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Access to Content by new Media Platforms: A Review of the Competition Law Problems

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I. Introduction

The paper seeks to provide a discussion of the competition law issues raised by access to premium content (essentially blockbusters and football rights) by content delivery operators with a special emphasis on new media platforms. A significant amount of literature has been published on the application of competition rules to premium content rights agreements,[1] but the specific obstacles encountered by new media platforms have been relatively unexplored. This paper seeks to fill this gap in the literature.

The European Commission (hereafter, the Commission) has recognised in its decisions that premium content is an "essential input" for operators active in the delivery of audio-visual content.[2] There is indeed no substitution possible with other less attractive forms of content. In fact, premium content such as major football events represents "stand-alone" driver content for pay-TV operators.[3] Absent access to such content it is very difficult for a content delivery operator to gain or retain market shares. Access to premium content is thus a matter of life or death for such operators.

Yet, getting access to premium content is not an easy matter. First, premium content is scarce as there are only a few blockbusters and a limited number of premium sport events every year. Moreover, premium content rights contracts usually involve some form of exclusivity pursuant to which dominant pay-TV operators often manage to monopolize such rights for several years at the expense of weaker competitors. The combination of scarcity and exclusivity has translated into a spiralling of the costs involved in buying premium content.[4] For instance, while in 1992, broadcasters paid € 434 million for the

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1 See, e.g., Darren McAuley, "Exclusively for All and Collectively for None: Refereeing Broadcasting Rights between the Premier League, European Commission and BSkyB", (2004) 25-6 *European Competition Law Review*, 370; Stefan Szymanski and David Harbord, "Football Trials" (2004), 25-2 *European Competition Law Review*, 117.

2 See Commission Decision of 13 October 2000, Vivendi/Canal+/Seagram, Case No IV/M.2050, OJ C 311 of 31 October 2000 p.3 at §19.

3 See Commission Decision 2004/311/EC of 2 April 2003, Newscorp/Telepiù, Case COMP/M.2876, OJ L 110 of 16 April 2004 pp.73-125 at § 66.

4 Other factors may also have contributed to the growing cost of acquiring premium content, such as for instance the cost increases of the football players in the 1990s.

TV rights of the English Premier League, in 2000, they paid € 2,6 billion for only three seasons.[5]

The lack of access to premium content represents a significant handicap for new entrants, such as new media platforms. If these platforms want to gain market share, they need to show programmes, which are able to compete with the content shown by dominant pay-TV operators.[6] Access foreclosure to premium content would thus not only prevent new entries from taking place in the highly concentrated pay-TV market, but would also affect technological developments and consumer choice as the latter would be prevented from watching their favourite programmes on the platform of their choice. Thus, in a number of policy speeches, Commission officials have insisted on the importance that new media platforms gain access to premium content.[7]

The main argument followed throughout the paper is that, while recent Commission decisions contain remedies, which will help new media platforms to gain access to premium content, such remedies are insufficient to create a level playing field in the market for the acquisition of such content. Numerous anti-competitive practices continue to plague this market and further competition law intervention is thus required.

This paper is divided into seven sections. Following this introduction, Part II reviews the reasons why access to premium content is a major bottleneck affecting the content delivery market and in particular new entrants on that market. Part III outlines the legal framework in which the debate over access to premium content takes place. Part IV addresses the complex issue of market definitions in the media industry. Part V reviews the competition law issues that have been addressed by the Commission in its decisional practice. Reference to relevant Court of Justice case-law is also made. Part VI analyses the extent to which the remedies adopted by the Commission sufficiently address the difficulties encountered by new media platforms in acquiring premium content. Part VII discusses the problem for new platform operators in acquiring TV channels. Finally, Part VIII contains a brief conclusion.

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[5] See Torben Toft, "TV Rights of Sports Events", Brussels, 15 January 2003.

[6] See Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398), OJ L 291 of 8 November 2003, pp.25-55 at § 83:"[…] content rights will be necessary for the development of the new services, in the same way as content rights are necessary for TV broadcasting services, where football content is being used to entice consumers to take up pay-TV subscriptions and to attract advertisers to TV channels."

[7] See, e.g., Philip Lowe, "Media Concentration & Convergence: Competition in Communications", speech delivered in Oxford on 13 January 2004, available at http://europa.eu.int/comm/competition/speeches/text/sp2004_002_en.pdf

II. Premium content as a major bottleneck

As we have seen above, access to premium content is a major bottleneck affecting the content delivery industry. This is perhaps the most important concern for operators and this represents a very large proportion of their costs. For instance, football represents 30-65% of the broadcasters' total rights expenditure.[8] We have seen in the preceding section that some factors, such as scarcity of content or exclusivity, may be a part of the problem, but other factors are also relevant. They are briefly summarized in the bullet points, which follow:

- Because of scarcity combined with exclusivity, buying rights may involve astronomical amounts of money and thus create important financial risks for new operators. This may in turn lead to barriers to entry, especially considering the commercial policy of sellers, such as the requirement of minimum guarantees;

- Rights holders try to extract maximum value of their rights, by a variety of commercial practices, such as, for instance, selling movies several times (the so-called windows system);

- Rights holders also want to protect the value of their rights by preventing content to be shown through certain delivery means (e.g., movie rights or football rights sellers tend to be reluctant to sell their rights to new media platforms because they believe this may diminish their value);[9]

- There is a tendency for content producers and content delivery companies to enter into long-term exclusive contracts. There may good reasons for exclusivity, but at the same time it creates significant risks of foreclosure.[10]

- Buyers of rights will often negotiate holdback and pre-emption rights (e.g., for second window movies), which may prevent new entrants from entering the market as "fringe" competitors. These protection rights may also have the effect of withdrawing content (e.g., second window movies) from the market.

- The rights purchased by content delivery operators may cover one platform (e.g., DTH), but also several other platforms (e.g., UMTS and Internet). In the latter case, these alternative platforms are unable to deal with the content provider directly. Instead, they will have to negotiate with a competitor on the delivery segment (i.e., the company who bought the rights for the different platforms), which may decide not to sell them the rights to prevent entry.

[8] Herbert Ungerer, "Commercialising sport: Understanding the TV Rights debate", speech delivered in Barcelona 2 October 2003, available at http://europa.eu.int/comm/competition/speeches/text/sp2003_024_en.pdf

[9] See Alexander Schaub, "Sports and Competition: Broadcasting rights for sports events", Speech delivered in Madrid, 26 February 2002: "We have for example seen a reluctance of sports associations in granting Internet and UMTS-rights because broadcasters fear that the Internet will undermine the value of their TV rights.", p.6, available at http://europa.eu.int/comm/competition/speeches/text/sp2002_008_en.pdf

[10] See Lowe, supra note 7, at p.8.

- In the sports industry, rights are often sold jointly (e.g. the Premier League or the UEFA). In some cases, rights may also be purchased jointly (e.g., the Eurovision system);

- The media market has been subject to both vertical and horizontal mergers in recent years. There may good reasons for such mergers, but they will often involve significant risks for competition. Hence, such mergers have been only authorized provided that the parties accepted to agree to significant commitments;

- On the delivery segment, new entrants face a chicken and egg problem: to gain market shares they need premium content, but to gain access to content they need significant market shares.

In sum, although some describe the market for the acquisition of rights as a "bidder market" (because of exclusivity, competition is rather "for" the market, rather than "in" the market), this seems to be hardly the case in Europe.[11] Indeed, the market(s) for the acquisition of premium content is suffering from serious market failures with the result that only dominant pay-TV operators have access to such content. Some form of public intervention through, for instance, the application of EC competition rules is therefore needed.

III. The legal framework

A distinction should be made here between, the sector-specific regulatory framework and the competition law framework.

As far as the media sector is concerned, the sector-specific regulatory framework comprises two main components. First, there is the new regulatory framework for electronic communications which, with some limited exceptions, regulates the non-content related aspects of electronic communications.[12] This framework contains the rules that should be applied to electronic communications operators holding significant market power.[13] The second component of the sector-specific framework is the TV without

[11] See infra, text accompanying note 62.

[12] In substance, the new regulatory framework on electronic communications is composed of 5 directives: one framework directive and four specific directives respectively dealing with authorisations, universal service, access and interconnection, and data protection and privacy in the telecommunications sector. See Directive 2002/21 on a common regulatory framework for electronic communications networks and services, 2002 OJ L 108/33; Directive 2002/20 on the authorization of electronic communications networks and services, 2002 OJ L 108/21; Directive 2002/22 on universal service and users' rights to electronic communications networks and services, 2002 OJ L 108/51; Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities, 2002 OJ L 108/7; Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 2002 OJ L 201/37.

[13] For a good discussion of this framework, see Alexandre de Streel, "Remedies in the Electronic Communications Sector" in D. Geradin, Ed., *Remedies in Network Industries*, Intersentia, 2004.

borders directive, which regulates content-related issues.[14] There is thus a clear work sharing between these two components of the sector-specific regulatory framework.

This regulatory framework contains two relevant provisions discussing access to content. First, Article 3(a) of the TV without borders directive permits Member States to take measures to ensure wide access by the public to "free-to-air" television coverage of major sports events that are regarded in the Member State as being of "major importance" for society. This covers both events of national importance (such as, for instance, the "Giro" in Italy or the "Vuelta" in Spain), but also events of international importance such as the Olympic Games or the football World Cup. Second, Article 31(1) of the Universal Service Directive permits Member States to impose proportionate and transparent "must carry" obligations on cable television network operators. They may be imposed when a significant number of end users use cable networks to receive radio and television broadcasts. They may also be imposed on terrestrial and satellite networks.

The main aspects of the competition law framework are Article 81 and 82 of the EC Treaty, which respectively prohibits restrictive agreements between competitors and abusive conduct by dominant operators, as well as the Merger Control Regulation which prevents mergers that may "significantly impede effective competition".[15] As will be seen below, recent decisions such as the exemption of the UEFA joint selling agreement and the clearance of the *Newscorp/Telepiu* merger (in both cases after significant commitments made by the Parties), bear testimony to the major influence of competition rules in the shaping of the legal environment of the media rights markets.

While there are often interactions between competition law and sector-specific regulation,[16] the rest of the paper will essentially focus on the application of competition rules to the problems raised by access to content. I indeed believe that it is on the basis of EC competition rules that effective remedies could be designed to address the market failures which are still plaguing the market(s) for acquisition of premium content.

IV. Market definitions

Competition law is about markets and market definition is often the first necessary step in competition law analysis. Defining product markets is not an easy task in the media

[14] See Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), OJ L 298 of 17 October 1989, p. 23 as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 JO L 202 of 30 July 1997 p.60.
[15] See Article 2(3) of the Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29 January 2004, pp.1-22
[16] See Damien Geradin and Greg J. Sidak, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", forthcoming in the *Handbook of Telecommunications Economics*, 2nd Vol. at p.18

industry as the technological environment is evolving very quickly.[17] It is also an industry involving a range of operators, such as, for instance, content suppliers, channel suppliers, free-to-air TV operators, pay-TV operators, as well as a range of different products, such as video-on-demand, near-video-on demand, pay-per-view, etc. Market structures thus tend to be complex.

From a general standpoint, it is useful to draw a distinction between upstream and downstream markets. While the upstream level is concerned with the production/acquisition of content, the downstream level relates to the delivery of content to the consumers. There are, however, clear interactions between the two levels as, for instance, commercial practices taking place at the upstream level will affect the competitive structure of the downstream level.

At the upstream level, the Commission has traditionally segmented the purchasing activity for content rights into separate markets according to the nature of the content. Segmentation on the basis of content can be illustrated by the following examples:

- In *Canal+/RTL/GICD/JV*, the Commission found that although sport broadcasting rights may constitute a distinct field from other television programming, that market ought to be further subdivided into separate product markets and that, at least within the EEA, football broadcasting rights may not be regarded as substitutes for other sports broadcasting rights.[18] The Commission therefore concluded that there was a separate market for the acquisition and resale of football broadcasting rights to events that are played regularly throughout every year.

- In *Vivendi/Canal+/Seagram*, the Commission distinguished between a market for broadcasting rights for feature films and a market for broadcasting rights made-for-TV programmes.[19]

- In *Newscorp/Telepiu*, the Commission defined the markets affected by the transaction as separate markets. These concerned the acquisition of: exclusive rights to premium films; exclusive rights to football events that take place every year where national teams participate (mainly national league, national cup, UEFA cup and UEFA Champions League); exclusive rights to other sport events; and acquisition of TV channels.[20]

The above market definitions were defined in the context of specific cases at a given point in time. Nothing would thus prevent the Commission from further sub-dividing these markets in the future. For instance, in *Newscorp/Telepiu*, the Commission invoked

[17] For a discussion of market definition in the broadcasting sector, see Laurent Garzaniti, *Telecommunications, Broadcasting and the Internet - EU Competition Law and Regulation*, 2nd Ed., Sweet & Maxwell, 2004 at pp.452-491.
[18] See Commission Press Release of 13 November 2001, "Commission clears sports rights venture between Canal+, RTL and Groupe Jean-Claude Darmon", IP/01/1579.
[19] See Commission Decision, supra note 2, at § 17.
[20] See Commission Decision, supra note 3, at § 55.

the possibility that the acquisition of exclusive broadcasting rights for popular sport events (e.g., important tennis tournaments, boxing matches, golf and motor bike races, etc.) could be considered as separate product markets according to single sports.[21] However, the Commission did not take a formal position on that point. Similarly, as will be seen below, a further market segmentation could be envisaged as, for instance, it could be argued that during a limited period of time, each blockbuster could be defined as a single market. As the Commission has never taken a formal decision on this issue, it still remains open.

At the downstream level, the Commission draws a distinction between different modes of delivery of audio-visual content to consumers. For instance, in *TPS*, the Commission decided that the market for pay-TV was separate from that of free-to-air TV.[22] In *Newscorp/Telepiu*, the Commission went one step further as it distinguished between the pay-TV market, the cable market, the free-to-air TV market, and the new media platforms.[23] But here again, as at the upstream level, the above market definitions have been adopted in specific circumstances and these definitions might well evolve in the future. Moreover, further downstream markets have also been identified by the Commission, such as, for instance, in *UEFA* where the Commission refers to the "downstream markets on which broadcasters compete for advertising revenue depending on audience rates and pay-TV subscribers".[24]

Because of cultural and linguistic differences, the Commission generally defines markets as being national in scope or a wider area that is linguistically homogeneous.[25]

V. The competition law issues addressed by the Commission and the European Courts

Over the last few years, the Commission has adopted several important decisions over access to premium content. Interestingly, these decisions have been reactive rather than pro-active, i.e. they result from notifications under former Regulation 17/62 (i.e. notification for exemption under Article 81(3) EC) or under the Merger Control Regulation. However, the Commission is now taking a pro-active attitude with its decision to launch a sector inquiry into the sale of sports rights to Internet and 3G mobile operators.[26] In the discussion that follows, I draw a distinction between the Commission decisions regarding selling and buying and those regarding merger transactions. As far as the buying and selling agreements are concerned, three types of practices have been examined by the Commission: (i) joint selling; (ii) joint buying; and (iii) long term exclusivity contracts. For the sake of convenience, joint selling and long term-exclusivity contracts, which are often combined, will be discussed under a single heading.

[21] Id. at §§ 71-72.
[22] See Commission Decision of 30 April 2002, COMP/JV 57-TPS, at § 14.
[23] See Commission Decision, supra note 3, at § 19.
[24] See Commission Decision, infra note 6, at § 80.
[25] Id. at §§ 88-89.
[26] See Commission Press Release of 30 January 2004, "Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators", IP 04/134.

A. Selling and buying practices

Joint selling and joint buying schemes are relatively frequent in media rights markets. From a general standpoint, joint selling agreements involve cooperation in the selling of products and services between undertakings operating at the same level of the supply chain. Joint buying agreements cover a wide range of different forms of coordination of purchase policy between undertakings.

1. Joint selling

The issue of joint selling of rights has been recently discussed by the Commission in its *UEFA* decision, which relates to the joint selling arrangement regarding the sale of commercial rights of the UEFA Champions League, a pan-European football club competition.[27]

The Commission considered that this joint selling arrangement restricted competition among the football clubs as it had the effect of coordinating the pricing policy and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content (restriction of competition at the upstream level).[28] However, this agreement could nevertheless be exempted as it provided the consumer with the benefit of league focused media products from this pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced or distributed equally efficiently.[29]

The Commission thus exempted this joint selling agreement provided that the Parties substantially modified the notified agreement. One of the particular difficulties of the agreement was that UEFA sold the free-TV and pay-TV rights on an exclusive basis in a single bundle to single TV broadcasters per territory for several years in a row.[30] This created substantial risks of foreclosure since it made it possible for a single large broadcaster per territory to acquire all TV rights of the UEFA Champions League to the exclusion of all other broadcasters (restriction of competition at the downstream levels).[31]

Following the intervention of the Commission, the re-notified agreement contains the following features:

- The media rights contracts will not be concluded for a period longer than 3 years;[32]

[27] See UEFA decision, supra note 6.
[28] Id. at § 1.
[29] Id.
[30] Id. at § 19.
[31] Id.
[32] Id. at § 25.

- The award of rights contracts will follow an "invitation to tender" giving all qualified broadcasters an equal opportunity to bid for the rights in the full knowledge of the key terms and conditions;[33]

- The UEFA will unbundle the media rights by splitting them into several rights packages that will be offered in separate packages to different parties;[34]

- The UEFA will also allow the football clubs to sell on a non-exclusive basis in parallel with UEFA certain media rights relating to action in which they are participating;[35]

- Both UEFA (in respect of all matches) and the football clubs (in respect of matches in which they participate) will have a right to provide video content on the Internet one and a half hours after the match finishes, that is to say, as from midnight on the night of the match [...]. Both UEFA and the football clubs may choose to provide their services themselves or via Internet service providers. The content will be based on the raw feed produced for television;[36]

- Both UEFA (in respect of all matches) and the clubs (in respect of matches in which they participate) will have a right to provide audio/video content via UMTS services available maximum 5 minutes after the action has taken place (technical transformation delay). This content will be based on the raw feed produced for television [...]. UEFA intends to build a 3G/UMTS wireless product that will be based on an extensive video database to be developed by UEFA. UEFA will offer the rights on an exclusive or non-exclusive basis to operator(s) with an UMTS licence, initially and exceptionally for a period of four years and subsequently for periods of three years.[37]

The *UEFA* decision is important because it raises a number of important issues and provides helpful insights into how the Commission will address joint selling agreements combined with long-term exclusivity in the future. Already, similar principles as those found in the UEFA decision can be identified in the Article 19(3) notice recently released by the Commission in the *Premier League* case.[38]

[33] Id. at § 27.
[34] Id. at §§ 32-39.
[35] Id. at § 34.
[36] Id. at § 40 and § 42.
[37] Id. at § 44 and § 45.
[38] See Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/ C.2/38.173 and 38.453 - joint selling of the media rights of the FA Premier League on an exclusive basis, OJ C 115 of 30 April 2004, pp.3-6. These principles can also be identified in the Commission's approach to the system for marketing the rights to broadcast the first and the second division Bundesliga matches. See Commission Press Release of 24 July 2003, "New marketing system for Bundesliga broadcasting rights", IP/03/1116.

2. Joint purchasing

As far as joint purchasing agreements are concerned, an interesting case relates to the investigation launched by the Commission following the notification by Sogecable and Via Digital of an agreement in which they pooled forces to acquire and exploit the broadcasting rights to Spanish First League football matches for 11 seasons ending in 2009 through the audiovisual sport joint venture.[39] The Commission took the view that the agreement amounted to an unacceptable monopolization of the rights by the two main TV Platforms for a very long period of time and warned that it would impose fines unless the agreement was terminated or significantly modified.[40] Following this, Telefonica and Sogecable announced that they would give entrants in the Spanish cable and digital terrestrial television markets access to the football rights and accepted that such competitors would be free to set their own pay-per-view prices. The Commission, however, closed the case following the decision of Via Digital and Sogecable to merge, a merger which was accepted by the Commission subject to undertakings by the Parties.

Another important decision of the Commission relates to several agreements concerning the joint acquisition of sports television rights, the sharing of the jointly acquired sport television rights, the exchange of the signal for sporting events, the sub-licensing scheme and the sub-licensing rules notified by the European Broadcasting Union (hereafter, "EBU"), a professional non-profit association of radio and television organizations. This decision, adopted in May 2000, exempted these agreements under Article 81(3).[41] An important part of this decision concerned the sub-licensing scheme and the sub-licensing rules, which constituted the access scheme for third party access to the Eurovision system. This access scheme was seen as necessary by the Commission to counterbalance the restrictions of competition created by the joint acquisition scheme put into place by the EBU. This decision was, however, annulled by the Court of First Instance, (hereafter, the "CFI") in October 2002 on the ground that contrary to what the Commission had concluded in its decision, the sub-licensing scheme did not guarantee competitors of EBU sufficient access to rights to transmit sporting events held by the latter on the basis of their participation in that purchasing association.[42]

B. <u>Mergers and alliances</u>

In recent years, there has also been a significant consolidation movement in the media industry. While some mergers essentially had a vertical dimension, others mainly had a horizontal dimension, while some others again had both horizontal and vertical components.[43] While there are generally valid business justifications for mergers in the

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[39] See Commission Press Release of 12 April 2000, "Commission ready to lift immunity from fines to Telefónica Media and Sogecable in Spanish football rights case", IP/00/372.
[40] Id.
[41] See Commission Decision of 10 May 2000, Case IV/32.150 - Eurovision, OJ L 151 of 24 June 2000, pp.18-41.
[42] See CFI, 11 July 1996, Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities, Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, ECR [1996] II-649.
[43] For a review of such mergers, see Garzaniti, supra note 17, at 452-491.

media sector, such mergers may also trigger anti-competitive effects. For instance, while vertical media mergers between content providers and delivery companies may allow parties to realize economies of scope and offer new products and services to consumers, they may also create the risk of discriminatory access to content.[44] Similarly, while horizontal mergers may allow parties to realize economies of scale, they may also strengthen market power at the upstream and/or downstream level(s), thus triggering the risks of foreclosure effects.[45]

For instance, in *Newscorp/Telepiu*, the Commission expressed concern that the merger between the two major Italian pay-TV operators would create a quasi-monopolistic situation for the acquisition of exclusive rights for films.[46] This monopsonistic situation, in the absence of corrective measures, would foreclose access to content for third parties and was likely to restrict availability of content to consumers, thus reducing their possibilities of choice.[47] This problem would be further aggravated by the fact that the Parties would be able to further reduce the accessibility of content by exercising holdback and pre-emption rights as regards second window movies, as was envisaged in Telepiu's existing contract with most majors.[48] This would effectively prevent potential new entrants (such as new media platforms) from attempting to enter the market as "fringe" competitors. Moreover, these protection rights exercisable by the Parties would effectively withdraw second window rights from the market, thus harming consumers' welfare and their freedom to choose at what price and at what time to "consume" pay-TV products.

Because of these concerns, such mergers were generally cleared provided that the Parties agreed to substantial commitments. As far as the acquisition of content is concerned, the commitments included in the *Newscorp/Telepiu* case are important, especially as they provide access to content by new media platforms. With respect to these platforms, the commitments offered by Newscorp provided that:

> "*On-going exclusive contracts*
> [...]
> b) *Newscorp* shall waive exclusive rights with respect to TV platforms other than DTH (terrestrial, cable, UMTS, Internet etc.). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH.

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[44] A similar issue was at stake recently, in the context of the Sony/BMG merger where the Commission raised concerns that Bertelsmann, who has a leading position in television and radio broadcasting, in Europe through its subsidiaries could give preferential access to Sony BMG music, foreclosing competing record companies from equal access to the TV/radio markets in some countries. See Commission Press Release of 12 February 2004, "Commission opens in-depth investigation into Sony/Bertelsmann recorded music venture", IP/04/2000.
[45] See NewsCorp/Telepiu, supra note 3.
[46] Id. § 150.
[47] The Commission also applied the same analysis with respect to the implications of the mergers on the market for the acquisition of exclusive rights for football events in which national teams participate. See § 162 of the decision.
[48] Id. at § 152.

c) *Newscorp* shall waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms.

Future exclusive contracts
d) *Newscorp* shall not subscribe contracts exceeding the duration of two years with football clubs and of three years with film Studios. The exclusivity attached to these contracts would only concern DTH transmission and would not apply to other means of transmission (for example, terrestrial, cable, UMTS and Internet). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH. As regards football rights and world-wide sports events, the contractual counterparts shall be granted a unilateral right to terminate contracts on a yearly basis.
e) *Newscorp* shall not acquire protection rights for DTH and will waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms.
f) *Newscorp* shall not acquire, through future contracts or re-negotiations of the terms of the existing contracts, any protection or black-out right with respect to DTH.

Relations with competitors/third parties: wholesale offer and access to the platform and technical services.
g) *Newscorp* shall offer third parties, on a unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform offers such premium contents to its retail customers. Such offer will be made on the basis of the retail minus principle."[49]
[….]

These commitments represent a significant step made by the Commission to address the difficulties met by new media platforms active in the Italian market to acquire premium content. As will be seen in the next Part, however, these commitments address only part of the difficulties. Further interventions on the basis of competition rules will thus have to be made to create a level playing field between existing and new platforms on the market for the acquisition of premium content.

VI. How do the current remedies fare with the new media platforms?

The prior section laid out the principal competition law problems regarding the acquisition of premium content, which were addressed by the Commission in some recent decisions. This section analyses the extent to which the remedies contained in these decisions sufficiently address the difficulties experienced by new media platforms in acquiring premium content, which, as will be seen below, in great part result from the restrictions of competition contained in the contracts concluded between content holders and dominant content delivery operators. As many of the issues discussed below have not yet been addressed by the Commission and the European Courts, the forthcoming

[49] Id. at §225.

developments are exploratory in nature. Some of the arguments developed may thus appear particularly “creative”. Time will test their validity.

Although the markets for the acquisition of premium movies and the market for the acquisition of premium sport content hold distinctive features,[50] many of the difficulties encountered in new media platforms when it comes to acquiring premium content are similar for movies and sport. They are thus jointly addressed in the paragraphs which follow.

A. Common issues

1. High minimum guarantees

One significant problem for new media platforms seeking to acquire premium content results from the high minimum guarantees that need to be paid by such platforms to premium movie or sport rights holders. These minimum guarantees represent a heavy burden for new entrants as, unlike fees to be paid to right holders on the basis of a model of revenue sharing, they have to be paid upfront by these new entrants independently of the number of subscribers they will eventually manage to capture. In practice, they operate as a barrier to entry as the payment of such rights involves substantial risks for these companies.

So far, the Commission has not addressed such minimum guarantees, although they could amount to competition law infringements. First, there are reasons to believe that such guarantees could violate Article 82 of the Treaty. The application of this provision requires that two conditions be present: (i) one or several companies are in a dominant position and (ii) an abuse is committed. The existence of a dominant position essentially depends on the definition of the relevant market. While a broad definition of the market will reduce the likelihood that one given company is in a dominant position, a narrow market definition will increase the likelihood of a finding of dominance. For instance, in the movie industry, one could argue that every blockbuster represents, during a limited period of time, a market in itself as other successful movies might not represent valid substitutes. Although this would have to be backed up by serious market analysis, some movies, such as “Lord of the Rings” or “Gladiator” represent at a given point in time and for a limited period of time a “must have” for content delivery operators. In such a case, the holder of the rights for such a movie would be dominant. This argument would, however, lead to extremely narrow market definitions and competition authorities may resist this approach.[51] Moreover, the fact that Hollywood movies are, with limited

[50] For instance, sport events are highly perishable goods as, while the value of the rights for live broadcasting is very high, the value of the rights for deferred broadcasting will be considerably less. Movie rights keep their value for a considerably longer period of time.

[51] This issue can however, be subject to discussion. Indeed, competition authorities generally seek to define relevant product markets as narrowly as possible. A field where narrow market definitions have, for instance, been found is intellectual property rights. Inventions protected by intellectual property rights have often been considered as a relevant product market with the consequence that the holder of the right is unavoidably dominant. See, for instance, ECJ, 6 April 1995, Radio Telefis Eireann and Independent Television Publications Ltd v. Commission, C-241/91 and C-242/91, ECR [1995]-743.

exceptions, generally sold in bulk (through output deals) would tend to suggest that defining blockbusters as a single market product even for a limited period of time is invalid.

But even if one were opting for a broader definition of the market, which would for instance amount to the market for the selling/buying of Hollywood movies, one could probably hold the majors collectively dominant. A situation of collective dominance arises when several companies (none of which is dominant alone) jointly enjoy market power on a given market.[52] This is, for instance, the case in tight oligopolistic markets where tacit coordination among the firms on the market can take place, leading to collective price increases or to parallel behaviour. For a situation of collective dominance to be found, it is necessary to prove the existence of "economic links" between the undertakings on the market.[53] As the ECJ held in *Compagnie Maritime Belge*, the concept of economic links is not limited "to the existence of agreements or of other links in law but can also be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market".[54] The test for the required intensity of the links to ensure the stability of a collusive equilibrium was clarified by the CFI in *Airtours* where it was held that for collusion to occur, (i) a certain amount of transparency, (ii) a punishment (or retaliatory) mechanism and (iii) the absence of reaction by consumers and potential competitors that could undermine the collusive policy (i.e. assessment of the barriers to entry).[55]

On the basis of this case law, it could be convincingly argued that the market for the selling/buying of Hollywood movies is characterized by a situation of collective dominance. In addition to a number of features which are prone to give rise to coordinated effects (limited number of firms, symmetry of market shares, high barriers to entry - i.e. huge financial investments for producing movies - similar degree of vertical integration among the firms, limited buyer power etc.) it could be argued that the first and the third conditions laid down in *Airtours* are fulfilled. As far as the first condition is concerned, the market for the selling/buying of Hollywood movies is highly transparent because the majors often announce publicly and long in advance the new movies, their budgets, etc. As far as the third condition is concerned, it is unlikely that a collective price increase by the majors would lead to the entry of new competitors given the substantial barriers to entry on this market. Similarly, it is doubtful whether consumers

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[52] See, generally, on collective dominance and oligopolistic markets, see Richard Whish, *Competition Law*, 4th Ed., Butterworths, 2001 pp.473-482. See also, Sigrid Stroux, "Is EC Oligopoly Control Outgrowing Its Infancy?" (2000) 23 *World Competition*, 3-50; Juan Briones and Atilano Jorge Padilla, "The Complex Landscape of Oligopolies under EU Competition Policy - Is Collective Dominance Ripe for Guidelines?", (2001) 24 *World Competition*, 307-318.

[53] See CFI, 10 March 1993, Società Italiano Vetro v. Commission, Case T-68/89, ECR[1992] II-1403

[54] See ECJ, 16 March 2000, Compagnie Maritime Belge Transports SA v. Commission, Case C-395, 396/96P, ECR[2000] I-1365 at § 45.

[55] CFI, 6 June 2002, Airtours plc v Commission, Case T-342/99, [2002] ECR II-2585. On this case, see Massimo Motta, "EC Merger Policy and the Airtours Case", (2000) 4 *European Competition Law Review*, 199; Ali Nikpay and Fred Houwen, "Tour de Force or Little Local Turbulence? A Heretical View on the Airtours Judgment", (2003) 5 *European Competition Law Review*, 193.

would shift to new suppliers or whether a sufficient decrease in demand would dissuade firms to increase their price.

As far as the abuse is concerned, the minimum guarantees could amount to an unfair trading condition contrary to Article 82(a) of the Treaty. Indeed, it is hard to believe that high minimum guarantees could be imposed by movie rights holders in a competitive market. Moreover, the Commission has already condemned such types of practices as abusive. For instance, in *BRT v. SABAM*, a case concerning a performing rights society, it was considered that restrictions imposed on the authors who were members of the society were unfair in so far as they were not necessary to allow the performing rights society to properly conduct its business.[56] Similarly, in *Tetra Pak II*, a clause obliging the payment of a rent, at the beginning of the contract, of almost the same amount as the value of the value of the machine was considered unfair.[57] *Mutatis mutandis*, high minimum guarantees would in fact force new platform operators to spend extremely important sums on content, even before they were given the time to gain market shares, thus forcing them to take extreme financial risks.[58]

Hence, the compensation of premium content right holders should be done exclusively on a revenue sharing model, which would allow new platforms to enter the market and gain market shares. To be compatible with EC competition law, the fees charged by the rights holder(s) under the revenue sharing mechanism should not be excessive and should be established in a non-discriminatory manner, while excessive prices would amount to another violation of Article 82(a).[59] Price discrimination among platforms, absent an objective justification, would amount to an abuse under Article 82(c) of the Treaty.[60]

2. Exclusivity agreement with the dominant operator in the pay-TV national market

Exclusivity is an issue which has been addressed by the Commission in the *UEFA* and *Newscorp/Telepiu* decisions (in the context of Article 81 in the former case and the Merger Control Regulation in the latter). The remedies imposed in these decisions such as, for instance, the reduction of the length of the contracts, the unbundling of the rights into smaller packages (*UEFA*), as well as the right for film studios and football clubs to unilaterally terminate contracts with the Parties with no applicable penalties, the Parties' waiver of exclusive rights vis-à-vis TV platforms other than DTH and for pay-per-view, video-on-demand, and near-video-on-demand for all platforms (*Newscorp/Telepiu*), clearly go a long way towards addressing exclusivity problems in the media industry. Of course, the terms of these decisions are only binding on the Parties, although they

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[56] ECJ, 30 January 1974, Belgische Radio en Televisie v SV SABAM and NV Fonior, 127-73, ECR [1974]-51.
[57] CFI, 6 October 1994, Tetra Pak International SA v Commission, T-83/91, ECR [1994] II-755.
[58] A similar analysis can be made for sport rights.
[59] See ECJ, 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission, 27/76, ECR [1978]-207.
[60] See Commission Decision 94/210/EC of 29 March 1994, Case IV/33.941 - HOV SVZ/MCN, OJ L 104 of 23 April 1994 pp.34-57. See also, CFI, 30 September 2003, Manufacture française des pneumatiques Michelin, v. Commission, Case T-203/01, not yet published.

certainly represent important precedents, which will guide the Commission in further inquiries.

Yet, these decisions will not suddenly solve all problems linked with exclusivity and there will still be cases in the future where new media platform operators will be foreclosed access to premium content by exclusive agreements. Where such agreements are concluded by dominant pay-TV operators, it is subject to question whether they are compatible with Article 82 of the Treaty. By concluding exclusive agreements with premium rights holders, the dominant operator would in fact foreclose weaker competitors to gain access to premium content, thereby preventing them from entering or excluding them from the pay-TV market and thus strengthening its dominant position on this market. Of course, the purchasing of exclusive rights will generally involve the payment of very high sums to right holders by the dominant operator (thus making such an exclusionary strategy very costly), but, as in classic predatory strategies, the initial loss this may entail would be subsequently compensated by the monopolization of the downstream market.

The dominant operator could try to objectively justify its purchase of exclusive rights by claiming, for instance, that such rights are needed to protect sunk investments. But the bulk of the physical investments carried out by pay-TV operators were initially made in the 1990s, and are thus largely amortized. Moreover, the need to protect investments would be a paradoxical argument in an industry where the principal costs of downstream operators relate to the buying of exclusive premium content rights. Exclusivity would thus be needed to help dominant operators to amortize the huge investments made in the purchasing of rights, the exclusivity of which would be largely responsible for their astronomical costs.[61] Thus, exclusivity triggers significant allocative efficiency losses without these losses being compensated by dynamic efficiency gains (as there is no reason to believe exclusivity is necessary to induce investments and innovation in the sector, quite the contrary as its primary victims are new media platforms).

It could also be argued that, on the supply side, it is necessary for premium rights holder to engage in exclusive agreements in order to protect the value of their rights. For instance, there seems to be a fear among premium right holders that the sharing of such content on new media platforms could destroy the value of their rights. But this concern seems to be unsubstantiated as such platforms are generally closed systems. Renting a movie through an Internet-based video on demand service is not conceptually different than renting a movie from a video store. In both cases, the content holder will share revenues with the distributor and the movie will be watched once by no one else than the renter(s). In fact, the risk that the value of the rights might be undermined seems to be much higher with video-cassettes and DVDs as these can be easily replicated.

More generally, from a public policy standpoint, exclusive rights for premium content can hardly find any justification. The pervasiveness of such rights has transferred the

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[61] See Antonio Nicita and Giovanni Ramello, "Content Exclusivity and Competition Policy in Media Markets: the Case of Pay-TV in Europe", forthcoming in (2005) *International Journal of the Economics of Business*.

competition paradigm in the media industry into a regime of competition "for" the market. Competition "for" the market is a model that can be recommended in markets holding natural monopoly features, such as water systems, but clearly should have no place in markets where competition "in" the market is possible.[62] But even if a model of competition "for" the market was to be recommended, it would not work in practice as, because of its imperfections, only dominant pay-TV operators seem to be in a position of acquiring premium content rights.

By contrast, the absence (or at least a strong reduction of the scope) of exclusivity would hold many benefits from a public policy standpoint. First, in the absence of exclusivity, the content delivery business would essentially consist in purchasing and selling bundles which satisfy the consumers.[63] This would force operators to work towards the satisfaction of consumer preferences as a key factor for gaining market shares would be the ability to provide the right bundle to the right customer. Other variables to the competitive process would be prices, quality and convenience of the service. Moreover, by allowing several platforms to compete for viewers/subscribers, this approach would comply with the principle of "technological neutrality" and enhance consumer choice as the latter could select the platform in which they wish to watch a given content. Thus, in contrast with a tight exclusivity model, an open model would trigger both allocative (in terms of price cuts, quality increase, etc.) and dynamic (in terms of investment into new networks, etc.) efficiency gains.

An interesting question at this stage is the extent to which a requirement of sub-licensing by the content delivery operator holding the rights could reduce the foreclosure effects of exclusive agreements. A sub-licensing requirement might certainly contribute to reduce such effects. But the value of sub-licensing depends in great part on the terms on the basis of which sub-licences are granted.[64] Sub-licences sold at excessive prices may be of little value to competitors. In addition, to allow such a scheme to be effective and in compliance with EC competition rules, the terms of the sub-licences should be known in advance and be transparent and non discriminatory.

An interesting form of sub-licensing can be found in the commitments made by the Parties in the *Newscorp/Telepiu* merger, which *inter alia* provide that:

> "g) *Newscorp* shall offer third parties, on an unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform offers such premium contents to its retail customers. Such offer will be made on the basis of the retail minus principle."

In its discussion of the usefulness of this remedy the Commission explains that "[t]he underlying idea is that such wholesale offer will lower barriers to entry in the pay-TV

[62] See Damien Geradin and Michel Kerf, Controlling Market Power in Telecommunications: Antitrust vs. Sector-specific Regulation, Oxford University Press, 2003, at Chapter 2.
[63] See Nicita and Romello, supra note 61.
[64] See John Temple Lang, "Media, Multimedia and European Community Antitrust Law" (1998) 21 *Fordham International Law Journal*, 1296.

market by allowing non-DTH pay-TV operators to access premium contents which would otherwise be too costly for them to purchase directly or which are locked away by means of long-duration exclusivity agreements entered into by the incumbent players with the content providers".[65] Responding to comments made by third parties, the Commission further explains that "[a]s regards the contractual availability of the necessary rights in order to provide a wholesale offer, Newscorp has submitted an undertaking including a 'best endeavours clause' concerning the acquisition of the necessary non-DTH rights for the wholesale offer to work".

This wholesale offer regime deserves several comments. First, the possibility given to non-DTH operators to buy premium content is a useful way to introduce some competition in the downstream content delivery market. But it provides no long-term solution to the problem of exclusivity as it does little to help new media platforms to buy rights directly from the premium content right holders. One could, of course, argue that there is no longer any necessity for these platforms to buy content directly from rights holders as they can buy the same rights on a wholesale basis from the pay-TV operators. But this is not entirely true. First, this wholesale regime essentially transforms non-DTH platforms into resellers, which is at best a form of fringe competition. Second, the retail minus pricing mechanisms provided for in the decision means that the margins that can be made by non-DTH operators are extremely small. In practice, this system continues to allow the content delivery operators to charge its monopoly profits to its competitors.[66] Thus, while this system might allow some competition on the fringe, this competition will not translate into cheaper prices. In some cases, the margin will be so tight that no entry will be possible. Such a situation could lead to a "margin squeeze", a practice that can amount to an abuse of a dominant position.[67] Finally, and perhaps more fundamentally, the wholesale model places new entrants at the mercy of the pay-TV incumbent. As the terms of the undertakings submitted by the merged entity are loosely drafted,[68] there is a danger that the pay-TV incumbent will drag its feet when asked to provide unbundled contract elements to new entrants. Though the decision provides for an arbitration mechanism, as well as the possible intervention of the Italian Communications Regulator in case of disputes over the application of the commitments, these disputes will, however, always be extremely difficult to solve as they will usually involve issues such as the definition of premium content, cost-allocation strategies, etc. They will also inevitably introduce delays and costs, which will mainly affect new entrants.

Thus, while the introduction of a wholesale offer regime is a desirable step which should allow new entrants to gain access to premium content and gain market shares, it will

[65] Voir § 246 of the decision, supra note 3.

[66] For a discussion of the pros and cons of retail minus schemes, see which in practice amount to Efficient Component Pricing Rule (ECPR), see Geradin and Kerf, supra note 62, at 39-41.

[67] For an example of margin squeeze in the telecommunications sector, see the Deutsche Telekom decision adopted by the Commission on 21 May 2003, COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, OJ L 263 of 14 October 2003, p.9. A discussion of margin squeeze in the media sector can be found in the OFT decision in the BSkyB case, see decision of the Office of Fair Trading under section 47 relating to decision CA90/20/2002: Alleged Infringement of the Chapter II Prohibition by BSkyB, 29 July 2003, §§ 16 et seq.

[68] See § 249 of the decision, supra note 3.

never replace the ability of these operators to buy premium content rights directly from right holders.[69]

3. The presence of hold back clauses in contracts between rights holders and the exclusive buyers of such rights

Pursuant to holdback clauses, the acquirer of the content rights is prevented from selling such content to other media platforms. This issue was addressed in the *Newscorp/Telepiu* decision as the Parties committed to waive any protection rights as regards means of transmission other than DTH.

But more generally, the legality of such rights could be put into question. For the same reason of exclusivity agreements, holdback clauses could be considered as abuses of dominant position on the part of dominant pay-TV operators as they prevent alternative platforms from gaining access to premium content. Such operators have indeed much to gain by having such clauses inserted in the contracts rights they negotiate with content providers. Such clauses could thus contribute to a strategy of exclusion of new media platforms from the content delivery market.

In addition to the potential application of Article 82 in the context of a single dominance situation, it is subject to question whether the concept of vertical collective dominance as applied by the CFI in *Irish Sugar* could be applied with respect to holdback clauses.[70] In the latter case, the CFI came to the conclusion that collusive practices between undertakings placed a different level of production aiming at protecting their national market from imports or at preventing the entry of new competing brands could be brought under the concept of joint dominance. As seen above, a condition for this is to prove the existence of "economic links". In *Irish Sugar*, a number of structural links (holding of shares by the producer in the distribution company) as well as behavioural commitments (exclusive supply commitment etc.) has been evidenced by the Commission. A transposition of the *Irish Sugar* line of reasoning could be attempted, by considering that holdback clauses are a collusive vertical strategy implemented between rights holders and content delivery operators in order to foreclose new entrants' entry on the market. The concept of "economic link" would flow from the tight contractual framework between the Parties and a number of correlated interests.

4. Multi-year duration and automatic renewal of contracts

The Commission has always been attentive to ensure that the duration of the exclusivity in supply contracts is no longer than necessary. The length of the exclusivity that is tolerated essentially depends on the circumstances.[71] For instance, in the energy sector

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[69] Torben Toft, "Football, Joint Selling of Media Rights" 3 (2003) *Competition Policy Newsletter* 47 at 48. While sub-licensing arrangements can in some circumstances help to remedy competition problems, it is preferable to have direct contractual relationships between the original rights owners rather than contractual relationships among competitors.

[70] See CFI, 7 October 1999, Irish Sugar plc v Commission, T-228/97, ECR [1999] II-2969.

[71] See ECJ, 6 October 1982, Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, 262/81, ECR [1982]-3381 at § 19 ("It must therefore be stated that it is

where considerable investments are made by parties, the Commission will generally tolerate relatively long periods of exclusivity (e.g., 15 years).[72] By contrast, in sectors where no major investments are made, the maximum length of exclusivity tolerated by the Commission might be considerably shorter. This seems to be the case in the media sector. For instance, in *UEFA*, the Commission required the Parties to reduce the length of media rights contracts and the Parties eventually proposed the principle that such contracts be concluded for a period not exceeding the UEFA Champions League seasons.[73] In *Newscorp/Telepiu*, the Parties committed that "Newscorp shall not subscribe contracts exceeding the duration of two years with football clubs and of three years with film studios".[74]

Clauses providing for automatic renewal of premium content contract rights often amount to a disguised method to extend the duration of exclusivity. Indeed, it is only when one of the two parties decides not to renew the contract that third parties could be given a chance to bid for content rights. As both content providers and dominant content delivery operators generally favour exclusivity, this situation may never take place in practice.[75] As a result, the Commission has generally considered such clauses to be anti-competitive.[76]

In some cases, media rights agreements also contain a preferential renewal clause pursuant to which at the expiration of the agreements, the incumbent buyer is given an opportunity to match the highest bid received from any third party. Such clauses, which are often referred to as "English clauses", enhance transparency in the market and thus increase the likelihood that a competitor making an aggressive offer, will not gain the market, but simply force the incumbent buyer to match this offer.[77] As a result, English clauses will usually fare no better than automatic renewal clauses in the eyes of the Commission.[78] For instance, in *Sport 7*, the Commission considered that the granting by the Dutch football association of an exclusive licence to a new broadcaster, Sport 7, for the duration of seven years, was caught by Article 81(1) and could not be exempted as it

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for national courts, where appropriate, to make such inquiries and in particular to establish whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not from a general point of view, such exercise within a given geographic area is such as to prevent , restrict or distort competition within the common market.").

[72] See Commission Decision 91/329/EEC of 30 April 1991, IV/33.473 - Scottish Nuclear, OJ L 178 of 6 July 1991 pp.31-36. See also Notice pursuant to Article 19(3) of Council Regulation No 17/62, Case No IV/E-3/35.485 - REN/Turbogás) OJ C 118 of 23 April 1996 pp.7-8; Notice pursuant to Article 19(3) of Council Regulation No 17/62 Case No IV/E-3/35.698 - ISAB Energy, OJ C 138 of 09 April 1996 pp.3-5. See, finally, XXVIIth Annual Report on Competition Policy at p.127.

[73] See Commission Decision, supra note 6, at § 25.

[74] Id, at § 225.

[75] See Ungerer, supra note 8.

[76] See Schaub, supra note 9, at p.7.

[77] See Jonathan Faull and Ali Nikpay, *The EC Law of Competition*, Oxford University Press, 1999, at p.165.

[78] See, e.g., the *IRI/A.C. Nielsen* case, XXVIth Annual Report on Competition Policy at § 63.

eliminated competition for the rights for too long a period.[79] In addition, the re-negotiation process foreseen at the end of the contract gave *Sport 7* an advantage because it had the right to match the bid of its competitors.

B. <u>Issues specific to the movie industry</u>

In addition to these common issues, some additional issues are specific to the market for the acquisition of movie rights and the market for the acquisition of sport rights.

1. Exploitation of windows

As far as movie rights are concerned, a specific difficulty for the new media platforms relate to the systems of exploitation of windows used by the majors,[80] i.e. time periods during which a movie can be exploited for one purpose only.[81] Pursuant to that system, the first exploitation is generally theatrical release in cinemas, followed by home video, pay-per-view/video-on-demand, pay-TV, and free-to-air TV. The new media platforms' concern with this windows system is that it places video-on-demand, which is one of the core services they sell to their clients, at a competitive disadvantage compared with home video, which benefits from an "earlier" window while this is an analogous service.

One way to attack this system would be to say that it amounts to an abuse of dominance on the part of the movie producers. Application of Article 82 requires the identification of one or several dominant companies. As pointed out above, single or collective dominance can probably be identified in the market for the supply of blockbusters. As far as the abuse is concerned, it would take the form of a discrimination between contract delivery operators contrary to Article 82(c) of the Treaty. This provision provides that: "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" can be held to constitute an abuse of a dominant position.

The first condition of application is to show that the transactions are equivalent. In the present case, it could convincingly be argued that, from the point of view of the rights sellers, selling such rights for exploitation through video stores or through video-on-demand, represent equivalent transactions. The second condition of application of Article 82(c) requires that the dominant firm's trading parties be placed at a competitive disadvantage as a result of the discrimination. This is not hard to establish in the present case. Being only authorized to show a blockbuster two months after its release in videostores is a clear handicap for new media platforms as it considerably reduces the proceeds they could earn through their video-on-demand services. It also deprives them

[79] See the comments on the case *Sport 7/KNVB* in the XXVIIth Annual Report on Competition Policy at p.122.
[80] Unlike movie rights, sports rights are not sold in accordance with exploitation mechanisms. TV rights to sports events are generally sold exclusively to a single broadcaster, account being taken, however, of the limits that have now been placed in the UEFA decision.
[81] See Faull and Nikpay, supra note 77, at p.776.

from a commercial asset (the ability to show blockbusters shortly after their release in cinemas), which could help them build a subscriber base.

As a general rule, it is a legitimate defence for a dominant operator accused of discriminatory behaviour to demonstrate that this behaviour can be objectively justified. One dominant supplier accused of price discrimination could, for instance, show that it was forced to discriminate to meet a competitor's offer.[82] But in this case, it is not clear why, for instance, the exploitation of movie rights through videostores and video-on-demand should be realized through different windows. As pointed out above, these two services are conceptually similar. In fact, video-on-demand is just a more technologically advanced way for customers to buy a movie for a single viewing.

Similarly, from a public policy standpoint, allowing that the exploitation of movie rights through videostores and video-on-demand would benefit to consumers as it would allow them to watch a blockbuster at a given point in time on the platform of their choice. Giving video-on-demand a better window would also allow new media platforms to gain subscribers, hence allowing them to become stronger competitors on the content delivery market, as well as inducing them to invest in new technologies.

2. Most Favoured Nation clause

Contracts between Hollywood studios and content buyers usually contain "Most Favoured Nation" clauses (hereafter, "MFN clauses") pursuant to which every time a content buyer gives a special advantage to a studio (i.e., a higher revenue sharing offer to the benefit of this seller or an advantageous selling condition), this advantage should be extended to the other studios. To induce content buyers' compliance, these MFN clauses also provide for control mechanisms allowing studios to verify whether advantages are extended to all of them.

MFN clauses entail serious restrictions of competition as they have the effect of harmonizing prices and other selling conditions. As far as prices are concerned, MFN clauses lead to a mechanism of price leadership whereby one firm's pricing movements are followed by its rivals. In view of the anti-competitive effects created by MFN clauses, the Commission decided a couple of years ago to initiate an investigation into such clauses. So far, the Commission has not taken a decision and it is thus not yet possible to know whether and how the Commission will address these restrictions of competition.

Perhaps the most obvious approach to attack MFN clauses would be to consider them as a price cartel. Obviously, studios share an interest in imposing MFN clauses in content rights contracts and this practice seems to be so pervasive that these operators know what they are doing. The problem for a plaintiff is that Article 81(1) requires that proof of an anti-competitive agreement between competitors be established. Absent material proof of such an agreement, a concerted practice will have to be inferred from circumstantial evidence. But the competition authorities will not be necessarily easy to convince that

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[82] See Faull and Nikpay, supra note 77, at p.176.

such evidence meets the evidentiary requirements of Article 81(1).[83] An alternative for the application of Article 81(1) would be to tackle the MFN clause as an anticompetitive vertical agreement. However, because its effect on competition is likely to be limited if examined on a stand alone basis, it is probable that such clause will not have a sufficient anti-competitive impact to forbid it pursuant to Article 81(1). Nonetheless, a solution for bringing MFN clauses within the remit of Article 81(1) could be to rely upon the doctrine of "cumulative effect" whereby the effect of an agreement may be reinforced if there are similar agreements between the same firms of between third parties.[84] Vertical practices which may, as such, be considered of minor importance, can nonetheless infringe Article 81(1) by virtue of the cumulative effect of parallel networks of similar agreements. Pursuant to this approach, it could be considered that the generalisation of MFN clauses in contracts between studios and content providers leads to a phenomenon of price harmonization that restricts competition.

Another approach to tackling such clauses is to argue that they amount to an abuse of a dominant position committed by collectively dominant firms (i.e. the major Hollywood studios). The advantage of this approach is that it would lower the evidentiary requirement imposed by the application of Article 81. Indeed, as was said before, the movie industry demonstrates a number of oligopolistic features. Interdependent parallel behaviour by majors could thus be caught under the concept of collective dominance. In particular, the anticompetitive effect of the similar trading conditions imposed by the majors o, their customers could be seen as a form of tacit coordination constitutive of an abuse pursuant to Article 82 of the Treaty. It is not sure, however, whether an action of this kind would be admissible before a competition authority. Indeed, the Commission has made a cautious use of the concept of collective dominance under Article 82 EC. Rather, it has mainly enforced the doctrine *ex ante*, in the context of merger proceedings.[85]

C. Specific issues to the sports industry

1. The sale of all rights to a single content delivery operator

One serious problem faced for new media platforms is that sports rights, and in particular football rights, have usually been sold to a single broadcaster (generally Pay-TV operators) through joint selling arrangements. Thus, it has been impossible for these platforms to acquire football rights directly from the rights owner.

[83] In particular, the heavy burden of proof imposed on competition policy pursuant to the Woodpulp II case. See

[84] See, for instance, ECJ, 12 December 1967, Brasserie de Haecht, Case 23/67, ECR [1967]-407; ECJ, 28 February 1991, Stergios Delimitis v Henninger Bräu AG, Case C-234/89, ECR [1991] I-935.

[85] Even in merger control, the Commission seems to be now more cautious about relying on a finding of collective dominance to prohibit a merger. For instance, in the BMG/Sony merger, the Commission has recently backed off from the claim it initially made in its statement of objections that the merger raise major competition problems because BMG and Sony were part of an oligopolistic market. See Global Antitrust Weekly 290, 12-18 June 2004, p.1.

This problem has, however, been addressed by the Commission in its UEFA decision. The re-notified UEFA agreement implies an unbundling of the media rights by dividing them in different rights packages that will be sold to different parties. For instance, we have seen that, as reported by the Commission, the re-notified agreement provides that "[b]oth UEFA (….) and the football clubs (….) will have the right to provide video content on the Internet one and a half hours after the match finishes, that is to say, as from midnight on the night of the match"[86] and that "[b]oth UEFA and football clubs may choose to provide their services themselves or via Internet service providers".[87] Read literally, the second sentence does not offer any guarantee to new media platforms (e.g., Internet portals selling content to its customers) that they will have access to the Champions League games.[88] Indeed, this sentence gives the UEFA and the football clubs a choice between providing video content on the Internet by themselves or to sell the rights to Internet service providers.

In contrast, the re-notified agreement seems to offer better guarantees to UMTS operators to acquire football rights. The re-notified agreement provides that "[b]oth UEFA (….) and the clubs (….) will have a right to provide audio/video content via UMTS services available 5 minutes after the action has taken place (technical transformation delay)"[89] and that "UEFA will offer the rights on an exclusive or non-exclusive basis to operator(s) with an UMTS licence, initially and exceptionally for a period of three years".[90] The second sentence thus provides that the UEFA will have to offer the rights to UMTS operators. It is not clear, however, why there is such a difference of treatment between Internet and UMTS operators.[91] Is this only because, as the first sentence suggests, UMTS operators will only be entitled to show specific actions of the match, rather the whole match? Some clarification would be helpful on this point.

2. Embargo time

Another problem that is faced by the new media platforms relates to the embargo that is imposed on them before they can show football games. As seen in the preceding section, the re-notified UEFA agreement provides that Champion League games could only be shown on the Internet one and a half hours after the match finishes.[92] Interestingly,

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[86] § 40.
[87] § 42.
[88] For a similar approach, see § 26 of the Article 19(3) Notice, which the Commission has adopted in the Premier League case ("Both the FALP (in respect of all matches) and the clubs (in respect of matches in which they participate) will have a right to provide video content on the Internet as of midnight on the night of the match").
[89] § 44.
[90] § 45.
[91] By contrast, the Article 19(3) Notice of the Premier League case seems to be more restrictive. See § 28 where no reference is made to UMTS operators. ("Both the FALP (in respect of all matches) and the clubs (in respect of the matches in which they participate) will have a right to provide audio/video content via UMTS services).
[92] It is interesting to observe that this embargo had been explicitly criticized by Internet service providers, which submitted observations on the UEFA re-notified agreement. See § 98 ("Internet service providers would like to have live rights. They consider that the embargo is too long for deferred exploitation and that

however, it also provides that "[l]ive streaming will not be made possible because of the technical development of the Internet at this stage, which does not permit the maintenance of a satisfactorily high quality. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future".[93] Thus, as soon as the technology for live streaming will be available (in fact, it seems to be already available), the re-notified agreement should thus be amended.

By contrast, the re-notified agreement does not provide for a revision of the 5 minutes embargo that is imposed on the sharing of football games on UMTS. Here again, it is not clear from the decision of the Commission why Internet and UMTS service providers are subject to a different treatment. Is it again because UMTS operators will only be offered to show football actions, a process which needs some editing? Interestingly, the Article 19(3) Notice released by the Commission in the Premier League provides that in that case the embargo for Internet and UMTS services will be equivalent (games can only be watched as of midnight of the match). This is an issue, which would benefit from further clarification.

VII. Other potential competition law problems: The access to TV channels

So far, this paper has been concerned with the acquisition of premium movies and sports content. Yes, other types of contents may also be attractive, such as, for instance, TV channels. TV channels are increasingly seen as a commodity with firms producing TV contents (games, talk shows, news, series, etc.), and/or acquiring and assembling contents into channels, and/or delivering channels to the viewers.[94] There is often some degree of vertical integration between these activities, thus raising the risk of discriminatory access to channels. Some TV channels are extremely popular and represents "must have" for new media platforms. Among valuable channels figure not only commercial channels, but also in some cases public free-to-air TV channels (Fox News, Disney Channel, etc.), which are susceptible to attract a large TV audience (e.g., RAI, BBC, etc.).

As far as cable operators are concerned (some of which can be considered as new media platforms when they provide interactive services, multimedia products, etc.), getting access to TV channels may in some Member States (e.g., Belgium or France) be ensured through the "must carry" obligation, which is found in Article 31(1) of the Universal Service directive.[95] But must carry obligations do not have to be imposed by the Member States. This is only an option that is left to their discretion.[96]

Internet and TV are two distinct markets. They regret that deferred rights are reserved for UEFA and the football clubs and that Internet service providers are excluded from competing for the rights").

93 § 40.

94 See Nicita and Ramello, supra note 61, at p.4.

95 See supra, text accompanying notes 14.

96 To the extent that some free-to-air channels are largely funded by the tax payers' money, it is subject to question whether such channels should be subject to a "must offer" obligation so as to allow consumers/tax payers to watch these channels on the platform of their choice.

Thus, in absence of regulatory requirements, how could a new media platform gain access to TV channels? Although to the best of the author's knowledge this issue has never been addressed by a competition authority, it is interesting for the sake of the argument to explore whether EC competition law could be helpful to these new media platforms. Let's take the hypothetical example of a new media platform that would seek to obtain the rights to broadcast the channels of the two main TV operators. These channels would indeed be extremely popular and, thus, an essential tool to attract viewers to the platform. The new media platform would rebroadcast these channels unedited. In particular, they would not remove the adverts from the programmes. Assuming that these operators were to refuse to sell the rights or only accept to sell these rights at an excessive price, what would be the legal avenues open to these new platforms?

As far as the refusal to sell TV channels rights is concerned, two strategies could be explored.

First, to the extent that this problem relates to access to valuable inputs, it is subject to question whether the case law of the ECJ on refusal to supply could be relied upon here.[97] In order for this case law to apply, several conditions must be met. First, it is essential to demonstrate that the provider(s) of the input is/are in a dominant position on the market for that input (the upstream market). In our hypothetical example, the upstream market would consist of the market for the designing and assembling of national TV free-to-air channels and two operators would be on that market. As far as establishing dominance is concerned, in the *Magill* case, the Commission's decision (subsequently upheld by the CFI and the ECJ) found that three Irish TV companies enjoyed a dominant position on their respective TV listings magazines (the input that was requested the plaintiff in that case).[98] *Mutatis Mutandis*, a similar approach, whereby each of the TV operators would be found dominant on the market for their own TV channels, could be envisaged here. Alternatively, as suggested by Professor Whish in relation to *Magill*,[99] a collective dominance approach could also be followed provided that the conditions imposed by the ECJ in *Compagnie Maritime Belge* are met.[100]

One would need to show that a refusal to supply the requested input (in this case TV channels) would be abusive. In order to identify an abuse, the strict conditions imposed by the ECJ in *Bronner* would have to be met.[101] According to the ECJ, Article 82 of the Treaty may only apply to refusal to supply cases where three conditions are fulfilled: (i) the refusal of access to a facility must be likely to prevent any competition at all on the applicant's market, i.e. the downstream market, in this case the market for the delivery of

[97] See ECJ, 6 March 1974, Commercial Solvents v. Commission, Case 6-7/73, ECR [1974]-223. See also, John Temple Lang, "The Principle of the Essential Facilities Doctrine in European Community Competition Law - The Position Since Bronner", (2000) 1, *Journal of Network Industries*, 375; Derek Ridyard, "Essential Facilities and the Obligation to Supply Competitors and Access to Essential Facilities", (1996) 17, *European Competition Law Review*, 438.
[98] See Commission Decision 89/205/EEC of 21 December 1988, Magill TV Guide/ITP, BBC and RTE, IV/31.851, OJ L 78 of 21 March 1989, pp. 43-51
[99] See Whish, supra note 52, at p.474.
[100] See ECJ, supra note 54.
[101] See ECJ, 26 November 1998, Oscar Bronner v. Mediaprint, C-7/97, [1998] ECR I-7791 at § 41.

TV channels; (ii) the access must be indispensable or essential for carrying out the applicant's business; and (iii) the access must be denied without any objective justification.[102] These conditions are not necessarily easy to meet and whether or not they are met in a given case essentially depends on the specific circumstances of that case.

The other avenue would be to argue that the TV channels rights holders' reluctance to sell these rights to new media platforms is part of a strategy of predation. As in our hypothetical example, the new media platforms would rebroadcast the channel programmes with the adverts they contain, it would indeed be in the TV channels rights owners' best interests to have such channels rebroadcast on additional platforms. As the number of viewers would increase, so would the value of the advertising slots. Thus, by refusing to sell their rights to a new media platform, the TV channels rights holders would in fact sacrifice short-term profits for the long-term profits that would be reaped by excluding the rival platforms, a strategy that is assimilated to predation.[103]

Another problem with which new media platforms could be faced is that, while TV channel suppliers are willing to sell their rights, they may do so at an excessive price. In fact, excessive prices could be another way of deterring entry or excluding rival platforms. This would be part of the same strategy of predation analyzed above. But even if these excessive prices were not part of a strategy of exclusion, they could still violate Article 82 as a form of exploitative abuse. However, proving such an abuse may not be so easy. In *United Brands*, the ECJ provided that a price is deemed to be excessive when "it has no reasonable relation to the economic value of the product supplied".[104] However, experience teaches that competition authorities as well as courts are generally reluctant to find a price excessive, if only because they do not want to be transformed into price regulators.[105] Moreover, determining the reasonableness of a price is not easy in practice (because of asymmetry of information problems) and it is only in the most blatant cases of abusive pricing, such as the sudden increase of a price by several hundred percent, that they will be willing to intervene.

VIII. Conclusions

Access to premium content is of critical importance for new media platforms as such content is necessary to attract viewers and gain market shares. So far, it has been difficult for these platforms to gain access to premium movies, sports, or even TV channels. Access foreclosure to premium content not only prevents new entry from taking place in the highly concentrated pay-TV market, but it also affects technological developments

[102] In the case where the input is protected by intellectual property rights, the ECJ seems to impose an additional condition, which is that the refusal prevents the emergence of a new product for which there is a potential consumer demand. See ECJ, 29 April 2004, IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG, C-418/01, not yet published.
[103] See Philip Areeda and Donal F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 (1975) *Harvard Law Review* 697.
[104] See ECJ, 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission, 27/76, ECR [1978]-207 at § 250.
[105] See Faull and Nikpay, supra note 77, at §3.298.

and consumer choice as the latter would be prevented from watching their favourite programmes on the platform of their choice.

This difficulty for new media platforms of gaining access to premium content is in great part due to the existence of long-term exclusive contracts between movies and sports rights holders and dominant pay-TV operators. In some recent decisions, such as *UEFA* and *Newscorp/Telepiu*, the Commission took measures to reduce the length and the scope of the exclusivity in order to prevent the monopolization of premium content rights by some pay-TV operators. These decisions also contain specific measures to facilitate the acquisition of premium content rights by new media platforms.

The decisions do not, however, appear sufficient to create a level playing field on the markets for the acquisition of premium content rights. Other commercial practices, such as high minimum guarantees, holdback clauses, exploitation of rights through a system of windows, and MFN clauses create barriers to new entrants, such as the new media platforms. As some of these practices represent severe restrictions on competition, it is suggested that the Commission and the national competition authorities should initiate investigations to put them to an end. The sector enquiry launched by the Commission into the sale of sports rights to internet and 3G mobile operators is a good positive first step.