

Competition & Regulatory Newsletter

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European Commission approves Telia/Bonnier Broadcasting with FRAND remedies

On 15 November 2019 the European Commission [announced](#) that, after a Phase II investigation, it has approved the proposed acquisition by Telia of Bonnier Broadcasting conditionally. The deal is worth €849.7 million, and will give Telia ownership of Bonnier's television networks and all related streaming and advertising-based services.

Background

Telia is a Swedish multinational telecommunication operator. It provides mobile and fixed telecommunications services as well as broadband and television services in Denmark, Estonia, Finland, Lithuania, Norway and Sweden. Bonnier Broadcasting is currently part of the media conglomerate Bonnier Group. It owns Swedish and Finnish commercial broadcasters and a pan-Nordic premium television channel operator. As a retail TV distributor, Telia Company licenses TV channels (including ancillary rights) from TV broadcasters, such as Bonnier Broadcasting, to include them in its retail audio-visual offering.

The proposed acquisition was formally notified to the Commission on 15 March 2019 and a Phase II investigation was opened on 10 May 2019. The proposed transaction would create a vertically integrated player in the audio-visual industry in Denmark, Finland, Norway, and Sweden.

Commission's concerns and opening of Phase II investigation

The Commission was concerned that the proposed transaction would reduce competition in Finland and Sweden, where Bonnier Broadcasting is the owner of TV channels that are used by nearly all TV distributors free-to-air and basic pay TV channels and premium pay TV sports channels. The Commission took the [preliminary view](#) that consumers in these jurisdictions would face reduced choice and higher prices for retail TV distribution. The Commission's preliminary investigation identified the following main concerns:

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- *TV distribution:* Telia's competitors in TV distribution in Finland and Sweden could be foreclosed from the market by not having access to Bonnier Broadcasting's specific TV channels that are important for consumers.
- *Streaming:* The merged entity could deny access to its streaming application to customers using competing mobile and fixed internet providers, namely advertising video on demand (AVOD) and subscription video on demand services (SVOD).
- *Advertising:* The merged entity could deny access to TV advertising space on its free-to-air and basic pay TV channels to Telia Company's competitors in the markets for retail mobile telecommunication, fixed internet and TV services.

Phase II investigation and commitments

In its press release, the Commission stated that during its in-depth investigation, it gathered extensive information and received feedback from actors at the various levels of the TV value chain, in particular TV broadcasters and retail broadcasters of TV services.

To address the Commission's competition concerns, Telia offered the following commitments (of which an [interim non-confidential version](#) is available on the Commission's website):

Telia offered to license the merged company's channels to rival TV distributors in Finland and Sweden on fair, reasonable and non-discriminatory (FRAND) terms. This would include basic free TV channels, pay TV channels and premium pay TV sports channels, as well as ancillary rights which would allow a distributor to make the content available for streaming over the internet. Telia also committed not to limit rivals' access to the merged company's streaming services and applications over the internet (AVOD and SVOD services) to end users, nor to discriminate against competitors in the sale of advertising space on the merged company's channels. Furthermore, Telia committed to protect rival TV broadcasters', TV distributors' and telecoms providers' confidential information by maintaining information barriers between the company's wholesale and retail business.

The Commission said that the commitments - which apply in Finland and Sweden and for a duration of ten years - ensure that the deal will "no longer raise competition concerns". The clearance decision is conditioned on "full compliance with the commitments".

The EU Commissioner for Competition, Margrethe Vestager, said the decision allows consumers in Finland and Sweden to "*continue to benefit from a wide range of TV channels and audio-visual content both through traditional TV and over the internet*". Marie Ehrling, chair of the Telia board, said in a [press release](#) that the company hopes the deal will create a "*strong Nordic player to compete with international corporations who are very active in the Nordics*".

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Conclusion and future outlook

It can be expected that any other such deals which involve popular television or internet content will be scrutinised to a similar extent, despite increasing competition from the likes of Netflix, Disney+ and Amazon Prime, etc. The decision and the extent of conditions imposed demonstrates that, despite this growing competition in television content, the Commission still views television channels as an important input for television distributors.

Other developments

Merger control

Advent International/Cobham merger: Secretary of State consults on undertakings to address national security concerns

On 19 November the Secretary of State for Business, Energy and Industrial Strategy [announced](#) a consultation on undertakings offered as part of the proposed acquisition by Advent International, a US private equity firm, of Cobham plc, a UK defence company.

The parties proposed certain undertakings in response to the Secretary of State issuing a European intervention notice in September 2019 on public interest grounds relating to national security. The undertakings are designed to mitigate these public interest concerns. The proposed commitments would ensure that existing security arrangements, which apply to Cobham and protect sensitive government information, will be continued and strengthened, and that, in addition to existing boards, new board structures that Advent plan to institute will comply with nationality requirements. The commitments would also require Cobham's new owners (i) to honour the terms of existing contracts and notify the Ministry of Defence in advance if there is a material change to Cobham's ability to supply key services, and also refrain from withdrawing from any specified service for a set period; and (ii) to give the Ministry of Defence prior notice of plans to sell the whole, or elements of, Cobham's business.

The Secretary of State is minded to accept the proposed undertakings. However, she will not take a final decision until the consultation has closed and any representations have been considered. The deadline for representations is midnight on Tuesday 17 December 2019.

One of our recent briefings covers the [latest developments on the expansion of foreign investment controls in the UK and beyond](#).

General competition

Youku awarded RMB 395,000 in unfair competition case against Baidu

On 15 November 2019 PRC's Beijing Haidian People's Court (BHPC) handed down its [judgment](#) on the unfair competition case between Youku Information Technology and Baidu, awarding RMB 395,000 (approximately € 51,000) against Baidu.

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Youku, a PRC video streaming service provider, complained that an application developed by Baidu enabled users to watch Youku's full video streams without needing to download Youku's mobile application or to watch pre-video advertisements, both of which were specifically developed by Youku to promote its video-streaming mobile application. Youku alleged that Baidu's actions breached PRC's Anti-Unfair Competition Law (AUCL) and caused Youku to suffer economic loss.

Baidu argued that the ad-blocking function provided by its application is common across the industry, and that the requirements imposed by Youku on its users to download its mobile application for full video access and to watch pre-video advertisements in fact limits users' choice. It argued that such a business model harming consumers' choice should not be protected by law.

The BHPC ruled that Youku's business model ought to be protected by law as there was no evidence showing that Youku's actions had gone beyond the boundaries of its "legal business" and its "legitimate commercial decisions", or that it had illicitly or unreasonably limited or damaged users' legitimate interests.

Further, the BHPC found that Baidu's application had obstructed and disrupted the normal operations of the services provided by Youku, and prevented Youku from achieving its commercial goals of generating advertising revenue, promoting the mobile application and broadening its paid membership base. This fundamentally harmed Youku's economic interests.

Although Baidu's actions did not fall under the specific categories of restricted behaviour stipulated in Article 12 of the AUCL, they were "in spirit" similar to actions that disrupted market competition for personal illicit gains. The BHPC therefore ruled against Baidu.

Baidu is currently appealing the ruling.

Cecilio Madero Villarejo speech on "The legacy of Commissioner Vestager and a peek into the future"

The European Commission has [published](#) a speech by Cecilio Madero Villarejo, Acting Director-General for Competition, in which he discussed the achievements of Margrethe Vestager as Competition Commissioner in the past five years, and the expectations for her continuation in this role and for her appointment as Executive Vice President for digital affairs.

The speech notes that one hallmark of Commissioner Vestager's first mandate has been her frequent references to the full implications of competition policy. In many speeches and interviews she has emphasised the political and social impact of the Commission's action noting that *"enforcing competition rules can make markets work for the people, and not the other way round"*. Another hallmark has been the vigorous defence of the independence and impartiality of enforcers, with the ECN+ directive being a major achievement in this respect.

Villarejo predicts the continuance of a focus on digital industries and emphasises that, in fast-moving digital markets, the Commission needs to use its tools to their full extent. In this respect, Villarejo mentions the Commission's recent Broadcom decision, imposing interim measures for the first time since 2001, and notes that *"when the facts and the circumstances of future cases call for interim measures, we can expect that they will be used again"*.

In mergers, the speech outlines that there was a sharp increase in notifications of transactions during Commissioner Vestager's first mandate. The Commission took almost 1,800 merger decisions, 38 of which required in-depth investigations. Six proposed deals were prohibited (three in 2019). Nevertheless, the

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overall rate of intervention has remained constant. Villarejo also highlights the increase in simplified cases since 2014 and the extension of the Commission's assessment beyond straightforward theories of harm related to price.

The speech concludes by outlining the Commission's aims for the future, including (i) continued enforcement in a robust, objective and independent manner; (ii) dialogue in the EU and with international partners; and (iii) keeping all channels open with legislators, industry representatives and social advocates to keep the Commission's rules, policies and priorities ahead of the curve.

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