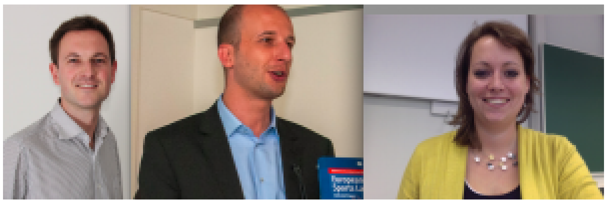
Merger Mania in Distribution and Content Markets: Need for European Action



Tom Evens of Ghent University (iMinds-MICT) in Belgium and Ben Van Rompuy and Karen Donders of Vrije Universiteit Brussel (iMinds-SMIT) exam media regulatory issues in Flanders and the threats facing media pluralism and competition in the European Union as a whole unless the European Commission takes immediate action.

In recent years, the EU and national competition authorities have been remarkably lenient in their assessment of proposed transactions in the media sector (opposed to the European Commision's critical review of media mergers in the 1990s). They often accept horizontal and vertical consolidation in the name of projected efficiencies. Moreover, despite media scholars' observations about the threats to consumer choice and media pluralism, cross-ownership regulations across EU Member States have systematically been relaxed.

In 2014, merger and acquisition activities have once again accelerated in European media markets. The new wave of mergers and acquisitions is characterized by far-going consolidation in distribution markets and concentration among content providers and distributors. Vodafone's acquisition of Ono and Kabel Deutschland in Spain and Germany, as well as Liberty Global's acquisition of cable infrastructure in the UK (Virgin, 2013) and the Netherlands (Ziggo, 2014) are exemplary for further horizontal concentration. Liberty Global's interest in vertical integration has become apparent through its purchase of shares (all in 2014) in production company all3media, free-to-air broadcaster ITV, and De Vijver Media – a Belgian production and free-to-air television company. Liberty Global, which earns over 90% of its revenues in the 12 European markts it is active in, has been unequivocal about its strategy of vertical integration with OTT, television production, and free-to-air television. CEO Mike Fries said such a strategy is a means to fight competition from players such as Netflix and to avoid transmission fees for broadcasters reaching US levels.

The European Commission is about to end its investigation of the horizontal merger between Liberty Global subsidiary UPC and Ziggo in the Netherlands. Rumour has it that few remedies would be imposed on the cable operator that post-transaction will have a market share of 90% in cable distribution. The remedies would include an offer to sell Liberty Global's Film 1 premium channel, a promise to maintain access for OTT operators, and a 'pledge' not to discriminate against rivals.

The situation in Belgium

We hope that the European Commission will take a closer and more cautious look when reviewing the latest transaction in Belgium (i.e. the acquisition of a 50% stake in De Vijver Media by Telenet, a Liberty Global subsidiary). Telenet is active in Flanders (the northern part of Belgium). It holds monopoly control over cable in one of the world's most cabled regions. Penetration of cable is over 95%. Telenet has a market share of nearly 80% in the market for television distribution and is active in broadband, fixed telephony, and pay-TV. The Flemish broadcasting market is fairly concentrated as well with public broadcaster VRT, and commercial free-to-air broadcasters Medialaan and De Vijver Media accounting for a combined market share of about 80% (age group 18-54). Telenet taking a controlling share in De Vijver Media, being the second commercial broadcaster in Flanders, will add to the existing precarious competitive situation in both the television distribution and broadcasting market.

There are at least three reasons why the acquisition of De Vijver Media in a small region like Flanders is problematic and why Europe should care.

1. Telenet is the monopolistic owner of the cable infrastructure in Flanders and faces virtually no countervailing pressure in the market for television distribution: access to Telenet's cable network cannot be foregone by broadcasters in favor of another mode of transmission. As a result of the proposed transaction, Telenet would effectively gain control over the entire audiovisual chain including production, scheduling, advertising, transmission and access, in the Flemish television market. Such a situation is from both a competition and media pluralism angle undesirable. For those currently worrying about the creation of a dominant position in their national or regional market for television distribution: this is what the next phase looks like.

2. The type of vertical integration in the case at hand multiplies the possibilities of Telenet to gain a competitive advantage by means of exclusionary or discriminatory practices *vis-à-vis* its competitors. For example, Telenet could give more prominence to De Vijver Media television programmes in its non-linear services. It could also charge higher prices for distribution to competitors of De Vijver Media. The advantage thereof would be the weakening of powerful broadcasters such as VRT and Medialaan, which would result in more revenues for De Vijver Media. At the same time, it would make it possible for Telenet to decrease its transmission payments to VRT and Medialaan, which are at present far above average in Europe. In the long run this will jeopardise investments these broadcasters make in domestically produced content and, hence, harm Flemish consumers.

3. The control of a free-to-air broadcaster allows cable operators to sit on both sides during carriage negotiations. As a gatekeeper, Telenet would be judge and party at the same time, and it would be able to obtain commercially sensitive information from its competitors (to the benefit of Vier and Vijf). As a vertically integrated distributor, Telenet obtains crucial insights, through Vier and Vijf, in the carriage fees paid by its competitors. As an advertiser, Telenet obtains information about other broadcasters' new programs and schedules. Should these broadcasters, Medialaan and VRT, have innovative ideas with regard to new programs, channels or services, they will need Telenet's platform to bring this new idea to the consumer. It is naïve to think that 'Chinese walls' could prevent this kind of sensitive information to flow from De Vijver Media to Telenet or the other way around. In contrast to Medialaan, De Vijver will also have privileged access to subscriber data and accurate data on the viewing habits, generated by Telenet's set-top boxes. This is strategic information for selling (targeted) advertisements, direct marketing, and other commercial purposes.

A problematic regulatory situation in Europe

It is worrying that multinationals such as Liberty Global, regardless the investments they make in terms of innovation, can 'shop around' in European distribution and content markets without facing increased legal and regulatory scrutiny. The incredible integration between provision of content and distribution of content is resulting in large companies that control the value chain and are capable of deciding the levels of competition *they* deem desirable. Such a situation can hardly be considered desirable by the European Commission that has for decades been emphasizing that rivalry and competitive market structures are an essential driver of economic welfare and media pluralism. It merits attention from all Commissioners and national government leaders in the European Union.

One should thus not underestimate the significance of this 'small' Flemish case for the preservation of effective competition on the European distribution and content markets. Telenet CEO John Porter said this would be a European precedent and he could not have been more right. The signficance of this test case goes far beyond the business case of Liberty Global or Telenet. Both companies are commercially successful and deliver value to their customers. Telenet has most certainly contributed to innovation and quality of service in the Flemish market. However, that should not make us turn a blind eye to the fact that this merger case is capable of accelerating a trend towards link-ups between distribution companies and content providers all over Europe. The time is now to urge the European Commission to carefully determine the limits of this industry transformation.

This article gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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