



JEAN MONNET CHAIR IN DIGITAL TRANSFORMATION AND AI POLICY

DIGITAL ECONOMY AND DATA STRATEGY

Course Market Law and Regulation a.y. 2022-2023

Course convenor: Professor Valeria Falce (Valeria.Falce@unier.it)

Module 3.

An European Strategy for data: Competition in the Media Industry

Introduction and Overview

Competition in the Media Industry: Law and Cases

- Sport:
 - Access to sport rights
 - Joint selling
 - Distribution on new media
- Music
 - Digital licensing
 - CISAC case study
 - Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA
- Movies
 - Windows of exploitation
 - India sector inquiry case study
- Broadcasting:
 - Access to sport and movie rights
 - The UK approach
- What competition policy for digital markets?
 - EU 2019 Report
 - OECD Reports

Audiovisual Entertainment

TV

Home Entertainment

Cinema

Sport

Movies (US and non-US)

Other TV / Home Entertainment Content

Pre-produced (tape sales)

Commissioned

Factual

Non-scripted

Scripted / TV series

Upstream Level (Content Suppliers)

W/Sale Level

TV Channel Suppliers

(Direct Supply)

Wholesale distributors

Theatrical distributors

Vertically integrated distributors

Broadcasters / OTT Players

FTA Model

Cable

DTH

DTH

Pay Model

OTT

Cable

DTH

DTH

Linear

S-VOD

T-VOD

Digital Retailers / EST (e.g. Apple TV)

'Bricks and Mortar' Retailers

Exhibitor (Cinemas / Theatres)

Retail Level

VIEWERS

Competition Law Background: Three pillars

1	Anti-competitive agreements	Prohibition of anti-competitive agreements or coordinated conduct between independent companies (unless the conditions for an exemption are met). This includes “cartels”
2	Abuse of dominant / monopoly position	Prohibits abusive conducts by dominant companies or companies with substantial (degree of) market power in any particular “relevant market”
	Merger control	

- All three pillars are designed to preserve effective competition to the benefit of customers/consumers
- All three pillars require a sound definition of the affected market
- Media industry under scrutiny and risks of bad precedent

Competition, the relevant market and competitors

What is competition?

Competition encourages companies to offer consumers goods and services at the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.

What is the relevant market?

This is the market that combines the product market and the geographic market, defined as follows:

- a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

What is a competitor?

Other businesses that operate or could potentially operate in the same relevant market

Market Definition in the Media Industry

- Not an end in itself, but an analytical tool to help identify competitive constraints:
 - is the hypothetical monopolist test (SSNIP test) reliable?
- Features of the media and tech industries that have attracted scrutiny:
 - Economies of scale and value-based pricing
 - Inter-related markets (two-sided markets)
 - Network effects
 - Complex supply chain involving a number of stages of production/exploitation
 - Zero-pricing of online services (search, social media)
 - Economies of scale
 - Market tipping
 - Rapid change and convergence

(2002 and 2005 EC Market Definition Reports in the Media Industry)

Historical Market Definitions in the Media Industry: Broadcasting

- Wholesale (upstream) broadcasting markets:
 - Content based definitions (sport; premium movies; other TV programmes; US/European)
 - Distinct markets according to movie windows (PPV/VOD; first pay; second pay)
 - Distinction between football and other sport events
- Retail broadcasting markets:
 - Pay TV and Free TV
 - No distinct markets according to the methods of transmission (satellite, cable, DTT)
 - DVDs, PPV/VOD -vs- Pay TV
 - all-TV?

Historical Market Definitions in the Media Industry: Music

- Recording and distribution of music:
 - Content based definitions (different genres? compilations?) or all music?
- Music publishing:
 - Distinct markets according to the exploitation of different categories of rights?
- Online music:
 - Retail market for online music delivery (streaming/downloading)
 - Wholesale market for the granting of licences for online music
 - Separate market from traditional CDs?

Market Definition in the Media Industry: Fast-forward to the digital present

Challenges for competition analysis in the current media industry:

- Have the Competition Authorities recognised the impact of changes in distribution and consumption of media content in an all-media marketplace?
- What is the competitive impact of the internet on content distribution (on-demand catch-up TV, simulcasting, legitimate licensing, piracy), advertising, newspapers, publishing?
- Is the competition process sufficiently streamlined to respond to the rapidly changing digital environment?
- Are the merger tools capable of assessing competitive constraints between the internet and traditional media?
- What is the evidence needed to assess current competitive constraint in the digital world?

Market Definition in the Media Industry: Fast-forward to the digital present

Challenges for competition analysis in the current media industry:

- Are market shares reliable indicators of market power in highly differentiated media markets?
- Do existing rules take into account the many new channels to market and the array of consumer offerings facilitated by the digital environment?
- Are existing (narrow) market definitions based on past inquiries still relevant, binding and/or appropriate for a digital world where product boundaries and company sectors are becoming blurred?
- Does competition policy reflect the international nature of the creative industries and allow world leading companies to emerge and compete effectively on the merits?

Investigations in the Media Industry:

Key Issues Investigated:

- Joint selling of rights to content
- Access to content rights (sport rights; movie rights; “must have” content)
- Link-up of upstream content and downstream distribution platforms
- Duration of exclusivity contracts
- Access to third party platforms
- Joint Buying of Content
- Merger conditions
- Impact of online distribution on digital platforms

Competition law issues under spotlight in media sector

The media sector has received significant attention from competition regulators in recent years. In particular, the focus has been on:

- Sports rights – significant competition and regulatory interventions
 - Tender rules for national leagues (no single buyer rule)
- Access to premium / “must have” content
 - ‘Wholesale must offer’ of Sky Sports premium channels in the UK and Italy
- Territorial exclusivity/geoblocking
 - EC’s on-going movies Pay-TV investigation
- Platform competition/dominance
 - Example: Canal + ; Telefonica; Sky UK
- Vertical integration and foreclosure
 - E.g. in recent reviews of *Fox/Sky* and *Comcast/Sky*, since Sky owns both the distribution platform and upstream channels and content , the EC considered allegations of input foreclosure (withholding content from third party platforms) and customer foreclosure (precluding access to the platform by third party channels)
- Joint ventures
 - Endemol Shine joint venture was also scrutinised by antitrust regulators and in particular it met the thresholds for European Commission Merger Regulation review.

As well as antitrust and regulatory interventions there have also been merger remedies, undertakings (e.g., Sky Italia Stream/Tele+, Canal+, Telefonica)

Access to sport rights

Joint selling of football rights

- **UEFA (2003):**
 - Article 81(3) exemption until 31 July 2009
- **German Football League (2005):**
 - commitments in force until 30 June 2009
 - BKA investigation 2016: no single buyer
- **UK FA Premier League (2006):**
 - Commitments
 - OFCOM investigation into number of live matches (2014-16)
- **Italy (2009-2010):**
 - commitments until 2012
 - Investigation for the sale of 2015/18 rights

Joint selling of football rights

Assessment of Joint Selling under EU Competition law

- Article 101 TFEU: prohibits Agreements between undertakings that have object/effect of restricting competition on the market
- Article 101(3) TFEU: agreements may be exempted if (1) contribute to improving the production or distribution of goods; (2) restriction is proportionate; (3) restriction does not eliminate competition; (4) consumers receive a fair share of the benefit

Joint selling of football rights: Summary of key points

- Live football events a separate market (to the extent they are a key driver for TV broadcasters)
- Focus on horizontal (upstream) restrictions and potential foreclosure impact downstream
- Tender process – transparent and non-discriminatory
- No single buyer rule
- Limitations on scale: Unbundled packages with interesting matches to allow bids
- Inter-platform versus intra-platform competition
- Shorter duration of exclusivity to ensure periodic market opening
- Minimise unexploited rights
- Availability of new media rights (internet and mobile)

Online music licensing

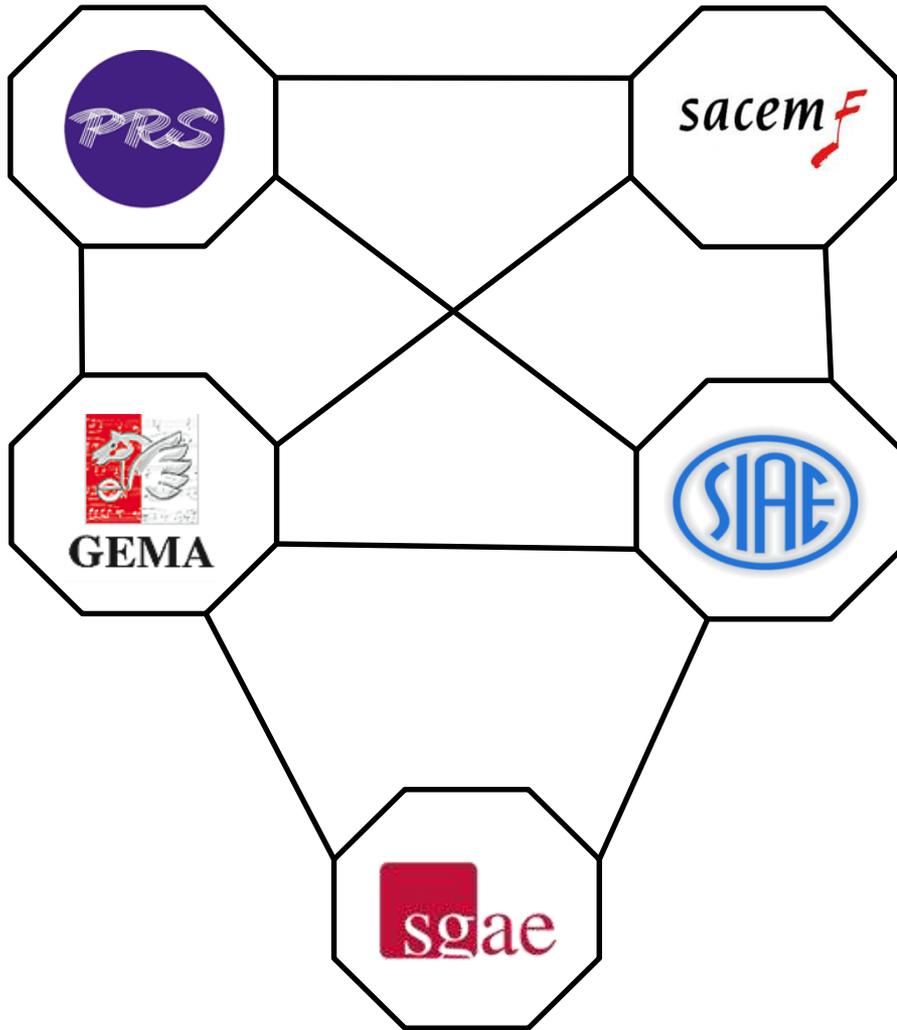
Online Music Rights: Key Issues

- Focus of EC competition cases and policy interventions to facilitate:
 - one-stop shop
 - multi-territorial licences
 - multi-repertoire licences
 - competition among collecting societies
 - competition among right holders

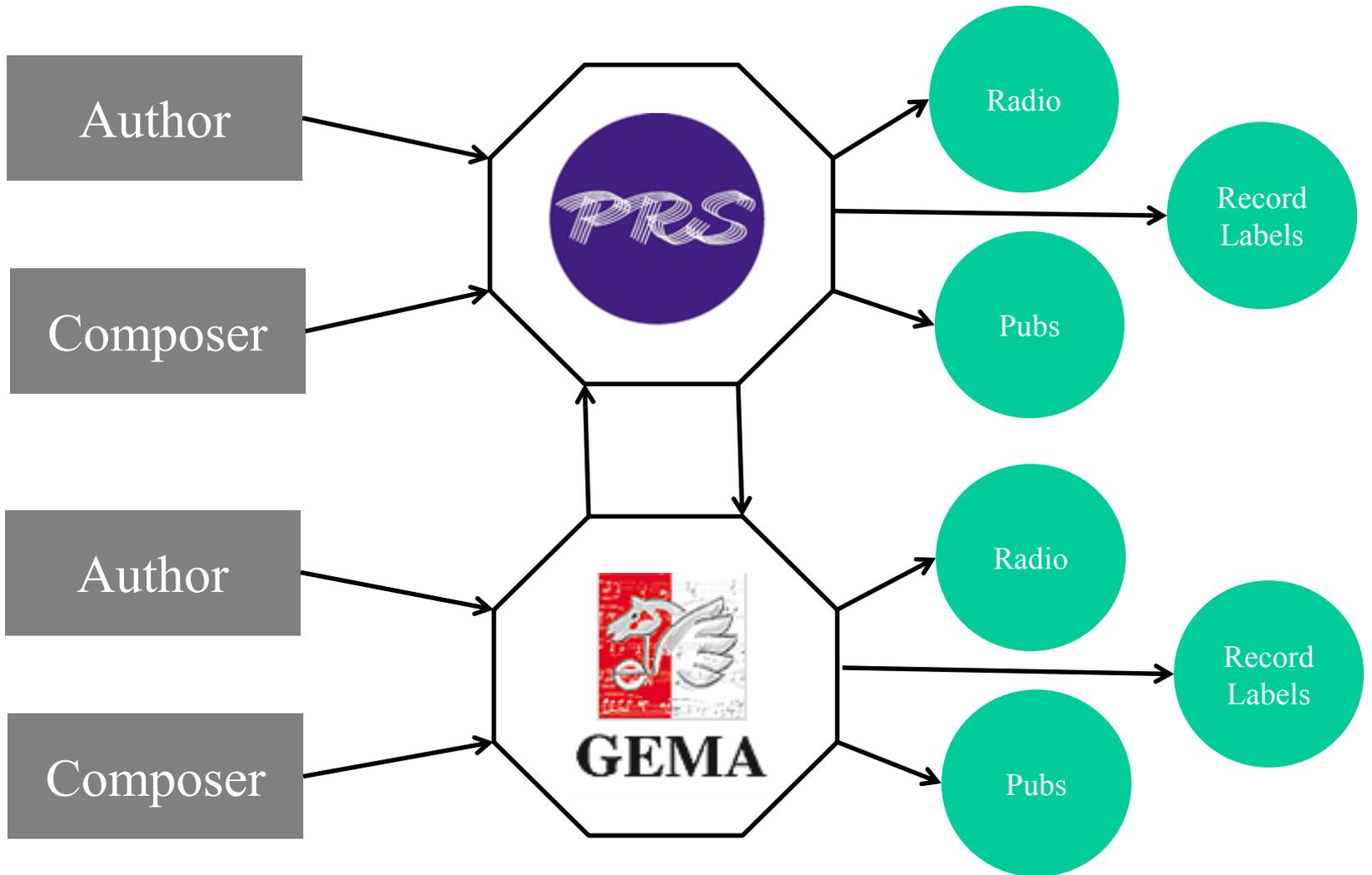
Online Music Rights: case study CISAC

International Confederation of Societies of Authors and Composers:
represents 219 member societies in 115 countries

- CISAC Model Contract:
 - Reciprocal representation agreements whereby collecting societies give each other the right to grant licences for any **public performance** of musical works of their respective members
 - Approved for the first time in 1936 and applies to all categories of exploitation of musical works requiring a **public performance licence**
 - Each European collecting society has signed reciprocal representation agreements and, therefore, is entitled to license, and collect royalties for, not only the repertoire of its own members, but also the repertoire of all associated collecting societies
 - Meant to apply outside domestic territory and to new technologies



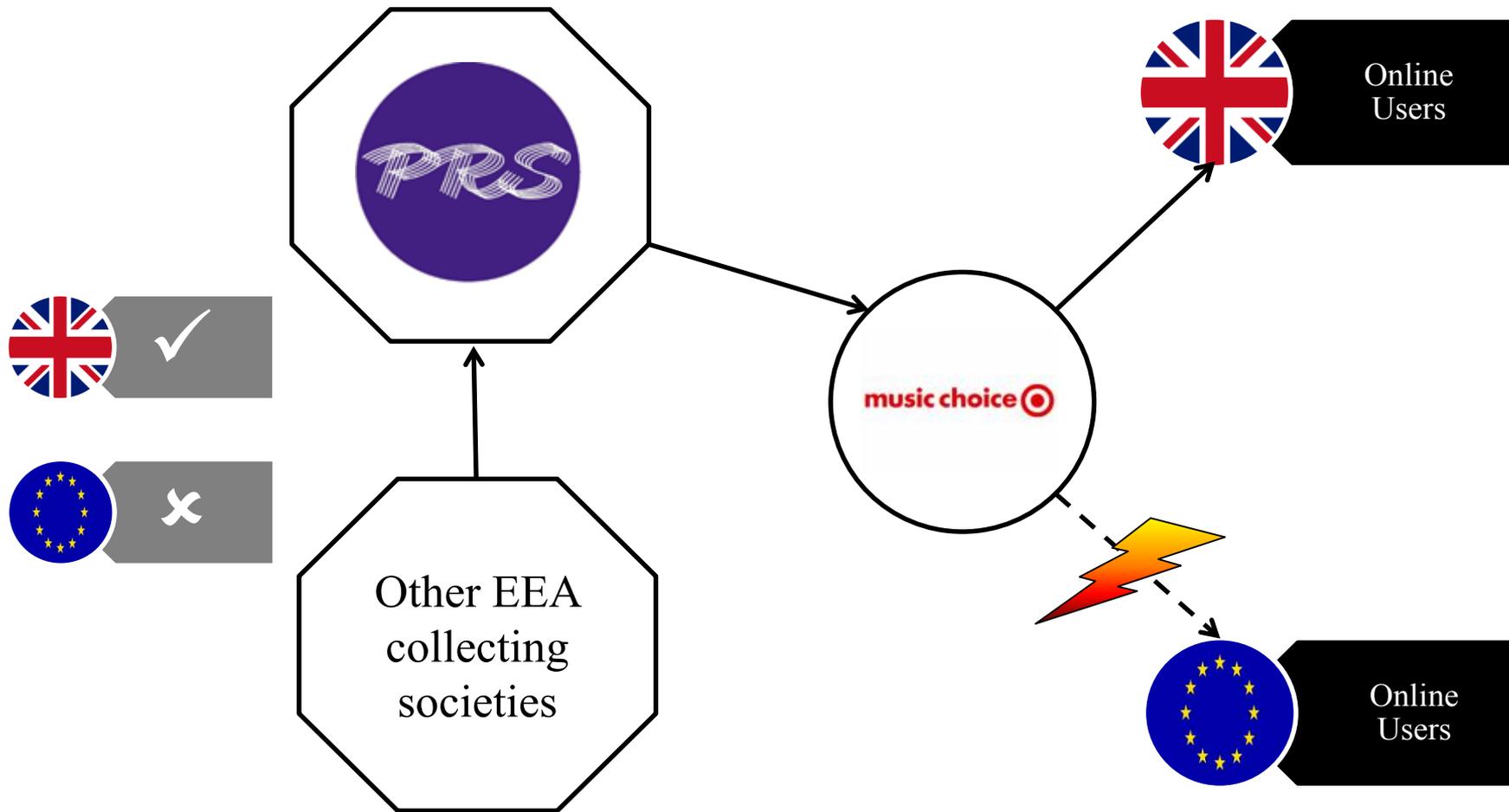
- Bilateral agreements and reciprocal representation
- Societies authorise each other to license the other's repertoire



Online Music Rights: CISAC

CISAC Model Contract – Relevant Clauses:

- Membership clause (applied by 23 collecting societies):
 - Prevents an author from choosing or moving to another collecting society
- Territorial clauses:
 - Prevent a collecting society from offering licences to commercial users outside their domestic territory
 - Include an exclusivity clause by which a collecting society authorises another collecting society to administer its repertoire on a given territory on an exclusive basis (absolute territorial protection)
 - A concerted practice among all collecting societies resulting in a strict segmentation of the market on a national basis



Online Music Rights: case study CISAC

- Complaints by RTL (2000) and Music Choice (2003)
 - Statement of Objections (2006)
 - Commitments offered by CISAC and 18 collecting societies (2007) but market testing comments were negative
 - Prohibition Decision (2008)
- RTL and Music Choice need a one-stop shop to offer a pan-Euro service but can't receive a licence which covers several countries and have to negotiate with each individual collecting society.
- The Decision is in line with the Commission case-law: it first applied the antitrust rules (for abuse of a dominant market position), to a collecting society in 1971 to GEMA (German collecting society) and subsequently did so in 1981 (GVL). These cases concerned membership restrictions that led to discrimination of authors on the basis of their nationality or other abuses stemming from the scope and length of the membership contract.

Online Music Rights: CISAC Prohibition Decision

- **Membership restrictions** prevent authors from choosing which collecting society they want to represent them:
 - 23 collecting societies had membership restriction clauses in some of their contracts.
- **Territorial exclusivity** clause prevents a collecting society from offering licences to commercial users outside a given territory:
 - restricts competition among collecting societies and forces users to deal with a monopoly provider in each territory
 - consistent with EU's Court of Justice case-law in 1989 (*Tournier and Lucazeau* judgments).
 - 17 collecting societies had it in some of their contracts and the exclusivity is *de facto* present in all collecting societies' domestic territory.

Online Music Rights: CISAC Prohibition Decision

- Scope of copyright exploitation: online (internet), satellite and cable retransmission rights.
- **Concerted practice** between collecting societies according to which the collecting societies limit their mandates to the domestic territory of the other collecting societies:
 - the result is a **de facto exclusivity** for the granting of licences which cover the repertoire of more than one collecting society and a strict segmentation of the market on a national basis.
 - consistent with the EU Court of Justice case-law in the *Tournier* (1989) and *Lucazeau* (1987) judgments that a concerted practice which limits the right to grant licences to domestic territories is illegal.

Online Music Rights: CISAC decision annulled by the Court of Justice (12 April, 2013)

- Only the Commission's decision in respect of the finding of the concerted practice has been annulled.
- The General Court held that the Commission has not provided sufficient evidence.
- The Commission, first, did not have documents proving the existence of concertation between the collecting societies as regards the territorial scope of the mandates which they grant each other.
- Secondly, the Commission did not render implausible the applicants' explanation that the parallel conduct of the collecting societies at issue was not the result of concertation, but rather of the need to fight effectively against the unauthorised use of musical works.

Online Music Rights:

Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

The JV provides copyright holders with a number of services:

- **Licensing music to online platforms** for the combined music repertoire of PRSfM, STIM and GEMA on a multi-territorial basis (currently online platforms need separate licences)
- **Copyright administration services** (i.e. collection and processing of royalties from online platforms and provision of data base services) to collecting societies and “Option 3 music publishers” (music publishers that have withdrawn the mechanical rights to their Anglo-American repertoire from collecting societies and have decided to license these rights directly)
- https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5204

Online Music Rights:

Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

The Commission focussed its investigation on the impact of the joint venture on competition in the market for copyright administration services.

- As regards copyright administration services provided to 'Option 3 publishers', the Commission had concerns that the creation of the joint venture would make it more difficult for new players to enter the market or for existing ones to expand.
- For example, the joint venture could force 'Option 3 publishers' to use only its services for copyright administration.

Online Music Rights:

Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

- 'Option 3 publishers' typically license performing rights together with their mechanical rights by virtue of a mandate granted to them by PRSfM.
- Following the creation of the joint venture, PRSfM could have an increased incentive to push 'Option 3 publishers' or their service providers who are not yet customers of the joint venture to purchase copyright administration services from the joint venture. The reason for this is that PRSfM controls the performing rights that match the mechanical rights that 'Option 3 publishers' have withdrawn from the collecting societies system and license directly.

Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

- The copyright administration services that the joint venture will offer to other collecting societies are a new product because they relate to multi-territorial licences. So far, collecting societies have only administered each other's repertoires for a single country, namely the home country of the collecting society. Some collecting societies have just started, or are considering, cooperating to provide copyright administration services to other, smaller collecting societies.
- The Commission was concerned that the creation of the joint venture would prevent some of the existing cooperation initiatives from succeeding or new cooperation initiatives from emerging.
- The joint venture could bundle the different types of copyright administration services it offers and make it difficult for customers of its database to take their data to a competitor. In addition, the joint venture could require its customers not to source their copyright administration services from any other third party. This would lead to less competition and potentially higher prices for customers.

Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

- The Commission also investigated the impact of the joint venture on competition in the market for online licensing. Specifically, it assessed whether the combination of the repertoires of PRSfM, STIM and GEMA into the new product that the joint venture will license to online platforms would allow it to charge higher royalty rates than those each of the parties would obtain if they licensed their repertoires separately.
- The Commission analysed the contractual terms between online platforms and collecting societies and the royalties paid by online platforms, as well as information provided by market participants and documentary evidence from the parties. Based on this analysis, the Commission found that in the present market situation, collecting societies licensing larger repertoires on a multi-territorial basis are typically not able to command higher royalty rates than those licensing smaller repertoires on a multi-territorial basis. The Commission therefore concluded that the creation of the joint venture was unlikely to lead to higher royalty rates for online platforms.

Online Music Rights:

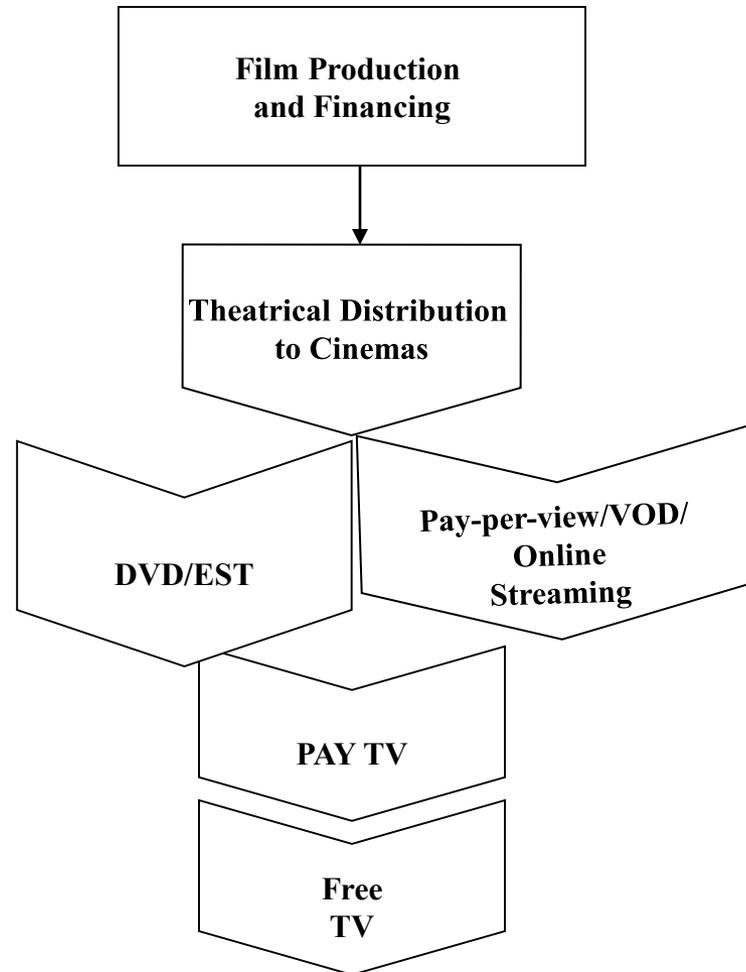
Joint venture for cross-border licensing of online music between PRSfM, STIM, GEMA (2015)

Commitments:

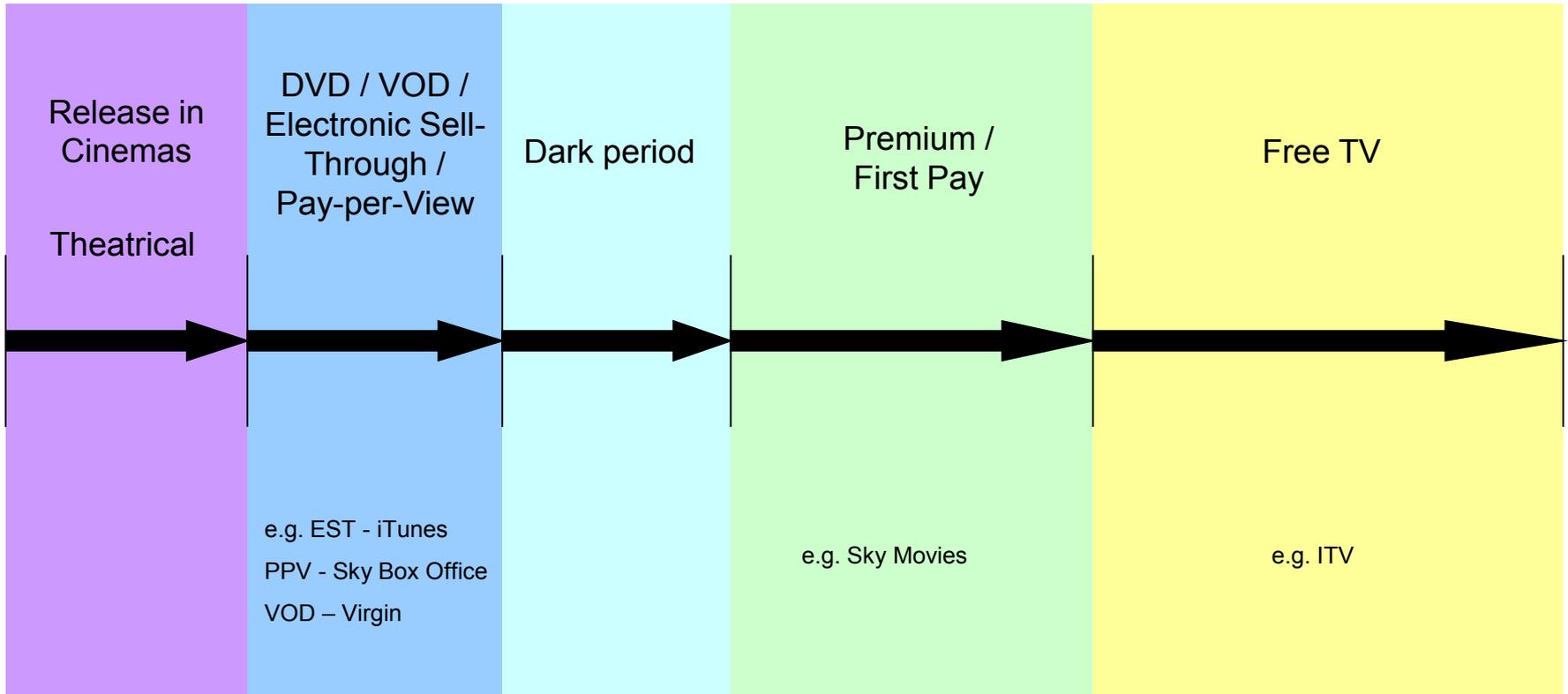
- PRSfM won't use its control over performing rights that it manages to force "Option 3" publishers to purchase copyright administration services from the JV.
- The JV will offer key copyright administration services to other collecting societies on fair, reasonable and non-discriminatory terms and facilitate switching to other providers of database services
- The JV will not enter into exclusive contracts with its customers for copyright administration services other than for database services

Movies

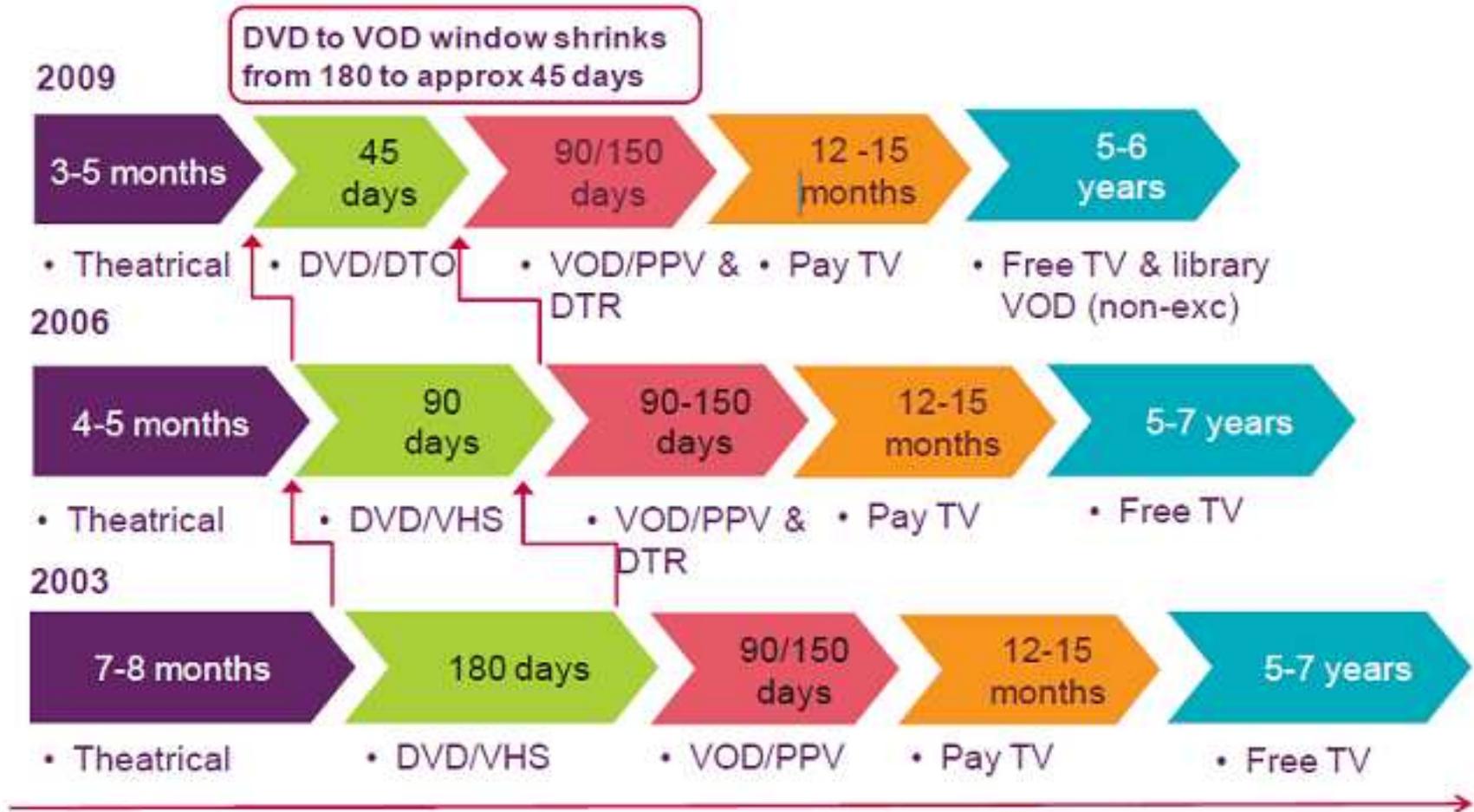
Media Industry Background: Film Distribution Cycle



New Feature Films Windows



New Feature Films Windows



Source: Ofcom, Industry sources, Screen Digest (windows are indicative and change on a title-by-title basis)

Average release windows have been shrinking

In 2019, 82% OF FILMS WERE AVAILABLE ON TVOD LESS THAN 5 MONTHS AFTER THE CINEMA RELEASE

For all markets analysed, the average window between the release in cinemas and the release in TVOD of the more successful films was 19 weeks, i.e. about 4.5 months.

On average, retail, i.e. the definitive sale of a film, benefits from an earlier window. But the gap with rental, i.e. the rental of the film for a definite period of time, is of one week only.

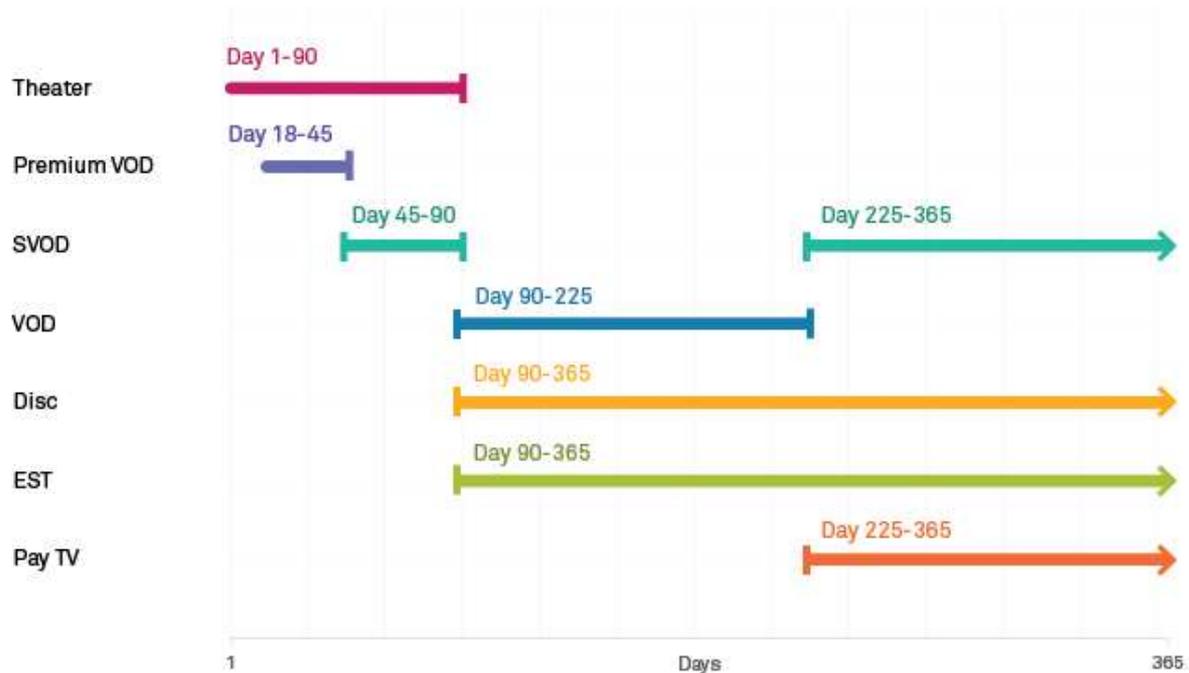
The majority of the more successful films were released between 4 and 5 months after the theatrical release. Only 18% of the more successful films were released more than 5 months after the theatrical release.

European Observatory Report:

<https://rm.coe.int/the-theatrical-tvod-window-a-sample-analysis/1680951884>

Evolving film release windows post pandemic

Evolving film release windows - year one



As of July 2021.
Source: Industry information
Kagan, a media research group within the TMT offering of S&P Global Market Intelligence.
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Movie making value chain

Movie Distribution @ 30,000 Ft.

- Value Chain of Movie Making



- Process of Movie Making



Movie features relevant for competition law

- “experience goods”
- Quality not reflected in price
- High fixed and sunk costs
- Success is unpredictable
- Profitability depends on risk spread over portfolio of films (of ever 10 films, 2 are expected to earn high revenues, 3 to cover the costs, and the others lose money)
- Market shares are volatile and change over time
- No single studio has been found to be “dominant”

See OECD “Digital Content and Evolution of Film and Video Industries” (2008) and “Competition Policy and Film Distribution” (1995)

Case study on film distribution: India (2022)

Key trends

- ***Characteristics of film distribution value chain***
 - The market for films demonstrates an interplay between competition and monopoly. To elucidate, a film has the legal status of a copyright, and in that sense, it is regarded as a monopoly. However, it is grouped with other films, and together, they form an industry or field of economic activity which is competitive.
- ***Risk mitigation and recoupment of investment***
 - Industry stakeholders focus on models that allow them to maximise revenues. The following models have been found to be prevalent in the industry such as
 - i) dynamic pricing, where the pricing of the film ticket is higher in the first week than the subsequent weeks;
 - ii) micro-scheduling of films, where studios coordinate release dates to avoid too many competing movies from being released at the same time;
 - iii) holdback of films, a specific clause in an agreement between a producer and an exhibitor for exclusive exploitation rights;
 - and iv) exclusivity deals, a practice by way of which production houses undertake deals with exhibitors to show content exclusively on their platform for a fixed period of time.

Case study on film distribution: India (2022)

Bargaining Power Imbalance Between Multiplexes and Producers / Distributors

- Downstream players such as multiplexes, have an upper hand in bargaining power due to a supply-demand mismatch.
- The upstream players such as producers, are required to incur the expenses for all in-theatre promotions and have to subsidise the cost for the theatre owners for the use of exhibition equipment.
- Revenue sharing arrangements such as sliding scale arrangements are undertaken between the multiplexes and the producers / distributors.

Recommendations for self regulation

- Standard contracts should be avoided and superseded with tailored contracts, depending upon the content-type, the scale, and other such requirements of the parties involved.
- Aggregate agreements should be preferred over existing sliding scale arrangements, where multiplexes and producers can share the aggregate revenues generated by a film based on a pre-negotiated percentage split.
- Fair and reasonable terms in relation to promotions, including sharing of such costs, should be adopted.

Case study on film distribution: India (2022)

Lack of Transparency in Box Office Revenue Collections

- No uniform model has been in use, for the purposes of tracking and recording box office collections. There have been reports of producers receiving box-office numbers through handwritten faxes or even via calls.
- Information asymmetry in relation to the revenue sharing agreements between the producers and single screen owners leads to reduced transparency for calculating, storing, and releasing of box office collection data.
- India has not shifted to the standards applicable globally, which would allow the film industry to receive accurate box-office figures.

Recommendations for self regulation

- Adoption of uniform box office monitoring systems to generate, record, and maintain ticketing logs and reports, and the data collected by such a system should not be alterable by any stakeholder.
- Producers should invest in independent auditors who would ensure that these monitoring systems are working properly.

Case study on film distribution: India (2022)

The potential antitrust concerns arising out of digital cinema: Virtual Print Fee (VPF), the cause for all anticompetitive activities

- Imposition of VPF has been controversial. It is a cost levied on the producers / distributors to assist and subsidise the theatres, in being able to convert their analog projectors to digital ones.
- Producers have argued that the imposition of VPF leads to anticompetitive activities by way of (i) acting as a barrier to entry as it leads to a significant increase in the cost of releasing a movie into theatres; and (ii) the exhibitors disallowing the release of a movie if VPF is not paid.
- VPFs impose exorbitant costs on small producers, as there is no provision for a sunset clause with respect to the imposition of VPF.

Recommendations for self regulation

- Consensus should be achieved towards introducing a sunset date for the levy of VPF.
- Imposition of VPF should be phased out. VPF paid to the multiplexes should be phased out on priority followed by single-screen theatres.
- Until a sunset period is decided, VPF charges should be decided by the Digital Cinema Equipment (DCE) providers and the producers in a mutually acceptable manner, through consultations.

Case study on film distribution: India (2022)

Anticompetitive conduct by associations

- Anti-competitive conduct by associations constituted majority of the cases filed before the CCI. Such conduct includes the mandatory requirement of dealing with only association members, boycotting, and banning of films, imposition of restrictive holdback periods, etc.

Recommendations for self regulation

- Associations must avoid bans and boycotts and must not prohibit its members from working with non-members.
- Associations should avoid other conduct that has previously been found to be anti-competitive by the CCI.
- Associations must consider utilising alternative dispute resolution channels such as mediation.
- Associations should conduct events to educate their members about the significance of market competition.

Case study on film distribution: India (2022)

Exclusive dealing in digital cinema

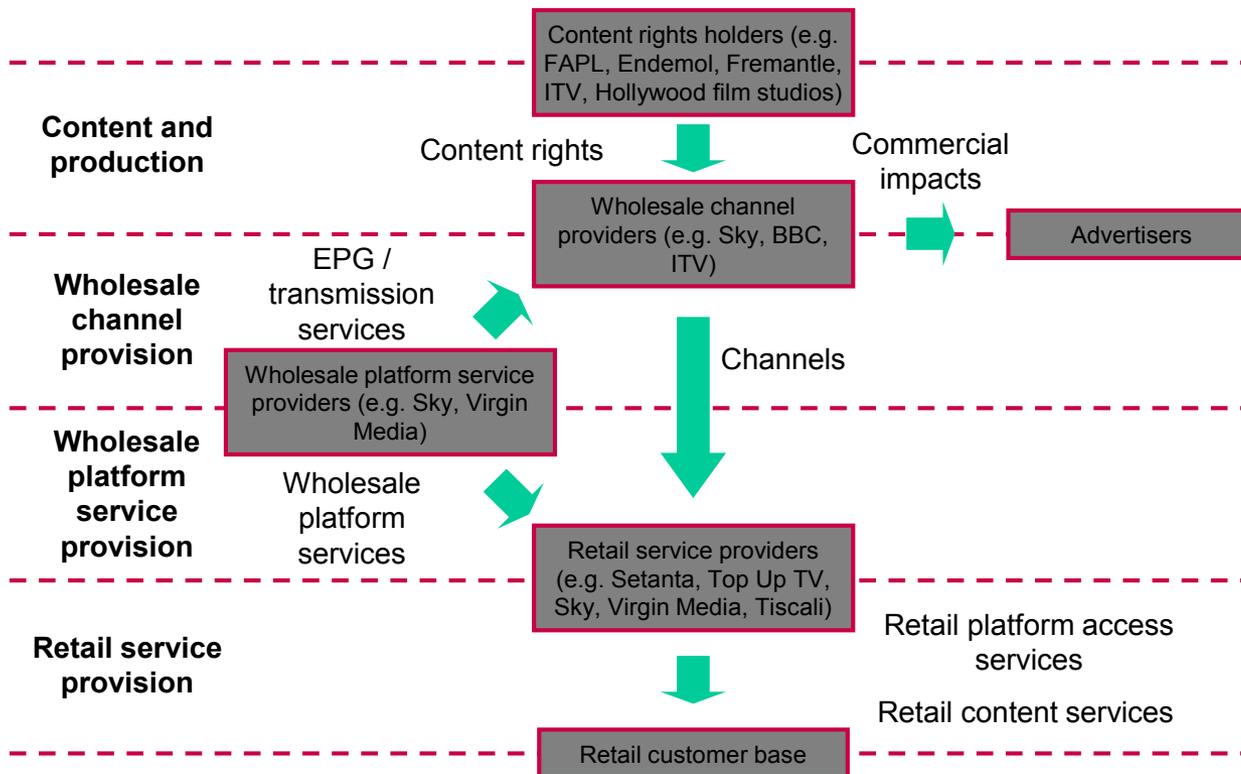
- Most theatres have been found to have undertaken exclusive deals with DCE service providers, leading to tying and bundling of services.
- Such tying and bundling has the ability to restrict the engagement of third-party service providers and amounts to causing restraint of trade and can adversely affect competition.

Recommendations for self regulation

- Any sort of leveraging by way of agreements between DCE service providers should not act as entry barriers for newer entities and other service providers.
- Long-term agreements with one-sided clauses should be avoided.

Broadcasting: The UK approach

Media Industry Background: Value Chain (source: OFCOM)



OFCOM Pay TV market investigation (2007)

Strategic review prompted by submission by BT, Setanta, Top Up TV and Virgin Media.

Observed characteristics of the pay TV market

Content aggregation

- Content and production:
 - Collective selling by owners of sport rights
 - Selling on a staggered basis and for a fixed duration of key content rights
- Wholesale channel provision:
 - Aggregation of content into wholesale channels and bouquet of channels
- Retail service provision:
 - Retail bundling of wholesale basic entertainment channels into tiered basic entertainment packs
 - Buy-through for bundling basic and premium content
 - Mixed bundling of sports and movies to encourage purchase of both forms of premium content

OFCOM Pay TV market investigation (2007)

Observed characteristics of the pay TV market

Production costs of content and downstream pricing

- Content and production:
 - Production costs are high but do not scale with the number of viewers
 - Content rights are typically sold for a fixed fee and on an exclusive cross-platform basis
- Wholesale channel provision:
 - Channels are usually licensed for a per subscriber fee, often with platform-specific exclusivity clauses
- Retail service provision:
 - Bundling and buy-through provide mechanisms for price discrimination among consumers with widely varying content preferences

OFCOM Pay TV market investigation (2007)

Operation of the market

- Content aggregation: areas of concern in relation to potential for leverage:
 - Vertical relationship between wholesalers and retailers or premium content: level of competition depends on what premium content is made available to retailers by wholesalers and on what basis
 - Horizontal relationship between retailing of premium content and retailing of basic content
- Short-run operation of the market: access to premium content (incentives of wholesale channel providers to license content to retailers on other platforms)
- Short-run operation of the market: basic content (buy-through)
- Long-run operation of the market: access to premium content (barriers to entry by new platforms)

OFCOM Pay TV market investigation (2007)

Summary of possible concerns:

- There may be significant barriers to entry into the market for premium wholesale channels.
- A vertically integrated incumbent may supply content to established retail competitors, but may have ability and incentive to reduce quality.
- A vertically integrated incumbent may have ability and incentive to foreclose potential new retailers by denying them content.
- The prevalence of vertical integration between retail and platform operations may cause this problem to extend to foreclosing possible development of new platforms.

OFCOM Pay TV Market Investigation (2007)

BSkyB' s Response

- Context in which Pay-TV services are provided: competition between pay-TV and FTA; dynamic and innovative nature of the sector.
- Lack of evidence of consumer harm.
- No downstream foreclosure: Sky has strong incentives to make its channels available on other platforms.
- No upstream foreclosure: access to DTH platform is regulated and other broadcasters can bid and win content.

OFCOM Pay TV second consultation (2008)

- Desirable consumer outcomes
- Importance of premium content
- Market structure and market definition
- Content aggregation and market power
- Competition issues related to core premium content
- Effects on consumers
- Remedies

OFCOM Pay TV second consultation (2008)

Desirable consumer outcomes

- Content that consumers value highly is available on all platforms
- Consumers are able to choose from a broad range of content bundles
- Different platforms are able to innovate in a manner that plays to the strengths of the particular distribution technology used by those platforms
- A fair deal in terms of pricing (but it is difficult to determine an appropriate price for content)

OFCOM Pay TV second consultation (2008)

Importance of premium content

- Consumers' choice of pay TV retailer is primarily influenced by the content bundles which are available from different retailers
- Focus on content which is likely to be the most effective in driving Pay TV subscriptions
- Broad audience appeal and high degree of exclusivity to Pay TV:
 - Live top-flight sports
 - First-run Hollywood movies (but impact of internet downloads?)

OFCOM Pay TV second consultation (2008)

Market structure and market definition

- Focus on wholesale markets for premium sports and premium movies:
 - Narrow economic market for wholesale of premium sports channels (live FAPL matches)
 - Narrow economic market for the wholesale supply of channels which include movies from the major six Hollywood studios shown in the first Pay TV window

OFCOM Pay TV second consultation (2008)

Content aggregation and market power

- Content aggregation and price discrimination are not necessarily a source of concern in and of themselves
- Content aggregation is necessary to assemble a viable Pay TV proposition
- Price discrimination allows content to be distributed widely to consumers, while still allowing the recovery of content production and distribution costs
- Concerns arise where the market power can be leveraged into other markets.
- Sky has market power in the wholesale of Core Premium Sports and Core Premium Movie channels.

OFCOM Pay TV second consultation (2008)

Competition issues related to core premium content

- Market power gives Sky the ability to affect competition:
 - Incentive to restrict the supply of its Core Premium channels to other retailers and other platforms to favour its own platform and its own retail business (refusal to supply/ unfavourable terms)
 - Possible high-wholesale prices

Effects on consumers

- Reduction in consumer choice and retail innovation
- Reduction in platform innovation
- Risk that prices to consumers will be high

OFCOM Pay TV second consultation (2008)

Remedies: approaches

- Take no further action
- Intervene to eliminate market power at source:
 - change the way in which content rights are bought and sold
- Intervene to eliminate the incentives to exploit upstream market power in downstream markets:
 - structural separation between wholesale and retail
- Intervene to reduce the ability to act on these incentives:
 - wholesale must-offer obligation on regulated terms

OFCOM Pay TV second consultation (2008)

Remedies: proposal

- Wholesale must-offer obligation on regulated terms under sectoral competition powers
- Ex-ante pricing

OFCOM Pay TV second consultation (2008)

BSkyB Response

- Market is working well for consumers: substantial innovation due to significant competitive pressures at retail level PVRs, VOD, HD, choice of content and platforms.
- OFCOM's recourse to sectoral powers is unsound and unjustified.
- OFCOM has failed to define the downstream, retail-level market.
- BSkyB's channels are not indispensable to retailers (being "important" is not enough).
- BSkyB has no incentive to restrict supply (wide distribution can increase total profits) and there is no evidence that it has restricted supply.
- No clear-cut evidence of high wholesale prices.
- Remedies are unprecedented, highly onerous and amount to confiscatory regulation.

OFCOM Pay TV Third Consultation – OFCOM's views (2008)



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- Considering action under **sectoral competition powers** – “*ensure fair and effective competition*” in provision of licensed services (s.316 CA)
- Narrow economic markets at wholesale and retail levels – importance of premium content
 - Core Premium Sports channels: live ‘top-flight’ sports programming
 - Core Premium Movie channels: first TV subscription window of movies from big 6 studios
- Sky has market power
- Competition concerns
 - restricted distribution of Core Premium Channels – Sky’s strategic incentives
 - restricted exploitation of movies SVoD rights
 - high wholesale prices \Rightarrow high prices for consumers
 - reduced platform innovation

OFCOM Pay TV Third Consultation (2008)

OFCOM' s Proposals

Wholesale must-offer obligation on Sky

- Core Premium channels: Sky Sports 1 and 2, Sky Movies (except Classics)
- HD and SD versions (and certain interactive services)
- supply to retailers on non-Sky platforms
- price control ('extended retail minus')
- reference offer on FRAND terms

OFCOM Pay TV Third Consultation (2008)

OFCOM' s Proposals

Ex-Ante Price control remedy

- support efficient entry by hypothetical large scale DTT retailer
- substantial cuts to Sky' s wholesale prices, inc. for existing customers (i.e. VM)
- range for consultation: 12 – 30% price cuts on weighted average basis

Ofcom' s view of effects on Sky

- best case – positive
- worst case – negative, but OK because only decreasing high margins, not *“loss-making territory”*

Content rights remedies – how rights for movies (SVoD) and FAPL are sold

OFCOM Pay TV Third Consultation (2008) OFCOM' s Proposals – BSkyB' s Response (2009)

- Ofcom' s recourse to its sectoral powers is unsound.
- Ofcom' s assessment of evidence is skewed and its analytical approach defective.
- “Competition issues” unfounded:
 - no strategic incentive to withhold wholesale supply
 - no restricted distribution
 - no evidence that wholesale prices high
- Consumers are well served.
- Proposed regulation is highly interventionist and unprecedented - carries real risks of consumer detriment.
- “Remedy” is unnecessary and disproportionate.
- Ofcom' s impact assessment is inadequate.

OFCOM Pay TV Statement (2010)

Ofcom's incentives theory

- Sky has enduring market power in wholesale and retail markets for pay TV packs including 'core premium sports channels' (Sky Sports 1&2)
- Pay TV retailers need wholesale access to Sky Sports 1&2 to compete effectively
- History of failed negotiations between Sky and other pay TV operators – Sky restricting wholesale supply of Sky Sports 1 & 2
- Sky acting on strategic/dynamic incentives
 - i. to protect its retail business on DTH
 - ii. to reduce risk of stronger competition for key sports rights
- Strategic incentives outweigh static incentive to supply: Sky 'leaving money on the table'

OFCOM Pay TV Statement (2010)

- **Wholesale must-offer remedy on sports:** To require that Sky Sports 1 and 2 (SD) are offered to retailers on platforms other than Sky's at wholesale prices set by OFCOM (at 23.4% below current wholesale price to cable) – conditions inserted in Sky's broadcasting licences
- **Reference to the CC on pay-tv movies**
- **Consent to Sky retailing on DTT:** To approve Sky and Arqiva's request for Sky to offer its own pay-tv services on DTT (Picnic) but conditional on a wholesale must-offer obligation on Sky Sports 1 and 2 being in place, and on any movies channel included in Picnic being offered to other digital terrestrial TV retailers

OFCOM Pay TV Statement – BSkyB’ s appeal to CAT (2010-2012)

BSkyB’ s Interim Relief application seeking suspension of the outcome of Ofcom’ s Pay TV Market investigation – Agreed Order (April 2010):

- Ofcom’ s wholesale must offer (WMO) obligation will initially apply only in respect of BT, Top-up TV and Virgin Media on DTT and cable.
- Each of BT, Top-up TV and Virgin Media would effectively pay the rate card price for Sky Sports 1 and/or Sky Sports 2, with the difference between that and the relevant WMO price paid into escrow.
- At the conclusion of the appeal, the CAT will determine the distribution of the monies held in escrow.

OFCOM Pay TV Statement – BSkyB’ s appeal to CAT (2010-2012)

BSkyB’s appeal – key grounds

- Ofcom misconstrued and misapplied its sectoral competition powers
 - retail services are neither “licensed services” nor “connected services”; imposition of WMO accordingly outside the scope of s.316 powers
 - Ofcom’s competition concerns traverse same ground as prohibitions in CA98; Ofcom should have applied same approach - failed to do so
- Sky did not act on an incentive to withhold supply
 - incentive to distribute channels widely, on satisfactory terms
 - Ofcom’s interpretation of the evidence of the commercial negotiations strongly and fundamentally disputed
 - no plausible strategic incentive to withhold
- Ofcom’s analysis re: WMO obligation is fundamentally flawed
 - impact
 - proportionality
 - calculation to set prices

OFCOM Pay TV Statement – CAT’s judgment (August 2012)

- 300 (of 345) pages devoted to forensic review of **negotiations**
- Significant number of Ofcom’s pivotal findings of fact are inconsistent with the evidence
- Ofcom misinterpreted evidence of negotiations
- Sky engaged constructively with counterparties
- Regulatory gaming much more important than Ofcom recognised
- Ofcom’s competition concerns are unfounded and Sky’s appeal must be allowed
- Not necessary to determine other grounds of appeal (but Sky acting for ordinary profit/revenue-maximising commercial motives)

OFCOM Pay TV Statement – CAT’s judgment (August 2012)

Serious criticism of Ofcom’s approach - examples:

- findings did not “*represent a full, fair and accurate reflection*” of negotiations [308]
- conclusions were “*at best of little significance and at worst positively misleading*” [397]
- “*This conclusion is plainly at odds with the facts as presented in the documents*” [310]
- findings gave “*a false picture*” [396]
- Ofcom was “*commercially naïve*” [478]
- conclusions were “*at best of little significance and at worst positively misleading*” [397]
- “*far from providing support, [the evidence] shows that a significant number of Ofcom’s pivotal findings in the Statement are wrong*” [496]

OFCOM Pay TV Statement – BT’s appeal

Court of Appeal judgment

(13 February 2014)

BT’s appeal upheld:

- The CAT erred in law by simply focusing on Ofcom’s assessment of the evidence provided by Sky and BT about their willingness to negotiate wholesale deals
- The CAT failed “to appreciate the importance of Ofcom’s conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to competition concerns.’
- The CAT had failed to deal with the appeal on its merits
- The Cat’s conclusion that the Ofcom WMO remedy must be set aside was based on an incomplete set of conclusions.
- Remittal to the CAT for further consideration, findings and conclusions.

On 30 October 2014 the Supreme Court refused permission to appeal.

On 5 November 2015 the CAT extended the 2010 order to include BT’s internet television platform YouView.

OFCOM Review of the pay-tv wholesale must-offer obligation (2014-2015)



- Ofcom review on whether regulation of the supply of key sports content remains appropriate and, if so, whether any changes are necessary.
- Assessment included three questions:
 - What constitutes key content?
 - To what extent would limited distribution of key content be likely to prejudice fair and effective competition?
 - Absent regulation, to what extent do holders of key content have incentives to limit distribution of that key content?

http://stakeholders.ofcom.org.uk/binaries/consultations/wholesale-must-offer/statement/review_of_wmo_sStatement.pdf

<http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/pay-tv/pay-tv-wholesale/>

OFCOM Review of the pay-tv wholesale must-offer obligation (2014-2015)

- A number of developments in Pay-TV since the 2010 WMO obligation:
 - Wider availability of Sky Sports
 - Existing pay-tv providers have grown
 - New providers have entered
- Live Premier League matches still stand out as the most important content for consumer subscriptions decisions in pay-tv
- Sky's strong market position means its content has the potential to impact competition
- BT's position has strengthened but currently the importance of BT Sport appears unlikely to impact competition
- Sky is currently supplying its sports channels on commercial terms outside of the WMO obligation
- On the basis of the available evidence the concerns about terms of supply were not borne out in practice
- No justification for regulation = WMO condition removed from Sky's broadcast licences

OFCOM Review of the pay-tv wholesale must-offer obligation (2016 CAT)



- In December 2016, the Competition Appeal Tribunal has rejected BT's appeal <http://www.catribunal.org.uk/239-9606/Judgment-.html>
- In its first ground, BT alleged that OFCOM had erred in law in the application of section 316(2) of the Communications Act 2003 (“the Act”) and acted in breach of its duties under section 3 of that legislation by adopting a ‘wait and see’ approach based on an assessment of Sky’s current supply agreements; BT also alleged that OFCOM’s approach, focusing as it did on current supply arrangements, was insufficiently forward looking and that OFCOM had not conducted an appropriate proportionality assessment.
- The Tribunal held that even where OFCOM has identified a risk of conduct prejudicial to fair and effective competition, it retains a broad discretion under section 316(2) to determine whether or not licence conditions are appropriate to address that risk, as well as discretion as to what the precise form of those conditions should be. Furthermore, the 2015 Statement, read as a whole, shows both that OFCOM recognised that it should conduct a forward looking assessment and that it did in fact carry out such an assessment. The Tribunal found that a proportionality assessment is not relevant in the context where regulation is being withdrawn and that OFCOM had carried out an appropriate balancing exercise.

OFCOM Review of the pay-tv wholesale must-offer obligation (2016 CAT)

- In grounds 2, 3 and 4, BT contended that OFCOM had carried out an inadequate market analysis and that, on the basis of the analysis that it had done, it could not properly have come to the conclusion that it was appropriate to remove the WMO. BT contended: that OFCOM should have carried out an orthodox competition analysis, or the type of detailed analysis that it had carried out in 2010; that it failed to take sufficient account of the WMO and its effect on Sky's supply arrangements, on which OFCOM had in any event placed undue reliance; and (in ground 3) that it wrongly focused on key content rather than on sports channels.
- The Tribunal found that OFCOM had conducted a sufficient analysis of competitive conditions and that it had not placed undue reliance on current supply arrangements or placed insufficient weight on the WMO.

OFCOM Review of the pay-tv wholesale must-offer obligation (2016 CAT)

- In ground 4, BT also contended that OFCOM had failed to examine properly whether Sky's wholesale pricing was too high to allow retailers to compete effectively (as it had done in 2010). The Tribunal held that OFCOM's overall conclusion on pricing, relying on commercial agreements in the market going beyond what was required by the WMO, was sound. BT also complained that the consultation process was flawed because it had not specifically highlighted pricing issues and that OFCOM had not given due consideration to a pricing analysis that BT had submitted. The Tribunal observed that BT had been able to submit the evidence it wished to submit and nothing of substance turned on the fact that this had not been done in response to a formal consultation. The Tribunal found that BT's pricing analysis was designed to answer a question that was pertinent in 2010, but no longer relevant in 2015.

OFCOM Review of the pay-tv wholesale must-offer obligation (2016 CAT)

- Ground 5 was BT's contention that OFCOM had erred by not condemning as harmful to fair and effective competition Sky's practice of insisting on a grant-back condition (also referred to as a requirement for reciprocal supply) and by adopting a 'wait and see' approach. BT argued that harm had already crystallised, whereas OFCOM took the view that negotiations between BT and Sky were ongoing and that the requirement for reciprocity might lead to harm if the negotiations resulted in either non-supply or supply on terms harmful to competition.
- The Tribunal did not agree with BT that harm had crystallised. Neither was the Tribunal persuaded that OFCOM was wrong in according little weight to BT's economic modelling of the grant back condition, or that it was wrong to decide to monitor the market closely and intervene when it considered it necessary.

Movies on Pay-TV market investigation (2010-12)

OFCOM Terms of Reference

- supply and acquisition of rights to movies sold by the major Hollywood studios to broadcast films for the first time on pay TV
- wholesale supply and acquisition of pay TV packages including core premium movie channels

CC required to determine “*whether any feature or combination of features of each ‘relevant market’ prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK (ie results in an adverse effect on competition (AEC))*”

Movies on Pay-TV market investigation (2010-12)

Theory of harm

- (a)* Sky has market power as a retailer of pay TV such that there is ineffective competition in the market for pay TV;
- (b)* pay-TV movie content in the FSPTW is significant to consumers in choosing their pay-TV retailer, which requires, among other things, that movie content on pay TV in the FSPTW has no close substitutes;
- (c)* other pay-TV retailers (and/or third parties) cannot obtain the rights to sufficient movie content in the FSPTW directly from the studios in order to create movie services which compete effectively with Sky; and
- (d)* most movie content in the FSPTW on pay TV is controlled by Sky, and there is limited availability to other pay-TV retailers both of movie content

Competition Commission

Movies on Pay-TV market investigation (2010-12)

- Launch of Netflix and Amazon/Lovefilm (early Jan 2011)
 - *"Is it likely we will become a bidder against Sky over the years? Absolutely. We will definitely be a bidder against Sky, yes, but do we need it at launch, no."*
 - the CC *"could make it easier for us to bid"* but *"we could also just bid against [Sky]. We are not dependent on whatever the Competition Commission does"*.
- Provisional Remedies Decision *"as required"* (end Jan 2011)
- OTT services a *"material alteration"* in supply
 - *"Widespread availability of Internet access...a structural development"*
- Revised Provisional Findings (May 2012)
- Final Report (Aug 2012)

Competition Commission

Movies on Pay-TV market investigation (2010-12)

- Significance and Barriers - evidence pre OTT entry:
 - *“Sky Movies were significant to the subscription decisions of only a relatively small minority of all pay-TV subscribers, and FSPTW content an even smaller minority”.*
- OTT entry reaffirms that range and price more important than recency
- Sky Movies perhaps an *“ ‘optional extra’ rather than a ‘must have’ ”*.
- barriers faced by OTT retailers:
 - lower (and eroding)
 - *“realistic prospect of being able to outbid Sky for FSPTW rights from at least one major in future”*
 - *“willingness to incur significant risk”*

Competition Commission

Movies on Pay-TV market investigation (2010-12)

Main findings

- *“we found that Sky’s position with respect to the acquisition and distribution of FSPTW movie content on pay TV [as referred by Ofcom] did not give Sky such an advantage over its rivals as adversely to affect competition in the pay-TV retail market. Further, we found that **no AEC arose in the upstream rights market** as a result of Sky’s position with respect to the acquisition and distribution of FSPTW movie content”*
- *“Accordingly, we found that there were no features relating to ‘the supply and acquisition of subscription pay-TV movie rights in the FSPTW of the major studios’ or ‘the wholesale supply and acquisition of packages including core premium movies channels’ which gave rise to an AEC in any market.”*

What competition policy in the digital era?

Digitisation and Competition Policy

What competition policy in the digital era?

EC report published in April 2019

<http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

J. Crémer, Y. de Montjoye, H. Schweitzer, Competition Policy For The Digital Era, EU, 2019:

- Analysis about the economic features of the Digital Economy
- Complete analysis about the economic features of the Digital Economy
- In-depth discussion on the role of data in the new economy
- The suitability of traditional Antitrust instruments in the Digital field
- Debate on merger's review and the referral system

Digitisation and Competition Policy

What competition policy in the digital era?

Platform economy:

- ❖ Economies of scale
- ❖ Strong network effects

Data economy:

- ❖ The ability to use data to develop new innovative services and products is a competitive parameter whose importance is increasing

Mergers and Innovation:

- ❖ “Killer acquisitions”

Goals and Methodologies of EU Competition Law in the Digital Era

Theory of Harm:

- ❖ Necessity to reshape the consumer welfare standard?

Market Definition:

- ❖ In digital markets, less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.

Market Power:

- ❖ In many online markets, consumers do not pay a monetary price for services (e.g., Facebook, Google Search). Consequently market shares cannot anymore be calculated on the basis of sales. Other parameters such as data and access to data need to be taken into consideration to assess market power.

The Burden of proof (error costs):

- ❖ Err on the side of disallowing conduct

Competition Law and Regulation:

- ❖ Complements not substitutes

Digitisation and Competition Policy

Platforms (I)

Competition for the market:

In markets where externalities and returns to scale are strong, competition authorities need to prevent dominant firms from hindering rivals from generating their own positive network effect. For this purpose competition authorities need to carefully look at:

- ❖ Best Price Clauses/ Most Favoured Nation (MFNs) Clauses
- ❖ If competition between platforms is sufficiently vigorous, it could be sufficient to forbid wide MFNs while still allowing narrow MFNs. If competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels and it would be appropriate for competition authorities to also prohibit narrow MFNs.
- ❖ Multihoming, switching, and complementary services

Digitisation and Competition Policy

Platforms (II)

Competition on Platforms (in the market): platforms, in particular marketplaces, act as regulators, setting up the rules and institutions through which their users interact, this is true for both dominant and non-dominant platforms. Rule-setting by platforms does not represent a competition problem per se. However the following issues may arise:

- ❖ Selling of monopoly positions: Platforms may propose preferred placement to advertisers who pay a higher
- ❖ Lack of transparency
- ❖ Leveraging of market power
- ❖ Self-Preferencing

Digitisation and Competition Policy

Data (I)

Access to personal data:

- ❖ Data portability (GDPR) might be seen as an instrument to overcome particularly pronounced lock-in effects.

Data pooling:

- ❖ Sharing of data through data pools can often be pro-competitive efficient,
- ❖ On the other hand data pools may also raise concerns: (i) the foreclosing of competitors by hindering access to the pool or granting access only on less favourable terms; (ii) sharing of sensitive data will amount to an anti-competitive information exchange; (iii) data pooling may discourage competitors from differentiating and improving their own data collection; (iv) there may be cases where the granting of access to data on non- FRAND terms may result in an exploitative abuse.

Digitisation and Competition Policy

Data (II)

The refusal of dominant firm to give access to data may rise competition concerns, however:

- ❖ Classical essential facilities doctrine may not be the right framework to handle refusal of access to data cases.
- ❖ The assessment of indispensability is much more complex for access to data cases. The distinction between volunteered, observed and inferred data may be relevant for the analysis of indispensability.
- ❖ Article 102 TFEU may not be the right tool to deal with data requests for purposes unrelated to the market served by the dominant firm.
- ❖ Article 102 TFEU may be the right tool to deal with data request related to complementary markets. In this case competition authorities will need to specify the condition to access.
- ❖ It would be necessary to make a case by case assessment related to the different type of data.
- ❖ It would not be possible to give access to personal data when there is no consent (GDPR).
- ❖ Regulation may be needed.

Digitisation and Competition Policy

Mergers and Acquisitions

The current regime of EU merger control may need modification in order to enable it to better address concerns relating to digital markets dynamics. The major issues can be identified in two different aspects:

- ❖ **Jurisdictional thresholds:** Many acquisitions may escape the Commission's jurisdiction because they take place when start-ups do not yet generate sufficient turnover to meet the thresholds set out in the EUMR, while the competitive potential of such start-ups may not be reflected in their turnover.
- ❖ **Substantive assessment:** Often the target might be seen as a potential competitor of the acquirer but frequently, the uncertainty of whether the target will truly turn into a competitor in that market will be high and the relevant time horizon rather long. Consequently, the merger will probably be considered as a conglomerate merger. But given that theories of harm for conglomerate mergers are limited to the foreclosure of actual or potential rivals who may be prevented from accessing supplies or markets, and to coordinated effects, it might be necessary to inject some “horizontal elements” into the conglomerate theories of harm.

Digitisation and Competition Policy

Background: OECD reports

OECD, The Digital Economy, 2012:

- Two papers from Professors Brousseau and Tim Wu enrich the analysis. Professor Brousseau outlined the features of the digital economy, while Prof. Wu highlighted the decisive role of Competition Authorities in the years to come, and the challenges to adapt established competition concepts to the new digital markets.

OECD, Big data: Bringing competition policy to the digital era, 2016:

- Hearings about big data and their implication on competition policy and its effectiveness.
- Hearings about big data and their implication on competition policy and its effectiveness.
- Interesting, in particular, the contribution from Professor Stucke, that highlighted: a) the importance of privacy as a parameter of quality for competition assessment, and b) the lack of analytical tools to assess non-price effects.

Digitisation and Competition Policy

Background: OECD reports

OECD, Algorithms and Collusions, 2017:

- Key topics:
 - how algorithms can change market characteristics making collusion easier, and the ability of firms to tacitly collude through algorithms;
 - the tools available to Competition Authorities to address the dual role of algorithms -from explicit collusion facilitators to instruments for tacit collusion
 - debate on whether algorithms can harm consumers in other ways, and in particular hinder innovation.

OECD, Non-price effects of mergers, 2018:

- The role of non-price effects on consumer welfare, with particular focus on innovation and privacy.
- The challenges that these effects raise on merger assessment
- The implication of dynamic qualitative analysis and the evaluation of non-price efficiency claims.

Digitisation and Competition Policy

Background: OECD reports

OECD, Abuse of dominance in digital markets (2020)

- Many digital markets exhibit certain characteristics, such as low variable costs, high fixed costs and strong network effects, that result in high market shares for a small number of firms. In some cases, these lead to “competition for the market” dynamics, in which a single firm captures the vast majority of sales.
- Firms in these concentrated markets may possess market power, the ability to unilaterally and profitably raise prices or reduce quality beyond the level that would prevail under competition. There is an ongoing debate about whether competition policy is adequately making use of this tool in digital markets today.
- Authorities face numerous challenges when bringing abuse of dominance cases in digital markets:
 - First, determining whether a firm is dominant is a substantial challenge.
 - Second, authorities must decide whether to use new theories of harm, such as self preferencing, rather than existing theories such as tying and bundling, or refusal to deal.
 - Third, abuse of dominance cases can be lengthy and resource-intensive.

Digitisation and Competition Policy

Background: OECD reports

OECD Competition Economics of Digital Ecosystems (2020)

- How competition between ecosystems works and how it may differ from competition between traditional firms;
- The economics of ecosystems and the role that ecosystems play today in digital markets;
- Potential benefits and concerns of ecosystems for competition, and the reasons why some succeed and others fail
- The consequences for enforcement of competition law from the proliferation of ecosystems.

OECD, Ex Ante Regulation and Competition in Digital Markets (2021)

- An understanding of what is on the table in terms of the content of *ex-ante* regulation.
- A number of agencies from jurisdictions where regulatory proposals have been put forward or implemented intervened.
- The precise nature of the relationship between regulation and competition enforcement in digital markets, and in particular the degree to which ex-ante regulation and ex-post enforcement are complementary rather than antagonistic.
- Issues related to *ex-ante* regulation: data privacy, consumer protection, the role of fairness, innovation, and economic concentration, and their trade-offs with competition.
- A higher-level question that was addressed related to the protection of competitors rather than consumer welfare by proposed regulations, and the institutional implementation of the ex-ante regulation.