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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from the Netherlands

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Netherlands --

1. Football Broadcasting Rights: Competition in Television Broadcasting vs. Distribution Platforms - Introduction

- 1. In the Netherlands, competition in television broadcasting is relatively well-developed. Commercial and public broadcasting companies compete fiercely for viewers and advertisers and with the introduction of digital television, the number of available free-to-air as well as pay-TV channels has been growing steadily. Historically, cable has been the main distribution platform for television signals, but the combined market share of cable companies has declined in recent years², in favour of DVB-T, IPTV, satellite and other platforms. In this paper, we deal with a recent merger decision of the Netherlands Competition Authority (hereafter NMa) which shows a switch in emphasis from competition within distribution platforms (between broadcasting companies) to competition between platforms. The NMa focuses on the market with a higher risk of competition issues and a higher potential for technological developments.
- 2. At the end of August 2012, the NMa received a concentration notification for the proposed acquisition of Eredivisie Media and Marketing (hereafter: EMM) by Fox International Channels (hereafter: Fox), a subsidiary of News Corporation. EMM is a limited partnership founded by the clubs playing in the top Dutch football league ("Eredivisie") for the joint marketing of their media rights. Fox operates several television channels in the Netherlands. Worldwide, Fox is active in a broad range of media markets.
- 3. In addition to seeking an assessment of the proposed takeover, the parties involved also sought assurances from the NMa with regard to the compatibility of their plans to market the football rights, with the cartel prohibition and the prohibition on abuse of a dominant position (articles 6 and 24, respectively, of the Dutch Competition Act).
- 4. The NMa decided to issue an informal opinion on the compatibility of the marketing plans, separate from the formal decision on the concentration, once Fox committed to several concessions to ensure compliance of its future marketing agreements with competition law. These concessions intend to ensure undistorted competition in free-to-air TV broadcasting and (especially) competition between distribution platforms.

More than 80% of households currently watches digital television.

The combined market share of cable companies was more than 90% between 2000 and 2004. Estimations for 2012 range roughly between 60% and 70%.

³ Currently, these are National Geographic, National Geographic Wild, Foxlife and 24Kitchen.

2. Brief history of Dutch football broadcasting

- 5. Following the example of the German Bundesliga and the English Premier League, the Dutch Eredivisie clubs started to offer the broadcasting rights to football matches as six packages from the season 2005/2006.⁴ The NMa stipulated that the tender procedure should be transparent and non-discriminatory and the method for assessing the various bids should be objective, transparent and verifiable.⁵
- 6. The TV rights to the highlights and one live match to be played on Friday evening were acquired by a new entrant in the free-to-air TV market Talpa. After Talpa discontinued, the rights were taken over by RTL. The TV rights for the live matches on Saturday and Sunday to be aired on pay-TV were acquired by Tele2. Both Talpa/RTL and Tele2 incurred considerable losses, as they could not generate sufficient income to cover fees paid to Eredivisie.
- 7. In the second tender, covering the rights for the 2008/2009 season, the bids for the rights to live matches were so low, that the Eredivisie clubs decided to set up their own pay-TV channel: Eredivisie Live. The Eredivisie Live channels were offered to all interested distribution platforms, i.e. cable, satellite, DVB-T, ADSL and fiber networks. The rights to the highlights were sold to the Dutch public channel (NOS).
- 8. At the end of 2012, EMM, which markets the Dutch football broadcasting rights, was taken over by Fox. Fox has committed to offering the Eredivsie Live channels to all platforms as before and intends to set up a new free-to-air TV channel, which will broadcast a programme featuring the highlights.

3. Television Broadcasting Markets

- 9. In a recent European Commission decision concerning the Dutch television market a distinction was made between the market for broadcasting rights to audiovisual content and the market for the transmission of television signals at the wholesale level.⁶ Also, the market for television advertising is relevant, since television broadcasting markets are two-sided markets.
- 10. Markets for audiovisual content can be further subdivided according to the type of rights sold. Generally, a distinction is made between broadcasting rights for 'Video On Demand' or 'Pay Per View', broadcasting rights for Pay-TV and broadcasting rights for free-to-air TV. In the case *HBO/Ziggo/HBO Nederland* the European Commission has considered the market for broadcasting rights to audiovisual content to be national in scope. 8
- 11. Markets for audiovisual content can be further be distinguished by type of content. In previous decisions, the NMa and the European Commission have distinguished between the following markets: (i) films; (ii) football events played regularly throughout the year in which national club teams participate;

6126/RTL NL – Radio 538, paragraph 29.

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The European Commission accepted joint selling of media rights by clubs in the Bundesliga and the Premier League, subject to commitments to ensure sufficient competition in the downstream broadcasting markets. See Cases COMP/C-2/37.214 and COMP/C-2/38.173.

⁵ NMa case 4237/Eredivisie CV – Exploitatie uitzendrechten, page 6.

⁶ Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 16.

Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 18; NMa case 7185/Sanoma – SBS, paragraph 51; NMa case 6126/RTL NL – Radio 538, paragraph 30-33.

⁸ Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 35.

This is not to say that a further subdivision according to type of content is not possible. See NMa case

- (iii) football events not played regularly throughout the year in which national teams participate; (iv) other sports; (v) other television content.¹⁰
- 12. On the market for the transmission of television signals at the wholesale level, the European Commission and the NMa have, in the past, distinguished between the transmission of free-to-air TV and pay-TV.¹¹ The European Commission considers the market for the transmission of television signals at the wholesale level to be national in scope.¹²
- 13. The NMa and the European Commission have also delineated a market for television advertising, which can be separated from markets for advertising in printed media¹³, radio, or internet. This market has also been considered national in scope by both the NMa and the European Commission.¹⁴

4. Concentration Decision

- 14. On the possible markets for audiovisual content, Fox and EMM had either no overlap or a very small market share. The same held for the possible markets for the transmission of television signals at the wholesale level. On the market for television advertising, the joint market share of Fox and EMM was very small. The most important positions in this market are taken by the free-to-air broadcasters RTL Netherlands (4 channels), SBS Netherlands (3 channels) and the Dutch public broadcasting company (3 channels), with a combined market share of 92%. Also, the possibility of vertical effects of input or customer foreclosure were considered unlikely, so the takeover was cleared after the first-phase investigation.
- 15. More interesting perhaps, from a competition perspective, are the considerations concerning the compatibility of Fox's plans for marketing the football rights, with the cartel prohibition and the prohibition on abuse of a dominant position, and this will be covered in the next section.

5. Informal Opinion

16. To facilitate the takeover by Fox there will be a new agreement on the marketing of the football broadcasting rights, which will run until the summer of 2025, at the earliest. Parties requested an informal opinion from the NMa with respect to the compatibility of the proposed way of marketing these broadcasting rights with competition law.

5.1 Live matches

17. Parties have committed to offer the Eredivisie Live channels to all present and future distribution platforms in a verifiably non–discriminatory manner. In this context, non-discriminatory means, among other things, that prices (per subscription to Eredivisie Live) will not depend on the number of subscribers

Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 18; NMa case 6126/RTL NL – Radio 538, paragraph 29-33.

Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 22; decision of the European Commission, December 21, 2010, in Case COMP/M.5932 – News Corp/BSkyB, paragraph 85; NMa decision of 28 June 28, 2005, in Case 4490/UPC – Canal+, paragraphs 22 en 30.

Case COMP/M.6369 – HBO/Ziggo/HBO Nederland, paragraph 39.

Case COMP/M.5932 – News Corp/BSkyB, paragraph 262; NMa case 7185/Sanoma – SBS, paragraph 57; NMa case 6126/RTL NL – Radio 538, paragraph 27.

Case COMP/M.5932 – News Corp/BSkyB, paragraph 270; NMa case 7185/Sanoma – SBS, paragraph 66; NMa case 6126/RTL NL – Radio 538, paragraph 37.

to the platform, and will not depend on the purchase of other Fox channels. In this way, competition between distribution platforms will not be distorted.

- 18. The takeover does have the effect that the rights to live matches will not be available to other broadcasters for a relatively long period of time. However, market developments do not indicate that these rights are necessary to be able to compete in the possible market for (premium) pay-TV. Furthermore, parties have asserted that the 2007 tender, when the live broadcasting rights were offered in several packages, resulted in bids that were so low that the clubs switched to an alternative way of exploitation (the Eredivisie Live channels).
- 19. In a number of other European countries, the rights to live matches are offered in different packages to pay-TV channels. Usually, (almost) all packages of live rights are acquired by a single pay-TV operator, which does not necessarily offer these channels to all distribution platforms.
- 20. An advantage of the exploitation of the Eredivisie Live channels is that they are offered to all distribution platforms. Moreover, this will be done on non-discriminatory terms, in a way that smaller platforms will not be at a disadvantage to larger platforms. In addition, the Eredivisie Live channels will also be offered to possible future distribution platforms, supporting possible technological developments in the distribution of audiovisual content.

5.2 Highlights programme

5.2.1 Free-to-air Television broadcasting

- 21. The broadcasting rights to the highlights of the national premier football league can be important to promote competition between free-to-air television broadcasters, and especially in facilitating entry of a new broadcasting company. An overview programme of highlights of the matches played over the weekend has the potential to draw a large group of viewers, which in turn can make the channel attractive to advertisers. Since the current free-to-air broadcasting companies are competing quite fiercely with ten main Dutch channels, a new entrant would need popular content such as football to be able to make a successful entry into the market.
- 22. Fox has indicated that it may start a new free-to-air channel which will air the highlights from the season 2014-2015. This may influence the competition between television channels. In principle, the entrance of a new channel will increase competition and result in a broader supply of television programmes for consumers. Parties have asserted that the exclusive exploitation of the broadcasting rights to the highlights is necessary to realise a successful entry into the market. Besides the football highlights, the new channel will broadcast other content.
- 23. In the NMa's opinion, the use of an excessively lengthy exclusive exploitation provision by Fox, may negatively affect competition between broadcasters. On the basis of financial prognoses in Fox's business plans, the NMa considers a term of six years as reasonable to make profitable exploitation of a new free-to-air television possible. Furthermore, the NMa states that it is important that broadcasters can bid for the highlights rights periodically. Such periodic bidding will make it possible for new television channels to enter the market with a football highlights programme, as parties themselves asserted to be necessary.
- 24. In view of these considerations, parties have made concessions to limit the licence period to six years, after which the broadcasting rights will become available to the market. At that point, the clubs will decide to whom the rights will be awarded (Fox will have no vote).

5.2.2 Distribution platforms

- 25. Fox and EMM have promised not to exclude any distribution platforms directly, but do reserve the right to develop commercial propositions with incentives to distribute combinations of the channel with the highlights programme with other Fox channels. For instance, Fox might offer a discount on Fox NL to a distribution platform that also purchases National Geographic, National Geographic Wild, Foxlife and/or 24Kitchen from Fox. Parties argue that such propositions can be important to obtain a position in the free-to-air television market. This means that the Fox NL channel may be offered to distribution channels under discriminatory conditions. If that leads to a significant distortion of competition between distribution platforms, it may be in breach of the cartel prohibition.
- 26. If it is established that the Fox channel, which airs the Eredivisie highlights programme, is 'must have content' for distribution platforms, i.e. distribution of the Fox NL channel is of major importance to compete with other platforms, there may also be a violation of the prohibition on abuse of a dominant position, even though Fox's market share may not be very high.
- 27. The NMa is not convinced by the argument that combined offerings of the Fox NL channel with other Fox channels is necessary to obtain a position in the free-to-air television market. The general expectation is that distribution platforms will be more than willing to distribute the Fox NL channel, which features the popular football highlights programme. It is more likely that a channel such as Foxlife or 24Kitchen would profit from these combined offerings than that it would help Fox NL to enter the market.

6. Conclusion

28. Both the free-to-air TV broadcasting market and the pay-TV broadcasting market in the Netherlands, appear to be fairly competitive. By ensuring the broadcasting rights to football highlights can be bid for periodically, entering the free-to-air television market with the help of these rights remains possible in the future. The NMa has now put the main emphasis on competition between distribution platforms, rather than within platforms (between broadcasters). This is an important step as the market in which distribution platforms operate runs a higher risk of restricted competition than the broadcasting markets in the Dutch context. If for instance, the football content were distributed exclusively by cable companies, this would impede competition and hamper technological progress from other types of distribution platforms.