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Media Windows in Flux

Challenges for Audiovisual Media Chronology

by Martin Kuhr

EDITORIAL

The marketing of a film depends, among other things, on arrangements concerning the chronological distribution of exploitation rights. In many ways, it is rather like dividing up a cake, except that media windows are being distributed rather than slices of cake: Who gets the best piece? Is everyone satisfied? Is there anything left over? Was it worth making?

For the producer, a film is worth making if the revenue it generates at least covers the production costs. One way of achieving this is to define chronological periods and sell exploitation rights for the various media. Cinema, television services in their different forms, IPTV, Video on Demand, etc. can be served one after the other, with the rights sold for varying lengths of time. However, economic considerations need not necessarily mean that everybody gets a slice of the cake, or that the whole cake is distributed. It may make financial sense, for example, not to include a VoD window if pay-TV operators are prepared to pay more for the rights to that window. Nor is the usual media chronology set in stone. New media windows, such as those for mobile audiovisual media services, may play a role in the future.

This IRIS *plus* does not, however, deal with economic considerations, but with the legal framework on which an economic strategy, however it is chosen, must be built. The author begins by explaining how rules on media chronology have developed. On this basis, it is easy to see who defines the media windows according to which rules and why there are different models. The author also points out that media windows can have competition law implications that extend beyond the question, "Who gets which window?"

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Susanne Nikoltchev
IRIS Coordinator
Head of the Department for Legal Information
European Audiovisual Observatory

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EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
http://www.obs.coe.int
e-mail: obs@obs.coe.int

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Challenges for Audiovisual Media Chronology

Martin Kuhr,
Institute of European Media Law (EMR)
Saarbrücken/Brussels

A. Introduction

Who is afraid of television? Or to be more precise: which producer or distributor of audiovisual media content, particularly cinema films, still fears the potentially negative impact that (excessively) early exploitation on pay-TV or free-to-air television might have on box office revenue? Just as the fear that television would replace cinema has proved to be largely unfounded, so too the frequently expressed suggestion that traditional audiovisual electronic media would be completely replaced by the Internet and the "new media" it carries, such as IPTV or Video on Demand, seems equally inaccurate at the present time.[1]

Certainly, current economic data appear to suggest the opposite: average daily TV viewing figures in Europe have been rising for years, cinema ticket sales – ignoring seasonal and annual fluctuations - are only falling slightly,[2] while DVD sales have been growing at the same rate as Video on Demand (VoD) services.[3] Admittedly, however, the increasing usage of media both overall and individually does not necessarily mean that turnover or profits are also rising.

In this context, a whole series of questions arise: is there still a need for specific (legislative) rules governing the period of time between the release of a film in the cinemas and its exploitation in other media? Cinema release is often followed first by release on video/DVD, then as (Near) Video on Demand, then pay-TV and finally free-to-air television. It is worth bearing in mind that this exploitation chain or "media chronology"[4] is inaccurate to the extent that, for example, not all content is necessarily shown in cinemas in the first place. In addition, new media are now using completely different types of exploitation sequence: for example, particularly successful video clips produced by private individuals and initially posted on platforms such as YouTube may then be shown on television and subsequently sold as a sampler on a DVD. How should this be dealt with? It should also be noted that many current regulations use the date of *domestic* cinema releases in order to calculate blocking periods for other distribution methods. Should this approach be continued in the light of sometimes pan-European or even worldwide marketing strategies, particularly in the VoD sector?[5]

Even so, the priority for rightsholders is to generate maximum revenue from their works. As long as there are no drastic reasons to prevent it, particularly under competition law, it is increasingly the case that the choice and the practical structure of media sequences are laid down in the form of agreements. Meanwhile, some media windows continue to be defined by law, forming part of the apparatus of certain support mechanisms designed to promote the production and distribution of European films. Since the countries that operate in this way also want to (indirectly) support cinemas as cultural venues, it is doubtful in view of these objectives whether dispensing with legal provisions on media windows would prove to be problematic.

Media windows have also played a role in the past in competition law provisions. Attention should also therefore be paid to the extent to which agreements on media chronology, particularly exclusive agreements, might conflict with EC competition law

This report investigates the relevant provisions and current practices relating to media windows at European and national levels. The money earned from producing and marketing audiovisual media content and the related investment returns are discussed to the extent that they are relevant to the tightrope walk between the feared cannibalisation effects and the hoped-for marketing synergy effects for which media windows are created. However, the report does not aim to suggest ways of maximising revenue from the overall exploitation of audiovisual media content.[6]

B. European Legal Frameworks for Media Windows

The European legal framework for media windows has developed in a relatively clear way, characterised by the fact that strict legislative provisions have been abandoned in favour of contractual solutions. In this respect, the main provisions of the Council of Europe's European Convention on Transfrontier Television on the one hand and those of the EC "Television without Frontiers" Directive on the other are very similar in terms of their origins, development and, finally, content.

I. Council of Europe

For an understanding of this subject, the European Convention on Transfrontier Television of 5 May 1989 and the background to the rule it contains on media windows is of particular interest.

Recommendation No. R(87) 7 of the Committee of Ministers of the Council of Europe,[7] which preceded the Convention, contained the following individual recommendations to the Member States:

> "3. Encourage the conclusion of agreements aimed at taking into account the diversification of types of film distribution and ensure, within the limits of their authority, that priority in film distribution is given to cinemas, which alone are capable of exhibiting films to the best advantage, and respect the following general hierarchy of distribution channels:
> - cinema,
> - videogram,
> - television;
> 4. Where local conditions permit encourage the conclusion of agreements designed to ensure that broadcasting stations do not schedule cinema films on days and at times when cinemas are most likely to attract large audiences; [...]"

This Recommendation was based on the status of technology and the media industry at the time, which explains why cinema, video and television are the only distribution channels mentioned. The States were encouraged, insofar as they were able, to give priority in film distribution to cinemas. Agreements were also suggested as a way of ensuring that cinema films were not broadcast on television on days and at times when cinemas could normally expect to attract large audiences and when their interests were therefore particularly threatened.

At the same time, the fifth individual recommendation suggested that television and other media were not only perceived as a "threat", but also as partners and (indirect) co-financiers of the film industry:

> "5. Take steps to encourage the various distribution channels to support the production of cinematographic works of European origin by ensuring that they not only pay adequate property rights but also make a fair contribution to state measures to assist film production, such as:
> - contributions from television companies to production aid funds,

- contributions from companies producing the new audiovisual systems involved in film diffusion (notably cable networks or videograms) to funds for different sectors of the film industry,
- with due regard to the autonomy of television systems, greater co-operation between television and cinema, not only in the co-production of films, but also in their presentation, as well as by increasing the amount of information (publicity for example) relating to the cinema which is conveyed by television and by associating television in the wider distribution of films by means of subtitling; [...]"[8]

This Recommendation also makes it clear that the importance of television as an additional distribution channel for European films was already recognised at that time.

The European Convention on Transfrontier Television, which was adopted two years later in an effort to facilitate cross-border transmission and retransmission of television programmes, contains a rule on cinema film distribution. According to Art. 10 para. 4 of the original version:

"No cinematographic work shall accordingly be transmitted in such services, unless otherwise agreed between its rights holders and the broadcaster, until two years have elapsed since the work was first shown in cinemas; in the case of cinematographic works co-produced by the broadcaster, this period shall be one year."

This rule forms part of the so-called Stockholm Compromise of 23/24 November 1988, which produced pioneering political agreements on the regulation of blocking periods for cinema films and on quotas.[9] This and subsequent compromises paved the way for crucial progress in discussions concerning the EC "Television without Frontiers" Directive, which contained a provision similar to Art. 10 para. 4 (Art. 7; see below).[10] The Stockholm Compromise attached particular importance to freedom of contract in favour of rightsholders and TV companies; the blocking periods laid down could be amended by means of contractual agreements.

After the Convention was amended in 1998, following the first amendment of the EC "Television without Frontiers" Directive, and entered into force on 1 March 2002, the new Art. 10 para. 4 stipulated the following:

"The Parties shall ensure that a broadcaster within their jurisdiction does not broadcast cinematographic works outside periods agreed with the rights holders."

The Convention therefore gives the parties the central role in organising media windows. It can therefore be assumed, in principle, that the rightsholders have a relatively strong negotiating position.

II. European Union

The European (Economic) Community has dealt with the theme of "media windows" in various legislative instruments. Of course, the most important include the "Television without Frontiers" Directive, now known as the Audiovisual Media Services Directive, as well as the provisions of EC competition law.[11] However, a series of so-called "soft law" instruments, particularly European Commission Communications, also deal with the issues we are concerned with in this report.

1. Directive 89/552/EEC "Television without Frontiers"

a) "Television without Frontiers" Green Paper

On 14 June 1984, following two European Parliament resolutions[12] which did not address the issue of media windows, the Commission published a "Green Paper on the establishment of a Common market in broadcasting, especially by Satellite and Cable" under the title "Television Without Frontiers", which was based on the latest technical, political and legal developments relating to the media.

One of the purposes of the Green Paper was to enable the Commission to clarify, as part of the public debate on the establishment of a common market for broadcasting (radio and television), its position regarding what it considered to be relevant copyright issues and to emphasise the importance of the EEC Treaty for the television sector. In the Green Paper, the Commission wrote that, in practice, holders of cinema film rights only granted TV broadcasting rights if the transmission of the film had no detrimental effect on other forms of marketing, such as the showing of the film in cinemas.[13] However, the Green Paper did not propose any Europe-wide regulations on media windows.

b) Preparing for the "Television without Frontiers" Directive

On 30 April 1986, after thorough analysis of the Green Paper, the Commission submitted to the Council a "Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities".[14] The ECJ judgment in the *Cinéthèque* case was particularly important for the rule it contained concerning media windows.[15] In its judgment, the Court had ruled that Art. 30 of the EEC Treaty (which protected the free movement of goods - now Art. 28 of the EC Treaty) was not incompatible with national laws on the distribution of cinematographic works, combining a chronological order of distribution (cinemas followed by video cassettes) with a ban on exploitation outside that sequence, provided that these rules applied equally to all video cassettes, whether manufactured in the national territory or imported. Television broadcasters also had to comply with rules on blocking periods. The ECJ, on the basis of funding structures at the time (the French Government stated that 80% of revenue came from cinema screenings), was prepared to accept that the national measures had been taken for legitimate cultural purposes, i. e., in order to encourage the creation of cinematographic works irrespective of their origin. France had also argued that this question could not simply be dealt with in the contract between the holders of film rights on the one hand and the manufacturers and distributors of video cassettes on the other, since such a system of self-regulation would create the risk of an economic imbalance due to the growing power of the video industry. The ECJ stressed that Community law did not harmonise the relevant issues at that time.

The "Television without Frontiers" Directive therefore coordinated exploitation on television. It was adopted on 3 October 1989, just a few months after the European Convention on Transfrontier Television (see above) and entered into force on 3 October 1991.

c) The Original 1989 Directive

Unlike the Convention on Transfrontier Television, the "Television without Frontiers" Directive is based on the freedom to provide services enshrined in Art. 59ff. of the EEC Treaty (now Art. 49 of the EC Treaty). Under Art. 7 of the original Directive, the Member States were obliged to ensure:

"that the television broadcasters under their jurisdiction do not broadcast any cinematographic work, unless otherwise agreed between its rights holders and the broadcaster, until two years have elapsed since the work was first shown in cinemas in one of the Member States of the Community; in the case of cinematographic works co-produced by the broadcaster, this period shall be one year."

As was explained in recital 25, measures were needed to ensure that a certain period of time elapsed between the first showing of a film in cinemas and the first time it was broadcast on television.

Here already, the following can be stated: since a TV broadcaster needs to agree a contract with a rightsholder in order to broadcast a film, the exception became the rule. The condition that needed to be met in order for the Directive's provision to be overridden, i. e., the existence of an agreement, was generally

fulfilled.[16] The aforementioned partnership between film production and television was taken into account insofar as the blocking period for co-productions involving different TV broadcasters was cut to one year.

d) Subsequent Amendments of the Directive in 1997 and 2007

The 1997 and 2007 amendments to the EC "Television without Frontiers" Directive modified the provision concerning the time period between cinema and television exploitation. After the first amendment in 1997,[17] Art. 7 stated that the Member States should:

"ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rights holders."

Recital 32 suggests that, according to the revised opinion of the Community legislator, the question of blocking periods for the TV broadcast of cinematographic films is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.

The second amendment, set out in the Audiovisual Media Services Directive of 11 December 2007,[18] was designed to take into account the "convergence" of services and technology. The name itself makes it clear that the Directive has been adapted in line with technical advances. Now, rather than "television broadcasting activities" and "broadcasters", the Directive concerns "audiovisual media services" and "media service providers". This broadening of terms had become necessary for various reasons, including the emergence of Video on Demand services (see recital 1), which had a particular impact on media chronology.

Under Art. 3d, the Member States must:
"ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders".

However, no further changes to the rules on media windows were introduced. The Member States have until 19 December 2009 to introduce the measures necessary to comply with the Directive.

The development of the media window rules in the EC Directive clearly shows that a high level of importance has always been attached to freedom of contract. This can be explained not least by the context of a common internal market and the principles of free movement of goods and services.

2. Commission Communication on the Film Industry of 2001

On 26 September 2001, the Commission published a Communication on certain legal aspects relating to cinematographic and other audiovisual works. In this document, the Commission referred to "questions on media chronology" and noted that:

"the chronology of windows for the economic exploitation of films in Member States of the European Union [is] based on agreements between the relevant economic actors."

It also stressed that this rule was sufficient and that deadlines for film exploitation (media windows) should continue to be left to contractual arrangements between the parties involved, since the rights could then be exercised flexibly in the different phases of media chronology.[19]

3. Film Online Charter/Communication on Creative Content Online

Technical advances mean that online distribution is becoming an increasingly lucrative alternative to traditional distribution channels for rightsholders. According to the report on "Interactive Content and Convergence", published in January 2007, income from online content will reach EUR 8.3 billion by 2010, more than four times its 2005 level.[20] However, online distribution necessitates a new approach to copyright issues, which was discussed in the European Film Online Charter and in the Communication on Creative Content Online.

a) European Charter for the Development and the Take-up of Film Online

On 23 May 2006, the European Charter for the Development and the Take-up of Film Online was adopted at the 59th Cannes International Film Festival. This Charter, endorsed by all groups involved in the online film market, is designed to promote the development of new forms of online film distribution. It recognises "Film Online" as a growth market, while stressing the importance of copyright. The Charter correctly points out that, from a copyright point of view, it is vital for online film distribution that rights are cleared by all the copyright holders (directors, writers, actors, etc.). It also suggests that agreements on release dates (media windows) are to be concluded between producers, rightsholders and online distributors. Here again, it is proposed that media windows should be determined by the parties.

b) Communication on Creative Content Online in the Single Market

Following a public consultation on the theme of creative content online in the single market, the European Commission published the corresponding Communication on 3 January 2008, in which it described the market for creative online content. In view of technical developments and the resulting possibilities for distributing film material, cinema, home entertainment and television are the main distribution channels.[21] With this Communication, the Commission hopes to launch a public consultation on a draft Recommendation on Creative Content Online by the Council and the European Parliament. This document will look more closely at themes that include the promotion of innovative licensing regulations in the field of audiovisual works.

C. National Rules on Media Windows

A brief overview of the situation in various countries, including EU Member States and States Parties to the Council of Europe Convention, shows that most of them do not have legislation on media windows, even though Art. 28 of the Convention and Art. 3 of the Directive give them the freedom to apply stricter or more detailed provisions to programme services broadcast within their jurisdiction. Although this overview is in no way exhaustive, it does show the different approaches that have been adopted in this area.

I. Countries with Legislation on Media Windows

Firstly, we shall consider the countries which currently have legislation concerning media windows, even though in some cases they merely repeat the content of European laws.

1. France

Both the background to the aforementioned ECJ judgment in the *Cinéthèque* case and the origins of the Convention on Transfrontier Television and "Television without Frontiers" Directive clearly show the particular relevance of French regulations. A *Décret* (decree) adopted on 26 January 1987 introduced a one-year deadline for the terrestrial broadcast of cinematographic films on pay-TV and specialist television channels, a two-year deadline for general TV channels which co-produced the film concerned, and a three-year deadline for all other TV broadcasters.[22] Previously, the TV broadcast of films was regulated by specific lists of terms and conditions.[23]

French law was subsequently brought into line with the amendments to EC law contained in Directive 97/36/EC. Now, the Freedom of Communication Act expressly refers to agreements between television providers and professional film industry organisations concerning media windows. These agreements take prece-

dence over any individual arrangements between rightsholders and TV companies.[24] Concluded between the parties concerned in 2005, they impose a nine-month deadline for Pay-per-View, while pay-TV has to wait 12 months before the first broadcast and 24 months before the second. The corresponding deadlines for free-to-air television are between 24 and 36 months. For Video on Demand, representatives of the industries involved agreed a 33-week blocking period for the first time on 20 December 2005. A 36-month deadline applies to *Subscription VoD* (SVoD), although this may be extended by 30 days for films prefinanced by a television company. This agreement was initially due to expire after 12 months. A new agreement is currently under discussion.

For video releases, a blocking period of 12 months after the issue of the film certificate (*visa d'exploitation*) applies, although the Culture Minister may grant exceptions to this rule (*dérogations*). In such cases, the blocking period may not be shorter than six months after the first cinema screening.[25]

On 23 November 2007, an agreement was reached in France between music and film producers, Internet service providers and the Government, under which films may be made available via VoD six months after they are first shown in cinemas, i.e., on the same date that they can be released on DVD.[26]

2. Germany

Under German law, Art. 30 of the *Filmförderungsgesetz* (Film Support Act - *FFG*) stipulates that state subsidies received for the production of a film must be paid back if certain blocking periods for various types of media are not respected. The blocking period for DVDs and videos is six months from a film's release in German cinemas. It is 12 months for individual access services (Near Video on Demand – NVoD) and Video on Demand for individual films or for a fixed subscription-based film service (Pay-per-View – PPV). An 18-month deadline applies to Pay-per-Channel (PPC). Finally, the blocking period for unencrypted television is 24 months.

However, under a *majority* decision of the Executive Committee of the *Filmförderungsanstalt* (Film Support Agency - *FFA*), these periods may be shortened to five (DVD/video), six (NVoD, VoD, PPV), 12 (PPC) or 18 (unencrypted TV) months, provided it is not contrary to the interests of the film industry. Subject to the same condition, the Executive Committee may *unanimously* decide to reduce them to four, four, six and six months respectively. However, these deadlines only apply to films assisted under the terms of the Film Support Act.

The current rules enshrined in the *FFG* will expire at the end of 2008. For this reason, experts are currently discussing the next set of regulations.[27] It looks likely that the new general blocking periods will be shortened[28] in line with the increasing demands of rightsholders.

It should be reported that, in 2007, one film distribution company in Germany wanted to release on DVD two films that were not subject to the *FFG*'s three instead of the customary, although not legally fixed, six months after they were first shown in cinemas. Cinema operators feared that this would affect visitor numbers and threatened to remove the distribution company's films from its programme. In the end, it was agreed that the films could be released on DVD four months after their first cinema screening.[29]

3. Austria

Austria also has no general legislation on media windows. However, as in Germany, there are regulations for films produced with the aid of state funding. Art. 11a of the *Filmförderungsgesetz* (Film Support Act - *FFG*) defines the blocking periods, which are basically the same as those in Germany. These can also be reduced significantly according to Art. 11a paras. 2 and 3 *FFG*, provided it is not contrary to the interests of the film industry.

4. Portugal

Media window regulations are contained in the Portuguese *Decreto-Lei* (legislative decree) no. 227/2006 of 15 November 2006.[30] Under Art. 61 para. 1, films screened in cinemas may not be broadcast on pay-TV until four months after their first commercial cinema showing and not on free-to-air television until 12 months have passed. According to para. 2, these periods are halved for a television company which co-produced the film. Para. 3 states that films cannot be released on video until two months after their first commercial cinema screening. Under para. 4, blocking periods are set at two months for pay-TV and nine months for free-to-air television for films that are first released on video or DVD. Para. 5 stipulates that these rules can be amended through agreements between rightsholders and TV companies or video distributors. If a film is not shown in cinemas, it can be broadcast on television or released on video/DVD immediately (para. 6).

5. Other Countries

According to Art. 10 para. 8 of Presidential Decree 100/2000, the TV broadcast of a European film in *Greece* is only admissible under the terms of a contractual agreement. Previously, Art. 4 para. 6 of Presidential Decree 236/1992 imposed a two-year blocking period, which was cut to one year for films co-produced by the TV broadcaster. Art. 27 para. 2 of *Luxembourg's* Electronic Media Act also refers to contractual rules. In *Hungary* also, media windows are defined in the context of freedom of contract between the parties (Art. 4/A of the 1996 Broadcasting Act). In *Romania*, Art. 90 para. 1 lit. a of the Audiovisual Media Act also states that media windows should be the subject of contractual agreements. In *Latvia,* Art. 17 section 6 of the Broadcasting Act merely states that films should be broadcast in accordance with copyright law.

II. Countries without Legislation on Media Windows

Here, we shall look at a few countries which have either never had legislation concerning media windows or have dispensed with such legislation.

1. United Kingdom

In the United Kingdom, there is an agreement between the parties involved.[31] Blocking periods usually last for between three and six months after cinema release for DVDs (firstly for rental then for sale, at least until 2003); six months for Pay-per-View and VoD; 12 months for pay-TV; and three years for free-to-air television.

2. Italy

In Italy, Art. 15 para. 14 of Act no. 223 of 6 August 1990 was the first legislative provision that corresponded with Art. 7 of the Television Without Frontiers Directive (89/552/EEC). It was repealed by *Decreto* no. 177 of 31 July 2005, since when there has been no legislation on media windows in Italy.

3. Other Countries

There is no legislation on media windows in Spain, Denmark, Serbia and Lithuania.

III. Interim Conclusion

The findings in this chapter have shown that, reflecting the situation in European law, there is a clear trend at national level for the subject of media windows to be dealt with by the parties involved.

D. Competition Law Aspects

European competition law has an impact both on national legislation and contractual agreements linked to film distribution. Since media chronology is based on exclusive rights, the aims of copyright law can conflict with those of competition law. It should be noted first of all that the purpose of copyright, as an expression of the protection of ownership, is to safeguard the exploitation rights of the author or rightsholder. Copyright and performance rights guarantee exclusivity, since nobody is permitted, in principle, to use a third party's work without the consent of the rightsholder. Competition law, on the other hand, regulates commercial behaviour; it is designed to protect open, fair competition. In principle, copyright-protected exclusivity can therefore lead to problems under competition law, such as when a supplier only wants to sell its products or services via a certain dealer or middleman.

European competition law contains rules on mutually agreed behaviour (Art. 81 EC Treaty, cartel law), abuse of a dominant market position (Art. 82 EC Treaty) and company mergers (Merger Regulation). All of these provisions may need to be considered when dealing with questions related to the granting of rights to audiovisual media content. However, the present report deals mainly with the issue of abuses of market power.[32]

The question therefore needs to be determined of when a party which is entitled to exploit a film breaches competition law, even though it does not exceed its right to exploit the film. This is particularly relevant since, as mentioned above, EC secondary legislation gives precedence to freedom of contract where the regulation of media windows is concerned.

I. Abuse of a Dominant Market Position

We shall examine particularly whether the owner of rights to audiovisual media content can infringe Art. 82 of the EC Treaty by refusing to grant a licence to exploit a particular film (such as via Video on Demand, pay-TV or DVD) to an interested party, or by only granting a licence for a period after that in which the interested party wanted to exploit the film. Art. 82 prohibits the abuse of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States.

1. Relevant Market

Firstly, a company's economic position needs to be determined from a competition law point of view. To this end, it is necessary to define the market in which it offers its products or services and to distinguish this from other markets. The relevant market is defined according to material, geographical and, if applicable, time-related factors.

In order to define the *materially relevant market* and distinguish it from other markets, it is necessary to include all products and/or services which, on account of their characteristics, are considered to be the same and therefore theoretically interchangeable. From a geographical point of view, the area of supply and demand of the goods and/or services is taken into account. The relevant market is defined more precisely using the so-called "market dominance" test and its core principle of demand substitutability. The test involves checking whether consumers would buy product B instead of their usual product A if there was a small but non-transitory price increase (SSNIP test[33]). In addition to this, product substitutability is examined, i.e. possible switching of production by the supplier.

As far as the film rights market is concerned, it should be noted that any company wishing to earn money from the exploitation of film rights must be careful to acquire rights to films that are of interest to a sufficiently high number of customers. Experience has shown that certain types of content – so-called premium films or blockbusters – attract more customers than other films. For this reason, the European Commission, as part of its monitoring of EC competition rules, has defined a materially relevant market for first-window premium films (for the pay-TV sector), divided into a submarket for Hollywood productions and one for premium films produced by other studios.[34]

It is well known that media content is more attractive if it can be marketed exclusively. The more opportunities viewers or users have already had to see a film – whether at the cinema, on DVD or on Pay-per-View – the less interest there usually is in broadcasting it on free-to-air television, particularly for the second or third time. Consequently, the price of rights within the first pay-TV window is much higher than for films being broadcast for the second time (via the same means of distribution). The cost of film rights in the second window is only between 5 and 25% of the cost during the first window.[35] Since these films have different values and are not interchangeable with other films from the consumer's point of view, the Commission defined a market for the acquisition of broadcasting rights to so-called first-window films.[36]

2. Dominant Market Position

It is unclear whether and when, in one of the markets described above, a rightsholder can occupy a dominant market position in the sense of Art. 82 of the EC Treaty. A dominant market position is held if the rightsholder is able, in the relevant market, to behave to an appreciable degree independently of its competitors, customers and suppliers.[37] This is completely dependent on the company's economic position, particularly its share of the relevant market. If there are no additional factors, a market share of 70% or more is considered to constitute a dominant position. Where a company holds a market share of between 45 and 70%, its competitors' respective market shares are taken into account, as well as the length of time that the market share has been held.[38] Vertical company mergers can also lead to a dominant market position.[39] Therefore, depending on the individual case, a rightsholder may occupy a dominant market position. This may concern a particular media window if the window constitutes an independent market. However, it remains unclear whether one of the studios or film distribution companies responsible for making or selling premium films can be considered to hold a dominant position in view of the current market situation.[40] It is also unlikely that the purchaser of exclusive rights packages for a national market can occupy a dominant market position.

3. Abuse of a Dominant Market Position

In principle, a rightsholder who, for example, owns the exclusive rights for a particular country (particularly in the form of rights packages, which are currently very common) can decide whether, when and how to (sub-)license these rights under freedom of contract, provided there are no legislative rules that need to be taken into account. It is therefore able, in principle, to determine media windows. It is therefore necessary to clarify when a film rightsholder's refusal to grant a licence or to grant the specific type of licence requested can be considered an abuse.

Abuse is determined solely according to objective criteria.[41] In general, any behaviour by a company with a dominant market position, which unjustifiably harms or weakens competition, is considered to be an abuse if it affects trade between Member States. There is a distinction between "exploitative" abuse (characterised, for example, by extremely inflated pricing) and "exclusive" abuse (characterised by the use of market position to obstruct competition).[42]

Art. 82 (2) (b) of the EC Treaty states that abuse may consist in limiting production, markets or technical development to the prejudice of consumers. Cases of "refusal to supply" have formed a

subset of such abuses. For example, in the *Commercial Solvents* and *CBEM*[43] cases, the ECJ ruled that the refusal to supply a competitor with the raw materials or services it needs to carry out its own business is abusive if such refusal is likely to eliminate all competition in the secondary market for the manufacture of products made from those raw materials.[44] In the *Magill* case, the ECJ ruled that the refusal by the owner of an intellectual property right to grant a licence only constitutes abuse of a dominant position "in exceptional circumstances".[45] In this case, the ECJ found such circumstances in the fact that the supply of the information concerned was indispensable for carrying on the business in question. The refusal to supply the necessary data prevented "the production [...] of a new product, for which there was potential consumer demand". The Court decided that the refusal was not justified by material considerations and, finally, that it was likely to exclude all competition in the ancillary market. Following the Magill case, the *IMS Health* ruling explained that the three aforementioned criteria must be satisfied cumulatively.[46]

This case-law suggests that, as far as film rights are concerned, a dominant market position might be abused if a company (such as a pay-TV broadcaster or VoD provider) was refused a licence by a rightsholder, thus preventing the emergence of a new product (transmission via pay-TV or Video on Demand), for which there was potential consumer demand. The refusal to grant a licence should also be unjustified. Finally, the refusal should be likely to exclude all competition in the ancillary market (pay-TV or Video on Demand).

Whether a dominant market position has been abused must always be judged on a case-by-case basis. It should be remembered that, since there is still a number of Hollywood studios in the premium film market, pay-TV broadcasters, for example, which are keen to put together an attractive service, are able to purchase film rights at different times from a variety of providers. It seems unlikely that an abuse could be committed if access to such productions remained open in principle, i.e., if steps were taken to ensure that different parties had the opportunity to purchase the rights, such as by offering short windows and limiting the size of rights packages. In the Video on Demand sector, it is also becoming clear that non-exclusive rights are taking precedence over exclusive contracts for specific platforms. There is often, therefore, open access to premium content.[47]

II. Forbidden Agreements

An agreement on audiovisual content exploitation rights can also be problematic from the point of view of European cartel law if media windows are determined by associations (of companies) or several companies acting together.[48] Under Art. 81 para. 1 of the EC Treaty, agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States are prohibited as incompatible with the common market.

It is true that, according to the ECJ, copyright in a film and the resulting right to show films are not in themselves covered by Art. 81 of the EC Treaty. Nevertheless, the *exercise of those rights* may meet the criteria contained in Art. 81 of the Treaty where there are economic and/or legal circumstances which restrict film distribution to an appreciable degree or distort competition on the film market, bearing in mind the specific characteristics of that market.[49] For example, the Commission ruled that European competition law was breached by a TV broadcaster which acquired the exclusive rights to broadcast more than 1,000 feature films, which it could select from virtually the whole film library of a particular studio over a period of 15 years, without any possibility of sublicensing to other TV broadcasters.[50]

The fact that a state regulation promotes agreements between industry representatives and, where applicable, gives these arrangements priority over individual contracts throws up two key questions: can these constitute unlawful cartels in the sense of Art. 81 of the EC Treaty? And how should the state's role in this be evaluated? Member States themselves can, through their own actions, give cause for cartel provisions to be examined. The duty of loyalty (of the Member States towards the EC) enshrined in Art. 10 of the EC Treaty prohibits states from introducing or maintaining in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. Art. 81 would therefore be violated if a Member State required or favoured the adoption of unlawful cartel agreements or reinforced their effects or deprived its own legislation of its official character by delegating to private companies the responsibility for taking economic decisions affecting the economic sphere.[51]

However, as far as agreements between rightsholders on the one hand and TV broadcasters on the other are concerned, it is debatable whether these can be described as cartels, unless there are exceptional circumstances affecting trade, such as those in the aforementioned case that was decided by the Commission. In addition, the inadmissibility of an agreement would be thrown into doubt if, as mentioned in Art. 81 para. 3 of the EC Treaty, it was advantageous, even for consumers. Neither is it clear, as part of the consideration of the overall circumstances, whether the state regulation mentioned would be capable of exempting the companies concerned from the scope of competition law. Finally, it should be borne in mind that a Member State would be taking the public interest into account if it attempted to achieve the cultural objective of safeguarding a diverse film landscape and preserving cinemas by adopting a rule on media windows that supported freedom of contract.

E. Conclusion

In summary, it is clear that, even though it remains in rightsholders' interests to exploit their rights in the most profitable way, there are still very few legislative provisions that protect these interests by defining media windows. It may even be argued that such provisions cannot be justified at all, in view of the freedoms of the single market. In other words, it is questionable whether the ECJ, if asked to rule on the *Cinéthèque* case today, would reach the same decision again. There are two reasons for this: cinemas no longer represent such a dominant source of overall revenue from the sale of rights as in the past. It is also doubtful whether the Court would now agree with France's argument that media windows should not be determined solely by an agreement between the owners of film rights on the one hand and the manufacturers and distributors of video cassettes on the other. The aforementioned tendency to strengthen freedom of contract suggests otherwise and gives rise to the suspicion that it is assumed that there is a certain balance of power in the negotiating positions of the parties concerned.

In addition, it is true that the traditional chronology for film exploitation – cinema, video and finally television – has rarely been expanded to include "new media" such as Pay-per-View or Video on Demand. Agreements between rightsholders and exploiting parties have almost completely replaced legislative provisions; not even the intended protection of cinemas as cultural venues has been able to prevent this. On closer inspection, what at first glance might give the impression that culture has surrendered to commerce is actually facilitating the consistent exploitation of rights to audiovisual content. Rightsholders can determine – in consultation with the exploiting parties – how maximum profit can be generated from their rights.

Cinemas as cultural venues have not (yet) lost their role in society, even though they are constantly having to look for new ideas in order to fend off competition from other media. They continue to receive help with this task; at least in the legislative

provisions described above, this takes the form of (state) subsidies for film production. In order to protect cinemas as cultural venues, defining blocking periods for these films in law remains a tried and tested method of support.

Generally speaking, the time period between a film's release in cinemas and its exploitation by other media is becoming increasingly short. Subsequent forms of exploitation are also moving closer together chronologically. As a result, a blurring of previously rigid media sequences is accompanied by clearly discernible preferences for one particular distribution channel or another. The most "forceful" approach to the levelling out process is the "day and date" principle.

Only time will tell what the impact of the newly-structured media windows will be, including that in relation to the definition of relevant markets and related restrictions enshrined in competition law.

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1) According to a survey by the European Interactive Advertising Association (EIAA), Internet use is steadily rising among young Europeans and this is leading to a fall in the use of television and other media (survey in Belgium, Denmark, Germany, France, Great Britain, Italy, the Netherlands, Norway, Sweden and Spain), see http://www.eiaa.net/Ftp/casestudiesppt/EIAA_Mediascope_Europe_2007_Pan_European_Executive_Summary.pdf
2) See press release of the European Audiovisual Observatory of 11 February 2008, available at: http://www.obs.coe.int/about/oea/pr/berlinale2008.html
3) A useful overview is contained in the European Audiovisual Observatory's Yearbook, volume 3, "Film and Home Video". Regarding cinema attendance figures, see pp. 47 ff., for the DVD market see pp. 79 ff. and Video on Demand pp. 93 ff. According to the follow-up study on VoD commissioned by the European Audiovisual Observatory, the number of VoD services is increasingly rapidly. At the end of 2007, there were 258 VoD services in the 24 European countries covered by the study, compared to 142 at the end of December 2006. The study is available at http://www.obs.coe.int/online_publication/expert/vod2008_note.pdf
4) In this connection, terms such as "media window", "exploitation chain", "time limit", "blocking period" or "holdbacks" are used, see Cichon, "Licences and Media Windows", in: European Audiovisual Observatory (ed.), IRIS Special "Legal Aspects of Video on Demand", pp. 53 ff., 61.
5) Media windows are becoming shorter, particularly in the VoD sector. Under the so-called "day and date" principle, a film is released on VoD and DVD on the same day. A number of practical examples show that this can have positive effects on the DVD market, see press release at http://www.broadbandtvnews.com/?p=3561
6) See the report concerning the state of research in the United Kingdom, Bakhshi, The theatrical window: unchartered waters?, available at http://www.ukfilmcouncil.org.uk
7) Recommendation No. R (87) 7 of the Committee of Ministers to Member States on Film Distribution in Europe (adopted by the Committee of Ministers on 20 March 1987, at the 405th meeting of the Ministers' Deputies), available in English at http://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=44900&SecMode=1&DocId=693318&Usage=4 . Reservations concerning paragraph 3 or paragraphs 3 and 4 of the Recommendation were registered by Germany, Sweden and the United Kingdom.
8) This idea is also contained in Recommendation No. R (93) 5 of the Committee of Ministers to Member States containing principles aimed at promoting the distribution and broadcasting of audiovisual works originating in countries or regions with a low audiovisual output or a limited geographic or linguistic coverage on the European Television Markets (adopted by the Committee of Ministers on 13 April 1993, at the 492nd meeting of the Ministers' Deputies).
9) Documents concerning the 2nd European Ministerial Conference on Mass Media Policy in Stockholm are available at: http://www.coe.int/t/e/human_rights/media/4_documentary_resources/DH-MM(2006)004_en.pdf ; the theme of blocking periods for cinematographic films is only mentioned very indirectly; however, see Höfling/Möwes/Pechstein, *Europäisches Medienrecht*, 1991, p. 4, and Möwes, *Eine Medienpolitik für morgen*, 2000, pp. 22 ff., available at: http://www.humanrights.coe.int/Media/documents/other/Historisches%20document%20(D).doc
10) A decisive role was played by the negotiations between the Heads of State or Government of the EC Member States in Rhodes on 2 and 3 December 1988; the meeting report is available at http://aei.pitt.edu/1483/01/rhodes_june_1988.pdf
11) Problems that may arise under European competition law in relation to media windows are described in section D.
12) Resolutions of 12 March 1982, OJ C 87 of 5 April 1982, p. 110, and of 25 May 1984, OJ C 172 of 2 July 1984, p. 212.
13) COM (84) 300 final, p. 312.
14) COM (86) 146 final, OJ C 179 of 17 July 1986, p. 4.
15) ECJ, joined cases 60/84 and 61/84, *Cinéthèque*, European Court reports 1985, p. 2605.
16) See also José Martín-Pérez de Nanclares, *Die EG-Fernsehrichtlinie*, 1994, p. 125.
17) Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30 July 1997, p. 60.
18) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332 of 18 December 2007, p. 27.
19) COM (2001) 534 final, p. 24.
20) Interactive Content and Convergence; Implications for the Information Society, study for the European Commission (DG Information Society and Media), published on 25 January 2007, available at: http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/interactive_content_ec2006.pdf
21) See Commission working document, SEC (2007) 1710 of 3 January 2008, p. 11, available at: http://ec.europa.eu/avpolicy/docs/other_actions/col_swp_en.pdf
22) *Décret n°* 87-36 of 26 January 1987.
23) These lists of terms and conditions – *cahiers de charges (et de missions)* – contain binding provisions for public and private broadcasters concerning matters such as the transmission of cultural programmes.
24) Art. 70-1 of the *Loi relative à la liberté de communication* (Freedom of Communication Act) of 30 September 1986, amended on 1 August 2000.
25) *Décret n° 83-4 du 4 janvier 1983 portant application des dispositions de l'article 89 de la loi n° 82-652 du 29 juillet 1982 sur la communication audiovisuelle modifié par décrets n° 97-503 du 21 mai 1997, n° 2000-1137 du 24 novembre 2000 et n° 2005-352 du 14 avril 2005* (Decree No. 83-4 of 4 January 1983 implementing Article 89 of Act No. 82-652 of 29 July 1982, amended by Decree No. 97-503 of 21 May 1997, Decree No. 2000-1137 of 24 November 2000 and Decree No. 2005-352 of 14 April 2005. Available at: http://www.cnc.fr/Site/Template/A2.aspx?SELECTID=23&ID=24&TextId=150&t=3
26) Agreement on the development and protection of cultural works and programmes in new networks, http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm
27) Federal Government press release, available at: http://www.bundesregierung.de/nn_23394/Content/DE/Pressemitteilungen/BPA/2007/12/2007-12-04-bkm-runder-tisch-in-hamburg-zur-novellierung-des-filmfoerderungsgesetzes.html
28) See the experts' proposal of 5 March 2008, available at http://www.bundesregierung.de/nsc_true/Content/DE/Artikel/2008/03/Anlagen/2008-03-05-vorentwurf-novelle-filmfoerderungsgesetz,templateId=raw,property=publicationFile.pdf/2008-03-05-vorentwurf-novelle-filmfoerderungsgesetz
29) News report available at http://rsw.beck.de/rsw/shop/default.asp?sessionid=A894023F5C0B4EF2A37229A014442489&docid=218063&highlight=Kinoketten
30) *Decreto-Lei n.º 227/2006 de 15 de Novembro, Diário da República, 1.ª série—No. 220—15 de Novembro de 2006*, available at: http://www.ica-ip.pt/Admin/Files/Documents/contentdoc654.pdf
31) See statement of the UK Film Council on the Ofcom consultation "Review of the Television Production Sector", available at: http://www.ukfilmcouncil.org.uk
32) The compatibility of provisions on media windows with basic freedoms (free movement of goods and freedom to provide services) is not discussed in any depth.
33) SSNIP – *"small but significant and non-transitory increase in price"*, see Capito, in: Castendyk/Dommering/Scheuer, *European Media Law*, 2008, Art. 82 para. 10 ff.
34) Commission decision of 13 October 2000, IV/M.2050, *Vivendi/Canal+/Seagram*, available at: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2050_en.pdf
35) EMR/ZEI, *Media Market Definitions – Comparative Legal Analysis*, 2003, para. 1.115 ff.
36) Commission decision of 13 October 2000, IV/M.2050, *Vivendi/Canal+/Seagram*, paras. 14 and 18.
37) ECJ, case 322/81, *Michelin*, European Court reports 1983, p. 3461.
38) Capito in Castendyk/Dommering/Scheuer, *op. cit.*, Art. 82 para. 32f.
39) ECJ, case 27/76, *United Brands*, European Court reports 1978, p. 207, paras. 69–81, 85–90.
40) See European Audiovisual Observatory, Yearbook, vol. 3 "Film and Home Video", p. 29 ff.
41) ECJ, case 85/76, *Hoffmann-La Roche/Commission*, European Court reports 1979, p. 461 para. 91.
42) Capito in: Castendyk/Dommering/Scheuer, *op.cit.*, Art. 82 para. 38.
43) ECJ, joined cases 6/73 and 7/73, *Commercial Solvents/Commission*, European Court reports 1974, p. 223, particularly para. 25, and case 311/84, CBEM/CLT and IPB, European Court reports 1985, p. 3261, particularly para. 26.
44) ECJ, C-7/97, *Bronner*, European Court reports 1998, I-7830, para. 38.
45) ECJ, joined cases C-241/91 P and C-242/91 P, *RTE and ITP/Commission*, European Court reports 1994, I-743,see particularly para. 49 ff.
46) ECJ, C-418/01, *IMS Health*, European Court reports 2004, I-5039, para. 38.
47) Regarding the resulting licensing law problems, see Cichon, "Licences and Media Windows", *op. cit.*, pp. 53, 54 ff.
48) The *Associazione Italiana Internet Providers,* for example, is therefore calling for all private contractual arrangements on media windows to be checked against cartel law provisions. See response to the Commission consultation on creative content online in the single market, question 19, available at http://ec.europa.eu/avpolicy/docs/other_actions/contributions/aiip_col_en.pdf
49) ECJ, case 262/81, *Coditel*, European Court reports 1982, p. 3381, particularly para. 17.
50) Commission decision of 15 September 1989, case IV/31.734 – *Film purchases by German television stations*, OJ L 284 of 3 October 1989, p. 36.
51) ECJ, C-185/91, *Reiff*, European Court reports 1993, I-5801; C-2/91, Meng, European Court reports 1993, I-5751; C-35/99, Arduino, European Court reports 2002, I-1529.