

Competition Law in the Media and Audiovisual Sectors

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Interplay between competition law and the EMFA



Competition law and media pluralism

- Media pluralism is a **fundamental value of the EU**
 - Article 2 TEU;
 - Article 11 (2) Charter: pluralism is one of the fundamental values of the EU.
- **Competition policy** should contribute to media pluralism as a fundamental value of the EU
 - See for example §23 of the preamble to the EU Merger Regulation: *“It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in **Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.**”*
- The application of the competition rules on anti-competitive agreements, merger control and abuse of dominance can make an important contribution to maintaining and developing media pluralism:
 - Avoid **excessive concentration** in media markets;
 - Avoid **exclusionary behaviour** that forecloses smaller media players and/or impedes market entry,



Competition law and media pluralism

- Some national competition authorities have addressed media plurality concerns during the exercise of their **merger control** powers:
 - BCA, 25 October 2013, Case 2013-C/C-03, *Mediahuis*
 - FCA, 4 June 2015, Decision 15-DCC-63, *La Dépêche du Midi/ Journal Midi Libre*
 - BCA, 22 December 2020, Case 20-C/C-41, *IPM/Vers l’Avenir*.
- Media pluralism could be viewed as a **consumer benefit** under article 101 (3) TFEU
 - Does improving media pluralism equate to “improving the production or distribution of goods or to promoting technical or economic progress”
 - By analogy with the chapter on the relationship between competition law and sustainability objectives in the Commission’s draft new horizontal guidelines





Competition law and media pluralism

- **But:**

- EC Decision, 22 December 2010, Case M.5932, News Corp/BSkyB, §307:

“The purpose and legal frameworks for competition assessments and media plurality assessments are very different. The focus in merger control is whether there is a “significant impediment to effective competition”, including the ability of the merged entity to profitably increase prices on defined antitrust markets post-merger. By contrast, a media plurality review reflects the crucial role media plays in a democracy, and looks at wider concerns about whether the number, range and variety of persons with control of media enterprises will be sufficient.” ()

- Art 21(4) EUMR

“Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation” => Member States may organize separate ‘plurality of the media’ review

European Media Freedom Act (EMFA)

- Article 21 EMFA:
 - **Notification obligation:**
 - “*media market concentrations that could have a significant impact on media pluralism and editorial independence*” must be notified in advance.
 - **Assessment criteria:**
 - Impact on **media pluralism**, diversity of media players, taking into account the online environment, ...;
 - Safeguards for **editorial independence**;
 - Whether in the absence of the concentration, the acquiring and the acquired entity would remain **economically sustainable** (and whether there are sustainable alternatives),

Relationship between EMFA-review and competition review

- Different filing triggers but **likely overlaps** i.e. concentrations requiring review under both frameworks
- EMFA **assessment distinct from competition law assessment** but many **touchpoints**:

EMFA Assessment	Competition Assessment
<ul style="list-style-type: none">• Assessment of impact on media plurality and diversity of media players	<ul style="list-style-type: none">• Assessment of reduced competition caused by horizontal overlaps between purchaser and target
<ul style="list-style-type: none">• Safeguards for editorial independence	<ul style="list-style-type: none">• Assessment of the efficiencies of the concentration;• Remedies offered to safeguard effective competition
<ul style="list-style-type: none">• Economic sustainability in the absence of the concentration	<ul style="list-style-type: none">• Assessment of the efficiencies of the concentration;• Failing firm defense

- **Challenges to consistency?**



Multiplication of notification regimes for (media) concentrations

Avoid distortion of competition	Preserve media plurality
Competition law <ul style="list-style-type: none">• EC Regulation 139/2004 (including art 22 referrals)• National merger control rules• ECJ, 16 March 2023, Case C-449/21, <i>Towercast</i>	European Media Freedom Act <ul style="list-style-type: none">• Upcoming filing obligations under art. 21 of the European Media Freedom Act
Digital Markets Act <ul style="list-style-type: none">• EC filings by gatekeeper under art. 14 DMA (EU Regulation 2020/1828) (e.g., online advertising services, advertising exchanges,)...	Foreign Direct Investment Reviews <ul style="list-style-type: none">• National regimes may review deals affecting critical media infrastructure and freedom and pluralism of the media (see EU Regulation 2019/452)
Foreign Subsidies Regulation <ul style="list-style-type: none">• EC filings under Chapter 3 of the Foreign Subsidies Regulation (EU Regulation 2022/2560)	

Competition law and the changing media landscape

Challenges for Competition Enforcers and Market Participants



Competition law and the changing media landscape

- **Disruptive changes in audiovisual media as an example**
 - Shift to OTT and on-demand viewing and competition from global SVOD players in both TV content acquisition and retail TV markets
 - Shift of advertising budgets to online and competition from GAFA



Merger control – structure of the analysis

- Market definition
- Competitive assessment
 - Horizontal effects (assessment of horizontal overlaps)
 - Non-horizontal effects
 - Input foreclosure by vertically integrated entities
 - Customer foreclosure by vertically integrated entities
 - Conglomerate effects

Retail AV services – market definition

- Most recent EC decisions analysing retail AV services:
 - consider that all distribution technologies (including OTT) are part of the retail market for AV services (see for example EC decision, 12 November 2019, M.9064, *Telia/Bonnier*, §200);
 - leave open the question whether non-linear retail AV services are part of the same relevant market as linear retail AV services;
 - However, EC Decision, 21 December 2021, M.10475, *United Group/Wind Hellas*, §48, considers that the market for retail AV services encompasses linear and non-linear distribution (see also EC decision 30 June 2020, M.9757, *Providence/VOO/Brutélé*, §30.)

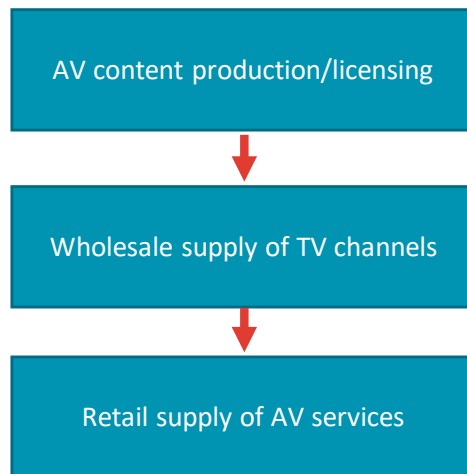
Retail AV services – competitive assessment

- Recent EC decisions increasingly take into account the indirect competitive pressure exerted by OTT SVOD offerings on retail AV services, as a factor when assessing **horizontal effects**:
 - EC decision, 30 April 2020, M.9604, *Nent/Telenor/JV*, §151:
 - “Considering the hypothetical market including non-linear OTT services, OTT players would exercise a **competitive constraint** on the Parties and the JV. In this respect, it is notable that in Norway there would remain post-Transaction numerous OTT players who would constrain the JV, namely Netflix and HBO Nordic as well as new entrants Disney+ whose OTT service is expected to launch in the second half of 2020 in the Nordics.”
 - EC Decision, 21 December 2021, M.10475, *United Group/Wind Hellas*, §203:
 - “Sixth; the results of the market investigation confirm that OTT players (such as Amazon and Netflix) **exert significant competitive pressure** on market players using other distribution models”
 - EC Decision, 10 March 2022, Case M.10515, *Iliad/UPC Polska*, §174:
 - “Fourth, global OTT platforms such as Netflix, Amazon Prime, HBO GO or Viaplay have gained significant traction in the market, and the market investigation confirmed that OTT players **exert significant competitive pressure** on AV service providers in Poland”
 - EC Decision, 15 March 2022, Case M.10349, *Amazon/MGM*, §203-204:
 - “First, SVOD players face competition by other retail suppliers of AV content (TVOD platforms, Pay-TV, etc). (...) ARD/ZDF and Vodafone were indicated by market participants as the leading players.”



Wholesale AV services – competitive assessment

- The traditional AV value chain consisted of 3 vertically connected layers:



- Recent decisions take into account direct-to-consumer OTT strategies for broadcasters and AV content producers when assessing vertical foreclosure theories of harm in the AV value chain:
 - EC decision, 30 April 2020, M.9604, *Nent/Telenor/JV*:
 - §221: “Third, the Commission considers that end customers might still access NRK’s content and channels through NRK’s retail OTT AV service, NRKTV.” (no input foreclosure)
 - §451: “Second, while the results of the market investigation indicated that such foreclosure strategy may have a negative impact on their ability to compete, the Commission considers that **rival TV broadcasters are also able to develop new strategies to reach viewers**. In the first place, the Commission notes that both Discovery and TV2 Norge have launched their **own OTT services in order to reach viewers directly**.” (no customer foreclosure)



Wholesale AV services – competitive assessment

- Recent decisions take into account direct-to-consumer OTT strategies for broadcasters and AV content producers when assessing vertical foreclosure theories of harm in the AV value chain (contn'd):
 - EC decision, 22 December 2021, *Discovery/Warner Media*:
 - §413: “Third, competition concerns regarding customer foreclosure are unlikely to arise when there is a sufficiently large customer base, at present or in the future, that is likely to turn to other suppliers active in the upstream market. In that regard, the market for the wholesale supply of TV channels, irrespective of any possible market definition, is not a necessary intermediary for undertakings active in the markets for the production of commissioned AV content, and external commissioned AV content, to make their product available to end consumers. Notably, **recent technological advances and evolving consumers’ habits have largely affected the landscape of the distribution of AV content.** Indeed, the Commission observes that digitalisation has lowered entry barriers to the distribution of content, such that **content producers can easily reach viewers through Direct to Consumers (DTC) technologies** (e.g., for instance through the internet by supplying their content to an OTT AV retailer). **The traditional distribution infrastructure (involving for instance TV towers, cable systems, etc.), which requires AV content to be aggregated into TV channels before being supplied, is no longer a necessary means of distribution for AV content to reach consumers.**”
 - §414: “Moreover, in all of the relevant Member States, the market investigation confirmed that **the traditional three-layer classification fails to properly take into account the markets dynamics resulting from Direct-to-Consumer broadcasting,** as the frontiers between the different layers are becoming increasingly blurred as a consequence of the global market trend for vertical integration.”
 - §415: “The traditional value chain [...] is more and more challenged by market developments and changing consumer behaviour, particularly the switch to non-linear and OTT viewing. **Content providers are increasingly by-passing channel providers and traditional distribution platforms and offering their content directly to the consumer via an app on an OTT basis.**”
 - §417: “Therefore, the Commission considers that, in all of the relevant Member States, **there are sufficient economic alternatives for the upstream rivals to sell their output, without incurring significantly higher costs**”



**WARNER BROS.
DISCOVERY**

TV-Advertising – market definition

- The line between online advertising and TV advertising “*is becoming increasingly blurred, due, in particular, to the rise of non-linear (video-on-demand) viewing*” (EC decision, 9 September 2014, Case M.7288, *Viacom/Channel 5*, §38).
- However, the EC and national competition authorities continue to consider them as separate product markets:
 - EC Decision, 12 August 2020, case M.9802, *Liberty Global/DPG-Media/JV*,
 - EC decision, 6 October 2020, case M.9669, *PPF Group*, §62;
 - BCA, 29 March 2022, BMA-2022-C/C-08, *RTL/DPG Media/Rossel*;
 - ACM, 3 March 2022, *Talpa Network/RTL Group*.

TV-advertising – market definition

- The ACM did not accept RTL's arguments regarding the pressure from online advertising on TV advertising and prohibited the acquisition of Talpa Networks by RTL Group:
 - Advertisers and media agencies still see material differences between TV advertising and online advertising;
 - TV advertising is crucial for marketing products to consumers
 - The constraint of online-advertising on the prices of TV-advertising is insufficient to exercise a price constraint;
 - The ACM vetoed the merger between the two largest providers of TV-advertising.
- The FCA did not accept arguments regarding the pressure of online advertising on TV advertising and objects to the acquisition of M6 by Bouygues
 - Notwithstanding the changes of the AV markets (shift to online and non-linear viewing) TV advertising remains a very powerful media;
 - The development of VOD does not challenge this power;
 - The launch of HVOD-offers does not change this analysis
 - The merger between the two largest providers of TV advertisers must be blocked.



TV-advertising – competitive assessment

- Recent decisions take into account the indirect constraint by online advertising on TV-advertising
 - BkAmt, 11 June 2021, *RTL/SuperRTL*: The FCO has taken into account that online video advertising exerts competitive pressure in the TV advertising sector
 - BCA, 29 March 2022, BMA-2022-C/C-08, *RTL/DPG Media/Rossel*.



Key Take Aways

- Increased red tape for media mergers? multiple parallel filing obligations and challenges to consistency;
- Recent cases acknowledge changing market dynamics and gradually alter the competition assessment of media mergers.



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