IRIS Special

Edited by the European Audiovisual Observatory

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Television and Media Concentration

Regulatory Models on the National and the European Level

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

IRIS Special: Television and Media Concentration
Regulatory Models on the National and the European Level
European Audiovisual Observatory, Strasbourg 2001

ISBN 92-871-4595-4

Director of the Publication:
Wolfgang Closs, Executive Director of the European Audiovisual Observatory
E-mail: w.closs@obs.coe.int

Editor and Coordinator:
Dr. Susanne Nikoltchev (LL.M. EUI and U of M)
Legal Expert of the European Audiovisual Observatory
E-mail: S.Nikoltchev@obs.coe.int

Partner Organisations that contributed to IRIS Special: Television and Media Concentration

IViR – Institute of European Media Law
Rokin 84, NL-1012 KX Amsterdam
Tel.: +31 (0) 20 525 34 06
Fax: +31 (0) 20 525 30 33
E-Mail: website@ivir.nl

EMR – Institute of European Media Law
Nell-Breuning-Allee 6, D-66115 Saarbrücken
Tel.: +49 (0) 681 99275 11
Fax: +49 (0) 681 99275 12
E-Mail: emr@emr-sb.de

CMC – Communications Media Center
New York Law School
57 Worth Street, New York, NY 10013
USA
Tel.: +1 212 431 2160
Fax: +1 212 966 2053
E-Mail: Michael.Botein@cmcnyls.edu

MMLPC – Moscow Media Law and Policy Center
Mokhovaya 9, 103914 Moscow
Russian Federation
Tel./Fax: +7 (0) 503 737 3371
E-Mail: arichter@glas.apc.org
arichter@glasnet.ru

Proofreaders:
Florence Pastori, Géraldine Pilard-Murray, Candelaria van Strien-Reney

Translators:
Brigitte Auel, France Courrèges, Christopher Edwards, Isabelle Heesch, Katherine Parsons, Stefan Pooth, Patricia Priss, Erwin Rohwer, Véronique Schaffold, Robert Spence, Stella Traductions, Nathalie-Anne Sturlèse

Editorial Assistant:
Michelle Ganter

Marketing:
Markus Booms
E-mail: M.Booms@obs.coe.int

Typesetting:
Pointillés, Hoenheim (France)

Print:
Finkmatt Impression, La Wantzenau (France)

Publisher:
European Audiovisual Observatory
76 Allée de la Robertsau, F-67000 Strasbourg
Tel.: +33 (0)3 88 14 44 00 - Fax: +33 (0)3 88 14 44 19
E-Mail: obs@obs.coe.int - html://www.obs.coe.int

Television and Media Concentration

Regulatory Models on the National and the European Level

Published by the
European Audivisual Observatory

This IRIS Special offers what is probably the first ever introduction to the legal problems involved in the concentration of the ownership of television companies and to the legal aspects of the economic involvement of television in other media markets as well as markets up- and downstream of television.

The IRIS Special series allows in-depth studies on legal topics of relevance to the audiovisual sector. The topics are selected and processed in collaboration with our network, and in particular with our partner organisations.

Opinions expressed in articles are personal and do not necessarily represent the views of the Observatory, its members or the Council of Europe.

IRIS Specials are produced in the Observatory's three working languages. In order to achieve maximum comprehensibility and precision in all three language versions, we are dependent on the work of our proofreaders and translators; their support is much appreciated.

This Special, like all other publications of the European Audiovisual Observatory in the legal field, would not have materialised without the valuable assistance and perseverance of our colleague Michelle Ganter.

Wolfgang Closs
Executive Director

Susanne Nikoltchev
Legal Expert

INDEX

GERMANY

THE UNITED KINGDOM

SPAIN

ITALY

FRANCE

EUROPEAN UNION

UNITED STATES

FEDERATION OF RUSSIA

Television and Media Concentration

Regulatory Models on the National and the European Level

Introduction

In January 1999, the Committee of Ministers of the Council of Europe adopted a Recommendation to its Member States on Measures to Promote Media Pluralism.

The Appendix to Recommendation No. R (99) 1 commences with the words:

> "Member States should consider the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels.
>
> Member States should examine the possibility of defining thresholds – in their law or authorisation, licensing or similar procedures – to limit the influence which a single commercial company or group may have in one or more media sectors. Such thresholds may for example take the form of a maximum audience share or be based on the revenue/turnover of commercial media companies. Capital share limits in commercial media enterprises may also be considered. If thresholds are introduced, Member States should take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licenses for that market."

The task defined here is by no means an easy one in view of the rapid convergence of markets that were previously divided along media and geographic lines. Limiting media power is a matter of considerable importance, in order to guarantee media variety while also continuing to ensure free and fair competition. The adoption of measures designed to defend pluralism is only one side of the coin here. The other side involves understanding existing regulations and applying them in practice. The parties concerned here are lawmakers, regulatory and monitoring bodies, and market players. They must all obtain an overview of the legal situation that is relevant to their work or their plans, so as to be able to perform their duties or plan their actions.

This book is intended first and foremost to contribute to a better understanding of the variety of legal problems and regulations that are relevant to limiting concentrations of power in the medium of television. The term television here covers television in analog and digital form, whether broadcast terrestrially, via satellite or via cable. The subject of the investigation will be the legal limitations on three types of economic interpenetration:

– "horizontal media concentration", *i.e.*, ownership and capital integration among different television broadcasters;

– "vertical media concentration", *i.e.*, ownership and capital integration among television broadcasters and their associated production and distribution markets;

– "diagonal media concentration", *i.e.*, ownership and capital integration among television broadcasters and other media such as the print media and internet providers.

We shall concentrate in particular on the investigation of a selection of models for establishing rules, which are currently applicable in states of the European Union with comparatively large television markets, and which at the same time suggest alternative approaches to regulating media concentration. The countries selected for the study are Germany, France, the United Kingdom, Italy and Spain. In describing the legal situation in these countries we shall point out the special features and basic regulatory approach of each of the various legal models as well as the ways in which each model is implemented in practice.

The presentation of the media-specific rules applying in each country will be complemented by a description of the competition law in force in each country, since such law flanks media law in relation to merger control and in relation to providing protection against the abuse of dominant market positions.

These descriptions would of course be incomplete if they did not also include an overview of relevant EC rules and key decisions of the European Commission. There are already indications that Community law will achieve even greater importance in future, to the extent that the European Union makes ever-increasing use of the possibilities it has for creating a legally binding framework within which the European media market can flourish.

In order to clarify the implications that continued development of EC law might have on the coexistence of competition and media law, the description of Community law will be followed by a chapter on the overall development of, and current trends in, the field of media concentration regulation in the USA. In North America the need for regulation of television market power seems to be already receding.

By contrast, there is a need for regulation in countries which are just beginning to set up a private radio and television broadcasting market and which are therefore having to come to terms with the question of limiting media concentration for the very first time. Such countries include, for example, the Russian Federation, where the movement away from state-run towards private broadcasting is getting underway.

A. Characteristics of the Various Models

There are many reasons why it is urgently necessary to further develop and rethink the rules on media concentration. Among these reasons are, for example, the emergence of new and increasingly international multimedia companies, the harmonisation of television and its associated production and distribution markets, the increasing digitisation of television (with the concomitant emergence of new access restrictions in respect of transmission modalities and encryption techniques for providers and consumers) as well as a growing interest on the part of television companies in expanding their range of services to include online services.

The regulatory models presented here do not merely reflect completed economic and technical changes in the market; they are also concerned with ensuring flexibility for future developments in this extremely fast-moving sector of the media. Achieving this dual goal will require that the design process of such a regulatory model should begin with the central question of how to measure the degree of media concentration.

1. Measuring Media Concentration

1.1. Horizontal Media Concentration

The countries included in this study have essentially arrived at four different answers to the question of how to measure the extent of economic integration in respect of one and the same television market. Put very simply, they have developed the following alternatives:

– The Audience Share Model

The central idea behind the audience share model is to determine the percentage of all television viewers reached by programmes attributable to one company (whether as a television provider itself or via its shares in various broadcasting companies) over a certain time period.

This approach is the one adopted in Germany and the United Kingdom, although with some differences.

The approach assumes that the total audience share is estimated beforehand, which involves taking into account all programmes including those of the public service broadcasting sector.

The rules in force in the two countries result in different versions of the audience share model, especially in relation to the thresholds applied (*i.e.*, in relation to the permissible share of the audience in percentage terms); there are also differences in respect of the conditions applying to whether or not a programme can be attributed to a provider, as well as differences with respect to the question of whether the applied threshold value is absolute or whether it can be modified by the addition of other criteria as well.

– The License Holder Share Model

This method, which is the one that has been adopted by Spain, limits the multiple economic involvements a company is permitted to have in broadcasting license holders. It states that a company may neither directly nor indirectly 1) own shares in a greater number of broadcasting license holders than that envisaged under law, or 2) exercise control over the basic capital of these license holders.

The law thus on the one hand stipulates a maximum number of license-holders (generally one) while at the same time placing a ceiling on possible (direct or indirect) capital involvement or possession of voting rights in the license-holder company.

In addition, Spanish law has largely included the transmission means in the license holder share model, *i.e.*, whether broadcasts are analog or digital, and which geographical region is covered. The various combinations of these aspects have led to a highly complex set of rules governing horizontal media concentration.

– The Revenue Share/Frequency Limitation Model

This model combines two thresholds in the form of maximum percentages: the first value determines the maximum extent of the share in programmes with respect to the total range of frequencies available for commercial broadcasting, while the second value places a ceiling on the revenues a market player is permitted to earn relative to the total revenues generated in the market as a whole.

Italy, which follows this model, distinguishes between the means of transmission and the geographical area of the awarded licenses in setting the thresholds.

– The Capital Share/Broadcasting License Model

In this approach, which is employed in France, up to three separate criteria are applied cumulatively. For each market player, (1) a permissible capital share ceiling is imposed in respect of any one broadcaster, (2) a maximum number of licenses is stipulated, and (3) additional limits are imposed on capital shares in multiple broadcasting stations in respect of particular areas (e.g. terrestrial analog broadcasts)

The rules of French law, too, partly distinguish between the means of transmission, the geographical area covered by the programmes and, more recently, between analog and digital television as well.

Audience share, revenue/turnover and capital share limits are also presented in Point 1 of the Appendix to the Council of Europe's Recommendation No. R (99) 1 as examples of possible criteria that could be used to set thresholds.

1.2. Vertical Media Concentration

The rules on economic integration of television broadcasters with production and distribution markets are highly fragmentary in character and thus can hardly be called "models", although they could perhaps develop in that direction.

– Italy has so far not set any specific legal limits on vertical integration.

– In Germany, vertical media concentration is sometimes a factor in relation to the application of the audience share model to cases of horizontal concentration, to the extent that it is necessary to determine whether or not a dominant market position has been achieved in particular individual cases

– In the United Kingdom, some aspects of vertical media concentration are subject to special rules. These rules concern essentially digital services such as *Electronic Programme Guides* (*EPG*),[1] *conditional access* and *multiplexes*.[2] All in all, the United Kingdom is following a policy aimed at initially overcoming the current situation of vertical integration in the area of broadcasting.

– Spanish law limits vertical media concentration for some markets which are upstream and downstream of the television broadcasting market. The issues involved here are conditional access systems in television receivers and transmission capacities for audiovisual content.

– In France, it appears that vertical media concentration in connection with multiplexes may in future be subject to particular rules. The central concern of current discussions on this issue is to ensure there are at least a certain minimum number of multiplex operators.

The Council of Europe has explicitly urged its Member States to consider the introduction of specific measures to deal with cases in which vertical integration might lead to disadvantageous effects in terms of media pluralism.[3]

1.3 Diagonal Media Concentration

Cases of trans-media ownership integration are subject to various degrees of regulation; in all models, the legal limitations are primarily oriented towards mutually distinct markets, *i.e.,* they are horizontal in character. However, determining whether or not such markets are in existence is a problem of considerable significance in respect of cases of diagonal integration. A particular range of media content and services assigned to one market may turn out to be subject only to the regulations pertaining to that particular market.

Spanish law, for example, is prepared to let the matter rest here.

The German solution to the problem goes somewhat further, since diagonal media concentration can always be taken into consideration in determining that a market position has become a dominant one (horizontal concentration).

In addition, there are the following approaches, which are specifically oriented toward trans-media ownership integration:

– The most detailed set of rules is in place in France, which applies the "two out of four areas" limit. This rule is specifically intended to permit ownership integration in respect of at most two media markets, thus effectively limiting cases of diagonal integration on the basis of the "percentage of population served" figures that have already been achieved. The details of the calculation of the central component (percentage of population served) are determined by various media combinations, taking into account the geographic area served by the media concerned. The regulations as a whole are highly specific and technical, as they were required to conform to a prior high court ruling pertaining to their constitutionality or lack thereof; as a result, they have turned out to be quite complicated indeed.

– In the United Kingdom, the law provides that ownership of a certain percentage share in a newspaper excludes the acquisition of certain licenses. The rules vary depending on the geographical area served by the newspaper. In addition, there are further limits imposed to protect the public interest.

---

1) Navigation software for digital television.

2) Multiplexes involve the bundling of several television channels simultaneously into a single digital signal for transmission. Each television multiplex, in turn, is designed to carry various broadcasing channels. Moreover, the multiplex process can be used to disseminate additional services, such as EPGs or teletext, for example.

3) European Council Recommendation No. R (99) 1, Appendix, Point I. The Recommendation also refers to the fact that in Europe regulation has been underdeveloped or lacking as a result of a tendency to emphasise traditional media to the exclusion of others.

– In Italy, the legal situation is unclear, due to a still ongoing discussion of the scope of a high court decision which ruled that one of the central regulations was unconstitutional. There is disagreement about whether or not the extensive bans on diagonal integration are still legally in force. There are detailed regulations with various combinations such as the proportion of the total sales figures of a newspaper publisher compared with the national sales figures on the one hand, and on the other the number of national stations broadcasting terrestrially.

  One fact which is apparently undisputed is that limits pertaining to accumulation of radio and television licenses (determined both in percentage terms and, as an ancillary measure, in numerical terms), as well as special restrictions for advertising agencies, continue to be legally in force.

2. How Much Concentration Can Media Pluralism and/or the Media Market in fact Tolerate?

Each of the three forms of concentration gives rise to a question concerning the borderline between permissible and impermissible concentration. Without wishing to anticipate too much of the more detailed discussion of this borderline that follows, we can say that the decision about where to draw the line is intended to be taken in such a way as to ensure the coexistence of several market players. This consideration is based on the conviction that plurality of opinion, as one of the pillars of democratic societies, requires the presence of several providers and that competition on the national market also promotes a desirable level of economic growth.

3. Further Aspects of Regulation

There are other aspects that can and should be considered in relation to working out the concrete details of a regulatory model and which are also relevant factors in the models presented here. First, it is necessary to determine the relevant markets. Here the question arises as to whether public service broadcasting and private television represent separate markets. Next, it is necessary to decide whether integrations resulting in concentration should be treated separately according to the following conditions:

– means of transmission (terrestrial, cable or satellite);

– analog or digital transmission;

– local, regional or national broadcasing licenses.

With respect to the practicability of the regulations, the concomitant transparency and enforcement regulations are of considerable significance.

The regulatory models presented here also encompass specific, non-market-oriented ownership restrictions. The range of possible measures involved here includes limitation of ownership (or even a ban on acquiring ownership) for market players who are non-EU nationals, political bodies, religious groups, public service organs or advertising agencies (to the extent that these are not already treated, as in Italy, as cases of diagonal media concentration).

Finally,we must also consider the relationship between special media law regulations and general competition law.

4. Media Specific Rules and National Competition Law

As a market, broadcasting is also subject automatically to competition law. In general, the anti-concentration rules of media law differ from competition law in terms of their goals. In media law, it is primarily a question of ensuring media pluralism; competition law, on the other hand, has the task of ensuring the functioning of market mechanisms and, within this framework, of preventing any abuse of a dominant position in the market. These differing goals also have consequences for the sphere of application of the regulations. Whereas cartel law is applied wherever cartel formation via mergers, takeovers or secret agreements is concerned, media law more specifically addresses the problem of concentrations of opinion and resultant market power. In particular, media law applies to the case where one market player gains in market power by opening new channels or by displaying significant internal growth.

In most cases, both media law rules and competition law rules are applicable in parallel. However, this is sometimes only true in a restricted sense for competition law, as in the United Kingdom, as specific rules of media law limit the scope of competition law in practice. On the other hand, Italian law and French law explicitly state that media law is not *lex specialis* and thus does not derogate from competition law. Hence, the full scope of competition law is applicable here.

Thus, to a varying degree, each and every legal matter can be subject to dual legal procedures, with the possibility of different outcomes in each case. These two areas of law are, however, in agreement, at least to the extent that media law also takes into consideration whether a concentration situation allows the presence of a sufficient number of providers. Indeed, it may even be expected that media law will turn out in the majority of cases to make higher demands for a competition-friendly market, since it sees the existence of several market players as a condition for pluralism. On the other hand, competition law, in particular at the European level,

stresses that the media branch must remain competitive. Thus, it will not always decide against concentration of opinion and in favour of the intended strengthening of plurality on the national markets.

5. EC Competition Law

To the extent that media concentration concerns the single market of the European Union (EU), European Community Law (EC Law) is applicable, with the admissibility or inadmissibility of concentration processes being regulated not by media-specific law but by competition law rules. These have priority over the national rules, since EC Law overrides National Law in its sphere of applicability.

In the case of concentration situations of relevance to the single market, the EU Member States only retain the responsibility for monitoring the situation in the event that the European Commission is inactive and only to the extent that: there is a legitimate interest in taking national action, this action is appropriate, is kept to the absolute minimum necessary and allows at least marginal control on the part of the Commission. The defense of media pluralism is recognised as constituting a legitimate interest.

Basically, the European Commission accepts national media policy, but for the future it plans to state certain uniform framework guidelines for every form of communication structure and communication services, in order to create more legal security for access and connection agreements and in relation to authorisation procedures for communication services. The European Commission appears to be moving away from a system of prior checks based on the ownership relationship and moving towards after-the-fact checks with special consideration to be given to possible market access hurdles. The Commission intends to maintain its present system of European-wide determination of the product markets.

To date, decisions of the European Commission have tended towards a recognition of PayTV plus its upstream access services as a separate reference market, and have also tended tended to draw a distinction on the basis of the means of transmission (cable, satellite, terrestrial). In addition, a distinction has in the past been made with reference to the television production market in terms of independently-produced content and content produced by the television broadcaster itself, and media-specific advertising markets were recognised. In a variety of decisions, the European Commission has shown that, despite the increasing internationalisation of broadcasting, it still views the geographical markets as being characterised by linguistic and cultural barriers and thus as being national.

In connection with an outline directive, the European Commission has also considered the adoption of guidelines for the loosening of a community-wide uniform determination of the relevant threshold for permissible concentration movements (the presence of “considerable market power”).

Up to the present, the European Commission has taken into consideration both vertical and diagonal concentration in its evaluation of the state of competitive relations. It has considered as a further criterion that of market transformations due to technical progress and the adaptability on the part of competitors that such transformations require. In addition, questions of access have been of particular importance,[4] whether due to the fact that the Commission has permitted mergers that had proven to be the only possible way to gain access to a market, or whether due to the fact that the Commission has made efforts to prevent the creation of access control monopolies.

In addition to the points mentioned above, anyone upon whom EC Law is binding or who voluntarily abides by that Law must also, in the area of media concentration and with a view towards citizens from EU Member States, take into account the general requirements of EC Law in terms of transparency, non-discrimination and equal access.

B. Counterpoles

In the preceding section, mention was made of trends towards the setting up of standards of reference, at Community level, for dealing with media concentration. In this connection, a glance at the USA and the Russian Federation may turn out to be highly informative.

1. The USA

The US market is not just of interest to Europe by virtue of its being an important benchmark for the international competitiveness of the European market, but also because it has had more experience of a free competition situation.

In the USA the broadcasting market was organised on the basis of private enterprise right from the beginning, and thus it can look back on a much longer tradition of regulation to prevent media concentration. A further reason why a comparison with the USA is advisable is that, just as in the European Union, there is a very large territory to be covered and multi-faceted cultural, economic and political interests that have to be satisfied. The USA has also, in the last few decades, tried out various media-specific regulation models; the results of

4) See also the detailed description of the problems faced by European law in relation to broadcasting companies’ access to the digital television market, in IRIS PLUS 2001 No. 1.

these experiments show us some interesting aspects that can be applied to the evaluation of the European models presented in this volume. On the one hand there appears to be confirmation of the thesis that in a supranational context competition law maintains the upper hand over media law. However, recent developments have shown that the emphasis in the US market has now shifted from media law to telecommunications law. On the other hand, it also becomes clear that Europe places more emphasis on cultural and pluralistic aspects and could thus highlight different aspects of future regulation.

2. The Russian Federation

In a similar fashion to the USA and the European Union, the Russian Federation, too, is facing special challenges due to the coming together of various states, the geographical size of the country as a whole, and the cultural and political significance of television as well as its tremendous potential. Unlike the case of the USA or the European Union, however, regulation to prevent media concentration is still largely unexplored territory, and a stronger move away from political monopolisation of television is necessary. Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe on Measures to Promote Media Pluralism is also an appeal to spur on this development. An overview of the current market situation in the Russian Federation, the law in force there, and the current legislative initiative on media concentration, shows particularly clearly how important it is to come to terms with various models for the regulation of the television market and how considerable the difficulties are that are associated with the development of a system that protects pluralism.

Strasbourg, February 2001

Susanne Nikoltchev, Editor and co-ordinator
Legal Expert of the European Audiovisual Observatory

GERMANY

Bettina Häussermann & **Alexander Scheuer**
Institute of European Media Law (EMR)

In terms of broadcasting law, media concentration matters are primarily dealt with by §§ 25 *et seq.* of the *Rundfunkstaatsvertrag* (Agreement between Federal states on Broadcasting – *RStV*).

A. Horizontal Media Concentration

In this presentation, consideration should first go to horizontal media concentration, *i.e.,* trends towards concentration on the part of companies operating on the same market.[1]

1. Definition of the Broadcasting Market

The relevant market is as defined in § 27 sub-para 1 *RStV*. All German language programmes broadcast by public service and private broadcasting stations operating nation-wide are included in determining audience share. Public service broadcasting thus forms part of the market subject to concentration control even if it is not exposed to diversification measures under §§ 26 et seq. *RStV.*[2] German language programmes produced abroad and received throughout Germany are considered only if the broadcaster has become established abroad in order to circumvent German media law.[3]

Paragraph 27 *RStV* makes no distinction between transmission media (terrestrial, cable or satellite).

Considering the fact, furthermore, that § 27 *RStV* makes no distinction between analog and digital television, no individual relevant market need be assumed. In this context, the *Kommission zur Ermittlung der Konzentration im Mediabereich* (Committee on Investigating Media Concentration – *KEK*)[4] pointed out in its decisions on Premiere that no conclusions could be drawn from a dominant position in the (digital) pay TV area as to dominant opinion-forming power in terms of the inter-state broadcasting treaty. The assessment of dominant opinion-forming power has to be seen in terms of nationwide television coverage.[5] The importance of pay TV as part of television broadcasting nationwide is currently small.[6]

2. Content of Applicable Legislation

Paragraph 26 represents the main focus of the regulations on media concentration in the inter-state broadcasting treaty. It relates "dominant opinion-forming power" mainly to the number of individual viewers covered by any one television broadcaster or some corresponding or equivalent concept.[7]

2.1. Thresholds

2.1.1. Audience Share of 30% Percent or Equivalent Influence on Opinion

According to the audience share model set out in § 26 sub-para 2 *RStV*, a company can broadcast an unlimited number of programmes, so long as it does not acquire dominant opinion-forming power.[8]

Under § 26 sub-para 2 line 1 *RStV*, dominant opinion-forming status is to be presumed if the programmes attributable to one company represent a yearly average of 30%. The same holds true under line 2 with a slightly lesser audience share, so long as the company holds a dominant position on a related media market or where an aggregate assessment of its activities on television and a related media market show that the influence on opinion achieved corresponds to that of a company with a television audience share of 30%.

Both line 1 and line 2 on the alternative "a general assessment of television activity ..... indicates that the influence on opinion corresponds to an audience share of 30 percent in television" cover the case of horizontal media concentration. As the rule in § 26 sub-para 2 line 2 *RStV* would otherwise be more significant on media-related markets primarily where concentration is vertical and diagonal, it should be dealt with first in the corresponding sections.[9]

---

1) Knothe/Lebens, *Rundfunkspezifische Konzentrationskontrolle des Bundeskartellamts*, in: AfP 2000, pp. 125-131(127).

2) Stock, *Konzentrationskontrolle in Deutschland nach der Neufassung des Rundfunkstaatsvertrages* (1996), in: Stock/Röper/Holznagel, *Medienmarkt und Meinungsmacht*, Berlin, Heidelberg, New York 1997, p. 34.

3) See also Art. 2 of Directive 89/552/EEC (consolidated version).

4) The KEK was established on the basis of the 3rd RStV on 15 May 1997. Its task is to review compliance with the provisions on diversity of opinion in television and arrive at appropriate decisions.

5) See Decision of the KEK in the Premiere case, on 26 January 1999, Casefile: 026, Section II.4, p. 26.

6) See Decision of the KEK in the Premiere case, on 21 September 1999, Casefile: 047, Section III.3.2.1, p. 21.

7) See KEK-homepage: http://www.kek-online.de/cgi-bin/esc/zuschauer.html

8) Hesse, *Rundfunkrecht,* 2. edition, München 1999, 5. Chapter, marginal note 72.

9) See below B. 1.1.

2.1.2. Audience Share of 10 Percent

There is another threshold value of significance in the broadcasting regulations: § 26 sub-para 5 *RStV* determines certain responsibilities in the event of an average audience share of at least 10 percent.[10] In this case, contrary to § 26 sub-para 2 *RStV*, it is a definite limit rather than a presumptive rule.[11]

2.2. Means of Measuring Concentration

The audience share which is important in the determination of the existence of dominant opinion-forming power is determined by the viewing duration of a transmitter in a given time interval as measured against the total transmitting time of all transmitters in the same interval. The determination of whether an audience share of 30% is achieved involves three steps: firstly, the audience share of every television programme is investigated, then the attribution of the audience shares as determined to the companies with an interest in the transmitters, and finally the assessment, derived from these two steps, of the emergence of dominant opinion-forming power.[12]

2.2.1. Determination of Audience Share - § 27 *RStV*

The broadcasting regulatory authorities determine audience share through the *KEK*, using for each programme the average audience share over the last twelve months. This twelve-month period was computed in each case until the time the concrete procedure was introduced.[13] Under §27 sub-para 2 line 2 *RStV*, the investigation of viewers is to be done with effect from three years of age.

2.2.2. Attribution of Audience Share as Determined – § 28 *RStV*

The attribution of the audience shares, as determined, to the companies with an interest in the transmitter can be summarised as follows. The audience share of a transmitter is attributed to a company only if it has at least a 25% equity holding in the transmitter, or exercises comparable influence (see § 28 sub-para 1 and 2 *RStV*). Shareholdings below the 25% threshold are not taken into account in the concentration assessment, while above that line there is complete attribution.[14]
More specifically the attribution is handled as follows:

(a) § 28 sub-para 1 line 1 *RStV*
Under § 28 sub-para 1 line 1 *RStV*, a company is assigned the audience share for all programmes broadcast by itself or another company in which it has a direct holding of at least 25% of capital or voting rights.

(b) § 28 sub-para 1 lines 2 to 4 *RStV*
Indirect shareholdings are also taken into account for attribution purposes. Company (A) is assigned the audience share for all programmes broadcast by by television company (C) in which Company (A) is involved indirectly via subsidiary company (B), where

– company (A) and its subsidiary company (B) are connected in a group, and

– subsidiary (B) company holds at least 25% of the capital or voting rights in television company (C).[15]

(c) § 28 sub-para. 2 and 4 RStV
Shareholdings under § 28 sub-para 1 *RStV* are considered under § 28 sub-para 2 and 4 RStV to be of equivalent influence. The assessment of equivalent influence takes account *inter alia* of contractual agreements, provisions of statutory law and existing property relationships.[16]

2.3. Safe Havens

The sections of the interstate broadcasting treaty on plurality of opinion, which are final under § 39 line 2 *RStV* in respect of nationwide television, make no provision for exceptional cases in particular areas.

3. Legal Remedies

The consequences of the presence of elements of concentration are determined in accordance with § 26 sub-paras 3 to 5 *RStV*.

3.1. Determination of Dominant Opinion-Forming Power

The determination of dominant opinion-forming power has various consequences.

3.1.1. § 26 sub-para. 3 *RStV*

Paragraph 26 sub-para. 3 *RStV* covers what is known as the external growth of broadcasting companies, *i.e.*, the situation where a new programme is to be broadcast and consequently licensed or wider holdings sought or existing holdings increased. If a company has acquired dominant opinion-forming power with the

10) Further details here in A.3.2.

11) Ring/Kreile/Dörr/Stettner, *Medienrecht*, Volume II, *Kommentar zum Rundfunkstaatsvertrag*, last update: July 2000, München, Berlin, C-0.3 § 26 marginal note 31.

12) Mailänder, *Konzentrationskontrolle zur Sicherung von Meinungsvielfalt im privaten Rundfunk*, Hamburg, Dissertation, 1998/1999, p. 295 *et seq.*

13) See § 27 sub-para.1 RStV plus the official grounds in: Ring, *Medienrecht*, B 5 § 27, p. 2.

14) Mailänder, *Konzentrationskontrolle*, p. 296.

15) Presentation proposal from Pelny, *Konzentrationskontrolle für den privaten Rundfunk*, in: AfP 1998, pp. 35-40(36).

16) *Ibid.*, pp. 35-40(36).

programmes attributed to it, then under § 26 sub-para 3 *RStV* no further licenses may be issued to this company for programmes attributed to it, nor may the acquisition of further attributable holdings in broadcasters be deemed unobjectionable. The rule under §26 sub-para 3 *RStV* is addressed to all involved. Under § 20 sub-para 1 *RStV* private producers require regional licenses to operate. Within the licensing procedure, the *KEK*, under §37 sub-para 1 *RStV* and in cases of § 37 sub-para 2 RStV, the Directors' Conference (*KDLM*) have sole authority to determine questions of plurality of opinion. It is for the *KEK* to determine whether the conditions have been met for "dominant opinion-forming power" and set in train the legal consequences laid down in sub-para 3.

New licenses or holdings may be allowed if other holdings are given up, so that the company overall does not acquire dominant opinion-forming power. In such case, the legal determination requirements for sub-para 3 to apply are no longer present.[17]

3.1.2. § 26 sub-para 4 *RStV*

Sub-para 4 covers the case of "internal growth," where the audience share in respect of attributable programmes increases.[18] Should a company acquire dominant opinion-forming power, then under § 26 sub-para 4 *RStV* either as many holdings must be given up as will bring the company's share of the audience market below the 30% threshold or what are known as plurality-building measures taken in accordance with § 30 *RStV*.[19] The possibilities listed under § 26 sub-para 4 *RStV* have equal weighting.

This means specifically: under § 26 sub-para 4 line 1 No 1 *RStV*, the company can give up its attributable holdings in broadcasters until its attributable audience share falls below the decisive threshold. In practice, this means that the broadcaster is required to dispose of shares in a programme producer.[20]

Furthermore, under § 26 sub-para 4 line 1 No 2 *RStV*, a company has the possibility, in cases where dominant opinion-forming power is determined, despite a minor undershoot below the 30% threshold, of reducing its position on relevant media-related markets or giving up attributable holdings in producers. Again, this takes on greater significance in cases of vertical and diagonal concentration.[21]

Under § 26 sub-para 4 No 3 *RStV*, a company may also take plurality-building measures in accordance with §§ 30 to 32 *RStV*. This is the mildest form of encroachment on the entrepreneurial freedom of the broadcaster.[22] By way of plurality-building measures, the law provides for the release of airtime to independent third parties in accordance with § 31 *RStV*. This is designed to contribute to diversity in programming, particularly in the areas of culture, education and information. Under § 30 No 2, as against § 32 *RStV*, plurality-building may also be achieved by establishing a programme advisory committee, making a contribution to plurality and diversity of opinion.[23]

After the *KEK* has verified dominant opinion-forming power, the following procedure under sub-para 4 is initiated. The *KEK* discusses the measures to be considered with the company. If the *KEK* limits its proposal to one of the measures listed in sub-para, the company is at liberty, as part of these discussions, to propose other measures. No voting right of the company is connected.[24] The final decision remains with the *KEK*. The purpose of the discussions is to arrive at a decision by mutual consent. If this is not successful, the *KEK* is required to lower the market power of the company to the legal limit by having the broadcasting regulatory authority proceed with a partial license withdrawal.[25] Because of the severe consequences of the provisions of sub-para 4, a sense of perspective must be strictly observed throughout the discussion procedure described. This means that that the *KEK* must offer and discuss the three alternatives in sub-para 4, line 2, which the legislator sees as equivalent. It has no discretionary powers in putting forward its proposals.[26] Only when the broadcaster has rejected all three measures offered or failed to implement them within an appropriate time limit may licenses be revoked.

3.2. 10% Audience Share

Broadcasters of comprehensive programmes, or thematic programmes with an emphasis on the information sector, are required under § 26 sub-para 5 *RStV*, if they have an audience share of at least 10%, to provide an independent third party with a given amount of airtime (known as "window programmes"). This plurality-building measure is intended to prevent the development of dominant opinion-forming power. Within a time limit of six months after determination and notification by the regulatory authority, airtime is to be provided to independent third parties. In the event of the time limit being exceeded, the license is to be compulsorily revoked.[27]

---

17) Ring/Kreile/Dörr/Stettner, *Medienrech*t, op. cit., C-0.3, § 26 marginal note 23.

18) *Ibid*., C-0.3, § 26 marginal note 24.

19) Hesse, *Rundfunkrecht*, 2. edition, München 1999, 5. Kapitel, marginal note 73.

20) Ring/Kreile/Dörr/Stettner, *Medienrech*t, *op. cit*, C-0.3, § 26 marginal note 27.

21) See below B. and C.

22) Ring/Kreile/Dörr/Stettner, *Medienrech*t, *op. cit*, C-0.3, § 26 marginal note 27.

23) *Ibid*., C-0.3, § 26 marginal note 29.

24) See Grounds for the 3rd RStV in: Ring/Kreile/Dörr/Stettner, op. Cit., A 2.1 concerning § 26, p. 11.

25) *Ibid.*, C-0.3, § 26 marginal note 25.

26) *Ibid.*, C-0.3, § 26 marginal note 26.

27) On the moot point whether these window programmes are to be considered as part of § 26 sub-para 2 RStV, with the consequence that the surrounding comprehensive programme is exempt from a verdict of inadmissible opinion domination, see Neft, *Meinungsdominanz im Fernsehen*, ZUM 1998, pp. 458-465(461 *et seq.*).

4. Justifications and Policy

The regulations on concentration in the inter-state broadcasting treaty are essentially based on three ideas.

Firstly, the regulations are designed to ensure diversity of opinions. This is to be seen in § 25 sub-para 1 *RStV*

> "Diversity of views is essentially to find expression in the substance of private broadcasting. The significant political, philosophical and social forces and groups must find fair and reasonable expression in comprehensive programming; the views of minorities are to be taken into consideration. The possibility of offering thematic programmes remains unaffected by this."

The idea of diversity of views and prevention of dominant opinion-forming power goes back to judgements on matters of broadcasting law by the *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*). In its view, the control of broadcasting must be based on "an unambiguous standard focusing on substantial, clearly identifiable and demonstrable shortcomings. This basis can only be a standard of balanced diversity. This does not, however, involve the production of any arithmetic equivalence of trends of opinion but covers the essential requirements of diversity of opinion, which are to be protected against concrete and serious risks: the possibility for all trends of opinion – including those of minorities – to find expression in private broadcasting and preclude seriously unbalanced influences due to individual broadcasters or programmes impacting on the formation of public opinion, in other words preventing the development of dominant opinion-forming power."[28]

The legislator is consequently required "to counter concentration trends in a timely manner and as effectively as possible, particularly since aberrations once in place can be very difficult to rectify."[29] This means that in controlling media concentration, particular importance is attached to action being taken before a *fait accompli* has been created and that control should be driven by preventive rather than repressive considerations.[30] In the most recent judgement by the Federal Constitutional Court on German sports television[31] and television reporting, this jurisprudence was developed further. The Court made it abundantly clear that for the "prevention of dominant opinion-forming power.....not only effective arrangements at broadcaster level are required but also adequate measures against a monopoly of information."[32]

The choice of audience share model for the limitation of dominant opinion-forming power is to be seen against the background of the fact that what is called a "participation model" was introduced in the 1991 inter-state broadcasting treaty. The criterion used was the number of programmes broadcast and the level of capital and voting rights in programme producers.[33]

In amending the law, the decisive feature was the complicated nature of its provisions. Furthermore there was broad consensus on the fact that the old system was out-dated. Proceeding from the premise that with digital technology the number of available transmission channels would shortly increase and that broadcasters would go over to offering programme packages instead of various individual channels, it was felt that the limitation to broadcasting two programmes under §21 sub-para 1 *RStV* in the old version was too rigid. Furthermore, for various reasons, the view prevailed that the old system had failed.[34] As of 1994, various concrete models for reforming the regulations on concentration control in the inter-state treaty were discussed. The proposals ranged from adjusting the theshold levels on the basis of the old regulation system to the complete abandonment of this system in favour of an advertising, audience market or media use model.[35] Quite early on in the discussion, an "audience share model" took the lead, focused on the national private commercial market. Other approaches defended by other authors were dismissed after having been briefly checked out.

There was an attempt to extend the viewer share model into an overarching "media use model", to include print, radio and services similar to broadcasting, designed to include vertical and diagonal concentrations.[36]

The actual design of the audience share model was based on the following consideration: with the adoption of the 30% threshold, what are known as the transmitter families, as they have developed in the Kirch group and in the Bertelsmann group, are not just accepted but would be permitted further opportunities for development, restricted in scope, *i.e.*, up to the 30% level.[37] The future broadcasting market was not to lose its international competitiveness.[38]

---

28) BVerfGE 73, 118, 159 *et seq.*

29) BVerfGE 73, 118, 160.

30) Cf. KEK Annual Report for the period 1. July 1999 to 30 June 2000, p. 6.

31) BVerfGE 95, 163, 172 *et seq.*

32) BVerfGE, 1 BvF 1/91 of 11. November 1997, sub-para N° 112, http://www.bverfg.de.

33) Schellenberg, *Rundfunk-Konzentrationsbekämpfung zur Sicherung des Pluralismus im Rechtsvergleich: Rundfunkstaatsvertrag 1997 und Landesmediengesetze im Vergleich mit den Kontrollsystemen in Frankreich, Italien und Großbritannien*, Baden-Baden 1997, p. 40.

34) *Ibid.*, p. 40 *et seq.*; Mailänder, *Konzentrationskontolle*, *op. cit.*, p. 292.

35) Schellenberg, *op. cit.*, p. 41.

36) Stock, *Konzentrationskontrolle in Deutschland*, *op. cit.*, pp. 17 *et seq.*

37) Ring/Kreile/Dörr/Stettner, *Medienrecht*, *op. cit.*, C-0.3 § 26, marginal note 1.

38) Cf. Mailänder, *Konzentrationskontrolle*, *op. cit.* p. 294.

B. Vertical Media Concentration

Vertical media concentrations, *i.e.,* cases where a company combines[39] with other companies upstream and/or downstream in production and trading terms, are also covered by the inter-state broadcasting treaty.

1. Content of Applicable Legislation

1.1. § 26 Sub-Para 2 RStV

Cases of vertical concentration are covered by "media-relevant related markets" under § 26 sub-para 2 RStV. Under this rule, the existence of dominant opinion-forming power will be presumed if a company occupies a dominant market position on a media-relevant related market or if the overall assessment of its activities in television and other markets indicates that the influence upon opinion thus acquired is equivalent to that of a company with a 30% audience share on television.

1.1.1. Minor Undershoots Below the 30% Audience Share

This rule is also closely related to the 30% threshold and applies solely when a group on the television market acquires something approximating to dominant opinion-forming power.[40] Contrary to several views in the literature and the position of the *KDLM*, which wished the borderline here to be assessed purely quantitatively, the *KEK* does not assume that the concept carries with it any hard and fast area of tolerance.[41] This is not to be read into the inter-state broadcasting treaty. The quantitative figures are to be set against the broadcaster's structural, qualitative features characterising his position on the television market and media-relevant related markets and which are to be weighed up as part of an overall assessment.[42]

1.1.2. Dominant Market Positions

The question whether a company holds a dominant position on a market is to be determined in terms of cartel law.[43] Under § 19 sub-para 2 of the *Gesetzes gegen Wettbewerbsbeschränkungen* (law on restrictive practices – *GWB*) this is *inter alia* the case when a company, as participant on a particular market, is either not exposed to competition at all or possesses an outstanding position with regard to its competitors.[44]

1.1.3. Media-Related Relevant Markets

In the official grounds to § 26 *RStV*, there is the statement: "Media-related relevant markets such as advertising, radio, press and production are to be included as indicators whether dominant opinion-forming power has been established within the meaning of this regulation."[45]
Alongside this explanation, the aims and objectives of the inter-state broadcasting treaty can be helpful in clarifying the concept "media-related relevant market". Diversity of views is to be ensured. Consequently, under that heading only those markets are to be understood that have a substantial relationship with opinion forming.[46] This would be lacking, for instance, in the case of markets dealing with supply and demand for technical equipment used in broadcasting television programmes, and the same is true of the market for cable network and satellite operators. These pertain solely to the external conditions of television programme broadcasting without any relevance to opinions of any kind, just so long as they provide each transmitter with transmission facilities.[47]

1.1.4. Attribution of Audience Share to Participating Companies

In the area of vertical concentration, § 28 sub-para 2 is of primary relevance in matters of attribution. In determining an influence comparable to a 25% shareholding, it relies on opportunities for bringing influence to bear deriving from programme supply, programme purchasing or programme production.

1.2. Separate Overall Assessment beyond Legal Presumption – § 26 Sub-Para 1 RStV

In particular for cases where, in determining audience share, no minor undershoot below the 30% level is ascertained, the *KEK* undertakes a separate overall assessment based on § 26 sub-para 1 *RStV*. The assumption that § 26 sub-para 2 contains a definitive substantive definition of dominant opinion-forming power is at variance both with the character of the regulation as being of a presumptive nature only, the

39) *Ibid*., p. 163.

40) See parallel to the case of cross-ownership: Röper, *Wirtschaftliche Folgen des neuen Rundfunkstaatsvertrags*, in: Stock/Röper/Holznagel, *Medienmarkt und Meinungsmacht*, Berlin 1997, p. 101.

41) The KDLM proceeded on the assumption that where there was an audience share of 28%, there was no situtation of a minor undershoot. The KEK in its decision of 26 January 1999 commented on this inter alia in its decision of 26. January 1999, Casefile: 026, II.3.2.2, pp. 23 *et seq.* A full description of the current situation is to be found in: Martinek, *Die Zurechnung von Zuschaueranteilen nach §§ 25 ff des Rundfunkstaatsvertrages 1996*, EMR-Schriftenreihe, volume 19, pp. 53 *et seq.*

42) Cf. Decision by KEK in the Premiere case, on 21. September 1999, Casefile: 047, Section III.3.2, p. 18.

43) Ring/Kreile/Dörr/Stettner, *Medienrecht*, *op. cit.*, C-0.3 § 26, marginal note 17; Kreile/Stumpf, *Das neue „Medienkartellrecht"*, MMR 1998, pp. 192-195(194).

44) See below D. 3.1. and 3.2.

45) See official grounds on § 26 in: Ring, *op.cit.*, C-0.3 § 26 p. 3.

46) Kreile/Stumpf, *op. cit.*, pp. 192-195(194).

47) Ring/Kreile/Dörr/Stettner, *op. cit.*, C-0.3 § 26 marginal note 18; Neft, ZUM 1998, pp. 458-465(464).

regulation's development and the requirement for a constitutional interpretation. Were there indications to suggest that dominant opinion-forming power might also be considered by virtue of stronger positions in the television sector independent of audience share, the *KEK* would then be required to investigate the facts in the case. In its assessment, there would be included the television advertising market, the procurement market for certain television programmes and the market for television productions,[48] access to system technology for pay TV and the possession of programme resources.[49]

1.3. § 53 Sub-Para 3 RStV

Paragraph 53 RStV deals with freedom of access to services connected with digital television. It is designed to provide all broadcasters with access on fair, reasonable and non-discriminatory terms to services with an impact on access to the technical system. This relates in particular to the technical platform, as it is called, and the development of decoders enabling the viewer to access digital and coded programmes and services in accordance with the current state of the art.[50]
In its sub-para 3, § 53 *RStV* contains a prohibition on discrimination which is specific to broadcasting.[51] It deals with suppliers possessing a dominant market position in terms of the bundling and marketing of programmes. Should other suppliers request this service, those in possession of a dominant market position may not unfairly stand in the way, either directly or indirectly. Furthermore, no distinction may be made in dealing with one such supplier vis-à-vis other similar suppliers without proper justification.
Whether there is a dominant market position or not is a matter for the competent regulatory broadcasting authority to enquire into. In the course of this enquiry, regard must be had under § 10 of the "Charter on freedom of access to digital services following § 53 sub-para 7 *RStV*" drawn up by the *DKLM* (Directors' Conference of the regulatory authority for broadcasters), to decisions by the Federal Cartel Office (BKartA) and the Regulatory Authority for Telecommunication and Post (RegTP). Failing such decisions or if in the meantime relevant amendments have come into force, the competent regulatory broadcasting authority takes account of the opinions of the BKartA or the RegTP under cartel or telecommunications law in arriving at a decision.

2. Legal Remedies

The machinery set out in § 26 sub-para 3 and 4 *RStV* also applies in cases of dominant opinion-forming power by virtue of vertical concentration, as detailed above. It should be noted that § 26 *RStV* with its sub-para 4 line 1 No 2 contains a special rule in respect of holdings on a media-related relevant market.[52]

3. Justifications and Policy

The significance of ensuring media diversity against a background of vertical integration was borne in mind by the *BVerfG* in its DSF decision: "It is also not evident that the diversity requirement might lose any weight as a result of later developments. The vertical integration of broadcasters with production firms, owners of film and sports events transmission rights and proprietors of news magazine (programmes) and the privatisation of transmission channels make its consideration rather more urgent. This is all the more true since undesirable developments with their resulting potential for political influence are, once established, difficult to rectify."[53]

C. Diagonal Media Concentration

Diagonal concentration refers to integrations under company law between companies that neither belong to the same market nor stand in a supplier-purchaser relationship[54] particularly in cases of cross-ownership[55] between press and broadcasting companies.

1. Content of Applicable Legal Rules

1.1. § 26 Sub-Para 2 Line 2 RStV

In § 26 sub-para 2 line 2, the inter-state broadcasting treaty contains a rule that is connected with the problem of cross-ownership, since the printed press market, for instance, is included as a media-related relevant market in the assessment of dominant opinion-forming power.[56]

As regards threshold values and sanctions, reference must be made to the observations on horizontal and vertical concentrations.[57]

---

48) Decision of KEK in the *ProSieben Media AG* case of 26 January 1999, Casefile: 007/029, Section II.5, pp. 25 *et seq.*

49) Decision of KEK in the Premiere case on 26 January 1999, Casefile: 026, Section II.6.2, pp. 29 *et seq.*

50) Ring/Kreile/Dörr/Stettner, *op. cit.*, B 5 § 53 marginal note 5.

51) Knothe/Lebens, *Rundfunkspezifische Konzentrationskontrolle des Bundeskartellamts*, in: AfP 2000, pp. 125-131(126).

52) See above A. 3.1.2.

53) BVerfGE 95, 163, 173.

54) Knothe/Lebens, *op. cit.*, p. 127.

55) Pelny, *op. cit.*, p. 36.

56) Ring/Kreile/Dörr/Stettner, *op. cit.*, C-0.3 § 26 marginal note 9.

57) See above A. 2.1., A. 3.1., B. 1.1, B. 2.

1.2. Limitations Arising out of State Broadcasting Laws

Certain limits on holdings in the press sector may also arise out of state broadcasting laws.[58]
However, these limits are not fully applicable to nationwide television[59] and affect only broadcasts of a regional or local nature.[60] Otherwise these rules come into effect only when in a given broadcast area a dominant newspaper publisher has a shareholding in a private broadcaster.[61] By way of example, a newspaper publisher in Lower Saxony with a dominant position within the broadcasting area of an information programme may only hold a less than 25% share in the capital or voting rights of the programme broadcaster.[62] A dominant market position is assumed to exist in Saxony (§ 8 sub-para 2) with 20% of all periodical print publications in the broadcasting area. The law in the Saarland (§ 50 ll No 6 LRG) refers to § 22 *GWB* (old version).[63]

2. Justifications and Policy

To prevent concentrations of this kind the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) has erected special obstacles. Although the constitution makes no provision for „separation of powers" in the communications field, there are certain dangers to be feared where opinion-forming power in the broadcasting area is combined with opinion-forming power in the printed press. The Court comes to the conclusion: "Accordingly, the task of ensuring the free formation of opinion calls for precautionary measures to preclude dominant opinion-forming power arising from a combination of influences in broadcasting and the press".[64]

D. General Law on Competition

1. Interaction between Special Legislation and the Law on Competition

1.1. The Relationship between the Rules

The following preliminary remark should be made on the relationship between broadcasting law and the law on competition.

In passing the *Gesetz gegen Wettbewerbbeschränkung* (Law on Restrictive Practices – *GWB*), the Federal Government made use of the legislative authority assigned to it under the constitution on „Trade and Industry" (Art 74 No 11 *GG*) and „Prevention of Abuse of Positions of Economic Strength" (Art 74 No 16 *GG*), whereas under Arts 70 and 30 *GG* the States were given authority in matters pertaining to broadcasting.

Cartel law and media law pursue different objectives. The *GWB* protects competition and the individual competitor. The provisions on the control of mergers are designed to prevent the emergence and development of dominant market positions that jeopardise effective competition. In broadcasting law, on the other hand, the emphasis lies on ensuring diversity of opinion. Because of this functional complementarity, the relationship between cartel and broadcasting law proceeds largely from the cumulative application of the two.[65]
Thus, we find the following statement in a *KEK* decision of 26 January 1999:
"Merger supervision under the *GWB* along with the supervision of concentrations under the Agreement among Federal States on Broadcasting (*RStV*) is admissible under the constitution (BVerfG 73, 118, 173, 174) but does not come into opposition in the event of non-prohibition under a dissenting judgement under the *RStV*. The inter-state agreement serves other purposes than the supervision of mergers under the law on competition and follows other yardsticks. However, there may be overlaps, where corresponding cases are to be judged in accordance with different legal criteria. These occur particularly where there are changes in shareholdings and companies combine, since the decisions of the competition authorities constitute the facts in the case for concentration control purposes under broadcasting law.[66]

1.2. Distinction between Internal and External Growth

Independently of the basically parallel applicability, there is some delimitation inasmuch as media concentration law also covers organic corporate growth, that is growth through increase in market share without the company itself increasing in size[67] whereas cartel law primarily aims at limiting external growth, *i.e.*, growth in terms of mergers and acquisitions.[68]

---

58) See *§ 29 I, II Mediengesetz des Landes Sachsen Anhalt; § 8 VII Niedersächsisches Landesrundfunkgesetz; § 25 VII BayMG; § 10 IV Bremisches LMG; § 25 II HmbMedienG; § 17 VIII, 18 HPRG; § 16 VIII LRG RhPf; § 50 II Nr. 6 LRG Saarl; § 8 II SächsPRG; §§ 17 I Nr. 4, 18 TPRG.*

59) E.g.: *§§ 25 VII, XI BayMG; § 16 VIII LRG RhPf; §§ 1 II Nr. 2, 25 II HmbMedienG.*

60) E.g.:*§ 29 I, II Mediengesetz des Landes Sachsen Anhalt; § 10 IV, V Bremisches LMG; § 18 HPRG; § 18 TPRG.*

61) See § 8 sub-para.VII *Niedersächsisches Landesrundfunkgesetz; § 50 II Nr. 6 LRG Saarl; § 17 II HPRG.*

62) See § 8 sub-para. VII *Niedersächsisches Landesrundfunkgesetz.*

63) See below D.1.3.

64) BVerfGE 73, 118, 175.

65) Mailänder, *op. cit.*, pp. 252 *et seq.*

66) See Decision of KEK in the Premiere case, on 26 January 1999, Casefile: 026, Section I.2, p. 6.

67) Knothe/Lebens, *op. cit.*, p. 127.

68) Jochimsen, *Medienaufsicht in der Kontroverse – Konzentration, Kontrolle und KEK*, in: K&R 1999, pp. 433-442(439).

1.3. Particularities in Local State Law

Some state broadcasting laws have attempted to incorporate cartel law into broadcasting law, inasmuch as they require a "decision on there being no objection under cartel law" before issuing licenses.[69] Thus, for example, under § 17 sub-para 7 of Hessian private broadcasting law, the applicant is required to demonstrate to the regulatory authority that no merger supervision regulations stand in the way of his plans. On request by the regulatory authority, he is required to substantiate his claim through a reporting procedure to the *Bundeskartellamt* (Federal Cartel Office – *BKartA*).

1.4. § 7 Television Signal Transmission Law and Its Relation to § 53 RStV

Furthermore, § 7 sub-para 1 of the Federal Television Signal Transmission Law of 14 November 1997 contains a further obligation upon suppliers and users of conditional access systems who produce and market access systems to digital television services. All broadcasters must be offered technical services on fair, reasonable and non-discriminatory terms enabling their digital television services to be received by authorised television viewers equipped with decoders.

Considering the substantive closeness to § 53 *RStV*, the question arises of the relationship between these two rules. While issues of communications law and cartel law with regard to the special demands of digital developments were reflected in the Television Signal Transmission Law of 14 November 1997, with § 53 *RStV* the States have responded to these developments in terms of broadcasting law and media law.

Competition law can indeed prevent discrimination – in purely economic terms – and the danger of an economic position being exploited. The rule under § 53 *RStV*, on the other hand, is directed against such dangers as emerge from the free play of forces which are part of the broadcasting mission. It attempts to balance the free play of the forces and even out imbalances.[70]

2. Definition of the Relevant Television Market

The relevant television market is made up of three components: factual, spatial and temporal.

2.1. The Factually Relevant Market

Cartel law assesses the existence of restrictive practives in terms of a "market". A "dominant market position" is determined in terms of a given "market" (the market power concept, as it is known). It is one and the same market, if all goods are interchangeable from the viewpoint of the buyer (the concept of functional interchangeability or requirements market concept).[71] All products which, in terms of their qualities, economic purpose and price, are so close that the sensible user views them as fully fit for their purpose and finds them interchangeable on a critical comparison are of equal market value.[72]

In the broadcasting sector, the Federal Cartel Office systematically distinguishes specifically broadcasting advertising markets. The demand for the advertising industry is interpreted to the effect that there is a separate market for advertising-financed television as against the independent advertising markets supplying either the radio or the printed press. The Federal Cartel Office distinguishes between these television markets and the market for pay TV programmes.[73]

Sometimes it is also claimed that alongside the television advertising market there is a separate television viewer market.[74] The argument goes that the programmes broadcast free of charge by the private broadcasters represent economic goods called for by the viewers to meet a need which is supplied by the broadcasters in order to gain an advantage. The reception of the television programmes by the viewers is of economic value for the broadcaster and represents in his view the expected *quid pro quo*, as the broadcaster's proceeds from the sale of advertising time depend directly upon the audience coverage for his programmes. Competition on quality between broadcasters for the viewer's favour basically fulfils the function of effective price-based competition and thus the monitoring and control function of the market as such.[75]

2.2. Spatially Relevant Market

Functional interchangeability is also crucial from the demand point of view on the spatially relevant supply market.[76] The spatial market covers only such products as can be obtained without extraordinary expenditure, from which it can be deduced that on the television supply side the spatial markets are as a rule determined by the actual transmission area of the transmitter. Following the practice of the Federal Cartel Office with advertising-financed television of circumscribing only one television advertising market, the spatially relevant market is determined by the outreach of the advertising messages. For the purposes of

69) Knothe/Lebens, *op. cit.*, p. 126.

70) Ring/Kreile/Dörr/Stettner, *op. cit.*, B 5 § 53 marginal note 3.

71) Knothe/Lebens, *op. cit.*, p. 128.

72) Bechtold, Kartellgesetz – *Gesetz gegen Wettbewerbsbeschränkungen, Kommentar*, 2. edition, München 1999, § 19 marginal note 6.

73) Mailänder, *op. cit.*, p. 260 *et seq.*

74) *Ibid.*, p. 261.

75) Schmidt, *Gibt es einen Fernsehzuschauermarkt im Sinne des Gesetzes gegen Wettbewerbsbeschränkungen?*, in: ZUM 1997, pp. 472-478(477f)

76) Bechtold, Kartellgesetz, 2. edition, § 19 marginal note 13.

German merger supervision, the Federal Republic represents the external frontier in terms of the spatial relevance of the GWB. This means that with the cross-border transmission of a programme, the applicability of the GWB would not extend across the border. The competitive position of programme inputs across the border first came under consideration in assessing market domination.[77]

2.3. Temporally Relevant Market

By "temporally relevant market" is to be understood the time in which competitive relationships are to be investigated. While the factual and spatial markets must be determined in every case, the time aspect is dealt with in exceptional cases only. There has to be a motive for enquiring whether competitive relationships are relevant only for a given time. The time component comes into play mainly when goods or commercial services are on offer at a given point in time or for a short period. Examples of this are exhibitions or tickets for sports events. Such cases would no doubt ultimately be a question of factual market delimitation.[78]

3. When Is a Dominant Market Position Acquired or Increased?

The answer to this question is to be found in § 19 sub-paras 2 and 3 *GWB*.

3.1. Legal Definitions – § 19 Sub-Para 2 GWB:

Paragraph 19 sub-para 2 line 1 *GWB* contains several legal definitions of market domination by a single company. Under § 19 sub-para 2 line 1 No 1 *GWB*, a company is dominant inasmuch as it is the supplier or buyer of a given kind of goods or commercial services without any competitor or exposure to effective competition. Market domination is also present under No 2 of that line when a company enjoys a commanding market position with respect to its competitors. In determining this alternative, consideration is given *inter alia* to the company's market share, financial capacity, access to procurement or sales markets and other structural features.[79] Paragraph 19 sub-para 2 line 2 *GWB* deals with dominant oligopolies. Legally, two conditions must be met. Firstly, between the oligopolists there must be absence of competition *inter se*. Furthermore, in their totality, in their external relationships with other companies they must fulfil the conditions of line 1.[80]

3.2. Presumptions of Market Domination

Paragraph 19 sub-para 3 *GWB* contains several refutable presumptions concerning market domination. In line 1 there is a (simple) presumption concerning individual market domination, while line 2 contains a qualified presumption for oligopolies, with reversal of the burden of proof.[81] The criterion for the presumption of individual market domination is a market share of one-third. For the qualified presumption of oligopoly, the figure of 50% applies to three companies and two-thirds for up to five.

4. Intervention Level under § 38 Sub-Para 3 GWB

On the issue of which companies are subject to German merger control, § 35 sub-para 1 *GWB* lays down certain intervention thresholds (1 billion DEM sales worldwide, 50 million DEM domestic). Under § 38 sub-para 3 *GWB* there are particular features that apply to the press and, since the reform of the *GWB*, to broadcasting companies. With newspapers and magazines, broadcasting programmes and the sale of broadcasting advertising time, twenty times the proceeds from sales are to be accounted for. That means that in the media sector, mergers with effect from a worldwide overall sales figure of one-twentieth of the otherwise relevant sums, *i.e.*, 50 million DEM, are subject to merger control. As a result, local broadcasters, who until now were able to carry out acquisitions and takeovers without supervision by the cartel authorities, are brought under control.[82]

Under § 35 sub-para 2 No 1 *GWB* a merger is not subject to control by the Federal Cartel Office where an independent company, not part of a group, having posted sales of 20 million DEM in the previous year, combines with another company. This clause does not apply, however, to companies combining on press markets.

A further exception from merger control is the „bagatelle market clause" under § 35 sub-para 2 No 2 *GWB*. Here no merger takes place where a market is involved on which goods or commercial services have been supplied for at least five years and where sales in the previous year were less than 30 million DEM.[83]

---

77) Mailänder, *op. cit.*, p. 262.

78) Wiedemann (editor), *Handbuch des Kartellrechts*, München 1999, § 23 marginal note 13.

79) *Ibid*., § 23 marginal note 16.

80) *Ibid*., § 23 marginal note 26.

81) *Ibid*., § 23 marginal note 28.

82) Traugott, *Die neue deutsche Fusionskontrolle*, in: WRP 1999, pp. 621-628(622).

83) *Ibid*., pp. 622 *et seq*.

5. Legal Instruments against Concentration

5.1. Prohibition under § 19 *GWB*

§ 19 GWB begins by prohibiting the abusive exploitation of a dominant market position by a company.
The question whether a company's behaviour on the market constitutes abusive exploitation is to be answered on the basis of a comprehensive assessment of the interests involved.[84] Support for this is provided by the non-exhaustive listing of the regulatory details in § 19 sub-para 4 GWB which include inter alia abusive obstruction (No 1) and abusive exploitation (No 2 and 3). Denial of access as under § 19 sub-para 4 No 4 GWB was re-introduced by the amending law. This would be the case if a dominant company refuses another company access to its network despite reasonable consideration.[85] The rule originates with a proposal by the BKartA. This was the view that central competitive importance attaches to "essential facilities" in a growing number of economic areas. Hence, the problem of access denial should also be dealt with by a comprehensive regulation.[86]
In the case of abusive exploitation, the cartel authorities are able to prohibit this behaviour under § 32 GWB and issue an injunction for abuse.[87] Should anyone contravene this injunction, he would be committing an offence under § 31 sub-para No 6 GWB.
In terms of civil law, contractual annulment is considered as a possible outcome under § 134 of the *Bürgerliches Gesetzbuch* (Civil Code – *BGB*) in a case of contravention of this ban.[88] Furthermore, under § 33 GWB a contravention of § 19 GWB may be grounds for claims for damages and a cease and desist order on the part of another, even private, user.[89] Paragraph 34 GWB moreover opens up the possibility, once incontestability of the injunction is established, of siphoning off the excess proceeds due to the prohibited action.

5.2. Prohibition under § 36 Sub-Para 1 GWB

Under § 36 sub-para 1 1 *GWB*, a merger which may be expected to establish or strengthen a dominant market position is to be prohibited by the Federal Cartel Office, unless the companies concerned demonstrate that by combining they also bring about improvements in competitive conditions and that these outweigh the disadvantages of market domination.

5.3. Prohibition on Discrimination § 20 *GWB*

Paragraph 20 *GWB* forbids certain companies and associations of companies from unfairly obstructing other companies or from dealing with them unequally without objectively justifiable cause. The purpose of the provision is to ensure equality of opportunity and the maintenance of competitive performance. This ban is not directed against every obstruction but just those not containing arrangements in conformity with performance and competition.[90] Being of immediate application, this ban entails sanctions similar to those of § 19 *GWB*.

5.4. Supervision of Abuse § 16 *GWB*

Independently of the existence of a dominant market position, abusive behaviour is also covered by § 16. Thus, the Federal Cartel Office may declare agreements between companies on goods or commercial services to be invalid and forbid the implementation of further similar arrangements, if other companies are hindered and competition in the market impaired. Paragraph 16 *GWB* covers precisely those contracts which are not concluded by companies in competition with one another.[91]

E. Specific Ownership Restrictions

Ownership restrictions have a part to play in the concept of the broadcaster in broadcasting law. Under § 20 *RStV*, private broadcasters require a license in accordance with state law. The Federal Constitutional Court has attempted a definition of the concept of "broadcaster". Accordingly, the broadcaster of a programme is "the person who establishes its structure, plans sequences, assembles the programme and supplies it to the audience under a single designation. By virtue of these activities referring to the overall programme, he is distinct from the mere supplier of individual transmissions or individual programme items. It is not necessary that the broadcaster should transmit the programme himself or produce the individual transmissions himself."[92]

84) Wiedemann (editor), *op. cit.*, § 23 marginal note 31.
85) Knothe/Lebens, *op. cit.*, pp. 127 *et seq.*
86) Wiedemann (editor), *op. cit.*, § 23 marginal note 64.
87) *Ibid.*, § 23 marginal note 69.
88) *Ibid.*, § 23 marginal note 69.
89) *Ibid.*, § 23 marginal note 78.
90) Eckstein, *Exklusivverträge und Pay-TV*, Dissertation, Saarbrücken, Uni. 2000, p. 121.
91) Eckstein, *ibid.*, p. 113.
92) Ruling by BVerfG, 1 BvR 661/94 of 20. February 1998, para No 56, http://www.bverfg.de/

The requirements for a broadcasting license break down into personal and material.[93] With regard to the problem of ownership restrictions, personal requirements are most important. Under most state laws, legal persons under private law as well as natural persons apply for licenses. Nonetheless, all media laws contain excluding personal requirements, particularly to ensure state freedom and avoid excessive concentrations of power in communications.

1. Foreign Applicants

The term "private broadcaster" in § 20 *RStV* includes foreign natural and legal persons under private law. The provision makes no distinction between German and foreign nationals and accordingly does not rule out foreign persons under private law. The regulations under separate state law are not affected by this, however. Some state broadcasting laws make the issuance of a broadcasting license subject to the applicant having his residence or registered office in the Federal Republic of Germany or in a Member State of the European Union.[94] In some cases, they extend this to residence or a registered office located in a state within the European Economic Area.[95]

2. Relationship to Government Departments

Local authorities and legal persons in public service coming under them are systematically excluded from applying for a license.[96] Furthermore, the state media laws state that members of local legislative authorities, members of the Federal Government or State Government[97] or European Parliament[98] shall not receive any concession. It should be noted, however, that churches and other public service and philosophical groups, the Jewish religious community and the universities are frequently explicitly exempted from this exclusion.[99]

3. Political Parties

Furthermore, political parties and electoral groups and persons and associations connected with them are debarred from receiving a license.[100]

93) Ring/Kreile/Dörr/Stettner, *op. cit.*, B 5 § 20 marginal note 4.

94) E.g.: § 5 sub-para. 1 sentence 2 LRG NW; § 50 sub-para. 1 No. 2 LRG Saarland.

95) § 13 sub-para. 2 No 5 *Landesmediengesetz Baden-Württemberg*.

96) § 13 sub-para. 3 No 1 *Landesmediengesetz Baden-Wür*ttemberg; § 6 sub-para. 2 *Landesrundfunkgesetz für das Land Rheinland-Pfalz*; § 50 sub-para. 2 No 1 LRG Saarland.

97) § 13 sub-para. 3 No 3 *Landesmediengesetz Baden-Württemberg*, § 5 sub-para 2 No 3 LRG NW; § 50 sub-para 2 No 2 *LRG Saarland*; § 6 sub-para. 2 No 3 HPRG; § 8 sub-para. 4 No 5 *Bremisches LMG*.

98) § 7 sub-para. 3 No 2 Nds LRG.

99) E.g.: § 5 sub-para. 2 No 1 LRG NW.

100) § 7 sub-para. 3 No 3 Nds LRG; § 13 sub-para. 3 No 6 *Landesmediengesetz Baden-Württemberg*; § 5 sub-para. 2 No 4 LRG NW; § 6 sub-para. 2 *Landesrundfunkgesetz Rheinland-Pfalz*; § 50 sub-para. 2 No 3 *LRG Saarland*; § 10 sub-para. 3 No 4 LRG *Schleswig-Holstein*; § 6 sub-para. 2 No 4 HPRG; § sub-para. 4 No 4 *Bremisches LMG*.

ANNEX

1. Laws

Rundfunkstaatsvertrag
German Interstate Treaty on Broadcasting
URL: http://www.alm.de/index2.htm

Grundgesetz
German federal constitution or 1949 Basic Law
URL (in French and German): http://www.jura.uni-sb.de/BIJUS/grundgesetz/

Gesetz gegen Wettbewerbsbeschränkungen
Law on Restrictive Practices or Federal Cartel Law
URL: http://www.bundeskartellamt.de/kartellgesetz.html

Landesmediengesetze
State Media Laws
Source: Bauer/Ory, Recht in Hörfunk und Fernsehen, Volumes 2 and 3: Broadcasting Law in Individual States, looseleaf collection

2. Case Law

Dritte Rundfunkentscheidung (FRAG /Saarländisches Rundfunkgesetz)
Ruling of the Federal Constitutional Court of 16.06.1981 (BVerfGE 57, 295)

Vierte Rundfunkentscheidung (Landesrundfunkgesetz Niedersachsen)
Ruling of the Federal Constitutional Court of 04.11.1986 (BVerfGE 73, 118)

Fünfte Rundfunkentscheidung
Ruling of the Federal Constitutional Court of 24.03.1987 (BVerfGE 74, 297)

DSF-Entscheidung
Ruling of the Federal Constitutional Court of 18 December 1996 (BVerfGE 95, 163)

Entscheidung zur Kurzberichterstattung
Ruling of the Federal Constitutional Court of 17.02.1998 (BVerfGE 97, 228)

Extra-Radio
Ruling of the Federal Constitutional Court 20.2.1998 (BVerfGE 97, 298)

Downloadable on Internet :
http://www.uni-wuerzburg.de/dfr/

3. Media Supervisory/Regulatory Authorities

Kommission zur Ermittlung der Konzentration im Medienbereich (KEK)
(Committee for Investigating Concentration in the Media Sector)
Steinstraße 104-106
14480 Potsdam
Tel.: 0331 - 6 60 17 70
Fax: 0331 - 6 60 17 79
info@kek-online.de
http://www.kek-online.de

Konferenz der Direktoren der Landesmedienanstalten (Directors' Conference)
This is the body representing all regulatory authorities – Arbeitsgemeinschaft der Landesmedienanstalten in der Bundesrepublik Deutschland (ALM) (Association of regulatory authorities for broadcasting)

Arbeitsgemeinschaft der Landesmedienanstalten (ALM)
c/o Landesanstalt für Rundfunk Nordrhein-Westfalen (LfR)
Zollhof 2
40221 Düsseldorf
Telefon: 0211/77007-140/141
Telefax: 0211/77007-345
http://www.alm.de

4. Bibliography

Bechtold, Rainer, Kartellgesetz – *Gesetz gegen Wettbewerbsbeschränkungen*, Kommentar, 2. Auflage, München 1999;

Eckstein, Patrick, *Exklusivverträge und Pay-TV*, Dissertation, Saarbrücken 2000;

Hesse, Albrecht, *Rundfunkrecht*, 2. Aufl., München 1999;

Jochimsen, Reimut, *Medienaufsicht in der Kontroverse – Konzentration, Kontrolle und KEK*, in: K&R 1999, P. 433-442;

Knothe, Matthias/Lebens, Julia, *Rundfunkspezifische Konzentrationskontrolle des Bundeskartellamts*, in: AfP 2000, P. 125-131;

Kreile, Johannes/Stumpf, Christoph, in: MMR 1998, P. 192-195;

Mailänder, Peter, *Konzentrationskontrolle zur Sicherung von Meinungsvielfalt im privaten Rundfunk*, Hamburg, Dissertation, 1998/1999;

Martinek, Michael, *Die Zurechnung von Zuschaueranteilen nach §§ 25 ff des Rundfunkstaatsvertrages 1996 anläßlich der Lizenzanträge der Premiere Medien GmbH & Co. KG auf Zulassung zur bundesweiten Veranstaltung von digitalen Pay-TV-Programmangeboten*, EMR-Schriftenreihe, Band 19;

Neft, Hans, *Meinungsdominanz im Fernsehen, – Aufgreifkriterien des neuen § 26 Abs. 2 Rundfunkstaatsvertrag (RStV)*, in: ZUM 1998, P. 458-465;

Pelny, Stefan, *Konzentrationskontrolle für den privaten Rundfunk*, in: AfP 1998, P. 35-40;

Ring/Kreile/Dörr/Stettner, *Medienrecht, Band II, Kommentar zum Rundfunkstaatsvertrag*, Stand: Juli 2000, München, Berlin;

Schellenberg,Martin, *Rundfunk-Konzentrationsbekämpfung zur Sicherung des Pluralismus im Rechtsvergleich: Rundfunkstaatsvertrag 1997 und Landesmediengesetze im Vergleich mit den Kontrollsystemen in Frankreich, Italien und Großbritannien*, Baden-Baden 1997;

Schmidt, Klaus-Eberhard, *Gibt es einen Fernsehzuschauermarkt im Sinne des Gesetzes gegen Wettbewerbsbeschränkungen?*, in: ZUM 1997, P. 472-478;

Stock/Röper/Holznagel, *Medienmarkt und Meinungsmacht – Zur Neuregelung der Konzentrationskontrolle in Deutschland und Großbritannien*, Berlin, Heidelberg, New York 1997;

Traugott, Rainer, *Die neue deutsche Fusionskontrolle*, in: WRP 1999, P. 621-628;

Wiedemann, Gerhard, (Hrsg.), *Handbuch des Kartellrechts*, München 1999.

THE UNITED KINGDOM

Professor Thomas Gibbons,
School of Law, University of Manchester, UK.

A. Horizontal Media Concentration

1. Definition of the Broadcasting Market

For the purposes of media concentration, public and private television broadcasting are distinguished from each other. There are no concentration rules applicable to the former, represented by the BBC, Channel 4 and the Welsh Authority (Sianel Pedwar Cymru or S4C), which are public corporations. Thresholds of concentration apply to the whole market but they have been formulated so that they effectively target only the private sector.

Regulation of horizontal concentration is predicated on the assumption that a single television market can be identified. However, regulation is framed in terms of distinctions based on different transmission paths: analog, cable and satellite. Within the category of analog transmission, the degree of public service broadcasting offered by different channels is a basis for further distinctions.

The significance of digital technology is not consistently recognised: a separate regime applies to analog transmission of digital terrestrial television, but satellite and cable regulation is the same, whether analog or digital.

2. Content of Applicable Regulation

The relevant rules are contained in Schedule 2 of the Broadcasting Act 1990, as applied by section 5. The schedule was radically amended, by section 73 and Schedule 2 of the Broadcasting Act 1996, to introduce a "market share" approach and has been further modified by secondary (delegated) legislation. The basic scheme is to prohibit any body (which includes a company) from controlling a license or combination of licenses to which more than 15% of the total television audience share can be attributed. There are additional limits on participating interests in such license ownership. Furthermore, there are absolute restrictions on holding certain combinations of licenses.

2.1. Definitions relating to Control and Influence

The concept of control is given a very broad definition in Part I of Schedule 2. By paragraph 1(1), "control": "(a) in relation to a body corporate, shall be construed in accordance with sub-paragraph (3), and (b) in relation to any body other than a body corporate, means the power of a person to secure, by whatever means and whether directly or indirectly, that the affairs of the first-mentioned body are conducted in accordance with the wishes of that person". By paragraph 1(3), "For the purposes of this Schedule a person controls a body corporate if –(a) he holds, or is beneficially entitled to, more than 50 per cent of the equity share capital in the body, or possesses more than 50 per cent of the voting power in it; or (b) although he does not have such an interest in the body, it is reasonable, having regard to all the circumstances, to expect that he will be able, by whatever means and whether directly or indirectly, to achieve the result that the affairs of the body are conducted in accordance with his wishes; or (c) he holds, or is beneficially entitled to, 50 per cent of the equity share capital in that body, or possesses 50 per cent of the voting power in it, and an arrangement exists between him and any other participant in the body as to the manner in which any voting power in the body possessed by either of them is to be exercised, or as to the omission by either of them to exercise such voting power". Furthermore, under paragraph 1(3A), "For the purposes of sub-paragraph (3)(c) – (a) 'arrangement' includes any agreement or arrangement, whether or not it is, or is intended to be, legally enforceable, and (b) a person shall be treated – (i) as holding, or being beneficially entitled to, any equity share capital which is held by a body corporate which he controls or to which such a body corporate is beneficially entitled, and (ii) as possessing any voting power possessed by such a body corporate".

Part I of Schedule 2 also contains the definition of a company's "associates" in paragraph 1A: "For the purpose of determining the persons who are the associates of a body corporate for the purposes of this Schedule – (a) an individual shall be regarded as an associate of a body corporate if he is a director of that body corporate, and (b) a body corporate and another body corporate shall be regarded as associates of each other if one controls the other or if the same person controls both". There is also provision for an individual's associates in paragraph 2: "For the purpose of determining the persons who are an individual's associates for the purposes of this Schedule, the following persons shall be regarded as associates of each other, namely – (a) any individual and that individual's husband or wife and any relative, or husband or wife of a relative, of that individual or of that individual's husband or wife; (b) any individual and any body corporate of which that individual is a director; (c) any person in his capacity as trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor; (d) persons carrying on business in partnership and the husband or wife and relatives of any of them; (e) any two or more persons acting together to secure or exercise control of a body corporate or other association or to secure control of any

enterprise or assets; and in this sub-paragraph 'relative' means a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or descendant (the stepchild or illegitimate child of any person, or anyone adopted by a person, whether legally or otherwise, as his child, being regarded as a relative or taken into account to trace a relationship in the same way as that person's child); and references to a wife or husband shall include a former wife or husband and a reputed wife or husband".

Amongst other detailed definitional provisions, one relating to participating interests, in paragraph 6, is also worthy of note: "In this Schedule any reference to a participant with more than a 20 per cent interest in a body corporate is a reference to a person who – (a) holds or is beneficially entitled to more than 20 per cent of the shares in that body, or (b) possesses more than 20 per cent of the voting power in that body".

2.2. Audience Share Thresholds

In summary, paragraph 2 of Part III of the Schedule restricts the holding of, or having interests of more than 20% in, two or more licenses to provide certain television services that together account for more than 15% of the total television audience.

In detail, it states that: "(1) No one person may, at any time when his audience time in respect of the period of twelve months ending with the last day of the preceding calendar month exceeds 15 per cent of total audience time in respect of that period – (a) hold two or more licenses to provide relevant services falling within one or more of" the following categories: regional and national Channel 3 services and Channel 5; satellite television services; licensable programme services; and digital programme services. In addition, no person may "(b) be a participant with a qualifying interest [that is, an interest of more than 20%] in two or more bodies corporate each of which holds a license, or two or more licenses, to provide services falling within one or more of those categories [mentioned above]" or "(c) hold any license to provide a relevant service falling within any of those categories and be a participant with a qualifying interest in any body corporate which holds such a license or two or more such licenses".

A similar prohibition, in paragraph 2(1)(5), applies to a person who provides a foreign satellite service (that is, established outside the UK but directed at UK audiences) and whose audience share exceeds 15%: it is not permitted to hold also any license to provide one of the television services mentioned above, or have more than a 20% interest in such a license. Finally, no person with more than a 15% of audience share may hold a license to provide digital programme services (that is, programming on digital terrestrial television) and provide two or more such services.

2.3. Attributing and Calculating Audience Time

Audience time is attributed to the programme provider rather than the carrier of the service. The core element is the aggregate of the audience time attributable to services provided by a license holder of any Channel 3, Channel 5, satellite, licensable programme services or digital programme services. However, to prevent accumulations of interest across the whole television market, there are additional attributions to those holding participating interests in a license. By paragraph 2(2) of Part III of Schedule 2, one half of the audience time attributable to the license holder of any Channel 3, Channel 5, satellite, licensable programme services or digital programme services is attributed to any person who does not control but has more than a 20% interest in license holder. The half share so attributed is not, however, deducted from the license holder's share. Furthermore, where a license holder is providing a digital programme service, half of any concurrent foreign satellite service audience is added to the aggregate.

For the purposes of determining concentration, the audience time attributed is an "estimate" by the regulator, the Independent Television Commission (ITC), of the number of hours that would be produced by "(i) ascertaining, in relation to every person who in that period watched any programme included in that service, the total amount of time he spent in that period watching programmes so included, and (ii) adding together all the amounts of time so ascertained" in respect of "(a) every television programme service capable of being received in the British Islands, and

(b) every other service which consists wholly or mainly in the broadcasting, or transmission by satellite, from a place outside the British Islands of television programmes which are capable of being received in the British Islands" (Paragraph 3 of Part III of Schedule 2). The ITC has discretion to disregard some categories of viewing, by reference to audience type and programme duration, including video recording. It may also take into account industry practice (in effect, the statistics produced by the Broadcasting Audience Research Board).

Audience time is calculated and attributed to public service broadcasters, for the purpose of determining the total television audience and so that the 15% threshold can be applied to commercial (private) television licenses.

2.4. Additional Absolute Limitations

By paragraph 4 of Part III of Schedule 2, there are absolute limits on concentrations of holding in respect of the two main commercial analogue broadcast channels: "(1) No one person may at any time hold a license to provide a national Channel 3 service and a license to provide Channel 5. (2) A person who holds a license to provide a regional Channel 3 service for a particular area may not also hold any other license to provide a regional Channel 3 service for that area".

There is also a limit on the holding of licenses to provide television multiplex services, the separate "wholesale" entities for distributing digital terrestrial television programming (the digital programme services) that have been created by the Broadcasting Act 1996. By paragraph 5 of Part III of Schedule 2, "(1) No one person may at any time hold more than three licenses to provide television multiplex services. (2) For the purposes of sub-paragraph (1), a person who is a participant with more than a 20 per cent interest in a body corporate which holds a license to provide a television multiplex service but does not control that body shall be treated as holding the license held by that body". The latter provision has the effect of limiting an interest in a fourth multiplex to 20 per cent or less. Further interests in multiplexes are to be even more diluted: "(3) No one person may at any time, in relation to each of five or more licenses to provide television multiplex services, be either the holder of the license or a participant with more than a 10 per cent interest in a body corporate which holds the license". Although the powers have not so far been invoked, these provisions may be amended by secondary (delegated legislation).

In relation to digital programme services, a digital points scheme has been introduced to prevent accumulation of interests in programme services across multiplexes (as opposed to a situation where one broadcaster provides many such services on one multiplex) during the early stages of digital terrestrial television. The basic approach, under paragraph 7 of Part III of Schedule 2, is to assign two points to each digital programme service and to limit the number of points that can be held by reference to the size of the market. Only two points can be held when there are 10 or fewer points in the whole market. Where the market sustains more than 10 but less than 40 points, a maximum of four points can be held. Once the total number of points is more than 40, the maximum number that can be held is one quarter of the total. There is provision for assigning one point to small or restricted services, and the scheme can be amended, and ultimately discontinued, by secondary (delegated) legislation.

3. Legal Remedies

The ITC has power, under section 5 of the Broadcasting Act 1990, to insert conditions in licenses for the purposes of ensuring compliance with Schedule 2. Such conditions include requirements to provide information about changes in the nature or characteristics of a company that might be relevant to such compliance. Powers of enforcement are contained in sections 40-42, 44 and 55 of the Broadcasting Act 1990. They include powers to fine a licensee or to suspend or revoke a license. The ITC's exercise of its powers is subject to judicial review but no challenge has yet been mounted against its supervision of ownership regulation.

4. Justifications and Policy

These provisions reflect a debate during the mid-1990s, notably at the European Commission and in Germany and the United Kingdom, characterised by strong industry pressure to relax ownership rules and a wish to remove the rigidity of "shareholder" limitations on control of media sectors. The resulting legislative theme was the market share approach, which requires that media power should be assessed by reference to the influence that it has on its readership and audience. A pure approach, in which a common measure for all kinds of media would be employed to measure their impact on media pluralism, proved difficult to devise and implement. Measures of revenue and audience reach were rejected in favour of the more manageable, if less accurate, measure of audience share (receivers tuned to a channel) and readership (copies of newspaper sold). The effect of applying the new rules has been to liberalise the market and to reduce restrictions on media ownership. This was justified as being necessary to allow large media conglomerations to grow and defend the UK industry against North American competition. But Government policy was also directed at enhancing diversity and plurality in the media and the legislation actually adopted a cautious approach that combines the competition-based influence of market share with the absolute limits contained in the previous shareholding approach.

Nevertheless, the choice of 15% as the threshold figure for audience share has no firm basis. It reflects an intuition that diversity in television services will be achieved by ensuring that the internal pluralism offered by the public broadcasters is complemented by at least three "players" in the commercial sector. Given that public broadcasters account for around 55% of audience share, the threshold means, effectively, that a commercial licensee cannot acquire more than one third of the remaining audience. The other significant threshold, of 20%, represents a pragmatic judgment about the degree of participation that is required to secure effective control of a company.

B. Vertical Media Concentration

1. Content of Applicable Legislation

An important aim of the Broadcasting Act 1990, and to a lesser extent the Broadcasting Act 1996, was to introduce structural vertical deregulation. At the same time, the legislation made provision for continuing, behavioural measures that are closely related to competition regulation.

1.1. Structural Features

The Broadcasting Act 1990 separated broadcasting responsibility from regulatory supervision, by replacing the Independent Broadcasting Authority with the Independent Television Commission and the Radio

Authority. Programme provision has been separated from distribution in a number of ways. The analog transmission systems owned by the commercial television companies (Broadcasting Act 1990, sections 127-141) and the BBC (Broadcasting Act 1996, sections 131-135) have been privatised. Provision has been made for cable systems ("local delivery services", by sections 72-82, Broadcasting Act 1990) and satellite services (sections 43-45 of the same Act) to be licensed separately from programming provision. In the case of the latter, if programming is not already licensed by virtue of being a retransmission of other programming, a separate license (for a "licensable programme service", by sections 46-47 of the 1990 Act) is required. The Broadcasting Act 1996 introduced the concept of a multiplex, separating the wholesale distribution of digital terrestrial services from delivery (sections 6-17 of the Act) and from programming (sections 18-23 of the Act). In digital satellite provision, by contrast, the multiplexing function is not vertically disintegrated. Both pieces of legislation have separated "additional services" or teletext (sections 48-55 of the 1990 Act and sections 24-27 of the 1996 Act) from video programming, which may be regarded as vertical disintegration (there are no horizontal restrictions on multiple ownership of what are rather limited services).

1.2. Independent Productions and European Quotas

One aim of the Broadcasting Act 1990 was to implement the requirement in Article 5 of the "Television without Frontiers" Directive (89/552/EEC as amended by 97/36/EC) that "broadcasters reserve at least 10% of their transmission time … for European works created by producers who are independent of broadcasters." However, the 1990 Act imposes a stricter requirement. Sections 16(2)(h), 25(2)(f) and 29(2)(b) apply to commercial analog television services and sections 186-187 apply to BBC services. Each must contain include at least 25% of programming supplied by a range of independent producers, to be measured by reference the cost of acquisition as well as programme content. In the case of the BBC, the Director-General of Fair Trading (the initial competition regulator) has a duty to monitor its compliance. In related provisions under the Broadcasting Act 1990 (sections 16(2)(g), 25(2)(e) and 29(2)(b) respectively), licensees for Channels 3, 4 and 5 must ensure that "a proper proportion" of matter included in programmes is of European origin. There is a similar obligation imposed on the BBC (in its Agreement, Clause 4.4f).

In addition, it may be noted that the constitution of Channel 4 has contributed to vertical disintegration in the analog television market. The channel has a public service remit but is commercially funded. However, it is a commissioning and editing channel and does not make its own programmes. Instead, it obtains programming and films from independent producers (by section 25(5), Broadcasting Act 1990).

1.3. Conditional Access

Provision for conditional access to digital platforms was deliberately omitted from the Broadcasting Act 1996 because the Government considered it to be a telecommunications issue. Consequently, it is regulated by the Office of Telecommunications (OFTEL) under the Telecommunications Act 1984. Current arrangements incorporate provisions of the Directive of the European Parliament and the Council of 24 October 1995 on the Use of Standards for the Transmission of Television Signals (O.J. No. L 281 (95/47/EC)) through the issue of a class license and under regulations issued under the Telecommunications Act 1984 (The Conditional Access Services Class License; Advanced Television Services Regulations 1996 (Statutory Instrument No. 3151 of 1996, and the amending regulations, No.3197 of 1996)). The license covers anybody who provides conditional access services to third parties and applies to access to all digital television programmes, whether transmitted by satellite, terrestrially or by cable. The key provision of the license is Condition 1, which requires that the provision of technical conditional access services should be offered on a "fair, reasonable and non-discriminatory" basis. Condition 3 imposes a fair trading requirement: acts or omissions are prohibited which prevent, restrict or distort competition through an abuse of a dominant position or an anti-competitive agreement. The Director-General also has power to insist on the provision of a common interface to allow different conditional access systems to inter-operate. In issuing multiplex licenses for digital terrestrial television, the ITC also has power to scrutinise applicants' proposals for set-top boxes, with a view to encouraging common interfaces (by virtue of section 7(3)(a) of the 1996 Act).

1.4. Electronic Programme Guides

OFTEL's approach is to ensure that consumers' needs should be given first priority and that the operation of Electronic Programme Guides (EPGs), which are likely to be also conditional access systems, do not restrict, distort or prevent competition. One requirement of the 1996 Regulations is that all set-top boxes must have the capacity to receive and display free-to-air broadcasts, such as those of the BBC or Channels 3 and 4. Since EPGs also comprise programming material, the ITC has a concurrent jurisdiction under its general duty to secure fair and effective competition (Broadcasting Act 1990, section 2(2)). Its Code of Practice requires that EPG providers should not discriminate between free-to-air and pay television services and should give due prominence to public service channels. Where the EPG provider is also a broadcaster, no undue prominence should be given to that company's services at the expense of others.

2. Legal Remedies

In respect of license conditions relating to independent productions and digital terrestrial television, the ITC's powers of enforcement are those contained in sections 40-42, 44 and 55 of the Broadcasting Act 1990.

They include powers to fine a licensee or to suspend or revoke a license. In respect of telecommunications issues, enforcement provisions are contained in sections 16-18, Telecommunications Act 1984. The Director-General of Telecommunications has powers to require compliance with license conditions. Breach of such conditions may be enforced by a court injunction and ultimately a revocation process initiated by the Secretary of State for Trade and Industry. Third parties may be entitled to damages for loss caused by the breach.

3. Justifications and Policy

The Broadcasting Act 1990 was a deliberate attempt to break up the vertically integrated, public service broadcasting model that had previously characterised the UK. The 25% independent productions quota, together with the existence of Channel 4, has made a major contribution to revitalising the independent sector in the UK. Privatisation of the transmission networks was consistent with the broader policy being pursued by the Conservative administration in the late 1980s and much of the 1990s. Although analog broadcasting was not disintegrated, the regulatory framework has created separate licenses for programme provision and thereby enabled it to be separated from distribution across cable, satellite and digital terrestrial television. Furthermore, for many kinds of programme service, the regulatory regime makes an implicit distinction between license holders' obligations and ownership. Where licenses have been allocated initially through competitive tendering, such licenses can be transferred through normal market exchanges. However, the license conditions (for example, the kind of service to be offered or the media ownership rules) remain unchanged and must be fulfilled by the new owner.

C. Diagonal Media Concentration

1. Content of Applicable Legislation

The market share approach is also applied to cross-media holdings. The principal features, in summary, are that a national newspaper proprietor with a market share of 20% or more may not hold a Channel 3 or 5 license or a national or local radio license, and a regional Channel 3 license may not be held by a local newspaper proprietor with a local market share of more than 20% in its coverage area.

1.1. Definitions

By Part IV of Schedule 2 of the Broadcasting Act 1990, newspapers may be designated "national" or "local" by the ITC, having taken into account their circulation profiles (paragraph 2 (1)-(3)). By paragraph 2(4), the "national market share" of any national newspaper at any time in a calendar month "is the total number of copies of that newspaper sold in the United Kingdom in the six months ending with the last day of the previous month, expressed as a percentage of the total number of copies of all national newspapers sold in the United Kingdom in those six months". A similar definition applies to "local market share" in respect of local newspapers (paragraph 2(5)). The ITC has discretion to rely on estimates of circulation and may consult with the relevant industry body [the Audit Bureau of Circulation] (paragraph 2(6)). By paragraph 2(7), "In relation to any newspaper which is distributed free of charge rather than being sold, references in sub-paragraphs (4) to (6) to the number of copies sold shall have effect as references to the number of copies distributed".

Another interpretative provision of note is paragraph 3(1): "For the purposes of this Part of this Schedule a person runs a national or local newspaper if – (a) he is the proprietor of the newspaper, or (b) he controls a body which is the proprietor of the newspaper".

1.2. Market Share Thresholds

In detail, paragraph 4 states that "(1) No person who runs a national newspaper which for the time being has, or national newspapers which for the time being together have, a national market share of 20 per cent or more may hold a license to provide – (a) a regional or national Channel 3 service or Channel 5, or (b) a national or local radio service. (2) A license to provide a regional Channel 3 service may not be held by a person who runs a local newspaper which for the time being has, or local newspapers which for the time being together have, a local market share of 20 per cent or more in the coverage area of the service".

Similarly, "A license to provide digital programme services may not be held by a person who runs a local newspaper which for the time being has, or local newspapers which for the time being together have, a local market share of 20 per cent or more in the coverage area of any digital programme service provided under the license (paragraph 4(3)).

The unstated implication of these provisions is that national newspaper groups can control licenses to provide local delivery services (cable), licensable programme services, satellite services, restricted services, digital multiplex services and digital programme services for both television and radio.

There are also restrictions on participation contained in paragraph 5: "(1) No proprietor of a national newspaper which for the time being has, or of national newspapers which for the time being together have, a national market share of 20 per cent or more shall be a participant with more than a 20 per cent interest in a body corporate which is the holder of a license to provide any of the services specified [below] in sub-

paragraph (4). (2) No person who is the holder of a license to provide any of the services specified in sub-paragraph (4) shall be a participant with more than a 20 per cent interest in a body corporate which runs a national newspaper which has, or two or more national newspapers which together have, a national market share of 20 per cent or more. (3) No body corporate in which a person who runs a national newspaper which has, or national newspapers which together have, a national market share of 20 per cent or more is a participant with more than a 20 per cent interest, shall be a participant with more than a 20 per cent interest in a body corporate which holds a license to provide any of the services specified in sub-paragraph (4)". The services referred to in sub-paragraphs (1), (2) and (3) are (a) a regional or national Channel 3 service or Channel 5, and (b) national or local radio services.

Other parts of paragraph 5 contain provision for various layers of corporate control and allow amendments to the percentage interests to be made by secondary (delegated) legislation.

1.3. The Public Interest Test

Additional restrictions apply where control of or by a newspaper proprietor may operate against public interest, notwithstanding that the proprietor meets the threshold criteria described above. The test is applied by the ITC when a newspaper body has become connected with a body holding certain types of broadcasting license. These are Channel 3 and Channel 5 (and certain radio licenses).

Thus, by paragraph 9, "(1) A license to provide any of the services specified in sub-paragraph (4) may not be granted to a body corporate which is, or is connected with, the proprietor of a national or local newspaper if the relevant authority determines that in all the circumstances the holding of the license by that body corporate could be expected to operate against the public interest. (2) Subject to sub-paragraph (3), a body corporate which holds a license to provide any of the services specified in sub-paragraph (4) [that is, "a national Channel 3 service or Channel 5" and certain national radio services] shall not become, or become connected with, the proprietor of a national or local newspaper and continue to hold the license if the relevant authority determine within the permitted period that in all the circumstances the continued holding of the license by that body corporate operates, or could be expected to operate, against the public interest." By sub-paragraph (3), the public interest test is applied as a "one-off" test for situations developing after the 1996 Act came into force and involving new connections, where previously there were none, between national or local markets in the press and licenses to broadcast in the same areas as those markets. Thus, if there is already a connection between a national newspaper and broadcaster and a further national newspaper is acquired, the test does not apply. But, if there is a connection between a national newspaper and a broadcaster and the former acquires a new local newspaper in the broadcast area, the test will apply. The public interest test has to be applied within a permitted period, normally three months.

In paragraphs 10 and 11, there are substantially similar provisions relating to regional Channel 3 services and digital programme services respectively. Paragraph 12 makes provision for the ITC to determine the public interest test in anticipation of a new connection being established between the press and broadcasters.

The public interest criteria are found in paragraph 13 of Part IV of Schedule 2:
"(1) The matters to which the relevant authority shall have regard in determining, for the purposes of paragraphs 9, 10, 11 or 12, whether the holding of a license by a body corporate which is, or is connected with, the proprietor of a newspaper operates, or could be expected to operate, against the public interest include – (a) the desirability of promoting – (i) plurality of ownership in the broadcasting and newspaper industries, and (ii) diversity in the sources of information available to the public and in the opinions expressed on television or radio or in newspapers, (b) any economic benefits (such as, for example, technical development or an increase in employment or in the value of goods or services exported) that might be expected to result from the holding of the license by that body but could not be expected to result from the holding of the license by a body corporate which was not, and was not connected with, the proprietor of a newspaper, and (c) the effect of the holding of the license by that body on the proper operation of the market within the broadcasting and newspaper industries or any section of them. (2) References in paragraphs 9, 10, 11 and 12 to the public interest include references to the public interest within any area of the United Kingdom".

1.4. Telecommunications

By Part V of Schedule 2 of the Broadcasting Act 1990, the Secretary of State for Culture, Media and Sport has power to make orders restricting national public telecommunications operators from holding any licenses granted by the ITC (and the Radio Authority). Current provision made under the authority of this power is contained in Part V of the Broadcasting (Restrictions on the Holding of Licenses) Order 1991 (Statutory Instrument 1991/1176). It provides that an ITC license may not be held by "a national public telecommunications operator who has an annual turnover, attributable to his business as such an operator, which exceeds £2 billion".

2. Legal Remedies

The ITC's powers of enforcement are those contained in sections 40-42, 44 and 55 of the Broadcasting Act 1990. They include powers to fine a licensee or to suspend or revoke a license.

3. Justifications and Policy

The basic rationale is the belief that editorial independence will be compromised if the same companies own both kinds of mainstream media for news and political expression. The limitations in the Broadcasting Act 1996, however, reflect a more relaxed approach to rules about cross-holdings whilst protecting the position of the quasi-public service channels. Companies have been eager to develop interests in different sectors of the media and, at the international level, large consolidations of corporate power have become regarded as a precondition for competitive success. The reasons for a 20% threshold for newspaper cross-holdings are obscure, although it has had the effect of excluding the two largest current press interests, News International and the Mirror Group, from owning quasi-public service licenses. In respect of telecommunications and broadcasting cross-holdings, the rules do not reveal a major change of policy that was announced in 1998. From 2001, changes to the conditions in telecommunications licenses will allow operators to carry and to provide broadcasting entertainment.

D. General Competition Law

1. Interplay between Media Specific Rules and Competition Law

Competition law is largely excluded from application to concentration in television markets by the media specific rules outlined above. The ITC does have a general remit to consider competition: section 2(2)(a)(ii) of the Broadcasting Act 1990 requires it to discharge its functions in the manner which it considers is best calculated to ensure "fair and effective competition" in the provision of licensed services and services connected with them. However, this obligation is not directed against concentrations of ownership as such but against anti-competitive practices more generally. It complements, for example, Section 8(2)(b) of the 1990 Act which prohibits licensees from unreasonably discriminating against advertisers and section 12(1)(e) of the Broadcasting Act 1996 which requires multiplex licensees not to show undue discrimination in the terms on which they contract with broadcasters. In respect of abuses of a dominant position, the ITC has little scope for action under broadcasting legislation, given the content of the present rules.

The key contemporary piece of competition legislation is the Competition Act 1998, which is modelled on Articles 81 and 82 of the EC Treaty and is intended to incorporate EC competition law into UK practice. The primary enforcer under this Act is the Director-General of Fair Trading. Other regulators in specific industrial sectors have concurrent jurisdiction to apply the basic competition rules; a media related example is the Director-General of Telecommunications. However, the ITC does not have such concurrent jurisdiction. Although there is no need for it to do so (given the ownership rules), it cannot apply competition law directly. Nor can it regulate mergers directly and independently of the ownership rules. By contrast, the competition regulators are strictly not precluded from enforcing competition law in the television sector and there are various areas of overlap, for example, the supervision of independent productions in the BBC, the networking agreement in Channel 3, the effects of premium channel bundling in cable and satellite and the regulation of conditional access and electronic programme guides. Some of those issues, such as the latter (discussed above) have an indirect effect on media concentration. Another instance is the Channel 3 networking arrangement, for which provision is made in section 39 of the Broadcasting Act 1990, and which is intended to prevent large, programme-making licensees from dominating the network.

Nevertheless, the ownership rules generally preclude the competition regulators from having to take action. The area where competition regulation does have some direct impact on media concentration, however, is the television advertising market. Where joint ownership of licenses creates a dominant position in purchasing television advertising, there is a general competition concern. The Director-General of Fair Trading, in consultation with the ITC, has indicated that one company should not control more than 25% of the television advertising market. Arguably, this has served to constrain media takeovers as much as the ownership rules.

2. Justifications and Policy

Given current trends towards convergence in the media, the overlapping jurisdictions of media-related regulators in the United Kingdom are difficult to justify. Following European-wide discussion of new regulatory options, Government proposals to rationalise communications regulation are expected to be published in December 2000.

E. Specific Ownership Restrictions

By section 3(3) of the Broadcasting Act 1990, the ITC may not grant a license to, or allow it to be held by, any person unless it is satisfied that "he is a fit and proper person to hold it".

By section 5(1)(a) of the 1990 Act, the ITC must do all that it can to secure that no license is issued to a person who is a disqualified person under Part II of Schedule 2 of the Act. The schedule contains the following series of disqualifications.

1. Non-EEC Nationals and Bodies Having Political Connections (Paragraph 1)

In respect of nationality, the following are disqualified: "(a) an individual who is neither – (i) a national of a member State who is ordinarily resident within the European Economic Community, nor (ii) ordinarily

resident in the United Kingdom, the Isle of Man or the Channel Islands; (b) a body corporate which is neither (i) a body formed under the law of a member State which has its registered or head office or principal place of business within the European Economic Community, nor (ii) a body incorporated under the law of the Isle of Man or the Channel Islands". However, (controversially) the restriction does not apply to local delivery licenses, satellite licenses, licensable programme services, additional services, multiplex services or digital programme services (by sub-paragraph (2)).

In respect of political bodies, the following are disqualified: "(c) a local authority; (d) a body whose objects are wholly or mainly of a political nature; (e) a body affiliated to a body falling within paragraph (d); (f) an individual who is an officer of a body falling within paragraph (d) or (e); (g) a body corporate which is an associate of a body corporate falling within paragraph (d) or (e); (h) a body corporate in which a body falling within any of paragraphs (c) to (e) and (g) is a participant with more than a 5 per cent interest; (hh) a body corporate which is controlled by a body corporate falling within paragraph (h)".

Further provision is made for more complicated layers of control, making the following, also, disqualified persons: "(i) a body which is controlled by a person falling within any of paragraphs (a) to (g) or by two or more such persons taken together; and (j) a body corporate in which a body falling within paragraph (i), other than one which is controlled – (i) by a person falling within paragraph (a), (b) or (f), or (ii) by two or more such persons taken together, is a participant with more than a 5 per cent interest.

2. Disqualification of Religious Bodies (Paragraph 2)

The following persons are disqualified persons in this category: "(a) a body whose objects are wholly or mainly of a religious nature; (b) a body which is controlled by a body falling within paragraph (a) or by two or more such bodies taken together; (c) a body which controls a body falling within paragraph (a); (d) a body corporate which is an associate of a body corporate falling within paragraph (a), (b) or (c); (e) a body corporate in which a body falling within any of paragraphs (a) to (d) is a participant with more than a 5 per cent interest; (f) an individual who is an officer of a body falling within paragraph (a); and (g) a body which is controlled by an individual falling within paragraph (f) or by two or more such individuals taken together".

Under sub-paragraph (2), the ITC has power to make exceptions for satellite or licensable programme service holders if it is satisfied that it is appropriate.

3. General Disqualification on Grounds of Undue Influence (Paragraph 4)

"(1) A person is a disqualified person in relation to a license granted by [the ITC] if

in the opinion of that body – (a) any relevant body is, by the giving of financial assistance or otherwise, exerting influence over the activities of that person, and (b) that influence has led, is leading or is likely to lead to results which are adverse to the public interest". A "relevant body" is defined in sub-paragraph (2) and means, basically, a body having political connections or its affiliates (as described above).

4. General Disqualification of Broadcasting Bodies (Paragraphs 5 and 5A)

This category includes the publicly owned public service broadcasters, namely, the BBC and S4C. It also includes, in relation to specified licenses, companies that are owned by the public service broadcasters. Thus, "5A. (1) A BBC company, a Channel 4 company or an S4C company is a disqualified person in relation to –(a) any license granted by [the ITC] to provide regional or national Channel 3 services or Channel 5,

and (b) any license granted by the Commission to provide a local delivery service. (2) A BBC company is also a disqualified person in relation to any license granted by the Authority to provide a national, local or restricted [radio] service".

5. General Disqualification of Advertising Agencies (Paragraph 6)

The following persons are also disqualified persons in relation to an ITC license: "(a) an advertising agency; (b) an associate of an advertising agency; (c) any body which is controlled by a person falling within sub-paragraph (a) or (b) or by two or more such persons taken together; (d) any body corporate in which a person falling within any of sub-paragraphs (a) to (c) is a participant with more than a 5 per cent interest".

ANNEX

1. Legislation

1.1. Primary Legislation

Telecommunications Act 1984 (c. 12)
Broadcasting Act 1990 (c.42)
Broadcasting Act 1996 (c.55)

1.2. Principal Secondary Legislation

Broadcasting (Restrictions on the Holding of Licenses) Order 1991 (Statutory Instrument [S.I.] 1991 No.1176).
Advanced Television Services Regulations 1996 (S. I. 1996 No. 3151)
Advanced Television Services (Amendment) Regulations 1996 (S.I. 1996 No.3197)
Satellite Television Service Regulations 1997 (S.I. 1997 No. 1682)
The Television Broadcasting Regulations 1998 (S.I. 1998 No. 3196)
The Television Broadcasting Regulations 2000 (S.I. 2000 No. 44)

Legislation passed after 1996 is available on the United Kingdom's legislation web site: http://www.hmso.gov.uk/acts.htm

2. Regulatory Authorities

The Independent Television Commission (33 Foley Street, London W1W 7TL, UK) publishes guidance and consultation documents from time to time. It also publishes press releases, but not detailed decisions, about its public interest determinations. The documents are available on its web site: http://www.itc.org.uk/

The Office of Telecommunications (OFTEL) (50 Ludgate Hill, London EC4M 7JJ, UK) also publishes guidance and consultation documents. They are available on its web site: http://www.oftel.gov.uk/

The Office of Fair Trading (OFT) (Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX) publishes similar information on its web site: http://www.oft.gov.uk/

3. Bibliography

Thomas Gibbons, *Regulating the Media* (1998) 2nd ed. London: Sweet & Maxwell

Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry" in C. Marsden & S. Vershulst (eds.) *Convergence in European Digital TV Regulation* (1999) London: Blackstone Press.

P. Humphreys, *Mass Media and Media Policy in Western Europe* (1996) Manchester University Press.

B. Robinson, "Market Share as a Measure of Media Concentration", in T. Congdon *et al.*, *The Cross Media Revolution: Ownership and Control* (1996) Luton: John Libbey Media.

SPAIN

Alberto Pérez Gómez*
Dirección Audiovisual
Comisión del Mercado de las Telecomunicaciones
aperez@cmt.es

A. Horizontal Media Concentration

The Spanish rules targeting horizontal media concentration place great emphasis on the relevance of the transmission path, as the legislation has split the television market into terrestrial TV, satellite TV and cable TV.

The distinction between analog and digital is relevant in some cases, for example, there are no specific restrictions imposed upon analog satellite broadcasters, but there are specific ownership limits placed on digital satellite broadcasters.

In some cases the territorial coverage of the TV service in question is taken into account, as there are specific ownership restrictions imposed upon local terrestrial broadcasters.

The specific ownership restrictions relating to television do not apply to the terrestrial TV services directly provided by national and regional public broadcasters, but they apply to any other TV services provided by such broadcasters.

1. Terrestrial TV

1.1. Analog terrestrial TV

1.1.1. National Analog Terrestrial TV

Ownership Limits

The *Ley* 10/1988, *de Televisión Privada* (the Private TV Act),[1] regulates the provision by private concessionaires of the public service of national analogue terrestrial TV. According to the preamble of this Act, one of its main goals is to foster media pluralism. In order to achieve this goal, Art. 19.1 of the Private TV Act[2] establishes two ownership limits:

> (1) It prohibits an undertaking from holding, directly or indirectly, shares in more than one license-holder.
>
> (2) It prohibits an undertaking from having, directly or indirectly, holdings exceeding 49% of the share capital of the license-holder.
>
> For the purposes of the application of this Article at national level, it must be understood that "license-holder" is a company that has been granted a concession for the provision of national (digital or analog) terrestrial TV services.[3]

The underlying reasoning behind the two limits established by Article 19 of the Private TV Act is the following:

> (1) The limit on the holding of shares in more than one license-holder attempts to ensure that different undertakings have a chance to enter the national terrestrial TV market. It is necessary to take into account the fact that when the Private TV Act was approved in 1988, there were only three national analog terrestrial TV licenses available.
>
> However, the introduction of Digital Terrestrial TV has increased the number of national terrestrial TV licenses available, but this ownership limit has not changed, and it applies to any national terrestrial TV license-holder, whether analog or digital.
>
> (2) The 49% limit on the holding of shares that an undertaking can have in the share capital of a license-holder attempts to ensure internal pluralism in the ownership structure of a license-holder.
>
> However, a 49% stake is often enough to allow an undertaking to conduct the affairs of the license-holder in accordance with its wishes.

---

* Disclaimer: The views expressed in this paper are those of the author, and not those of the *Comisión del Mercado de las Telecomunicaciones*.

1) Private TV Act 10/1988, 3 May 1988, as amended by Article 96 of Act 50/1998, on taxation, administrative provisions and social affairs, 30 December 1998, and Article 67 of Act 55/1999, on taxation, administrative provisions and social affairs, 29 December 1999.

2) Art. 19 of the 1988 Private TV Act was partially amended by Article 96 of Act 50/1998, on taxation, administrative provisions and social affairs.

3) When the Private TV Act was approved in 1998, Article 19 was meant to apply only to national analog terrestrial broadcasters. However, it now also covers national Digital Terrestrial Television (DTTV) broadcasters. Moreover, several new provisions also refer to Article 19 of the Private TV Act, so it also establishes ownership restrictions on regional DDTV broadcasters, and it partly applies to digital satellite TV broadcasters.

One of the most controversial aspects of these limits is the concept of "indirect holdings". Article 23 of the Private TV Act defines them as those which allow an enterprise to effectively control, by means of agreements, decisions or concerted practices, a capital share that exceeds the limits established in this Act.

Article 23 has been interpreted in different ways, and in June 1999 the *Audiencia Nacional* (High Court) had an opportunity to try to establish the precise meaning of this provision.

The *Audiencia Nacional* held that the acquisition by *Telefonica* of a 25% stake in the private national terrestrial broadcaster *Antena 3 TV* was lawful. This operation took place in July 1997, and was authorised by the relevant authority, the *Ministerio de Fomento* (now, the *Ministerio de Ciencia y Tecnología* – Ministry for Science and Technology). This authorisation was challenged in court by the Spanish media group *PRISA*, which has joint control, together with *Canal Plus Francia*, of the private national terrestrial broadcaster *Sogecable*.

As mentioned above, Article 19.1 of the Private TV Act forbids any natural or legal person from holding, either directly or indirectly, shares in more than one license-holder. *PRISA* claimed that the operation authorised by the Ministry had led to a breach of that limit by two banks: *Banco Bilbao Bizcaya* (*BBV*) and *Cajamadrid*. Both banks directly owned shares in the private broadcaster *Sogecable*, as well as a stake in *Telefonica*, which, after the notified operation was approved, became the main shareholder of the private broadcaster *Antena 3 TV*.

The *Audiencia Nacional* dismissed the argument put forward by *PRISA*. According to the Court, the fact that these banks held stakes in *Telefonica* did not mean that they had an "indirect holding" contrary to the ownership limits established by the law because it had not been proved that those banks effectively controlled both *Sogecable* and *Antena 3 TV* (the latter, by means of the effective control of *Telefonica*). To support its decision, the *Audiencia Nacional* said that when applying Article 19 of the Private TV Act, it was necessary to bear in mind that the goal of this provision was to safeguard the basic constitutional principle of media pluralism, which, according to the court, could not be considered to be endangered in this case.

One of the three judges filed a dissenting opinion, as she considered that Article 19 of the Private TV Act had been breached, and that the authorisation granted by the *Ministerio de Fomento* should therefore have been declared void.

This judgment sets an important precedent, but as it was not adopted by the *Tribunal Supremo*, and there have not been any further judgments confirming the interpretation of the *Audiencia Nacional*, the question should be considered open to further discussion.

Transparency Measures

Natural or juridical persons must seek the authorisation of the *Ministerio de Ciencia y Tecnología* when they make "relevant transactions", defined by Article 21 of the Private TV Act[4] as those which increase or decrease their holdings by more than 5% of the share capital, or those that increase or decrease their holdings making them go above or below 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40% or 45% of the share capital.

The *Ministerio de Ciencia y Tecnología* shall not authorise transactions that are made by corporations or individuals whose ownership structure or commercial relations are not sufficiently clear, or are contrary to the ownership limits established by the law. The Act does not determine when an ownership structure or a commercial relation shall be deemed unclear.

The Private TV Act authorises the *Ministerio de Ciencia y Tecnología* to ask for all the information it may need to apply this Act.[5] This information shall be treated as confidential.

There is also a National Special Registry for Private Terrestrial Television Broadcasters.[6] All the relevant transactions affecting these broadcasters are placed on record. Access to this Register, kept by the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission – *CMT*),[7] is open to the public.

Relevant Authority and Sanctions

The body responsible for enforcing these ownership limits is the *Ministerio de Ciencia y Tecnología* (Ministry for Science and Technology),[8] which usually acts through its *Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información* (State Department for Telecommunications and for the Information Society – *SETSI*).

A breach of the ownership limits shall result in the loss of the license, but the holder has a period of a month

4) Art. 21 of the 1988 Private TV Act was partially amended by Article 67 of Act 55/1999, on taxation, administrative provisions and social affairs.

5) See Article 7.2 of the Private TV Act.

6) See Article 20 of the Private TV Act and Decree 951/1989, on the creation of the Special Registry for Private Televisions, 28 July 1989.

7) On the powers of the CMT to keep Registers, see Article 1.Dos.2.n of Act 12/1997, on the liberalization of telecommunications, 24 April 1997.

8) See Articles 7.c, 25.2 and 25.3 of the Private TV Act, and Decrees 557/2000, of 27 April 2000; 696/2000, of 12 May 2000; and 1451/2000, of 28 July 2000, on the creation and organization of the *Ministerio de Ciencia y Tecnología*.

in which he may remedy the infringement. This sanction of loss of the license is imposed by the Council of Ministers, following a proposal of the *Ministerio de Ciencia y Tecnología*.[9]

A breach of the transparency measures is considered as a very serious infringement.[10] Offenders shall be liable to a fine ranging from 15 million pesetas (ESP) (90.000 EUR) to 50 million ESP (300.000 EUR); suspension of broadcasting or, in some cases, loss of the license.[11]

1.1.2. Local Analog Terrestrial TV

Ownership Limits

Local analog terrestrial TV[12] is regulated by *Ley* 41/1995 *de televisión local por ondas* (the Local Terrestrial TV Act).[13] According to this Act, local terrestrial TV is a public service that may be provided by up to two concessionaires in each municipality. One of the two concessions available in each municipality is reserved for the local authorities. The second concession may be granted by the Autonomous Communities to natural or juridical persons.[14]

The restrictions on media concentration in the local terrestrial analogue TV market are established in Article 7 of the Local Terrestrial TV Act. This Article establishes two limits:

> (1) The first limit restricts the number of licenses one person can hold. For these purposes, Article 7 of the Local Terrestrial TV Act forbids the creation of a network of local terrestrial TV license-holders. A network of this kind exists if one or more natural or juridical persons control more than one local terrestrial TV license-holder. It shall be deemed that this control exists if the controlling person: (a) holds the majority of the shares or (b) controls the majority of the voting rights, or (c) has the power to appoint the majority of the members of the board of directors, of more than one local terrestrial TV license-holder.[15]
>
> (2) The second limit forbids license-holders from entering into networking agreements with other license-holders. A networking agreement exists if two or more local terrestrial TV concessionaires broadcast the same programming during more than 25% of their transmission time, even if it is transmitted at different times of the day.[16] Despite this prohibition, local terrestrial TV license-holders may be allowed to enter into networking agreements if the relevant Autonomous Community so authorises.[17]

The underlying reasoning behind the two limits established by Article 7 of the Local Terrestrial TV Act is similar: although they are meant in theory to safeguard media pluralism, in fact their main aim is to avoid the use of local terrestrial TV license-holders to create national TV networks. However, these limits are much stricter than those that apply to other local media markets (such as the local cable TV market or local FM or DAB radio markets), in which networking agreements are generally permitted.[18] They have a very limited effect in the different local terrestrial TV markets concerned, as an undertaking cannot create local networks or control several local terrestrial TV license holders in the same municipality (there is only one license available for natural or juridical persons, as the other available license is reserved for the local authorities); they do not necessarily ensure the allocation of a certain amount of time to local programming, as there are no provisions in the Local Terrestrial TV Act imposing this kind of positive obligation upon local terrestrial broadcasters.[19]

Transparency Measures

The Local Terrestrial TV Act includes some transparency obligations aimed at allowing the authorities to control the situation where someone owns more than one local terrestrial TV license-holder.[20]

---

9) See Article 17 of the Private TV Act. This Article was partially amended by Article 96 of the Act 50/1998, on taxation, administrative provisions and social affairs.

10) See Article 24.2.a) and 24.2.f) of the Private TV Act.

11) See Article 25.1.c) of the Private TV Act.

12) In Spain, there is no regional private terrestrial analog TV. The only regional terrestrial broadcasters are the public regional broadcasters, which are not bound by specific ownership limits.

13) Local Private TV Act 41/1995, 22 December 1995. In the regional level, see the Decree of Navarre 313/1996, on Local Terrestrial TV, 9 September 1996; the Catalan Decree 320/1996, on Local Terrestrial TV, 1 October 1996, as amended by the Catalan Decree 111/1998, 12 May 1998; and the Decree of Castilla-La Mancha 54/2000, on Local Terrestrial TV, 21 March 2000.

14) These concessions cannot be granted yet because the necessary Technical Plan has not been approved by the Spanish Government. In the meantime, the Transitional Provision of the Local Terrestrial TV Act authorizes those local TV broadcasters which were providing services before January 1995 to continue with their activity until the concessions are granted.

15) See Article 7.2 of the Local Terrestrial TV Act. See also Article 17.3 of the Decree of Navarre 313/1996.

16) See Article 7.3 of the Local Terrestrial TV Act. See also Article 7 of the Decree of Navarre 313/1996.

17) See Article 7.4 of the Local Terrestrial TV Act. See also Article 7.4 of the Decree of Navarre 313/1996, Article 5.2 of the Catalan Decree 320/1996 and Article 5.2 of the Decree 54/2000.

18) For the radio broadcasting sector, see the Sixth Additional Provision of the 1987 Telecommunications (Regulation) Act, 31/1987, 18 December 1987 and Article 3 of the Ministerial Order on DAB services of 23 July 1999, and for the cable TV sector, see the Cable Telecommunications Act, 42/1995, 22 December 1995.

19) However, the Autonomous Communities, when implementing this Act, can impose obligations of this kind. See Art. 13 of the Catalan Decree 320/1996, and Art. 13 of the Decree of Castilla-La Mancha 54/2000.

20) See Article 13 of the Local Terrestrial TV Act.

However, this Act does not include transparency measures intended to inform the authorities if several license-holders broadcast the same programming for more than 25% of their transmission time. This problem has been indirectly solved with the approval of Act 22/1999, on the amendment of Act 25/1994, incorporating the "Television without Frontiers" Directive into Spanish Law, as this Act obliges all broadcasters to keep a record of the programmes they have broadcast during the preceding six months.[21]

Relevant Authorities and Sanctions

The *Comunidades Autónomas* (Autonomous Communities) enforce the sector-specific ownership limits set out for local analog terrestrial TV.[22] In sixteen Autonomous Communities (out of seventeen existing ones), the relevant authority is a Department of the regional Government. Only Catalonia has an independent authority: the *Consejo del Audiovisual de Cataluña* (Catalan Audio-visual Council – *CAC*).[23]

As for the penalty system, the Local Terrestrial TV Act refers back to that of the telecommunications legislation.[24]

According to the *Ley* 11/1998 *General de Telecommunicaciones* (the General Telecommunications Act),[25] serious or repeated failure by holders of concessions to comply with the essential conditions imposed upon them, and the repeated failure to comply with the requirements regarding information drawn up in the exercise of its functions by the relevant administrative authorities shall be considered as very serious offences,[26] punishable by fines ranging from 50 million ESP (300.000 EUR) to 100 million ESP (600.000 EUR).[27]

Depending on the circumstances, very serious offences may result in the loss of the license.[28] The Local Terrestrial TV Act establishes that some infringements shall be considered, for these purposes, as very serious offences that shall entail the loss of the license, such infringements include the failure to comply with some of the transparency measures set out by Article 13 of the Act.[29]

The failure by holders of concessions to comply with the essential conditions applicable to them, except where this constitutes a very serious offence, shall be considered as a serious offence,[30] punishable by fines ranging from 5 million ESP (30.000 EUR) to 50 million ESP (300.000 EUR).[31]

The failure to furnish data required by the administration where the furnishing thereof is a requirement under the applicable legislation shall be considered as a minor offence, punishable by fines of up to 5 million ESP (30.000 EUR).[32]

1.2. Digital Terrestrial TV

Ownership Limits

Digital Terrestrial TV (DTTV) is mainly regulated by the *Real Decreto* 2169/1998 *por el que se aprueba el Plan Técnico Nacional de la televisión digital terrenal* (the Decree on the National Technical Plan on DTTV) and by the *Orden* of 9 October 1998 *(por la que se aprueba el Reglamento Técnico y de Prestación del servicio de televisión digital terrenal* (Ministerial Order on the provision of DTTV services).[33] According to these provisions, there will be national, regional and local multiplexes. However, the National Technical Plan has not determined yet which frequencies shall be used for local multiplexes, so that at present only national and regional multiplexes exist.

The National Technical Plan currently identifies five national multiplexes and one regional multiplex.[34] These multiplexes can carry four digital TV programme services, unless the *Ministerio de Ciencia y Tecnología* states, by means of a Ministerial Order, that a multiplex can carry more digital TV programme services.[35]

The National Technical Plan reserves some digital TV programme services for the existing national and regional terrestrial broadcasters. The remaining digital TV programme services will be managed by private concessionaires. A concession for the provision of DTTV services can allow a juridical person to manage one single DTTV programme service,[36] or several.[37]

---

21) See Art. 19 of the Act 25/1994, on the implementation into Spanish Law of the Directive 89/552/EEC ("Television without Frontiers", 12 July 1994, (http://www.setsi.mcyt.es/legisla/radio_tv/ley25_94.htm) as amended by Act 22/1999, on the amendment of Act 25/1994, 7 June 1999, (http://www.setsi.mcyt.es/legisla/radio_tv/ley22_99.htm).

22) See Article 17 of the Local Terrestrial TV Act. Nevertheless, as these limits have not been implemented in practice yet, because the concessions cannot be granted until the Technical Plan is approved by the national Government, it is not clear if the *Ministerio de Ciencia y Tecnología* would have some responsibilities in relation to the enforcement of these limits, whose effective application might need to take into account the position of an operator in more than one Autonomous Community.

23) See the Catalan Act 2/2000, on the Catalan Audio-visual Council, 4 May 2000.

24) Article 16 of the Local Terrestrial TV Act refers to the 1987 Telecommunications (Regulation) Act, 31/1987, 18 December 1987, but as the penalty system of this Act has been repealed by the 1998 General Telecommunications Act, it must be understood that the penalty system of the latter applies.

25) General Telecommunications Act 11/1998, 24 April 1998, as amended by Articles 9 and 94 of Act 50/1998, on taxation, administrative provisions and social affairs, 30 December 1998, and Article 66 of Act 55/1999, on taxation, administrative provisions and social affairs, 29 December 1999.

26) See Article 79.16 and 79.17 of the General Telecommunications Act.

27) See Article 82.2 of the General Telecommunications Act.

None of the provisions which regulate DTTV services establishes new specific ownership restrictions. They merely refer to Article 19 of the Private TV Act.[38] As already mentioned above,[39] Article 19.1 of the Private TV Act[40] establishes two limits:

(1) It prohibits an undertaking from holding, directly or indirectly, shares in more than one license-holder.

(2) It prohibits an undertaking from having, directly or indirectly, holdings exceeding 49% of the share capital of the license-holder.

The first of these two limits prevents an undertaking from holding more shares than one national (analog or digital) terrestrial TV license-holder.

It also prevents a company from holding shares in more than one regional DTTV license-holder in the same Autonomous Community.

However, it seems that the Autonomous Communities have considered that this limit does not prohibit an undertaking from holding shares in national (analog or digital) terrestrial TV license-holders and in regional DTTV broadcasters.[41]

The decision to apply the limits of the 1988 Private TV Act to DTTV broadcasters has been criticized by some authors. They consider that these limits were adopted, more than a decade ago, to address problems related to a TV market that has substantially changed since then. For example, they point out that these limits do not take into account the fact that the introduction of DTTV has increased the number of licenses available.

Moreover, the lack of new specific limits for regional DTTV services may affect the development of the terrestrial TV market as a whole. Although the Private TV Act forbids an undertaking from holding shares in more than one national terrestrial TV license-holder, it would be possible for an undertaking holding shares in a national terrestrial TV license-holder to effectively control a second national terrestrial network, if that undertaking obtains a DTTV license in all seventeen Autonomous Communities, and these regional DTTV license-holders, controlled by the same person, enter into networking agreements, which are not restricted in any way by the ownership limits of the Private TV Act.

The DTTV broadcasters that provide conditional access services for digital TV shall also comply with the provisions of the *Ley* 17/1997 *por la que se incorpora al Derecho español la Directiva 95/47/CE* (Act on the implementation of Directive 95/47/EC) that regulate the use of digital decoders and the relationship between digital TV platform operators and independent content-providers. These provisions of the Act 17/1997 will be discussed below.[42]

Transparency Measures

The transparency measures that apply to national and regional DTTV broadcasters are the same as those that apply to national analog TV broadcasters.[43]

The only difference is that, at regional level, the body in charge of authorising the relevant transactions and obtaining the information needed to apply these provisions will be the relevant regional authority (a

---

28) See Article 82.3.B of the General Telecommunications Act.

29) See Article 15.b) of the Local Terrestrial TV Act.

30) See Article 80.15, 80.16 and 80.17 of the General Telecommunications Act.

31) See Article 82.2 of the General Telecommunications Act.

32) See Article 82.2 of the General Telecommunications Act.

33) See the Decree on the approval of the National Technical Plan on Digital Terrestrial TV of 9 October 1999 and the Ministerial Order on the approval of the Regulation on some technical aspects and on the provision of Digital Terrestrial TV services of 9 October 1998. These provisions implement the Forty-Fourth Additional Provision – Regulation of Digital Audio Broadcasting and Digital Terrestrial Television – of Act 66/1997, on taxation, administrative provisions and social affairs, 30 December 1997.

34) See Article 3.1 and Annexes I and II of the National Technical Plan on DTTV (Decree 2169/1998).

35) See paragraph 7 of the First Additional Provision of the Decree 2169/1998. The *Ministerio de Ciencia y Tecnología* has already stated that the national multiplex which is going to be shared by the national public service broadcaster *RTVE* and the three national terrestrial analogue broadcasters (*Antena 3 TV*, *Telecinco* and *Sogecable*) will carry five digital TV programme services. See Art. 5 of the Ministerial Order of 4 December 1998 (http://www.setsi.mcyt.es/legisla/radio_tv/o041298.htm).

36) This will be the case for the two new national free-to-air DTTV concessionaires that the Government will choose before December 2000. See the First Clause of the Call for Tenders of 10 March 2000, (http://www.setsi.mcyt.es/legisla/radio_tv/RE100300/re100300.htm).

37) The concession of the pay-TV platform *Onda Digital/Quiero TV* allows it to manage three DTTV multiplexes of four DTTV programme services each, and two extra programme services in a fourth multiplex, *i.e.,* a total of fourteen DTTV programme services. See the Call for Tenders of 11 January 1999 (http://www.setsi.mcyt.es/legisla/radio_tv/re110199/re110199.htm).

38) See in particular Article 3 of the Ministerial Order of 9 October 1998.

39) See the paragraph "Ownership Limits", in A.1.1.1., "National Analog Terrestrial TV".

40) Art. 19 of the 1988 Private TV Act was partially amended by Article 96 of Act 50/1998, on taxation, administrative provisions and social affairs.

41) A broadcaster (*Onda Digital/Quiero TV*) has been granted a concession for the provision of national DTTV services (Resolution of the *Ministerio de Ciencia y Tecnología* of 2 September 1999), as well as a concession for the provision of DTTV services in the Autonomous Community of Madrid (Order of the Autonomous Community of Madrid 2232/1999, 29 October 1999). Until now, this is the only Autonomous Community which has granted regional DTTV licenses.

42) See Part B (Vertical Media Concentration).

43) See the paragraph "transparency measures", in A.1.1.1., "National Analog Terrestrial TV".

Department of a regional Government and, in the case of Catalonia, the CAC, an independent authority). In addition, the Special Register for DTTV concessionaires will also be kept by the regional authorities.

Relevant authorities and sanctions

The body responsible for enforcing these limits at national level is the *Ministerio de Ciencia y Tecnología*, and, at regional level, a Department of a regional Government and, in the case of Catalonia, the *CAC*, an independent authority.

The sanctions are those prescribed by the Private TV Act, which have already been mentioned above.[44]

2. Cable TV

Ownership Limits

The *Ley* 42/1995 *de telecomunicaciones por cable* (Cable Telecommunications Act)[45] divided the country into regional or local geographic areas. In each geographic area, up to two concessionaires were authorised to provide cable telecommunications services (cable TV, Internet access and voice communications). One concession in each geographic area was reserved by this Act to *Telefonica Cable*, a subsidiary of the public telecommunications operator *Telefonica*.[46] The other available license (known as "the second concession") has been allocated by the process of calls for tenders.

In 1998, the Abrogating Provision of the General Telecommunications Act repealed the 1995 Cable Telecommunications Act, "except insofar as it provides for the television broadcasting service regime. In particular, Articles 9.2.a), 10, 11.1.e, f and g, Article 12 and paragraphs 1 and 2 of the Third Additional Provision shall remain in force". As some of the ownership limits are not to be found in any of these Articles expressly quoted in the Abrogating Provision of the General Telecommunications Act, and they did not cover broadcasting services alone, it is somewhat unclear whether these ownership limits remain in force or not.

As mentioned above, the Cable Telecommunications Act establishes a duopoly in the cable TV market. In each relevant regional or local geographic area, one concession is reserved for *Telefonica Cable*, and the second concession is granted, after a call for tenders, to the successful bidder. *Telefonica* cannot hold shares in the companies that have been granted the so called "second concession"[47] and, at the same time, it is obliged to have more than 50% of the capital share of its cable subsidiaries.[48]

The main ownership limit in the cable TV sector is enshrined in Art. 4.3 of the Cable Telecommunications Act. According to this provision, no natural or juridical person shall have holdings, directly or indirectly, in the share capital of two or more companies which have been granted a concession for the provision of TV cable services, or directly or indirectly own or control two or more of those companies, if they jointly have more than 1,5 million subscribers in Spain as a whole.[49]

In order to determine when a natural or juridical person controls a cable concessionaire, Article 4.3 of the Cable Telecommunications Act refers to the definition of control set out in Article 42 of the *Código de Comercio* (Commercial Code).[50] This Article establishes that a company is considered as a subsidiary of a group when it is under its control. It shall be deemed that this control exists if the controlling company holds the majority of the shares of the subsidiary, or if it controls the majority of the voting rights, or if it has the power to appoint the majority of the members of the board of directors. Such aspects as personal links with management, or financial or contractual links between enterprises (in particular, agreements concerning the supply of elements necessary to operate the media organization concerned) are not taken into account in this definition of control.

This limit, which forbids an undertaking from holding shares or controlling cable concessionaires that jointly have more than 1,5 million subscribers in Spain as a whole, is intended to avoid the situation whereby a single cable operator controls a significant part of the national cable TV market. This limit in itself has no significant effect in any of the 43 regional or local geographic areas into which the Spanish territory is divided for these purposes.

In the national market, cable operators' competitors include, among others, satellite TV broadcasters, whose broadcasts cover the whole territory, and which are not bound by these kinds of limits. However, this is not in practice a real handicap for cable operators: at present, the Spanish cable TV market has only 400,000

44) See the paragraph "Relevant Authorities and Sanctions", in A.1.1.1., "National Analog Terrestrial TV".

45) Cable Telecommunications Act 42/1995, 22 December 1995. See also Decree 2066/1996, approving the regulation of technical aspects and on the provision of cable telecommunications services, 13 September 1996.

46) See paragraph 1 of the First Additional Provision of the Cable Telecommunications Act.

47) See paragraph 4 of the Second Additional Provision of the Cable Telecommunications Act.

48) See paragraph 5 of the Second Additional Provision of the Cable Telecommunications Act.

49) It must be understood that this limit does not apply to *Telefonica Cable*, as the Act gives it the right to be a concessionaire in all geographic areas, and it obliges *Telefonica* have more than 50% of the capital share of its cable subsidiaries, so if *Telefonica* were to have more than 1,5 million subscribers, it would not be possible for this company to sell some of its regional and local cable subsidiaries. In any case, up to now *Telefonica Cable* is still in a trial period.

50) See Decree of 22 August 1885, on the Commercial Code.

subscribers,[51] so that it is impossible for any undertaking to hold shares or control cable concessionaires which jointly have more than 1,5 million subscribers. In fact, most market studies forecast that the cable market as a whole will not reach the threshold of 1,5 million subscribers until 2003, so this limit does not impose any relevant restriction upon cable operators.

The Cable Telecommunications Act obliges cable TV operators to reserve transmission capacity to independent content-providers.[52] The cable TV operators that provide conditional access services for digital TV must also comply with the provisions of the Act 17/1997 that regulate the relationship between digital TV platforms operators and independent content-providers and the use of digital decoders. These provisions will be discussed below in the context of vertical media concentration.[53]

Transparency Measures

The *Ministerio de Ciencia y Tecnología*, which granted the cable TV concessions, is entitled to ask for any information it may need to apply these limits.[54]

There is also a Special Registry for Cable TV Concessionaires.[55] All the relevant transactions affecting these broadcasters are placed on record. Access to this Register, which is kept by the *Comisión del Mercado de las Telecomunicaciones*,[56] is open to the public.

Relevant Authorities and Sanctions

The *Ministerio de Ciencia y Tecnología* is the body in charge of enforcing the ownership limit that prohibits an undertaking from holding shares or controlling cable concessionaires that jointly have more than 1,5 million subscribers.

As for the penalty system, the Cable Telecommunications Act refers back to that of the telecommunication's legislation,[57] which has been explained above.[58]

3. Digital Satellite TV

Ownership Limits

Terrestrial and cable TV are considered public services, and the provision of those services by a natural or juridical person requires any such person to have been previously granted a concession. The situation in the satellite TV market is very different: satellite TV is a liberalized service, and, in order to provide this service, it is only necessary to obtain an authorisation, granted by the *Comisión del Mercado de las Telecomunicaciones* (*CMT*) in a standard way, subject to prior accreditation by the applicant of compliance with the requirements laid down by the legislation.[59]

The legislature has not considered it necessary to impose any specific ownership limits upon analog satellite TV broadcasters.

However, there are some restrictions placed on digital satellite TV broadcasters. According to the Fourth Transitional provision of the *Ley* 17/1997 *por la que se incorpora al Derecho español la Directiva 95/47/CE*,[60] one of the limits set by Article 19.1 of the Private TV Act (the one that prohibits an undertaking from having, directly or indirectly, holdings exceeding 49% of the share capital of a license-holder) also applies to digital satellite TV operators. The Act 17/1997 states that this limit shall only apply insofar as the Government does not declare, following a binding opinion of the *CMT*, that there is sufficient competition in this sector.

As mentioned above, the underlying reasoning behind this kind of limit is to ensure internal pluralism in the ownership structure of a license-holder.

---

51) See IDATE, *Development of Digital TV in Spain*, 2000.

52) See Articles 10 and 11.1.d of the Cable Telecommunications Act.

53) See Part B (Vertical media concentration).

54) See Articles 76.2, 79.4, 79.17 and 81.3 of the General Telecommunications Act, and Article 30 of Decree 1994/1996, approving the Regulation of the Telecommunications Market Commission.

55) See Article 5 of the Cable Telecommunications Act and Annex III (Special Registry for Cable Concessionaires) of the Decree 1653/1998, on the creation of some public Telecommunications Registries, 24 July 1998.

56) On the powers of the CMT to keep Registers, see Article 1.Dos.2.n of the Act 12/1997, on the liberalization of telecommunications, 24 April 1997.

57) Article 13.1 of the Cable Telecommunications Act refers to the 1987 Telecommunications (Regulation) Act, 31/1987, 18 December 1987, but as the penalty system of this Act has been repealed by the 1998 General Telecommunications Act, it must be understood that the penalty system of the latter applies.

58) See the paragraph "Relevant Authorities and Sanctions", in A.1.1.2., "Local Analog Terrestrial TV".

59) On the granting of satellite TV authorisations, see Art. 5 of the Decree 137/1997, approving the regulation of technical aspects and on the provision of satellite telecommunications services, of 31 January 1997. On the granting of digital satellite pay-TV authorisations, see also Art. 3 of Act 17/1997, on the implementation of the EC Directive 95/45/EC, on TV signals, of 3 May 1997.

60) Act 17/1997, on the implementation of the EC Directive 95/45/EC, on TV signals, of 3 May 1997, as amended by Decree Law 16/1997, on the amendment of Act 17/1997, 13 September 1997.

However, a 49% stake is often enough to allow an undertaking to conduct the affairs of the license-holder in accordance with its wishes.

This limit was adopted in 1988 bearing in mind the situation of the national analog terrestrial TV market, in which there were only three licenses available. The current situation in the digital satellite TV market is certainly different. In particular, the market is liberalized, and much more accessible for new entrants than the national analog TV market, in legal, economic and technical terms.

The satellite TV broadcasters that provide conditional access services for digital TV must also comply with the provisions of Act 17/1997 which regulate the use of digital decoders and the relations between digital TV platforms operators and independent content providers. These provisions of Act 17/1997 will be discussed below.[61]

Transparency Measures

Both the *CMT* and the *Ministerio de Ciencia y Tecnología* are entitled to ask for any information they may need to apply these limits.[62]

Relevant Authorities and Sanctions

The provisions of Act 17/1997 concerning the ownership limits imposed upon satellite digital TV operators are somewhat unclear with regard to the responsible authority and they have not been implemented in practice yet. Therefore, it is difficult to state at this stage which authority will ultimately be responsible (the *Ministerio de Ciencia y Tecnología* or the *CMT*).[63]

The penalty system would, in any case, be that of the General Telecommunications Act, which has been explained above.[64]

B. Vertical Media Concentration

There are no specific restrictions of this kind imposed upon national and local analog terrestrial TV broadcasters, national and regional free-to-air DTTV broadcasters, analog satellite TV broadcasters and digital satellite free-to-air TV broadcasters.

However, in some cases Spanish media law does impose upon TV broadcasters some restrictions that affect markets placed upstream or downstream from the TV broadcasting market:

(1) In the receiver equipment market, Spanish media law imposes requirements relating to digital decoders and to the provision of conditional access services for digital TV, which affect digital pay-TV broadcasters

(2) In the audio-visual content market, Spanish media law places some obligations on cable operators (B.2.1.) and digital pay-TV broadcasters (B.2.2.), relating to the access of independent content-providers to the service providers' collections.

1. Requirements relating to the Receiver/Equipment Market

The provision of conditional-access services for digital TV is regulated by Act 17/1997, which basically incorporates the EC Directive 95/47 on TV signals, into Spanish Law.[65]

According to Article 7 of this Act, the providers of conditional-access services for digital TV (DTTV, digital cable, digital satellite) must use decoders that are directly and automatically open, either because they use a multicrypt system, or because the decoders' owners reach an agreement with the other digital TV operators. The *CMT* has the responsibility for approving the agreements reached by the operators. It must ensure that the terms of the agreements are fair, transparent and non-discriminatory and allow the consumers to receive all the digital TV programme services with one single decoder. If such an agreement is not reached, the *CMT* is allowed to establish the legal, technical or economic conditions necessary to allow the decoders to be directly and automatically open.

The goal of this provision is to avoid the use of proprietary conditional-access systems that would restrict competition in the digital pay-TV market, or the ability of customers to receive all digital pay-TV services with a single decoder.

Although Act 17/1997 does not regulate APIs (Application Programming Interfaces), the *CMT*, invoking its duty of safeguarding competition in the telecommunications and audio-visual services market, adopted a

61) See Part B (Vertical media concentration).

62) See Articles 76.2, 79.4, 79.17 and 81.3 of the General Telecommunications Act, and Article 30 of Decree 1994/1996, approving the Regulation of the Telecommunications Market Commission.

63) In favour of the intervention of the CMT, it could be argued that it is the CMT which grants authorisations for the provision of digital satellite TV services, so according to Article 79.16 of the General Telecommunications Act, this body could be considered as entitled to sanction the failure by the holder of an authorisation for the provision of digital satellite TV services to comply with one of the conditions imposed by the CMT when it decides to issue that authorisation: the compliance with the ownership limits imposed by the Act 17/1997.

64) See the paragraph "Relevant authorities and sanctions", in A.1.1.2., "Local Analog Terrestrial TV".

65) Act 17/1997, on the implementation of the EC Directive 95/45/EC, on TV signals, of 3 May 1997, as amended by Decree Law 16/1997, on the amendment of Act 17/1997, 13 September 1997.

Resolution in September 2000, stating that it would investigate the impact of the use of proprietary APIs in the Digital Terrestrial TV market.[66]

2. Requirements relating to the Audiovisual Content Market

2.1. Obligations of Cable TV Operators

Concerning the relationship between cable TV operators and independent content-providers, cable TV operators are obliged to reserve 40% of the capacity used for the provision of audio-visual services for independent content-providers,[67] provided enough of them request access to the cable network in question. The body in charge of enforcing this obligation will be the relevant regional authority[68] (a Department of a regional Government and, in the case of Catalonia, the *CAC*, an independent authority[69]).

The goal of this provision is to prevent cable operators from taking advantage of their control of the infrastructures to restrict the access of independent content-providers to their networks.

However, if this provision is to have the intended effect, it is necessary to adequately define the concept of "independent content-provider". The Cable Telecommunications Act refers to the concept of "independent producer" in Act 25/1994, on the incorporation into Spanish Law of the "Television without Frontiers" Directive.[70] According to this Act, a producer is not considered to be independent of a broadcaster if the latter owns or controls more than 50% of the share capital of the producer, or if it controls the majority of its voting rights.

This definition does not follow Recital 31 of the EC Directive 97/36 on the amendment of the 1989 "Television without Frontiers" Directive, which states that Member States, in defining the notion of "independent producer", should take appropriate account of new criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights. For example, according to Spanish media law, a content-provider could be deemed independent from a cable operator if the latter does not hold shares or control voting rights in the former, even if the cable operator in question turns out to be the only customer of the content-provider.

Moreover, these rules do not prevent a company from being the sole content-provider of a cable TV operator, and the lack of precise adequate transparency measures makes it very difficult to determine what the relationship is between a content-provider and a cable TV operator.

2.2. Obligations of Independent Content-Providers

As for the relationship between independent content-providers and digital pay-TV platforms, Article 7.c of Act 17/1997 establishes that the providers of conditional-access services for digital TV shall ensure that all independent content-providers and broadcasters in general have access under fair, transparent and non-discriminatory conditions to the technical means needed to allow the reception of their digital TV services by the decoders of the customers of said providers of conditional access services. The fee for the use of decoders will be freely set by the parties, and it will be cost-orientated. The providers of conditional-access services for digital TV shall keep separate accounts.

The *CMT* shall adopt the necessary binding resolutions in order to solve the conflicts that may arise between independent content-providers or broadcasters in general and providers of conditional-access services for digital TV.

Article 7.c of Act 17/1997 also states that the providers of conditional-access services for digital TV (cable, satellite, terrestrial), must reserve 40% of their transmission capacity for independent content providers, provided enough of them request access to the digital pay-TV platform in question and offer programme services of adequate quality.

This provision is clearly inspired by the one that regulates the relationship between independent content-providers and cable operators. The only relevant difference is that the content-providers, in order to be able

---

66) The API's perform in the digital TV decoders a function similar to that of the operating systems in PC's. If a decoder has a proprietary API embedded, it will not be able to understand interactive TV applications broadcast by a digital TV platform that uses a different proprietary API.

In Spain, the main operator in the DTTV market, *Quiero TV*, has chosen a proprietary API, *Open TV*. One of its rivals, the broadcaster *Sogecable*, has complained that this choice may affect competition in the DTTV market, and could restrict the ability of customers to receive all digital TV and interactive TV services with a single decoder. *Quiero TV* has argued that when it started operating it had to chose a proprietary API because there were no open APIs at that time, and that it then accepted a compromise to start the migration to an open API (the *Multimedia Home Platform* -MHP- fostered by the *Digital Video Broadcasting* group) as soon as it becomes available. Nevertheless, the CMT has decided to open an inquiry in order to assess what the situation is in this market. See the Resolution of the CMT of 28 September 2000.

67) See Articles 10 and 11.1.d of the Cable Telecommunications Act. According to Article 11.1.e, f, and g of the Cable Telecommunications Act, cable TV operators must also include in their offers the national analogue terrestrial TV channels, as well as the regional and local terrestrial channels distributed in the geographic area covered by the cable TV concession ("must-carry rules").

68) See paragraph 1 of the Third Additional Provision of the Cable Telecommunications Act, the Final Provision of the Decree 2066/1996 and the Third Additional Provision of the Act 12/1997, on the liberalization of telecommunications, 24 April 1997.

69) The only Autonomous Community that has implemented the provisions of the Cable Telecommunications Act related to independent content-providers is Catalonia. See Article 6 of the Catalan Act 8/1996, on the regulation of audio-visual programming broadcast by cable, of 5 July 1996, as amended by the Catalan Act 2/2000, on the Catalan Audio-Visual Council, of 4 May 2000, and implemented by the Catalan Decree 265/1997, on the implementation of the Catalan Act 8/1996, of 17 October 1997.

70) See Art. 3 of Act 25/1994, on the implementation into Spanish Law of the Directive 89/552/EEC ("Television without Frontiers", 12 July 1994, (http://www.setsi.mcyt.es/legisla/radio_tv/ley25_94.htm) as amended by Act 22/1999, on the amendment of Act 25/1994, 7 June 1999, (http://www.setsi.mcyt.es/legisla/radio_tv/ley22_99.htm).

to enjoy the right of access to the digital pay-TV platforms must offer programme services of "adequate quality", a very vague concept that it is not further developed in any other legal provision.

C. Diagonal Media Concentration

There are no specific restrictions targeting diagonal media concentration in Spain.

For example, as long as an undertaking respects general competition law and the limits to horizontal concentration in the media sector, it is possible for that undertaking to simultaneously own or control an unlimited number of national and regional newspapers; several national analog and digital radio networks; cable TV operators covering all the Spanish territory; an unlimited number of satellite TV operators; a national (analog or digital) terrestrial TV operator and several regional DTTV operators.[71]

D. General Competition Law

The concentrations relating to the TV sector must comply with both general competition law and with the sector-specific limits imposed upon TV broadcasters by Spanish media law, the latter usually setting stricter limits than the former. Furthermore, media specific rules apply to all TV broadcasters, while only the media mergers that reach certain thresholds have to be notified to the competition authorities.

Even if the goals of these systems are different (competition law tries to ensure free competition in the market, while the aim of the provisions of media law concerning ownership is to safeguard media pluralism), in many cases they complement each other: if there is no free competition in the media market, it is very likely that there is no media pluralism. However, competition law on its own is not enough to ensure media pluralism, so the need for special rules concerning concentration on the media market, over and above any safeguards provided through competition law, is widely accepted.

1. 1989 Legislation

The system for controlling mergers, as regulated by the *Ley* 16/1989 *de defensa de la competencia* (Act on the Protection of Competition),[72] is clearly dominated by the Spanish Government. The *Ministerio de Economía* (Ministry for Economic Affairs) decides whether to directly approve the notified cases, or to refer them to the *Tribunal de Defensa de la Competencia* (Court for the Protection of Competition – *TDC*).[73] In the event a file is forwarded to the *TDC*, this independent body merely issues a non-binding opinion,[74] and it is the Council of Ministers that adopts the final decision, either authorising (in certain cases subject to certain conditions that counterweigh possible restrictive effects) or prohibiting the operation.[75]

2. Merger Decisions under the 1989 Legislation

From 1989 (when the Act on Protection of Competition was approved) until 1999, there was no system of compulsory notification of concentrations. During this period, no concentration was forbidden by the Government, and the Council of Ministers only adopted two decisions relating to mergers in the media sector.[76]

2.1. Unión Radio (1994)

The first of these two cases, *Unión Radio* (1994), was concerned with the acquisition of control of the main radio group in Spain, *Antena 3 Radio*, by the main Spanish media group, *PRISA*, which controlled the second national radio network, *SER*, as well as several other national radio networks. Although this case does not directly affect the TV market, it is, nevertheless, a leading case in this sector, as it sets an important precedent that affects the application of Spanish competition law to any media merger.

The new group resulting from the notified merger controlled 60% of the total audience share at the national level, and 60% of national advertising revenues. However, the Government decided that the relevant market was local radio advertising, as the FM radio concessions have local coverage. The Government announced this definition of the geographic market in spite of the fact that nearly all local radio broadcasters had reached networking agreements with the national radio groups, so most of their programming was broadcast

71) In addition, that undertaking could also simultaneously own or control magazines; film and sports TV rights; proprietary conditional access systems; telecommunications companies; internet service-providers, and/or content-providers (which can produce TV programs, films and/or theme-specific channels).

72) See Act 16/1989, on the Protection of Competition, 17 July 1989, as amended by Decree-Law 6/1999, on urgent measures of liberalization and increase of competition, 16 April 1999; the Act 52/1999, on the amendment of the Act on the Protection of Competition, 28 December 1999; and Decree-Law 6/2000, on the adoption of urgent measures for the increase of competition in the goods and services markets, 23 June 2000.

73) See Articles 14 and 15 of the Act on the Protection of Competition.

74) See Article 16 of the Act on Protection of Competition.

75) See Article 17 of the Act on Protection of Competition.

76) In both cases, the parties opted to voluntarily notify the relevant agreements as concentrative joint ventures because those agreements had been previously denounced by third parties before the *TDC* as cooperative joint ventures which had allegedly led to the co-ordination of the competitive behaviour of the undertakings involved. The Government finally decided that both operations were indeed concentrations, which implied that it retained the decision-making power in relation to these cases, which had important political implications.

nationwide, and a lot of their advertising revenues were obtained at national level. Following its definition of the relevant market, the Government approved the merger,[77] and it only imposed some conditions in relation to some local radio markets.

This decision was challenged before the *Tribunal Supremo* (Supreme Court) which, six years later, declared the Decision of the Council of Ministers approving this concentration void.[78] The *Tribunal Supremo* considered that the Government, when assessing the effects of this merger, failed to take into account the need to effectively ensure the basic constitutional principle of media pluralism.

2.2 Cablevisión (1996)

The second case was *Cablevisión* (1996). In 1995, the public telecommunications operator *Telefonica* and the only existing pay-TV broadcaster in Spain at that time, *Sogecable* (jointly controlled by the first Spanish media group, *PRISA*, and by *Canal Plus France*) formed a joint venture, *Cablevisión*, to combine their activities in the cable TV market and in the market for conditional-access services for digital TV. The case was notified by the parties to the *Servicio de Defensa de la Competencia*, and the *Ministro de Economía* decided to refer it to the *TDC*. In its non-binding opinion, the *TDC* stated that the proposed operation was not a concentration, but an anti-competitive agreement within the meaning of Article 81 of the EC Treaty. Furthermore, the *TDC* considered that if the operation were a concentration, it should be forbidden because of its negative effects on the affected relevant markets, but, as it would have a Community dimension, it should be for the European Commission to decide whether to approve it or not.[79] The Spanish Government decided not to follow the opinion of the *TDC*, and it approved the concentration subject to certain conditions.[80]

However, the European Commission decided that the merger had a Community dimension and the parties were finally obliged to notify the European authorities of the operation.[81] In July 1996, the European Commission said that there were serious doubts as to whether this operation was compatible with the common market. The Commission considered that the concentration could well have a foreclosure effect, and, in particular, it could prevent new players from entering the market for the supply of technical services (mainly conditional-access services) to cable operators.[82] As in the MSG (1994) or NSD (1995) cases,[83] the European Commission also tried to prevent the incumbent operators in the telecommunications and media sectors from extending their dominant positions into new or neighbouring markets. In November 1996, when the European Commission was just about to prohibit the operation,[84] the parties decided to withdraw it. It is necessary to bear in mind that this concentration had been approved a few months earlier by the Spanish Government.

3. 1999 Legislation

In 1999, the Government amended the Act on Protection of Competition, introducing a system of compulsory notification of concentrations in Spain.[85] The *Servicio de Defensa de la Competencia* must now be notified of the concentrations when one of the following thresholds is met.[86]

> (1) if as a result of the concentration a market share of 25% in the market or in a defined geographical area therein is acquired or increased, or
>
> (2) the combined aggregate turnover in Spain of all undertakings concerned is more than 40,000 million ESP (240 million EUR), provided that the aggregate Spain-wide turnover of each of at least two of the undertakings concerned is more than 10,000 million ESP (60 million EUR).

Since the amendment of the provisions related to merger control in 1999, the Government has been more active in the application of these rules.

4. Merger Decisions under the 1999 Legislation

One of the most important cases since 1999 was the merger of two of the main Spanish banks, *Banco Bilbao Vizcaya (BBV)* and *Argentaria*. This merger affected several relevant markets, including the audio-visual market, in which both banks participate directly or indirectly.

---

77) See the Order on the publication of the Resolution of the Council of Ministers of 20 May 1994 approving the *Antena 3 Radio/SER/Unión Radio* merger, 2 June 1994.

78) See the Judgment of the *Tribunal Supremo*, Administrative Chamber, M. Martínez Ferand and others v Council of Ministers (Resolution of 20 May 1994, approving the *Unión Radio* merger).

79) See the Opinion of the *TDC* on the *Cablevisión* case, Case C-21, 1996.

80) See the Order on the publication of the Resolution of the Council of Ministers of 1 March 1996, approving the *Sogecable/Telefonica/Cablevisión* merger, of 14 March 2000.

81) See the Resolution of the President of the Court of First Instance, T-52/96R, *Sogecable/Comission*, 12 July 1996.

82) See the press note of the European Commission IP/96/677, "Commission opens in-depth investigation into Cablevision", 22 July 1996.

83) See the Decisions of the European Commission in the cases *MSG Media Services*, of 9 November 1994, IV/M.469, OJ L 364, of 31 December 1994, and *Nordic Satellite Distribution*, of 19 July 1995, OJ L 53, of 2 March 1996.

84) See the *XXVI Report on Competition Policy - 1996*, 1997, SEC (97) 628 final, paragraphs 150-151, pp. 74-75.

85) See Decree-Law 6/1999, on urgent measures of liberalization and increase of competition, 16 April 1999.

86) See Article 14 of the Act on Protection of Competition, as amended by Decree-Law 6/1999.

The Government approved this merger, but it attached to its decision some conditions and obligations intended to minimise the anti-competitive effects of the merger in some of the markets affected by the operation.[87] The Government set restrictions to the simultaneous participation of the *BBVA* in more than one leading enterprise in certain strategic markets, including the markets for cable services, radio, free-to-air TV, pay-TV and TV rights.[88] The aim of the Government was to avoid the possibility of potential competitors in some key markets from being jointly or solely controlled by the same group, which could co-ordinate the behaviour of enterprises that should otherwise be competing with each other.

According to the limits set by the Government, the *BBVA* may have more than 3% of the share capital in only one out of the five most important enterprises in any of those markets, and it may only appoint members to the board of directors of that same and only enterprise. When applying these limits, the Government will take into account any direct or indirect participation of the *BBVA* in any leading enterprise in the above-mentioned markets.

This concentration affected the audio-visual market because:

(1) *Argentaria* is one of the main shareholders of *Telefónica* (the Spanish incumbent telecommunications operator, which is the main shareholder of the terrestrial free-to-air broadcaster *Antena 3 TV* and of the satellite digital pay-TV platform *Vía Digital*, and which also controls 40% of *Audiovisual Sport*, the company that manages the TV rights of the Spanish Football League);

(2) The *BBV* is the main shareholder of *Telefónica* and it is also one of the main shareholders of *Sogecable* (which manages *Canal Plus,* a terrestrial pay-TV service, and *Canal Satélite Digital,* a satellite digital pay-TV platform; and it also owns 40% of *Audiovisual Sport*).

According to the limits set forth by the Government in its decision, the new *BBVA* might be obliged to reduce its participation in *Sogecable* or in *Telefónica*, which compete with each other in the pay-TV market.[89]

It must be noted that several mergers which affected the Spanish TV market had a Community dimension, and therefore have been controlled by the European Commission, which until now has taken more decisions relating to mergers affecting the Spanish TV market than the Spanish competition authorities.[90]

E. Specific Ownership Restrictions

1. Non-EU Ownership

The restrictions on certain groups (foreign ownership, or political, religious or other interest groups) are in practice limited to restrictions on non-EU ownership.[91]

Several sector-specific provisions include restrictions to non-EU ownership of media:

The Private TV Act establishes, in Article 19.2, that natural or juridical persons not of EU nationality or domiciled outside the EU shall only be authorised to have holdings in the private TV concessionaires under the principle of reciprocity. In any event, they must comply with the media ownership limits established for the private TV operators in Art. 19.1 of the Private TV Act (an undertaking shall only hold, directly or indirectly, shares in one license-holder, and this holding shall not exceed 49% of the share capital).

The restrictions on non-EU ownership of Art. 19.2 of the Private TV Act were originally meant to apply only to national private analog terrestrial broadcasters, but now they also apply to national and regional private DTTV broadcasters.

---

87) See the Resolution of the Council of Ministers approving the *Argentaria/BBV* merger, of 3 March 2000.

88) The Government distinguished a market for "cable services", as being different from the markets of pay-TV, free-to-air TV, fixed telephony, broadband access or internet services. The TDC, in its Opinion on the case C-51, *Caja de Ahorros de Pamplona/CajaNavarra*, of 2000, also mentioned a "cable services market". It is not very clear to which product or service this market refers.
In the *BBVA* case, the Government also distinguished a market for "TV rights". This definition of the market seems to be too broad, as usually it is possible to distinguish between different categories of TV rights (football, cinema, independent productions, etc.).

89) This merger shall not only comply with the limits imposed by the Government applying general competition law: the merging companies must also respect the specific limits to media ownership set forth by the 1988 Private TV Act. According to these limits, a media undertaking shall only hold, directly or indirectly, shares in one license-holder, and this holding shall not exceed 49% of the share capital. The authority that had the responsibility of applying these limits, the *Ministerio de Fomento* declared that the *BBVA* could be holding shares directly in one license-holder (*Sogecable*) and indirectly in a second one (*Antena Tres*, whose main shareholder is *Telefonica*, in which the *BBVA* has a controlling stake). This would mean that the *BBVA* would be breaching the limit that forbids an enterprise to hold shares in more than one license-holder. In order to comply with this limit, the BBVA would have to sell its shares in *Sogecable* or in *Telefonica*. In May 2000, the *BBVA* decided to sell part of its shares in *Sogecable*, reducing its stake to less than 5%, although it is not clear if this will be enough to solve the legal problems related to the compliance with these limits.

90) See the press note of the EC Commission on the *Cablevisión* case IP/96/677, "Commission opens in-depth investigation into Cablevision", 22 July 1996; and the EC Commission Decisions *Bankamerica / General Electric / Cableuropa* of 19 June 97, IV/M.939; *Cable i Televisió de Catalunya (CTC)* of 28 January 1998, IV/M 1.022; *Cableuropa/Spainco/CTC* of 28 January 1998, IV/M.1091; *STET/GET/Madrid Cable* of 2 June 1998, IV/M.1148; *Particitel/Cableuropa* of 31 July 1998, IV/M.1251; *Canal Plus/CDPQ/Bank of America/Numéricâble*, IV/M.1327; *Kirch/Mediaset*, of 2 August 1999, IV/M.1574; *Bertelsmann/GBL/Pearson TV*, M.1958, of 29 June 2000; *Telefonica/Endemol,* M.1943, of 11 July 2000; *Telecom Italia/Endesa/Fenosa,* M.1973, of 12 September 2000, and *Vivendi/Canal +/Seagram,* M.2050, of 13 October 2000.

91) In some countries, such as the UK, there are some restrictions on municipal authorities and religious groups. In Spain, one of the two concessions available in each locality for the provision of local terrestrial TV services is reserved by the 1995 Local Terrestrial TV Act to the municipal authorities; and the Spanish Church controls *COPE*, the national radio group with the second highest audience share, which is also one of the bidders in the call for tenders for the granting of two new national free-to-air DTTV concessions, which is due to come to an end by December 2000.

The Local Terrestrial TV Act 41/1995 states, in Art. 13, that only EU nationals may obtain a concession for the provision of local terrestrial TV. If the license-holder is a legal person, the shareholding of non-EU nationals shall not exceed, directly or indirectly, 25% of the share capital.

The Cable Telecommunications Act 42/1995 states, in Art. 4.2, that the participation of foreign natural or juridical persons in the cable TV concessionaires shall comply with the rules established in this matter by:

(1) the Spanish regulation in foreign investments (which sets an authorisation procedure which applies, amongst others, to the radio and TV sectors in general); and

(2) the 1987 Telecommunications Act, which has been repealed and replaced by the 1998 General Telecommunications Act. Art. 17.2 of the 1998 General Telecommunications Act states that individual licenses may be held by natural or juridical persons having the nationality of an EU Member State or having another nationality where there is such provision in international agreements of which Spain is a signatory. Where the license-holder is a company or other juridical person, holdings in its capital belonging to natural persons not of EU nationality or to legal persons domiciled outside the EU may not exceed 25% unless such holdings are permitted under international agreements binding on Spain or are authorised under the principle of reciprocity.

2. Ownership by Political Bodies

Although there are no specific limits on political bodies owning or participating in TV broadcasting companies, the elected representatives (as well as their relatives) are ineligible, according to Spanish public procurement law, to make contracts with the State.[92] This provision therefore prevents elected representatives and their relatives from obtaining TV broadcasting concessions (needed for the provision of cable TV and terrestrial TV services), as a concessionaire has to make a contract with the State. However, this limit does not expressly forbid elected representatives or their relatives from holding shares in companies holding TV broadcasting concessions.

ANNEX

1. Legislation

1.1. Spanish Constitution

Constitución española of 27 December 1978 (Spanish Constitution), BOE of 29 December 1978 (N.B.: Art. 13 of the Spanish Constitution amended on 27 August 1992). Available in Spanish at: http://vlex.com/es/legislacion/Derecho_Constitucional/Derechos_y_Deberes_Fundamentales/1
Available in English at: http://www.uni-wuerzburg.de/law/sp00000_.html

1.2. Terrestrial TV

1.2.1. National Analog Terrestrial TV

Ley 10/1998, *de Televisión Privada* of 3 May 1988 (Private TV Act – LTVPr), BOE of 5 May 1988. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/ley10_88.htm

LTVPr modificada por el art. 96 de la Ley 50/1998, *de Medidas Fiscales, Administrativas y del Orden Social* of 30 December 1998 (LTVPr amended by art. 96 of the Act on taxation, administrative provisions and social affairs), BOE of 31 December 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/ley50_98.htm

LTVPr modificada por el art. 67 de la Ley 55/1999, *de Medidas Fiscales, Administrativas y del Orden Social* of 29 December 1999 (LTVPr amended by art. 67 of the Act on taxation, administrative provisions and social affairs), BOE of 30 December 1999. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/ley55_99.htm#a67

Real Decreto 951/1989, *por el que se regula el Registro Especial de Sociedades Concesionarias para la gestión indirecta del servicio público esencial de televisión* of 28 July 1989 (Decree on the creation of the Special Registry for Private Televisions), BOE of 29 July 1989

1.2.2. Local Analog Terrestrial TV

Ley 41/1995, de televisión local por ondas of 22 December 1995 (Local Private TV Act – LTVLo), BOE of 27 December 1995. Available in Spanish at: http://www.setsi.mcyt.es/legisla/radio_tv/ley41_95/ley41_95.htm

Decreto Foral de Navarra 313/1996, *por el que se regula el régimen jurídico de la gestión, mediante concesión administrativa, del servicio de televisión local por ondas terrestres en la Comunidad Foral de Navarra*, 9 September 1996 (Decree of Navarre on Local Terrestrial TV), *BO Navarra* of 23 September 1996

Decreto de Cataluña 320/1996, *de regulación del régimen jurídico de las televisiones locales por ondas terrestres* of 1 October 1996 (Catalan Decree on Local Terrestrial TV), *DO Cataluña* of 14 October 1996

Decreto de Cataluña 111/1998, *por el que se modifica el Decreto* 320/1996, de *regulación del régimen jurídico de las televisiones locales por ondas terrestres* of 12 May 1998 (Catalan Decree on the amendment of Decree 320/1996, on Local Terrestrial TV), *DO Cataluña* of 19 May 1998

Decreto de Castilla-La Mancha 54/2000, *sobre el régimen jurídico de las televisiones locales por ondas* of 21 March 2000 (Decree of Castilla-La Mancha on Local Terrestrial TV), *DO Castilla La Mancha* of 25 March 2000*Ley* 11/1998,

92) See Art. 20.e) of the Legislative Decree 2/2000 on public procurement, 16 June 2000, (http://es.derecho.org/boe//Junio_de_2000/21_de_Junio_de_2000/1).

General de Telecomunicaciones of 24 April 1998 (General Telecommunications Act – LGT), BOE of 25 April 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/lgt/indice.htm

LGT modificada por el los arts. 9 y 94 de la Ley 50/1998, *de Medidas Fiscales, Administrativas y del Orden Social* of 30 December 1998 (LGT amended by arts. 9 and 94 of the Act on taxation, administrative provisions and social affairs), BOE of 31 December 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/ley50_98.htm

LGT modificada por el art. 66 de la Ley 55/1999, *de Medidas Fiscales, Administrativas y del Orden Social* of 29 December 1999 (LGT amended by art. 66 of the Act on taxation, administrative provisions and social affairs), BOE of 30 December 1999. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/ley55_99.htm#a66

1.2.3. Digital Terrestrial TV

Disposición Adicional Cuadragésimo Cuarta – Régimen jurídico de la radiodifusión sonora digital terrenal y de la televisión digital terrenal – de la Ley 66/1997, *de Medidas Fiscales, Administrativas y del Orden Social* of 30 December 1997 (Forty-Fourth Additional Provision – Regulation of Digital Audio Broadcasting and Digital Terrestrial Television – of Act 66/1997, on taxation, administrative provisions and social affairs), BOE of 31 December 1997. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/da44.htm

D.A. 44ª de la Ley 66/*1997 modificada por la Disposición Adicional Trigésima de la Ley* 55/1999, *de Medidas Fiscales, Administrativas y del Orden Social* of 30 December 1999 (44th Additional Provision of Act 66/1997 amended by the Thirtieth Additional Provision of Act 55/1999 on certain taxation and administrative provisions and social affairs), BOE of 30 December 1999. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/ley55_99.htm#da30

Real Decreto 2169/1998, *por el que se aprueba el Plan Técnico Nacional de la televisión digital terrenal* of 9 October 1998 (Decree on the approval of the National Technical Plan on Digital Terrestrial TV), BOE of 16 October 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/rd216998.htm

Orden de 9 de octubre de 1998, por la que se aprueba el Reglamento Técnico y de Prestación del servicio de televisión digital terrenal, of 9 October 1998 (Ministerial Order on the approval of the Regulation on some technical aspects and on the provision of Digital Terrestrial TV services), BOE of 16 October 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/radio_tv/o91098.htm

Orden de 30 de diciembre de 1999, por la que se introduce una disposición adicional única en el Reglamento Técnico y de Prestación del Servicio de Televisión Digital Terrenal, aprobado por Orden del Ministerio de Fomento, de 9 de octubre de 1998, autorizando la emisión a las entidades adjudicatarias de las nuevas concesiones otorgadas para la prestación del servicio de televisión con tecnología digital terrenal, en régimen abierto y con carácter promocional, de uno de los programas cuya explotación se les permita, of 30 December 1999 (Ministerial Order of 30 December 1999, on the introduction of an Additional Provision to the Ministerial Order of 9 October 1998), BOE of 8 January 2000. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/o301299.htm

Disposición Adicional Tercera (coordinación de programas de televisión digital terrenal) del Real Decreto 1206/1999, *por el que se modifica parcialmente el Real Decreto* 1886/1996, *de 2 de agosto, de estructura básica del Ministerio de Fomento*, of 9 July 1999 (Third Additional Provision (co-ordination of digital terrestrial TV programmes) of Decree 1206/99, which partially amends Decree 1886/1996, on the structure of the Ministry of Development (Ministerio de Fomento)), BOE of 10 July 1999. Available in Spanish at: http://www.setsi.mcyt.es/legisla/radio_tv/rd1206_99_da3.htm

1.3. Cable TV

Ley 42/1995, *de telecomunicaciones por cable*, of 22 December 1995 (Cable Telecommunications Act – LTCable), BOE of 23 December 1995. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ cable/ley42_95.htm

LTCable modificada por la Ley 12/1997, *de liberalización de las telecomunicaciones*, of 24 April 1997 (LTCable amended by the Act on Liberalization of Telecommunications), BOE of 25 April 1997. Available in Spanish at: http://www.setsi. mcyt.es/legisla/teleco/ley12_97.htm

LTCable derogada, "a excepción de lo dispuesto para el régimen del servicio de difusión de televisión", por la Disposición Derogatoria de la Ley 11/1998, General de Telecomunicaciones, of 24 April 1998 (LTCable abrogated, "except as it provides for the television broadcasting service regime", by the Abrogating Provision of the General Telecommunications Act), BOE of 25 April 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/lgt/indice.htm

Real Decreto 2066/1996, *por el que se aprueba el Reglamento Técnico y de Prestación del servicio de telecomunicaciones por cable*, of 13 September 1996 (Decree approving the regulation of technical aspects and on the provision of cable telecommunications services), BOE of 26 September 1996. Available in Spanish at: http://www.setsi.mcyt.es/legisla/cable/rd206696/rd206696.htm

Real Decreto 1652/1998, *por el que se aprueba el Reglamento de los Registros Especiales de Titulares de Licencias Individuales y de Titulares de Autorizaciones Generales para la prestación de servicios y para el establecimiento y explotación de redes de telecomunicaciones (incluye Registro de Operadores de Cable)*, of 24 July 1998 (Decree on the creation of some public Registries of holders of individual licenses and holders of general authorisations for the provision of telecommunication services and the establishment or operation of telecommunications networks – this includes the Registry of Cable Operators), BOE of 5 September 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/rd165298/rd1652.htm

Ley de Cataluña 8/1996, *de regulación de la programación audiovisual distribuida por cable*, of 5 July 1996 (Catalan Act on the regulation of audio-visual programming broadcast by cable), *DO Cataluña* of 19 July 1996)

Ley de Cataluña 8/*1996 modificada por la Ley de Cataluña* 2/2000, *del Consejo Audiovisual de Cataluña*, of 4 May 2000 (Catalan Act 8/1996 amended by the Catalan Act on the Catalan Audio-visual Council), *DO Cataluña* of 8 June 2000

Decreto de Cataluña 265/1997, *que desarrolla aspectos de la Ley de Cataluña 8/1996 de regulación de la programación audiovisual distribuida por cable*, of 17 October 1997 (Catalan Decree on the implementation of the Catalan Act 8/1996 on the regulation of audio-visual programming broadcast by cable), *DO Cataluña* of 24 October 1997

1.4. Digital Satellite TV & Provision of Conditional Access Services for Digital TV

Ley 17/1997, *por la que se incorpora al Derecho español la Directiva 95/47/CE, de 24 de octubre de 1995, del Parlamento Europeo y del Consejo, sobre el uso de normas para la transmisión de señales de televisión y se aprueban medidas adicionales para la liberalización del sector*, of 3 May 1997 (Act 17/1997, on the implementation of EC Directive 95/ 45/EC, on TV signals), BOE of 6 May 1997. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/ley17_97.htm

Real Decreto-Ley 16/1997, *de modificación parcial de la Ley* 17/1997, *por la que se incorpora al Derecho español la Directiva 95/47/CE, de 24 de octubre de 1995, del Parlamento Europeo y del Consejo, sobre el uso de normas para la transmisión de señales de televisión y se aprueban medidas adicionales para la liberalización del sector*, of 13 September 1997 (Decree-Law 16/1997, on the amendment of Act 17 / 1997, on the implementation of the EC Directive 95/47/EC), BOE of 15 September 1997. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ radio_tv/rdl16_97.htm

1.5. Competition Law

1.5.1. General Competition Law

Ley 16/1989, *de defensa de la competencia*, of 17 July 1989 (Act on the Protection of Competition – LDC), BOE of 18 July 1989. Available in Spanish at: http://vlex.com/es/legislacion/Derecho_Mercantil/Derecho_de_la_Competencia/2
Unofficial consolidated version (June 2000) available in Spanish at: http://www.mineco.es/dgpedc/dc/ley.htm

LDC modificada por el Real Decreto-Ley 6/1999, de Medidas Urgentes de Liberalización e Incremento de la Competencia, of 16 April 1999 (LDC amended by Decree-Law 6/1999, on urgent measures of liberalization and increase of competition), BOE of 17 April 1999

LDC modificada por la Ley 52/1999, *de reforma de la Ley* 16/1989, *de 17 de julio, de Defensa de la Competencia*, of 28 December 1999 (Amended by Act 52/1999, on the amendment of Act 16/1989, on the Protection of Competition), BOE of 29 December 1999. Available in Spanish at: http://es.derecho.org/boe//Diciembre_de_1999/29_de_diciembre_de_1999/1

LDC modificada por el Real Decreto-Ley 6/2000, *de Medidas Urgentes de Intensificación de la Competencia en Mercados de Bienes y Servicios*, of 23 June 2000 (Decree-Law on the adoption of urgent measures for the increase of competition in the markets for goods and services), BOE of 24 June 2000. Available in Spanish at: http://es.derecho.org/boe//Junio_de_2000/24_de_Junio_de_2000/5

1.5.2. Sector-Specific Competition Law (telecommunications, audio-visual and interactive services)

Ley 12/1997, *de liberalización de las telecomunicaciones*, of 24 April 1997 (Act on Liberalization of Telecommunications), BOE of 25 April 1997. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/ley12_97.htm

Ley 12/1997 *modificada por la Ley* 11/1998, *General de Telecomunicaciones*, of 24 April 1998 (Act 12/1997 amended by the General Telecommunications Act), BOE of 25 April 1998. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/lgt/indice.htm

Ley 12/1997 *modificada por la Ley* 52/1999, *de reforma de la Ley* 16/1989, *de 17 de julio, de Defensa de la Competencia*, of 28 December 1999 (Act 12/1997 amended by Act 52/ 1999, on the amendment of Act 16/1989, on protection of competition), BOE of 29 December 1999. Available in Spanish at: http://es.derecho.org/boe//Diciembre_de_1999/29_de_diciembre_de_1999/1

Real Decreto 1994/1996, *por el que se aprueba el Reglamento de la Comisión del Mercado de las Telecomunicaciones*, of 6 September 1996, (Decree 1994/1996, approving the Regulation of the Telecommunications Market Commission), BOE of 25 September 1996. Available in Spanish at: http://www.setsi.mcyt.es/legisla/ teleco/rd1994_96.htm

Orden de 9 de abril de 1997 por la que se aprueba el Reglamento de Régimen Interior de la Comisión del Mercado de las Telecomunicaciones, of 9 April 1997 (Order on the Internal Regulation of the Telecommunications Market Commission), BOE of 11 April 1997. Available in Spanish at: http://www.setsi.mcyt.es/legisla/teleco/o090497/orden.htm

Resolución de 31 de julio de 1998, de la Comisión del Mercado de las Telecomunicaciones, por la que se hace pública la Circular 1/1998 sobre campañas publicitarias efectuadas en el mercado de las telecomunicaciones y de los servicios audiovisuales, telemáticos e interactivos, por los operadores que disfruten de una posición de dominio, of 31 July 1998 (Resolution of the Telecommunications Market Commission setting limits to advertising campaigns by operators with a dominant position on the telecommunications, audio-visual and interactive services markets), BOE of 31 August 1998). Available in Spanish at: http://www.cmt.es/cmt/circulares/index.htm

2. Case Law/Administrative Decisions

2.1. Media Law

2.1.1. Case Law

Sentencia de la Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección Octava, PRISA/Ministerio de Fomento, Telefónica de España, S.A., Telefónica Multimedia, S.A., Antena 3 TV, S.A y Corporación Financiera Cajamadrid, of 29 June 1999 (Judgment of the Audiencia Nacional, Administrative Chamber, PRISA v Ministerio de Fomento, Telefónica, Antena 3 TV and others)

2.1.2. Relevant Administrative Decisions

Acuerdo del Consejo de la Comisión del Mercado de las Telecomunicaciones de 28.09.2000, por el que se aprueba la resolución sobre la solicitud de intervención presentada por Sogecable, S.A. relativa a la adopción de determinadas medidas para garantizar la libre competencia en la prestación de servicios de la sociedad de la información en el sector de la televisión digital de ámbito estatal y el derecho de los usuarios de acceder a la pluralidad de ofertas existentes en el mercado, of 28 September 2000 (Resolution of the CMT on the intervention of the CMT requested by Sogecable in relation to the adoption of certain measures for the safeguarding of free competition in the DTTV market). Available in Spanish at: http://www.cmt.es/cmt/document/ decisiones/RE-00-09-28-06.html

2.2. General Competition Law

2.2.1. Case Law

Sentencia del Tribunal Supremo, Sala Tercera (Contencioso-Administrativo), recurso 533/94, M. Martín Ferrand, M. Miralles, L.A. De la Viuda, F. Jiménez Losantos, J.M. García, L. Herrero-Tejedor y P.J. Ramírez/Consejo de Ministros (Acuerdo de 20.05.1994, aprobación de concentración Unión Radio), of 9 June 2000 (Judgment of the Tribunal Supremo, Administrative Chamber, M. Martínez Ferand and others v Council of Ministers (Resolution of 20.05.1994, approving the Unión Radio merger))

2.2.2. Administrative Decisions

Orden de 2 de junio de 1994 por la que se hace público el Acuerdo del Consejo de Ministros de 20 de mayo de 1994 por el que conforme a lo dispuesto en el artículo 17 de la Ley 16/1989, de Defensa de la Competencia, no procede oposición a la operación de concentración consistente en la cesión de la gestión por parte de "Antena 3 Radio, S.A." y de la "Sociedad Española de Radiodifusión, S.A." a favor de la "Sociedad de Servicios Radiofónicos Unión Radio, S.A.", of 2 June 1994 (Order on the publication of the Resolution of the Council of Ministers approving the Antena 3 Radio/SER/ Unión Radio merger), BOE of 21 June 1994. Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/tdccoec13.htm

Informe del Tribunal de Defensa de la Competencia (TDC), Expdte. C 13, Unión Radio, 1994 (Opinion of the TDC on the Unión Radio case). Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/tdccoec13.htm

Orden de 14 de marzo de 1996 por la que se hace público el Acuerdo del Consejo de Ministros de 1 de marzo de 1996,

por el que conforme a lo dispuesto en el artículo 17 de la Ley 16/1989, de Defensa de la Competencia, se aprueba la operación de concentración de Cablevisión, subordinando su aprobación a la observancia de determinadas condiciones, of 14 March 1996 (Order on the publication of the Resolution of the Council of Ministers approving the Sogecable/Telefonica/Cablevisión merger), BOE of 29 March1996. Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/tdccoec21.htm

Informe del Tribunal de Defensa de la Competencia (TDC), Expdte. C 21, Cablevisión, 1996 (Opinion of the TDC on the Cablevisión case). Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/tdccoec21.htm

Acuerdo del Consejo de Ministros de 4 de marzo de 2000, por el que, conforme a lo dispuesto en el artículo 17 de la Ley 16/1989, de 17 de julio, de Defensa de la Competencia, se decide subordinar a la observancia de determinadas condiciones la aprobación de la operación de concentración económica consistente en la fusión por absorción de Argentaria Caja Postal y Banco Hipotecario, S.A., por el Banco Bilbao Vizcaya, S.A., of 3 March 2000 (Resolution of the Council of Ministers approving the Argentaria/ BBV merger). Available in Spanish at: http://www.mineco.es/dgpedc/ dc/n033.htm

Informe del Tribunal de Defensa de la Competencia (TDC), Expdte. C 47, BBVA, 1999 (Opinion of the TDC on the BBVA case). Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/ tdccoec47.htm

Acuerdo del Consejo de Ministros, de 25 de mayo de 2000, por el que, conforme a lo dispuesto en el artículo 17 b) de la Ley 16/1989, de 17 de julio de 1989, de Defensa de la Competencia, se decide subordinar a la observancia de determinadas condiciones la aprobación de la operación de concentración económica consistente en la toma de control por parte de Antena 3 Televisión, S.A. de la sociedad Movierecord Cine, S.A., of 26 May 2000 (Resolution of the Council of Ministers approving the Antena 3 TV/Movierecord merger). Available in Spanish at: http://www.mineco.es/dgpedc/ dc/n027.htm

Informe del Tribunal de Defensa de la Competencia (TDC), Expdte. C 46, Antena 3 TV/Movierecord, 2000 (Opinion of the TDC on the Antena 3 TV/Movierecord case). Available in Spanish at: http://www.mineco.es/tdc/ Concen. Economicas/tdccoec46.htm

Acuerdo del Consejo de Ministros de 26 de mayo de 2000 por el que, conforme a lo dispuesto en la letra a) del artículo 17 de la Ley 16/1989, de 17 de julio de 1989, de Defensa de la Competencia, se decide no oponerse a la operación de concentración económica consistente en la fusión por absorción de la Caja de Ahorros y Monte de Piedad Municipal de Pamplona por la Caja de Ahorros de Navarra, of 26 May 2000 (Resolution of the Council of Ministers approving the Caja de Ahorros de Pamplona/ CajaNavarra merger). Available in Spanish at: http://www.mineco.es/dgpedc/ dc/n039.htm

Informe del Tribunal de Defensa de la Competencia (TDC), Expdte. C 51, Caja de Ahorros de Pamplona/CajaNavarra, 2000 (Opinion of the TDC on the Caja de Ahorros de Pamplona/CajaNavarra case). Available in Spanish at: http://www.mineco.es/tdc/Concen.Economicas/ tdccoec51.htm

Concentración Telefonica Media/Uniprex, Expdte. N-025, notificada 21.10.1999; aprobación tácita 22.11.1999 (Merger Telefonica Media/Uniprex – Onda Cero; notified on 21 October 1999; deemed to have been approved on 22 November 1999). Available in Spanish at: http://www.mineco.es/dgpedc/ dc/notifica.htm

Concentración Telefonica Media/Cadena Voz, Expdte. N-042, notificada 22.12.1999; aprobación tácita 23.01.2000 (Merger Telefonica Media/Cadena Voz Radio; notified on 22 December 1999 – deemed to have been approved on 23 January 2000). Available in Spanish at: http://www.mineco.es/dgpedc/ dc/notifica.htm

3. Regulatory Authorities

Ministerio de Ciencia y Tecnología -
Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información (SETSI)
(Ministry for Science and Technology – State Department for Telecommunications and for the Information Society)
Palacio de Comunicaciones - Calle Alcalá, 50 –
28071 MADRID
Tel.: +34 91 346 15 00
http://www.setsi.mcyt.es/

Comisión del Mercado de las Telecomunicaciones (CMT)
(Telecommunications Market Commission)
Calle Alcalá, 37 – 28014 MADRID
Tel.: +34 91 372 43 00
E-mail: cmt@cmt.es /audiovisual@cmt.es
http://www.cmt.es

Consejo Audiovisual de Cataluña (CAC)
(Catalan Audio-visual Council)
C/ Gravina 1, 1er – 08001 BARCELONA
Tel.: +34 93 270 12 30
E-mail: audiovisual@correu.gencat.es
http://www.gencat.es/cac/

The relevant Departments of the Governments of the 17 Autonomous Communities: Andalusia, Aragón, Asturias, Baleares, Basque Country, Canarias, Cantabria, Catalonia (except for responsibilities assumed by the CAC), Castilla-La Mancha, Castilla-León, Comunidad Valenciana, Extremadura, Galicia, Madrid, Murcia, Navarra, La Rioja; plus the two Autonomous Cities of Ceuta and Melilla:

– *Andalucía:*
Consejería de Presidencia –
Dirección General de Comunicación Social
Calle Alfonso XII, 17-19 - 41001 SEVILLA
Tel.: +34 955 035 201

– *Aragón:*
Consejería de Obras Públicas, Urbanismo y Transportes –
Dirección General de Transportes y Comunicación
Paseo María Agustín, 36 - 50071 ZARAGOZA
Tel.: +34 976 715 438

– *Asturias:*
Consejería de Infraestructuras y Política Territorial –
Dirección General de Transportes y Telecomunicaciones
Calle Coronel Aranda, 2, 4º - 33005 OVIEDO
Tel.: +34 985 105 524

– *Cantabria:*
Consejería de Industria, Turismo, Trabajo y Comunicaciones
– Dirección General de Transportes y Comunicaciones
Calle Burgos, 11, 3ª planta – 39008 SANTANDER
Tel.: +34 942 236 303

– *Castilla La Mancha:*
Consejería de Obras Públicas –
Dirección General de Telecomunicaciones
Calle Cristo de la Vega, s/n – 45071 TOLEDO
Tel.: +34 925 266 118

– *Castilla León:*
Consejería de Fomento –
Dirección General de Telecomunicaciones
C/ Rigoberto Cortejoso, 14 – 47014 VALLADOLID
Tel.: +34 983 419 418

– *Extremadura:*
Consejería de Educación, Ciencia y Tecnología –
Dirección General de Telecomunicaciones
Calle Vespasiano, 8 – 06800 MERIDA (BADAJOZ)
Tel.: (924) 381 497

– *Galicia:*
Consejería de Educación, Comunicación Social y Turismo –
Dirección General de Comunicación Social y Audiovisual
Ed. San Caetano,s/–15704 SANTIAGO (A CORUÑA)
Tel.: +34 981 541 246 / 981 544 381

– *Canarias:*
Consejería de Presidencia –
Dirección General de Comunicaciones e Informática
Avd. José Manuel Guimerón, 8 –
38071 SANTA CRUZ DE TENERIFE
Tel.: +34 922 476 549

– *Baleares:*
Consejería de Innovación y Energía –
Dirección General de Tecnología y Comunicaciones
Calle San Pedro, 7 –
07012 PALMA DE MALLORCA (BALEARES)
Tel.: +34 971 176 490

– *Madrid:*
Consejería de Presidencia –
Servicio de Radiodifusión y Televisión
Puerta del Sol, 7, 1ª planta – 28013 MADRID
Tel.: +34 91 580 28 14

– *Murcia:*
Consejería de Tecnología, Industria y Comercio –
Dirección General de Tecnologías y Telecomunicaciones
Calle Isidoro de la Cierva, 10 – 30001 MURCIA
Tel.: +34 968 225 290

– *Navarra:*
Consejería de Obras Públicas,
Transporte y Telecomunicaciones –
Dirección General de Transportes y Telecomunicaciones
Avda. San Ignacio, 3, 6º – 31002 PAMPLONA (NAVARRA)
Tel.: +34 948 427 404

– *País Vasco:*
Consejería de Hacienda y Administración Pública –
Dirección General de Informática y Telecomunicaciones
Calle Donosti-San Sebastián, 1 –
01010 VITORIA-GASTEIZ (ALAVA)
Tel.: +34 945 018 522

– *La Rioja:*
Consejería de Desarrollo Autonómico y Administraciones Públicas – Secretaría General Técnica –
Sección de Ordenación de las Telecomunicaciones
Calle Vara del Rey, 3 – 26071 LOGRONO (LA RIOJA)
Tel.: +34 941 291 130

– *Valencia:*
Consellería de Presidencia–
Dirección General de Telecomunicaciones y Modernización
Calle Miguelete, 5, 3ª planta – 46001 VALENCIA
Tel.: +34 963 866 319

– *Ceuta:*
Presidencia –
Viceconsejería de Presidencia y Telecomunicaciones
Plaza de Africa, s/n – Palacio de la Asamblea – 51001 CEUTA
Tel.: +34 956 528 225

– *Melilla:*
Jefatura Provincial de Inspección de las Telecomunicaciones – Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información – Ministerio de Ciencia y Tecnología
Calle Pablo Vallescas, 20, 1º - 52001 MELILLA
Tel.: +34 952 678 494

Ministerio de Economía –
Secretaría General de Política Económica y Defensa de la Competencia –
Servicio de Defensa de la Competencia (SDC)
(General Secretariat for Economic Policy and Defense of Competition – Defense of Competition Unit)
http://www.mineco.es/dgpedc/dc/index.htm

+ Subdirección General de Concentraciones –
(Merger Task Force)
Paseo de la Castellana 162, 28046 MADRID
Tel.: +34 91 583 51 67

Tribunal de Defensa de la Competencia
(Defense of Competition Court - TDC)
Avenida Pío XII, 17 – 28016 MADRID
Tel.: +34 91 353 05 10
http://www.mineco.es/tdc/tdc.htm

4. Bibliography

Ariño, G., De La Cuétara, J. M., Y Aguilera, L.*: Las telecomunicaciones por cable. Su regulación presente y futura*, 1996.

Arnaldo Alcubilla, E y Montejo Velilla, S. (Coords.), *Telecomunicaciones por cable*, 2000.

Baño León, J. M.: "La ordenación del mercado de la televisión y el papel de las autoridades españoles de la competencia", en S. Muñoz Machado (Dir.), *Derecho europeo del audiovisual*, 1997.

Calvo Díaz, G. (Dir.): *El nuevo marco jurídico de las telecomunicaciones y de los servicios audiovisuales*, 1999.

Conde, J.: "El Reglamento de las Telecomunicaciones por Cable", en J. Cremades, *Derecho de las telecomunicaciones*, 1997.

De La Quadra Salcedo, T.: "Informe preliminar sobre el régimen jurídico del audiovisual", en VVAA, *El régimen jurídico del audiovisual*, 2000.

De La Quadra Salcedo, T.: "Los programadores independientes y el Estatuto de la empresa audiovisual", en S. Muñoz Machado (Dir.), *Derecho europeo del audiovisual*, 1997.

Escobar De La Serna, L.: *Derecho de la información*, 1998.

Escobar Roca, G.: "La difícil consecución del pluralismo informativo", *La Ley, Año XXI*, nº 5181, 10 November 2000.

Escobar Roca, G.: "Libertad de expresión, pluralismo y derecho a la competencia en España", *Cuadernos Iberoamericanos de Derecho de la Información y de la Comunicación*, nº 1, 2000.

Escobar Roca, G.: "¿Quién debe controlar la televisión", en J.F. Merino y M. Pérez-Ugena (Coord.), *Régimen de las telecomunicaciones*, 1997.

Fernández Farreres, G.: *El paisaje televisivo en España*, 1997.

García Casillejo, A.: "La CMT como regulador del mercado de los servicios audiovisuales", *Asociación de Autocontrol de la Publicidad*, September 1998.

Grupo De Regulación De Las Telecomunicaciones (GRETEL): *Convergencia, competencia y Regulación en los Mercados de las Telecomunicaciones, el Audiovisual e Internet*, 2000.

Laguna De Paz, J.C.: *Televisión y competencia*, 2000.

Laguna De Paz, J. C.: *Régimen jurídico de la televisión privada*, 1994.

Martín, Y Pérez De Nanclares, J.:
La Directiva de Televisión,1995.

Montero, J.J. Y Brokelmann, H.: *Telecomunicaciones y televisión - La nueva regulación en España*, 1999.

Muñoz Machado, S., *Servicio público y mercado* – Tomo III*: La Televisión*,1998.

Pérez Gómez, A.: "Las concentraciones de medios de comunicación", *Quadern del Consell de l'Audiovisual de Catalunya*, nº 7, March 2000.

Pérez Gómez, A.*: El régimen jurídico de la concentración de medios de comunicación en la Unión Europea*, 1999, 346 pp.

Pérez Gómez, A.: *Estudio comparado sobre las normas aplicables a las concentraciones de medios de comunicación – Alemania, Francia, Italia, Reino Unido y España,* 2000, 695 pp. (Tesis doctoral – finalizada, pero aún no publicada).

Rallo Lombarte, A.: *Pluralismo informativo y Constitución*, 2000.

Sánchez De Diego Fernández De La Riva, M.:
"Concentración informativa y libertad de información", en P. Farias y M. Sánchez de Diego (Coords.), *Las libertades informativas en el mundo actual*, 1999.

Sanabria Martín, F.: "Concentración empresarial, libertad informativa y diversidad de contenidos en los medios de comunicación", en VVAA, Manuel Fraga. *Homenaje académico*, Vol. II,1997.

Sánchez Tabernero, A. y Corredoira, L.: *Transparencia y control de los medios informativos - Informe sobre la situación española y perspectiva europea*, 1994.

Solozábal Echevarría, J.J.: "La ordenación jurídica de la televisión en España", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 1993, nº 5.

Souviron Morenilla, J.M.*: Derecho público de los medios audiovisuales: radiodifusión y televisión*, 1998.

Vallés Copeiro Del Villar, A.: "Legislación española sobre concentración de los medios de comunicación social", *Cuadernos de la Cátedra Fadrique Furió Ceriol*, nº 6, 1994.

ITALY

Prof. Roberto Mastroianni,
Università degli studi di Firenze

Dr. Maja Cappello,
Autorità per le garanzie nelle comunicazioni

A. Horizontal Media Concentration

1. Definition of the Broadcasting Market

The *Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunciazioni e radiotelevisivo*[1] (Communications Act of 31 July 1997, no. 249) deals with the issue of media concentration by introducing a wide definition of the relevant market. Article 2, para. 1 provides as follows:

> "In the sectors of radio and television broadcasting, also in the most developed forms, realised with any technical multimedia publishing means whatsoever, including electronic means and related sources of financing, any act or behaviour having as its aim or effect the creation or the maintenance of a dominant position by a single subject, including controlled or affiliated subjects, is prohibited."

The broadcasting market is thus defined in very broad terms, so as to include any means of transmission of broadcasting signals and without distinguishing between public and private broadcasting or between free to air and pay television. The main aim of the wide definition has been to avoid the situation whereby the constant evolution of new technologies would necessitate continual updates of provisions concerning media concentration.

More generally, mergers and acquisitions that lead to concentrations in violation of Article 2 para. 1 cannot be permitted and all subjects operating in the communications sector as defined above are obliged to communicate to the *Autorità per le garanzie nelle comunicazioni* (Communications Authority) and to the *Autorità garante della concorrenza e del mercato* (Competition Authority) the agreements and concentrations to which they are party.

2. Content of Applicable Regulation

With particular reference to the broadcasting market in a narrower perspective, the Communications Act combines two thresholds relating to the number of concessions and to revenue shares.

Article 2, para. 6 of the Communications Act provides that a single subject, or subjects controlled by or affiliated to subjects, which in their turn control other holders of concessions, can not hold concessions or authorisations that allow them to cover more than 20 per cent of respectively analog television or radio networks and digital television or radio programmes transmitted over terrestrial broadcasting frequencies according to the national frequency plan. Considering that the available frequency channels are 11 in total, and that three of them are allotted to the public concessionaire, no subject may therefore hold more than two TV channels.

Article 2 of the Communications Act thus limits the broader definition of the *Disciplina del sistema radiotelevisivo pubblico e privato*[2] (Media Act of 6 August 1990, no. 223). According to Article 15, para. 4 of the Media Act, no subject was allowed to hold more than 25 per cent of the total number of concessions available for national terrestrial television and radio broadcasting, and in any case no more than three national channels.

This provision, to the extent that it referred to national television broadcasting concessions, was held to be unconstitutional in light of the principle of freedom of information enshrined in Article 21 of the Constitution.[3] The ruling, however, never had any practical effect since the Court saved the transitional measures provided by a subsequent Law of 1992. Thereafter the new Communications Act no 249/97 permitted the commercial broadcasters in question to keep control of three channels until the substantial development of alternative means of transmissions would have taken place. With specific regard to horizontal media concentration, the provisions contained in the Communications Act must be deemed as having replaced those laid down by the Media Act and declared unconstitutional, since they introduce new limits for the same situation.

Different conclusion might need to be drawn for cases of diagonal media concentration (see below part C).

In addition to the above-mentioned limits, the Communications Act, Article 2, introduces for the first time thresholds based on revenue shares, while previous concentration limits in the broadcasting sector were only linked to a proportion calculated on available concessions according to the national frequency plan.

---

1) *Gazzetta Ufficiale della Repubblica Italiana*, 31 July 1997, No. 177, *Supplemento Ordinario*, http://www.agcom.it/L_naz/L_249.htm

2) *Gazzetta Ufficiale della Repubblica Italiana*, 9 August 1990, No. 185, *Supplemento Ordinario*, http://www.agcom.it/L_naz/L223_90.htm

3) Constitutional Court, judgement No. 420/94 of 7 December 1994.

Article 2, para. 8, letter a) refers to all broadcasters with nation-wide television concessions that are entitled to provide public television service or encrypted services, or both, via terrestrial transmission. They may raise revenues for a share not exceeding 30 per cent of the resources of the television sector calculated on a domestic basis as regards encrypted and terrestrial broadcasting. The resources taken into account are revenues deriving from broadcasting licensing fees collected by the treasury for the financing of the public service, and from national advertising.

Different thresholds apply to subjects, to which authorisation for television broadcasting via cable or via satellite has been issued. Pursuant to Article 2, para. 8, letter. c) they may collect revenues for no more than 30 per cent of the total resources of the sector of national television broadcasters transmitting via cable or satellite.

With reference to subjects to which radio concessions have been issued for the national coverage of the territory, Article 2 par. 8, letter b) allows them to gather their economic resources deriving from revenues obtained from advertising and sponsorship for a quota not exceeding 30 per cent of total resources collected in the radio sector.

The calculation of the overall revenues of the players of the broadcasting market is achieved by means of a questionnaire which is sent every year by the Communications Authority to broadcasters and advertising agencies. More precisely, one questionnaire is sent to the public concessionaire, one to private broadcasters both on a national and local basis and a third one to advertising agencies. The questionnaires are designed to establish the following information:
– revenues derived by public concessionaires from public financing ,
– overall revenues derived from the broadcasting of advertising, teleshopping and sponsoring,
– revenues derived from agreements with public institutions for the transmission of particular informative programmes or messages,
– revenues derived from pay television services,
– revenues derived by advertising agencies from the sale of advertising, teleshopping and sponsoring spaces.

The answers provided by broadcasters and advertising agencies have the value of declarations made under penal responsibility of the parties, which may justify legal action by the Communications Authority in case of false or incorrect information. The Authority may in any case check the information by verifying the public budgets of the parties.

3. Legal remedies

Pursuant to Article 2, para. 7 of Communications Act no. 249/97, if one of the specified quantitative limits is reached by virtue of agreements or through newly-emerging situations of concentrations, the Communications Authority will take appropriate action. As a general rule, when the Communications Authority ascertains the existence of a dominant position that is the result of agreements or of mergers and acquisitions leading to concentrations of undertakings or of spontaneous growth of an undertaking (within the limitations described in the next paragraph), it is also deputed to impose sanctions on the broadcasters concerned. The sanctions may consist of an order to separate the undertakings or assets brought together and may be applied even in a case of spontaneous growth after 1 August 1997 if it leads to a dominant position which eliminates or compromises pluralism.

Considering the radical change in defining the relevant thresholds brought about by the Communications Act when compared with those laid down by the preceding legislation, Article 2, para. 9 of the Communications Act introduces an exception for the first application of this provision – after 1 August 1997 – in order to ensure a gradual implementation of the new thresholds. Art. 2, paragraph 9 stipulates that no sanction be imposed, should a dominant position be reached by a spontaneous growth of the undertaking in question provided that this growth neither creates a dominant position nor eliminates or compromises competition or pluralism. It is further required that the subject in question commenced radio and television activities before 1 August 1997, the moment of entry into force of the Communications Act no. 249/97. In these cases the Communications Authority, with a properly grounded decision and at the same time informing Parliament, will not take action as prescribed by Article 2, para. 7.

For purposes of assessment, to be performed before the date of the issue or renewal of the concessions or authorisations, the Authority will invite the subjects concerned to demonstrate, within a pre-determined term and on the basis of appropriate documentation, that their dominant positions is not to be considered as prohibited by law.

The companies concerned thus have the chance to demonstrate that the share achieved is less than the limits set by Article 2 para. 8, or that, although the limits of Article 2 para. 8 have been exceeded with regard to the reference market, this fact by itself does not amount to their having a dominant position. When determining the reference market, the companies must take into account, *inter alia*, the existence of technical, economic or juridical constraints on the entry into the reference market, and the possibility of access to productive factors, and the size and number of existing competitors. In any case it will be the responsibility of the Communications Authority to carry out all the necessary enquiries in order to determine the exact facts concerning the situation in question.

The Communications Authority applied these rules for the first time by adopting Decision no. 365/00/CONS of 13 June 2000,[4] which ascertained the existence of dominant positions in the terrestrial television broadcasting market. As already mentioned, according to Article 2, par. 8 of the Communications Act, a dominant position is presumed when a broadcaster earns more than 30 per cent of the economic resources of the broadcasting sector.

On 2 December 1999, the Communications Authority began an examination of the Italian broadcasting market with reference to the year 1997 and notified the commencement of preliminary proceedings to the two main Italian broadcasters, Rai and RTI, and to their advertising agencies, Sipra and Publitalia, in order to verify whether they had exceeded the thresholds fixed by the Communications Act. In its decision, the Communications Authority ascertained that the two separate economic units – Rai & Sipra and RTI & Publitalia – had both exceeded the thresholds, but that their positions on the market, though dominant, had been reached by the means of a spontaneous growth of their undertakings without restricting competition or pluralism.

After having informed the Parliament, the Communications Authority decided to carry out promptly a broader analysis of the television broadcasting market, paying particular attention to the following factors: distribution of technological and economical resources, access to production factors, number, strength, and audience of the undertakings of the relevant market, and impact of multimedia and digital technologies. The survey is still being conducted, and the results will probably be published at the beginning of 2001.

4. Justification and Policy

The choice of combining thresholds based on the number of concessions and on revenue shares was motivated by the fact that a threshold based merely on the number of concessions, while still useful to measure the impact on pluralism in the free-to-air market, was not considered to be in line with the availability of a potentially infinite number of channels due to technological advancements.

The alternative method of measuring concentration based on audience shares was put aside during the parliamentary discussion.

B. Vertical Media Concentration

Italian legislation does not contain any specific provisions with regard to vertical media concentration. Broadcasters may, for example, be owners of film archives or be proprietors of decoders for digital television, provided free competition is not compromised. As a result, ordinary competition rules will be applied to potential agreements or operations of concentration involving operators of the broadcasting sector (see below part D).

C. Diagonal Media Concentration

1. Content of Applicable Legislation

1.1. Cross-Ownership between Broadcasters and Press

a) The Italian legislature regulated cross-ownership between broadcasters and press for the first time by the Media Act no. 223/90 (see above part A). According to Article 15, para. 1 of the Media Act, rules are necessary in order to avoid the formation of dominant positions in the mass communications sector. Article 15, para. 1 of the Media Act applied the following limitations for operators involved both in press publishing and television broadcasting:

A company publishing newspapers, whose total circulation is more than 16 per cent of the total national circulation, is not permitted to hold a concession for national broadcasting of terrestrial TV channels (letter a);

A company publishing newspapers, whose total circulation is more than 8 per cent of the total national circulation, is not permitted to hold more than one concession for national broadcasting of terrestrial TV channels (letter. b);

A company publishing newspapers whose total circulation is less than 8 per cent of the total national circulation, is not permitted to hold more than two concessions for national broadcasting of terrestrial TV channels (letter. c);

These provisions apply only in the case of subjects cross-owning broadcasting companies and companies publishing newspapers. They do not apply to periodicals. The Media Act no. 223/90 does not provide for any specific limitations for cross-ownership of publishing companies and other channels of communication, including cable or satellite television.

b) It is still unclear whether the provisions contained in the Media Act no. 223/90 described under a) are still applicable. This is because the Communications Act no. 249/97, mentioned above, while not expressly covering the matter of cross-ownership, provides for a different, general threshold based on the economic

4) http://www.agcom.it/provv/D365_00_CONS.htm

revenues of companies operating in the mass-communications market. Art. 2, para. 8, letter d) of the Communications Act stipulates:

> "The subjects that hold shares in companies operating in the sectors of radio/television broadcasting and newspaper/magazine publishing are allowed to collect, as the sum of the revenues from both sectors, revenues not in excess of 20 per cent of the total amount of resources obtained from advertising, the fees from teleshopping, sponsorships, revenues from agreements with public bodies, financing from the public service, revenues from pay-television supply, sales and subscriptions of newspapers and magazines, from the electronic publishing market for household consumption. (...)."

Hence, the question is whether or not the entry into force of the new provisions implicitly abrogated the cross-ownership rules prescribed by the Media Act no. 223/90. The question has not been settled yet. According to some, the new rules contained in the Communications Act no. 249/97, by introducing new thresholds based on the collection of revenues, render obsolete the old rules based on ownership. Others argue that the two sets of rules cover different matters, so they could both be applied in the case of companies operating in both markets.

1.2. Cross-Ownership between Broadcasting and Radio Operators

The Media Act no. 223/90 provided for a limitation to horizontal ownership of private television and radio networks. As already mentioned, according to Article 15, para. 4, a subject is not allowed to hold more than 25 per cent of the global number of concessions available for national terrestrial television and radio broadcasting; in any case, the same subject cannot own more than three national channels. This provision was interpreted as applying also to cross-ownership of television and radio broadcasting with the result that the number of licenses could not exceed three.

The Communications Act no. 249/97, which, it will be remembered, provides for thresholds based on revenue shares, introduces new provisions regarding cross-ownership. It refers to radio broadcasters expressly in a provision concerning horizontal concentration. Article 1, para. 8, letter d), previously cited, provides for a general threshold involving both radio and television operators, while another section of the same Article covers limits concerning radio broadcasters only.[5]

1.3. Rules concerning Advertising Agencies

The Communications Act no. 249/97 also provides for anti-concentration rules aimed at preventing integration of the television and advertising markets. Article 2, para. 8, letter. e) provides that advertising concessionaires cannot accumulate resources in the radio and television sectors in excess of the limits prescribed in the previous letters of the same Article (see above). It also includes specific limits in cases of agencies concessionaires of television and radio operators. The provision reads as follows:

> "Advertising concessionaires can accumulate financial resources in the radio and television sectors to a degree which shall not exceed the shares indicated under letters a), b), c) and d). The advertising concessionaire, controlled by or affiliated with a subject to which a radio- television broadcasting concession or authorisation has been issued, can collect advertising also for other subjects to which concessions have been given at a local level, within the limits set down by the first sentence of the present letter and upon condition that the said concessionaire company or subject collect advertising on an exclusive basis for the concessionaire or authorised subject that controls it or that is related to it".

In general, it must be stressed that, according to para. 10 of Art. 2 of Communications Act no. 249/97, all the limits set out in para. 8 do not apply to subjects holding television or radio concessions for terrestrial broadcasting frequencies or an authorisation to offer pay-tv services via cable or satellite, in cases where the concession is issued for the broadcasting of a single national channel.

2. Legal Remedies

If one considers that the limitations set forth in Article 15 of the Media Act no. 223/90 are still applicable (as mentioned before, the question is not yet resolved), the remedies available, if elements of concentration are satisfied, are those provided by Article 31, para. 6 of the same statute. This provision enables the *Autorità per le garanzie nelle comunicazioni* (before the entry into force of Communications Act no. 249/97 the competence was with the *Garante per la radiodiffusione e l'Editoria*,) to take the appropriate measures in case of violation. The Communications Authority first requires the subjects that exceeded the thresholds to remove the unlawful situation within a period of not more than one year. In case of non-compliance, the concession of the subject in question can be revoked by the Ministry of Communications on a proposal from the Communications Authority (Art. 31, para. 7).

In case of infringement of the rules enshrined in Article 2, para. 8 of the Communications Act no. 249/97, the Communications Act provides for intervention by the Communications Authority following the rules already considered above (Article 2, para. 7 and 9; see part A).

---

5) According to Art. 1, para. 8, letter. b): "The subjects to which radio concessions have been issued for the national coverage of the territory can gather the economic resources deriving from revenues obtained from publicity and sponsorship for a quota not exceeding 30 per cent of the total resources obtained in the radio sector. For the purpose of initial development of the sector, the Authority may fix a quota regarding the collection of economic resources higher than that laid down in the present letter."

3. Justifications and Policy

The policy underlying the limits included in the Communications Act no. 249/97 is clearly stated in Article 2, para. 1, which provides in general terms the purpose of the anti-concentration provisions (see part A). Given the general rationale of the law and that it considers the communication sector as an "integrated" market, it is forbidden to create or maintain a dominant position with regard to the combined shares occupied in the television, radio and press sectors.

D. General Competition Law

1. Interplay between Media Specific Rules and Competition Law

In the Italian legislation, the limitations prescribed for television operators by specific legislation concerning the communications market, are not exclusive vis-à-vis general competition law.

For competition law this clearly follows from the wording of Article 20 of the *Norme per la tutela della concorrenza e del mercato*[6] (Competition Act of 10 October 1990, no. 287) according to which the application of the rules of that law do not derogate from any of the specific rules for the radio and television broadcasting sector, notwithstanding the fact that specific legislative rules might in theory derogate from general competition law rules. In addition to the specific rules concerning pluralism, the rules enshrined in Articles 81 and 82 of the EC Treaty protecting competition are also applicable to television broadcasters in cases where agreements between undertakings or abuse of dominant positions assume a European relevance (*i.e.*, affect the functioning of the internal market).

It is generally considered that the two sets of rules (general competition law and specific legislation) govern different situations. In general, while the former aims to avoid the abuse of dominant positions, the latter forbids the formation of such a position and considers it unlawful per se insofar as it limits the right of citizens to be informed. In addition, general antitrust law intervenes only in cases of concentration realised through merger and acquisition, while it does not cover different behaviour such as the setting up of a new channel or the production of a new editorial product, both of which might interfere with the principle of pluralism.

Thus, for instance, it may well be that behaviour that is compatible with Articles 2 and 3 of the Competition Act (which extend the provisions of Articles 81 and 82 of the EC Treaty to domestic situations) can be considered unlawful by the Communications Authority according to the specific rules included in the Communications Act no. 249/97.

In other words, it is clear that the mere fact that an operator may hold a strong and predominant influence and position in a given market will not satisfy the requirements for distortion of competition within the market. Only the abuse of such predominance aimed at eliminating or restricting competition can be defined as unfair market practice according to the general Competition Act. In order to meet the specific goals of communications policy, it is necessary, therefore, to apply specific rules aimed at avoiding the acquisition of a dominant position as such.

In the Communications Act no. 249/97, this is recognised not only in the specific provisions concerning the thresholds applicable to mono- and multimedia operators (Article 2, par. 8, discussed above), but also in rules which:

– prescribe that any acts, operations leading to concentration, and agreements, which are in conflict with the prohibitions established by the present article, are null and void (Art. 2, para. 2);

– require subjects operating in the sectors indicated in Article 2, para. 1 (see part A) to communicate to the Communications Authority and to the Competition Authority, agreements and operations concerning media concentration, to which they are a party. So the same operation is subject to a double control according to the different parameters laid down in the General Competition Act and in the Communications Act no. 249/97 (Art. 2, para. 3).

The Communications Authority controls trends and developments of the markets regarding the sectors referred to under Article 2, para. 1, and will make public the findings of the inquiries conducted in the form of specific annual reports (Art. 2, para. 4).

2. The Definition of the Relevant Television Broadcasting Market

The definition of the relevant television broadcasting market in the specific provisions of the Communications Act no. 249/97 is set out in the text of Article 2, para. 8. As already described (see part A), the Law prescribes rules applicable to the broadcasting market as a whole (*i.e.*, irrespective of the means of transmission of television signals) as well as anti-concentration rules for any specific segment (traditional terrestrial broadcasting, cable and satellite television).

As to the application of the Competition Act no. 287/90, no specific definition of the relevant market emerges from the text of this Statute. Yet the definition follows the general rules provided by Articles 2 and

6) *Gazzetta Ufficiale della Repubblica Italiana*, 13 October 1990, no. 240, *Supplemento ordinario*, http://www.agcm.it/tema0351.htm

3 of the Competition Act no. 287/90 as well as by Articles 81 and 82 of the Treaty of Rome (applicable, respectively, to antitrust issues of national and European relevance) as interpreted by the domestic and European courts and administrative authorities (the Italian Competition Authority and the European Commission).

3. When Is a Dominant Market Position Established or Enhanced?

The Competition Act no. 287/90 provides in its Article 2, concerning agreements restricting freedom of competition, that:

> "1. The following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions taken by consortia, associations of undertakings and other similar entities, even if adopted pursuant to their Articles or Bylaws.
>
> 2. Agreements are prohibited between undertakings which have as their object or effect measurable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that:
>
> a) directly or indirectly fix purchase or selling prices or other contractual conditions;
> b) limit or restrict production, market outlets or market access, investment, technical development or technological progress;
> c) share markets or sources of supply;
> d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;
> e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 3. Prohibited agreements are null and void."

With regard to the definition of concentration, Article 5 provides the following:

> "1. A concentration shall be deemed to have arisen when:
>
> a) two or more undertakings merge;
> b) one or more persons controlling at least one undertaking or one or more undertakings, acquire the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or by any other means;
> c) two or more undertakings create a joint venture by setting up a new company.
>
> 2. Control of an undertaking shall not be deemed to have been acquired in the case of a bank or financial institution which acquires shares in an undertaking when established, or when its share capital is raised, with a view to re-selling them on the market, provided that it does not exercise any voting rights vested in those securities while holding them; in no case shall the holding period exceed 24 months.
>
> 3. Operations which have as their main object or effect the coordination of the actions of independent undertakings shall not constitute concentrations."

Article 6 prohibits concentrations restricting free competition. More precisely, the Competition Authority shall examine operations related to concentrations in order to ascertain whether they create or strengthen a dominant position on the domestic market with the effect of measurably eliminating or restricting competition on a lasting basis. In order to exercise such control, Article 16 of the Law requires operators to notify the Competition Authority of operations leading to concentrations of particular importance. This threshold is reached if the combined aggregate domestic turnover of all the undertakings concerned exceeds LIT 500 billion or if the aggregate domestic turnover of the undertaking which is to be acquired exceeds LIT 50 billion.

Notified operations shall be examined taking into account the possibilities of substitution available to suppliers and users, the market position of the undertakings, the conditions of access to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to entry of competing undertakings and the evolution of supply and demand for the relevant goods or services.

Whenever the investigation shows that the operation entails restrictive effects on the free market, the Competition Authority may either prohibit the concentration or authorise it while stipulating the necessary measures to prevent such consequences.

4. Legal Remedies

In the case of an infringement of the general competition rules in the television market, the whole set of remedies set forth by national and European law is applicable. Competitors may bring an action before the *Tribunale civile* (civil court) since Articles 2 and 3 of the Competition Act produce direct effects in relations between individuals and before the Competition Authority. The addressees of the decision of the Competition Authority that wish to contest the finding that their conduct is not compatible with Articles 2 and 3 of the Competition Act no. 287/90 may appeal to the *Tribunale amministrativo regionale* (administrative tribunal). If the practice in question has an European dimension, and thus falls within the

scope of Articles 81 and 82 of the EC Treaty, both the Commission of the European Communities as well as the national courts will in principle be competent to deal with it. In addition, the Competition Act, as modified by *Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – Legge comunitaria* 1994[7] (European Community Act 1994, of 6 February 1994, no. 52), enables the Italian Competition Authority to apply Articles 81 and 82 of the EC Treaty.

It should also be remembered that the procedural rules diverge in cases of an alleged breach of, respectively, European and national *competition law. In the first situation, private parties may lodge a complaint before a Tribunale* (Tribunal), whose decision can be challenged before the *Corte d'Appello* (Court of Appeal) and finally, but only on issues of law, before the *Corte di Cassazione* (Court of Cassation). In the second situation, Article 33 of the Competition Act no. 287/90 requires complainants to contest the decision before the Court of Appeal judging in first instance; an appeal can then be lodged with the Court of Cassation, but again only on issues of law.

E. Specific Ownership Restrictions

Italian legislation does not contain any specific limits to particular target groups, but limits the possibility of holding concessions for national broadcasting of terrestrial TV channels to companies established in Italy or in the European Union. According to Article 3, para. 2, of the Communications Act no. 249/97, subjects with citizenship or nationality of a state that is not a member of the European Union may control companies on condition that such States ensure conditions of real reciprocity towards Italy, without prejudice to the provisions deriving from international agreements.

ANNEX

1. Legislation

Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo (Communications Act) of 31 Juli 1997, no. 249, in *Gazzetta Ufficiale della Repubblica Italiana*, 31 July 1997, no. 177, *Supplemento ordinario*, avaible at http://www.agcom.it/L_naz/L_249.htm

Norme per la tutela della concorrenza e del mercato (Wettbewerbsgesetz) of 10 October 1990, no. 223, in *Gazzetta Ufficiale della Repubblica Italiana*, 13 October 1990, no. 240, *Supplemento Ordinario*, avaible at http://www.agcm.it/tema0351.htm

Disciplina del sistema radiotelevisivo pubblico e privato (Mediengesetz) of 6 August 1990, no. 223, in *Gazzetta Ufficiale della Repubblica Italiana*, 9 August 1990, no. 185, *Supplemento ordinario*, avaible at http://www.agcom.it/L_naz/L223_90.htm

2. Case law/Administrative Decisions

Judgement of the *Corte Costituzionale* (Constitutional Court) of 7 December 1994, no. 420, in *Giurisprudenza costituzionale*, 1994, S. 3716, avaible at http://www.aer.it/associati2/giurispru/INDICECRONOLOGICO/05-071194%20sent.htm

Decision of the Autorità per le garanzie nelle comunicazioni (Communications Authority) no. 365/00/CONS of 13 June 2000, in *Gazzetta Ufficiale della Repubblica Italiana*, 14 July 2000, no. 163, *Supplemento ordinario*, avaible at http://www.agcom.it/provv/D365_00_CONS.htm

3. Regulatory Authorities

Autorità per le garanzie nelle comunicazioni
(Communications Authority)
Centro Direzionale - Isola B5 - Torre Francesco
I-80143 Napoli
Tel. +39081 7507111
Fax +39081 7507616
http://www.agcom.it

Autorità garante della concorrenza e del mercato
(Competition Authority)
Via Liguria, 26
I-00187 Roma
Tel. +3906 481621
Fax +3906 48162256
http://www.agcm.it

4. Bibliography

V. Roppo - R. Zaccaria,
Il sistema radiotelevisivo pubblico e privato, Milano 1991

Lamberti, *L'informazione televisiva tra diritto comunitario e diritto interno*, Milano, 1997

R. Zaccaria, *Diritto dell'informazione e della comunicazione*, Padova, 1998

G. Santaniello (dir), *Trattato di diritto amministrativo*, vol. XXVIII, *Informazione e telecomunicazione*, Padova, 1999

N. Lipari - E. Bocchini - S. Stammati, *Sistema radiotelevisivo e autorità per le telecomunicazioni*, Padova, 2000

7) *Gazzetta Ufficiale della Repubblica Italiana*, 10 February 1994, No. 34, *Supplemento ordinario*, http://www.agcm.it/tema0354.htm

FRANCE

Parts B, D and E: Laurence GIUDICELLI
Barrister/Paris

Parts A, C and E: Emmanuel DERIEUX
University professor, Panthéon-Assas (Paris 2)
Editorial consultant, Légipresse

A. Horizontal Media Concentration

1. Definition of the Broadcasting Market

Although they are not considered as actual "markets", it is nevertheless a fact that French legislation to counter concentration in the audiovisual communication sector – the Freedom of Communication Act of 30 September 1986 (referred to as "the Act of 30 September 1986") – draws a distinction between public radio and television broadcasting, to which it does not apply, and private radio and television broadcasting, to which it applies exclusively.

Although they do not constitute a particularly coherent, strict group, a number of features of the provisions designed to counter concentration take differing views of terrestrially-broadcast television (whether broadcast over land or by satellite), and radio and television broadcast via cable. The national or regional dimension (covering a geographic area whose population is, for "national" television, greater than, and for "regional" television fewer than 6 million inhabitants) is a further criterion to be taken into account in conjunction with those mentioned above. The Act of 1 August 2000, amending the Act of 30 September 1986, introduced – particularly as regards a number of aspects of the provisions to counter concentration – the famous distinction between analog and digital television.

2. Content of Applicable Regulations

The rules designed to counter concentration comprise restrictions that apply to an operator holding capital in an audiovisual communication company and holdings in a number of companies in the same sector, and also apply to the accumulation of licenses. The provisions of the Act of 30 September 1986 referred to in the following sections are applicable in aggregate.

2.1. Share in Capital

The provisions of the Act of 30 September 1986 (as amended) stipulate the maximum proportion of capital that a single "person" (usually a subsidiary of a major communication, industrial or financial group) may hold in a company operating a television service:

- for a television service broadcast terrestrially over land on a national scale (to more than 6 million inhabitants), this limit is, according to Article 39-I of the Act, 49% of the capital (prior to the amendment made to the Act on 1 February 1994, the limit was 25%);
- for a television service broadcast terrestrially over land on a regional scale (to fewer than 6 million inhabitants), this limit is, according to Article 39-III of the Act, 50% of the capital;
- this limit of 50% of the capital also applies for television services broadcast by satellite (Article 39-III of the Act).

2.2. Number of Licenses

Among the provisions to counter concentration, Article 41 of the Act of 30 September 1986 (in particular as amended by the Act of 1 August 2000) stipulates the number of licenses to operate television services that a single "person" (company) may hold:

- just one for a television service broadcast terrestrially over land on a national scale in analog mode (Art. 41, para. 2);
- the holder of a license for a television service broadcast terrestrially over land on a national scale may not be allocated at the same time a second license for a service of the same type on a regional or local scale on the mainland (a number of licenses of this type may be granted for overseas broadcasting) (Art. 41, para. 2);
- the holder of a license for this type of television service broadcast terrestrially over land on a national scale in analog mode may, according to the provisions introduced by the Act of 1 August 2000, be granted up to five licenses to operate services of this type in digital mode (but only four if the programme broadcast in analog mode is taken up in digital mode) (Art.41, para.3);
- the same "person" (company) may be awarded two licenses to operate television services via satellite (Art. 41, para. 4);

– for television services broadcast terrestrially over land in analog or digital mode on a regional or local scale, the same "person" (company) may be awarded several licenses if the total number of users served is fewer than six million (Art. 41, paras. 5 and 6);
– a holder of a license to operate a television service broadcast terrestrially over land in either analog or digital mode on a regional or local scale may not be awarded more than one license in the same geographical area (Art. 41, paras. 7 and 8);
– for television via cable, the same person may hold several licenses as long as the total population of the geographical areas served does not exceed 8 million (Art. 41, para. 9).

2.3. Holdings in Several Companies in the Same Sector

Above certain thresholds, there are restrictions on the same "person" holding capital in a number of television companies broadcasting terrestrially, at least in certain sectors:

– for television services broadcast terrestrially over land on a national scale in analog mode, according to Article 39-I of the Act of 30 September 1986, if a person holds more than 15% of the capital of one company, its holding in a second company in the same sector must be less than 15%; if it holds more than 5% of two of these companies its holding in a third must be less than 5%;
– for television services broadcast via satellite, according to Article 39-II of the Act of 30 September 1986, if a person holds more than one-third of the capital of one company, its holding in a second company in the same sector must be less than one-third; if it holds more than 5% of the capital of two of these companies its holding in a third must be less than 5%.

3. Legal Remedies

In practice, it is extremely difficult to supervise compliance with these arrangements to counter concentration – which are aimed at all aspects of concentration. This is firstly due to the actual complexity of the arrangements and secondly, no doubt, to the possibility of creating multiple companies or "persons" and indirect holdings. It also depends on the timing of when supervision can or should be carried out and on the authority to which the task is entrusted. The multiplicity and the diversity of these bodies or authorities are probably both the cause and the consequence of a relative slackening of these controls. Nevertheless, in the absence of penalties there can be no real obligation.

As regards obligations concerning companies or structures, Articles 74 to 76 of the Act of 30 September 1986 lay down, as "criminal provisions", the penalties incurred by anyone failing to abide by the obligations concerning transparency (information to be supplied to the responsible regulatory body, the *Conseil supérieur de l'audiovisuel*, the fact that shares must be registered shares and may not be held under another name). Without transparency, however, no check can truly be made on adherence to the arrangements to counter concentration and guarantee diversity.

Article 77 of the Act of 30 September 1986 also sets out the penalties incurred by anyone contravening the provisions of Article 39 or 40 on the holding any one person or company may have in one or more companies operating audiovisual communications services. In fact there have been very few cases of this range of penalties being applied.

Respect for the provisions concerning diversity should normally constitute one of the vital elements in the examination of applications by the *Conseil supérieur de l'audiovisuel* (*CSA*) when granting operating licenses. Changes in the scheme of ownership or breakdown of capital, while not being subject to its authorisation, must nevertheless be notified (Art. 38 of the Act of 30 September 1986). Failure to abide by the arrangements to counter concentration is justification for the refusal to grant a license or the withdrawal of a license (one of the means available to the *CSA* to exercise sanctioning powers; usually used in the case of failure to meet programming requirements). It is not certain, however, that the regulatory body (the *CSA*) has all the means of knowing and appreciating the actual composition and situation of the various financial groups as regards these arrangements to counter concentration.

4. Justifications and Policy

In its decision of 18 September 1986, prior to promulgating the Act of 30 September 1986, the Constitutional Council considered that "the diversity of currents of socio-cultural expression is in itself an objective having constitutional value; respect for this diversity is one of the conditions of democracy; the free communication of thoughts and opinions, guaranteed by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, would not be effective if the public addressed by the means of audiovisual communication did not have at its disposal (...) programmes guaranteeing the expression of trends of differing natures".

Article 39 of Act no. 82-652 of 29 July 1982 (repealed by the Act of 30 September 1986) provided as follows: "Non one person may acquire a holding which has the effect of increasing his holding, either directly or indirectly, to more than 25% of the capital of a private company having a license for a television service broadcast terrestrially if this service is available to the entire territory of mainland France."

The Constitutional Council retorted that "Article 39 of the Act in no way prohibited any one person from having a holding of up to 25% of the capital of a number of private companies each having a license for a television service broadcast terrestrially available throughout the mainland" and that "the article did not

set any limit on the holding of any one person in the capital of companies having licenses for a television service broadcast terrestrially over parts of the territory."

It also commented that "... neither Article 31, nor any other provision of the Act, set any limit on granting to any one person licenses for radio and television broadcasting via cable...".

The Constitutional Council also made a statement regarding another provision designed to counter concentration, namely Article 41 of Act no. 82-652 of 29 July 1982; this article did not "...take account, in the limits it lays down, of the situation of persons holding a license to broadcast on long wave...", nor did it limit "the possibility for any one person to hold licenses both to use frequencies for broadcasting radio services terrestrially over land, and licenses to operate television services broadcast terrestrially concurrently ...", and because it prohibited "the accumulation by the same person of two licenses within the same geographical area, without making any objection to any one person being granted, at the same time, one or more other licenses for serving the entire territory either as a national service or through a network of local services ...".

The Constitutional Council therefore declared that since "... the provisions of Articles 39 and 41 of the Act did not meet the constitutional requirements to ensure diversity (...), Articles 39 and 41 of the Act should be declared contrary to the Constitution."

In its decision of 27 July 2000, prior to promulgating the Act of 1 August 2000 amending the Act of 30 September 1986, the Constitutional Council, referring to the "applicable standards of compliance with the Constitution", again made mention of the "objectives of constitutional value" and the "preservation of the diversity of currents of socio-cultural expression".

It was because the Parliament had no desire to be "censored" again by the Constitutional Council that it adopted such complicated arrangements – particularly by means of the first reform of the Act of 30 September 1986 made under the Act of 27 November of the same year – covering every possible situation.

B. Vertical Media Concentration

1. Legislation Applicable to Digital Television

In France, digital television broadcast via satellite or cable is developing via a vertical mode of organisation, in which a bundle operator controls the entire chain providing content. Thus a service schedule is drawn up by the operator, who chooses a conditional access system and broadly defines the terminals that it helps to finance through rental charges or subsidies received.

There is little room for regulation in organisation of this kind for cable.

Act no. 96-299 of 10 April 1996 on experimentation in information technologies and services, adopted for a three-year period in 1996 and extended recently, together with its implementing regulations, while taking into account the need for a certain amount of regulation, defines objectives such as:

– the non-weakening of operators already involved in the development of cable and satellite bundles;

– the non-reduction of the number of programmes being broadcast on analog;

– the preservation and development of public-sector television.

For example, there is at present no answer to the questions arising in the allocation of multiplexes. It does not allow an allocation of resources per channel and reduces the role of regulation (the present system for cable), unless an obligation to take up certain channels is enforced according to criteria to be defined by legislation.

In such a system it is unlikely that diversity of programming will be ensured.

2. The Opinion of the *Conseil supérieur de l'audiovisuel* of 23 November 1989: Multiplex Operators Must Have a Specific Legal Framework

In the context of public consultation on the "digitalisation of television and radio broadcast terrestrially" announced by the Government, the *CSA* provided a document summarising its position, together with its answers to the various questions raised.

In the opinion of 23 November 1999, the *CSA* considered that multiplex operators should have their own legal framework. A multiplex operator is deemed to be a person responsible for the assembly of signals and the dynamic management of the technical capacity of the multiplex. The person is responsible for the statistical management of the resource at any given time, and for the optimum use of global technical capacity over a period of time.

In order to minimise the risk of a monopoly situation, there should be at least two multiplex operators. They should abide by a set of technical instructions and be legally bound, using precise contractual terms, upwards in respect of editors and downwards in respect of technical broadcasters.

The *CSA* should have supervisory powers.

In the same opinion, it states that free competition must be effective in all areas of the sector: editing, managing the multiplex, technical broadcasting, commercial distribution. These various aspects need to be

defined and identified precisely. In order to safeguard diversity, there could be statutory restrictions on the accumulation of a number of these functions.

The migration to the digital, away from the analog, should be rapid so that everyone involved, particularly new entrants, can achieve their economic equilibrium as quickly as possible.

One of the basic principles of French legislation on the audiovisual sector is the entrusting to a single body of the global mission of regulating the sector. The *CSA* believes that this principle should not be challenged as regards digital broadcasting.

C. Diagonal Media Concentration

The "two situations out of four" scheme considers the case of a "person" who invests not only in the television sector but in other communication sectors as well (the audiovisual sector and the written daily press). The arrangements differ depending on whether the national or regional framework is being considered. The Act of 1 August 2000 established different schemes in this respect depending on whether analogue or digital television was involved. Above certain thresholds, no one "person" may invest in more than two of the four sectors concerned.

1. National Framework

In the national framework, according to the provisions of Article 41-1 of the Act of 30 September 1986, which refer – *inter alia* – to analogue television, no one "person" may operate or control more than two of the following four following types of media beyond certain limits:

– one or more television services broadcast terrestrially over land in analog mode for a population of more than 4 million inhabitants (Art. 41-1-1);

– one or more sound radio services broadcast terrestrially over land for a population of more than 30 million inhabitants (Art. 41-1-2);

– one or more cable radio and television services for a population of 6 million inhabitants (Art. 41-1-3);

– one or more daily newspapers with political and general content with a circulation exceeding 20% of national circulation of publications of the same type (Art. 41-1-4).

For digital television, the Act of 1 August 2000 inserted into the Act of 30 September 1986 an Article 41-1-1 which provides that no one "person" may operate or control more than two of the following types of media beyond certain limits:

– one or more television services broadcast terrestrially over land in digital mode for a population of more than 4 million inhabitants (Art. 41-1-1);

– one or more sound radio services broadcast terrestrially over land for a population of more than 30 million inhabitants (Art. 41-1-2);

– one or more distributors of services reaching a population of 6 million inhabitants (Art. 41-1-1-3);

– one or more daily newspapers with political and general content with a circulation exceeding 20% of national circulation of publications of the same type (Art. 41-1-4).

2. Regional Framework

In the regional framework, according to the provisions of Article 41-2 of the Act of 30 September 1986, which refer – *inter alia* – to analog television, no one "person" may operate or control more than two of the following four following types of media beyond certain limits:

– one television service broadcast terrestrially over land in analog mode broadcast in the area (Art. 41-2-1);

– one sound radio service broadcast terrestrially over land available to more than 10% of listeners in the area (Art. 41-2-2);

– one cable broadcasting service in the area (Art. 41-2-3);

– editing or controlling one or more daily newspapers with political or general content circulated in the area (Art.41-2-4).

For digital television, the Act of 1 August 2000 inserted into the Act of 30 September 1986 an Article 41-2-1 which provides that no one "person" may operate or control more than two of the following types of media beyond certain limits:

– one television service broadcast terrestrially over land in digital mode broadcast in the area (Art. 41-2-1-1);

– one sound radio service broadcast terrestrially over land available to more than 10% of listeners in the area (Art. 41-2-1-2);

– one or more service distributors located in the area (Art. 41-2-1-3);

– editing or controlling one or more daily newspapers with political or general content circulated in the area (Art. 41-2-1-4).

D. General Competition Law

1. Competent French Authorities

At national level, le *Conseil de la Concurrence* (monopolies board) and the *Direction de la Concurrence, de la Consommation et de la Répression des Fraudes* (*DGCCRF*) are responsible for reporting any infringement of competition law and for deciding on sanctions. They investigate strategic alliances and the arrangements attached to such agreements, such as the use of satellite capacity or cable infrastructures, and exclusivity agreements connected with technology for controlling access and audiovisual rights.

According to Article 41-4 of the Act of 30 September 1986 (as amended) monopolistic practices in the audiovisual sector, *i.e.*, abuse of a dominant position, discriminatory practices and barriers to competition, are also subject to general law (Order of 1 December 1986) and may be penalised by the *Conseil de la Concurrence*. Therefore the existence of specialised institutions such as the *Conseil supérieur de l'audiovisuel* (*CSA*) does not deprive the monopolies board of all competence as regards the audiovisual sector.

As regards audiovisual communication companies subject to authorisation, supervision of the specific regulations contained in the Act of 30 September 1986 (as amended) rests with the *CSA* itself.

2. Legal Scheme

General law – Order no. 86-1243 of 1 December 1986 (referred to as "the Order of 1 December 1986") – prohibits monopolistic and restrictive practices.

2.1. Anti-Competition Practices

2.1.1. Abuse of a Dominant Position under French Law

Article 8 of the Order of 1 December 1986 prohibits the abusive exploitation by a company or group of companies of:

– a dominant position in the domestic market or of a substantial part of it;

– the economic dependence on it of a client or supplier company which has no equivalent solution elsewhere (…).

The definition of abuse of a dominant position is fairly broad, such that the term may be considered to mean any practice harmful to competition in a given sector, whether or not its purpose or effect is to cause abuse.

2.1.1.1. Recent Case Law: a Case of Abuse of a Dominant Position in the Pay-TV Market and in the Market for Broadcasting Rights for Recent French Films

On 15 June 1999 the Court of Appeal in Paris found the company CANAL+ guilty of abusing its dominant position in the case of CANAL+ v. TPS and Multivision.

The fine amounted to more than 10 million FRF, for infringement of Article 8 of the Order of 1 December 1986.

The Court found that CANAL+, which occupies a dominant position in the pay television market and in the market for broadcasting rights for recent French films, had abused its position by requiring producers to sign contracts for the pre-purchase of broadcasting rights. This gave it priority and exclusivity for pay broadcasting, and stopped producers from selling the rights for their films for pay-as-you-view broadcasting, thereby preventing the emergence of television broadcasting of recent films on a pay-as-you-view basis.

The Court also said that the practice of exclusion referred to in the case was all the more serious in that it concerned a new market, preventing its development.

On 30 May 2000, the Commercial Chamber of the Court of Cassation upheld the Court of Appeal's decision, and emphasised that this position had deprived television viewers of an alternative broadcasting service offering recent films made in French.

This case came to court at a time in France when, in a context of growing demand for programmes, exclusivity contracts were flourishing in the audiovisual field, the cinema and sports.

2.1.1.2. Characteristics of Abuse of a Dominant Position according to French Law

Analysis of the abuse of a dominant position presupposes in the first place the detection of a dominant position.

A dominant undertaking is one that is in a position to hamper the functioning of its competitors because none of them offers its clients or suppliers a serious alternative, so that it is able to determine more or less freely the operating conditions for the market.[1]

1) 1980 Report by the Committee on Competition, p.227, *La Documentation française*, 1980.

The dominant position should be considered as having the means of exercising a direct influence on a given market or, in other words, as the ability of the undertaking or group of undertakings to behave independently and to control, regulate or block a given market.

This presupposes the determination of the reference market in order to be able to identify such a position. Thus a reference market is considered to be one which allows identification of a situation of autonomous competition, *i.e.*, one in which a number of undertakings compete with each other to distribute the same product or service. This is particularly true of the vast television market. The matter becomes more sensitive where the market under consideration falls within a much wider context, constituting some kind of "sub-market". Once this sub-market becomes sufficiently autonomous to be considered independent, it may serve as a reference market in order to appreciate the situation of undertakings in competition with each other. Identification of the reference market in order to appreciate whether or not a company is in a dominant position then involves an assessment of the proportion of the market occupied by the company. Here, two options are open to the authorities responsible for monitoring adherence to the regulations on competition. The first consists of determining a percentage of the market under consideration; the second consists of considering a set of data in order to compare the situation of the company to that of others. The bodies responsible for such monitoring in the audiovisual sector tend to favour the second option.

Abuse of a dominant position means exploiting a dominant position in order to reduce or remove any competition in a given sector.

Whatever body is instructed to detect abuse of a dominant position (independent administrative authority, community authority, court, etc.), the matter is dealt with objectively. There is little need to know whether there are any mitigating circumstances to justify an abuse of the dominant position.

Abuse exists once its characteristic legal conditions are met.

The practice of imposed pricing often reveals an abuse of a dominant position. It may involve an abnormally low price, or it may involve a minimum number of orders placed with a single company whose dominant position thus makes it an unavoidable partner for programme companies.

Dumping and discriminatory pricing may also be assimilated to the abusive exploitation of a dominant position.

In the media sector abuse may also take the form of an extension of the activities of a company responsible for a communication activity into sectors related to its prime area of interest.

Another potential form of abuse of a dominant position is the exclusivity contract. Such contracts do not in themselves restrict competition, but they are supervised in the framework of restrictive practices. Nevertheless, the conditions under which such contracts are concluded may give rise to abuse if one of the partners is in a dominant position.

2.1.2. Concerted Action, Agreements, Formal or Tacit Understandings, Coalitions

Article 7 of the Order of 1 December 1986 also prohibits agreements between companies or groups of companies where the purpose or potential effect is to prevent, restrict or distort market competition, concerted action, agreements, formal or tacit understandings, and coalitions, particularly where they are aimed at:

– limiting access to the market or the free exercise of competition by other companies,

– preventing prices from being determined by the free play of market forces, by artificially promoting their increase or decrease,

– limiting or controlling production, outlets, investments or technical progress,

– allocating markets or sources of supply.

Agreements in the media sector may take the form of boycotts, abusive exploitation of certain rights or refusal to distribute.

2.1.3. Justification of Abuse of a Dominant Position

Abuse of a dominant position may, however, be justified. The Order of 1 December 1986 (Article 10 (2)), like Article 85-3 of the EC Treaty, allows companies in a dominant position to escape the penalties they would normally incur, if they can demonstrate that their dominant situation, rather than hampering competition, actually contributes to the economic progress of the sector without eliminating competition in respect of a substantial proportion of the products in question.

The Order of 1 December 1986 (Article 10 (1)) adds a further exception in relation to the statutory or regulatory obligations that require economic operators to adopt certain behaviour or certain practices contrary to Articles 7 and 8. Thus the provisions of Articles 7 and 8 are not applicable to practices "resulting from the application of legislation or the corresponding regulations for its application".

In any event, the conditions required for appreciating the existence or absence of abuse of a dominant position in the media sector are not fundamentally different from those that apply in other sectors.

If there are any special features, they concern more the specific structure of the media sector, its evolution and its links with related or parallel markets (production, distribution, advertising, etc.).

2.1.4. Legal Remedies

Article 9 of the Order of 1 December 1986 provides for the nullity of an undertaking, agreement or contractual clause relating to a practice prohibited by Articles 7 and 8.

Article 12 of the same Order provides that the monopolies board may take precautionary measures, including the suspension of the practice in question and a court order requiring the parties to return to the previous position. Such measures must remain strictly limited to what is necessary to deal with the emergency.

The monopolies board may also order the parties concerned to put a stop to their anti-competition practices within a fixed period of time or impose other specific conditions. It may impose a fine applicable either immediately or in the event of failure to comply with orders made (Article 13 of the same Order).

2.2. Restrictive Practices

Lastly, Section IV of the Order of 1 December 1986 defines the legal scheme of restrictive practices. These are defined as infringements of competition, which do not prevent the exercise of competition, but distort it to such a point that normal market conditions no longer apply. Examples are various practices contrary to commercial law such as refusal to sell, discrimination, imposed prices, etc.

In the media sector, these restrictive practices have mainly taken the form of restrictions in distribution and access to communication products, justified by special, exclusive relationships between certain partners.

These mainly concern exclusivity contracts in the form of contracts for use, rental or distribution with the specific feature that they confer an exclusive right to broadcast an audiovisual or cinematographic work.

Moreover, Article 36 of the Order of 1 December 1986 provides that if any producer, trader, industrialist or craftsman (…) refuses to satisfy the demands of purchasers of products or demands for the provision of services where such demands are not of an unusual nature, are made in good faith and refusal is not justified by the provisions of Article 10, the person making such refusal is obliged to make good the prejudice suffered.

E. Special Ownership Restrictions

Article 40 of the Act of 30 September 1986 provides that "without prejudice to the international undertakings subscribed to by France" (in particular the European Union Treaty among the fifteen Member States of the EU), "no person of foreign nationality may acquire a holding which has the effect of increasing, either directly or indirectly, the proportion of the company's capital held by foreigners or of voting rights at general meetings of shareholders to more than 20% in respect of a company holding a license for a (…) television service in French broadcast terrestrially over land".

In order to make this ban effective, Article 78 of the Act of 30 September 1986 provides that any infringement of it renders the perpetrators liable to a fine of between 100,000 and 1 million FRF.

ANNEX

1. Legislation

Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication
Freedom of Communication Act no. 86-1067 of 30 September 1986 (audiovisual sector), amended on numerous occasions, the most recent being on 1 August 2000.

The "consolidated" text of the Act, incorporating the various amendments, including those made by the Act of 1 August 2000, was published in the supplement to issue no. 175 (October 2000) of the Légipresse review (Victoires Éditions, Paris).

L'ordonnance n° 86-1243 du 1er décembre 1986
Order no. 86-1243 of 1 December 1986
http://www.mhr-viandes.com/fr/docu/docu/d0000049.htm

2. Case Law (in French)

The decisions of the *Conseil constitutionnel* (the Constitutional Council) and a selection of case law may be found in Derieux, E., *Droit de la communication. Jurisprudence. Recueil de textes*, Victoires Éditions, 4th ed., 2000, 350 pp.

For the decision prior to the promulgation of the Act of 1 August 2000, see Constitutional Council, Decision no. 2000- 433 DC of 27 July 2000, *Légipresse*, no. 175 IV 93-104, note by E. Derieux.
- *Arrêt de la cour d'appel* (Decision of the Court of Cassation) of 30 May 2000, in the Lamy business law review, September 2000, no. 30.
- *Arrêt de la Cour de cassation (*Decision of the Court of Appeal) of Paris of 15 June 1999, Légipresse, July/August 1999, III 94.
- Decision of the Court of Appeal of Versailles, Dalloz 1995, p.539.

3. Regulatory Authority

Conseil supérieur de l'audiovisuel (*CSA*)
Tour Mirabeau
39-43, quai André Citroën
75015 PARIS
(France)
Tel.: +33 (0)1 40 58 37 09
www.csa.fr

4. Bibliography (in French)

Biolay, J.-J., *Droit de la communication audiovisuelle*, Delmas.

Biolay, J.-J., *Aspects de la concurrence en matière audiovisuelle*, *Juris-Classeur Concurrence et consommation.*

Charbit, N., *Le numérique en concurrence* in *Gazette du Palais*, 15 May 1998.

Daguerre, A., *Les télévisions de proximité en débat*, Légipresse no. 133 II 90.

Debbasch, Ch., dir., *Droit de la concurrence et concentration des médias*, *Droit des médias*, Dalloz.

Debbasch., Ch. and Gueydan, Cl., dir., *La régulation de la liberté de communication audiovisuelle*, Economica.

Debbasch, Ch., *Droit de l'audiovisuel*, 4th edition, Précis Dalloz.

Debbasch, Ch., dir., *Traité de droit des médias*, Dalloz.

Derieux, E., *Droit de la communication* , 3rd edition, L.G.D.J.

Derieux, E., *Droit de la communication. Législation. Recueil de textes*, Victoires Éditions, 4th edition, 1999.

Derieux, E., *Droit de la communication. Jurisprudence. Recueil de textes*, Victoires Éditions, 4th edition, 2000.

Derieux, E., *Droit de la communication. Droit européen et international. Recueil de textes*, Victoires Éditions, 2000.

Derieux, E., *Les principes du droit de la communication dans la jurisprudence du Constitutional Council*, Légipresse no. 141 II 49-56.

Derieux, E., *Le dispositif anticoncentration dans la presse quotidienne. La pieuvre papivore et le tigre de papier*, Légipresse no. 171 II 58-61.

Les 10 principales avancées de la loi sur l'audiovisuel, http://www.culture.gouv.fr

Franceschini, L., *Les enjeux juridiques de la television numérique hertzienne terrestre*, Légipresse no. 165 II 119.

Gavalda, Ch., dir., *Droit de l'audiovisuel*, 3rd edition, Lamy.

Franceschini, L., *La Régulation de l'audiovisuel en France*, PUF.

Franceschini, L., *Loi du 1er août 2000 : un nouvel élan pour le service public*, Légipresse no. 175 II 101-105.

Gavalda, Ch. and Sirinelli, P., dir., *Droit des médias et de la communication*, Lamy

Hadas-Lebel, R., *La télévision numérique de terre: propositions pour une stratégie de développement*,

http://www.culture.gouv.fr

Lettre du ministre délégué aux finances et au commerce extérieur en date du 20 février 1997 au PDG de la Société CANAL+, relative à une concentration dans le secteur de la télévision à péage, Légipresse no. 146 IV 106.

Jouandet, Th-P., *Le dispositif anticoncentration*, *Pratique professionnelle de l'audiovisuel*, pp. 107-123, Victoires Éditions.

Rony, H., *La nouvelle loi du 1er février 1994 sur la communication audiovisuelle*, Légipresse no. 109 II 13-24.

Salzmann, J., *Le droit des concentrations,* GLN-Joly.

Tramoni, J.-J., *Le contentieux administratif de la communication audiovisuelle*, LGDJ.

EUROPEAN UNION

EU Involvement in National Television Ownership and Control Policies and Practices

Ad van Loon[1]

Ad van Loon is the Co-ordinator of International Research at the Institute for Information Law of the University of Amsterdam, Manager for Legal and Regulatory Affairs at VECAI (the industry association of cable operators in the Netherlands) and adjunct Professor of Law at New York Law School.

Introduction

Fifteen Europeen States established amongst them a union: the European Union (EU), which other European States will join soon. Within the framework of the European Union, three European Communities operate through common organs vested with supranational powers. As a consequence, the States which form the European Union (hereinafter: "Member States") are subject to a body of European law, whose implementation is ensured by the Court of Justice of the European Communities (ECJ). Within the framework of the European Community (EC, one of the three communities referred to above), the Member States formulated as one of their objectives the establishment among themselves of an internal market characterised by the abolition of obstacles to the free movement of goods, persons, services and capital. European law (hereinafter: EC law) plays a role whenever national rules or policies provide obstacles to the realisation of these rights of freedom of movement – that is, in cases where they (may) hamper the establishment or functioning of the internal market of the EU.

National rules on television ownership and control (including ownership and control over television broadcasting infrastructures such as transmission systems and cable systems) may directly or indirectly create such obstacles. Already the mere fact that transnational market players in Europe have to obey different rules of different Member States may be seen as hampering the freedoms mentioned above and therefore trigger EC involvement in national television ownership and control policies. The relationship between national and EC competences will be explained in detail below. After having described the current involvement of the EU in television ownership and control policies and practices, an indication will be given of how this existing landscape is likely to change in the near future, due to technological and economic developments. This part will be based on the regulatory proposals launched recently by the European Commission within the framework of its "Communications Review" strategy.

Legal (companies, undertakings) or natural persons (individuals) involved in practices leading to concentration of television ownership or control are subject to EU involvement whenever the EC competition rules apply to them. It will be explained below when this is the case.

A. EU Involvement in National Television Ownership and Control Policies

1. National *versus* European Ownership and Control Thresholds

In 1989, the Council of the European Communities adopted the "Regulation on the Control of Concentrations between Undertakings",[2] "to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community, and to be the only instrument applicable to such concentrations".[3]

Under this Regulation, Member States may no longer apply their national competition rules (if they have such rules) to concentrations with a Community dimension, unless the Regulation so provides.

Thus, the powers of national authorities to regulate are limited to cases where, because the European Commission does not intervene, effective competition within the territory of a Member State is likely to be significantly impeded and where the competition interests of that Member State cannot be sufficiently protected otherwise.

---

1) Certain parts of this chapter have already been published in:
Marsden, Christopher T. (ed.), *Regulating the Global Information Society* (series: Warwick Studies in Globalisation); London/New York 2000: Routledge (series: Politics).
Van Loon, Ad; "Onderzoek: Vergelijkende analyse "Cross Media Ownership"-beleid en regelgeving"; Report commissioned by the Ad-hoc Committee on Media Concentration established by the Government of the Netherlands; Den Haag: April 1999.

2) Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJEC* 30 December 1989 No L 395: 1-12;
Corrigendum to Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJEC* 21 September 1990 No L 257: 13;
Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, *OJEC* 9 July 1997 No L 180: 1-6.

3) Recital No 7 of the Regulation on the control of concentrations between undertakings of 21 December 1989 *OJEC* 30 December 1989 No L 395: 1.

Furthermore, the Regulation stipulates that in cases where the European Commission does not or cannot intervene, Member States may take appropriate measures to protect *legitimate* interests other than those covered by the Regulation, provided that such measures are compatible with the general principles and other provisions of Community law. "Plurality of the media" is explicitly mentioned as such a legitimate interest. So far, however, there has been only one concentration control decision in which the European Commission made reference to this article. The European Commission had recognised that the proposed transaction involved issues such as the accurate presentation of news and free expression of opinion and that, therefore, the national authorities could still review the transaction with a view to protecting the legitimate interest of media plurality.

However, the European Commission warned that in doing so, the national authorities should refer to the annex to the Concentration Control Regulation,[4] which stipulates in regard to Article 21(3) that,

> "In application of the principle of necessity or efficacy and the rule of proportionality, measures which may be taken by Member States must satisfy the criterion of appropriateness for the objective and must be limited to the minimum level of action necessary to ensure protection of the legitimate interest in question. The Member States must therefore choose, where alternatives exist, the measure that is objectively the least restrictive to achieve the end pursued."

The European Commission insisted that it should be kept informed of any conditions which the national authorities might deem appropriate to attach to the transaction (marginal control).

2. Past Activities regarding a Member State's Media Specific Anti-Concentration Policies

In its 1992 Green Paper on "Pluralism and Media Concentration in the Internal Market. An assessment of the need for Community action"[5] and the follow-up paper,[6] the European Commission analysed the necessity and the possibilities for a common European approach with regard to media concentration developments. On 26 September 1995, Commissioner Mario Monti, who was at that time charged with internal market issues, announced that it was his intention to submit to his collegues in the European Commission, a draft proposal for a Directive on the co-ordination of national rules concerning media ownership relations. He gave the following reasons for his ititiative:[7]

- given the fast rise in transfrontier media activities, the risk of circumvention of national laws was about to increase. This would render national laws ineffective and might thus provoke serious conflicts between national authorities;
- the need to create a level playing field so that media undertakings that seek to develop themselves and to invest across frontiers, notably with a view to the development of new Information Society services, would be able to benefit from the opportunities offered by an area without frontiers and could promote the growth and the competitiveness of the European media industry;
- the fact that different Member States had launched projects to modernise their national rules on media ownership and media activities and the fear that this might result in a refragmentation of the internal market.

The thresholds envisaged but never actually proposed, were:

- in the case of "monomedia ownership" relations (*i.e.*, either radio or television outlets): a maximum share in audience reach (*i.e.*, viewers or listeners) of 30 percent;
- in the case of "cross media ownership" relations the threshold would have been calculated on the basis of the average share of audience reach spread over the types of media involved. The threshold would have been set at ten percent of this average share. Therefore, if media owners would have reached, for example, with their newspapers ten percent of the relevant readers market, with their radio broadcasting services five percent of the relevant listeners market and with their television broadcasting services six percent of the relevant viewers market, their combined share in audience reach would have been 10 + 5 + 6 = 21 percent. This result would have been divided by the number of media types controlled by these owners: *i.e.*, three in this case, the result of which would have been seven percent (twenty-one divided by three). This result would have been below the fixed threshold of ten percent and would therefore have been unproblematic from the point of view of concentration control.

---

4) This annex is quoted by the European Commission in its concentration control decision in case No IV/M.423 - Newspaper Publishing, 13 March 1994.

5) "Pluralism and Media Concentration in the Internal Market. An assessment of the need for Community action", Commission Green Paper, 23 December 1992, COM(92)480 final.

6) "Follow-up to the consultation process relating to the Green Paper on 'Pluralism and Media Concentration in the Internal Market - An assessment of the need for Community action'", 5 October 1994, COM(94) 353 final.

7) *See*: "IRIS - Legal Observations of the European Audiovisual Observatory", 1995-9: 12.

8) Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJEC* 5 August 1998 No L 217: 18-26; *see also*:
Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, *OJEC* 21 July 1998 No L 204: 37-48.

Eventually, Commissioner Monti's ideas turned out not to be feasible from a political point of view. Despite the fact that the European Commission considered his proposal on a number of occasions, it was in the end decided not to turn it into a formal proposal for a Directive.

After that, it became quiet for a while. Both the Member States and the European Commission had realised that technological developments were rapidly changing the traditional media environment. Digitization of telecommunications and broadcasting infrastructures triggered the development of new interactive services which created new business opportunities along with new business models. As a consequence, different sectors of the industry which were traditionally separate, such as the telecommunications, broadcasting, content and computer industries, started to develop common interests which led to concentration operations of undertakings representing these different industries.

Thus, it became necessary for the European Commission and the Member States to develop a wider view on the political and societal consequences of these developments and to reconsider existing media specific anti-concentration policies and other types of media policies (content-related policies to promote and safeguard diversity and pluralism in the media; access rules; etc.).

The European Commission feared that the actions that Member States were taking to regulate the new environment would lead to a refragmentation of Europe's internal market. Therefore, it saw a need for a co-ordinated approach at EC level when questions relating to activities with such highly transnational connotations as those of the new services were dealt with.[8] It considered it, however, to be premature to co-ordinate national rules and regulations by means of extensive or exhaustive harmonisation at EC level of the substantive law, given that, at this stage, not enough was known about the form and the nature that the new services would take, that there was at national level no specific regulatory activity in this field, and that the need for, and content of, such harmonisation in the light of the internal market could not be defined.[9]

As an alternative, a procedure was developed for the provision of information, the holding of consultations, and administrative co-operation amongst Member States and between the Member States and the European Commission in respect of new draft rules and regulations affecting the new environment. The objective was,

> "to ensure real and effective protection of the general-interest objectives involved in the development of the Information Society."[10]

The notion of "Information Society services" was developed, and was defined as:

> "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."[11]

The practical consequence of the exercise is that whenever Member States want to regulate services rendered by means of two or more computers which are interconnected (such as interactive television services; Internet access; etc.), they have to notify their regulatory proposals to the Commission before they are definitively adopted. The proposals will then be reviewed with the other Member States to ensure that they are compatible with the free movement of services and with the principle that there should be a one-stop regulatory shop whereby, once a service offered in a Member State obeys the laws of that Member State, it can benefit from the legal certainty of circulating freely throughout the European Union irrespective of the laws of the other Member States. According to the case law of the Court of Justice of the EC, if a Member State failed to notify such a national rule, the rule would not be binding on economic operators.[12]

3. Current Activities regarding a Member State's Media-Specific Anti-Concentration Policies

At the end of 1999, the European Commission believed the time was ripe to go one step beyond the transparency and consultation mechanism which was highlighted in the previous paragraph. It presented its views on a substantial review of communications policies.[13]

It is the European Commission's intention to create a single legal framework for all communications infrastructures and services. In regard to national anti-concentration policies relating to communications infrastructures and services, the European Commission wants to acquire the competence to define relevant product markets while the Member States would remain competent to define the relevant geographical markets.[14]

---

9) Recital 11 of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJEC* 5 August 1998 No L 217: 18-26

10) Recital 9 of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJEC* 5 August 1998 No L 217: 18-26.

11) Article 1, para. 2 (a) of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJEC* 5 August 1998 No L 217: 18-26.

12) Case C-194/94. 30 April 1996. *CIA Security International SA v Signalson SA and Securitel SPRL*. [1996] ECR: I-2201.

13) "Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review", Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (1999) 539.

14) Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 12 July 2000, COM(2000)393.

The Member States would be obliged to assess whether there are any undertakings with significant market power within the product markets identified by the European Commission. The European Commission would publish guidelines for such an assessment.

In cases where a Member State would come to the conclusion that there is an undertaking with significant market power in a product market identified by the European Commission, it would have the power to impose certain obligations on this undertaking (such as, for example, an obligation to provide access to independent third parties). The obligations which could be imposed would, however, also be fixed by the European Commission. A list of possible measures from which a Member State might choose would be published.

At the moment it is still unclear which criteria will be used to assess whether an undertaking has significant market power. According to the European Commission, an undertaking may be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

In addition, according to the European Commission, where an undertaking has significant market power in a specific market, it may also be deemed to have significant market power in a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

Furthermore, in one of the recitals of the Directive, the European Commission indicated that,

> "ex ante regulatory obligations designed to ensure effective competition are justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for the construction of network infrastructure, or which are vertically-integrated entities owning or operating network infrastructure for delivery of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access."[15]

It remains to be seen what the final outcome of the discussions in the EU Council and in the European Parliament will be. Judging from the ongoing discussions it seems unlikely that Member States will be prepared to allow the European Commission to fix relevant product markets. Also, the European Commission's definition of significant market power is the subject of a fierce debate. Finally, it remains to be seen what parameters (if any) will be given to national regulatory authorities on the basis of which they can assess whether or not there is effective competition in a given market and whether or not it should be assumed that market power held in one market is leveraged into another market.

4. EU Involvement in National Frequency Distribution Policies for Television Broadcasting Purposes

Traditionally, European States are free to assign and license radio spectrum. Technological and regulatory changes have led to an increased demand for radio spectrum use in Europe; for example, as a consequence of the introduction of private broadcasting, of mobile phone systems, and of wireless multimedia services. Radio spectrum has rapidly become a valuable economic resource and the individual States, which traditionally own and control this scarce resource, are confronted with new challenges, such as how to divide this scarce resource so as to provide the maximum economic and social benefit for consumers and market players. As the European Commission indicates,[16] this requires that States choose between commercial and non-commercial users on the one hand, and between different applicants wishing to provide the same type of services, on the other hand. For this, they have introduced new mechanisms, such as auctions (*i.e.*, valuation by the highest bidder) and administrative pricing (*i.e.*, valuation by government agencies).

When deciding how to assign scarce resources like radio spectrum among interested parties, European States must respect the general requirements of EC law. This means that they shall not discriminate between their own nationals and nationals of other EU Member States and that they shall not distort competition by giving undue privileged treatment to public or publicly-financed organisations that might compete with private market players. Transparency, non-discrimination and equal access are keywords in this matter.

5. EU Involvement in National Cable Distribution Policies

Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services[17] obliges Member States to abolish all restrictions on the supply of transmission capacity by cable TV networks, and to allow the use of cable networks for the provision of telecommu-

15) Recital 20 of Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 12 July 2000, COM(2000)393.

16) "Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review", Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (1999) 539 final.

17) *OJEC* 26 October 1995 No L 256: 49 -54.

nications services other than voice telephony. In addition, Member States are to authorize the interconnection of cable TV networks with the public telecommunications network for this purpose, in particular interconnection with leased lines, and they are to ensure that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished. Not surprisingly, these measures have triggered concentration operations between telecommunications operators and cable operators.

To mitigate the consequences of the liberalisation process, the European Commission required from Member States that they would take measures to monitor possible improper behaviour by at least imposing a clear separation of financial records between their broadcasting tasks and their telecommunications activities.

In addition, the European Commission determined that in order to allow for the monitoring of any improper cross-subsidies between the broadcasting tasks of cable TV operators which are provided under exclusive rights in a given franchise area and their business as providers of capacity for telecommunications services, Member States should guarantee transparency as regards the use of resources from one activity which could be used to extend the dominant position to the other market. However, as the European Commission stipulated explicitly,

> "Given the complexity of the financial records of network providers, it is extremely difficult to detect cross-subsidies between the reserved activities and the services provided under competitive conditions. It is thus necessary to require those cable TV operators to keep separate financial records, and in particular to identify separately costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions once they achieve a significant turnover in telecommunications activities in the licensed area."[18]

The operators concerned were also required to use an appropriate cost accounting system which could be verified by accounting experts and which would ensure the production of recorded figures.

According to Recital 20 of the Directive, at the time of the adoption of the Directive the European Commission already had doubts as to whether an obligation to separate financial records would be sufficient to avoid improper practices. The European Commission announced that it would take further measures if necessary.

Consequently, in July 1999, the Commission adopted a Directive aimed at ensuring that telecommunications networks and cable TV networks owned by a single operator would be separate legal entities.[19]

As regards the cable distribution of television programme services intended for the general public, and the content of such programmes, Recital No 17 of Commission Directive 95/51/EC mentioned above, stipulates that this will continue to be subject to specific rules adopted by Member States.

6. EU Involvement in National Restrictions on Foreign Ownership

A number of Member States of the European Union try to protect the national identity of the media in their respective countries by restricting the share of capital held by foreign natural or legal persons in the Member States' media undertakings.

One should distinguish between, on the one hand, holdings in the capital of domestic undertakings by natural or legal persons from other EU Member States and, on the other hand, by natural or legal persons from states outside the EU.

Among themselves, the Member States adopted the principle of free movement of capital which is laid down in the Treaty establishing the European Community (the EC Treaty). Thus, any restrictions on holdings in the capital of domestic undertakings only apply to natural or legal persons from states outside the EU. At the same time, it is relatively easy for those undertakings to make use of the freedom of establishment within the EU. For this, it is sufficient to establish a corporation under the law of the EU Member State with the most liberal regime in regard to the establishment of undertakings from outside the EU. Once established in an EU Member State, the activities of that corporation do not necessarily have to take place in the country where the corporation now has its seat, has its main office, or its executive board. It is possible to establish immediately a subsidiary, agency or branch in another Member State, where all activities will be concentrated.[20] Even if the presence of the newly established corporation, in that other EU Member State, does not have the form of an agency, branch or subsidiary, it suffices if there is a simple office controlled either by the corporation's own staff or by one or more individuals authorized to represent the corporation on a permanent basis; there should be some kind of economic activity for an unlimited period of time, from a permanent base in a Member State other than the State where the corporation is established.[21]

---

18) Recital 19 of Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, *OJEC* 26 October 1995, No L 256: 49 -54.

19) Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, *OJ* 10 July 1999 No L 175: 39-42.

20) Case 79/85 *Segers* [1986] ECR 2382-2390.

21) Case 221/89, *Factortame*, [1991] ECR 3956-3971.

B. EU Involvement in Concentration of Television Ownership and Control Practices

When evaluating practices that come under the Regulation's definition of concentration control, the European Commission procedes as follows: firstly, it defines the relevant product and geographical markets in question; then it considers whether or not a dominant economic position would be established or strengthened in the markets identified, as a result of the notified concentration operation; finally, if that is the case, the European Commission assesses the consequences for the existing competition relations and decides whether or not it can accept those consequences. The Commission may propose amendments to the notified operation in order to mitigate the identified consequences.

1. Defining Relevant Markets

Based on an analysis of past concentration control decisions by the European Commission, certain conclusions can be drawn as to how the European Commission tends to define markets relating to television broadcasting.

1.1. Markets for Television Broadcasting Services

In the past, the European Commission concluded that the geographic reference market for TV broadcasting is primarily influenced and determined by the existence of language and cultural barriers, delimiting areas within which language and culture are relatively homogeneous.[22] Although technical advances have contributed significantly to a gradual process of internationalisation, television broadcasting markets remain mainly national or regional (language-based).[23] This finding includes the pay-per-view and pay-TV markets.[24] For the reasons mentioned above, TV broadcasting is currently limited to national markets.[25] Hence the main question is whether or not a dominant economic position is created or strengthened in the national market for (a particular form of) television broadcasting.

The following elements shall be taken into account to determine the scope of a particular television broadcasting market, in particular to determine whether the market for pay-TV should be regarded as distinct from the market for free-access channels.[26]

- Pay-TV is primarily financed by subscription fees, which means that there is a trade relationship between the programme supplier and the viewer as subscriber, whereas free-access television is financed by public authorities and/or by advertising revenue. In the case of advertising-financed television there is a trade relationship only between the programme supplier and the advertising industry.[27]
- Pay-TV offers a more specialised programme-mix in order to meet the requirements of a target audience (for example, live coverage of sports events; first television screenings of recent films or highly-reputed works, etc.).
- The fact that the reception of pay-TV services requires a decoder opens up the possibility for the supplier to apply with regard to identical programmes different price scales for different States.[28]

Considering these elements, the European Commission distinguishes the market for pay-TV services from the market for free-access TV services.[29]

The distinction between the two product markets could, however, according to the Commission, become blurred in the case of pay-TV programmes that are financed from a mixture of sources, *i.e.*, subscription fees and advertising.[30] The distinction may also become blurred with the emergence of digital packages combining free-access and pay-TV channels.[31] As soon as this happens, it may no longer be possible to distinguish more than one relevant product market for television broadcasting services.

---

22) Case No IV/M.110 - ABC/Générale des eaux/Canal+/W.H. Smith TV, 10 September 1991;
Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994.

23) Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994;
Case No IV/M.489 - Bertelsmann/News International/Vox, 6 September 1994;
Case No IV/M.1091 - Cableuropa/Spainco/CTC, 28 January 1998.

24) Case No IV/M.1219 - Seagram/Polygram, 21 September 1998.

25) Case No IV/M.655 - Canal+/UFA/MDO, 13 November 1995.

26) Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994;
Case No IV/M.489 - Bertelsmann/News International/Vox, 6 September 1994;
Case No IV/M.584 - Kirch/Richemont/Multichoice/Telepiù, 5 May 1995;
Case No IV/M.853 - Bell Cable Media/Cable & Wireless/Videotron, 11 December 1996;
Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

27) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

28) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

29) Case No IV/M.110 - ABC/Générale des eaux/Canal+/W.H. Smith TV, 10 September 1991;
Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.853 - Bell Cable Media/Cable & Wireless/Videotron, 11 December 1996;
Case No IV/M.1091 - Cableuropa/Spainco/CTC, 28 January 1998;
Asunto nõ IV/M.1022 - Cable i televisiò de Catalunya (CTC), 28 January 1998.

30) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

31) Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

1.2. Access Risks

As explained in paragraphs A.2. and A.3. above, due to new technologies which lead to new economic settings and to new business models, there has been a gradual change in the media concentration discussion from ownership and control policies to access regulation.

At present, any new pay-TV service provider entering the market is obliged to use the technical infrastructure and related services of the pay-TV supplier that is already established on the market. These services include systems for user guidance to help the viewer locate individual programmes. The need for user guidance results from the increase in the number of programme services offered, due to increased transmission capacity resulting from the digitization of the transmission process. Established operators are in a position to influence the location of their competitors' programmes. The control of user guidance systems enables the operator to place programmes of competing pay-TV suppliers on positions in the programme menu (the Electronic Programme Guide – EPG) that make them less attractive.[32]

Another relevant factor, which makes it difficult for a new pay-TV service provider to enter the market, is that the establishment of a subscriber management system requires an extensive customer service organisation in the country where subscribers are located.[33] A separate market for subscriber management may even develop in parallel to the existence of several access control solutions. In addition, a separate market for programme packaging (*i.e.*, the putting together of packages of programmes ("bouquets") of different programme suppliers[34] leading to "smart card" competition.

Established operators may also influence the marketing of competing programmes by the way they place such programmes on the smart cards that they issue. The operator of conditional access places on the smart cards the pay-TV programmes and programme packages offered, which are then released by the authorisation signals transmitted with the television signal. It is to be expected that the average pay-TV subscriber will not wish to have to use a variety of different smart cards. The operator who owns the technical infrastructure can therefore impede any competitors by not placing them on the first smart card with the more attractive programmes, but instead on additional new smart cards.[35]

The first operator in a new market could acquire substantial informational advantages. This applies with respect to plans for the provision of new programme services and particularly to the structure of the customers' pool and the viewing behaviour of all subscribers, due to the fact that the subscriber management system is handled by the first operator.[36] First operators do not even have to acquire access to data on individual customers. It is sufficient for them to obtain access to non-personal data that give, for example, information on the age profile of the viewers of the relevant programmes. Moreover, in the case of interactive pay-TV services such as pay-per-view, it is possible to ascertain from non-individualized data which specific group prefers which specific programme contents and to what extent. This information confers substantial competitive advantages because it makes it much easier to develop programmes or programme packages oriented towards particular target-groups.[37]

As explained, in new markets that are just developing, the first supplier of services will automatically acquire a monopoly position. However, if the assumption for markets within the EU is that no market dominance exists, this presupposes that the future market in question remains open to future competition and that the monopoly is consequently only temporary.[38]

Ownership of distribution infrastructure, such as transmission and cable systems, poses another threat to market access for television broadcasting services. The European Commission saw such a threat where the holder of the monopoly for the fixed telephone network was at the same time the dominant owner of the broadband cable network, because he would control the two main means of transmission that could provide the return channel required for interactive digital television services.[39]

---

32) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.993 - Bertelsmann/Kirch/Premiere, 27 May 1998, *OJEC* 27 February 1999 No L 53: 1-30;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45.

33) Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994;
Case No IV/M.584 - Kirch/Richemont/Multichoice/Telepiù, 5 May 1995.

34) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40.

35) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40;
Case No IV/M.993 - Bertelsmann/Kirch/Premiere, 27 May 1998, *OJEC* 27 February 1999 No L 53: 1-30;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45.

36) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40.

37) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

38) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40;
Case No IV/M.993 - Bertelsmann/Kirch/Premiere, 27 May 1998, *OJEC* 27 February 1999 No L 53: 1-30;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45.

39) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45;
Case No IV/M.856 – British Telecom/MCI (II), 14 May 1997. *OJEC* 8 December 1997 No L 336: 1-15.

1.3. The Market for Infrastructures for the Distribution of Television Programme Services

Another distinction has to be drawn between the markets for, on the one hand, broadcasting as a service and, on the other hand, for providing broadcasting signals to subscribers. For example, a market exists where would-be investors enter into competition to acquire franchises, to construct networks and consolidate their position as cable operators, whereas the business of delivering services on that capacity, or of allowing others to do so, can be regarded separately.[40]

Reception via cable, satellite and terrestrial frequencies are not necessarily regarded by the consumer as interchangeable (substitutable).

Reception via cable, satellite and terrestrial frequencies are also not necessarily regarded as interchangeable (substitutable) from the suppliers' point of view, since for a programme supplier broadcasting solely via satellite (direct-to-home) the costs per household reached and per year are significantly higher than similar costs for a programme supplier broadcasting via satellite and cable. The costs for the latter are comparable to the costs of a broadcaster broadcasting only via cable.[41]

Therefore, the European Commission has identified a separate market for cable television networks[42] and a separate market for the distribution of TV signals via satellite.[43]

1.4. The Market for TV Productions

Independent TV production constitutes a relevant product market that is separate from the market for the in-house productions of broadcasters. The in-house production of broadcasters is essentially used for their own purposes. Although these productions are sometimes offered on the international market, they are normally not offered to other broadcasters within the same market. There is, therefore, no direct competition between in-house production and the programmes of independent producers that are offered on the programmes market. Furthermore, it appears that, in overall terms, the in-house production of public broadcasters is largely geared to certain production categories such as: news, other information, cultural and youth programmes, documentaries, sports programmes and some types of entertainment. In these segments, public broadcasters do not have to rely on independent producers' programmes.[44]

The market for independent production is characterised by the trading relationship between broadcasters, which need programmes to broadcast on their channels, and independent producers, which supply these programmes.[45]

Because the value per hour of, on the one hand, inexpensive documentaries and, on the other hand, expensive drama and entertainment programmes varies significantly, the market share in the market for independent productions must be calculated on the basis of value rather than on the number of hours produced. Accordingly, the European Commission considers value-based calculation to be the only appropriate method of calculation of the market shares.[46]

Although independent production constitutes a relevant product market, there may still be separate geographic markets for independent productions in the same language. In the case of RTL/Veronica/Endemol (20 September 1995), for example, the European Commission came to the conclusion that the Flemish Community of Belgium was *de facto* excluded from the relevant market for Dutch independent productions. Cultural differences were considered to be as such that virtually no Dutch productions were bought in Belgium and no Belgian productions were bought in the Netherlands.[47]

1.5. The TV Advertising Market

The European Commission distinguishes TV advertising from advertising through other media, in particular through the print media. The consumers targeted through the various types of advertising as well as the techniques employed (*i.e.*, short films for TV advertising, graphics for magazines) and the prices in relation to the number of consumers targeted differ considerably. Although there may be fluctuations between the different types of media, TV advertising and advertising in print media are for the European Commission, distinct markets.[48] In addition, the Commission distinguishes markets for radio advertising[49] and for advertising on the Internet.[50]

---

40) Case No IV/M.853 - Bell Cable Media/Cable & Wireless/Videotron, 11 December 1996.

41) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21.

42) In the U.S. referred to as "cable television systems".

43) Case No IV/M.469 - MSG Media Service, 9 November 1994, *OJEC* 31 December 1994 No L 364: 1-21;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998, *OJEC* 27 February 1999 No L 53: 31-45;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40.

44) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

45) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

46) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

47) *See also*: Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

48) Case No IV/M.176 - Sunrise, 13 January 1992;
Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52;
Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

49) Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

50) Fall IV/M.973 - Bertelsmann-Burda-HOS Lifeline, 15 June 1997.

Moreover, according to the European Commission, TV advertising markets remain mainly national or regional due to linguistic, cultural and regulatory barriers,[51] even if technical advances and the increasing importance of transmission by satellite may lead to a gradual internationalisation of TV markets.[52]

Even in different national markets, in which advertising is broadcast in the same language, radically different conditions of competition may exist with respect to competition for advertising revenue.

2. The Appraisal by the European Commission of Concentration Operations in the Identified Relevant Markets

After having defined the relevant product and geographical markets, the Commission appraises the concentration operation by looking at the (possible) consequences for competition in the relevant market or relevant markets identified.

In its appraisal of a concentration operation, the Commission will assess whether or not a dominant economic position is established or strengthened, and if so, to what extent the operation is necessary to reach the intended objectives (for example, in the Nordic Satellite Distribution case the Commission was of the opinion that the vertically integrated nature of the proposed operation was not necessary to create an integrated infrastructure for the distribution of satellite TV and other related services).[53]

2.1. The Appraisal by the European Commission of Concentration Operations In General

According to the European Commission, the appraisal of the proposed concentration has to include future developments, especially the transformation of markets through technical progress[54], but the question of whether any possible further concentration should be expected in the future is irrelevant. Any further concentration will be decided on its own merits once it becomes subject to concentration control.[55] It must also be taken into account whether competitors in the relevant market(s) identified will be able to adjust themselves to the new competition relations which will result from the notified concentration operation.

If a concentration operation does not significantly strengthen an existing dominant position, the presence of other major participants on the reference market(s) does not pose a problem.[56] Where there is effective competition between the players on this market that will not change as a result of the concentration operation (see the case of Bertelsmann/CLT, in which the Commission decided that the concentration operation could go ahead despite the fact that the two major players on the advertising market – the newly-created CLT/UFA on the one hand and Kirch on the other hand – would together reach a market share of 88 percent).

If there are no indications that a proposed acquisition will fundamentally change conditions of competition in the reference market(s), and the increase of concentration caused by the particular transaction does not, in itself, imply a perceptible lessening of competition in the market, then there is no problem under the Concentration Regulation.[57]

The European Commission also accepts concentration operations that are the only way of obtaining access to a market (given the structure of the market, legal requirements and/or the presence of strong competitors).[58]

Concentration operations, whose main impact is outside the market of the European Union and the European Economic Area and which do not significantly impede competition within the common market, are of no concern for the European Commission's appraisal.[59]

Low viewer ratings cannot be regarded as potentially giving market power to broadcasters.[60]

It constitutes a problem if a statutory monopoly is involved in a concentration operation. For example, this is the case if an undertaking by law holds the exclusive right to provide the infrastructure for the

---

51) Case No IV/M.655 - Canal+/UFA/MDO, 13 November 1995;
Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52;
Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.
Case No IV/M.878 - RTL 7, 14 February 1997.
Case No IV/M.810 - n-tv, 16 September 1996.

52) Case No IV/M.566 - CLT/Disney/Super RTL, 17 May 1995.

53) Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40.

54) Case No IV/M.037 - Matsushita/MCA, 10 January 1991.

55) Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

56) Case No IV/M.202 - Thorn EMI/Virgin Music, 27 April 1992;
Case No IV/M.779 - Bertelsmann/CLT, 7 October 1996.

57) Case No IV/M.202 - Thorn EMI/Virgin Music, 27 April 1992.

58) Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994;
Asunto nõ IV/M.1022 - Cable i televisiò de Catalunya (CTC), 28 January 1998
Asunto nõ IV/M.1148 - STET/GET/Madrid, 28 May 998;
Case No IV/M.1251 - Particitel International/Cableuropa, 27 August 1998;
Case No JV.5 - Cégétel/Canal+/America Online/Bertelsmann, 4 August 1998, *OJEC* 28 January 2000 No. C 24: 4.

59) Case No IV/M.826 - ESPN/Star, 11 November 1996.

60) Case No IV/M.810 - n-tv, 16 September 1996.

transmission of radio and TV signals as well as other telecommunications services across municipal borders.[61] In such a situation, competitors of the undertaking(s) that establish a joint venture with the statutory monopoly are denied the economies of scale, from which this joint venture will benefit.

A situation of illegal concentration may arise if the establishment of a media concentration leads to an important change in the negotiating position of a market participant (like the cable operators in the case of Nordic Satellite Distribution[62] or of NC/Canal+/CDPQ/Bank America[63]). In the NC/Canal+/CDPQ/Bank America case, the establishment of a joint venture between Canal+, CDPQ and Bank America was notified to the Commission. Canal+ together with PRISA, had a controlling interest in the Spanish Sogecable, a very strong position in the market for pay-TV services and was an important content provider. Bank America and CDPQ were also present in the Spanish market for pay-TV services through their joint venture Cableuropa. The latter controlled 14 Spanish licenses for pay-TV and telecommunications services via cable. This concentration operation was considered as bringing about an important change in the negotiating position of the cable operators. The issue was resolved by Canal+ agreeing with the European Commission to negotiate with the Spanish cable operators about the granting of distribution rights for programme services and categories of programmes for which Canal+ had obtained the rights. The negotiations were to be held on a fair and non-discriminatory basis that would meet the requirements of EC law and the Spanish national competition rules.

2.2. The Appraisal by the European Commission of Concentration Operations in the Market for Access to Distribution Infrastructure

If a concentration operation allows an undertaking to control access to distribution systems (e.g. cable or conditional access systems), competitors depend on this undertaking for the distribution of their services. Therefore, the European Commission seeks to prevent "gateway" monopolies,[64] even if they offer an open encryption system.[65]

In the case of RTL/Veronica/Endemol (20 September 1995),[66] the European Commission criticised the dominant position of cable operators, which had been strengthened by Dutch media law. The requirement under Dutch law at the time, that a new private channel had to have access to cable networks covering at least 30 percent of households over at least five provinces had been a major hurdle for new private channels which were not yet known to the TV audience. When trying to meet this requirement and to attain a broad coverage of the TV audience in the Netherlands, the Scandinavian broadcasting company SBS had been faced with the strong negotiating position of the cable operators. By contrast, SBS's competitor Veronica had already obtained full access to all cable systems in the Netherlands as a result of the fact that it had already gained popularity amongst TV viewers in the Netherlands because it had been part of the public broadcasting system of the Netherlands.[67]

Even if the legislator would not have imposed a certain minimum coverage via the cable systems as a precondition for granting a license for a private commercial broadcasting service, it would still have been necessary for a broadcaster to ensure coverage of a significant amount of cable subscribers. The Netherlands had reserved the available terrestrial frequencies for the public broadcasters and there were relatively few households in the Netherlands receiving programme services via satellite, due to the broad coverage of the cable systems. Thus, cable operators would have had a strong negotiating position even without the legal requirement of a minimum coverage of cable subscribers.

In the view of the European Commission, the situation would be aggravated if cable operators were to establish and operate their own TV channels and to offer their own packages of TV channels which would lead to a further negotiating advantage for them.

---

61) Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40;
Case No IV/M.856 – British Telecom/MCI (II), 14 May 1997. *OJEC* 8 December 1997 NoL 336: 1-15.

62) Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40.

63) Case No IV/M.1327 - NC/Canal+/CDPQ/Bank America, 3 December 1998, *OJEC* 14 August 1999 No C 233 : 21.

64) Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March1996 No L 53: 20-40;
Case No IV/M.993 - Bertelsmann/Kirch/Premiere, 27 May 1998, *OJEC* 27 February 1999 No L 53: 1-30;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45;
Case No IV/M.856 – British Telecom/MCI (II), 14 May 1997. *OJEC* 8 December 1997 NoL 336: 1-15.

65) In an open encryption system, decoders are available from many sources and the consumer can, with the same decoder, receive TV channels in different open systems by using different smart cards. Any broadcaster can, for a small payment, acquire the right from the owner to use such an open system; in a closed encryption system, only broadcasters signing an agreement with the owner of the system are allowed to encrypt in this system. Such an agreement includes a right for a particular operator to administer the subscriber management system and, thus, prevents other operators from using the system. Households have to buy or rent additional decoders if they want to receive TV channels which are encrypted in other systems

66) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

67) Upon the introduction into Dutch media law of the possibility of licensing private commercial television services, the legislator offered the private law associations which together constituted the public broadcasting system in the Netherlands, the possibility to exit the public broadcasting system in exchange for an operating license for private commercial broadcasting. Veronica was the only association willing to take the risk of giving up its secure position in the public sector of the broadcasting system of the Netherlands.

2.3. The Appraisal by the European Commission of Vertical Concentration Operations

The European Commission, when judging media concentration operations, also took into account vertical integrations.[68] For example, in the case of Nordic Satellite Distribution the concentration operation would also have led to strong links between the company that was about to acquire a dominant position on the market for satellite TV transponder services suitable for Nordic viewers and an important broadcaster of Nordic TV channels. The latter was also a distributor of satellite TV channels to direct-to-home households. Moreover, through the links to the parent companies that were cable operators, Nordic Satellite Distribution would have been in a position to foreclose other satellite operators from leasing transponders to broadcasters from Nordic countries.

2.4. The Appraisal by the European Commission of Cross-Media Concentration Operations

In the case of RTL/Veronica/Endemol (20 September 1995),[69] the European Commission stated that a structural link between a TV broadcaster and print media dealing, *inter alia*, with TV-related features can be used to promote the TV programmes of the broadcasters. This may occur, despite the existence of statutes on editorial independence of the print media in question, since experience shows that ownership of print media tends to influence the general orientations of the media. Furthermore, there can be direct co-operation between broadcasters and print media owners that are linked to each other.

2.5. Ancillary Restraints

In certain circumstances, non-competition clauses in a concentration agreement may be considered as a restriction directly related and necessary to the implementation of the concentration (so-called "ancillary restraints").[70] If that is the case, the European Commission will accept those restrictions.

In the past, the European Commission has accepted that an agreement not to compete within a given territory in the fields of pay-TV channels, subscriber management systems for pay-TV and placement of satellite platforms for pay-TV broadcasting purposes may be a permissible restraint, which is ancillary to a concentration operation of pay-TV broadcasters. The European Commission considered that such restrictions in a concentration agreement between undertakings were related and necessary to the implementation of the concentration operation within the meaning of the Concentration Control Regulation and therefore decided to accept those.[71]

The European Commission found that a restriction in a production agreement concluded between the joint venture and a parent company which guarantees that the joint venture will purchase a certain minimum of the value of the programmes produced by the parent company, is not necessary for the implementation of the concentration operation and is therefore not acceptable.[72]

A license agreement which goes beyond the licensing of programme rights to a concentrative joint venture resulting from a concentration operation alone, cannot be regarded as directly related and necessary to the concentration.[73]

Copyright rules give copyright holders the exclusive right to grant or refuse the publication of their works that are protected by copyright law. If a concentration operation would imply a concentration of such exclusive rights, this could lead to the establishment or strengthening of a dominant economic position. For this reason, such exclusive rights are included in the European Commission's assessment within the framework of a concentration control procedure.

Even if there is no concentration operation, the ownership of or control over exclusive rights or an exclusive license to make use of certain programme material may, under certain circumstances, lead to an abuse of the dominant economic position that results from the exclusivity of the rights or the license. This issue will be dealt with in the next paragraph.

---

68) Case No IV/M.202 - Thorn EMI/Virgin Music, 27 April 1992;
Case No IV/M.489 - Bertelsmann/News International/Vox, 6 September 1994;
Case No IV/M.490 - Nordic Satellite Distribution, 19 July 1995, *OJEC* 2 March 1996 No L 53: 20-40;
Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52;
Affaire N IV/M.999 - CLT-UFA/Havas Intermédiation, 26 February 1998;
Case No IV/M.1219 - Seagram/Polygram, 21 September 1998;
Case No IV/M.993 - Bertelsmann/Kirch/Premiere, 27 May 1998, *OJEC* 27 February 1999 No L 53: 1-30;
Case No IV/M.1027 - Deutsche Telekom/Betaresearch, 27 May 1998,*OJEC* 27 February 1999 No L 53: 31-45;
Case No IV/M.1327 - NC/Canal+/CDPQ/Bank America, 3 December 1998, *OJEC* 14 August 1999 No C 233 : 21;
Case No JV.5 - Cégétel/Canal+/America Online/Bertelsmann, 4 August 1998, *OJEC* 28 January 2000 No. C 24: 4;
Fall N. JV.8 - Deutsche Telekom/Springer/Holtzbrink/Infoseek, 28 September 1998.

69) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

70) Case No IV/M.110 - ABC/Générale des eaux/Canal+/W.H. Smith TV, 10 September 1991.

71) Case No IV/M.410 - Kirch/Richemont/Telepiù, 2 August 1994.

72) Case No IV/M.553 - RTL/Veronica/Endemol, 20 September 1995, *OJEC* 5 June 1996 No L 134: 32-52.

73) Case No IV/M.566 - CLT/Disney/Super RTL, 17 May 1995.

2.6. Exclusive Rights

In the case where agreements between market participants in the media sector concern exclusive rights, it is the general policy of the European Commission not to prohibit these as such, although clearly these are restrictive agreements. The main objective of the European Commission is to safeguard access by all broadcasters and on equal terms to programmes, which may be of interest to the public, and, as a consequence, to ensure that programmes are not withdrawn from the market, notably by means of exclusive long-term licenses.

If all these requirements are fulfilled, the European Commission may exempt exclusive licensing agreements from the prohibition on cartel agreements and concerted practices.

There is also a possibility that restricitions on competition in the television market may result from the joint acquisition or selling of exclusive rights. This means that undertakings that do not participate in the trade involving these exclusive rights, will not benefit from the advantages such joint operations normally bring nor from the power of negotiation that goes with a large package of important exclusive rights jointly acquired or sold. The European Commission has announced that where this situation is likely to arise, it will only exempt such an agreement or concerted practice under the following conditions:

– if it results in a real rationalisation and in economies of scale,

– if the parties concerned maintain a certain degree of autonomy, and

– if, in the case of the acquisition of exclusive broadcasting rights by multinational associations, the non-participating entities keep some form of access to the programmes which are the object of the agreement.

C. Future EU Involvement in National Television Ownership and Control Policies and Practices

The EU Member States have vested the EC with competence in the areas of antitrust and competition law. As illustrated in this chapter, the European Commission has shown that whenever it takes decisions in antitrust or competition law cases connected with the media, not only does it take into account the specificities of the media sector, but it also protects the legitimate interests of the Member States in pursuing their objectives of media and cultural policies.

In principle, the EC takes national media policies vis à vis television ownership and control for granted as long as they do not affect the functioning of Europe's internal market. After all, national media policies are aimed at safeguarding and guaranteeing pluralism and diversity in the national media sector and at the protection of cultural interests. Media and cultural policies remain part of the EU Member States' own competences in Europe. However, as soon as media or cultural policies affect the functioning of Europe's internal market, the EC needs to take action to prevent that. Such action will normally take the form of a legally binding instrument, usually in the form of a Directive to co-ordinate or harmonise national laws or administrative provisions.

Broadcasting is becoming more and more a transfrontier activity (satellite broadcasters have started to offer pan-European services). All kinds of new interactive services are introduced on the basis of new business models which are linked to new technological possibilities. Enormous investments are made by companies in order to take advantage of the new challenges. Those companies have called for legal certainty and for a new technology-neutral regulatory framework for communications infrastructures and services.

The EC is currently trying to respond to these calls by, *inter alia:*

– establishing a framework, based on which Member States can impose sector specific *ex ante* obligations (provided that the European thresholds for imposing such obligations are met). The advantage for companies would be that they would know the views of the authorities in regard to their plans before investments are made, while decisions under competition law imposing limitations are made after investments have been made; also: the outcome of the decision-making process under competition law may not be certain, while transparent criteria that tell a company at which stage it becomes subject to *ex ante* obligations, provide more legal certainty;

– harmonising the rules for authorising the provision of communications services in general (*i.e.*, on a technology-neutral basis);

– establishing a European framework for access and interconnection agreements;

– setting European standards for universal service (in order to protect consumer interests).

Although the outcome of these attempts is at the moment still unclear, it seems obvious that regulation in Europe is shifting from *ex ante* to *ex post* control of economic developments and from ownership and control-based policies vis-à-vis the traditional media (newspapers, radio and TV) to access control vis-à-vis all possible bottlenecks ("gateway monopolies") in all ICT -related sectors.

UNITED STATES

Michael Botein

Professor of Law and Director,
Communications Media Center, New York Law School. B.A., 1966,
Wesleyan University; J.D., 1969, Cornell University; LL.M., 1971, Columbia University; J.S.D., 1979,
Columbia University.

Introduction

The United States is somewhat anomalous in terms of its legal treatment of concentration of control in the television industry. The reason is quite simple: unlike virtually any other country in the world, the US has relied upon private broadcasting for virtually its entire history.[1] Nations with government-run systems naturally do not run into concentration problems, since by definition the government is the only authorized operator. Most European countries have had exclusively state-owned systems until the last two decades, and some other developed countries – e.g., Israel – have allowed private television stations only in the last five years.

By contrast, from the early days of US radio there was tension between industry and government in imposing limits on ownership of the electronic media. As early as 1919, AT&T and General Electric attempted to create a monopoly on radio transmission, by establishing a complex system of patent cross-licensing. Because these two dominant firms held all patents – that is, for radio transmission and reception – their refusal to grant licenses to other entrants effectively made competition impossible. In 1920 the Department of Justice had begun an antitrust investigation into these practices, however, and by 1926 AT&T and General Electric canceled their agreement – an ironic anticipation of the AT&T divestiture some 60 years later.[2] As part of the arrangement, AT&T promised not to enter the electronic mass media field– then just AM radio. The effectiveness of this agreement now may be subject to doubt, however, in light of recent statutory developments, as discussed in Section C below.

Indeed, it is interesting to speculate on the development of the US radio and later television industries had AT&T been allowed to consolidate its dominant position in the telecommunications business. Presumably this was not a realistic economic proposition. In the late 1940's AT&T rejected a staff proposal to enter the television business, on the ground that it had no real future; showing that no one has a crystal ball on media development.

Indeed, today the US federal government provides only about USD 300 million of public broadcasting's operating budget; the other USD 1.2 billion comes from the private sector – a total of less than half the revenues of the three largest US commercial television networks. This leads to the rather strange result that countries like Switzerland or Australia – with a fraction of the US' population – contribute more to public broadcasting.

The United States' long tradition with regard to cross-ownership of radio and television stations appears to raise much less concerns than radio and TV cross-ownership in Europe. Indeed the history of limiting and liberalizing radio ownership often helps to define the legislative intent for parallel rules concerning television.

The US approach to concentration involves both competition policy and administrative regulation. Usually the two lead to the same result; but sometimes the antitrust regime is more severe – or more lenient – than the FCC.

Despite this difference in early history, the US and Europe have focused on two basic policy concerns: (1) decreasing barriers to competition; and (2) increasing diversity of expression.

To this extent, the US experience may be valuable, simply it is so much longer and thus has embodied so many different approaches to dealing with concentration. The US' many failures – and its few successes – thus may be a good guide for other nations in dealing with similar issues.

US authorities use different – and sometimes overlapping – definitions of relevant economic markets. In some cases, both courts and regulatory agencies use traditional antitrust market definitions. The Congress and the Federal Communications Commission ("FCC" or "Commission" or "Agency") have used other tests from time to time.

In terms of antitrust analysis, the first question is in defining the relevant market. Under both US antitrust and regulatory law, this breaks down into two sub-questions.

First, what is the "product market" – *i.e.*, what goods or services are deemed to compete with each other? The traditional test is whether particular goods or services are reasonably substitutable to buyers.[3] (For

1) Commercial radio began in the US during the 1920's, although it was not regulated until the Radio Act of 1927. E. Krasnow et. al., *The Politics of Broadcast Regulation* 10-16 (1982).

2) J. Udelson, *The Great Television Race* 5-9 (1982).

example, do cable and direct broadcast satellites compete for multichannel viewers?). Or, does Internet text compete with print publications? Presumably, television may compete with motion picture theatres, cable, DBS, or the Internet – depending upon the views of advertisers, programmers, and viewers. Most of these issues never have been addressed, let alone resolved.

Second, what is the geographic area within which services compete?[4] (For example, do television and direct broadcast satellites compete nationally, or only where a particular station is located?)

Aside from distinguishing between product market and geographic area, the US ownership rules follow a rather simplistic approach that merely distinguishes between common and cross-ownership. For example, it is viewed as common ownership, if an entity owns two or more television stations in geographical markets which do not overlap. However, owning two or more TV stations becomes a matter of cross-ownership if these stations are in the same geographic area. Hence, depending on the determination of the geographical market, the proprietorship of two TV stations could be horizontal or diagonal media concentration according to the categories of media concentration on which this study is based. The most interesting consequence of the US approach is, however, that diagonal media concentration becomes irrelevant – irrespective of what media are cross-owned – as long as it concerns different geographical markets.

To be clear, in the US neither the classification of ownership constellations nor the way in which they are regulated, is ideal for the distinction between horizontal, vertical, and diagonal media concentration chosen for this study. Nevertheless, to the extent possible, the presentation will follow the chronology of the general approach while at the same time indicating the US view on common and cross-ownership and respecting the geographic dimension of the United States.

A. Horizontal Media Concentration

1. Common Ownership: One Medium – Different Geographic Areas

As noted above, US authorities were concerned with common ownership of radio broadcasting from the very beginning. The FCC did not adopt any formal rules, however, until it authorized FM service in 1940; as part of its package, it limited owners to no more than six stations nationwide.[5] In the 1996 Telecommunications Act, the Congress repealed all common ownership restrictions on radio[6] – with the result that one US company now owns more than 1,000 – out of a total of 10,000 – radio stations around the country.

In 1940, the Commission authorized an experimental television service, but limited ownership to three stations nationally. In 1944, it raised this limit to five. The FCC increased the television station limit to seven stations in 1954.

This standard remained in place for a generation, until the Commission raised the limit once again in 1984 to 12 stations. In doing so, however, the FCC imposed an additional cap on total television ownership – namely, that the stations reach no more than 25 percent of the national audience – *i.e.*, the number of households found by private research organizations. With roughly 100 million households in the US, 25 percent was 25 million. The Commission deemed this necessary, since a company with stations in New York, Chicago, and Los Angeles would cover more than that amount of the national television audience. This approach thus gave station owners an incentive to cover one or two major markets (*i.e.*, in the ten largest population areas), and then to spread their remaining allocation among medium-sized areas – e.g., Cleveland, San Diego. In addition, the agency adopted a "UHF discount;" since UHF stations in the US – unlike Europe – traditionally have poor signals and small audiences; the rule counted UHF station viewers as only half of VHF. The Commission's goal was to encourage group television owners to invest in – and upgrade – UHF stations in order to increase their signal quality and coverage, while retaining their discount". This strategy was attractive not only because UHF stations cost only 10-20 percent as much as VHF to buy, but also because it widened the number of cable systems carrying the UHF stations.

Finally, and perhaps most creatively, the agency held that television station owners could have as many was 14 stations, so long as the last two were controlled by racial minorities – an interesting type of regulatory management which appeared to show no positive results.[7]

This apparent resolution lasted only until the Telecommunications Act of 1996. Although this statute was concerned primarily with attempting to reach a consensus among the cable and local as well as long-distance telecommunications industries, in order to get enough votes for passage the sponsors had to dole out benefits to almost every form of electronic media. One of the favors given to television was Section 212(c), which provided that:

> The Commission shall modify its rules for multiple ownership
>
> (A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control...[and]

3) United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377 (1956).

4) Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

5) M. Botein, *Regulation of the Electronic Mass Media* 199-213 (3d ed. 1998).

6) Telecommunications Act of 1996, Section 202(b).

7) Supra no 5.

(B) by increasing the national audience reach limitation for television stations to 35 percent.[8]

The 35 percent figure (roughly 35 million households) came as a result of a long debate between adherents to the existing 25 percent limit and proponents of a 50 percent limit. In the end it allowed group owners to acquire a few more stations in medium-sized markets, but did not – as with radio – allow them to blanket the country.

As the above shows, the Commission and Congress have changed their approach to limits on television ownership half a dozen times in the last several decades. On the one hand, this is the result of the increased number – *i.e.*, more than 1,000 – of television stations. On the other hand, it reflects the general trend towards deregulation – begun during the Reagan/Bush years – which now is slowly grinding to a halt.

2. Cross-Ownership: One Medium – One Geographic Area

As regards radio rather than television, the 1996 Act changed all of this. Section 202 of the Act required the Commission to approve radio cross-ownership in the following circumstances:

> (A) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (B) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (C) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 in the same service (AM or FM).

The statute went on to allow ownership of up to 5 commercial radio stations in markets with 14 or fewer stations – the vast majority of US markets – subject to a requirement that a licensee could not own more than 50 percent of the stations in any given market.

As might be expected, this set off a wild buying spree for radio stations – particularly because many of them (particularly AM) were in dire financial straits and thus commanded relatively low prices. As noted above, by the end of 2000, at least one radio conglomerate owned more than 1,000 stations – with several others not too fair behind.

Treatment of television under the 1996 Act was somewhat more restrained. Section 202(C)(2) simply provided that:

> The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person may own, operate, or control…within the same television market.

The Commission did not rush into granting waivers. In the summer of 2000, however, it adopted a general policy statement to the effect that it would consider allowing one entity to own two television stations in the same market. Although the details of its directive are complex, confusing, and not worth going into, the FCC basically held that it would allow companies to acquire two stations in the same market, so long as the acquiring station was in the top-rated four broadcasters, and the acquired station was not. This naturally limited acquisitions to the 20-30 largest television markets, simply because smaller ones do not have eight or more stations.

By the end of 2000, the Commission had granted such waivers in less than a dozen cases.

B. Vertical Media Concentration

Cross-Ownership: Broadcaster/Supporting Service – One Geographic Area

Similarly, restrictions that apply to television stations are subject to restrictions in terms of owning cable systems in their markets. Indeed, the FCC initially prohibited stations from having an interest in a local cable systems.[9] The agency's theory was that a station would use its joint ownership to favor one medium over the other – e.g., by limiting a system's number of channels in order to encourage viewers to continue watching the station. The only problem with this approach was that it never was clear which medium a joint owner would prefer. With the increasing growth and profitability of cable systems during the 1980's, it became perfectly plausible to assume that a conglomerate would favour cable's high cash flows over television's declining revenues. In any event, in the 1970's the Commission became increasingly liberal in waiving the television/cable cross-ownership rules, and eventually just ignored them. Under similar reasoning, the FCC eventually abandoned restrictions on ownership of multichannel video distribution systems ("MVDS") and cable – a decision without much impact, since the MVDS industry effectively went bankrupt by the end of the 1990's.

8) Telecommunications Act of 1996, Section 202(c).

9) 47 U.S.C. §533(b).

In addition, until the 1996 Act, the conventional wisdom has been that common carriers – both long-distance and local – could not own television stations. The theory was simply that Section 153(h) of the Act[10] states that "a person engaged in…broadcasting shall not…be deemed a common carrier." Neither the Commission nor the courts have ever squarely faced this question. In a 1979 decision, however, the US Supreme Court held that the Commission could not subject cable operators to "access channel" requirements; it reasoned that cable was akin to broadcasting, and thus that Section 153(h) prohibited even a quasi-carrier obligation such as access.

The decision does not answer, however, the question of whether joint ownership of a common carrier and a television station also is invalid; after all, a television station presumably could be operated totally independently – and not subject to any carrier restrictions – of a jointly owned carrier. Moreover, the 1996 Act specifically authorized local exchange carriers ("LECs") to control content; though this apparently was intended to entice them into the cable and MVDS markets, none have made more than a token commitment. At the same time, however, it seems only reasonable that if an LEC can operate a multichannel system, it also should be allowed to own a television station. Again, the statute seems somewhat internally inconsistent, and a definitive interpretation is unlikely in the near future. LECs in particular know enough to know that they do not know how to market, operate, and sell mass media – which probably accounts for their steering clear of ventures such as cable or MMDS. (To be sure, by buying up Telecommunications, Inc. and MediaOne, AT&T has become the largest cable operator in the world – with more than ten million subscribers. At least according to AT&T, however, its purpose has been not to further mass media, but rather to find ways of bypassing the LECs in delivering their long-distance services to individual consumers.)

Finally, it should be noted that television stations operate many types of ancillary businesses, which have little or nothing to do with broadcasting. For example, it is quite common for either networks or stations to produce advertisements, give marketing advice, place advertisements and the like. These activities generally, however, do not raise any legal or regulatory issues.

C. Diagonal Media Concentration

Cross-Ownership: Different Media – One Geographic Area

Once again, it is important to remember that the US broadcasting system began – and largely has remained – totally private. As a result, there has been a tendency for companies – initially family-owned – to move into new technologies as they have opened up – a kind of "old wine in new bottles" approach. For example, newspapers (usually with affiliated radio stations) acquired 50 of the first 142 television licenses made available by the FCC in 1952.

Most cross-ownership interests today, however, are created by large media transactions – *i.e.*, where an investor owns a newspaper company and buys a group television operator. For example, when Disney bought Capital Cities/ABC, it already owned two television stations – in addition to Capital Cities' television stations and newspapers around the country. In order to make the transaction work, it thus was necessary for the new company to sell off a number of properties. Entrepreneurs certainly know this well before they even contemplate this type of transaction; indeed part of the strategic planning for this type of deal depends on evaluating the loss of opportunity costs of divestiture.

During the 1920's many radio stations were created by newspaper owners. In turn, when television opened up in 1952, the prime applicants were newspaper-radio combinations. And some of these entities then went on to acquire cable franchises and, more recently, Internet operations. The major exception to this approach has been with DBS (Direct Broadcast Satellite); although a few veteran broadcasters have tried their hands at this, they exited the market rapidly – perhaps because of the financial and technological requirements.

Traditionally, the FCC tried to restrict broadcasters to one radio or television station in a given market – the "one-to-a-market" rule. This basically prohibited a company from owning more than one mass medium – television, radio, cable, or daily newspaper in the same geographic market. The Commission initially required cross-owners to reduce their holdings to one medium per market. In some cases, it granted waivers where an applicant could demonstrate that with a merger one of the entities would go bankrupt – creating a net loss for the public.

Today the Commission routinely grants waivers of 1-2 years to sell cross-owned properties. Its basic approach is to give any owner either a year or two, or to wait until the expiration of the current television license.[11] One of the little noticed results of this has been the effect of the 1996 Act's extension of television station license terms from 5 to 8 years. If a cross-ownership situation thus arose in the first year of a station's license, it would have 7 more years to comply with the cross-ownership rules. so far, the FCC has neither approved this approach nor proposed an alternative.

Television stations are subject to other limits on media which they may own. Perhaps the most significant has been a prohibition on joint ownership of television stations and newspapers in the same media market. These were quite common; as noted above, under the "old wine in new bottles" approach, it was perfectly

10) 47 U.S.C. § 152(h).

11) E.g., Field Communications, 65 FCC 2d 959 (1979).

natural for newspapers to expand into AM, FM, and then television as these new media became available.

Although not required by either the original or the 1996 Act, the Commission adopted the television/newspaper cross-ownership limitation in 1975 by rule, in response to a growing political concern about media conglomerates.[12] The rule had little immediate impact, however, because of its limited scope; it applied only to prospective – not existing – acquisitions, and solely to daily newspapers. Ironically enough, by the 1990's the number of newspaper/television cross-ownerships had decreased by almost 90 percent – for business rather than legal reasons. With the advent of new technologies and the general decline in newspaper revenues, many conglomerates sold all or some of their print properties to invest in cable and other technologies.

Moreover, the Commission was relatively generous in waiving the television-newspaper cross-ownership rule – particularly in large markets with multiple television stations and daily newspapers. This sometimes elicited a hostile response from Congress. For example, when Rupert Murdoch (by then a US citizen) bought television stations in New York and Boston – where he already owned daily newspapers – the FCC granted him a waiver to find a buyer for one of the two properties in each city in order to comply with the cross-ownership rules. Congress then passed an act prohibiting the FCC from considering waiver or repeal of the ownership rules. Ultimately, the D.C. Circuit invalidated the legislation on the ground that it violated due process and equal protection.[13] (Real cognoscenti of the common law may be interested to observe that in the last few years a few federal courts have used the constitutional ban on "bills of attainder" to achieve similar results in the telecommunications industry.)

D. Other Ownership Restrictions

Alien Ownership

Like most other countries, the US has limitations on ownership of television stations by aliens. The origins of this century-old policy are somewhat different, however, than those of other nations. Unlike other nations, the US never has been terribly concerned about "cultural imperialism" – partially because it is somewhat difficult to define "US culture" in the first place. Instead, the initial concerns arose during World War I in two contexts: (1) use of broadcast facilities to transmit intelligence information abroad; and (2) transmission of foreign propaganda directed at the US population.

Neither of these rationales made a great deal of sense at the time, and make even less today; after all, with a suitcase-sized satellite uplink, an half-witted spy could transmit information to any place in the world. Instead, policymakers have become more concerned with the ability of US firms – primarily studios and networks – to market their products abroad. Preventing aliens from owning substantial amounts of US media thus became a good bargaining tool to open and preserve foreign markets. (It created no problem for Rupert Murdoch, who had spent enough time in the US to become a citizen overnight when he wanted to acquire stations for the Fox Network.)

Section 310(b)[14] basically has two tests for alien ownership.

1. An alien is limited to 20 percent direct ownership in a US television station; or
2. A holding company owned by aliens may not own more than 25 percent in a US television station.

In the past, the Commission has been fairly lenient in granting waivers of the percentage limitations – especially for non-broadcast uses – if an applicant could show a good reason: most commonly, the unavailability of funding within the US.

Moreover, that statute does not apply by its terms to cable television. And the FCC has chosen not to apply it by regulation, since none of the traditional justifications – security, propaganda, foreign markets – apply to cable. It thus is less than surprising that many of the cable systems along the northern US border were financed by Canadian investors.

When the US became a signatory to the WTO a few years ago, in theory it should have opened media ownership to all other members. Since many other countries did not open their borders, however, the FCC basically adopted a test of "reciprocity" of access between itself and other signatories. So far, it appears that only about a dozen other countries have passed that test. The true test of globalization is just beginning in the US.

Conclusion

Despite the above discussion, US policy on television realistically did not have a major impact on the industry over the years.

To be sure, the Commission and the Congress have increased the number of stations and audience reach of

12) 47 C.F.R. § 73.3555(c).

13) News America Pub. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

14) 47 U.S.C. § 310(b).

individual firms. At the same time, however, the number of available television frequencies – primarily UHF with cable carriage – has more than doubled.

Moreover, television is no longer as attractive an investment as it once was, because of competition from a host of other media: cable, DBS, VCRs etc. An entrepreneur's incentive to acquire a large number of television stations – except as part of a network, such as Fox – is not as great as it was a decade ago. There thus are many more small group owners (again, primary of UHFs) than a decade ago.

Finally, many television investors have migrated to other new media, and many new entrepreneurs have emerged. One example is satellite broadcasting. An original applicant-and short-lived operator – was Hubbard Broadcasting – a family-owned broadcasting business for three generations. After a about a year of less than favorable results, it sold out to DirectTV – along with Echostar, one of the two dominant US DBS operators – because of apparent problems with both costs and audience reach. So the Hubbard family is back running its radio and television stations in the Midwest.

Actually, the biggest changes in the US media landscape have been on the telecommunications, rather than the masscommunications side. Consider the following:

– Bell Atlantic merges with NYNEX (both LECs), and then buys General Telephone & Electric – the last major local and long distance US operator – and gets long-distance authority from the New York authorities;

– SBC merges with Pacific Telesis and Ameritech (all of them LECs) and proceeds to apply for long-distance authority;

– MCI and Worldcom merge, giving them almost half of the US domestic long-distance market;

– Time-Warner and AOL merge, combining TW's film library and production resources with AOL's more than 27 million Internet subscribers. Unless the EU antitrust officials had intervened, the deal also would have included acquisition of EMI – the second largest music producer after TW.

Not to beat a dead horse, the point is that the major merger/acquisition activity is taking place in the telecom/internet field.

This suggests that concentration of control in the television industry may not be the most important development to watch today.

ANNEX

1. Statutes

47 U.S.C. § 202
47 U.S.C. § 310(b)
Newspaper Preservation Act, 15 U.S.C. § 1801 et.seq

2. Cases

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978)

Fox Broadcasting Stations, Inc., 77 Rad. Reg. 2d 1043 (1995)

News America Pub. v. FCC, 844 F. 2d 800 (D.C. Cir 1988)

Report and Order, 50 FCC Rcd 1723 (1989)

First Report and Order, 4 FCC Rcd 1723 (1989)

Multiple Ownership of AM, AM, and Television Stations, 95 FCC 2d 360 (1983)

3. Bibliography

Emord, The First Amendment Invalidity of FCC Ownership Regulations, 38 Cath. U. L. Rev. 401 (1989)

Lee, The FCC and Regulatory Duplication: A Case of Overkill?, 51 Notre Dame Law 235 (1975)

Sangster, A Tale of Two Standards: Antitrust, the Public Interest, and the Television Industry, 6 Hastings Comm/Ent L.J. 887 (1984)

Sterling, Newspaper Ownership of Broadcast Stations, 1920-68, 46 Journalism Q. 227 (1969)

NB: Most of the above case and statutory authorities are available on line at www.cmcnyls.edu

FEDERATION OF RUSSIA

Part A: Anna Kachkaeva
Professor, Faculty of Journalism, Moscow State University

Part B: Yana Sklyarova
Expert, the Moscow Media Law and Policy Center

Part C: Mikhail Fedotov
Doctor of Law, Secretary of the Union of Journalists of Russia

A. Conclusions from the Report on Concentration of the Mass Media in Russia (Excerpts, relevant to "Regulation of Media Concentration Relating to Television")1

1. Concentration of Regional Mass Media

From November 1998 to February 1999 the Moscow Media Law and Policy Center (MMLPC), together with ANO Internews and the National Press Institute conducted a poll of leading media entrepreneurs in 10 regions of Russia. It was intended to determine the scope and speed of media concentration in Russia. The results, together with extensive interviews conducted by Dr. Anna Kachkaeva with leading media executives in Moscow and the regions, laid the foundation for this survey.

The second half of the 1990s brought about an abrupt activation of media-ownership concentration in Russia's mass media market – the formation of big companies capable of large-scale investments in innovative technologies, and of expending huge sums on programme production, rapid mobilisation of capital from one sub-division to another, and so on. This integration may take several forms: cross-media corporations (publishing houses, radio, television), multi-sectoral conglomerates (*i.e.*, when mass media establishments collaborate with other sectors of the economy), horizontally and vertically integrated alliances (when mass media proprietors collaborate and control all stages of the mass media production and distribution process). In this way, media organisers – that is, businessmen providing substantial investments in tele- and radio broadcasting and the press – come to the fore.

There is no cohesive approach to solving this newly-emerging phenomenon of multidimensional concentration. It is not even the current focus of the mass media sector. Instead the sector is seriously preoccupied with another unique form of concentration in Russia, which became obvious as a result of the investigations for this report: the phenomenon of "ideological or political" concentration. This is a form of concentration that galvanises immensely every time the country is on the verge of a parliamentary, presidential, or local election. As a result, a "political monopoly" of mass media by the party in power materialises. Its actors include government officials, heads of administrations, governors and mayors regardless of their political predilections, and its extreme manifestation is exemplified by the (Presidential) "Family".

Before elaborating on the findings of this report of relevance to media concentration related to television, it is necessary to note that regional mass media executives are arbitrary in defining the form of ownership of their respective establishments. As a rule, they rather state its organisational/legal form. Undoubtedly, ambiguity of concepts is one of the key reasons hindering a more or less accurate depiction of the ratio of privately- and state-owned mass media on the one hand, and mass media with mixed forms of ownership on the other.

There are no more than two or three such businessmen that own the mass media in any given region. And all of them share certain common features. They, or their respective executives, ventured detailed and thorough responses to all parts of the questionnaire,[2] which was drawn up by the Moscow Media Law and Policy Center. When a business entity is owned by two, or – very occasionally – three partners, these partners control several television and radio channels in their respective regions, plus quite a few newspapers, and one or two advertising agencies. Moreover, their assets include editorial offices, transmitters, printing presses, and even television towers. Colleagues and competitors responding to the questionnaire referred to most mass media outlets owned by these private individuals as top notch. Several of these private individuals, commonly called "effective proprietors", view themselves as monopolists, but see no danger in that.

One other significant problem in Russian business is the concept of nominal proprietorship. Law-enforcement agencies frequently use instead the term "figurehead". However, as far as the mass media business is concerned, the proprietors are not always figureheads. In general, they are rather identified and fully engaged in a company, but lack access to the company's financial activities or its actual management. Implicit indicators derived from the poll and verified data from off-the-record interviews show that nominal

1) Main conclusions from the report prepared by the Moscow Media Law and Policy Center and authored by Prof. Anna Kachkaeva in 1999, as amended in 2000.

2) For the questionnaire, see http://www.medialaw.ru/e_pages/publications/concentration.htm

proprietors are numerous. They include: businessmen who, although they lack media interests, provide funds for publications; government officials listing their relatives as founders, since the law proscribes a combination of state service with commercial activity; mothers and spouses of businessmen/media owners, where the latter in an attempt to avoid unpleasant monopoly accusations register a publication or television channel that is formally independent, but is figuratively owned in a relative's name.

A completely exceptional situation exists for mass media outlets, whose founders include state structures. In this case, it is impossible to elucidate the exact enterprise or mass media outlet founded by an administration, mayor or state property committee. Memoranda of incorporation are required for substantiation. Although experts polled muse about hidden forms of manipulation and control, as well as instances of hostile entry of administrations into the founding board of one mass media outlet or the other, such facts lack tenable documentary confirmation. In addition, the majority of hostile take-over "victims" never agree to discuss these matters openly.

In all the regions surveyed, the majority of respondents concede that state authorities support their own mass media outlets. It goes without saying that this support would not have ruffled too many feathers if it were limited to the allocation of budget funds, an arrangement which officially protects a number of regional and municipal publications and television companies in their corresponding budgets. However, aside from all-reaching additional benefits provided to officially subsidised publications, each region lists 2-3 newspapers and at least one television station (besides the regional branch of the national broadcasting company) financed in one way or another from the city, regional, district or territorial budget.

Various regions have introduced laws that protect every mass media outlet, including those that are privately owned. Judging from completed questionnaires, Vladivostok, Krasnoyarsk, Ekaterinburg and Saint Petersburg all have effective Mass Media Protection Laws, and respondents are aware of their existence.

Issues of competition and monopolisation evoked unparalleled reactions from respondents. Of the 108 people polled, 89 acknowledged that there is competition in the media market. At the same time, only a few of those who support the presence of competition failed to assert that one outlet or another maintains a dominating grip on the market. Despite the paucity of publications citing overt problems associated with the dominating position of competitors, almost half of the poll participants dread "monopolisation" or believe in its likelihood. Evidently, a negative context surrounding the concept of "monopolisation" has taken a grip on the mass consciousness of persons involved in business, and this is not limited to the media business.

On the other hand, although media market domination can be regarded as an indirect confirmation of monopolisation, one can only substantiate a business' dominant position by providing concrete data on circulation figures, ratings, audience and so on, which as a rule are not gathered or kept in most regions. Probably, it is for this reason that the majority of those who fear monopolisation fail in their attempts to explain why monopolisation ought to be feared or what they see as the source of this threat. Apparently, it is possible to explain the origin of this not-always substantiated threat if "monopolisation" is considered not only from the economic viewpoint, but also from the political standpoint. Only then will talks of "political monopolisation" make sense.

The ratio of answers to the question "Does the threat of monopolisation exist? Yes or No" varied substantially from one region to another. In Krasnoyarsk for instance, not a single respondent felt the danger of media monopolisation. In Nizhny Novgorod, the majority of respondents (7 out of 10) also did not acknowledge the existence of such a prospect in their region. In Yekaterinburg, 8 out of 14 respondents expressed views that such a trend is possible, and exists, but said that the clear danger of monopolisation does not exist. In Saint Petersburg, Samara, Vladivostok and Novosibirsk, answers were almost equally divided between opponents and supporters. Only in Voronezh and Rostov-on-Don did those in fear of monopolisation predominate.

While representatives of public and political newspapers cite the possibility of media monopolisation, the majority of electronic media operations regard such an outcome as unlikely in their sector. One other phenomenon was observed: the smaller the volume of circulation and the more circumscribed a media outlet is, the less the executives of these media outlets are aware of competition or fear monopolisation at all.

The majority of respondents perceive the problem of monopolisation as a political one that originates through possible financing of mass media outlets by various political powers and power structures, e.g. on the eve of the forthcoming elections.

This perception reflects the specific characteristics of the development of the Russian business sector in the last decade, and is not limited to the media market. By investing money in mass media outlets, businessmen and political players are literally investing capital in power as a whole – and not only the "fourth power" (the mass media). Power is in turn converted into money, and money is once again transformed into power. Respondents believe that the election campaigns of 1999-2000 also provide strong evidence in support of this formula, regions included.

The following typical statements contain evaluations of the probability of media market monopolies:

– "Monopolisation is not a danger but a reality: the regional administration controls the lion's share of the media market, and at election-time it may control even more"; "Municipal and regional administrations are trying to establish holdings that serve them during the elections"; "As far as ideological monopolisation is concerned, you might have as many newspapers as possible, with all working in unison

for one owner representing the authorities", – similar responses were provided in varying proportions in all cities except Krasnoyarsk;

– "The threat of media monopolisation originates not from power structures (although this is not excluded), rather it stems from representatives of those circles (frequently, non-local, Moscow-based ones) interested in storming the local information market with their capital and their desire to take charge of the market (Rostov)";

– "This threat stems from financial structures and from oil and gas establishments" (Samara); "Pressure of foreign capital" (Saint Petersburg).

Several of those polled do not see anything strange in the prospect of monopolisation: firstly, as one of the respondents stated, all developed countries have media concerns; secondly, and this is the opinion of owners of the major media companies, the presence of a monopolist creates an unhealthy atmosphere, and therefore, no single monopolist wishes to remain isolated in a market: "Monopoly in the mass media market is disadvantageous because it undermines business profitability. For those who are fuelling political monopolisation, the state of the market is unimportant, political publications can be subsidised" (Igor Mishin).

The overwhelming majority of mass media in the regions continue to depend on the printing capacities and communications facilities put at their disposal by the state, which in reality remains the monopolist in this sector of the economy. All respondents (from both the broadcasting and print media) without exception concede that although starting up a newspaper is very simple, it is practically impossible to obtain a broadcasting frequency. The reasons are the same everywhere: shortage of spectrum resources, each channel is contended fiercely, and the licensing procedure proves extremely cumbersome.

2. Conclusions for the National Media Market

It is not accidental that the majority of participants in our poll dread intensification of "political monopolies" in the mass media sector. They cite examples of central media outlets, especially electronic ones, that were embroiled in "information wars" in 1997-1998 on the side of various financial and political groups battling not only over the privatisation of "sweet morsels" of state property (such as the telecom company *Sviazinvest* and oil giant *Rosneft*), but also over dominance in the government and the Kremlin.

Of course, this does not exclude "traditional" forms of media market monopolisation: the information collected in the course of this investigation makes it possible to argue that discrete private monopolists are appearing not only in the centre, but also in several Russian regions. And although this is still the exception rather than the rule, each of the major industrial centres lists at least one local "oligarch", that owns, for instance, three VHF television channels, two radio stations, a newspaper, and two advertising agencies. In addition, he owns two television channels and a radio station in a neighbouring city. This same hypothetical businessman very often maintains a privately-owned technical base – a studio complex and TV tower with transmitters. Altogether, while the exact set of companies controlled by a proprietor may vary, the scheme used is the same everywhere – and it entails establishing multi-sectoral corporations, which ostensibly is the future for regional mass media. Such mini-holdings consolidate, for example, groups of publications, television and radio stations in three or four cities of Ural and Siberia.

However, the state, in many shapes and forms, continues to maintain its position as the monopolist in the mass media market, since most printing houses are state-owned; all RTPTs (radio-television transmission centres), re-organised into VGTRK (National Television and Radio Broadcasting Company) affiliates, are owned by the federal government.

On the whole, however, Russia's federal-level mass media market is a bizarre mosaic of state- and privately-owned broadcasters vastly founded on personal connections and political power. Therefore, the regions are rife with rumours of government representatives attempting to create subsidiary media groups, which they support not only with budget funds, but also by enlisting subordinate government authorities to subscribe to a "preferred" publication and by allocating advertising revenue from government- or administration-funded firms. On the whole, those preferences that the state makes available to its sub-structures for purposes of launching mass media outlets are unequivocally regarded by their privately-owned counterparts as a violation of the spirit of fair competition: starting from restriction of access to information on government activities, subsidies, preferential tariffs to "own" publications and finishing by the monopoly of re-transmission of the signal of non-governmental broadcasters (90 per cent of the latter lease either transmitter or TV tower facilities from RTPTs).

In addition, broadcasters friendly to the state, administrations or the mayors enjoy other forms of preferential treatment as well. It is quite probable that all of these measures are aimed at keeping afloat those outlets that would have inevitably crumbled under intense competition. Of course, when talking on the scale of individual regions, and even on a larger scale, it is notable that Russian mass media are still far behind their western "teachers". In any case, our study found no evidence that would lend support to a trend of interregional consolidation of several mass media companies or creation of interregional newspaper chains in the regions studied (again, excluding political amalgamations among mass media outlets controlled by a number of mayors and governors, which in fact are not structured or consolidated into a single holding).

True enough, one can find a few regional examples of "horizontal" concentration concerning, for example, distinct programme production entities. There are companies that control several sub-divisions with each engaged in the production process.

However, thus far, the most prevalent form of concentration is diagonal concentration in different sectors of the mass media, under which a company controls various mass media types: radio, television and the press. The first and most successful example of such concentration in Russia (*Media-Most* holding) was established in January 1997. Other examples, namely companies such as prominent industry giants and financial-banking groups LOGOVAZ, Interros, Gasprom, LUKoil, Alpha Group equally constitute the core of a few mass media empires. Some of them have launched joint projects in the information market with the participation of foreign capital. Notable amongst them are the Independent Media publishing house and STS television network ("Story First" and Alpha Group's joint venture), since to some extent they constitute a form of international integration, though the joint companies are not present in global markets.

One way or the other, "vertical" integration is present in any mass media company or publishing house: they all tend to control different stages of the process of production and distribution.

A fundamental problem in relation to any form of concentration is the problem of its impact on competition. Despite the fact that almost half of the poll participants anticipate attempts at monopolising the mass media market by government authorities and big business, practically all acknowledge that nevertheless regional competition is highly developed. This competition concerns the "horizontal" level and is between companies engaged in one single type of mass media business: television companies, radio companies, or press publications.

The results of this market survey underscore that the success of measures directed at regulating media market concentration, including but not limited to legal ones, is inseparably tied to the need for transparency in this market.

Inasmuch as Russia lacks special restrictions on cross-linked media ownership or special laws regulating concentration, general antitrust law governs all legal relations. However, it is difficult to ascertain violations of even the few anti-trust provisions applicable to the mass media, because the media market is not constantly monitored and because the level of transparency of the mass media organisational structures is dismally low. Even if it were conceivable to take an account of media property and owners, finding a method for estimating criteria such as financial or political influence and human relations would be a very challenging task indeed.

Why is it so very difficult in Russia to achieve compliance with transparency rules, even if they do emerge in the practice of legal regulation of media concentration? Ownership relations (such as voting rights and shareholding) in the mass media sector are not evident; proprietor/employee relations (investigation of the makeup of boards of directors and their business interests, family ties, previous professional links) are not always accurately represented; financial links of a proprietor are too often impossible to trace because even the most "influential" proprietor does not officially hold shares in any of his enterprises (a classic example is Mr. Boris Berezovsky).

One of the first steps of newly-elected President Vladimir Putin was to construct a strong vertical power-structure, his representatives were appointed in the newly-formed seven federal districts. This might present new threats to regional media managers, because practically all heads of the federal districts have claimed the need to create their own district television programmes and newspapers. But this might be in conflict with the declared intentions of the government to form a workable media market and make the media free from excessive politicisation. "The state has not yet determined its course of action towards the media," said Presidential aide Sergei Yastrzhemsky. A few amendments to the media law or, perhaps, several new media bills, are expected to be tabled by the end of 2000 in order to enact, among other things, restraints to media concentration. Will these restraints be applied to the private media sector alone, or will they be extended to the "political media concentration" in the hands of the government and local authorities as well? It is not until these questions are answered that it will be clear what kind of media policy the new Russian administration wants to pursue.

B. Existing Legal Framework

Currently the regulation of media concentration related to broadcasting in Russia is part of general competition law with the following practical exception of media-specific legislation.

1. Media Specific Rules

One limit on media concentration results from the Regulation *0 litsenzirovanii televizionnogo veshchaniya i radioveshchaniya v Rossiyskoy Federatsii* ("On Licensing of Television Broadcasting and Radio Broadcasting in the Russian Federation") adopted, on 7 December 1994, by decree of the Government of the Russian Federation (#1359). Point 13 of the Regulation stipulates: "No legal entity shall obtain a television and/or radio broadcasting license for more than two broadcasting channels covering the same territory, if the zones served overlap completely or for more than two thirds of each zone, unless the existing law of the Russian Federation stipulates otherwise". Nevertheless the Regulation does not restrict the use of different classes of stations (AM, FM, SW, MW, etc.) by the same radio broadcaster, nor does it prohibit cross-ownership between broadcast and print media.

2. General Competition Law

Competition law does not address systematically concentration of companies involved in television

broadcasting. On the contrary, the current competition legislation is hardly suited to broadcasting since the Statute *O konkurentsii i ogranichenii monopolisticheskoy deyatelnosti na tovarnyh rynkah* ("On Competition and Restrictions of Monopolistic Activity on Commodity Markets") of 22 March 1991 deals primarily with business relations and does not reflect the peculiarities of the broadcasting industry (audience reach, share of other media outlets in the same market etc.). The Statute defines the market for a given commodity as the "sphere of commodity circulation". Yet the legislation has no relevant criteria for determining the market borders of broadcasting. In addition, the existing media legislation lacks the very definition of "broadcasting service". Consequently, it is not necessarily covered by the existing statutory notion of commodity itself. Likewise, the legal status of broadcasting institutions was left undefined. Moreover, the law does not distinguish between state-run and private broadcasting companies (Russia has about 100 state broadcasters). These legal omissions hamper the application of general antitrust restrictions.

No statutory definition of a proprietor of a mass medium exists, even though proprietors are important figures in ownership relations. Since the founders[3] of mass media are mostly legal entities they are subject to regulation by the civil law. The latter is based on the principles of the freedom of economic activity and prevention of unfair competition as laid down by the Russian Constitution (Article 34) and further developed in the Civil Code (1995), Article 10 of which forbids the abuse of a dominant market position.

Several legal acts dealing with business activities are in principle applicable to the editorial offices[4] of mass media, if the latter are established in the form of legal entities, and thus might have an impact on media concentration. In particular the Statute *Ob aktsionernyh obschestvah* ("On Joint-stock Companies") of 1995 regulates the relations between parent companies and subsidiaries, and establishes their legal statuses and mutual rights and duties. It also defines the dependent companies as those which are more than 20 per cent owned by the dominant company.

Furthermore, the Statute "On Competition and Restrictions of Monopolistic Activity on Commodity Markets" of 1991 promotes competition. The Statute establishes general criteria for assessing the level of competition. It defines "dominant market position" as an exclusive position allowing a company to influence the market situation. Quantitatively, a dominant market position exists if a company holds 65 percent of the relevant commodity market unless the federal antimonopoly body determines that a company's position is dominant with a lesser share given certain market conditions. The antimonopoly body, which is currently *Ministerstvo RF po antimonopolnoy politike* (the Ministry of the Russian Federation on Antimonopoly Policy), exercises control over proposed amalgamations and mergers of companies if the sum of their assets exceeds one hundred thousand times the amount of the minimum monthly wage (currently 83 roubles 49 kopecks or approximately 3 USD). It shall not approve a proposal resulting in the creation or strengthening of a dominant market position of a company or otherwise restricting competition unless such effect would be outweighed by the positive results of the transaction. The antimonopoly body may make its approval of a merger conditional on requirements aimed at maintaining the necessary conditions for competition. A court may declare null and void transactions completed in violation of an order prescribed by the anti-monopoly body.

The Federal Statute *Ob uchastii v mezhdunarodnom informatsionnom obmene* ("On Participation in International Exchange of Information") of 1996 entitles the federal antimonopoly body to prevent and prohibit monopolistic activity and unfair competition in transfrontier mass communications and exchange of information(Article 13). The Statute extends the statutory powers of the Ministry to the communications field.

Certain communications services (tele- and postal communications) are subject to the general competition regulation stipulated by the Federal Statute *O yestestvennyh monopoliyah* ("On Natural Monopolies") of 1995 to prevent monopolisation in the communication field. The law provides for specific means such as rates regulation and universal service requirements in order to allow control of natural monopolies in this area.

3. Specific Ownership Restrictions

There are specific ownership restrictions concern the legal status of the founder or license holder of a mass medium. The relevant provisions express the general perception that the national media system must encourage national representation in the media field and prevent "foreign influence". According to Article 7 of the Statute *O sredstvah massovoy informatsii* ("On the Mass Media") of 1991, a citizen of another state or a stateless person who is not domiciled in the Russian Federation cannot be the founder of a mass medium. However, this restriction does not apply to legal entities. As provided by the Regulation *O provedenii konkursov na poluchenie prava na nazemnoye efirnoye teleradioveshchanie* ("On Holding Competitions for Obtaining the Right to Broadcast") adopted on 26 June 1999 by decree of the Government of the Russian Federation, only individuals involved in business activity and legal entities that are registered in Russia according to the procedure established by law, shall participate in competitions to obtain the right to broadcast. An analysis of the different acts involved leads to the conclusion that this rule applies to legal entities with sufficient share of foreign capital. No law specifies any restrictions regarding a permissible share of foreign capital in such a company.

---

3) "Founder" is a basic term used by the Statute *O sredstvah massovoy informatsii* ("On Mass Media") to describe the person or entity entitled to set up a news organization and oversee the activities (*i.e.*, of the editorial office). The founder can be the editorial office itself, or the publisher, or distributor, or the owner of the property, or none of the above, or all of the above.

4) The Statute on Mass Media defines "editorial office" as the basic nucleus of relationships in the sphere.

Similar provisions regarding applicants for the use of radio spectrum in the Federal Statute *O sviazi* ("On Communications") (1995) (Articles 8 and 23) are basically designed to encourage foreign investment in the communications industry.

No ownership restrictions exist preventing religious and interest groups (political parties, etc.) from founding a mass medium or obtaining broadcast license. Such groups, if registered as legal entities, can not be deprived of any rights since the Russian Civil Code promulgates the principle of equality among all the participants of civil relations.

Main Acts that Regulate Concentration In Russia:

Media Concentration:

Regulation *O litsenzirovanii televizionnogo veshchania i radioveshchania v Rossiyskoy Federatsii*
(Regulation "On Licensing of Television Broadcasting and Radio Broadcasting in the Russian Federation" adopted by a decree of the Government of the RF on 7 December 1994 (#1359)).

Regulation *O provedenii konkursov na poluchenie prava na nazemnoye efirnoye teleradioveshchanie*
(Regulation "On Holding Competitions for Obtaining the Right to Broadcast" adopted by a decree of the Government of the Russian Federation on 26 June 1999 (#698)).

Statute *O sredstvah massovoy informatsii*
(Statute "On Mass Media" adopted on 27 December 1991, #2124-1).

Federal Statute *Ob uchastii v mezhdunarodnom informatsionnom obmene*
(Federal Statute "On Participation in International Exchange of Information" adopted on 4 July 1996, #85-FZ).

Federal Statute *O sviazi*
(Federal Statute "On Communications" adopted on 16 February 1995, #15-FZ).

General Concentration:

Federal Statute *O yestestvennyh monopoliyah*
(Federal Statute "On natural monopolies" adopted on 17 August 1995, #147-FZ).

Federal Statute *Ob aktsionernyh obschestvah*
(Federal Statute "On joint-stock companies" adopted on 26 December 1995, #208-FZ).

Statute *O konkurentsii i ogranichenii monopolisticheskoy deyatelnosti na tovarnyh rynkah*
(Statute "On Competition and Restrictions of Monopolistic Activity on Commodity Markets" adopted on 22 March 1991, #948-1).

C. Initiative for a Draft Law Addressing Media Concentration

The Federal Law *Ob osnovakh ekonomicheskikh otnosheniy v sfere massovoi informatsii* ("On the Basic Principles of Economic Relationships in the Area of Mass Information", hereinafter "the Draft Law") has been drafted as part of a research project implemented in 1998-2000 by the Moscow Media Law and Policy Center, together with Oxford University, and supported by the British Know-How Fund. The Draft Law was written by Prof. Mikhail Fedotov, with a group of Russian and Western European experts assisting him in the task. The Draft Law has been submitted to the *Komitet po informatsionnoi politike* (Committee on Informational Policy) of the State Duma of the Russian Federation and is being considered by the committee of experts attached to the Committee on Informational Policy.[5]

It should be emphasised that the recommendations of the Council of Europe's Cabinet of Ministers concerning public opinion, pluralism, transparency and other matters have been considered carefully when drafting this Draft Law. In addition, legislative and law-enforcement practice in some of the Western European countries (the United Kingdom, France, Spain, the Netherlands, Sweden, Finland and others) has been extensively drawn upon.

The purpose of the Draft Law is to generate favourable legal conditions for pluralism in the Russian media. "Pluralism" here is used to mean, on the one hand, a plurality of independent and autonomous media entities having access to a sufficient number of various sources of information and of means of production and distribution of media products; and, on the other hand, the reflection in the media of a diversity of political, social, religious and cultural views, with editorial independence observed and the rules of self-regulation that the media community itself may accept voluntarily duly respected.

The Draft Law is designed to introduce a set of measures aimed at ensuring pluralism.

First of all, the reference here is to measures capable of ensuring transparency of legal relationships concerning property and control over mass media entities (institutions or corporations). Since the notion of control in the Draft Law is interpreted fairly broadly, particular requirements of transparency apply not only to media holders and founders, but also to advertisers, content suppliers, communications service providers, etc., in short, to all those who actually depend on the functioning of a media entity. These

5) Its full text in English is available at http://www.medialaw.ru/e_pages/research/draft_law-c.htm

requirements are put forward to create conditions for control over the processes of media concentration and monopolisation of separate segments of this area, and, above all, to allow citizens an independent evaluation of media messages and materials based on the knowledge of the respective company's financial, political and business ties and obligations.

Secondly, the Draft Law regulates measures intended to prevent concentration of media entities and ensure fair competition among them.

Thirdly, the Draft Law regulates measures intended to ensure protection of the professional independence of editorial offices and journalists.

Since, in one way or the other, all these measures are connected with economic relationships, the Draft Law was named Federal Law "On the Basic Principles of Economic Relationships in the Area of Mass Information".

The Draft Law is intended to become an important part of the media legislation of the Russian Federation. Article 5 of the Statute *O sredstvakh massovoi informatsii* ("On Mass Media" of 27 December 1991) obliged the drafters of the new legislation to respect the Statute On Mass Media. Its provisions have been further developed in the Draft Law in line with all three regulatory goals outlined above. Thus, the Draft Law incorporates the basic requirements of transparency discernible in Part 1 Article 10 par. 10, of the Statute on Mass Media Law (the requirement to report, when registering, to what media entities the applicant is related as the founder, owner, etc.). Part 1, Article 19 of the Statute on Mass Media recognises the guarantee of professional independence of editorial offices.

In addition to the hierarchical link between the Draft Law and the Statute on Mass Media (the latter providing the basis for the regulation of the Draft Law, the closing section of the Draft Law introduces amendments to the Statute on Mass Media and to some other federal laws in order to prevent legal conflicts.

The terminology of the Draft Law is based on its interpretation section (Article 2 "Terms and Definitions"), which relies on the definitions of the Statute on Mass Media and the current anti-monopoly legislation, without repeating them. Especially important is the introduction of the notions of mass media entity (institution or corporation) and persons exercising control over them. The first notion had to be introduced because of the peculiarities of the interpretation section of the current Statute on Mass Media. This defines "media" as a form of periodical dissemination of mass information, and "editorial office" as the organisation for the production and release of media products.[6] The notion of editorial office, as defined in the Statute on Mass Media, has been criticised as inadequate for the purposes of a law intended to regulate economic relationships, because it omitted subjects of another conceptual line, such as unitary enterprises, joint-stock companies and others. This is why the notion of editorial office must be transformed into the notion of enterprise or institution, depending on whether its activity is commercial or otherwise. The notion of a person exercising control over a mass-information enterprise (institution or corporation) incorporates the combined scope of the notions "group of persons" and "affiliated persons" as defined by Article 4 of the 1991 Statute *O konkurentsii i ogranichenii monopolisticheskoy deyatelnosti na tovarnyh rynkah* ("On Competition and Restriction of Monopolistic Activity on Commodity Markets"). The resulting notion is broad enough to include instances where the media finds itself influenced by a legal, physical or official person not only because of ownership relationships, but also because of network agreements or other contracts, or even by virtue of kinship or political ties. The use of such a broad notion makes the mechanisms that exercise influence and pressure on media as transparent as possible because it expands the number of media inter-connections put under public scrutiny.

With regard to the interpretation section of the Draft Law, it should also be noted that it introduces for the first time such notions as "audit of mass information", "media audience", "sponsorship", "television trade" in this area. Some notions, such as "broadcaster", "press platform", "air time" already included in current legislation but which lacked the precision needed to prevent law-enforcement difficulties, have been elaborated upon.

The Chapter "Media Editorial Office" of the Draft Law aims to fill gaps and remove contradictions in the Media Law that resulted from the enactment of the first and second parts of the Russian Federation Civil Code. In particular, this chapter addresses the relationship between a media outlet and its editorial office as well as the possible organisational and legal forms required to establish an editorial office as a legal person, the legal status of an editorial office not acting as a legal entity, and other matters .

Noteworthy are Articles 6-8, which set out the guarantees of editorial independence. According to the legislator, these guarantees mean that the mechanisms of taking decisions concerning financial matters and decisions concerning editorial policy must be kept separate; that program statement should become mandatory and, thus, institutionalised; and that considerable compensations must be paid when the editor-in-chief and/or journalists are dismissed. By these means owners will be restricted from interfering editorial affairs.

Concerning the determination of media ownership, the Draft Law presumes that the owner of a media entity is its founder, unless its founding documents or the laws state otherwise. This approach would make it possible to avoid property redistribution in the media area.

---

6) The term "editorial office" is the core notion used by the Statute on Mass Media for mass media relationships (editor, journalists, publisher, distributor). In contrast, the Draft Law speaks of enterprises and institutions, thereby stressing pure media economics and not the creative process of journalism.

The Draft Law provides a special regime for media entities set up by state and local administration bodies within the framework of current media legislation. Evidently, state and municipal media entities must, on the one hand, provide citizens with a certain minimum of information support (e.g., during election campaigns, reporting on activities of government bodies, ensuring freedom of expression, etc.) and, on the other hand, act as independently in editorial policy as non-state media entities do. In this regard, the underlying idea of the Draft Law is that state and municipal media entities should not have links with non-state entities, and private persons should neither be owners nor co-founders of state and municipal media entities and, thus bind them. State and municipal media entities and their officials, in turn, should not have any interest in non-state media entities. As the current legislation does not contain such restrictions, this entails the danger of possible corruption and political monopolisation in the media area.

The Draft Law acknowledges the existing tax, customs and hard-currency privileges for the media prescribed by the law as early as 1995. At the same time, some general rules are introduced, which must be observed in dealing with benefits, grants and other privileges for the media. These rules are aimed at preventing state support of the media from becoming a tool of political pressure and bribery.

The Draft Law devotes a special chapter to the prevention of media concentration. It determines maximum limits for media holdings that are in the process of expanding.

For example, Article 26 (Ownership Restrictions in the Sphere of Television Broadcasting) of the Draft Law states:

"1. No legal entity or natural person shall be entitled to hold:
- more than one individual license, which actually covers more than 10 per cent of the audience, for television broadcasting throughout more than half of the subjects[7] of the Russian Federation;
  or
- more than one individual license, which actually covers more than 10 per cent of the audience, for television broadcasting throughout one of the subjects of the Russian Federation;
  or
- more than one individual license for television broadcasting in one eighth subject of the Russian Federation, provided that such television broadcasting actually covers not more than 10 per cent of the audience in any of the subjects of the Russian Federation;
  or
- more than three individual licenses for satellite television broadcasting;
  or
- more than one individual license for cable television broadcasting in one fifth municipal unit of each eighth subject of the Russian Federation.

2. Persons holding individual licenses for television broadcasting (other than cable broadcasting) actually covering more than 10 per cent of the audience shall be obliged to allot no less than 10 per cent of their airtime (excluding the duration of news programs, advertising and teleshopping) to programs produced by organizations which are independent of such persons and do not hold an individual license for television broadcasting."

Restrictions on cross-ownership is given a special emphasis because the current expansion of media holdings in Moscow and in the provinces usually means concentration of both print and electronic media with the same owners. The limits for cross-ownership fixed by the Draft Law are aimed at avoiding a situation whereby for a specific geographic area all media entities are controlled by one and the same person. The limits are listed in Article 28 ("Cross-ownership Restrictions") of the Draft Law:

"1. No legal entity or natural person shall be entitled:
- to own a mass media enterprise (institution, corporation) publishing newspapers and periodicals, of which the aggregate single print run exceeds 15 per cent of the aggregate single print run of all competing mass media, and to hold an individual license for television or radio broadcasting within the same territory;
  or
- to hold individual licenses for television and radio broadcasting within the same territory.

2. The restrictions established by this article with regard to the ownership of mass media enterprises (institutions, corporations) and the holding of individual licenses for television and radio broadcasting shall be equally applicable to persons who have control over mass media enterprises (institutions, corporations) producing and publishing newspapers and periodicals and/or broadcasting on the basis of those individual licenses."

The Draft Law contains very important rules concerning licensing of television and radio broadcasting. These rules will remove existing contradictions between the Statute on Mass Media and the Federal Law *O litsenzirovanii otdelnykh vidov deyatelnosti* ("On Licensing of Individual Kinds of Activity") that result from the lack of a federal law defining the rules of formation and activity of the Federal Television and Radio Broadcasting Commission (even though Article 30 of the Media Law requires such legislation). The Draft Law proposes that licensing of television and radio broadcasting activity and licensing of broadcasting channels should be kept apart much in the same way as it is done for licensing in the field of mining under the subsoil

7) According to the Constitution of the Russian Federation, Russia is divided in geographical entities called "subjects".

resources legislation. For these purposes, the notions of general licensing (for the performance of an activity) and individual licensing (for the use of a particular part of the radio-frequency spectrum) are introduced.

The Draft Law contains special rules for sponsorship, teleshopping, advertisement production and installation, use of independently produced programmes, etc. This reflects the need to separate media production from production of advertising. For the same reason, media holdings are not allowed to incorporate advertisement agencies.

A separate chapter addresses measures to ensure media transparency. Above all, it aims to secure a systematic collection of basic information on media entities that set up operation

Furthermore, the Draft Law requires the state registration body to collect and publish in the print media or by the Federal Broadcasting Commission "information of social significance", that is, information on the structure of the organization to which a given media entity belongs and on other entities by which it is controlled. Commercial secrets, however, have to be respected.

IRIS Special

Edited by the European Audiovisual Observatory

Television and Media Concentration

Regulatory Models on the National and the European Level

Due to continued technical developments, the increasing discussions on mergers and acquisitions in the media sector and related markets as well as a Recommendation of the Council of Europe to prevent or counteract concentrations that might endanger media pluralism, these are reasons enough for the European Audiovisual Observatory to produce a publication on "Television and Media Concentration". It is intended to contribute to a better understanding of the range of legal problems and regulations that are relevant to limiting concentrations of power in the medium of television. The term television pertains to television in analog and digital form, whether broadcast terrestrially, via satellite or via cable. The subject of the investigation will be the legal limitations on three types of economic interpenetration:

– **"horizontal media concentration"**, *i.e.*, ownership and capital integration among different television broadcasters;

"vertical media concentration", *i.e.*, ownership and capital integration among television broadcasters and their associated production and distribution markets;

– **"diagonal media concentration"**, *i.e.*, ownership and capital integration among television broadcasters and other media such as the print media and internet providers.

This publication focuses primarily on the investigation of a selection of models for establishing rules, which are currently applicable in states of the European Union with comparatively large television markets, and which at the same time suggest alternative approaches to regulating media concentration. The countries selected for the study **are Germany, France, the United Kingdom, Italy and Spain**. In describing the legal situation in these countries we shall highlight the special features and basic regulatory approach of each of the different legal models as well as the ways in which each model is implemented in practice. The presentation will be complemented by a description of the competition law in force in each country, as such a law flanks media law in relation to merger control and in relation to providing protection against the abuse of dominant market positions.

These descriptions would of course be incomplete if they did not also include an overview **of relevant EC rules and key decisions of the European Commission**. There are already indications that Community law will achieve even greater importance in the future to the extent that the European Union will make ever increasing use of the possibilities it has for creating a legally binding framework within which the European media market can flourish.

In order to clarify the implications that continued development of EC law might have on the coexistence of competition and media law, the description of the Community law will be followed by a chapter on the overall development of, and current trends in, the field of **media concentration regulation in the USA**. In North America the need for regulation of television market power seems to be already receding.

By contrast, there is a need for regulation in countries which are just beginning to establish a private radio and television broadcasting market and which are therefore having to come to terms with the question of limiting media concentration for the very first time. Such countries include, for example, **the Russian Federation**, where the movement away from state-run towards private broadcasting is underway.

Published by the
European Audiovisual Observatory
76, Allée de la Robertsau
F – 67000 Strasbourg
Tel. +33 (0) 3 88 14 44 00
Fax +33 (0) 3 88 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int

Strasbourg, 2001
EURO 27,-
ISBN 92-871-4595-4

In collaboration with the following partner organisations:

IViR Institute for Information Law

EMR Institute for European Media Law

NYLS New York Law School

Moscow Media Law and Policy Center, MMLPC