increasingly covered by the services of private, commercially run broadcasters. These rules ensure that the financing of public broadcasting is justified by the added value it brings to society in terms of its democratic, social and cultural needs.

34. The Communication's approach is based on Article 106 (2) TFEU, which applies to all services of general economic interest and requires the following conditions to be satisfied:

- There must be a true service of general economic interest, which is clearly defined as such, and
- The undertaking carrying out this service must be clearly entrusted with that task, and
- There is no overcompensation.

35. The Broadcasting Communication affords the Member States broad discretion to define the concept of public service. In principle, broadcasters may, within the remit of their public service activity, provide audiovisual services on new distribution platforms, aside from classical radio and TV broadcasts. These new media services must, however, satisfy the democratic, social and cultural needs of society in order to qualify as a public service. To that end, the Communication requires a prior evaluation procedure (called the Amsterdam test) to be conducted at the national level, in order to assess i) the new service's added value to society in terms of democratic, social and cultural needs, ii) the potential impact of the new service on the market, and iii) whether there is a balance between these two considerations. The test must be carried out by a body which is independent from the public service broadcaster, and all stakeholders must have the opportunity to make their views known.

36. Moreover, the Communication stipulates that public service compensation should not exceed the net costs of the public service. All revenues derived from the public service (including those resulting from commercial activities connected to the public service) should be calculated in order to ensure that the need for public financing is as low as possible. An independent body should monitor the execution of the service and the use of public funding.

6.2 Digital switchover

6.2.1 The criteria applied by the Commission

37. A number of Member States are providing public funding to encourage broadcasters and consumers to facilitate the switchover from analogue to digital terrestrial broadcasting. The Commission monitors that such aid complies with the following principles: Member States must demonstrate that the

¹⁶ Protocol on the system of public service broadcasting in the Member States, OJ C 340, 10 November 1997 in which Member States reiterate that the definition of the public service remit lies with them.

¹⁷ Communication from the Commission on the application of State aid rules to public service broadcasting of 2 July 2009, OJ C 257 of 27.10.2009, p.1

aid is a necessary and appropriate instrument, that is limited to the minimum necessary, and that it does not unduly distort competition. In this context, the Commission lays particular importance on technological neutrality. The aim is to ensure a level playing field between different transmission platforms, such as terrestrial, cable and satellite. This policy has been upheld by the Court which confirmed two negative decisions of the Commission (Berlin Brandenburg DVBT¹⁸ and Italy digital decoders¹⁹).

6.2.2 *Initiatives of the Commission*

38. In 2012, the Commission continued to apply the approach adopted in earlier decisions concerning State funding in support of digital switchover. For instance, it approved a Hungarian support scheme²⁰ for the acquisition of digital decoders by persons with low income. It has adopted a positive decision on aid to build a new local digital television multiplex (local DTT)²¹ that will carry newly created local digital television broadcast services (local TV services) covering certain cities in the UK. The Commission also opened an in-depth investigation on a Spanish plan to compensate digital terrestrial broadcasters for the extra costs of parallel broadcasting while services are re-allocated to another frequency in order to free the digital dividend²². There were doubts as to the proportionality, necessity and technological neutrality of the measure.

6.2.3 *Outlook for 2013*

39. The Commission will continue to apply its established policy concerning State aid for digital switchover. As most Member States have completed the switching from analogue to digital broadcasting, there will likely be fewer notifications of initiatives to facilitate the switchover. The Commission's assessment of these measures will place special emphasis on technological neutrality and the ultimate objective of ensuring wide consumer access to digital broadcasting.

7. **Conclusion**

40. The last two decades the television and broadcasting sectors have undergone significant changes partly due to changes in technology leading to more and better choice for consumers. The changes, such as digitisation, convergence and the rapid growth of pay-TV give rise to new challenges and put pressure on past business models. The evolving practices and behaviour of market operators continue to require close monitoring under merger control, State aid and antitrust rules to ensure that anti-competitive practices do not hamper innovation or prevent consumers from benefitting from the rich variety of available services at the best possible conditions. The Commission, as the EU competition agency, closely follows emerging paradigm shifts and challenges in television and broadcasting. Our enforcement experience may provide useful guidance to other competition authorities around the world faced with similar issues in the future.

¹⁸ C 25/04 Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg, 9 November 2005 (OJ L 200, 22.7.2006, p. 14), T-8/06 FAB Fernsehen aus Berlin GmbH v Commission, judgment of the General Court (then the Court of First Instance) of 6 October 2009 and C-544/09 P Germany v Commission, judgment of the Court of 15 September 2011.

¹⁹ C 52/05 *Subsidy to digital decoders*, 24 January 2007 (OJ L 147, 8.6.2007, p. 1), T-177/07 *Mediaset v Commission*, judgment of the General Court of 15 June 2010 and C-403/10 P *Mediaset SpA v Commission*, judgment of the Court of 28 July 2011.

²⁰ SA.34901 *Digital television decoders to socially disadvantaged households*, 6 December 2012, not yet published.

²¹ SA.33980 *Local television in the UK*, 5 December 2012, not yet published.

²² SA. 32619 *Compensation of damages for the liberation of digital dividend*, 25 April 2012, (OJ C 213, 19.7.2012, p. 41).