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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Spain

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Spain --

1. Regulatory framework

- 1. The new Spanish General Act on Audiovisual Communications came into force¹ in May 2010 and established a new legal framework for the audiovisual sector in Spain, gathering and organizing various earlier regulations.
- 2. Among other aspects, this Act established a new Spanish independent regulator² in broadcasting at state level³. However, the lack of political consensus has blocked the effective launch of this independent authority in 2011. At present, a new cross-sector independent regulatory authority is planned, the National Authority for Markets and Competition⁴. In the meantime, audiovisual matters are supervised by the Ministry of Industry.
- 3. As well, a certain competitive environment in the audiovisual market has been guaranteed by the Spanish competition authority (CNC Comisión Nacional de la Competencia). In this respect, the new audiovisual legislation introduced new and more flexible media ownership rules which, coupled with the multiplication of digital television channels after the digital switch-over of terrestrial television broadcasting in 2010 and the delicate economic situation in the sector, led to a series of television mergers which have required intense supervision and intervention by the CNC.
- 4. The 2010 Spanish General Act on Audiovisual Communications has been effective in consolidating legislation and clarifying rules, but it has also introduced some uncertainty, as is the case with the restrictions established concerning the exclusivity contracts of broadcasters with the football clubs, which are different to those established in the CNC case law, as will be further addressed.
- 5. Other interesting aspects of the new Act that affect the competitive scenario of the audiovisual markets, are the financing system of the Spanish State broadcaster (which has stopped broadcasting advertisement and is partly financed by contributions paid by third television broadcasters) and the possibility of broadcasting pay digital terrestrial television (DTT) channels.
- 6. Finally, the new legislation, despite the growing importance of pay television in the competitive strategies of telecom operators, as can be deduced by Spain's leading telecom operators various attempts to create and strengthen a structural link between the pay television market and the telecommunication

The State Audiovisual Media Council (Consejo Estatal de Medios Audiovisuales - CEMA).

Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual.

The only independent audiovisual authorities are regional (in Catalonia, Navarre until 2011 and Andalusia).

⁴ CNMC - Comisión Nacional de los Mercados y la Competencia

markets, did not establish a convergent national regulatory authority for telecommunications and the media. However, this will change with the planned National Authority for Markets and Competition.

7. A short summary of the above mentioned competition cases, as of other related proceedings, will be provided, bearing in mind that the main objective of the Spanish competition authority has been to guarantee access by competitors to the different segments of the communication markets value chain and its essential inputs.

2. ABERTIS - Access to television broadcasting facilities

- 8. The Spanish regulatory framework conceived the digitalization of television as a process of migration from "analogue terrestrial" to "digital terrestrial" broadcasting, with an initial mandatory terrestrial coverage of the population of 96% for commercial television broadcasters, and of 98% for the national public television broadcaster.
- 9. In a second phase, covering an additional 2.5% of the population, digitalization was deemed not profitable for commercial broadcasters, so these terrestrial network extension costs are being borne by Public Administrations⁵. Only for the final 1.5% coverage of the population are other technologies used instead of terrestrial broadcasting, such as satellite direct broadcast of DTT (Digital Terrestrial Television) channels.
- 10. Therefore, the regulatory framework has consolidated digital terrestrial broadcasting as the leading technology in television broadcasting in Spain, by mandating its use to all national television broadcasters with licenses to use the terrestrial radio electric spectrum, which include the main free-to-air television broadcasters in Spain.
- 11. ABERTIS, a Spanish telecommunications infrastructure operator, who owns and manages the only national terrestrial network for the broadcasting of DTT signals in Spain, is the only provider of transport services (from the television broadcaster offices to the terrestrial broadcasting stations) and distribution services (from the terrestrial broadcasting stations to viewers homes) of DTT signals to Spanish national television broadcasters.
- 12. Moreover, by virtue of the ex-ante regulation adopted by the Spanish national regulatory authority Telecommunications Market Commission (CMT), ABERTIS is obliged to give access to its national terrestrial network, in order to allow third television broadcasting network operators to use ABERTIS' sites to provide transport and distribution services to television broadcasters. However, until now ABERTIS' competitors only use its sites to give service to regional and local television broadcasters.
- 13. Nowadays ABERTIS is the sole provider of terrestrial broadcasting services to national television broadcasters, and its national network of terrestrial broadcasting sites cannot be replicated by any other private operator from an economic point of view.
- 14. In this context, in April 2010, the Investigations Division of the CNC opened formal proceedings⁶ against ABERTIS, for allegedly impeding other network operators from accessing ABERTIS' network of broadcasting sites via a margin squeeze between wholesale and retail prices.

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In 2010, SES Astra Ibérica SA denounced the plan to the European Commission as an illegal public aid.

Case S/0207/09
http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0207%2f09&Ambito=Conductas

- 15. Based on an analysis of ABERTIS' wholesale prices at which ABERTIS provides access to its network sites, and given the conditions that ABERTIS has agreed with all national television broadcasters, competitors who are as efficient as ABERTIS would have no positive margin for operating in the television signal transport and distribution markets.
- 16. In February 2012, the CNC Council adopted an infringement decision according to which ABERTIS had abused its dominant position by hindering the entry of competitors in the market for the distribution transport of DTT signals between April 2009 and December 2011.
- 17. Previously, in May 2009, ABERTIS was sanctioned for imposing abusive conditions on national television broadcasters⁷, preventing them from contracting distribution services out to third network operators.

3. Football Broadcasting Rights – Access to premium football content

- 18. Football broadcasting rights of Spanish competitions are one of the most important audiovisual contents for television broadcasters in Spain, especially for pay television operators, as they have a very high capacity to attract audiences and subscriptions, which cannot be replicated in a sustained form by any other kind of audiovisual content.
- 19. The existing model for the acquisition of football broadcasting rights in Spanish competitions, and the arrangements for their subsequent exploitation, has until recently been the result of decision-making by actors in the sector (football clubs and media operators), since there was no specific regulatory framework governing the terms for the acquisition and commercialization of those rights. Certain decisions by the Spanish competition authorities and the European Commission, both in relation to restrictive practices⁸ and merger control⁹ have likewise, albeit asymmetrically, influenced the conditions of competition in the sector.
- 20. The tendency towards market closure created by the current model for the acquisition of media rights in Spanish football competitions, which gives considerable competitive advantage to the purchaser which already holds the biggest portfolio¹⁰, is exacerbated by other elements of contractual practice, such as long contractual terms, and the ability to purchase rights that give an option for future exploitation.
- 21. Moreover, under this acquisition framework, rights purchasers have a huge incentive to pool those rights to maximize their value.
- 22. These factors combine to create a framework fostering the emergence of potential anticompetitive behavior, requiring very often the intervention by the competition authority.

⁷ Case 2748/06

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See, in that regard recent Resolutions in CC proceedings S/0006/07 and S/0153/09, and ongoing proceedings in S/0421/12 and S/0436/12.

See digital platform merger of SOGECABLE and VÍA DIGITAL in 2002 (case N-280), and SOGECABLE's proposed 2007 takeover of AVS (case N-06094). See as well European Commission proceedings AVS I (Case IV/36.438 AUDIOVISUAL SPORT) and AVS II (Case COMP/37.652).

At acquisition level, the ownership of the right belongs to the club which hosts the game, but superimposed on this right is the requirement to obtain the consent of the away team to broadcast the match. On each successive acquisition of rights this mechanism gives a considerable competitive advantage to the purchaser which already holds the biggest portfolio.

- 23. With regards to the most recent resolutions, on April 2010¹¹ the Spanish Competition Authority considered that a pooling agreement of football broadcasting rights of Spanish competitions between broadcasters automatically led to a restrictive market sharing agreement between the parties, which might be exempted as long as the pooling agreement would last no longer than three years. Moreover, it considered that all contracts granting football broadcasting rights of Spanish competition on an exclusive basis which exceeded three years were illegal.
- 24. In March 2011, the Spanish Competition Authority fined MEDIAPRO¹², which held broadcasting rights of all the teams in the main Spanish football competitions, for an abuse of a dominant position in the market for resale of these media rights, by offering preferred treatment to its own subsidiary, the pay television channel Gol T.

4. Television Mergers – Access to advertisement revenues and audiovisual content

- 25. The new 2010 audiovisual legislation allows national television channels cross-ownership as long as they do not exceed 27 per cent of the total audience and as long as there are three different national television broadcasters¹³.
- 26. After this regulatory change, several mergers between national television broadcasters in Spain were notified to the Spanish Competition Authority.

4.1 TELECINCO / CUATRO

- 27. In April 2010¹⁴ MEDIASET, the number one commercial free-to-air digital television broadcaster in terms of audience, gave notice of a merger with CUATRO¹⁵, the third commercial broadcaster, reducing the market to three main players, MEDIASET, ANTENA 3 and LA SEXTA.
- 28. The main competition problems were primarily identified in the television advertising market in Spain and to a lesser extent in the marketing of audiovisual contents.
- 29. In the television advertising market, given the total audience of the channels whose advertising would be managed by MEDIASET if the advertising of those channels was to be marketed jointly, the resulting entity would become indispensable to most advertisers¹⁶, favouring unilateral price increases. Furthermore, the resulting arrangement of the television advertising market, highly transparent and quite

See case S/0006/07
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See case C/0230/10 TELECINCO/CUATRO
http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=C%2f0230%2f10+&Ambito=Concentraciones

In 2006, the government approved a change in the license-holding conditions for Canal+, until then a pay television channel, to allow it to become a commercial FTA channel. Canal+ became Cuatro, a new commercial channel

The market test revealed that most advertising campaign need in a short period of time a coverage of at least 80%, which could not be attained without investing in Mediaset.

Spanish multimedia communications group founded in 1994 and involved in movie and television production, as well as in acquiring football media rights and producing pay television channels (GOL T).

This percentage figure was carefully chosen because it only prevented a merger between the two dominant commercial operators in Spain, Mediaset (Telecinco) and Antena 3.

symmetrical, would allow and encourage tacit coordination between MEDIASET and its main competitor, ANTENA 3.

- 30. The above competition concerns were aggravated by the regulatory decision in 2010 to eliminate advertising from the national public broadcaster, RTVE.
- 31. With regards to the advertisement market, the commitments put forward by MEDIASET during proceedings, try to promote the real possibility that advertisers may continue to advertise separately on the main television channels of the merged entity. In addition, they limit the maximum size of the television advertising packages offered by MEDIASET to an appropriate level, to prevent MEDIASET's television advertising from becoming indispensable for a significant number of advertisers.
- 32. As well, MEDIASET undertakes to break its agreements for joint management of advertising on free-to-air digital television channels of third parties and to sign no new agreements of this kind. In the case of advertising on pay television channels, MEDIASET undertakes to manage advertising of the pay television channels of third parties through a separate company and with clearly differentiated commercial policies.
- 33. In this regard, the CNC had previously identified the anti-competitive nature of these types of agreements¹⁷ between free-to-air digital television broadcasters.
- 34. With regards to the audiovisual rights markets, the main commitment proposed by MEDIASET is a limit of three years on the duration of its exclusivity contracts for premium audiovisual content.
- 35. In summary, the commitments submitted by MEDIASET restricted its commercial autonomy when it comes to managing television advertising and acquiring audiovisual content, which in the opinion of the Council of the CNC as reflected in its October 2010 Resolution¹⁸, would resolve the competition problems generated by the merger.
- 36. The monitoring of MEDIASET's behavioural commitments has proven to be complicated, leading to sanctioning proceedings against MEDIASET¹⁹ and the establishment in February 2013 of a penalty of 15.6 million euros, among other things, for breaching its commitment to guarantee freedom of choice to advertisers when acquiring advertisement on the different channels of the group.

4.2 ANTENA 3 / LA SEXTA

37. Almost two years later, in March 2012 ANTENA 3, MEDIASET's main competitor, gave notice of a merger consisting in the acquisition of exclusive control of LA SEXTA, the third commercial television broadcaster in Spain. The main competition problems raised by this merger were again primarily identified in the television advertising market, where the two media groups would control approximately 85% of the market.

See case S/0245/10 ANTENA 3/VEO TELEVISION
http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0245%2f10&Ambito=Conductas

See case C/0230/10
http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=101&PagSel=102&Numero=C%2f0230%2f10+&Ambito=Concentraciones

See case SNC/0024/12
http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=SNC%2f0024%2f12&Ambito=Ley+30

- 38. The CNC's analysis indicated that the effects of the merger on competition were more farreaching than in the previous merger, since the number of main operators was reduced from three to two (rather than from four to three), creating a reasonably symmetrical duopoly with no other operator left to act as a "maverick", as was the case with LA SEXTA, and provide a meaningful competitive alternative for advertisers.
- 39. In June 2012, ANTENA 3 lodged a final proposal for commitments, which according to the Spanish competition authority, did not guarantee freedom of choice for advertisers when contracting advertising campaigns on television channels, nor did they guard against the possible abusive exercise of market power by the merged entity, nor did they prevent incentives to tacit coordination by the duopolists.
- 40. In view of the above, in July 2012 the CNC allowed the merger but on the basis of several conditions addressing primarily competitive concerns in the television advertising market, which were significantly tougher than the commitments proposed by ANTENA 3 (which were quite similar to MEDIASET's commitments in its previous merger), on the basis that the market structure, where a symmetrical duopoly is created, is fundamentally different and requires different measures to safeguard the effective competition existing prior to the merger. The complications in monitoring the behavioural commitments in the previous merger were logically also taken into consideration.
- 41. In August 2012, once ANTENA 3 had declared that the merger would not take place due to the conditions imposed by the CNC, particularly those regarding the obligation to create separate commercial units to market the advertisement of the two main channels, the Spanish government stepped in by modifying the conditions, the first time the government made use of the legal right to counter the competition authority in merger cases.
- 42. The new conditions established by the Spanish government in ANTENA 3 / LA SEXTA merger mirror the restrictions placed on MEDIASET in its merger with CUATRO.
- 43. After this two mergers, there are in Spain two major national television broadcasters dominating the advertising market (MEDIASET and ANTENA 3), three operators dominating audience share (RTVE, MEDIASET, and ANTENA 3), and a group of small channels with tiny and niche audiences.

4.3 PRISA / TELEFONICA / TELECINCO / DIGITAL+ - Convergence of media and telecommunications

- 44. In April 2010 the CNC was notified the merger consisting in the acquisition by PRISA, Spain's leading media conglomerate, TELEFÓNICA, leading Spanish telecom operator, and MEDIASET, leading free-to-air television operator, of joint control over DIGITAL+, the number one pay television operator in Spain, previously under the sole control of PRISA.
- 45. The CNC Council resolved to initiate the second phase of the proceeding because the operation raised serious competition concerns, but the notifying parties finally amended the agreements that had given rise to the merger, and the proceedings were closed.
- 46. Nonetheless, it is interesting to review the competition concerns identified by the CNC to understand subsequent actions by the Investigative Division of the CNC.
- 47. At present, telecoms operators are present in the audiovisual market through subscription television multichannel portfolios. The pay television market is highly concentrated with three main national players, ONO (cable), TELEFÓNICA (IPTV) and DIGITAL+ (satellite), a non-telecom operator but leading subscription broadcaster. Neither ONO nor TELEFÓNICA operate in the free-to-air television

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market or produce their own audiovisual content, relying therefore to a great degree on premium content provided by third parties, included Digital+.

- 48. In light of the above, the merger would have threatened to distort competition in the pay television market, where DIGITAL+ and TELEFÓNICA are important competitors; as well as in the upstream markets of acquisition and commercialization of exclusive rights for premium content (films and sports, primarily football matches), which are the main drivers for customers when deciding to subscribe to a pay television offer, and where the parties would have incentives to foreclose the market to other telecom operators.
- 49. As well, the transaction would strengthen TELEFÓNICA's strong position in a number of telecommunications markets, weakening the capacity of alternative operators to replicate its access to technological infrastructures and geographic scope, provided by DIGITAL+'s satellite network, its access to premium content which enables attractive triple play offers, and its access to a large client base.
- 50. Even though the merger finally did not take place, TELEFÓNICA has not given up its intention to strengthen its structural link between the pay television market and the telecommunication markets, as means to reinforce its competitive position.
- 51. In this regard, during 2012 the CNC has initiated proceedings²⁰ for possible restrictive agreements between TELEFÓNICA and DIGITAL+ concerning premium audiovisual contents.

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See case S/0436/12 Liga Nacional de Fútbol