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Dominant Platforms and Competition Kaw Remedies
Panel - Discussion

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Contradictory elements at play as regards audiovisual and digital platforms in the current competitive environment.

On the one hand, as these platforms benefit from network effects and scale economies, this may lead in certain cases to ‘winner-takes-all’ situations.

On the other hand, the dynamic nature of the markets at stake may enable potential challengers to use an increasing variety of ways to reach end-users and that may allow such challengers to bypass gate keepers.

It may be argued that competitive pressures in these markets tend to force potentially dominant platforms to keep on innovating - But that is not necessarily so... CAUTION is required...
Different phases and trends in terms of EU Merger practice, beginning with a first phase in which the Commission prohibited five concentrations related with broadcasting and platforms - from 1994 to 1998.

Reference is made here to Commission decisions Bertelsmann/Kirch/Premiere (Case IV/M.993); Deutsche Telekom/Beta Research (Case IV/M.1027; MSG Media Service (Case IV/M.469); Nordic Satellite Distribution (Case IV/M.490); RTL/Veronica/Endemol (Case IV/M.553).

These cases had in common considerable vertical elements involving broadcasters with content and/or infrastructure providers.
However, there has been a shift in this domain. The Commission seems to have evolved from a position (1994-98) of willingness to secure platform competition as an overriding concern to a more flexible position open to clear transactions in this field subject or not to commitments.

General trend in EU merger control as from 1998 towards approval of notified transactions in the broadcasting/telecoms sector (involving various platforms) - many of which upon the condition that participating entities would respect the undertakings they proposed to the Commission in order to eliminate the anticompetitive concerns that resulted from the notified deal.

Until the end of 2014 and considering the NACE code the Commission has approximately adopted since May 1998 (date of the last in a string of prohibited decisions) 29 decisions subject to commitments in the information and communications sector (20 under article 6(1) (b) and 9 under article 8(2) of the EU Merger Regulation.
A somehow paradigmic exemple of this may be found in the Vivendi/Canal+/Seagram decision (Case COMP/M.2050) in which the Commission, despite various competitive concerns on high levels of MARKET POWER (e.g. (a) creation of a company with the world’s largest film library; (b) creation of the second largest library of TV programming in the EEA and of the first acquirer of output deals signed with the US studios; (c) Likelihood that Canal+ would have as a result of the concentration exclusive access to Vivendi’s movie rights) approved the concentration on the basis of a mix of behavioural and structural commitments - e.g. Vivendi undertaking to divest its entire stake in BSkyB and not to Grant to Canal+ the first-window rights covering more than 50% of Universal’s production, leaving the remaining 50% to other operators.
It may be disputed however whether this mixed-flexible approach will always work towards ensuring effective competition.

A shift from platform competition to some form of regulated market concentration - the Commission seems to have adopted an approach which “heralds a new era of realistical appraisal of the underlying financial conditions in which the sector operates” (see Alexiades and Cole, “Revisiting Competition Law and Regulatory Analyses of Consolidations in the Communications Sector”, in Financier Worldwide’s Industry Sector Review: Technology, media and Telecommunications Report (2004), 14.
Some key observations on REMEDIES:

- In mergers usually the Commission prioritizes STRUCTURAL to BEHAVIORAL commitments. However, as regards recent track-record of merger control decisions in broadcasting/platforms/communications the Commission seems to be approving operations subject to both STRUCTURAL and BEHAVIORAL undertakings - which implies risks...
Some particular hurdles in this field:

Traditionally, competition law considers market power to be a basis for potential antitrust liability, especially in the merger context. Accordingly, market definition remains a key way that authorities around the world undertake a market power inquiry. However, in some high tech markets - involving communications platforms - market definition is not always clear. Indeed, traditional measures like market share may not be appropriate measurements in analysing a given market.
On substantive issues, many of the same concerns that mergers in the high tech sector raise also arise in dominance cases. As underlined in various recent analyses and commentaries, competition authorities should review facts carefully and understand particular markets before intervening bearing in mind that all high tech markets (i) may not have significant network effects that impact competition, (ii) may not have traditional defined markets, and (iii) may not justify structural presumptions of significant market share leading to market power - all suggest that competition authorities should be careful in identifying potential anticompetitive conduct and crafting appropriate remedies.
As emphasized by various commentators (e.g. Harry First - “Netscape is Dead - Remedy Lessons from the Microsoft Litigation”, in C&R, Year 1, Nº 1, 2010, p. 319), “In carrying out any remedies in dominant firm cases, enforcers and courts should (...) be cautious, but they need not be timid. As an examination of the range of remedies imposed in the Microsoft litigation shows, any remedy in a dominant firm case presents unknowns (...). Enforcers need to evaluate the effectiveness of remedies. The evaluative process requires a definition of goals and the articulation of benchmarks for measuring progress and success (or lack of it). Absent this evaluative process, remedies will continue to be haphazard and we will learn little from past efforts”.

I would argue that in an appreciable number of cases involving dominant platforms this evaluation involves too many hurdles and therefore in a number of situations ex ante regulatory solutions are required.....